

**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,

Respondents.

**APPENDIX TO EMERGENCY APPLICATION TO VACATE EIGHTH
CIRCUIT STAY OF SECOND PRELIMINARY INJUNCTION**

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

Counsel of Record for Applicants

SEPTEMBER 27, 2018

TABLE OF APPENDICES

Appendix A

Opinion of the United States Court of Appeals for the Eighth Circuit,
Brakebill v. Jaeger, No. 18-1725 (Sept. 24, 2018)

Appendix B

Order granting Plaintiffs' Motion for Second Preliminary Injunction in Part,
Brakebill v. Jaeger, Case No. 1:16-cv-008, ECF No. 99, United States District
Court for the District of North Dakota (April 3, 2018)

Appendix C

Order granting Plaintiffs' Motion for Preliminary Injunction, *Brakebill v. Jaeger*,
Case No. 1:16-cv-008, ECF No. 50, United States District Court for the
District of North Dakota (Aug. 1, 2016)

Appendix D

Declaration of Dorothy Herman, *Brakebill v. Jaeger*, No. 1:16-cv-008
(D.N.D. June 20, 2016), ECF No. 44-11

Appendix E

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

Appendix F

Defendant's Motion for Expedited Review, *Brakebill v. Jaeger*, No. 1:16-cv-008
(D.N.D. Mar. 9, 2018), ECF No. 95

Appendix G

Declaration of Lucille Vivier, *Brakebill v. Jaeger*, No. 1:16-cv-008
(D.N.D. Apr. 24, 2018), ECF No. 109-1

Appendix H

Declaration of Elvis Norquay, *Brakebill v. Jaeger*, No. 1:16-cv-008
(D.N.D. Feb. 16, 2018), ECF No. 90-13

Appendix I

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

Appendix J

Declaration of Richard Brakebill, *Brakebill v. Jaeger*, No. 1:16-cv-008
(D.N.D. June 16, 2016), ECF No. 44-9

Dated: September 27, 2018

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

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 18-1725

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

Plaintiffs - Appellees,

v.

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

Defendant - Appellant.

Appeal from United States District Court
for the District of North Dakota - Bismarck

On Renewed Motion for Stay Pending Appeal

Submitted: September 10, 2018
Filed: September 24, 2018

Before COLLOTON, BENTON, and KELLY, Circuit Judges.

COLLOTON, Circuit Judge.

We are presented with a motion filed by the North Dakota Secretary of State to stay an order of the district court that enjoined parts of the North Dakota elections

statutes. One aspect of the statutes requires a voter to present at the polls a valid form of identification that provides the voter's current residential street address. The district court enjoined the Secretary from enforcing this provision. The court required instead that the Secretary must deem a voter qualified if the voter presents identification that includes a voter's current *mailing* address, such as a post office box, that may be located in a different voting precinct from the voter's residence. We conclude that the Secretary has demonstrated a likelihood of success on the merits in his challenge to this aspect of the injunction, that the State would be irreparably harmed by the injunction during the general election in November, and that a stay should be granted after consideration of all relevant factors. We therefore grant the motion to stay the district court's order in relevant part.

North Dakota has no voter registration requirement, so a resident may appear at the polls on election day and cast a ballot without any previous expression of desire to vote. Election officials at the polls are charged with determining whether a person who appears is qualified to vote.

Effective August 1, 2017, the North Dakota legislature provided that a qualified elector must provide a "valid form of identification" to the proper election official before receiving a ballot. N.D. Cent. Code Ann. § 16.1-01-04.1(1). A valid form of identification is a driver's license or nondriver identification card issued by the North Dakota department of transportation or "[a]n official form of identification issued by a tribal government" to a tribal member residing in North Dakota. *Id.* § 16.1-01-04.1(3)(a)(2).

To qualify a voter to receive a ballot, an identification must provide the voter's (1) legal name, (2) current residential street address in North Dakota, and (3) date of birth. *Id.* § 16.1-01-04.1(2). If the identification does not include all three pieces of information, then the voter must provide the missing information by supplementing the identification with one of several documents: a current utility bill, a current bank

statement, a check issued by a federal, state, or local government, a paycheck, or a document issued by a federal, state, or local government. *Id.* § 16.1-01-04.1(3)(b).

If a prospective voter is unable to show a valid form of identification but asserts qualifications as an elector in a particular precinct, then the voter may mark a ballot, and the election officials must set it aside in a sealed envelope. *Id.* § 16.1-01-04.1(5). The voter then has six days to present a valid form of identification either to an official at the polling place before the polls close, or to an employee of the office of the election official responsible for the administration of the election. *Id.*

Six plaintiffs in a pending lawsuit against the Secretary challenged the 2017 statute on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the Voting Rights Act. These plaintiffs, all Native Americans and residents of North Dakota, sued in January 2016 to enjoin a previous version of the North Dakota statute and obtained relief. After the legislature amended the law, the plaintiffs moved in February 2018 to enjoin the current statute.

The district court enjoined the Secretary from enforcing the requirement of § 16.1-01-04.1(2)(b) that a voter produce identification or a supplemental document with a “current residential street address,” and ordered that the Secretary accept “another form of identification that includes either a ‘current residential street address’ or a current mailing address (P.O. Box or other address) in North Dakota.” The court also ordered the Secretary to accept any form of tribal identification that sets forth a name, date of birth, and current residential street address *or* mailing address. Similarly, the court required that if a voter’s identification does not include a current residential street address, then the Secretary must accept supplemental documents from a tribal government that include either a current residential street address *or* a mailing address. The court relied exclusively on constitutional grounds and did not address the Voting Rights Act.

In support of its orders, the district court stated as follows:

The State has acknowledged that Native American communities often lack residential street addresses or do not have clear residential addresses. Nevertheless, under current State law an individual who does not have a “current residential street address” will never be qualified to vote. This is a clear “legal obstacle” inhibiting the opportunity to vote. The State can easily remedy this problem by simply eliminating the absolute need for a “current residential street address” and allowing for either a residential address, a mailing address (P.O. Box), or simply an address.

R. Doc. 99, at 8-9 (citations omitted).

The court also found that 4,998 otherwise eligible Native Americans (and 64,618 non-Native voters) did not possess a qualifying identification. The court cited “statistical data” showing that 19% of Native Americans lacked qualifying identifications. And the court found that 48.7% of Native Americans who lack a qualifying identification also lacked “the supplemental documentation needed,” such that 2,305 Native Americans would not be able to vote in 2018 under the North Dakota statute. To remedy these concerns about obtaining identification, the court ordered the Secretary to accept various documents issued by a tribal authority to a tribal member. The Secretary does not seek to stay these portions of the injunction.

The Secretary has appealed the injunction and also moved to stay one aspect of the injunction. Specifically, the Secretary seeks to stay the district court’s order that voters must be deemed qualified if they present identification or a supplemental document with a current *mailing* address rather than a current residential street address. Under Federal Rule of Appellate Procedure 8(a), we consider four factors in determining whether to issue a stay pending appeal: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2)

whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The most important factor is likelihood of success on the merits, although a showing of irreparable injury without a stay is also required. *Brady v. NFL*, 640 F.3d 785, 789 (8th Cir. 2011).

The Secretary contends that he will succeed on appeal because none of the six plaintiffs has Article III standing to challenge the statute’s requirement that a voter provide a current residential street address. The Secretary observes that each of the six plaintiffs has a current residential street address, and argues that the statute did not cause any of them to suffer an injury in fact. The district court concluded that the plaintiffs had standing to sue, because “the burden of having to obtain and produce an ID itself has been found sufficient to confer standing, regardless of whether the Plaintiffs are able to obtain an ID.” *See Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009). The court reasoned that all of the plaintiffs were injured in fact by “the requirement to maintain a ‘current residential street address,’ and thus an interest in real property, and the burden to maintain an ID or supplemental documents to prove he or she has a ‘current residential street address.’”

We conclude that at least one of the plaintiffs has standing to raise a facial challenge to the statute. While it is true that all six plaintiffs have a current residential street address, the statute at issue does not merely require a citizen to maintain a residential street address. The statute requires a voter to present a valid form of identification, or a supplemental document, that includes a current residential street address. Even where a person has a residential street address, the burden of obtaining a qualifying identification or supplemental document is sufficient to constitute an injury that gives a citizen standing to sue. *Id.* In this case, plaintiff Elvis Norquay presented evidence that he currently resides at a homeless apartment complex in Dunseith, but that his tribal identification lists a “prior” address in

Belcourt. To vote in the precinct where he currently resides, therefore, Norquay must either obtain a new form of identification with his current residential street address or a supplemental document that includes his current address. That burden is sufficient to give him standing to challenge the residential street address requirement.¹

On the merits of the facial challenge to the statutory requirement of a residential street address, however, we conclude that the Secretary has established a likelihood of success on appeal. A plaintiff seeking relief that would invalidate an election provision in all of its applications bears “a heavy burden of persuasion,” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 200 (2008) (opinion of Stevens, J.), as facial challenges are disfavored. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-51 (2008). Even assuming that a plaintiff can show that an election statute imposes “excessively burdensome requirements” on *some* voters, *Crawford*, 553 U.S. at 202 (opinion of Stevens, J.) (internal quotation marks omitted), that showing does not justify broad relief that invalidates the requirements on a statewide basis as applied to *all* voters. As the lead opinion in *Crawford* explained, “[w]hen evaluating a neutral, nondiscriminatory regulation of voting procedure, we must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.” *Id.* at 203 (internal quotation marks and brackets omitted).

Here, the district court thought the statutory requirement to produce an identification with a current residential street address posed a legal obstacle to the right to vote for Native Americans, because Native American communities often lack residential street addresses. The Secretary disputes whether street addresses are truly

¹It is unnecessary to address the broader theory of standing adopted by the dissent, *post*, at 12, that a requirement merely *to produce* a form of identification already in a voter’s possession causes an injury in fact.

lacking in those communities, and complains that the district court mistakenly relied on outdated evidence about two counties that had not finished assigning addresses as of 2011. But even assuming that some communities lack residential street addresses, that fact does not justify a statewide injunction that prevents the Secretary from requiring a form of identification with a residential street address from the vast majority of residents who have residential street addresses.²

The plaintiffs argue that the call for a residential street address is “invidious on its face” because it dictates that every voter must have “an interest in property.” The statute, however, does not require a voter to present identification that shows an interest in property. A person may reside at a street address without having an interest in the property where he resides: Elvis Norquay himself resides at a homeless shelter with a street address. Young adults living with parents and elderly parents living with children need have no interest in property. A voter need only show where he or she resides. North Dakota, having adopted a system that requires no advance

²The dissent posits that all state-issued forms of identification in North Dakota require payment of a fee, and that the State has therefore erected an unconstitutional barrier to voting. *Post*, at 14. The district court’s “mailing address” injunction, however, does not relieve a voter of the need to obtain a valid form of identification; it merely allows use of a mailing address rather than a street address in conjunction with the valid form of identification. The disputed portion of the injunction, therefore, is not justified as a remedy for any barrier arising from state-imposed fees.

In any event, North Dakota law has provided since August 1, 2013, that a resident may obtain a nondriver identification card without payment of a fee. N.D. Cent. Code Ann. § 39-06-03.1(4). The district court said that the North Dakota department of transportation website revealed a fee for a nondriver identification card. The judicially-noticed website is not in the record, but even assuming that the website then provided for a fee, the current website shows—consistent with the statute—that a nondriver identification card is available without payment of a fee. N.D. Dep’t of Transp., *ID Card Requirements*, <https://www.dot.nd.gov/divisions/driverslicense/idrequirements.htm> (last visited Sept. 21, 2018).

voter registration, maintains a legitimate interest in requiring identification and a showing of current residence to prevent voter fraud and to safeguard voter confidence.³

Crawford left open the possibility that a subset of voters might bring as-applied challenges against a regulation, and that a court might have authority to enter a narrower injunction to relieve certain voters of an unjustified burden. *Compare id.* at 199-200 (opinion of Stevens, J.), *with id.* at 204-05 (Scalia, J., concurring in the judgment). *See Frank v. Walker*, 819 F.3d 384, 386-87 (7th Cir. 2016). The district court in this case, however, did not limit its injunctive relief to the six plaintiffs. The injunction applied across the board to all voters and effectively declared the street address requirement unconstitutional in all cases. By definition, therefore, an as-applied theory cannot support the district court’s injunction. Each of the plaintiffs, moreover, has a current residential street address, so an injunction allowing voters to present identification with a mailing address rather than identification with a residential street address did not relieve any excessive burden of the statute as applied to *these plaintiffs*.

We are satisfied that the State would be irreparably harmed without a stay. If the Secretary must accept forms of identification that list only a mailing address, such

³The dissent, citing a North Dakota department of transportation website, asserts that a person must present one of six enumerated documents bearing her name to prove residence when obtaining a state identification card. *Post*, at 13-14. The same website, however, allows a person to prove a resident address by furnishing one of nine different documents, including a bank statement, credit card statement, pay stub, or school transcript/report card. N.D. Dep’t of Transp., *Acceptable Proof of Residential Address*, <http://www.dot.nd.gov/divisions/driverslicense/docs/proof-of-address-documents.pdf> (last visited Sept. 21, 2018). The governing statute requires only that a person provide “satisfactory evidence” of legal presence, and that the director of the department may require “proof of residence address,” without limiting methods of proof. N.D. Cent. Code Ann. § 39-06-03.1(3).

as a post office box, then voters could cast a ballot in the wrong precinct and dilute the votes of those who reside in the precinct. Enough wrong-precinct voters could even affect the outcome of a local election. The dissent's suggestion that the State protect itself from this harm by using maps or affidavits would require North Dakota to reinstate self-certification methods that the legislature already deemed insufficiently reliable when it adopted the residential street address requirement. The inability to require proof of a residential street address in North Dakota also opens the possibility of fraud by voters who have obtained a North Dakota form of identification but reside in another State while maintaining a mailing address in North Dakota to vote. The dissent deems this impossible, because only a resident of the State is supposed to receive a form of identification, but the injunction prevents election officials from verifying that a voter with such an identification has a current residential street address in the State. Even if the State can prosecute fraudulent voters after the fact, it would be irreparably harmed by allowing them to vote in the election.

We have considered the timing of the motion and whether proximity to the general election in November 2018 precludes the entry of a stay that otherwise is warranted. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam); *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968). In this case, we denied a previous motion for stay based on timing when the briefing was completed only one week before the primary election on June 12, 2018, but provided that the Secretary could file a renewed motion for stay after briefing on the appeal was completed on July 17. The Secretary complicated the timing question by waiting until August 16 to file a renewed motion, but we conclude that there is still sufficient time before election activity to make a stay permissible. Although the Supreme Court sometimes frowns on changes in election procedure when they come too close to an election, *see Veasey v. Perry*, 769 F.3d 890, 892-95 (5th Cir. 2014), there is no universal rule that forbids a stay after Labor Day. *See Mich. State A. Philip Randolph Inst. v. Johnson*, No. 18A240, 2018 WL 4285989 (U.S. Sept. 7, 2018) (order denying application to vacate

stay); *Mich. State A. Philip Randolph Inst. v. Johnson*, No. 18-1910, 2018 WL 4214710 (6th Cir. Sept. 5, 2018) (order granting stay).

Election day is November 6, and early voting in North Dakota does not begin until fifteen days before then. N.D. Cent. Code Ann. § 16.1-07-15(2)(a). Any North Dakota resident who might have relied on the district court's order allowing a voter to present identification with a mailing addresses has more than a month to adapt to the statute's requirement to present identification, or a supplemental document, with a current residential street address. The Secretary also should have sufficient time to educate and train election officials about that single change; counsel assured us at oral argument on September 10 that the Secretary could do so. We are informed that absentee ballots will not issue until September 27, *see id.* § 16.1-07-04; N.D. Sec'y of State, *2018 North Dakota Election Calendar* at 11 (Nov. 2017), <https://vip.sos.nd.gov/pdfs/Portals/electioncalendar.pdf> (last visited Sept. 21, 2018), so no absent voter should have received a ballot based on an identification with current mailing address only.

The plaintiffs argue that if this court stays the district court's injunction on mailing addresses, then we should reinstate a different injunction entered by the district court in August 2016. That order enjoined the election statute as it read in 2015 and required the State to reinstate so-called "fail-safe" provisions that were repealed by the North Dakota legislature in 2013. Under those provisions, a voter could obtain a ballot by executing an affidavit declaring under penalty of perjury that the voter was a qualified elector in the precinct or by having a member of the election board or poll clerk vouch for the voter. No form of identification was required. In its order enjoining the 2017 statute, the district court granted the Secretary's motion to dissolve the injunction of the 2015 statute, because the earlier order was "moot."

The plaintiffs suggest that we should reinstate the affidavit option from the previous injunction, but that injunction was entered based on a challenge to a

different statute, and the district court granted a motion to dissolve it. The North Dakota legislature amended the 2015 statute in response to the previous injunction and added, among other things, the opportunity for a voter to cast a set-aside ballot and to provide a proper form of identification within six days. N.D. Cent. Code Ann. § 16.1-01-04.1(5). The district court did not suggest that the affidavit option was an appropriate remedy for any injury caused by the requirement to obtain and present a form of identification with a current residential street address under the 2017 statute. In any event, as discussed, the Secretary is likely to succeed on his argument that the record does not justify a statewide injunction of the residential street address requirement, so there is no basis for substitute relief of equivalent breadth.

For these reasons, the motion for stay pending appeal is granted. The portions of the district court's order requiring the Secretary to accept forms of identification and supplemental documents that include a current *mailing* address rather than a current residential street address are stayed pending disposition of this appeal or further order of the court. The Secretary does not move to stay the remainder of the injunction, and it remains in effect. The appeal remains under submission, and an opinion on the merits will be filed in due course. We have not relied on any exhibits submitted with the renewed motion for stay, response, or reply, so the pending motion to strike is denied as moot.

In its order granting injunctive relief, the district court highlighted its concern that under current state law, a resident who does not have a "current residential street address" will never be qualified to vote. No plaintiff in this case falls in that category. If any resident of North Dakota lacks a current residential street address and is denied an opportunity to vote on that basis, the courthouse doors remain open.

KELLY, Circuit Judge, dissenting.⁴

On several issues, I agree with the court’s opinion. I agree that plaintiffs have standing regardless of whether they currently “possess[] an acceptable form of . . . identification,” because the statute’s requirement that they “produce . . . identification to cast an in-person ballot” constitutes an injury-in-fact. Common Cause, 554 F.3d at 1351. I also agree that the “courthouse doors remain open” to provide additional relief should other individuals who lack the necessary identification come forward before the November election.

But I would deny the motion to stay because (1) the Secretary has not made the requisite strong showing that he is likely to succeed on the merits, (2) the Secretary is unlikely to suffer irreparable injury absent a stay, (3) plaintiffs and other interested parties are likely to suffer substantial injury under a stay, and (4) the public interest favors continued injunctive relief. See Hilton, 481 U.S. at 776. For these reasons, I respectfully dissent from the grant of a stay.

“The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [our] discretion.” Nken v. Holder, 556 U.S. 418, 433–34 (2009). The first and most important requirement is that a stay applicant make a “strong showing that he is likely to succeed on the merits.” Brady, 640 F.3d at 789 (quoting Hilton, 481 U.S. at 776). For several reasons, the Secretary has not overcome this hurdle.

First, as the court correctly notes, the issue is not that North Dakota law requires voters to maintain a current residential street address, it is that voters must obtain and maintain certain forms of identification reflecting that address. The district court found that all state-issued identification cards in North Dakota require

⁴I concur in the denial of the motion to strike as moot.

payment of a fee. The Secretary has countered that state law requires the Department of Transportation to provide free non-driver's identification cards, but the evidence before the district court demonstrated that this was not North Dakota's actual practice. At least one plaintiff testified that she was charged a fee to obtain one of these cards in spite of the statute. The district court also found that the Department of Transportation's website stated that a fee is required to obtain the card. These factual findings are not clearly erroneous.⁵

In addition to incurring a cost, an eligible voter must also present certain documentation to obtain an identification card from the state. The governing statute allows the Department of Transportation to require "proof of residence address." N.D. Cent. Code § 39-06-03.1(3). Currently, the Department's website states, "All applicants must present proof of current name, date of birth, and legal presence in the United States." N.D. Dep't of Transp., Identification Requirements, <https://www.dot.nd.gov/divisions/driverslicense/docs/proof-of-identification-documents.pdf> (last visited Sept. 21, 2018). They must also provide their social security number, which they may be required to prove by presenting official documentation. Finally, "[p]roof of North Dakota residence address . . . may be

⁵The district court properly took judicial notice of the state's official website. See Missourians for Fiscal Accountability v. Klahr, 830 F.3d 789, 793 (8th Cir. 2016) (citing Pickett v. Sheridan Health Care Ctr., 664 F.3d 632, 648 (7th Cir. 2011), for "the authority of a court to take judicial notice of government websites"). The Secretary was on notice since at least 2016 that the district court might rely upon this website: plaintiffs cited to it in their initial motion for a preliminary injunction, and the Secretary did not object. See R. Doc. 44 at 10, 12. It appears that the Department of Transportation has since changed its website such that it no longer reflects a fee for those 18 years old or older. Compare N.D. Dep't of Transp., ID Card Requirements, <https://www.dot.nd.gov/divisions/driverslicense/idrequirements.htm> (last visited Sept. 21, 2018), with N.D. Dep't of Transp., ID Card Requirements, <https://web.archive.org/web/20180218061057/https://www.dot.nd.gov/divisions/driverslicense/idrequirements.htm> (archived Feb. 18, 2018).

required by presenting” at least one of the following documents, which “must contain [the applicant’s] **name** and **current physical** residence address”: (1) a government-issued property tax form; (2) a mortgage, lease, or rental document; (3) a homeowner’s or renter’s insurance policy; (4) a utility bill; (5) a non-cellular phone bill; or (6) a parent’s proof of address for a minor child.⁶ *Id.* at 3. Unless the individual is a minor (in which case voting is not an issue), each of these documents requires the individual to maintain some type of an interest in physical, residential property.

These facts, standing alone, would demonstrate that North Dakota has erected unconstitutional barriers for prospective voters. See Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) (“[W]ealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.”). But the district court made several other factual findings demonstrating that the burdens on certain groups of voters, especially Native Americans and the homeless, are excessive. The court does not dispute that the district court concluded (based on unrebutted evidence) that at least 69,616 eligible voters—including 4,998 Native Americans—currently lack the identification required to vote. That group comprises nearly twenty percent of the total number of individuals who vote in a regular quadrennial election in North Dakota. See N.D. Sec’y of State, 2010-2018 Election Results, <https://vip.sos.nd.gov/PortalListDetails.aspx?ptlhPKID=62&ptlPKID=4> (last visited Sept. 21, 2018) (showing 349,945 ballots cast in 2016 general election). And the district court further found that roughly half of eligible Native American voters lack proper supplemental

⁶The court cites a different document from the Department’s website listing nine “[a]cceptable documents for proof of North Dakota resident address,” but the document does not explain whether these can be used to obtain an identification card. It would be speculation to suggest that this more expansive list supercedes the express requirements for obtaining an identification noted above. At best, the issue is unclear.

documentation, such that “at least 2,305 Native Americans will not be able to vote in 2018 under the new law.” Although some portion of those Native American voters may be able to obtain proper identification under the aspects of the district court’s injunction not covered by the stay, it is likely that many eligible voters will still be disenfranchised.

That the election provision at issue burdens only some voters does not preclude relief. If the district court’s injunction was indeed overbroad, the appropriate response would be to narrow it to cover only individuals who lack a valid form of identification reflecting a current residential street address. And the relief that plaintiffs originally requested was not as broad as what the district court provided. Plaintiffs asked the court to reinstate the “affidavit option” to allow individuals who could not show a valid form of identification to vote by executing an affidavit swearing to the individual’s qualifications as a voter. As I understand it, the affidavit option under the first injunction would not be available to all voters, but only those who cannot produce one of the forms of identification required by the statute—that is, only those whose right to vote would be unconstitutionally burdened by the statute. These are exactly the sort of “as applied” remedies contemplated by Crawford. See 553 U.S. at 199–203 (opinion of Stevens, J.); see also Frank, 819 F.3d at 386–87 (“Plaintiffs now accept the propriety of requiring photo ID from persons who already have or can get it with reasonable effort, while endeavoring to protect the voting rights of those who encounter high hurdles. This is compatible with our opinion and mandate, just as it is compatible with *Crawford*.”).⁷

⁷I do not read the court’s opinion to foreclose these options, which would apply beyond the six plaintiffs. This court is not in a position to review the propriety of the affidavit option, because even though the district court reinstated the affidavit option in its first injunction and the Secretary did not appeal that decision, that injunction was dissolved upon the passage of new legislation and the granting of the second injunction.

The remaining stay factors do not favor the Secretary. The 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. There is no evidence in the record properly before us that this outcome is likely. Cf. Brady, 640 F.3d at 789 (“The movant must show that it will suffer irreparable injury unless a stay is granted.”). Furthermore, nothing in the district court’s injunction requires a voter to vote in the precinct attached to his current mailing address. The injunction does not change the definition of “residence” used to determine the voter’s precinct, see N.D. Cent. Code § 16.1-01-04.2(1); 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 verifying that the voter is in the correct precinct by other reliable means—perhaps by using a map or an affidavit to confirm his “residence.” See N.D. Cent. Code § 16.1-05-07(3) (requiring election officials to “direct an individual who is attempting to vote in the incorrect precinct . . . to the proper precinct and polling place”).

It seems unlikely that the injunction would enable voter fraud by someone who resides outside North Dakota but maintains a P.O. Box within the state. In order to vote, such a person would still need either a tribal identification “issued by a tribal government *to a tribal member residing in [the] state*,” id. § 16.1-01-04.1(3)(a)(2) (emphasis added), or an identification issued by the state itself, id. § 16.1-01-04.1(3)(a)(1). Neither of these documents could be issued to a non-North Dakota resident.

In contrast, the injury to plaintiffs and other North Dakota voters is likely to be severe and irreparable. “[T]he right of suffrage is a fundamental matter in a free and democratic society.” Reynolds v. Sims, 377 U.S. 533, 561–62 (1964). “[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights,” and therefore “any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” Id. at 562. I

disagree that plaintiffs are unlikely to be injured simply because they all have residential street addresses. As the court notes, “the statute at issue does not merely require a citizen to maintain a residential street address,” but to obtain and produce identification reflecting that address. And the court does not dispute that several plaintiffs testified that they lack a valid form of identification under the statute. As noted above, the evidence indicates that many other eligible voters will be disenfranchised absent further equitable relief.

The final stay factor is the interest of the public. We previously denied the Secretary’s request for a stay in this very case because there was an election only a week away. And absentee voting for the November election begins in *less than* a week. To grant a stay now fails to properly weigh the unique “considerations specific to election cases” that apply when a party seeks to upset the status quo “just weeks before an election.” Purcell, 549 U.S. at 4. The stay will require North Dakota to reevaluate its training of election officials, training which may again change should the district court enter further injunctive relief. See R. Doc. 45 at 12–15 (the Secretary explaining that revising election training materials takes several months). The confusion that may result from these “conflicting orders,” Purcell, 549 U.S. at 4–5, could be easily avoided by keeping the injunction in place until resolution of the appeal after the November election.

For the foregoing reasons, I would conclude that the Secretary has not met his burden of establishing that a stay is warranted.

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

September 24, 2018

West Publishing
Opinions Clerk
610 Opperman Drive
Building D D4-40
Eagan, MN 55123-0000

RE: 18-1725 Richard Brakebill, et al v. Alvin Jaeger

Dear Sirs:

A published opinion was filed today in the above case.

Counsel who presented argument on behalf of the appellant and appeared on appellant's brief was James E. Nicolai, AAG, of Bismarck, ND.

Counsel who presented argument on behalf of the appellee and appeared on appellee's brief was Matthew Lee Campbell, of Boulder, CO.

The judge who heard the case in the district court was Honorable Daniel L. Hovland. The order of the district court was entered on April 3, 2018.

If you have any questions concerning this case, please call this office.

Michael E. Gans
Clerk of Court

YML

Enclosure(s)

cc: MO Lawyers Weekly

District Court/Agency Case Number(s): 1:16-cv-00008-DLH

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

September 24, 2018

Mr. James E. Nicolai
ATTORNEY GENERAL'S OFFICE
500 N. Ninth Street
Bismarck, ND 58501

RE: 18-1725 Richard Brakebill, et al v. Alvin Jaeger

Dear Counsel:

The court has issued an opinion in this case.

Michael E. Gans
Clerk of Court

YML

Enclosure(s)

cc: Mr. Robert Ansley
Mr. Matthew Lee Campbell
Mr. Richard DE Bodo
Ms. Jacqueline De Leon
Mr. Thomas A. Dickson
Ms. Elizabeth Ann Fischer
Mr. Daniel Lewerenz
Mr. Joel West Williams

District Court/Agency Case Number(s): 1:16-cv-00008-DLH

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

Richard Brakebill, Dorothy Herman,)	
Della Merrick, Elvis Norquay,)	
Ray Norquay, and Lucille Vivier,)	
on behalf of themselves,)	
)	ORDER GRANTING PLAINTIFFS’
)	MOTION FOR SECOND
Plaintiffs,)	PRELIMINARY INJUNCTION
)	IN PART
vs.)	Case No. 1:16-cv-008
)	
Alvin Jaeger, in his official capacity as the)	
North Dakota Secretary of State,)	
)	
Defendants.)	

Before the Court is the Defendant’s “Motion to Dissolve Preliminary Injunction” filed on January 16, 2018. See Docket No. 80. The Defendants seek to set aside the “Order Granting Plaintiffs’ Motion for Preliminary Injunction” issued on August 1, 2016. Also before the Court is the Plaintiffs’ Second Motion for Preliminary Injunction filed on February 16, 2018. See Docket Nos. 89 and 92.

In August 2016, this Court carefully considered the *Dataphase* factors and concluded the public interest in protecting the right to vote for thousands of Native Americans who lacked a qualifying ID and cannot obtain one, outweighed the purported interests and arguments of the State. As a result, the North Dakota Secretary of State was enjoined from enforcing N.D.C.C. § 16.1-05-07 without any adequate “fail-safe” provisions that had been provided to all voters in North Dakota prior to 2013. In the past, North Dakota allowed all citizens who were unable to provide acceptable ID’s to cast their vote under two types of “fail-safe” provisions which were repealed in 2013.

In response to the preliminary injunction issued August 1, 2016, the North Dakota Legislative Assembly amended and enacted a new election law (House Bill 1369). Effective July 1, 2017, North Dakota law now permits individuals who do not present a valid ID when appearing to vote to mark a ballot that is then set aside until the individual's qualifications as an elector can be verified. See N.D.C.C. § 16.1-01-04.1(5). The new law provides in relevant part as follows:

1. A qualified elector shall provide a valid form of identification to the proper election official before receiving a ballot for voting.

2. The identification must provide the following information regarding the elector:

- a. Legal name;

- b. Current residential street address in North Dakota; and

- c. Date of birth.

3. a. A valid form of identification is:

- (1) A driver's license or nondriver's identification card issued by the North Dakota department of transportation; or

- (2) An official form of identification issued by a tribal government to a tribal member residing in this state.

- b. If an individual's valid form of identification does not include all the information required under subsection 2 or the information on the identification is not current, the identification must be supplemented by presenting any of the following issued to the individual which provides the missing or outdated information:

- (1) A current utility bill;

- (2) A current bank statement;

- (3) A check issued by a federal, state, or local government;

(4) A paycheck; or

(5) A document issued by a federal, state, or local government.

5. If an individual is not able to show a valid form of identification but asserts qualifications as an elector in the precinct in which the individual desires to vote, the individual may mark a ballot that must be securely set aside in a sealed envelope designed by the secretary of state. After the ballot is set aside, the individual may show a valid form of identification to either a polling place election board member if the individual returns to the polling place before the polls close, or to an employee of the office of the election official responsible for the administration of the election before the meeting of the canvassing board occurring on the sixth day after the election. Each ballot set aside under this subsection must be presented to the members of the canvassing board for proper inclusion or exclusion from the tally.

6. The secretary of state shall develop uniform procedures for the requirements of subsection 5 which must be followed by the election official responsible for the administration of the election.

N.D.C.C. § 16.1-01-04.1 (2017).

The State of North Dakota seeks an “expedited review” and ruling on its motion to dissolve the earlier injunction because another statewide election will occur on June 12, 2018. See Docket No. 95. The Plaintiffs seek to enjoin the enforcement of the new law for the same reasons outlined in their original request for injunctive relief back in 2016. The new law was passed in April 2017, and became effective on July 1, 2017. No action was taken by the State until January 16, 2018, to seek to dissolve the preliminary injunction. Both parties were fully aware of the impact of the new law dating back to April 2017, but waited until mid January 2018, to take any legal action to address the impact of the new law. If the need for an immediate and expeditious ruling was critically necessary, both parties could have easily filed, and should have filed, motions to address the new law in the summer of 2017, and avoided these last minute heroics and demands for an expeditious ruling. The parties had more than nine (9) months to

take legal action on the new law. The Court has now carefully reviewed the entire record without the benefit of having nine (9) months to cerebrate on the matter as the parties have done. See Docket Nos. 81, 92, 94, and 98.

Suffice it to say, the new law passed by the Legislative Assembly (House Bill 1369) in April 2017, still requires voters to have one of the very same forms of a qualifying ID's in order to vote that was previously found to impose a discriminatory and burdensome impact on Native Americans.

In support of the Plaintiffs' request for a second preliminary injunction, the record has been supplemented with the following statistical data which has not been challenged by the State:

- a. Consistent with the findings from the first survey, conducted in 2015, Native American eligible voters in North Dakota are less likely to possess a qualifying voter ID under current North Dakota law, as compared to non-Native Americans. The difference is statistically significant at the 99 percent level, the most rigorous level of social science testing.
- b. In the present survey, 19 percent of Native American eligible voters in North Dakota do not possess a qualifying voter ID. In contrast, 11.6 percent of non-Native Americans in North Dakota do not possess a valid ID. In 2015 we found that 23.5 percent of Native American eligible voters lacked an appropriate ID, compared to 12 percent of non-Native eligible voters. The findings from the present survey comport with those from 2015.
- c. Native Americans in North Dakota are significantly less likely to possess the most common type of ID-a driver's license. Only 64.6 percent of Native Americans indicated they have a driver's license that meets all requirements to vote. In contrast, 86.1 percent of non-Native Americans in North Dakota indicated they have a driver's license which meets all requirements.
- d. Native Americans face burdens in obtaining a state-issued ID. Many Native Americans lack the required underlying documents: Among those without a valid ID, 28.9 percent do not have a birth certificate or other

proof of identity required by the state, such as a passport or naturalization card; 56.7 percent do not have two documents showing a residential street address; 16.7 percent lack a social security card or W2 showing a social security number. In total, 65.6 percent of Native Americans that currently do not have a valid voter ID do not have all three types of the underlying documents they would need to obtain a voter ID.

- e. The North Dakota voter identification law indicate certain documents bearing one's full name and full residential street address can be presented in the instance that one has an otherwise valid piece of identification, but lacks an appropriate residential street address. Native Americans are less likely to possess several of the accepted documents than are their non-Native counterparts. Among North Dakota residents who lack a valid piece of ID because of the address requirement, 48.7 percent of Native Americans, or an estimated 2,305 Native eligible voters, do not possess at least one of the supplemental address documents accepted under the law. Comparatively, only 26.2 percent of non-Natives who lack a valid piece of identification because of the residential address requirement do not possess at least one of the supplemental address documents accepted under the law. This amounts to 15,908 non-native eligible voters.
- f. Knowledge levels regarding the law are very low in North Dakota, especially among Native Americans. In fact, 23.0 percent of Native Americans are not aware that a voter ID law exists, and only 12.7 percent of Native Americans reported they had heard or seen an official announcement or advertisement by the State of North Dakota about the new voter ID law.
- g. Native Americans are less likely than non-Natives to know that a residential street address is required on an ID to be valid. Among people who have an ID, but it lacks a residential street address, just 24.7 percent of Native Americans know that an ID must contain residential street address compared to 49.5 percent of non-Native Americans.
- h. Native Americans are more likely than are non-Natives to report having used a failsafe measure to vote in the past. Among all eligible voters, 12.1 percent of Native Americans reported having signed an affidavit and 9.7 percent report that a poll worker vouched for them. Comparatively, only 9.1 and 7.4 percent of whites report signing an affidavit or having been vouched for when they tried to vote in a previous election. Among those who lack a valid ID, 14.4 percent of Native Americans reported having signed an affidavit, compared to 7.3 of non-Natives, and an 16.7 percent of Native Americans report that a poll worker vouched for them, compared to 6.4 percent of non-Natives for whom the same was true. This

comports with analysis of the use of affidavits at the county level. Between 2012 and 2016, among the three counties with the highest percentage of Native American voters the number of affidavits used increased from 51 in 2012 to 390 in 2016. By comparison, in the three counties with the lowest percentage of Native American voters the number decreased by four affidavit ballots, from 38 to 34.

See Docket No. 90-1, pp. 3-6.

In August of 2016, the Court issued a 29-page order that included a careful analysis of the *Dataphase* factors as required under Eighth Circuit Court of Appeals case law. The State never appealed the order of injunction, despite their recent criticisms of the order. Rather than re-invent the wheel and again restate the same analysis and legal arguments enumerated in the August 1, 2016, Order (Docket No. 50), the Court expressly incorporates by reference the entirety of the facts and legal analysis set forth in that earlier order, all of which continue to be directly relevant to the *Dataphase* analysis of the new law.

The Court has also carefully reviewed the decisions of the United States Supreme Court in Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008) and the Fourth Circuit Court of Appeals in Lee v. Va. Bd. of Elections, 843 F.3d 592 (4th Cir. 2016).

In *Crawford*, the Supreme Court rejected a facial challenge to Indiana's photo identification law and upheld its constitutionality. The Indiana law required that registered voters present a government-issued photo ID's in order to vote, and voters who did not have such identification could obtain one only if they presented proof of residence and identity, such as a birth certificate. Crawford, 553 U.S. at 185-86. No ID is required to register to vote and Indiana offers free photo ID to qualified voters who establish their residence and identity. Id. at 186. Voters lacking an ID on election day are permitted to cast a provisional ballot which will be counted if the voter executes an affidavit or brings an ID to the circuit court clerk's office

within ten (10) days of the election. Id. The Supreme Court found that Indiana had a valid interest in adopting standards that aligned with federal election statutes, including the Help America Vote Act (“HAVA”) wherein Congress had indicated a belief that “photo identification is one effective method of establishing a voter's qualification to vote.” Id. at 193. The Supreme Court also found that Indiana had valid interests in preventing voter fraud, even though there was no evidence of any in-person voter impersonation having occurred in Indiana, and the state had an independent interest in protecting voter confidence in the integrity of its elections. Id. at 194–97. The Supreme Court concluded that these state interests justified the burdens imposed by the photo identification requirements in its election law. Id. at 202. For voters who lacked the required identification, the Supreme Court explained the ability to obtain a free photo identification meant that the burden was not substantial. The “inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote.” Id. at 198. While the Supreme Court recognized that for some voters, such as those who lacked a birth certificate or other documentation needed to obtain a free ID’s, the burden was greater, it nonetheless concluded this greater burden was not sufficiently substantial to render the statute unconstitutional. Id. at 199–202.

In *Lee*, the Fourth Circuit Court of Appeals rejected a challenge to Virginia’s photo ID law. The law in question required that all voters present a photo ID in order to cast a ballot. Lee, 843 F.3d at 594. Registered voters without an ID were allowed to cast a provisional ballot and cure their vote by presenting an ID in person, by fax, or by email within three days of the election. Id. Many types of ID were acceptable, and the Virginia Board of Elections provided free ID’s to voters without any documentation. Id. To obtain a free ID the voter need only

provide a name, address, birthdate, and the last four digits of their social security number. Id. at 595. The Fourth Circuit found the burdens imposed by Virginia were lighter than the Indiana law challenged in *Crawford*. Id. at 606. The Court explained that Virginia voters were not required to present any documentation to obtain a free ID and the justifications – preventing voter fraud, preserving voter confidence in election integrity, and alignment with federal statutes like HAVA – were the same as those advanced by Indiana. Id. at 607. The burdens imposed by the law were mitigated by the acceptance of a broad range of ID’s, providing for provisional ballots, and providing free ID’s without the need for documentation along with other assistance. Id. at 607-08.

Based on a careful review of *Crawford*, the updated Barreto/Sanchez statistical data, and a careful analysis of the *Dataphase* factors enumerated in detail in the Court’s earlier Order of August 1, 2016, - which are incorporated by reference - the following problems areas are identified:

- 1) 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. See Docket No. 90-1, ¶ 40. And 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 ¶ 41.
- 2) The State has acknowledged that Native American communities often lack residential street addresses (See Docket No. 97, p. 6) or do not have clear residential addresses (Docket No. 90-9, at 3-8). Nevertheless, under current State law an individual who does not have a “current residential street address” will never be qualified to vote. This is a

clear “legal obstacle” inhibiting the opportunity to vote. The State can easily remedy this problem by simply eliminating the absolute need for a “current residential street address” and allowing for either a residential address, a mailing address (P.O. Box), or simply an address. Neither the National Registration Voting Act nor any other federal or state laws the Court is aware of require a “current residential street address” in order to be able to vote.

- 3) The “set aside” ballot process the State proclaims as a “fail-safe” measure will not help any voter who lacks the means to obtain a qualifying ID to cast a vote. When the Court issued the preliminary injunction on August 1, 2016, the undisputed evidence revealed that 23.5% Native Americans did not have a state qualifying ID. Today, the updated and unrefuted statistical data reveals that 19% of Native Americans still lack qualifying ID’s.
- 4) The new law provides that voters who show up at the polls without the required ID’s will be allowed to mark a ballot which is then set aside by poll workers. This ballot will only be counted if the voter can produce a satisfactory ID at the polling place before the polls close on election day, or at an undisclosed office within six (6) days of the election. The new law is vague and unclear as to where and to whom such a voter is to produce any documents because as the new law simply states:

After the ballot is set aside, the individual may show a valid form of identification to either a polling place election board member if the individual returns to the polling place before the polls close, or to an employee of the office of the election official responsible for the administration of the election before the meeting of the canvassing board occurring on the sixth day after the election. Each ballot set aside under this subsection must be presented to the members of the canvassing board for proper inclusion or exclusion from the tally.

N.D.C.C. § 16.1-01-04.1.

No reasonable person who reads this statute would have a clue as to where and to whom they need to report to present a valid ID. (emphasis added). Common sense requires more than stating the voter needs to return “to an employee of the office of the election official responsible for the administration of the election before the meeting of the canvassing board occurring on the sixth day after the election.” The statute is vague and unclear at best. Further, otherwise qualified voters who cannot produce the required voter ID (because they have no “current residential street address”) will obviously never be able to produce the required ID within six days after the election, and as a result will never be able to vote.

- 5) The State asserts that a tribal ID “need be nothing more than a document from tribal authorities setting forth the tribal member’s name, date of birth, and current residential street address.” See Docket No. 81, p. 19. The State relies upon the affidavit of Deputy Secretary of State James Silrum to support this new-found interpretation of the law. See Docket No. 81-55. The reality is that the text of HB 1369 mirrors the language in HB 1332 and HB 1333, which required “an official form of identification issued by a tribal government.” Compare N.D.C.C. § 16.1-01-04.1 with N.D.C.C. § 16.1-01-04, amended by H.B. 1333, 64th Leg. Assemb. Reg. Sess. § 5 (2015) and N.D.C.C. § 16.1-01-04, amended by H.B. 1369, 65th Leg. Assemb. Reg. Sess. § 5 (2017). The State has previously interpreted this to mean a tribally-issued ID card. The State’s own marketing materials only mention a “tribal ID card” and make no reference to a document or letter from the tribe being sufficient. See Docket Nos. 81-56 through 81-64. Further, it is unclear under the plain language of the statute that a document or letter would meet the

requirement of an “official form of identification.” The placement of the tribal ID requirement with other traditional forms of ID cards such as a driver’s license and a non-driver’s ID makes this interpretation unlikely. Because it is undisputed not all North Dakota tribal governments issue tribal ID cards, it is more likely that the plain language of the statute requires a tribal ID card and not simply a letter from tribal authorities.

Silrum also asserts in his affidavit that the Turtle Mountain Tribal Chairman has been informed of this letter option since May 2014. See Docket No. 81-55, ¶ 43. However, there is no explanation of the type of public education campaign conducted to disclose this letter option, and the Deputy Secretary of State does not indicate whether the Standing Rock Sioux, Spirit Lake Tribe, or Mandan, Hidatsa & Arikara Nation have ever been informed of this informal letter option as an alternative to a qualifying ID.

Simply stated, there is no official state administrative rule, regulation, policy, procedure, memorandum, or any other document or public pronouncement espousing the Secretary of State’s interpretation of what constitutes a letter option as an alternative to a qualifying ID. Because there is no official State authority espousing that a letter issued by a tribal authority would be an acceptable form of identification, and all of the State materials show an ID card as the acceptable form of tribal ID, it is dangerous for an elector to trust that poll workers would consistently accept such a letter from a tribe as a valid form of identification to comply with the new law.

Silrum also states — without any supporting authority — that 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.” See Docket No. 81-55, ¶ 43. However, HB

1369's plain language requires that the identification be "issued by a tribal government" and makes no mention of the Bureau of Indian Affairs ("BIA") which is a federal agency. N.D.C.C. § 16.1-01-04.1(3)(a)(2). The Legislature was informed before the passage of the new law that the ID's of those living on the Standing Rock Reservation were issued by the BIA and not their tribal government. See Docket No. 50, p. 16. Despite these expressed concerns, the Legislature never changed the law's language. The plain language of the statute requires identification to be issued by a "tribal government" and not the BIA in order to be acceptable under HB 1369. N.D.C.C. § 16.1-01-04.1(3)(a)(2). The Secretary of State has now adopted a different interpretation of the new law, and the various types of identification and ID's that will be accepted at the polls, but no official announcement of this interpretation has been made to date.

- 6) Although the theoretical possibility of voter fraud exists with every election nationwide, the record before the Court has revealed no evidence of voter fraud in the past, and no evidence of voter fraud in 2016.
- 7) The parties have stated that North Dakota is the only State in the country without voter registration. Common sense and simplistic revisions to the existing law; the launching of a state-wide pre-election campaign informing all voters of the ID requirements, as now broadly interpreted by the Secretary of State; or a system of voter registration like that used in the other 49 states which allows for verification before the election rather than afterward would be an easy solution. North Dakota already maintains a Central Voter File in the Secretary of State's office.

- 8) The current law (N.D.C.C. § 16.1-01-04.1) completely disenfranchises anyone who does not have a “current residential street address.” This includes homeless persons as well as many persons living on Native American reservations. The “current residential street address” requirement is not required by the North Dakota Constitution, and is not required for registering or voting in other states. Under *Crawford*, this requirement is unquestionably a legal obstacle inhibiting the right to vote.
- 9) State non-driver ID cards still cost \$8, (See N.D.C.C. § 39-06-49(2)(a)) whereas most states provide such ID’s at no cost. There is no apparent reason North Dakota cannot provide free photo ID’s to all voters. For example, Virginia requires a photo ID for all voters in all elections. However, a free photo ID is available without requiring the voter to provided any documents. Voters can obtain free photo ID’s by simply providing his or her name, address, birthdate, and last four digits of their social security number.
- 10) Section 16.1-01-04.1(3)(a) does not permit the use of other tribal documents as a valid ID. More important, as previously noted the new law again fails to recognize that the BIA - rather than a tribal government - actually issues ID’s to many Native Americans. This was a problem previously identified by the Plaintiffs and the Court in August 2016, but was never addressed by the Legislature in the enactment of the new law. Further, Section 16.1-01-04.1(3)(b) does not permit the use of any other forms of tribal government documents (or letters from tribal authorities) or BIA-issued ID’s to be used to supplement an invalid ID.
- 11) Deputy Secretary of State James Silrum stated in his affidavit (Docket No. 81-55, ¶ 14) 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. Silrum also stated that the State will accept ID's issued by the BIA or a letter from a tribal official that lists the tribal members' name, residential street address (which often does not exist), and date of birth as an acceptable ID. See Docket No. 81-55, ¶ 43. However, as previously noted, the State fails to cite any authority permitting such rule making or demonstrating that any such rules have actually been promulgated by the Secretary of State.

After a review of the entire record, and careful consideration of all of the *Dataphase* factors, the Court finds the *Dataphase* factors, when viewed in their totality, weigh in favor of the issuance of a very limited preliminary injunction. There is no need to invalidate the entire new law passed by the Legislature in April 2017. However, 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. No eligible voter, regardless of their station in life, should be denied the opportunity to vote.

Accordingly, the Plaintiffs' Motion for a Second Preliminary Injunction (Docket No. 89) is **GRANTED** in limited part until further order of the Court. Specifically, the North Dakota Secretary of State is enjoined from enforcing only certain subsections of N.D.C.C. § 16.1-01-04.1 and only to the limited extent outlined below:

(1) The Secretary of State is enjoined from enforcing Section 16.1-01-04.1(2)(b) which mandates the need for a "current residential street address." The Court is unaware of any other state that imposes such a requirement to vote. Neither the North Dakota Constitution nor the National Registration Voting Act imposes such

a strict requirement. Instead, the Secretary of State shall allow a qualified voter to receive a ballot if they provide a valid form of ID as recognized in Section 16.1-01-04.1(3)(a) or another form of identification that includes either a “current residential street address” or a current mailing address (P.O. Box or other address) in North Dakota.

(2) The Secretary of State is enjoined from enforcing N.D.C.C. § 16.1-01-04.1(3)(a)(2) which mandates only certain valid forms of identification. Instead, the Secretary of State shall also allow and accept as a valid form of identification an official form of identification issued by a tribal government; the Bureau of Indian Affairs (BIA), 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 so long as those other forms of identification, (documents, letters, writings) set forth the tribal members name, date of birth, and current residential street address or mailing address. As previously noted, the affidavit of James Silrum submitted by the State reveals that the Secretary of State has already interpreted the new law to allow for these other valid forms of identification.

(3) The Secretary of State is enjoined from enforcing N.D.C.C. § 16.1-01-04.1(3)(b)(5) which allows for supplemental documents from a federal, state, or local government. The Secretary of State shall also allow and accept any documents issued by a tribal government, the Bureau of Indian Affairs (BIA), other tribal agencies or authorities, or any other document, letter, writing, enrollment card, or other forms of tribal identification which provide the missing

or outdated information, i.e., name, current residential street address or mailing address, and date of birth. Again, the Secretary of State has already interpreted the new law to allow for those other forms of supplemental documents.

(4) The Secretary of State shall provide clarification as to the meaning of N.D.C.C. § 16.1-01-04.1(5). Specifically, voters need to know where, when, and to whom a voter needs to present a valid form of identification if their ballot was set aside. The Court notes that N.D.C.C. § 16.1-01-04.1(6) provides that the Secretary of State shall develop uniform procedures to implement subsection 5. As a result, all that is needed are plans, procedures, rules, regulations, or some public pronouncement to inform voters of what they need to do.

In summary, the implementation of only a few selected subsections of N.D.C.C. § 16.1-01-04.1 is enjoined, in limited part, and only to the extent that the Secretary of State develop uniform policies, procedures, rules and regulations that incorporate the above-identified requirements. There is no need to invalidate the entire law. Further, nearly all of the above-identified requirements are based on the Secretary of State's own interpretations of the new election laws as revealed in the affidavit of Deputy Secretary of State James Silrum. See Docket No. 81-55.

The State needs to launch a state-wide pre-election campaign to inform voters of the ID requirements. The State of Virginia had no problem educating its voters in 2016 when the state was faced with similar challenges to its voting laws. See Lee v. Virginia Board of Elections, 843 F.3d 592, 596 (4th Cir. 2016). The educational campaign in Virginia involved the public posting of 500,000 posters describing the law and sending 86,000 postcards to persons on the active

voter list who did not possess a DMV-issued ID. The State of Virginia, as well as many other states, provide free photo ID's for all voters without requiring any documentation. This Court is not suggesting the North Dakota Secretary of State implement the same educational measures used in Virginia. The need to educate the voting public is obvious, but the method of doing so is left to the discretion of the Secretary of State.

In summary, common sense and a sense of fairness can easily remedy the above-identified problems to ensure that all residents of North Dakota, including the homeless as well as those who live on the reservations, will have an equal and meaningful opportunity to vote. The Defendant's "Motion to Dissolve Preliminary Injunction" (Docket No. 80) which relates to the August 1, 2016, Order - and the now repealed N.D.C.C. 16.1-05-07, is **GRANTED** as the earlier order is now moot. The Defendant's "Motion for Expedited Review" (Docket No. 95) is also **GRANTED**.

IT IS SO ORDERED.

Dated this 3rd day of April, 2018.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

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

Plaintiffs,)

vs.)

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

Defendants.)

**ORDER GRANTING PLAINTIFFS’
MOTION FOR PRELIMINARY
INJUNCTION**

Case No. 1:16-cv-008

Before the Court is the Plaintiffs’ motion for a preliminary injunction. See Docket No. 42. The Plaintiffs seeks a preliminary injunction enjoining the Defendant from enforcing, during the pendency of this action, the voter ID requirements codified at N.D.C.C. § 16.1-05-07. The Plaintiffs request the Court grant an injunction requiring the voter ID laws in place during the 2012 election be put in place during the pendency of this action. Namely, the Plaintiffs request the Defendant reinstate certain “fail-safe” provisions that give poll workers the authority to allow Native Americans and others the ability to vote based on their personal knowledge of that person’s voting eligibility. Plaintiffs also request Native Americans and others without sufficient ID be allowed to vote by signing an affidavit or declaration under penalty of perjury stating they are qualified to vote. The Defendant filed a response in opposition to the motion on July 5, 2016. See Docket No. 45. The Plaintiffs filed a reply on July 18, 2016. See Docket No. 48. For the reasons set forth below, the Court finds the lack of any “fail-safe” provisions to be dispositive in this matter. Although most voters in North Dakota either possess a qualifying ID or can obtain some form of acceptable identification, a safety net is needed for those voters who

cannot obtain a qualifying ID with reasonable effort. Accordingly, the Court enjoins the Defendant from implementing the current voter ID laws without the existence of some form of a “fail-safe” provision.

I. BACKGROUND

Until recently, North Dakota used a system of small voting precincts, whereby election boards and poll workers generally knew who were and who were not eligible voters in their precincts. If a poll clerk happened not to know a voter, they could ask that voter to produce one of many forms of an acceptable identification (“ID”) showing the voter’s residential address and birthday. Under the prior law, valid forms of ID included: a North Dakota driver’s license or non-driver’s license ID card; a U.S. passport; an ID card from a federal agency; an out of state driver’s license or non-driver’s ID card; an ID card issued by a tribal government; a valid student ID card; a military ID card; a utility bill dated 30 days before Election Day, including cell phone bills and student housing bills (online printouts were acceptable); and a change of address verification letter from the U.S. Postal Service.

If one form of ID did not provide a voter’s address and birth date, a voter could use two forms of ID that, in combination, provided address and birth date information. If a voter could not produce the requested ID, he or she could fall back on two “fail-safe” mechanisms to prove their voting eligibility. First, a member of the election board or a poll clerk could simply vouch for the voter. Second, the voter could execute an affidavit swearing under penalty of perjury that he or she was a qualified elector in the precinct. N.D.C.C. § 16.1-05-07(3), amended by H.B. 1332, 63rd Leg. Assembly; Reg. Sess. § 5 (2013).

On April 19, 2013, the Legislative Assembly of North Dakota enacted HB 1332. HB 1332 imposed new voter ID requirements on voting-eligible citizens:

- To be acceptable, any voter ID must provide the voter's residential address (post office box numbers are not sufficient) and his or her date of birth.
- A voter must submit one of these forms of ID (1) a North Dakota driver's license; (2) a North Dakota non-driver's ID card; (3) a tribal government-issued ID card; or (4) an alternative form of ID prescribed by the Secretary of State in a case where the voter did not possess any of the other acceptable forms of ID.

More importantly, the new law also did away with North Dakota's voucher and affidavit "fail-safe" mechanisms. With respect to the fourth category of acceptable ID, the Secretary of State prescribed two forms: (1) a student ID certificate; and (2) a long-term care ID certificate.

Just over two years later, on April 24, 2015, North Dakota adopted HB 1333, which imposed additional restrictions on North Dakota voters:

- The bill removed the ability of the Secretary of State to prescribe new forms of qualifying ID, and denied students the option of using college ID certificates (leaving long-term care certificates as the only acceptable ID prescribed by the Secretary of State and limiting the number of acceptable ID's to four).
- The bill clarified that driver's licenses and non-driver ID cards must be current.
- The bill clarified that military ID is not acceptable, except for service members stationed away from their North Dakota residences
- The bill eliminated a voucher provision for absentee voting (except for disabled absentee voters).

A survey by the National Conference of State Legislatures (NCSL) classified North Dakota as a “strict” non-photo ID state. See Docket No. 43, p. 15. The record reveals that because North Dakota stands alone in not having any “fail-safe” provisions, its current voter ID laws are arguably some of the most restrictive voter ID laws in the nation. The record further reveals that proponents of HB 1332 and HB 1333 asserted the new laws were necessary to curb voter fraud. Given the historical lack of voter fraud in the state, opponents complained that the new laws amounted to “a solution looking for a problem.” See Docket No. 44-2, p. 20.

The Plaintiffs are seven Native American voters from North Dakota who brought this action under the Voting Rights Act, and the United States and North Dakota Constitutions, to invalidate North Dakota’s new voter ID requirements. Under N.D.C.C. § 16.1-05-07, North Dakota voters must present a state-issued ID that shows both date of birth and a residential address to vote. The following forms of ID are currently required to vote in North Dakota: (1) a current North Dakota driver’s license’ (2) a current North Dakota non-driver’s ID card; (3) a long-term care certificate prescribed by the Secretary of State; or (4) a tribal government issued ID card. N.D.C.C. § 16.1-05-07(1)(a-c). A military ID card is not acceptable, except for service members stationed away from their North Dakota residences. N.D.C.C. § 16.1-05-07(1)(d).

The Plaintiffs argue that, in the absence of any “fail-safe” provisions, North Dakota now has the nation’s most restrictive voter ID requirements. The Plaintiffs contend these new ID requirements are needlessly and substantially burdensome for all the people of North Dakota, but impose particularly disproportionate burdens on Native Americans. The Plaintiffs contend that thousands of Native Americans in North Dakota do not have qualifying voter ID’s, or the resources to easily obtain qualifying ID’s, because they do not have the money to pay the license

fees or for travel, or they do not have the forms of ID required to get a new ID card (e.g. a birth certificate or social security card), and/or they have neither the time nor the means of transportation to track down documents and travel to a state office which issues the required forms of ID.

II. LEGAL DISCUSSION

The Plaintiffs seek a preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure. The primary purpose of a preliminary injunction is to preserve the status quo until a court can grant full, effective relief upon a final hearing. Ferry-Morse Seed Co. v. Food Corn, Inc., 729 F.2d 589, 593 (8th Cir. 1984). A preliminary injunction is an extraordinary remedy, with the burden of establishing the necessity of a preliminary injunction placed on the movant. Watkins Inc. v. Lewis, 346 F.3d 841, 844 (8th Cir. 2003); Baker Elec. Coop., Inc. v. Chaske, 28 F.3d 1466, 1472 (8th Cir. 1994); Modern Computer Sys., Inc. v. Modern Banking Sys., Inc., 871 F.2d 734, 737 (8th Cir. 1989). The court determines whether the movant has met its burden of proof by weighing the factors set forth in Dataphase Systems, Inc., v. C L Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981). The *Dataphase* factors include "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Id.* "No single factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they weigh towards granting the injunction." Baker Elec. Coop., Inc., 28 F.3d at 1472 (quoting Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc., 815 F.2d 500, 503 (8th Cir. 1987)); see CDI Energy

Servs., Inc. v. W. River Pumps, Inc., 567 F.3d 398, 401-03 (8th Cir. 2009). The Court is required under Eighth Circuit case law to analyze each of these four *Dataphase* factors.

A. PROBABILITY OF SUCCESS ON THE MERITS

The Plaintiffs contend in their complaint that North Dakota's voter ID requirements violate Section 2 of the Voting Rights Act and the Equal Protection clauses of both the North Dakota and United States Constitutions. A party challenging a federal or state statute or other government action who seeks a preliminary injunction must demonstrate that it is "likely to prevail on the merits," a higher bar than the more familiar "fair chance of prevailing" test. See Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 732-33 (8th Cir. 2008); Johnson v. Minneapolis Park & Recreation Bd., 729 F.3d 1094, 1098 (8th Cir. 2013). When evaluating a movant's "likelihood of success on the merits," the court should "flexibly weigh the case's particular circumstances to determine 'whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.'" Calvin Klein Cosmetics Corp., 815 F.2d at 503 (quoting Dataphase, 640 F.2d at 113). The Eighth Circuit has held that of the four factors to be considered by the district court in considering preliminary injunctive relief, the likelihood of success on the merits is "most significant." S & M Constructors, Inc. v. Foley Co., 959 F.2d 97, 98 (8th Cir. 1992).

The Plaintiffs contend North Dakota's voter ID requirements violate the Equal Protection Clause of the 14th Amendment to the United States Constitution. The United States Supreme Court has held:

A court evaluating a constitutional challenge to an election regulation must weigh the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the burden imposed by its rule.

Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190 (2008) (internal citations omitted).

There is not a litmus test for measuring the severity of a burden a state law imposes on voters, but any burden must be justified by relevant and legitimate state interests "sufficiently weighty to justify the limitation." Id. (quoting Norman v. Reed, 502 U.S. 279, 288-289 (1992)). As required in *Crawford*, the Court will make the "hard judgment" required after evaluating both the burdens placed upon Native American voters by North Dakota voter ID requirements, and North Dakota's justifications for imposing those requirements.

1. BURDENS PLACED UPON NATIVE AMERICANS

The Court will turn first to the burdens the Plaintiffs are alleged to have suffered, or will suffer, if the current voter ID requirements, codified at N.D.C.C. § 16.1-05-07, are not enjoined. It is undisputed that the more severe conditions in which Native Americans live translates to disproportionate burdens when it comes to complying with the new voter ID laws. The Plaintiffs have presented a multitude of affidavits and declarations from lay witnesses and expert witnesses to support their legal arguments. **It is important to note that with respect to the Plaintiffs' request for injunctive relief, none of the affidavits, declarations, surveys, studies, or data submitted by the Plaintiffs in support of their motion have been challenged or refuted by the State of North Dakota.**

The Plaintiffs cite to a statistical survey of North Dakota voters performed by Dr. Matthew A. Barreto and Dr. Gabriel R. Sanchez (“Barreto/Sanchez Survey”) which revealed the following:

- 23.5% of Native Americans currently lack valid voter ID, compared to only 12% of non-Native Americans. See Docket No. 44-1, p. 3.
- 15.4% of Native Americans who voted in 2012 currently lack qualifying voter ID, compared to only 6.9% of non-Native Americans. See Docket No. 44-1, p. 19.
- Only 78.2% of Native Americans have a North Dakota driver’s license, compared to 94.4% of non-Native Americans. See Docket No. 44-1, p. 3.
- 47.7% of Native Americans who do not currently have a qualifying voter ID lack the underlying documents they need to obtain an acceptable ID. See Docket No. 44-1, p. 21.
- Only 73.9% of Native Americans who lack a qualifying voter ID own or lease a car, compared to 88% of non-Native Americans; and 10.5% of Native Americans lack any access to a motor vehicle, compared to only 4.8% of non-Native Americans. See Docket No. 44-1, p. 22.
- Native Americans, on average, must travel twice as far as non-Native Americans to visit a Driver’s License Site in North Dakota. See Docket no. 44-1, p. 22.
- 21.4% of Native Americans are not at all aware of the new voter ID laws, and only 20.8% have heard about the law. See Docket No. 44-1, p. 20.

The Defendant neither disputes nor challenges these findings. As noted, there are no affidavits, declarations, surveys, studies, or exhibits attached to the Defendant’s response in

opposition to the request for injunctive relief. The Defendant has provided no legislative testimony or findings to counter the Barreto/Sanchez Survey, nor in any manner challenged any of the evidence the Plaintiffs have submitted. The Defendant seems to rely on Justice Scalia's concurrence in *Crawford*, which argues that individually specific evidence of the burdens placed upon a voter by new election laws and regulations are irrelevant when the statute, on its face, is generally applicable and nondiscriminatory. See Crawford, at 206-206 (Scalia, concurring) ("The Indiana photo-ID law is a generally applicable, nondiscriminatory voting regulation, and our precedents refute the view that individual impacts are relevant to determining the severity of the burden it imposes"). However, this Court is required to follow the standard laid out in the plurality opinion of the Supreme Court in *Crawford* authored by Justice Stevens, which requires a particularized assessment of the burdens levied by an election law. See Obama for America v. Husted, 697 F.3d 423, 441 n.7 (6th Cir. 2012) (supporting the contention that Justice Stevens' opinion is the "controlling" opinion in *Crawford*). Given the thorough and unrefuted record developed by the Plaintiffs in this case, and the lack of any evidence presented by the Defendant to the contrary, the Court gives the findings of the Barreto/Sanchez Survey, and the other studies and data presented by the Plaintiffs, considerable weight.

The undisputed evidence before the Court reveals that Native Americans face substantial and disproportionate burdens in obtaining each form of ID deemed acceptable under the new law. As detailed below, obtaining any one of the approved forms of ID almost always involves a fee or charge, and in nearly all cases requires travel. It also helps to have a computer with Internet access, a credit card, a car, the ability to take time off work, and familiarity with the government and its bureaucracy. Thus, obtaining a qualifying voter ID is much easier to

accomplish for people who live in urban areas, have a good income, are computer-literate, have a computer and printer, have a good car and gas money, have a flexible schedule, and understand how to navigate the state's administrative procedures. The declarations from the Plaintiffs' expert witnesses show that the typical Native American voter living in North Dakota who lacks qualifying ID simply does not have these assets. See Docket No. 44-2, p. 33.

(a) **Native Americans Trying to Obtain a Non-Driver's License ID Face Substantial Burdens in Providing Proof of Identification**

To obtain a non-driver's ID in North Dakota, "PROOF OF IDENTIFICATION IS REQUIRED." In other words, you need an ID to get an ID. The North Dakota Department of Transportation website lists nine "[a]cceptable forms of identification." The first listed item is a U.S. birth certificate (state certified; Government issued).¹ The Barreto/Sanchez Survey found that 32.9% of Native Americans who presently lack qualifying voter ID do not have a birth certificate. See Docket No. 44-1, pp. 20-21.

One obstacle to obtain a birth certification is money. To obtain a birth certificate, one must pay at least \$7. Impoverished Native Americans, such as Plaintiff Lucille Vivier, lack the disposable income necessary to obtain a birth certificate, and make the difficult decision not to spend their limited resources on a birth certificate. See Docket No. 44-2, pp. 43-44.

Another barrier is that to obtain a birth certificate, a person must present "proof of identity." Again, one needs an ID to get an ID. This can be a state-issued photo ID, a driver's license, a Bureau of Indian Affairs tribal ID card, a military ID card, or a U.S. passport or visa. A Native American applicant lacking a qualifying voter ID probably lacks these forms of ID as

¹North Dakota Department of Transportation, *ID Card Requirements* (2015), <http://dot.nd.gov/divisions/driverslicense/idrequirements.htm>.

well. Such applicants can still satisfy the ID requirement by presenting **two** of the following: social security card; utility bill with current address; pay stub showing name and social security number; car registration showing current address; and an IRS tax return. The Barreto/Sanchez Survey found that many Native Americans who presently lack a qualifying voter ID cannot provide these documents:

- 21.6% of Native Americans do not have two documents that show their residential address. One reason is that many Native Americans do not have residential addresses and the Post Office delivers their mail to a post office box. See Docket No. 44-1, pp. 3, 20-21. Another reason is that, on many reservations, the residential address system produces conflicting and problematic results. See Docket No. 44-10, pp. 2-3.
- 5.6% of Native Americans in North Dakota do not have a social security card or a W2 evidencing their social security number. See Docket No. 44-1, pp. 20-21.
- Many Native Americans lack access to transportation and have no car registration showing their current address. See Docket No. 44-2, p. 41.

Another acceptable form of ID is a “valid, unexpired U.S. Passport.” A passport application currently costs \$110, which is a significant amount for a person with few resources. See Docket No. 44-2, p. 30. The other seven forms of acceptable ID– “Report of a Birth Abroad issued by the United States Department of State,” “Certificate of Naturalization,” “Certificate of Citizenship,” “Valid unexpired Permanent Resident Card,” “Unexpired Employment Authorization Card,” “Unexpired Foreign Passport with I-94,” and “I-94 Card Stamped Refugee

or Asylee”—are all irrelevant and unobtainable to Native Americans born in the United States. See Docket No. 44-2, pp. 30-31.

(b) **Native Americans Trying Obtain a Non-Driver’s ID Face Substantial Cost Burdens**

Cost presents another barrier to obtaining a non-driver ID. According to the North Dakota Department of Transportation website, it costs \$8 to get a non-driver’s ID card if you have a driver’s license or need to replace a lost or stolen ID.² Native Americans who currently lack a qualifying voter ID may not be able to afford that.

(c) **Native Americans Trying to Obtain a Non-Driver’s ID Face Substantial Travel/Time Burdens**

The record shows that having the ID documents needed to obtain a non-driver’s ID is not enough. A person must also personally “visit one of the ND Driver’s License Sites.” The record reveals there are no Driver’s License Sites on any of North Dakota’s reservations. Further, a successful visit to a site requires knowledge and experience dealing with bureaucratic institutions, a means of transportation, money to pay for transportation, and the free time to travel the often significant distances to such sites. The undisputed evidence before the Court reveals that overcoming these obstacles can be difficult, particularly for an impoverished Native American. The declarations of the Plaintiffs’ expert witnesses, which have not been disputed by the State, disclose the following:

- **Many Native Americans do not know where Driver’s License Sites are located.** According to the Barreto/Sanchez Survey, only 64.9% of Native Americans in North Dakota who lack a qualifying voter ID know the location of

²See North Dakota Department of Transportation, *ID Card Requirements* (2015), <http://dot.nd.gov/divisions/driverslicense/idrequirements.htm>

the nearest Driver's License Site (as compared to 85.2% of non-Native Americans). See Docket No. 44-1, pp. 23-24.

- **Many lack means of transportation.** According to the Barreto/Sanchez Survey, only 73.9% of Native Americans in North Dakota lacking a qualifying voter ID own or lease a car (as compared to 88% of non-Native Americans); and 47.3% of Native Americans in North Dakota believe it would be a hardship if they had to rely on public transportation to get to a Driver's License Site (as compared to 23.1% of non-Native Americans). See Docket No. 44-1, pp. 22-24.
- **Travel distances to a Driver's License Site are significant.** For the average voting-eligible Native American in North Dakota, the average travel distance to the closest site is nearly 20 miles (as compared to appx. 11 miles for non-Native Americans). This translates to more than 70 minutes of travel time for a round trip. For Native Americans in North Dakota living on a reservation, the travel distance can be as great as 60 miles one way.
- **Drivers License Sites are not easily accessible.** There are no sites on any of the reservations in North Dakota. Because there are no Driver's License Sites on any reservations in North Dakota, access for Native Americans is severely limited. North Dakota only has 27 Driver's License Sites in the entire state – just one site per 2,600 square miles. Only four of these sites are open five days a week (excepting holidays). Twelve of the sites are open less than six hours on one day a month (or even less than that). One office is open for a total of 28 hours per calendar year. See Docket No. 44-4, pp. 5, 14-16.

The undisputed evidence in this case has established that travel to a Driver's License Site to obtain a non-driver's ID card (or a driver's license) is substantially burdensome for Native Americans. The Barreto/Sanchez Survey found that 44.1% of Native Americans lacking a qualifying voter ID reported they would have difficulty taking time off from work to travel to a Driver's License Site (compared to 26.2% of non-Native Americans), and 36.7% of Native Americans said it would be a problem to travel even six miles each way to a site (compared to 17.3% of non-Native Americans). The personal experiences of Plaintiffs' declarants Richard Brakebill, Lucille Vivier, Dorothy Herman, and LaDonna Allard further confirm the substantial burdens Native Americans encounter in obtaining qualifying voter ID's. See Docket Nos. 44-9, 44-10, 44-11, and 44-12.

(d) **Native Americans Who Currently Lack Qualifying Voter ID's Face Substantial Burdens in Obtaining a New Driver's License**

One finding from the Barreto/Sanchez Survey is that only 78.2% of voting-age Native Americans have a driver's license. As with non-driver's ID's, acquiring a new driver's license also requires a personal visit to a Driver's License Site. As previously discussed, such a visit can be burdensome for Native Americans who currently lack a qualifying voter ID. Further, getting a new driver's license also requires proof of ID—the same forms of ID required to obtain a non-driver's ID, which is problematic for Native Americans.

According to the North Dakota Department of Transportation website, a new license can cost as much as \$25 (\$5 to take the written test, \$5 to take a road test, and \$15 for the license

fee).³ Many impoverished Native Americans do not have the disposable income to pay for these fees.

(e) **Native Americans Who Currently Lack a Qualifying Voter ID Face Substantial Burdens in Updating Their Current Non-Driver ID or Driver's License**

Many existing non-driver's ID's and driver's licenses do not suffice as a qualifying voter ID because they do not reflect the person's current residential address. For voters who do have a residential address, North Dakota provides three ways for a person to update their license to show their current address, and each way presents burdens for Native Americans:

- The first way is to update the address online. This requires the person to have access to a computer and an Internet connection which is a problem. A survey of Native Americans in the Bismarck/Mandan area found that only 61% had their own computers, and only about half had access to the Internet. The record reveals that those figures are likely much lower for Native Americans living in rural areas and on reservations given the higher levels of poverty. See Docket No. 44-2, pp. 41-42.
- The second way is to visit a Driver's License Site and personally update the information, which as previously discussed can be burdensome.
- The third way to update a license (or non-driver ID) is to travel to a Driver's License Site and get a new one, which also poses a burden.

³North Dakota Department of Transportation, *Driver's License Requirements* (2015), <http://dot.nd.gov/divisions/driverslicense/dlrequirement.htm>.

(f) **Many Tribal Government Issued ID Cards Do Not Satisfy the New Law Because They Do Not Show a Residential Address and Are Substantially Burdensome to Obtain**

It is undisputed that many tribal ID's do not satisfy North Dakota's requirement of showing the "applicant's current or most recent North Dakota residential address" under the new law. 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 addresses. See Docket No. 44-2, pp. 36-38. In addition, obtaining new tribal ID's can be burdensome because they cost money, and one must travel to tribal headquarters to obtain one. Further, many Native Americans (including all those living on the Standing Rock Reservation) only have ID's issued by the federal Bureau of Indian Affairs; they do not have ID's issued by tribal governments. Thus, these forms of ID's also do not satisfy the voter ID laws' definition of "tribal government issued" ID card.

(g) **North Dakota's New Voter ID Laws Have Disenfranchised Native American Voters**

The Plaintiffs have presented evidence of disenfranchisement of voting-eligible Native Americans in the elections that have taken place since the amendments to N.D.C.C. § 16.1-05-07 in 2013 and 2015. The Plaintiffs have shown that North Dakota officials have admitted the new laws resulted in poll workers turning away voters because they did not have a qualifying ID. See Docket No. 44-2, p. 34. The record reveals that North Dakota poll workers turned away many Native Americans because their driver's licenses, non-driver ID, or tribal ID's did not disclose their current residential addresses. See Docket No. 44-2, pp. 35-36.

The difficulties cited above in obtaining a valid ID for the purposes of satisfying N.D.C.C. § 16.1-05-07, manifest themselves in the experiences of several of the named Plaintiffs

in this case. Lucille Vivier attested that her tribal ID was rejected at her polling place and she was not able to vote in 2014 because her tribal ID did not have a current residential address listed. See Docket No. 1, pp. 4-5. Plaintiff Richard Brakebill was denied the right to vote in November 2014 because he had an expired driver's license. When he sought to remedy this problem at a North Dakota Driver's License Site, he was denied a new form of ID because he did not have a copy of his Arkansas birth certificate. See Docket No. 1, p. 3. Nevertheless, Brakebill attempted to vote on election day in 2014 and presented his expired driver's license and his tribal ID. He was denied a ballot because his license had expired and his tribal ID did not reveal a current residential address.

Dorothy Herman was similarly unsuccessful in obtaining a new form of ID after two trips to a North Dakota Driver's License Site before the 2014 general election. Her first trip was unsuccessful because the Driver's License Site was closed, and her second trip was unsuccessful because her expired state card, with her current residential address, was insufficient to obtain a new state ID without a birth certificate. See Docket No. 1, p. 6. Herman presumed her tribal ID would be sufficient to vote in 2014, but she was ultimately denied a ballot because her tribal ID did not contain a current residential address. The record reveals these Plaintiffs and others were denied the right to vote in November 2014 (even though the poll workers knew them personally and knew they were qualified to vote) because they had invalid ID's under the new laws.

The undisputed evidence reveals that Native Americans living in North Dakota disproportionately live in severe poverty. According to an American Community Survey (ACS) covering the years 2009-2013, 21.7% of voting-age Native Americans had incomes below the poverty line, compared to only 7.6% of non-Native Americans. See Docket no. 44-4, pp. 6-7.

Another ACS study reported that 37.7% of all Native Americans live in poverty, compared to 5.3% of Anglo families. See Docket No. 44-2, p. 40.

The undisputed evidence and statistical data demonstrate the following, which reflects the disparate living conditions for Native Americans:

- The ACS study reported a median household income for non-Native Americans at \$56,566, compared to only \$29,909 for Native Americans.
- The ACS study found that the average income for non-Native Americans living in North Dakota is \$73,313, compared to \$48,763 for Native Americans.
- The Barreto/Sanchez Survey found that 22.3% of Native Americans who lack voter ID's have household incomes less than \$10,000.
- The unemployment rates on reservations are staggering. For example, unemployment at the Standing Rock and Turtle Mountain reservations is nearly 70%.

These undisputed statistics and studies support the finding that, given the disparities in living conditions, it is not surprising that North Dakota's new voter ID laws are having and will continue to have a disproportionately negative impact on Native American voting-eligible citizens.

The undisputed declarations of the Plaintiffs' expert witnesses also established the following:

- 23.5% of Native American eligible voters do not currently possess a qualifying voter ID. In contrast, only 12% of non-Native Americans do not possess a valid ID. See Docket No. 44-1, pp. 3-4.

- 15.4% of Native Americans who voted in the 2012 presidential election currently lack a valid voter ID, compared to only 6.9% of non-Native Americans who voted in the 2012 presidential election.
- Only 78.2% of Native Americans have a driver's license that they could potentially use as a qualifying voter ID. In contrast, 94.4% of non-Native Americans have a driver's license.
- Native Americans are disproportionately more likely to lack the formal educational background that could help them obtain qualifying forms of voter ID. For example, 34.5% of Native Americans who lack voter ID never finished high school, compared to only 5.7% of non-Native Americans.
- Native Americans who currently lack a qualifying voter ID disproportionately face logistical and financial burdens in obtaining a qualifying ID. For example, only 64.9% of Native Americans lacking voter ID know the location of the nearest Driver's License Site, compared to 85.2% on non-Native Americans; only 73.9% of Native Americans who lack voter ID own or lease a car, compared to 88% of non-Native Americans; 10.5% of Native Americans lack access to a motor vehicle, compared to only 4.8% of white households' 44.1% of Native Americans who lack a qualifying voter ID would have a problem getting time off work to go to a Driver's License Site to obtain qualifying ID, compared to only 26.2% of non-Native Americans. On the average, Native Americans in North Dakota must travel twice as far as non-Natives to visit a Driver's License Site.

The Defendant contends the requirements of N.D.C.C. § 16.1-05-07 are reasonable and that, at some point, each citizen has to take responsibility for his or her vote, including obtaining

the proper documentation necessary in order to cast that vote. See Docket No. 45, p. 6. The Defendant asserts the Plaintiffs have not shown that any burdens associated with obtaining a valid ID are any more restrictive on Native Americans in North Dakota than upon hundreds of thousands of similarly-situated non-Native Americans living in rural North Dakota. The Court finds the record clearly belies that contention, given the socio-economic disparities between Native American and non-Native American populations in North Dakota as demonstrated in the numerous studies and statistics presented by the Plaintiffs. Again, none of the studies have been challenged or refuted by the State. The Court will now weigh the burdens placed upon the Native American population in North Dakota with the Defendant's justifications for the voter ID requirements in N.D.C.C. § 16.1-05-07.

2. NORTH DAKOTA'S INTEREST

The Defendant relies heavily upon the United States Supreme Court's *Crawford* decision to support the contention that "[t]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Crawford*, 553 U.S. at 195. The Court agrees with the Defendant and the Supreme Court when it said that "the electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." *Id.* at 194. The Defendant has cited *Crawford* for the contention that "for most voters who need them [photo ID], the inconvenience of making a trip to the [North Dakota Driver's License Site], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Id.* at 198. However, what is ignored is that the United States Supreme Court in *Crawford* expressly recognized that "[b]oth evidence in the

record and facts of which we may take judicial notice, however, indicate that a somewhat heavier burden may be placed on a limited number of persons.” *Id.* at 199. The Indiana law that was challenged in *Crawford* allowed indigent voters, religious objectors, and voters who did not have the required photo ID when they went to vote, to cast provisional ballots which the state would count if the voter signed an affidavit. In contrast, North Dakota’s new voter ID laws completely eliminated the affidavit and voucher “fail-safe” mechanisms designated to protect those voters who do not possess an ID and who cannot obtain one with reasonable effort.

The undisputed evidence in the record clearly establishes that the Native American population in North Dakota bears a severe burden under the current version of N.D.C.C. § 16.1-05-07. The plurality of the Supreme Court in *Crawford* upheld the voter ID laws at issue in Indiana primarily because of a poorly developed record by the Plaintiffs. The record in *Crawford* did not provide “the number of registered voters without photo ID;” did not “provide any concrete evidence of the burden imposed on voters” who lacked photo ID; and the record said “virtually nothing” about the difficulties indigent voters faced. *Id.* at 200-201. To the contrary, the record before this Court does not suffer the same lack of support present in *Crawford*. The Plaintiffs here have developed a very thorough record that clearly apprises the Court of the significant number of voting-age Native Americans who reside in North Dakota whom lack a qualifying voter ID under N.D.C.C. § 16.1-05-07. The record is replete with concrete evidence of significant burdens imposed on Native American voters attempting to exercise their right to vote in North Dakota.

The Court finds that the undisputed evidence in the record reveals that N.D.C.C. § 16.1-05-07 imposes “excessively burdensome requirements” on Native American voters in North Dakota that far outweighs the interests put forth by the State of North Dakota. Further, the Court

finds the lack of any current “fail-safe” provisions in the North Dakota Century Code to be unacceptable and violative of the Equal Protection Clause of the 14th Amendment.

It appears from the record that North Dakota may be the only state in the country that does not allow for some type of a provisional ballot casting if a voting-age citizen does not have the requisite ID on election day. The new voter ID laws totally eliminated the previous “fail-safe” provisions that existed in the past in North Dakota. Although the majority of voters in North Dakota either possess a qualifying voter ID or can easily obtain one, it is clear that a safety net is needed for those voters who simply cannot obtain a qualifying voter ID with reasonable effort. The Court cannot envision a compelling reason or a governmental interest which supports not providing such an avenue of relief for potentially disenfranchised voters.

The Defendant has not offered any purported compelling state interest as to why North Dakota no longer provides any “fail-safe” mechanisms which would enable a person who could not produce a required voter ID to nevertheless be able to vote - just as North Dakota voters were allowed to do prior to 2013. The Defendant has failed to present any evidence showing that “fail-safe” provisions or provisional have resulted in voter fraud in the past, or are particularly susceptible to voter fraud in the future. To the contrary, the record before the Court reveals that the Secretary of State acknowledged in 2006 that he was unaware of any voter fraud in North Dakota. See Docket No. 44-2, pp. 18-21. There is a total lack of any evidence to show voter fraud has ever been a problem in North Dakota. Accordingly, the Court finds that the Plaintiffs are likely to succeed on the merits of their claim against the Defendant under the Equal Protection Clause of the 14th Amendment to the United States Constitution. Thus, this *Dataphase* factor weighs strongly in favor of the issuance of a preliminary injunction.

Having determined the Plaintiffs are likely to succeed on their claim under the 14th Amendment to the United States Constitution, the Court need not address their claims under the Voting Rights Act or the North Dakota Constitution. See Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1, 690 F.3d 996, 1004 n. 4 (8th Cir. 2012) (concluding that if one claim for relief satisfies the requirements for a preliminary injunction, other claims need not be considered).

B. IRREPARABLE HARM

The Plaintiffs contend they will suffer irreparable harm if N.D.C.C. § 16.1-05-07 is fully implemented without any “fail-safe” provisions. “The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.” Bandag, Inc. v. Jack's Tire & Oil, Inc., 190 F.3d 924, 926 (8th Cir. 1999). It is well-established that when there is an adequate remedy at law, a preliminary injunction is not appropriate. Modern Computer Sys., Inc., 871 F.2d at 738. To demonstrate irreparable harm, a plaintiff must show the harm is not compensable through an award of monetary damages. Glenwood Bridge, Inc. v. City of Minneapolis, 940 F.2d 367, 371 (8th Cir. 1991); Doe v. LaDue, 514 F. Supp. 2d 1131, 1135 (D. Minn. 2007) (citing Northland Ins. Co. v. Blaylock, 115 F. Supp. 2d 1108, 1116 (D. Minn. 2000)). The Eighth Circuit has explained that a district court can presume irreparable harm if the movant is likely to succeed on the merits. Calvin Klein Cosmetics Corp., 815 F.2d at 505 (citing Black Hills Jewelry Mfg. Co. v. Gold Rush, Inc., 633 F.2d 746, 753 (8th Cir. 1980)).

The irreparable harm the Plaintiffs will suffer if N.D.C.C. § 16.1-05-07 is implemented without any form of a “fail-safe” provision as had previously existed under state law is easy to understand. The right to vote holds a special place in our republic:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

It is clear that no legal remedy other than enjoining the State of North Dakota from implementing N.D.C.C. § 16.1-05-07 without any “fail-safe” provisions will be sufficient to ensure Native Americans, and any other citizens struggling to comply with the new voter ID requirements, have a clear and unequivocal opportunity to have their voice heard in future elections. The Plaintiffs have presented undisputed evidence that more than **3,800** Native Americans may likely be denied the right to vote in the upcoming general election in November 2016 absent injunctive relief. See Docket no. 44, p. 12. Thus, this *Dataphase* factor weighs in favor of the issuance of a preliminary injunction at this stage

C. BALANCE OF HARMS AND THE PUBLIC INTEREST

The balance of harm factor analysis examines the harm to all parties involved in the dispute and other interested parties, including the public. Dataphase, 640 F.2d at 114; Glenwood Bridge, Inc. v. City of Minneapolis, 940 F.2d 367, 372 (8th Cir. 1991). “In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (citation omitted). “In each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” Amoco Prod. Co. v. Village of Gambell, 480 U.S.531, 542 (1987). These factors—the balance of harms and the public interest—“merge when the Government is the opposing party.”

Nken v. Holder, 556 U.S. 418, 435 (2009). Moreover, granting preliminary injunctive relief is only proper if the moving party establishes that entry of an injunction would serve the public interest. Dataphase, 640 F.2d at 113.

The undisputed evidence in the record clearly demonstrates there are likely thousands of eligible voters in North Dakota who lack a qualifying ID. The undisputed evidence produced to date supports the conclusion that some of those voters will simply be unable to obtain the necessary ID, no matter how hard they try.

The State of North Dakota's interests must be measured against the specific remedy the Plaintiffs' seek, which is an injunction requiring the Defendant to implement a "fail-safe" measure as a part of its voter ID laws. The State's interests in requiring a voter ID are to prevent voter fraud and promote voter confidence. However, those interests would not be undermined by allowing Native American voters, or any other voters who cannot obtain an ID, to present an affidavit or declaration in lieu of one of the four (4) forms of permissible voter ID's. The undisputed evidence before the Court reveals that voter fraud in North Dakota has been virtually non-existent. In addition, the Defendant has produced no evidence suggesting the public's confidence in the electoral process would be undermined by excusing those voters who cannot reasonably obtain an ID from actually presenting an ID at the polls on election day.

The Court notes that many states that have voter photo-identification requirements allow those who lack ID's to vote by signing an affidavit or other statement or declaration to that effect, rather than being required to present an ID. The Defendant has never suggested the laws of those states fail to prevent fraud and promote voter confidence. See Idaho Code § 34-1114; Ind. Code § 3-11.7-5-2.(c); La. Rev. Stat § 18:562; Mich. Comp. Laws § 168.523(2); N.C. Gen. Stat. § 163-166.13(c)(2); S.C. Code § 7-13-710(D)(1)(b). Some of the states that accept

affidavits or statements in lieu of an ID require the use of provisional ballots as well as other procedures for challenging the ballots cast by those who do not present an ID. However, some states do not. See Idaho Code § 34-1114; La. Rev. Stat. § 18:562. The State of North Dakota has not argued that the use of provisional ballots is necessary to protect the state's interests.

Furthermore, the State has not shown it would be difficult to implement a remedy in time for the general election on November 8, 2016. To implement a “fail-safe” remedy, the State need only look to the law it repealed in 2013. The State need only direct election officials to print an affidavit form or a declaration form to be made available at the polls, and to accept a properly completed affidavit or declaration from voters in lieu of an ID – precisely what had been done in North Dakota prior to 2013 when the “fail-safe” provisions existed under North Dakota law.⁴ The Defendant may have to revise its voting materials relating to the voter ID requirements to include information about an affidavit option, but it is certainly practical to complete such tasks in time for the November 2016 election. There is no need to reinvent the wheel because prior to 2013, North Dakota had “fail-safe” provisions in place to ensure that all voters without an appropriate ID could nevertheless vote at the poll, rather than be denied the right to vote.

More importantly, the undersigned was informed by both parties during a status conference on May 12, 2016, that the State would be able to implement any injunction order if it was issued by early September 2016. Thereafter, the parties jointly agreed to a briefing schedule, which the Court approved, based on the Defendant's representations that the State could comply with any Order if issued by early September 2016.

⁴For an example of the affidavit or declaration form that was ordered on July 27, 2016, in Wisconsin, see Docket No. 49-1, p. 44.

The Court has carefully considered the balance of harms and the public interest *Dataphase* factors and finds that the right of voting-age Native Americans to cast a ballot outweighs any interest North Dakota may have in refusing to implement certain “fail-safe” provisions. The Defendant argues that the timing between the date of this order and election day is insufficient to train poll workers and implement new procedures at polling places across the state to reflect the nature of the injunction. The Court finds these arguments unpersuasive, particularly after the Court was informed by the State that it could comply with any order so long as an order was issued by early September 2016. The Court relied on those assurances and has issued this Order more than one month earlier than the parties requested.

The State of North Dakota conducted elections with “fail-safe” provisions in the North Dakota Century Code during numerous election cycles before 2013 and 2015. It is a minimal burden for the State to conduct this year’s election in the same manner it successfully administered elections for decades before the enactment of the new voter ID laws. The State can easily reinstate the “fail-safe” provisions that were repealed in 2013, and/or implement other “fail-safe” provisions utilized in many other states. It is difficult to believe it would be unduly burdensome to revert to a system that was in place just one election cycle ago.

The State also argues there is no viable way to authenticate affidavits signed pursuant to a “fail-safe” provision and, without authentication, voters will be deprived of the assurance that only qualified voters were allowed to cast ballots. The Court finds that the State of North Dakota has produced no evidence suggesting that the public’s confidence in the electoral process will be undermined by allowing voters disenfranchised by N.D.C.C. § 16.1-05-07 to vote under a “fail-safe” provision, as has been done in the past. The record reveals that North Dakota is apparently the only state without any “fail-safe” provisions in its election laws. There is no

evidence before the Court that every other state in the nation has been unable to prevent fraud and promote voter confidence by simply allowing the casting of provisional ballots or the implementation of other recognized “fail-safe” provisions as previously existed in this state. In balancing the equities and the public interest, the Court finds these *Dataphase* factors also weigh in favor of the issuance of a preliminary injunction.

III. CONCLUSION

After a careful review of the entire record, and careful consideration of all of the *Dataphase* factors, the Court finds the *Dataphase* factors, when viewed in their totality, weigh in favor of the issuance of a preliminary injunction. The Plaintiffs have met their burden of establishing the necessity of a preliminary injunction at this early stage. 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. It is critical the State of North Dakota provide Native Americans an equal and meaningful opportunity to vote in the 2016 election. No eligible voter, regardless of their station in life, should be denied the opportunity to vote. Accordingly, the Plaintiffs’ motion for a preliminary injunction (Docket No. 42) is **GRANTED** until further order of the Court. The North Dakota Secretary of State is enjoined from enforcing N.D.C.C. § 16.1-05-07 without any adequate “fail-safe” provisions as had previously been provided to all voters in North Dakota prior to 2013. In the past, North Dakota allowed all citizens who were unable to provide acceptable ID’s to cast their vote under two types of “fail-safe” provisions - which were repealed in 2013. The ill-advised repeal of all such “fail-safe” provisions has resulted in an undue burden

on Native American voters and others who attempt to exercise their right to vote. There are a multitude of easy remedies that most states have adopted in some form to alleviate this burden.

IT IS SO ORDERED.

Dated this 1st day of August, 2016.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court

APPENDIX D

**UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION**

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

Plaintiffs,

vs.

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

Defendant.

Civil No. 1:16-cv-8

DECLARATION OF DOROTHY HERMAN

Pursuant to 28 U.S.C. § 1746, I, Dorothy Herman, make the following declaration:

1. My name is Dorothy Herman, and I am an enrolled member of the Turtle Mountain Band of Chippewa Indians. I was born on June 11, 1940 in Belcourt, North Dakota and I am a citizen of the United States and North Dakota. I grew up in North Dakota and have lived in Rolla, North Dakota for about ten years. I have voted in many elections since I turned 18 years of age and became a qualified voter.

2. Prior to retiring, I was a teacher for 20 years at the Bureau of Indian Education school in Belcourt, North Dakota on the Turtle Mountain reservation. I have been married for a long time and my husband and I now rely on my retirement income and his social security as our means of support. My husband and I own a condo in Rolla and my retirement income pays for monthly expenses such as utilities, gas, groceries, television, medical care, and our phones, among other things. I do not have a car nor do I drive, but my husband owns a car and drives.

3. Before the November 2014 general election I had a state of North Dakota

identification card ("ID") that was expired. Prior to the election, I attempted to obtain a new state ID a couple different times. First, I went to the Driver's License Site in Devil's Lake, North Dakota. I had to arrange the trip to the Driver's Licensing Site in Devil's Lake with a relative of mine. Employees at the Devil's Lake Driver's License Site informed me that my expired state of North Dakota ID was insufficient proof of identity and that I could not obtain an ID. They said that I needed a copy of my birth certificate and proof of residence, which I did not have with me. Next, I went to the Driver's License Site in Rolla, which is only open twice a month and has limited hours. Thus it takes some advance planning to figure out when it is open and at what time. When I arrived at the Rolla Driver's Licensing Site, it was closed, although I thought it was during its regular hours. Thus, I would have to make arrangements for a third trip to a Driver's License Site to get an ID.

4. I saw an advertisement about the election and the new ID law prior to the general election in November of 2014. Based on that advertisement, I knew that a tribal ID was an acceptable form of ID. As a result, I thought that my tribal ID was sufficient to vote and I did not make arranging to travel a third time to get a state ID a priority before the election.

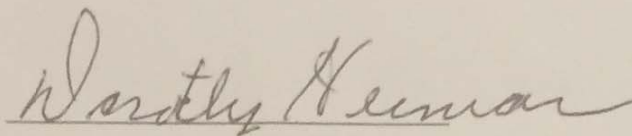
5. On the day of the election, my husband drove us to the polls. I had my tribal ID, which did not have an address on it, and with my expired state ID. The poll workers said that because my tribal ID did not have an address and my state ID was expired that I was not eligible to vote and they did not allow me to vote.

6. I had heard that the Turtle Mountain Band of Chippewa Indians were issuing new tribal IDs with residential addresses on them, and so I arranged for additional transportation to the tribal DMV to attempt to obtain a new tribal ID so that I could vote. My understanding is that a new tribal ID is \$10. However, because there were also tribal elections that day, we were informed that the tribal office was closed and I could not get a new tribal ID. Thus, I was not able to cast a ballot in the state and federal elections.

7. After the elections, I planned to get a new state ID. My husband had to drive me to the Driver's License Site office, and we made sure to figure out exactly when it was open. I took my birth certificate and all the documents I could think of with me and paid \$8 to obtain a new state ID.

10. In the end, the burden of attempting to obtain a new state ID as well as the misleading voter ads prevented me from voting.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 8 day of June 2016.

A handwritten signature in cursive script, reading "Dorothy Herman". The signature is written in dark ink and is positioned above the printed name.

Dorothy Herman

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2016, the document titled “**Declaration of Dorothy Herman**” was electronically filed with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (“NEF”) to:

Christopher S. Joseph
Assistant Attorney General
State Bar ID No. 07450
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email csjoseph@nd.gov

DATED: June 20, 2016

By: /s Matthew Campbell
Matthew Campbell

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
Fax: (303) 443-7776

APPENDIX E



Welcome:

Voters

Candidates

Political Parties

Election Officials

Information:

Ballot Measures

Campaign Finance

Election Results

[Vote.ND.Gov](#)[Click Here to Print Poster](#)

ID REQUIRED FOR VOTING

Requirements for Identification

(NDCC § 16.1-01-04.1)

➤ Identification must include the voter's:

- Name
- Current Residential or Mailing (PO Box or Other) Address
- Date of Birth

Acceptable Forms of Identification:

➤ Voting at the Polling Place – A Valid North Dakota:

- Driver's license
- Nondriver's identification card
- Tribal government or BIA issued identification (including those issued by BIA)
- Long term care identification certificate (provided by ND facility)
 - If an individual's valid form of identification does not include name, address, or date of birth; or the information is not current, the individual may supplement the identification with a current utility bill; a current bank statement; a check issued by a federal, state, local, or tribal government (including those issued by BIA); a paycheck; or a document issued by a federal, state, local, or tribal government (including those issued by BIA).
 - If an individual is not able to show a valid form of identification but asserts qualifications as an elector, the individual may mark a ballot that will be securely set aside. When the individual provides valid identification to the proper election official prior to the meeting of the canvassing board, the set aside ballot will be presented to the canvassing board for proper inclusion in the tally.

➤ Voting Absentee or by Mail – A Valid:

- North Dakota form of identification listed above
 - Passport or Military ID – Only for North Dakota residents living outside the United States who do not possess one of the other forms of identification.
 - Attester – An applicant without an acceptable form of identification may use an attester. The attester must provide his or her name, North Dakota driver's license, nondriver's, or tribal identification number, and sign the absentee/mail ballot application form to attest to the applicant's North Dakota residency and voting eligibility.
 - A copy of the supplemental documentation, if necessary, can be used when applying for an absentee/mail ballot.
 - Incomplete applications, including those needing to provide complete ID, will be returned to the applicant for completion and resubmission.

Statewide Election Countdown



42 Days

Where Do I Vote?

Enter Search Criteria

*House Number:

*Zip Code:

Search



Voter ID Information

Voter ID Requirements*

*Update your ID address when you move.

Voter Address Verification

ND Dept. of Transportation

[Online Address Change](#)[Driver's License Sites](#)[Address or Name Change Information](#)

Quick Links

[Frequently Asked Questions \(FAQ\)](#)[June 12, 2018 Election Information](#)[November 6, 2018 Election Information](#)[2018 Statewide Recount Guidelines](#)[North Dakota Election Calendar](#)[Election Law Book](#)[Absentee or Mail Ballot Application](#)

[W3C CSS](#) | [W3C WAI AA](#) | [W3C HTML5 Compliant](#)
[Download Adobe Reader](#) to view or print PDF files. | [Forms Help](#)

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

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

Plaintiffs,

vs.

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

Defendant.

**MOTION FOR
EXPEDITED REVIEW**

Case No. 1:16-CV-00008

.....

The defendant seeks expedited review of its motion to dissolve the current injunction, and the plaintiffs' motion for a second preliminary injunction, on the grounds that another statewide election will occur on June 12, 2018, 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 that election can be submitted as early as April 27, 2018. Timely resolution of the pending motions brought by both sides is necessary 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. The issue is one of great public significance as it affects the functioning of the statewide election process. The defendant therefore respectfully requests that the Court resolve this matter at the earliest possible time so that the defendant can prepare appropriately for the upcoming June 2018 primary election.

Dated this 9th day of March, 2018.

State of North Dakota
Wayne Stenehjem
Attorney General

By: /s/ James E. Nicolai
James E. Nicolai
Deputy Solicitor General
State Bar ID No. 04789
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email jnicolai@nd.gov

Attorneys for Defendant.

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

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

Plaintiffs,

vs.

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

Defendant.

DECLARATION OF LUCILLE VIVIER

Civil No. 1:16-cv-8

Declaration of Lucille Vivier

I, Lucille Vivier, make the following declaration:

1. My name is Lucille Vivier, and I am an enrolled member of the Turtle Mountain Band of Chippewa Indians. I have personal knowledge of the facts set forth in this declaration and could and would competently testify to those facts if asked to do so.
2. I was born on June 24, 1963 in Belcourt, North Dakota and I am a citizen of the United States. I grew up in North Dakota and have lived in either Dunseith or Belcourt my entire life.
3. I currently live in Dunseith, North Dakota and have for about the last 15 years. I have voted in many elections since turning 18 years of age and becoming a qualified voter.
4. I taught elementary and high school for 15 years, but I am now unemployed. For the last couple of years I cared for 5 children when I lived at my mother's house. I have

since moved and I no longer take care of them. I have since moved and I currently live at 208 Cottonwood Drive with my boyfriend.

5. I do not have a car and have to arrange a ride to get anywhere as there is no public transportation where I live.
6. In order to pay for utilities, groceries, and transportation I receive disability assistance and food stamps. Disability provides me with about \$750 per month and food stamps provides me with about \$46. I spend the majority of my disability assistance on electricity, water, phone, groceries (which is about half of my monthly income), clothes, transportation, and the health care needs for myself. At the end of every month, I typically do not have any money.
7. I receive fuel assistance, and I hope my assistance funds will last me through March. My lights and my heat are electric. I gave my North Central Electric account number to the Low Income Home Energy Assistance Program ("LIHEAP"), which pays the bill directly. Every month I call to see how much is left to know the account balance. I do not receive a bill.
8. On November 4, 2014, I attempted to vote in the general election but was not allowed to cast a ballot because I did not have the required form of identification.
9. Before the election, I never saw or heard anything about the voter ID law. I do not have a state of North Dakota identification card ("ID") or a North Dakota driver's license.
10. When I presented my tribal ID, the poll workers informed me that it was unacceptable because it did not have a residential address printed on it. The poll workers did not allow me to vote.

11. I have known the poll worker that turned me away since she was five years old and her family for most of my life. She knows who I am.
12. In order to vote, I obtained an updated tribal ID on August 8, 2016 for \$10. At that time I was still living with my mother. My tribal ID has my former residential address where I used to live with my mother, 3680 BIA Rd 8. It is now outdated since I moved from my mother's address and live with my boyfriend.
13. It was a challenge to obtain my ID with my residential address since I do not know exactly what my residential address is. Each agency I spoke to told me a different address. For example, the paramedics, Bureau of Indian Affairs ("BIA"), and United States Postal Service each gave me different addresses for my mother's house. I believe I ended up using the address that the BIA gave me, but I am not certain.
14. In my experience, many places on the reservation still do not have good addresses and the United States Postal Service does not consistently make residential mail deliveries. I tried to get my debit card sent to my current address but I never received it. I do not know if it is because Fed Ex could not locate my address to deliver the card, but I suspect that might be the case.
15. On August 10, 2016, the day after I got my tribal ID, I took my tribal ID, baptismal certificate, and EBT card to Minot to try and get a social security card because I believed I needed it to get a state ID.
16. The trip was very costly. I paid \$120 for a friend to drive me to the Social Security office in Minot, which is approximately 100 miles away and takes about 1.5 hours. The cost included payment to the driver, gas, and a meal for the driver. I also paid another \$40 to have another friend watch the three children I used to care for so I

could make the trip during business hours. I believed (because I looked at the social security application form) that I could utilize my Turtle Mountain tribal ID to obtain a social security card.

17. When I arrived I was told the office would accept Standing Rock and Spirit Lake tribal IDs but not Turtle Mountain IDs. I was denied a social security card.
18. Last December my boyfriend took me to the social security office again and I brought my baptismal certificate, Medicaid card, tribal ID, and birth certificate but I was again told that was not enough.
19. Because of the expense, I do not know if I will try to get a social security card again.
20. I attempted to vote in the 2016 general election with my new tribal ID. The poll worker told me that because I had a tribal ID I had to fill out an affidavit. I was upset that my tribal ID did not work because I went through the trouble of getting an updated tribal ID so that I could vote. I believe my tribal ID should have worked since it had my mom's residential address on it and the list said tribal ID was an acceptable form of identification.
21. I refused to sign the affidavit because I had an ID and did not think it was right that I had to sign the affidavit and give another address. I did not vote.

Executed on February 7 2018 at _____

I declare under penalty of perjury that the foregoing is true and correct.

A handwritten signature in cursive script, reading "Lucille Vivier", written over a horizontal line.

Lucille Vivier

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

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

Plaintiffs,

vs.

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

Defendant.

DECLARATION OF ELVIS NORQUAY

Civil No. 1:16-cv-8

Declaration of Elvis Norquay

I, Elvis Norquay, make the following declaration:

1. My name is Elvis Norquay, and I am an enrolled member of the Turtle Mountain Band of Chippewa Indians. I have personal knowledge of the facts set forth in this declaration and could and would competently testify to those facts if asked to do so.
2. I was born on June 2, 1957 in Belcourt, North Dakota, located on the Turtle Mountain Reservation. I am a citizen of the United States. I currently live in Dunseith, North Dakota and have lived in the Belcourt/Dunseith area for most of my life and for the past 30 years.
3. I have voted in many elections since turning 18 years of age and becoming a qualified voter.

4. I am a veteran of the U.S. Marine Corps.
5. I was denied the right to vote in the November 4, 2014 general election. In November 2014, I presented my tribal ID, but was denied the right to vote because my tribal ID listed no residential address.
6. I do not have a state driver's license or ID, and do not have a birth certificate.
7. I cannot afford the documentation needed to obtain a state ID. I also do not have access to transportation to travel to a Driver's License Site.
8. Last year, I obtained a tribal ID for \$10 but my wallet was stolen in June so I lost that ID. On October 3, 2017, I again replaced my tribal ID for a cost of \$15. I listed my residential address as 4604 BIA Rd 10 #664, which is in Belcourt, North Dakota. At the time, I was homeless and the residential address I listed was my address prior to becoming homeless.
9. At the time I obtained my ID I was living at the Belcourt Fayes Albert Building known as the Eaglesview Shelter for Men. In November of 2017, I moved to the Dunseith, into a homeless apartment complex near Willow Creek. I currently live in apartment number one.
10. Currently, social services in Rolla pays for my electricity. I have applied for fuel assistance and am waiting to hear back.
11. I receive social security and disability, which is directly deposited into my debit card. I do not receive a bank statement. I receive \$860 a month and I pay \$50 in child support.
12. I currently go and pick up my mail at my prior residential address 4604 BIA Rd #10 #664 in Belcourt. It is too difficult to switch my address over. I would

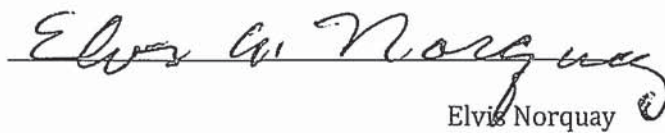
have to go to Social Security and Veterans Affairs and change my address and that is too much paperwork, especially since I am not sure if I am going to move again. I am in a homeless shelter and I do not know what Veterans Affairs will do with me. I currently have a letter from the Department of Veterans Affairs with my Belcourt address on it.

13. The only mail I get at Willow Creek is my utility bill. I immediately give the utility bill to Rolla Social Services who pays it. The utility company is Otter Tail. I hand it over and do not keep the bill. I currently have no documentation that contains my current address.
14. I do not have enough money to pay for a new ID with my new address. I would prefer to pay for food rather than update my address on my ID.

Remainder of page left intentionally blank. Signature page to follow.

Executed on February 7 2018 at Dunseith, ND

I declare under penalty of perjury that the foregoing is true and correct.


Elvis Norquay

APPENDIX I

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION**

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

Plaintiffs,

vs.

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

Defendant.

**FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

Civil No. 1:16-cv-8

INTRODUCTION.....	1
JURISDICTION AND VENUE.....	3
PARTIES	3
STATEMENT OF FACTS.....	9
I. NORTH DAKOTA’S VOTER ID RULES BEFORE HB 1332, 1333, AND 1369.....	9
II. DEFEAT OF HB 1447 IN 2011	11
III. ELECTION OF SENATOR HEIDI HEITKAMP.....	15
IV. ENACTMENT OF HB 1332 AND 1333.....	17
V. THIS COURT ENJOINS ENFORCEMENT OF HB 1332 AND 1333.....	25
VI. IMPLEMENTATION OF THE 2016 “FAIL-SAFE” AFFIDAVIT SYSTEM.....	27
VII. DELIBERATION OF HB 1369	30
VIII. ENACTMENT OF HB 1369	34
IX. HB 1369 MAINTAINS HB 1332’S AND 1333’S BURDEN ON NATIVE AMERICANS ...	39
A. General Native American Demographics in North Dakota	39
B. Native Americans in North Dakota have higher unemployment rates than non-Native Americans	43

C.	Native Americans in North Dakota experience a higher rate of poverty than non-Native Americans	44
D.	Native Americans in North Dakota experience a higher rate of Homelessness than non-Native Americans.....	48
E.	Native Americans in North Dakota Face Greater Health Threats than non-Native Americans	49
F.	Native Americans in North Dakota are more likely than non-Native Americans to Lack Qualifying IDs, Supplemental Documentation, and/or Street Addresses.....	50
	1. Native Americans Disproportionately Lack Qualifying IDs	50
	2. Native Americans Disproportionately Lack Supplemental Documents	51
	3. Native Americans Disproportionally Lack Street Addresses	52
G.	Obtaining a Qualifying ID in North Dakota is More Difficult For Native Americans	54
	1. Limited Hours of, and Distance to, North Dakota DLS Sites Increase The Burden On Native American Voters	54
	2. Native Americans are less likely to have access to transportation in North Dakota	60
	3. The Costs of Obtaining Documentation Is Overly Burdensome For Native Americans	61
X.	THE SECRETARY OF STATE’S CAMPAIGN FOR HB 1332 AND 1333 PROVIDED INADEQUATE NOTICE OF ID REQUIREMENTS	65
XI.	NATIVE AMERICANS ARE DISPROPORTIONATELY BURDENED BY A LACK OF A FAIL-SAFE VOTING OPTION.....	66
XII.	THE STATE’S INTERESTS ARE NOT OUTWEIGHED BY THE DISPROPORTIONATE BURDEN ON NATIVE AMERICANS’ ABILITY TO VOTE	69
XIII.	HISTORY OF DISCRIMINATION IN NORTH DAKOTA.....	70
A.	Discrimination in Voting.....	70
B.	Discrimination in Other Areas.....	72
	1. Education	72
	2. Loss of Land	76
	3. North Dakota Indian Affairs Commission	77
	4. Lending Discrimination	78
	CAUSES OF ACTION.....	79

I.	COUNT ONE: THE VOTER ID REQUIREMENTS IN HB 1369 WERE ENACTED FOR THE PURPOSE OF DENYING OR ABRIDGING THE RIGHT TO VOTE ON THE ACCOUNT OF RACE IN VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT ...	79
II.	COUNT TWO: THE VOTER ID REQUIREMENTS OF HB 1332, HB 1333, AND HB 1369 VIOLATE SECTION 2 OF THE VOTING RIGHTS ACT BECAUSE THEY HAVE THE RESULT OF DENYING OR ABRIDGING THE RIGHT TO VOTE ON ACCOUNT OF RACE.	79
III.	COUNT THREE: THE LACK OF “FAIL-SAFE” VOTING MECHANISMS IN HB 1332, HB 1333, AND HB 1369 HAS THE RESULT OF DENYING OR ABRIDGING THE RIGHT TO VOTE ON ACCOUNT OF RACE IN VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT.....	80
IV.	COUNT FOUR: HB 1332, HB 1333, AND HB 1369 PLACE UNCONSTITUTIONAL BURDENS ON QUALIFIED ELECTORS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.	82
V.	COUNT FIVE: HB 1369 EXCLUDES NON-PROPERTY HOLDERS FROM VOTING IN ELECTIONS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT	83
VI.	COUNT SIX: HB 1369 VIOLATES THE FIFTEENTH AMENDMENT.....	84
VII.	COUNT SEVEN: HB 1332, HB 1333, AND HB 1369 VIOLATE THE NORTH DAKOTA EQUAL PROTECTION CLAUSE IN ARTICLE I OF THE NORTH DAKOTA CONSTITUTION.	84
VIII.	COUNT EIGHT: HB 1369 VIOLATES THE EQUAL PROTECTION CLAUSE IN ARTICLE I OF THE NORTH DAKOTA CONSTITUTION BECAUSE IT EXCLUDES NON-PROPERTY HOLDERS FROM VOTING	86
IX.	COUNT NINE:HB 1332, HB 1333, AND HB 1369 VIOLATE ARTICLE II OF THE NORTH DAKOTA CONSTITUTION BY IMPOSING NEW VOTER QUALIFICATIONS ...	87
	PRAYER FOR RELIEF.....	88

Plaintiffs, by and through their undersigned attorneys, allege on information and belief as follows:

INTRODUCTION

1. This action is brought under the Voting Rights Act, 52 U.S.C. § 10301, and the Declaratory Judgment Act, 28 U.S.C. § 2201, by qualified Native American voters (or electors) in North Dakota who have been denied the right to vote and/or will be denied the right to vote through enforcement of North Dakota's recently enacted voter identification ("ID") laws. Plaintiffs seek to protect their right to vote under the United States Constitution, the North Dakota Constitution, and the Voting Rights Act.

2. During the course of these proceedings, North Dakota House Bill 1369 ("HB 1369") was enacted on April 24, 2017, which preserved strict voter ID requirements that restricted access to voting and excluded a "fail-safe" mechanism. 65th Leg. Assemb., Reg. Sess. (N.D. 2017) (codified at N.D. Cent. Code § 16.1-01-04.1). The failure to provide a fail-safe mechanism is "unacceptable and violative of the Equal Protection Clause of the 14th Amendment" as well as the 15th Amendment, the Voting Rights Act, and the North Dakota Constitution. Order Granting Pls.' Mot. for Prelim. Inj, Doc. 50 at 22; *see also* Doc. 50 at 1 (noting that the lack of a fail-safe mechanism is "dispositive"). The newest iteration of North Dakota's strict voter ID law is codified at N.D. Cent. Code 16.1-01-04, 16.1-01-04.1, and 16.1-01-04.2 among other places.

3. Prior to HB 1369, this litigation involved two statutes that made North Dakota's voting system the most restrictive in the nation - North Dakota House Bill 1332, 63rd Leg. Assemb., Reg. Sess. § 5 (N.D. 2013) (formerly codified at N.D. Cent. Code § 16.1-05-07) ("HB

1332”), and North Dakota House Bill 1333 (“HB 1333”), 64th Leg. Assemb., Reg. Sess. (N.D. 2015).

4. HB 1369 maintains North Dakota’s restrictive voter ID requirements with no fail-safe mechanism. Additionally, HB 1369 imposes a property requirement on electors. Plaintiffs seek a determination that HB 1369 disproportionately burdens and disenfranchises Native Americans and: (a) has a discriminatory purpose in violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301 (“Section 2”); (b) has a discriminatory effect in violation of Section 2 through its voter ID requirements; (c) has a discriminatory effect in violation of Section 2 through its lack of a “fail-safe” voting mechanism; (d) imposes substantial and unjustified burdens on the fundamental right to vote in violation of the Equal Protection Clause of the Fourteenth Amendment; (e) excludes non-property holders from voting in elections in violation of the Equal Protection Clause of the Fourteenth Amendment; (f) imposes unjustified burdens on the fundamental right to vote because of Plaintiffs’ race in violation of the Fifteenth Amendment; (g) denies qualified voters equal protection under the law in violation of the North Dakota Constitution because of its burdensome voter ID requirements and lack of fail-safe voting mechanism; and (h) denies qualified voters equal protection under the law in violation of the North Dakota Constitution because it excludes non-property holders from voting; (i) improperly makes ownership of a voter ID and possession of a street address a pre-condition and qualification to vote in violation of the North Dakota Constitution. For these and other reasons, this law should be declared unlawful and enjoined.

JURISDICTION AND VENUE

5. This Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331, 1343, 1367, and 52 U.S.C. § 10308(f).

6. Venue is proper in this court under 28 U.S.C. § 1391(b).

PARTIES

7. All of the Plaintiffs named in this Complaint are citizens of the United States, residents of North Dakota, Native Americans, and duly qualified electors eligible to vote in local, state, and federal elections in North Dakota. "The record reveals these Plaintiffs and others were denied the right to vote in November 2014 (even though the poll workers knew them personally and knew they were qualified to vote) because they had invalid ID's under the new laws." Doc. 50 at 17.

8. Under the new law, HB 1369, Plaintiffs likewise would have been disenfranchised or severely burdened despite being duly qualified electors. Therefore, all Plaintiffs have a direct, substantial, and legally protectable interest in the subject matter of this litigation.

9. Plaintiff Richard Brakebill is an enrolled member of the Turtle Mountain Band of Chippewa Indians and a United States Navy veteran. Mr. Brakebill is over the age of 18 and has lived in Rolla, North Dakota for at least ten years. Mr. Brakebill is therefore a qualified elector in North Dakota. "Plaintiff Richard Brakebill was denied the right to vote in November 2014 because he had an expired driver's license. When he sought to remedy this problem at a North Dakota Driver's License Site, he was denied a new form of ID because he did not have a copy of his Arkansas birth certificate." Doc. 50 at 17. He had a tribal ID without an address and an expired state of North Dakota ID with an old address. Mr.

Brakebill lives on a fixed income and currently works a seasonal, inconsistent job, further constraining his ability to secure the documentation necessary to obtain a qualifying ID or supplement his existing ID. "Nevertheless, Mr. Brakebill attempted to vote on election day in 2014 and presented his expired driver's license and his tribal ID. He was denied a ballot because his license had expired and his tribal ID did not reveal a current residential address." *Id.* Mr. Brakebill currently possesses a tribal ID that lists his street address but the ID expires August 2018, three months before the November 2018 election. Mr. Brakebill had to pay \$10 for his tribal ID, and will have to pay again next year for an updated tribal ID. Mr. Brakebill recently suffered a house fire and lost most of his possessions and is unsure whether he will be able to obtain another ID prior to the election due to the strain on his financial resources. Mr. Brakebill has also been unable to secure a state ID due to the logistical difficulty of getting to a North Dakota Driver's License Site ("DLS"). Mr. Brakebill believes he has to travel to the Devil's Lake DLS to obtain an ID – an approximately 1 hour and 15 minute drive – because the DLS nearest to him in Rolla is open so infrequently that attempting to go there is, practically speaking, impossible. The DLS in Rolla is open the second Wednesday of every month from 10:20 a.m. to 2:35 p.m.

10. Plaintiff Elvis Norquay is an enrolled member of the Turtle Mountain Band of Chippewa Indians and U.S. Marine Corps veteran. He is over 18 years of age, a citizen of the United States, and a citizen of North Dakota. Mr. E. Norquay has lived in Belcourt, North Dakota for around 25 years, and is therefore a qualified North Dakota elector. Mr. E. Norquay was denied the right to vote in the November 4, 2014 general election. When Mr. E. Norquay went to vote in November 2014, he presented his tribal ID, but was denied the

right to vote because his tribal ID listed no address. Mr. E. Norquay does not have a state driver's license or ID, and does not have a birth certificate. Mr. E. Norquay cannot afford the documentation he needs to obtain a state ID or the transportation to travel to a DLS. Mr. E. Norquay obtained a tribal ID for \$10 in the last year, but following the theft of his wallet, lost that ID. Mr. E. Norquay again replaced his tribal ID for a cost of \$15. Mr. E. Norquay, however, has since become homeless and is residing at the Fayer Albert building, a community homeless shelter. The address on his tribal ID is of his previous residence and is now therefore incorrect. He does not currently pay for his own utilities. He receives Social Security and disability which is directly deposited into his debit card. He has no written confirmation of his current residence at the Fayer Albert building. Mr. E. Norquay would prefer to pay for food rather than update the address on his tribal ID. Mr. E. Norquay is trying to secure other housing and does not view the shelter as permanent housing.

11. Plaintiff Ray Norquay is a member of the Turtle Mountain Band of Chippewa Indians. Mr. R. Norquay has lived in Belcourt, North Dakota for most of his life, and consistently for about the last six years. He is over eighteen years of age and a citizen of the United States, and is therefore a qualified North Dakota elector. Mr. R. Norquay attempted to vote in the November 4, 2014 general election, but he was denied the right to vote because he only had a tribal ID that did not list his street address. As a result of being denied the right to vote, he went to the tribal offices that same day and had to purchase a new ID with his street address on it. After purchasing the new ID, Mr. R. Norquay went back and was permitted to vote. Thus, Mr. R. Norquay had to pay to vote.

12. Plaintiff Della Merrick is a member of the Turtle Mountain Band of Chippewa Indians. Ms. Merrick has lived in Belcourt, North Dakota for about six years. She is over eighteen years of age and a citizen of the United States, and is therefore a qualified North Dakota elector. Ms. Merrick attempted to vote in the November 4, 2014 general election, but she was denied the right to vote because she only had a tribal ID that did not list her street address. As a result of being denied the right to vote, she went to the tribal offices that same day and had to purchase a new ID with her street address on it. After purchasing the new ID, Ms. Merrick went back and was permitted to vote. Thus, Ms. Merrick had to pay to vote.

13. Plaintiff Lucille Vivier is a member of the Turtle Mountain Band of Chippewa Indians. Ms. Vivier has lived in Dunseith, North Dakota for about 11 years, and before that she lived in Belcourt, North Dakota her whole life. She is over eighteen years of age, a citizen of the United States, a citizen of North Dakota, and is therefore a qualified North Dakota elector. Ms. Vivier attempted to vote in Dunseith for the November 4, 2014 general election, but she was denied the right to vote because she only had a tribal ID that did not list her street address. Ms. Vivier knew and grew up with the poll worker who rejected her ID since she was 5 years old. Ms. Vivier does not have a Social Security card or a birth certificate. Ms. Vivier only receives disability income and must pay for the needs of the five children she cares for. Three of the children she cares for have special needs, and thus Ms. Vivier has additional costs that are required for their care. "Impoverished Native Americans, such as Plaintiff Lucille Vivier, lack the disposable income necessary to obtain a birth certificate, and make the difficult decision not to spend their limited resources on a

birth certificate." Doc. 50 at 10. At significant cost, Ms. Vivier recently attempted to obtain a social security card, which she believed she needed in order to obtain a state ID. Because she does not own a car she paid \$120 for a friend to drive her to the Social Security office in Minot, which is approximately 100 miles away and takes over an hour. The cost included payment to the driver, gas, and a meal for the driver. She also paid another \$40 to have another friend watch the five children she usually cares for so she could make the trip during business hours. She believed (because she was told either by social security staff or a social security form) that she could utilize her Turtle Mountain tribal ID to obtain a Social Security card. When she arrived she was told the office would accept Standing Rock and Spirit Lake tribal IDs but not Turtle Mountain IDs and she was therefore denied a Social Security card. Ms. Vivier has since been unable to obtain a Social Security card or state ID. Ms. Vivier obtained a tribal ID at a cost of \$10. Since obtaining her ID she has moved from her mother's home to her boyfriend's home, which also is located in Dunseith. Her tribal ID contains her mother's address where she used to reside and not her current address.

14. Plaintiff Dorothy Herman is an enrolled member of the Turtle Mountain Band of Chippewa Indians and a retired teacher. She is 77 years old, has lived in North Dakota for about 45 years, and has voted throughout that time. Ms. Herman lives in Rolla, North Dakota and has lived there for about ten years. She is over eighteen years of age, a citizen of the United States and a citizen of North Dakota, and is therefore a qualified North Dakota elector. Prior to the election, Ms. Herman had in her possession an expired state ID with the correct residential address and a tribal ID without an address. Because her state ID was expired, Ms. Herman attempted to obtain a new state ID twice at the DLS in Rolla, North

Dakota during its advertised operating hours prior to the election. "Her first trip was unsuccessful because the Driver's License Site was closed, and her second trip was unsuccessful because her expired state card, with her current residential address, was insufficient to obtain a new state ID without a birth certificate." Doc. 50 at 17. To obtain an ID, they told her she would have to make a third trip to the DLS and pay \$8 after she located all of her documentation. Ms. Herman saw an advertisement about the new voter ID law prior to the 2014 general election, and based on that advertisement, she thought her tribal ID was a qualifying voter ID. Thus, Ms. Herman did not make a third trip to the DLS prior to the election. When Ms. Herman attempted to vote in Rolla in the 2014 general election with her tribal ID and expired state ID, she was denied the right to vote because her tribal ID did not have an address and her state ID was expired. "Herman presumed her tribal ID would be sufficient to vote in 2014, but she was ultimately denied a ballot because her tribal ID did not contain a current residential address." *Id.* When she was turned away on the day of the election, she attempted to pay to get a tribal ID with an address, but the tribal office was closed due to the elections. She returned to the DLS a third time after the election and paid the \$8 to obtain a new state identification card. Ms. Herman survives on her school teacher's retirement income and her husband's Social Security. For Ms. Herman, the expense and difficulty to obtain an ID ultimately prevented her from voting.

15. Defendant Alvin Jaeger is the North Dakota Secretary of State and is sued in his official capacity. The North Dakota Secretary of State is the State's chief election officer. The Office of the North Dakota Secretary of State is responsible for coordinating the implementation of HB 1369.

STATEMENT OF FACTS

I. NORTH DAKOTA'S VOTER ID RULES BEFORE HB 1332, 1333, AND 1369

16. North Dakota is the only state in the United States that does not have voter registration. N.D. Cent. Code § 16.1-01-5.1. It was one of the first states to adopt voter registration in the 1800s, but was the first state to abolish it in 1951. Instead, North Dakota established numerous small voting precincts, which ensured that election boards knew the voters who came to the polls to vote on Election Day and could detect people who should not be voting in the precinct.

17. North Dakota elections have been ranked first in the nation for election performance by the Pew Charitable Trust in 2008, 2010, 2012, and 2014, indicating North Dakota has consistently administered effective elections without voter registration even before implementation of its voter ID laws. *Data Visualization: Elections Performance Index - EPI Rank*, The Pew Charitable Trust (Aug. 9, 2016), <http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/elections-performance-index#indicator>.

18. This rating is based on the Elections Performance Index, or EPI, which “tracks 17 distinct indicators of election administration effectiveness. A state’s overall average is calculated from its performance on all 17 indicators, relative to all states across comparable federal election cycles—either presidential or midterm.” *Elections Performance Index - EPI 101*, *supra*. Some of the indicators include data completeness, voting wait time, provisional ballots cast, provisional ballots rejected, and registration or absentee ballot problems. *Elections Performance Index - Indicators*, *supra*.

19. Indeed, voter fraud in North Dakota “has been virtually non-existent.” Doc. 50 at 25.

20. The North Dakota Constitution provides that there are only three qualifications to be an elector: “[e]very 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.” N.D. Const. art. II, § 1. The North Dakota Constitution further provides: “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. The legislative assembly shall provide by law for the determination of residence for voting eligibility, other than physical presence.” *Id.* Prior to passage of North Dakota’s strict voter ID laws, a poll clerk in North Dakota was merely required to “request” that a qualified voter show identification that included the individual’s residential address and date of birth to verify eligibility. N.D. Cent. Code § 16.1-05-07(1), *amended by* HB 1332 § 5. If one form of ID did not have both the residential address and birthdate, the voter could utilize two forms of ID in combination. N.D. Cent. Code § 16.1-05-07(1)(d); *see also* Doc. 50 at 2.

21. Valid forms of ID previously included: a North Dakota driver’s license or non-driver’s ID card; a U.S. passport; an ID card from a federal agency; an out of state driver’s license or non-driver’s ID card; an ID card issued by a tribal government; a valid student ID; a military ID card; a utility bill dated thirty days prior to Election Day, including cell phone bills and student housing bills (online printouts were acceptable); and a change of address verification letter from the U.S. Postal Service. Doc. 50 at 2.

22. Alternatively, if the voter could not provide those forms of ID, there were two other fail-safe methods that would allow them to prove they were qualified. First, a member of

the election board or a poll clerk who knew the voter could personally vouch that the individual was a qualified elector in the precinct, and the person was then allowed to vote. N.D. Cent. Code § 16.1-05-07(2), *amended by* HB 1332 § 5; *see also* Doc. 50 at 2. Second, if no one could vouch for him or her, the election board challenged the person's right to vote, but the person could then execute a voter affidavit swearing to the fact that he or she was a qualified elector who could vote in the precinct. N.D. Cent. Code § 16.1-05-07(3), *amended by* HB 1332 § 5; *see also* Doc. 50 at 2. If the voter agreed to sign the affidavit, the election board and poll clerks were required to allow the voter to vote. Doc. 50 at 2.

II. DEFEAT OF HB 1447 IN 2011

23. In January of 2011 the North Dakota legislature introduced a bill, House Bill 1447 ("HB 1447"), relating to the canvassing of ballots of voters who were challenged at the polls. In response to concerns that North Dakota's open registration system would lead to fraudulent voters, the State Senate weighed an amendment to HB 1447.

24. The Amendment would have instilled stricter voter ID requirements that would have narrowed the set of acceptable IDs to a driver's license, tribal ID card, or form of identification prescribed by the secretary of state. S. Journal, 62-1447, Reg. Sess., at 1642 (N.D. 2011).

25. The Amendment initially would have modified the voter affidavit system to allow a voter to vote via affidavit at the poll but then set aside that voter's ballot. The voter then would have had to return within a specified period to provide an acceptable form of ID in order for the vote to be counted. If the voter did not return and show an acceptable form of ID, the ballot would not be counted. *See Hearing Minutes on H.B. 1447 Before H. Political*

Subdivision Comm., 62nd Leg. Assemb. 1 (N.D. Feb. 3, 2011) (statement of Rep. Koppelman, H. Comm. On Political Sub.).

26. Senator Sorvaag (R) explained the purpose of the deliberations: “[w]e don’t want people voting if they are not suppose [sic] to vote but we don’t want to disenfranchise people either by making the process to [sic] cumbersome.” *Hearing Minutes on H.B. 1447 Before H. Political Subdivision Comm.*, 62nd Leg. Assemb. 1 (N.D. Apr. 12, 2011) (statement of Sen. Ronald Sorvaag, S. Comm. On Political Sub.).

27. Senator Cook (R), noted the importance of a measured approach to modifying election laws: “[w]hen we do put a law in effect that is going to change how people are able to vote; we should make sure . . . we fully realize it; we discuss it; and we determine ourselves that is what we intend to do and justify it and I would hope that we give those people the opportunity to stick to the wisdom of that policy change. That is one of my concerns that kept me from embracing the bill that you brought before us. This is a very important issue; how people vote and they all look at it a little differently and we want to make sure we know all the consequences of it. That we fully vest the discussions and I think that leant a lot to the committee to put this into a study so we truly know what it is we are doing and what all the consequences are and we say this is the consequences we want.” *Id.* at 4 (statement of Sen. Dwight Cook, H. Political Subdivisions Comm.).

28. Senator Cook also noted the importance of voting rights and expressed that he was unsure if voter fraud was even an issue in North Dakota, stating: “The whole voting process is the basic core of the democratic process and we certainly don’t want to see somebody

win an election because of voter fraud but to what degree we have any of that I am not sure if we have a great degree." *Id.*

29. One of the sponsors of the bill, Chairman Koppelman, acknowledged that while he wanted to preserve the work already done, he thought "a study going forward to deal with some of the issues that have been discussed that aren't addressed in this bill might make some sense or to revisit this issue and see if it can be improved[.]" *Id.* at 6 (statement of Chairman Koppelman, H. Political Subdivisions Comm.).

30. During deliberations the Legislature modified the proposed amendment via hoghouse amendment to "do away with the affidavits" and "eliminat[ed] the issue of coming back with identification" since it "raised a lot of questions." *Hearing Minutes on H.B. 1447 Before H. Political Subdivision Comm.*, 62nd Leg. Assemb. 1 (N.D. Apr. 15, 2011) (statement of Chairman Koppelman, H. Political Subdivisions Comm.).

31. The modification to the amendment kept the ID requirements but removed the affidavit system entirely and instead devised a voucher system that allowed for either: a poll worker to vouch for the voter, another voter to vouch for one additional person, or a housemate to vouch for up to four people who lived at the same address. The Legislature used a hoghouse amendment to implement these modifications. *Id.* at 1-2.

32. Even under this amended version, members continued to raise concerns about accessibility for voters.

33. Rep. Zaiser (D) worried that under this system "[a]ssuming there is someone not well known in the district and they don't have their ID they are pretty much out of luck."

Hearing Minutes on H.B. 1447 Before H. Political Subdivision Comm., 62nd Leg. Assemb. 2 (N.D. Apr. 20, 2011) (statement of Rep. Zaiser, H. Political Subdivisions Comm.).

34. Senator Nelson (D) expressed concerns “with some of the folks that live in the downtown areas of major cities that have post office boxes . . . Many of them are venerable people so I am worried about them being left out of the system.” *Id.* at 2 (statement of Sen. Nelson, H. Political Subdivisions Comm.).

35. And, in response to Senator Nelson’s concern, the Legislature was notified that some Native Americans would have a difficult or impossible time obtaining an ID that required a street address.

36. Jim Silrum, Deputy Secretary of State, confirmed that P.O. boxes were widely used and that Native Americans in particular utilized the P.O. box system: “This is very much the case also in small town North Dakota where if you sent something to their street address the post office will return it because it needs to go to their post office box . . . We are also going to need to work with the tribal governments to make sure because a couple of our counties that have reservations in the state have not completed their 911 addressing. Even if they have the residence of those counties [they] don’t know what their 911 address is.” *Id.* at 2-3 (statement of Jim Silrum, H. Political Subdivisions Comm.).

37. On April 25, 2011, the Senate on a bipartisan basis voted 38-8 to reject the proposed amendment and declined to change the voter ID requirements or modify the affidavit or voucher systems.

38. 8 Republicans voted for the Amendment. 27 Republicans joined 11 Democrats to vote against the amendment.

39. Rep. Cook (R), who expressed that he did not believe fraud was a substantial concern and who worried openly about the bill's effect on accessibility to the polls, voted against the amendment.

III. ELECTION OF SENATOR HEIDI HEITKAMP

40. On November 6, 2012, Heidi Heitkamp (D), was elected to North Dakota's United States Senate seat in what was described by national media outlets as an "upset win." See Kate Nocera, *Heitkamp Scores Upset Win*, Politico (Nov. 7, 2012), <http://www.politico.com/story/2012/11/heitkamp-on-brink-of-upset-win-083466>.

41. Senator Heitkamp prevailed by a margin of 50.2% over her opponent Rick Berg (R) who received 49.3% of the vote. See Official Results General Election – November 6, 2012, ND Voices, <http://results.sos.nd.gov/resultsSW.aspx?eid=35&text=Race&type=SW&map=CTY> (last updated Nov. 15, 2012).

42. Senator Heitkamp won by nearly 3,000 votes, or one percentage point. *Id.*

43. Native Americans in North Dakota vote in a racially polarized manner and are generally Democrats. See Dr. Herron Decl., Doc. 44-7 at 3 ("my evidence implies that Native Americans in North Dakota vote for Democratic candidates at greater rates than do whites in the state"); see also Barreto Decl., Doc. 44-1 ¶ 51 ("[o]ur survey findings regarding the political preferences of Native Americans and non-Natives in North Dakota indicates a political environment characterized by racially divergent voting interests . . . Native Americans are much more likely to identify as Democrats than non-Native Americans There are dozens and dozens of similar election result patterns that show a very high

degree of correlation between the race and ethnicity of the voters within a precinct and their candidates of choice. Across almost any election in North Dakota, it is clear that Native American and non-Native American voters have different candidate preferences which amount to racially polarized voting.”)

44. Accordingly, Sen. Heitkamp, a Democrat, had worked to secure the Native vote, making frequent trips to North Dakota reservations. See Vonnice Lone Chief, *How the Indian Vote Boosted Heidi Heitkamp* (Nov. 8, 2012), <http://www.indianz.com/News/2012/007665.asp>.

45. In the days immediately following her election, local blogs identified the Native American vote as critical to Senator Heitkamp’s success. See Jim Fuglie, *United States Senator Mary Kathryn (Heidi) Heitkamp. How About That?*, The Prairie Blog (Nov. 9, 2012), <http://theprairieblog.areavoices.com/2012/11/09/united-states-senator-mary-kathryn-heidi-heitkamp-how-about-that/>; AnnMaria De Mars, *Native Americans: Why Heidi Heitkamp Won & Nate Silver Was Wrong?*, AnnMaria’s Blog (Nov. 19, 2012), <http://www.thejuliagroup.com/blog/?p=2808>.

46. National news outlets carried the story as well. See Meteor Blades, *American Indian Voters and Indian Organizers Gave N.D. Senate Edge to Democrat Heidi Heitkamp* (Nov. 8, 2012), <https://www.dailykos.com/stories/2012/11/8/1158417/-American-Indian-voters-and-Indian-organizers-gave-N-D-Senate-edge-to-Democrat-Heidi-Heitkamp>.

47. Today, it is widely recognized that the Native American vote was critical to Senator Heitkamp’s 2012 victory. Ari Natter, *Heitkamp Caught Between Constituencies in Pipeline Fight*, Bloomberg BNA (Sept. 19, 2012), <https://www.bna.com/heitkamp-caught->

constituencies-n57982077265/); see also Paula McClain & Jessica Johnson Carew, *Can We All Get Along?: Racial and Ethnic Minorities in American Politics* (7th ed. 2017); see also Doc. 44-1 ¶ 53("[w]hile Heitkamp won 50.2 percent of the statewide vote, she dominated in counties heavily populated by Native Americans.").

IV. ENACTMENT OF HB 1332 AND 1333

48. In the legislative session immediately following Senator Heitkamp's victory, HB 1332 was enacted on April 19, 2013.

49. HB 1332 significantly altered the voter ID requirements and eliminated the "fail safe" voucher and affidavit provisions in North Dakota.

50. Despite bipartisan concerns in the preceding legislative session in 2011 that modifying North Dakota's affidavit system would disenfranchise voters and that a study should be done to analyze the issue, no additional study measuring the impacts of changing voter ID requirements or eliminating the fail-safe provisions was conducted between the 2011 and 2013 legislative sessions.

51. Nor was any additional evidence presented proving fraud in North Dakota elections.

52. There were no prosecuted instances of voter fraud arising out of the 2012 election.

53. There were nine suspected instances of double voting that prosecutors declined to prosecute. In one of those instances, a stern talking to was deemed a sufficient deterrent. See Mem. from Alvin Jaeger, N.D. Secretary of State, on North Dakota – views and recommendations to The Presidential Advisory Commission on Election Integrity (Sept. 5, 2017), <https://www.scribd.com/document/358292085/Sos-00435420170907141608>.

54. Moreover, the legislative procedure utilized to pass HB 1332 was unusual. A “hoghouse” amendment was used to pass HB 1332. A hoghouse amendment replaces the entire text of a bill with new text. *North Dakota Legislative Council*, North Dakota Legislative Drafting Manual 63 (2015), <http://www.legis.nd.gov/files/general/2015draftingmanual.pdf?20160111162015>.

55. Public hearings are held on every bill in legislative standing committees. *See Legislative Branch Function and Process*, North Dakota Legislative Branch, <http://www.legis.nd.gov/research-center/library/legislative-branch-function-and-process> (last visited Nov. 30, 2017).

56. However, after the public hearings, these committees may choose to modify the contents of an original bill before they send it back to the house or senate for a vote. *See id.*

57. Because committee amendments are made after the public hearings take place, hoghouse amendments are not subject to public hearing.

58. Hoghouse amendments are disfavored. *Id.*

59. At the time of the bill’s passage through the House, Rep. Mock, (D) strenuously objected to the use of a hoghouse amendment for HB 1332 since it would “completely change the way we handle voters” and using a hoghouse would circumvent input from the public and agencies impacted by the bill. *House Floor Session: Hearing on H.B. 1332*, 63rd Leg. Assemb. (N.D. Feb. 12, 2013) (statement of Rep. Corey Mock).

60. Rep. Marie Strinden (D) also protested the process used to pass HB 1332 stating: “I take a lot of pride in the fact that this committee thinks very long and hard about all of our bills. . . . I can’t be proud of a bill that we all know has problems because no other bill that

we passed out of here have we done it with such stealth without addressing those problems.” *Hearing Minutes on H.B. 1332 Before H. Gov’t and Veterans Affairs Comm.*, 63rd Leg. Assemb. (N.D. Feb. 8, 2013) (statement of Rep. Marie Strinden, H. Gov’t and Veterans Affairs Comm.) [hereinafter *Hearing Minutes on HB 1332*].

61. Unlike the hoghouse amendment used for HB 1447, which arose in order to address the specific concerns raised by the legislature during deliberations, the hoghouse amendment here was not a consequence of the legislature’s deliberations. Instead, it replaced a bill that was intended to change the deadline for requesting absentee ballots and had nothing to do with in-person voting.

62. Indeed, instead of modifying absentee voting, HB 1332 limited the forms of ID *all* voters could use at the polls.

63. First, it required that the ID used must contain the voter’s residential address and date of birth. P.O. Box numbers were excluded as an acceptable type of address.

64. The Legislature required residential addresses despite being warned in the previous Legislative session by Deputy Secretary of State Jim Silirum that Native Americans in particular would be disproportionately impacted by such a change. *See* discussion above at ¶ 36.

65. Second, HB 1332 restricted the acceptable forms of ID to: (1) a North Dakota driver’s license; (2) a North Dakota non-driver’s identification card; (3) a tribal government issued identification card; or (4) an alternative form of identification prescribed by the Secretary of State if a qualified voter did not possess one of the other official forms of identification. HB 1332 § 5; *see* N.D. Cent. Code § 16.1-05-07(1)(a)-(c). The

Secretary of State only prescribed two additional forms of ID prior to the passage of HB 1333: (1) a student identification certificate, and (2) a long-term care identification certificate.

66. HB 1332 also prevented voters from using a driver's license or ID from another state in combination with other ID in order to vote.

67. HB 1332 limited a qualified elector's ability to vote in other ways as well.

68. Again, despite prior bipartisan concerns in the previous legislative session that removing the affidavit system and modifying the voucher system would disenfranchise too many voters, HB 1332 eliminated both the voucher and affidavit fail-safe provisions that previously could be utilized by qualified voters who could not produce an ID when requested by the poll clerk.

69. And, at the same time as passage of HB 1332, the Legislature rejected HB 1418, which would have allowed poll workers to vouch for eligible voters in their precincts that lacked ID.

70. This fail-safe would be as effective as an ID for addressing concerns of in-person voter fraud.

71. At the time of HB 1332's passage, Senators objected to HB 1332's harsh affects.

72. Sen. Warner (D) explained the bill's negative impacts on his rural district, which is 1/3 Native American, stating:

My district covers about 5000 square miles . . . there are a lot places in my district where you will have a 90 minute to a two hour drive to the closest DMV which may be open only one day a week, or one day a month, during business hours during the working week, never on Saturdays. I would guess half of the urban residences . . . [indecipherable] . . . in my towns are very small. Very few of my towns

actually have street names. Almost everybody receives their mail in a post office box. In huge swaths of my area, entire counties within my district I don't think there would be a single street name. I can't imagine how you start overcoming all of these obstacles. We have some pockets of extreme poverty in my district. I would guess no more than one in four or five adults has a car or a driver's license. If you need to get somewhere you have to find someone that will drive you there for that occasion. And I don't really think we need to be creating more impediments to voting in North Dakota. This is part of a national movement there may be a problem in other parts. We are very proud of our people in North Dakota and we don't need to be passing laws that we don't need.

Senate Floor Session: Hearing on H.B. 1332, 63rd Leg. Assemb. (N.D. Apr. 3, 2013)

(statement of Sen. John M. Warner).

73. Sen. Schneider likewise stated that the legislature was passing a bill to deal with a nonexistent problem resulting in a "human cost to some of our most vulnerable populations here in the state." *Id.* (statement of Sen. Mac Schneider)).

74. HB 1332 passed on essentially a party-line vote, 30-16 with only 1 Democrat in favor and only 3 Republicans opposed.

75. Of the Senators that remained in the Senate from the 2011 legislative session and that voted on HB 1447, 19 Senators switched their votes from Nay to Yay.

76. Senator Cook, who had previously expressed doubt over the need for a change of law, and who had called for additional study into the effects of the law, changed his vote from Nay to Yay.

77. After passage of HB 1332, qualified voters that showed up to the polls but did not have a qualifying ID were completely denied their right to vote.

78. During the next legislative session, the legislature again made the voter ID law more restrictive with the passage of HB 1333. HB 1333 was enacted on April 24, 2015.

79. During this 2015 Legislative Session the Legislature authorized studies related to voting, but rejected additional research into the impact of HB 1332 or into the potential impacts of HB 1333.

80. For example, H.B. 1389 "Management Study Related to Verification of Citizenship Status for Voting and For Obtaining Driver's License and Non-photo ID cards," passed. 64th Leg. Assemb., Reg. Session (N.D. 2015).

81. Another bill, HB 1302, initially would have allowed for a voter without an ID to fill out an affidavit attesting to their qualifications in order to vote, but was changed entirely via hoghouse to a study of voter registration systems, which passed. 64th Leg. Assemb., Reg. Session (N.D. 2015).

82. Meanwhile, that same year, House Concurrent Resolution 3057, "Election Administration Study," which in relevant part sought to study "concerns that have arisen during recent elections regarding proof of eligibility to vote," did not pass. H. Con. Res. 3057, 64th Leg. Assembly (N.D. 2015).

83. In the 2015 Legislative session, the Legislature also rejected attempts to make the voter ID requirements more accessible. SB 2330 would have required higher education institutions to include date of birth and residential addresses of students on student photo identification and inform students of voting eligibility requirements.

84. The bill was intended to give students a way of identifying themselves instead of HB 1332's system of a student certificate prescribed by the Secretary of State.

85. It would have allowed student identification to be an acceptable form of ID to vote, but failed to pass.

86. The Legislature also rejected SB 2353, which would have allowed a voter to cast a provisional ballot if they provided their mailing address. The county auditor would have mailed a postcard to the provisional voter at the provided address that the voter would have had to return. The mailed form would include an oath that the voter had resided in the precinct for 30 days.

87. The Senate also made HB 1333 more stringent. When HB 1333 was first introduced in the North Dakota House, it would have alleviated some of the stringent requirements of HB 1332.

88. For instance, it would have permitted electors to use identification in combination in order to provide all of the required information. For example, an elector could present an expired driver's license plus a U.S. Postal Service change of address form, or bill and bank statement with an updated address plus identification with an incorrect address in order to prove current residency within the precinct.

89. The Senate, however, removed these provisions and amended the bill to make the voter ID requirements even more restrictive.

90. The amendment that became HB 1333 also removed the ability of the Secretary of State to prescribe new forms of qualifying ID, and took away the option for students to use college identification certificates that the Secretary had previously recognized as an acceptable voter ID. It did, however, statutorily keep the long-term care certificate as a valid form of ID.

91. Pursuant to HB 1333, North Dakota only permitted citizens to use four forms of qualifying ID in order to vote.

92. Additionally, HB 1333 mandated that driver's licenses and non-driver ID cards must be current to be accepted at the polls.

93. Under HB 1333, military identification was not an acceptable form of ID, except for service members stationed away from their North Dakota residence.

94. HB 1333 also restricted absentee voting.

95. Prior to passage of HB 1333, absentee voters without a qualifying ID could submit an absentee ballot if another qualified elector vouched for his or her qualifications.

96. HB 1333 removed this provision for everyone except disabled voters. Under HB 1333, disabled voters could still utilize a voucher fail-safe mechanism.

97. HB 1333 also added to the Section entitled "Qualification of electors - Voting requirements" a requirement that "[f]or the purposes of this title, an elector seeking to vote in an election must meet the identification requirements specified in sections 16.1-05-07 and 16.1-07-06." HB 1333 § 1(9).

98. The strict voter ID laws adopted by HB 1332 and 1333 were "arguably some of the most restrictive voter ID laws in the nation." Doc. 50 at 4.

99. Following HB 1333's passage, on January 23, 2016, Rep. Nelson, whose district is majority Native American, explained in an op-ed in the Grand Forks Herald that as a Legislator he was well aware of how "[i]t's not a question of ID. Tribal members have IDs, but they happen to be IDs that North Dakota decided weren't good enough" since "tribal IDs in North Dakota do not . . . list the person's address." The reasons for this are "many" but most notably because "[t]here still are rural residents who cannot count on their 911 address being correct. So a great many tribal IDs do not have a 911 address that can be

counted.” Marvin Nelson, *N.D.’s Voter ID Laws Hurt Minorities’ Voting Rights*, Grand Forks Herald (Jan. 30, 2016), <http://www.grandforksherald.com/opinion/columns/3936274-marvin-nelson-nds-voter-id-laws-hurt-minorities-voting-rights>.

100. Enactment of HB 1332 and HB 1333 disenfranchised and imposed significant barriers for qualified Native American voters by establishing strict voter ID and residence requirements.

101. Those requirements had the result of denying Native Americans, including Plaintiffs, an equal opportunity to participate in the political process. *See generally* Doc. 50.

102. The strict voter ID requirements of HB 1332 and 1333 interacted with social and historical conditions to cause an inequality in the opportunities enjoyed by Native American and White voters to participate in the political process and elect their preferred representatives.

V. THIS COURT ENJOINS ENFORCEMENT OF HB 1332 AND 1333

103. This Court granted the Plaintiffs’ motion for preliminary injunction on August 1, 2016, and enjoined the Defendant from enforcing HB 1332 and 1333 “without any adequate ‘fail-safe’ provisions as had previously been provided to all voters in North Dakota prior to 2013.” Doc. 50 at 28.

104. This Court found that, “given the disparities in living conditions, it is not surprising that North Dakota’s new voter ID laws,” meaning HB 1332 and HB 1333, “are having and will continue to have a disproportionately negative impact on Native American voting-eligible citizens.” *Id.* at 18.

105. “It is undisputed that the more severe conditions in which Native Americans live translates to disproportionate burdens when it comes to complying with the new voter ID laws.” *Id.* at 7.

106. “Native Americans face substantial and disproportionate burdens in obtaining each form of ID deemed acceptable under [HB 1332 and HB 1333] . . . obtaining any one of the approved forms of ID almost always involves a fee or charge, and in nearly all cases requires travel.” *Id.* at 9.

107. “It also helps to have a computer with Internet access, a credit card, a car, the ability to take time off work, and familiarity with the government and its bureaucracy.” *Id.*

108. “The declarations from the Plaintiffs’ expert witnesses show that the typical Native American voter living in North Dakota who lacks qualifying ID simply does not have these assets.” *Id.* at 10.

109. “Thus, obtaining a qualifying voter ID is much easier to accomplish for people who live in urban areas, have a good income, are computer-literate, have a computer and printer, have a good car and gas money, have a flexible schedule, and understand how to navigate the state’s administrative procedures.” *Id.* at 9-10.

110. “In the past, North Dakota allowed all citizens who were unable to provide acceptable ID’s to cast their vote under two types of ‘fail-safe’ provisions—which were repealed in 2013.” *Id.* at 28.

111. “The new voter ID laws,” HB 1332 and HB 1333, “totally eliminated the previous ‘fail-safe’ provisions that existed in the past in North Dakota.” *Id.* at 22.

112. “Although the majority of voters in North Dakota either possess a qualifying voter ID or can easily obtain one, it is clear that a safety net is needed for those voters who simply cannot obtain a qualifying voter ID with reasonable effort.” *Id.*

113. This Court could not “envision a compelling reason or a governmental interest which supports not providing such an avenue of relief for potentially disenfranchised voters.” *Id.*

114. Thus, “[t]he ill-advised repeal of all such ‘fail-safe’ provisions has resulted in an undue burden on Native American voters and others who attempt to exercise their right to vote. There are a multitude of easy remedies that most states have adopted in some form to alleviate this burden.” *Id.* at 28-29.

115. This Court, therefore, enjoined HB 1332 and HB 1333 until the State implemented a “fail-safe” provision. *Id.* at 28.

116. To comply with the Court’s order, North Dakota elected an affidavit system as its “fail-safe” provision to remedy the undue burden that Native Americans faced in the 2016 General Election.

VI. IMPLEMENTATION OF THE 2016 “FAIL-SAFE” AFFIDAVIT SYSTEM

117. The 2016 election was the first election that featured both the strict ID requirements outlined by HB 1332 and HB 1333 and also allowed for the “fail-safe” affidavit system. In contrast, the 2014 election required certain types of ID under HB 1332 but did not allow for the “fail-safe” affidavit option.

118. In the 2016 election, the “fail-safe” affidavit system was widely utilized.

119. The State reported that 16,180 affidavits were executed, which is 5,661 more affidavits executed than the last measured election that had the affidavit option in 2012 prior to the Legislature's implementation of strict voter ID requirements.

120. Across the 53 counties in North Dakota, counties with larger shares of Native American populations experienced higher usage rates of affidavits in 2016, as compared to counties with the lowest share of Native Americans.

121. In Sioux County, which is 83% Native American, 10.7% of all ballots cast in the 2016 general election used affidavits.

122. In 2012, IDs were not required and vouchers and affidavits acted as available fail-safes. Under the 2012 system, the fail-safe affidavit method only accounted for 2.3% of all ballots cast in Sioux County.

123. Rolette County, which is 77% Native American, had 12 affidavits utilized in 2012.

124. In 2016 that number grew to 209 - an increase of 1642%.

125. In 2012, just one fourth of one percent of ballots in Rolette were by affidavit and in 2016 they had accounted for over 5 percent of all ballots - a 20-fold increase.

126. Overall, the top three most heavily Native American counties (Sioux, Rolette, and Benson counties), which are all majority-Native American, experienced a 750% increase in the rate of affidavit usage, as compared to a statewide average of a 43% increase from 2012 to 2016.

127. In contrast, the three counties with the smallest share of Native Americans (Billings, Slope, and Steele counties) experienced a decrease in affidavit usage by 4 less affidavit votes in 2016, or an 11% decline.

128. According to the Secretary of State Alvin Jaeger, there were two cases of probable double voting arising out of the 2016 election.

129. One involved an elector voting absentee and again in person. The Burke County prosecutor reached a pretrial diversion agreement with the elector in that case.

130. Another involved an elector voting in state and out of state. The state declined to prosecute that case. *See* Mem. from Alvin Jaeger, N.D. Secretary of State on N.D. – Views and Recommendations to the Presidential Advisory Commission on Election Integrity 4 (Sept. 5, 2017), <https://www.scribd.com/document/358292085/Sos-00435420170907141608>; John Hageman, *Diversion Agreement Reached In Rare North Dakota Voter Fraud Case*, The Bismarck Tribune (Sept. 15, 2017), http://bismarcktribune.com/news/state-and-regional/diversion-agreement-reached-in-rare-north-dakota-voter-fraud-case/article_9d3da36d-f4d2-58d9-9471-697249e1359c.html.

131. Following the 2016 election, the state investigated voters it suspected to be non-citizens.

132. All but one were determined to in fact be citizens and the remaining voter was not identified in an immigration database. It is unknown if citizenship was proven through other means or if federal law enforcement intends to further pursue the issue. *See generally* Rob Port, *We Have No Idea If Voter Fraud Changed the Outcome of Some North Dakota Elections*, SayAnythingBlog (Sept. 12, 2017), <https://www.sayanythingblog.com/entry/no-idea-voter-fraud-changed-outcome-north-dakota-elections/>.

133. According to local news sources, twelve voters may have used a post office or UPS location as their address in the 2016 election. It is unknown if these voters lacked street addresses, believed their P.O. boxes counted as a street address, did not wish to reveal their residential address to voting officials, or intentionally falsified their address. See Max Grossfeld, *Dozens of People Voted With False Addresses Committing Voter Fraud*, West Dakota Fox (July 20, 2017), <http://www.kfyrtv.com/content/news/Dozens-of-people-voted-with-false-addresses-committing-voter-fraud-435701893.html>.

VII. DELIBERATION OF HB 1369

134. On January 18, 2017, Jim Silrum, Deputy Secretary of State, emailed Cass County Auditor Michael Monsplaisir to discuss the bill he had drafted (HB 1369) that was based on “specific requests . . . from certain legislators.” E-mail from Jim Silrum, Deputy Secretary of State (Jan. 18, 2017) [hereinafter “Jan. 18th Communication”]

135. In a February 3, 2017 email to Hons von Spakovsky and Don Palmer, entitled *Re: Agenda & Info: Heritage Foundation Election Briefing for Secretaries of State – February 14-15, 2017*, Silrum stated the draft bill was “an attempt to keep our strong voter ID requirements” as well as provide a different form of “‘fail safe’ option for those who want to vote, but don’t have an ID at the time of voting.” E-Mail from Jim Silrum, Deputy Secretary of State (Feb. 3, 2017) [hereinafter “Feb. 3rd Communication”].

136. Silrum’s proposed “fail-safe” option still required that every voter possess an ID and therefore is not, in fact, a “fail-safe” option for those that lack an ID.

137. The proposal was similar to the reformation of the affidavit system proposed and rejected by the Legislature in 2011 under HB 1447. There, the Legislature debated an

affidavit system where a voter would have to return to show an ID after casting a provisional ballot. *See* discussion above at ¶ 25.

138. Silrum's draft HB 1369 similarly proposed that a voter without a valid ID must cast a "set-aside" ballot. The voter would then have to return to the county auditor's office in the days following the election and show a valid form of ID in order for the set-aside ballot to be counted.

139. Silrum explained that he believed that this set-aside system, which still required a voter possess an ID, would be an adequate "fail-safe" option because he was "convinced [the Court] incorrectly applied to ND the federal law requiring states to provide a fail-safe option for people to register to vote." Feb. 3rd Communication (emphasis in original).

140. Silrum then explained that by circumventing the registration system, his "set-aside" ballot option could impose more stringent requirements on voters than the requirements for registration to vote in most states. *See* Voter Registration Rules, available at: <https://www.vote.org/voter-registration-rules/> (last visited September 20, 2017).

141. He explained: "this type of voter ID system is much better than voter registration since the use of [voter registration] would simply push the determination of qualifications to the point at which an individual registers. From what I have seen, many state's laws don't allow them to do much vetting of the qualifications of electors at the time of registration, so what good is it to register someone if there is no way to determine if they meet the qualifications to be registered for that precinct." Feb. 3rd Communication.

142. In a January 18, 2017 email, Silrum also went on to explain that he believed the “set-aside” option would result in fewer affidavit votes being counted. Jan. 18th Communication.

143. In response to Cass County Auditor, Michael Montplaisir’s questions over the process for “dealing with provisional ballots,” Silrum predicted that the “set-aside” affidavit process would end up with many fewer affidavits being counted. *Id.*

144. Silrum explained that in other states, the affidavit systems that require a voter to return to verify registration act as an effective deterrent and result in fewer affidavits being counted: “From the conversation I have had with my colleagues in other states, they have poll workers give provisional ballots to nearly everyone they can’t verify as a registered voter since this removes the reasons for any arguments within the polling place as is the case when the poll worker is forced to tell that voter that they are not allowed to vote.” *Id.*

145. Silrum went on: “My colleagues say that since these voters don’t return to verify their registration status, the cost for a ballot and an envelope is a small price to pay to remove the conflict from the polling place while also keeping those voters who should not vote from casting a ballot.” *Id.*

146. On that same day in another email to Cass County Auditor Michael Montplaisir, Silrum again emphasized that his “set-aside” system would result in fewer votes being counted stating: “As for the set-aside ballots, I hope the fact that many individuals who cast them will not likely come into your office later to verify their qualifications will put some of the fears to rest about long lines outside your office in the six days after the election.” *Id.*

147. Silrum drafted HB 1369 with the intention of maintaining the requirement of an ID for every voter.

148. Silrum knew that the proposed system would likely result in fewer votes being counted.

149. Silrum also knew that the ID requirement coupled with a requirement of a verifiable street address placed a disproportionate and undue burden on Native American voters who attempt to exercise their right to vote. *See generally* Doc. 50; *see also* *Hearing Minutes on H.B. 1447 Before H. Political Subdivision Comm., 62nd Leg. Assemb.* 3 (N.D. Apr. 20, 2011) (statement of Jim Silrum, H. Political Subdivisions Comm.) (“We are also going to need to work with the tribal governments to make sure because a couple of our counties that have reservations in the state have not completed their 911 addressing. Even if they have the residence of those counties [they] don’t know what their 911 address is.”).

150. Prior to enactment of HB 1369, the Native American Rights Fund (“NARF”) provided testimony to both houses of the North Dakota Legislature. NARF explained that the “set-aside” system did not cure the disproportionate burden placed on Native American voters to obtain an ID in the first place and therefore would not adequately provide a “fail-safe” option for Native American voters that do not have an ID. *See Written Testimony of the Native American Rights Fund Regarding H.B. 1369*, Native American Rights Fund (Jan. 27, 2017), http://www.narf.org/wordpress/wp-content/uploads/2017/02/NARF_HB_1369_Testimony-1.pdf.

151. During the House floor session considering HB 1369, Rep. Johnson, (R), stated plainly “Judge Hovland spent a whole bunch of time in his order enjoining the 2015 bill

regarding the burden placed on Native Americans in obtaining what is a valid ID as provided in the bill. And there it is again. Despite that you provide a provisional ballot you are still requiring the same valid ID and that is not truly a fail-safe option like an affidavit is. . . . I would be remissed to substitute Judge Hovland's opinion for mine but I don't believe this will pass constitutional muster again and I do hope to see some red votes." *House Floor Session: Hearing on H.B. 1369*, 65th Leg. Assemb. (N.D. Apr. 17, 2017) (statement of Rep. Mary C. Johnson).

152. Despite being repeatedly warned of the disproportionate and burdensome impact that obtaining an ID with a permanent physical address has on Native Americans, *see generally* Doc. 50, the North Dakota Legislature failed to investigate the impact of HB 1369 on Native Americans prior to the bill's passage.

153. Indeed, no studies were commissioned investigating the bill's potential impacts and no consultations were made with tribal governments to see if the bill would disproportionately affect their people.

VIII. ENACTMENT OF HB 1369

154. HB 1369 was enacted on April 24, 2017. HB 1369 requires that all voters must have one of only three forms of specific ID, or fall into one of the specific exceptions made for the elderly, certain veterans, or the disabled absentee voter.

155. HB 1369 was intended to "replace[] voter affidavits in favor of a set-aside ballot that would be excluded from the count until such time that . . . voter that voted without the proper identification returns and . . . identifies himself at the polling place to prove their

identity.” *House Floor Session: Hearing on H.B. 1369*, 65th Leg. Assemb. (N.D. Feb. 2, 2017) (statement of Rep. Scott Louser, Member, H. Comm. on Gov’t and Veterans Affairs).

156. HB 1369 continues to require Native Americans to overcome “substantial and disproportionate burdens in obtaining each form of ID deemed acceptable.” Doc. 50 at 9.

157. Because HB 1369 still requires specific types of identification, HB 1369 does not contain any “fail-safe” provision to alleviate the disproportionate burden that Native Americans faced to comply with HB 1332 and HB 1333.

158. HB 1369 continues to limit the forms of ID that voters can use at the polls to (1) a North Dakota driver’s license; (2) North Dakota non-driver’s identification card; and (3) an official form of ID issued by a tribal government. *Compare* HB 1369 § 2 *with* HB 1332 § 5.

159. HB 1369 creates exceptions to the identification requirement for three classes of persons. It allows the secretary of state to prescribe a long-term care certificate for elderly individuals living in a long-term care facility to use as identification; allows uniformed service members or immediate family members temporarily stationed away from the residence or state to use a current military ID or passport; and allows for a person with a disability to have another qualified elector sign and certify the applicant is a qualified elector if the disabled person is voting absentee. HB 1369 § 2(4)(a)-(c).

160. For everyone else, as with HB 1332, their ID must be one of the three types allowed and provide the voter’s current residential street address and date of birth. HB 1369 § 2(2)(b),(c).

161. Additionally, H.B. 1369 established a section “Residence for voting – Rules for determining” that stated in relevant part “[f]or purposes of voting . . . [e]very qualified

elector may have only one residence, shown by an actual fixed permanent dwelling, establishment, or any other abode to which the individual returns when not called elsewhere for labor or other special or temporary purposes.” HB 1369 § 3(1).

162. The “Residence for voting – Rules for determining” section also includes a rule that “[f]or purposes of voting” the “street address verified by the individual as provided in section 16.1-01-04.1 when requesting a ballot to vote must be the address of residence for the individual.” HB 1369 § 3(2).

163. IDs with only a P.O. Box remain unacceptable as voter IDs under HB 1369.

164. If the voter presents one of the three forms of ID but the information on the ID is not current or lacks the voter’s current residential address or date of birth, the ID must be supplemented with one of five documents issued in the voter’s name and providing the missing or outdated information: (1) a current utility bill; (2) a current bank statement; (3) a check issued by a federal, state, or local government; (4) a paycheck; or (5) a document issued by a federal, state, or local government. HB 1369 § 2(3)(b)(1)-(5).

165. If the voter shows up to the polls to vote without a valid form of ID but asserts that he or she is qualified to vote in that precinct, the voter cannot vote. Instead, he or she is allowed to submit a ballot that “must be securely set aside” and is not counted until the voter returns with a valid ID. HB 1369 § 2(5).

166. As noted above, this “set-aside” provision was intended to replace the only “fail-safe” provision available—affidavits—with ballots that “would be excluded from the count” until the voter “returns and identifies himself.” *House Floor Session: Hearing on H.B. 1369*,

65th Leg. Assemb. (N.D. Feb. 2, 2017) (statement of Rep. Scott Louser, Member, H. Comm. on Gov't and Veterans Affairs).

167. The voter has until the polling place closes on Election Day to return to a “polling place election board member.” HB 1369 § 2(5).

168. After Election Day, the voter has six days to travel to “an employee of the office of the election official responsible for the administration of the election” and show a valid ID. *Id.*

169. Following verification, “[e]ach ballot set aside . . . must be presented to the members of the canvassing board for proper inclusion or exclusion from the tally.” *Id.*

170. Because a voter must still show a valid ID, and because the canvassing board may have discretion to deny inclusion of the vote, the provisional or set-aside ballot process is not a fail-safe mechanism for those that simply do not have an ID.

171. Further, the burden of traveling to present an ID for verification is especially burdensome for Native Americans who disproportionately lack resources for travel and access to transportation.

172. HB 1369 maintains HB 1332’s elimination of the voucher and affidavit fail-safe that, prior to HB 1332, could be utilized by qualified voters who cannot produce an ID when requested by the poll clerk.

173. However, in the most recent election law guidance issued August 2017, the Secretary of State allows absentee voters to sign a Voter Affidavit if they lack an ID. *See North Dakota Residences Choosing to Vote Absentee or By Mail*, N.D. Secretary of State, <https://vip.sos.nd.gov/pdfs/Portals/Voting-MailBallotAbsentee.pdf> (last visited Dec. 5,

2017) (stating that you must be able to provide an ID or “you complete a Voter’s Affidavit on which you attest to your qualifications as a voter”).

174. Additionally, HB 1369 maintains HB 1333’s mandate that driver’s licenses and non-driver ID cards must be current to be accepted at the polls.

175. HB 1369 also maintains HB 1333’s refusal to accept military identification as an acceptable form of ID except for service members stationed away from their North Dakota residence.

176. HB 1369 maintains HB 1333’s restrictions on absentee voting.

177. Prior to passage of HB 1333, absentee voters without a qualifying ID could submit an absentee ballot if another qualified elector vouched for his or her qualifications.

178. HB 1333 removed this provision for everyone except disabled voters. HB 1369 maintains this restriction.

179. HB 1369 maintains HB 1333’s modification to the “Qualification of electors – Voting requirements” section that “[a]n elector seeking to vote in an election must meet the identification requirements specified.” HB 1369 § 1(4).

180. On April 25, 2017, North Dakota Governor Doug Burgum signed HB 1369 into law and it was codified in N.D. Cent. Code 16.1-01-04, 16.1-01-04.1, and 16.1-01-04.2

181. Enactment of HB 1369 preserves the disenfranchisement and significant barriers imposed by HB 1332 and 1333 on qualified Native American voters by maintaining strict voter ID and street address requirements.

182. These requirements deny Native Americans, including Plaintiffs, an equal opportunity to participate in the political process.

183. Further, HB 1369's requirement that a qualified elector that utilized a "set-aside" ballot must make another trip to present an identification for verification is especially burdensome for Native Americans who disproportionately lack resources for travel and access to transportation.

184. The strict voter ID requirements of HB 1369 interact with social and historical conditions to cause an inequality in the opportunities enjoyed by Native American and White voters to participate in the political process and elect their preferred representatives.

185. Enactment of HB 1369 was intended to suppress the Native American vote.

IX. HB 1369 MAINTAINS HB 1332'S AND 1333'S BURDEN ON NATIVE AMERICANS

A. General Native American Demographics in North Dakota

186. North Dakota had a total population of 672,591 in 2010. Webster Decl., Doc. 44-4 ¶ 13. In 2010, North Dakota had a Native American population of 36,591 (5.4%). *Id.* According to the American Community Survey Five-Year Estimates 2011-2015, the Native American population rose to 38,286 (5.3%).

187. In 2010, 8,319 Native Americans lived on the Turtle Mountain Reservation – home of the Turtle Mountain Band of Chippewa Indians. *Id.* at ¶ 37 (Table 5). The Turtle Mountain Reservation is located in Rolette County, North Dakota. *Id.* at ¶ 16. It is approximately 72 square miles in area.

188. The Fort Berthold Indian Reservation, home of the Three Affiliated Tribes (Mandan, Hidatsa, and Arikara), has 4,556 Native Americans living on the reservation according to the 2010 Census. *Id.* at ¶ 37 (Table 5). The Fort Berthold Indian Reservation

occupies sections of six counties in North Dakota: Mountrail, McLean, Dunn, McKenzie, Mercer, and Ward. *Id.* at ¶ 16. The Fort Berthold Indian Reservation covers approximately 980,000 acres.

189. The Spirit Lake Reservation, home of the Spirit Lake Tribe, has 3,595 Native Americans living on the reservation according to the 2010 Census. *Id.* at ¶ 37 (Table 5). The Spirit Lake Reservation occupies sections of four counties in North Dakota: Benson, Eddy, Nelson, and Ramsey. *Id.* at ¶ 16. The Spirit Lake Reservation covers approximately 245,120 acres.

190. The Lake Traverse Reservation is the home of the Sisseton Wahpeton Oyate, and has only eight Native Americans living on the North Dakota side of the reservation according to the 2010 Census. *Id.* at ¶ 37 (Table 5). According to the 2013 American Indian Population and Labor Force Report by the Bureau of Indian Affairs, there were 448 tribal members living on the North Dakota portion of the Lake Traverse Reservation. 2013 *American Indian Population and Labor Force Report*, U.S. Dep't of the Interior 87 (2014), <https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc1-024782.pdf>. The Lake Traverse Reservation covers approximately 250,000 acres. The northern portion of the Reservation is located in Sargent and Richland counties in southeastern North Dakota. Doc. 44-4 at ¶ 16.

191. The Standing Rock Reservation, home of the Standing Rock Sioux Tribe, has 3,492 Native Americans living on the reservation according to the 2010 Census. *Id.* at ¶ 37 (Table 5). The Standing Rock Reservation is located in Sioux County, North Dakota. *Id.* at ¶ 16. The reservation covers approximately 2.3 million acres.

192. Chart 1 below details the total and voting age Native American population residing on reservations in North Dakota in 2010.

Chart 1

Reservation	Total Native American Population	Total Voting Age Native American Population
Ft. Berthold	4,556	2,883
Turtle Mountain	8,319	5,172
Spirit Lake	3,595	1,983
Standing Rock	3,492	2,136
Lake Traverse	8	6
TOTAL	19,970	12,180

SOURCE: Census of Population, 2010.

Id. at ¶ 37.

193. Chart 2 below provides the number of Native American people living in each of the fourteen North Dakota counties whose territory is wholly or partly on Indian reservations, according to the 2010 U.S. Census.

Chart 2

North Dakota County	Reservation and Tribe(s)	Number of County Residents That are Native American; Percentage of the County Population (U.S. Census 2010)
Rolette	Turtle Mountain Reservation: Turtle Mountain Band of Chippewa Indians	10,763; 77.2%
Mountrail	Fort Berthold: Three Affiliated Tribes	2,348; 30.6%
McLean	Fort Berthold: Three Affiliated Tribes	625; 7%
Dunn	Fort Berthold: Three Affiliated Tribes	449; 12.7%
McKenzie	Fort Berthold: Three Affiliated Tribes	1,412; 22.2%
Mercer	Fort Berthold: Three Affiliated Tribes	196; 2.3%
Ward	Fort Berthold: Three Affiliated Tribes	1630; 2.6%
Sargent	Lake Traverse: Sisseton Wahpeton Oyate	20; 0.5%
Richland	Lake Traverse: Sisseton Wahpeton Oyate	330; 2%
Benson	Spirit Lake Reservation: Spirit Lake Tribe	3,663; 55%

Eddy	Spirit Lake Reservation: Spirit Lake Tribe	58; 2.4%
Nelson	Spirit Lake Reservation; Spirit Lake Tribe	30; 1%
Ramsey	Spirit Lake Reservation; Spirit Lake Tribe	994; 8.7%
Sioux	Standing Rock Reservation; Standing Rock Sioux Tribe	3,492; 84.1%

Profile of General Population and Housing Statistics: 2010 Demographic Profile Data, U.S.

Census Bureau, Table DP-1 (2010),

<http://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t> (set to decennial census and modified for state and county data sets).

B. Native Americans in North Dakota have higher unemployment rates than non-Native Americans

194. "The unemployment rates on reservations are staggering. For example, unemployment at the Standing Rock and Turtle Mountain reservations is nearly 70%."

Doc. 50 at 18.

195. According to the 2009-2013 American Community Survey 5-Year Estimates, North Dakota as a whole has an unemployment rate of 3.3%, and a not in labor force rate of 29.5%.

196. According to the same survey, the unemployment rate for the White population in North Dakota is 2.8%, while the unemployment rate for the Native American population in

North Dakota is 10.3%. The percentage of White people not in the labor force in North Dakota is 29%, while the percentage of Native Americans not in the labor force in North Dakota is 42.8%.

197. Chart 3 below displays the estimated percentage of employed American Indians and Alaska Natives in civilian jobs for each tribe in North Dakota, according to the federal Bureau of Indian Affairs ("BIA").

Chart 3

Tribe	Estimated percentage of American Indian/Alaska Native Population Employed in Civilian Jobs in the Tribal Statistical Area	Estimated percentage of American Indian/Alaska Native Population Employed in Civilian Jobs in the Tribal Statistical Area and Nearby Counties
Three Affiliated Tribes	50.9-61%	<i>Unavailable</i>
Turtle Mountain Band of Chippewa Indians	35.4-44.1%	<i>Unavailable</i>
Standing Rock Sioux Tribe	<i>Unavailable</i>	44.5-53.1% (North Dakota only)
Spirit Lake Tribe	39.9-47.2%	40.2-50.6%
Sisseton-Wahpeton Oyate	48.7-57.9% (North and South Dakota)	

2013 American Indian Population and Labor Force Report, supra, at 50-51.

C. Native Americans in North Dakota experience a higher rate of poverty than non-Native Americans

198. "The undisputed evidence reveals that Native Americans living in North Dakota disproportionately live in severe poverty." Doc. 50 at 17.

199. Native Americans experience “disparate living conditions”: non-Native Americans earn “a median household income” of \$56,566 while Native Americans make “only \$29,909.” *Id.* at 18. “[T]he average income for non-Native Americans living in North Dakota is \$73,313, compared to \$48,763 for Native Americans.” *Id.* And “22.3% of Native Americans who lack voter ID’s have household incomes less than \$10,000.” *Id.*

200. According to the 2009-2013 American Community Survey 5-Year Estimates, North Dakota as a whole has a family poverty rate of 7.1%. This statistic represents the number of families whose income in the past 12 months was below the poverty level. The state has an individual poverty rate of 11.9%, which includes individuals whose income in the past 12 months was below the poverty level. Doc. 44-4 ¶ 18.

201. Within the Native American community in North Dakota, “21.7% of voting-age Native Americans had incomes below the poverty line, compared to only 7.6% of non-Native Americans.” Doc. 50 at 17. Overall, “37.7% of all Native Americans live in poverty, compared to 5.3% of Anglo families.” *Id.* at 18.

202. “Thus, the poverty rate for Native Americans of voting age is nearly three times that for Whites of voting age in North Dakota.” Doc. 44-4 ¶ 18.

203. The poverty rate for each reservation in North Dakota is similar. According to the 2009-2013 American Community Survey, the Fort Berthold Reservation has a family poverty rate of 18.6%. Families with at least one Native American household member have a poverty rate of 27.3%. Native American individuals have a poverty rate of 29.2%.

204. The Lake Traverse Reservation has a family poverty rate of 15%. Families with at least one Native American household member have a poverty rate of 36.9%. Native American individuals have a poverty rate of 40.8%. *Id.*

205. The Spirit Lake Reservation has a family poverty rate of 41.3%. Families with at least one Native American household member have a poverty rate of 49.9%. Native American individuals have a poverty rate of 53.5%. *Id.*

206. The Standing Rock Reservation has a family poverty rate of 33.6%. Families with at least one Native American household member have a poverty rate of 46%. Native American individuals have a poverty rate of 51.3%. *Id.*

207. The Turtle Mountain Reservation has a family poverty rate of 36.9%. Families with at least one Native American household member also have a poverty rate of 36.9%. Native American individuals have a poverty rate of 40.1%. *Id.*

208. As Chart 4 below reveals, the 2009-2013 American Community Survey 5-Year Estimates also shows that a disproportionately large percentage of individual Native Americans live below the poverty line when compared with White North Dakotans when broken down by county.

Chart 4

	Percentage of all Citizens Living Below Poverty Line	Native Americans Living Below Poverty Line	White North Dakotans Living Below Poverty Line

North Dakota	11.9%	39.6%	9.6%
Sioux County	40.5%	45%	10.6%
Rolette County	36%	41.4%	13.5%
Benson County	35.8%	53.2%	13.8%
Mountrail County	12.3%	21.9%	7.8%
McKenzie County	13.8%	47.2%	6%
Dunn County	10.1%	21.1%	9.1%
Ramsey County	12.1%	47.1%	7.7%
McLean County	10.9%	18.5%	10.4%
Sargent County	7.4%	31.6%	7%
Ward County	9.1%	29%	8.5%
Mercer County	7.3%	29.8%	6.8%
Richland County	11.8%	22.9%	11.1%

Poverty Status in Past 12 Months, 2009-2013 American Community Survey 5-Year Estimates,

U.S. Census Bureau, Table S1701,

<http://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t> (last visited May 2, 2017) (modified for county and state data sets).

D. Native Americans in North Dakota experience a higher rate of Homelessness than non-Native Americans

209. Native American people make up a disproportionate part of the state's homeless population. According to a 2014 point-in-time survey of homeless persons conducted for the U.S. Department of Housing and Development by the North Dakota Coalition for Homeless People, the total homeless population in North Dakota was 1,258. Of the total number of homeless people, 213 were American Indian or Alaska Native, making up 16.9% of the total, despite the fact that Native Americans make up only about 5% of the total state population. The point in time survey for 2015 had similar results. North Dakota Coalition for Homeless People, Inc., *News & Publications, Point in Time Counts*, <https://www.ndhomelesscoalition.org/new-page-2/> (last visited Dec. 6, 2017).

210. Beginning in 2016, the total number of homeless in North Dakota declined markedly to 261 individuals. However, of the total homeless people, 70 were Native American, increasing the percentage of Native American homeless to 26.8%. In 2017 the total homeless population again decreased to 257 but the total of Native American homeless instead increased to 76. In 2017, 29.5% of the homeless population is Native American despite Native Americans only comprising 5% of the population.

211. Additionally, homeless does not necessarily mean without a roof over their head, and many homeless would not be captured by the point-in-time survey. For example, according to the Turtle Mountain Housing Authority 2008 Preliminary Ten-Year Strategic Plan to End Homelessness, "[t]he homeless at Turtle Mountain are described as

‘precariously housed’ – that is, people who are imminent risk of becoming literally homeless at any time. Often, they are temporarily doubled up with friends or relatives – contributing to the overcrowding of many reservation homes.”

212. The precariously housed rely on the temporary goodwill of their family and friends and lack a permanent mailing address of their own.

E. Native Americans in North Dakota Face Greater Health Threats than non-Native Americans

213. The North Dakota Department of Health has released data from the 2010 census showing that among ten leading causes of death, the rate of death for Native American North Dakotans is higher than for the state’s general population. N.D. Dept. of Health, *North Dakota American Indian Health Profile* (2014), <http://www.ndhealth.gov/healthdata/communityhealthprofiles/American%20Indian%20Community%20Profile.pdf>.

214. The rate of infant and child deaths is also much higher among Native Americans in North Dakota than among the general population. *Id.*

215. Greater numbers of Native Americans in North Dakota are living with a disability than in the general North Dakotan population. While 8.6% of North Dakotans 18-65 live with a disability, 17.5% of Native Americans in the state do. *Id.*

216. Where 8.2% of white high school students have attempted suicide, Native American high school students’ suicide rate is nearly double at 14.3%. Among middle school students, Native American students attempt suicide at rates roughly triple that of their non-Native peers. 5.2% of white middle school children have attempted suicide, while

18.7% Native American middle school children have attempted suicide. McCool Decl., Doc. 44-2 ¶ 97.

217. North Dakota only has two Indian Health Service hospitals out of the 50 hospitals in the state. Therefore, many Native Americans must access health care outside of Indian Health Services, yet Native Americans are three times less likely than whites to have health insurance in the state. *Id.* at ¶ 94.

218. Nearly twice as many Native Americans than whites have reported they needed a doctor in the past year that they cannot afford. *Id.*

219. Native Americans in North Dakota are struggling to meet their most basic needs. *Id.* at ¶ 98.

F. Native Americans in North Dakota are more likely than non-Native Americans to Lack Qualifying IDs, Supplemental Documentation, and/or Street Addresses

1. Native Americans Disproportionately Lack Qualifying IDs

220. "23.5% of Native Americans currently lack valid voter ID, compared to only 12% of non-Native Americans." Doc. 44-1 ¶ 11.

221. "15.4% of Native Americans who voted in 2012 currently lack qualifying voter ID, compared to only 6.9% of non-Native Americans." *Id.* ¶ 41.

222. "Only 78.2% of Native Americans have a driver's license that they could potentially use as a qualifying voter ID. In contrast, 94.4% of non-Native Americans have a driver's license." *Id.* ¶ 11.

223. "47.7% of Native Americans who do not currently have a qualifying voter ID lack the underlying documents they need to obtain an acceptable ID." *Id.*

224. According to a nationwide study, citizens earning less than \$25,000 a year are twice as likely to lack documentation necessary to obtain qualifying forms of ID. Brennan Ctr. for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification*, 2(2006), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf.

225. The same report found that citizens earning less than \$35,000 a year are more than twice as likely to lack current government-issued photo identification. *Id.*

226. Additionally, although North Dakota law allows for use of an "official form of identification issued by a tribal government," (N.D. Cent. Code § 16 1-01-04.1), Plaintiffs, as well as many other Native Americans in North Dakota, do not possess tribal government IDs, or do not possess tribal government IDs that contain a current physical address.

227. Further, some tribal IDs, like those issued to Standing Rock Sioux tribal members, are issued by the BIA and may not meet the requirement of an "identification issued by a tribal government" as required by HB 1369 § 2.

2. Native Americans Disproportionately Lack Supplemental Documents

228. Even though HB 1369 allows voters to supplement required information where missing from the ID, many Native Americans will not have the supplemental documents required to prove a physical address.

229. "5.6% of Native Americans in North Dakota do not have a social security card or a W2 evidencing their social security number." Doc. 44-1 ¶ 11.

230. Many Native Americans lack access to transportation and have no car registration showing their current address. *Id.* ¶ 47.

231. "21.6% of Native Americans do not have two documents that show their residential address." *Id.* ¶ 11.

232. Native Americans are less likely than whites to have a bank statement in their name that has a street address.

233. Native Americans are less likely than whites to have a utility bill in their name that contains a street address.

234. Native Americans are less likely than whites to have a pay stub or earning statement with their name and street address.

235. Native Americans are less likely than whites to have a document from a state, local, or federal government agency that contains their name and street address.

3. Native Americans Disproportionally Lack Street Addresses

236. "21.6% of Native Americans do not have two documents that show their residential address. One reason is that many Native Americans do not have residential addresses and the Post Office delivers their mail to a post office box." Doc. 50 at 11.

237. Another reason is that, "on many reservations, the residential address system produces conflicting and problematic results." *Id.*

238. In fact, many tribal members do not even know their street address.

239. Some tribal members have been told they have more than one street address, and many either may not have one, or believe they do not.

240. Many tribal IDs do not include any address, and most tribes and the BIA do not require that tribal citizens put a street address on tribal IDs.

241. Even among tribal IDs that include a form of address, due to lack of, or relatively recent arrival of, residential mail delivery, many tribal citizens only list a P.O. Box address on their tribal IDs because that is the address they utilize for conducting their affairs or the address that they know.

242. Indeed, from 2011 to 2017, the Legislature was aware that Native Americans may not possess a street address or may not know their street address.

243. In 2011, Deputy Secretary Silrum testified to the Legislature: “[t]his is very much the case also in small town North Dakota where if you sent something to their street address the post office will return it because it needs to go to their post office box . . . We are also going to need to work with the tribal governments to make sure because a couple of our counties that have reservations in the state have not completed their 911 addressing. Even if they have the residence of those counties don’t know what their 911 address is [sic].” *Hearing Minutes on H.B. 1447 Before H. Political Subdivision Comm.*, 62nd Leg. Assemb. 3 (N.D. Apr. 20, 2011) (statement of Jim Silrum, H. Political Subcomm.).

244. On January 23, 2016, Rep. Marvin Nelson, whose district is majority Native American, explained in an op-ed in the Grand Forks Herald that as a Legislator he was well aware of how “it’s not a question of ID. Tribal members have IDs, but they happen to be IDs that North Dakota decided weren’t good enough” since “tribal IDs in North Dakota do not . . . list the person’s address.” The reasons for this are “many” but most notably because “[t]here are still rural residents who cannot count on their 911 address being correct. So a great many tribal IDs do not have a 911 address that can be counted.” See Marvin Nelson, *N.D.’s Voter ID Laws Hurt Minorities*, *supra*.

G. Obtaining a Qualifying ID in North Dakota is More Difficult For Native Americans

245. “Native Americans who currently lack a qualifying voter ID disproportionately face logistical and financial burdens in obtaining a qualifying ID.” Doc. 50 at 19.

246. “Further, getting a new driver’s license also requires proof of ID—the same forms of ID required to obtain a non-driver’s ID, which is problematic for Native Americans.” *Id.* at 14.

247. Social and historical conditions lead to high rates of poverty and unemployment among Native Americans in North Dakota, which prevent and will continue to prevent many Native Americans from obtaining the requisite underlying documentation necessary to obtain an ID required for voting.

1. Limited Hours of, and Distance to, North Dakota DLS Sites Increase The Burden On Native American Voters

248. “[T]ravel to a Driver’s License Site to obtain a non-driver’s ID card (or a driver’s license) is substantially burdensome for Native Americans.” *Id.* at 14.

249. “As with non-driver’s ID’s, acquiring a new driver’s license also requires a personal visit to a Driver’s License Site. . . . such a visit can be burdensome for Native Americans who currently lack a qualifying voter ID.” *Id.*

250. In order to obtain a North Dakota driver’s license or a nondriver ID card, a qualified voter in North Dakota must go to one of North Dakota’s remaining 19 DLSs.

251. There are only 19 DLS locations because eight DLSs have closed down since Dr. Gerald R. Webster submitted his analysis of DLSs on June 20, 2016, now making obtaining a driver’s license or nondriver ID card even more difficult. *Compare* N.D. Dep’t of Transp.,

Schedules, hours, and addresses for ND Drivers License sites, <https://www.dot.nd.gov/divisions/driverslicense/docs/Drivers%20Lic%20Sites.pdf> (last visited Dec. 1, 2017) (“2017 Drivers License Sites”) with Doc. 44-4 at ¶ 24.

252. There is not a single DLS on an Indian reservation in North Dakota. Doc. 50 at 12.

253. Because there are no Driver’s License Sites on any reservations in North Dakota, access for Native Americans is severely limited.

254. Moreover, the DLSs closest to North Dakota Indian reservations typically have very limited hours and are often located in places that are difficult for Native Americans to access. Doc. 44-4 ¶¶ 25, 39.

255. For instance, the closest DLS to the Turtle Mountain Reservation, located in Rolla, has recently decreased its operating hours from twice a month to once a month. It is now only open the first Wednesday of every month. It has also decreased its operating hours from 9:40 a.m. to 3:20 p.m. to 10:20 a.m. to 2:35 p.m. This DLS site, the nearest to all Plaintiffs in this case, now operates the most restrictive hours of any DLS location. *Compare* N.D. Dep’t of Transp., *Drivers License Sites* (revised Feb. 2014), <https://web.archive.org/web/20140327204243/http://www.dot.nd.gov/divisions/driverlicense/docs/Drivers%20Lic%20Sites.pdf> with 2017 Drivers License Sites.

256. The next closest site to the Turtle Mountain Reservation, located in Bottineau, is only open the first and third Tuesday of every month and only from 9:40 a.m. to 3:05 p.m. *Id.* The mean travel distance for voting age Native Americans from Turtle Mountain Reservation to a DLS is eleven miles, and the mean travel time is 17.4 minutes. Doc. 44-4 ¶¶ 38–39, Table 6.

257. The closest DLS to the Standing Rock Reservation was in Carson or Bismarck.

258. The Carson site closed in early August 2017.

259. An individual living on the Standing Rock Reservation will now have to travel to Bismarck to obtain a state ID. The mean travel distance for voting age Native Americans from the Standing Rock Reservation to a DLS is now 65.8 miles, and the mean travel time is approximately 112.4 minutes.

260. The closest DLS to the Fort Berthold Reservation is either in Watford City or Beulah. The Watford City site is only open on the first and third Wednesday of each month from 9:40 a.m. to 3:40 p.m. The Beulah site is only open on the second and fourth Wednesday of each month from 9:40 a.m. to 3:20 p.m. Otherwise, a tribal member on the Fort Berthold Reservation would have to travel farther to Williston or Minot. The mean travel distance for voting age Native Americans from Fort Berthold Reservation to a DLS is 49.6 miles. The mean travel time is 84.6 minutes. *Id.* at ¶ 38, 39, Table 6.

261. The closest DLS to the Lake Traverse Reservation is either the Oakes site or the Wahpeton site. The Oakes DLS is only open on the second Wednesday of each month from 10:00 a.m. to 3:00 p.m. The Wahpeton site is only open on the first and third Thursday of each month from 9:20 a.m. to 3:40 p.m. *See* 2017 Revised Drivers License Sites. The mean travel distance for voting age Native Americans from Lake Traverse Reservation to a DLS is 40.1 miles, and the mean travel time is 64.3 minutes. Doc. 44-4 at ¶ 39.

262. The closest DLS to the Spirit Lake Reservation is in Devil's Lake. That site is open every weekday from 8:00 a.m. to 4:45 p.m., except it is closed on the first and third Wednesdays of the month. *See* 2017 Revised Drivers License Sites, *supra*. The mean travel

distance for voting age Native Americans from Spirit Lake Reservation to a DLS is 14 miles.

The mean travel time is 25.3 minutes. Doc. 44-4 at ¶ 39.

263. There are no DLS sites open on Saturday or Sunday in North Dakota. 2017 Drivers License Sites.

264. The times and hours that the DLS sites are open change periodically.

265. For some Native Americans, traveling these distances would be unduly burdensome and costly given their lack of access to transportation and the time needed during working hours.

266. Charts 5 and 6 below illustrate the limited hours of, and average travel distances and times to, a DLS from each North Dakota reservation.

Chart 5

<i>Reservation</i>	<i>Mean Travel Distance to a DLS for Voting Age Native Americans</i>	<i>Mean Travel Time to a DLS for Voting Age Native Americans</i>
Ft. Berthold	49.6 miles	84.6 minutes
Turtle Mountain	11.0 miles	17.4 minutes
Spirit Lake	14.0 miles	25.3 minutes
Standing Rock	65.8 miles	112.4 minutes
Lake Traverse	40.1 miles	64.3 minutes
All Reservations	29.4 miles	50.3 minutes

Chart 6

<i>Reservation</i>	<i>Closest Driver's Licensing Site(s)</i>	<i>Hours of Operation*</i>
Standing Rock	Bismarck	Mon.-Fri., 7:30 AM-4:45 PM
Turtle Mountain	Rolla	1st Wed., 10:20 AM-2:35 PM
Turtle Mountain	Bottineau	1 st and 3 rd Tues., 9:40 AM-3:05 PM
Fort Berthold	Watford City	1 st and 3 rd Wed., 9:40 AM-3:40 PM
Fort Berthold	Beulah	2 nd and 4 th Wed., 9:40 AM-3:20 PM
Lake Traverse	Oakes	2 nd Wed., 10:00 AM-3:00 PM
Lake Traverse	Wahpeton	1 st and 3 rd Thurs., 9:20 AM-3:40 PM
Spirit Lake	Devil's Lake	Mon., Tues, Thurs., Fri., 2 nd and 4 th Wed., 8:00 AM-4:45 PM

*Hours of operation are based on a North Dakota Department of Transportation document revised August 2017. *See* 2017 Drivers License Sites.

267. There was a 29.6% reduction of sites between 2015 and August 2017.

268. Following the 2017 closure of DLS sites there has been an 11.4% increase in distance that the Native American voting age population has to travel to get to a DLS site.

269. There was a 1.7% decrease in operating hours.

270. “[A] successful visit to a site requires knowledge and experience dealing with bureaucratic institutions, a means of transportation, money to pay for transportation, and the free time to travel the often significant distances to such sites. The undisputed evidence before the Court reveals that overcoming these obstacles can be difficult, particularly for an impoverished Native American.” Doc. 50 at 12.

271. “[O]nly 64.9% of Native Americans in North Dakota who lack a qualifying voter ID know the location of the nearest Driver’s License Site (as compared to 85.2% of non-Native Americans).” *Id.* at 12-13

272. “[O]nly 73.9% of Native Americans in North Dakota lacking a qualifying voter ID own or lease a car (as compared to 88% of non-Native Americans); and 47.3% of Native Americans in North Dakota believe it would be a hardship if they had to rely on public transportation to get to a Driver’s License Site (as compared to 23.1% of non-Native Americans).” *Id.* at 13.

273. “For the average voting-eligible Native American in North Dakota, the average travel distance to the closest site is nearly 20 miles (as compared to appx. 11 miles for non-Native Americans).” *Id.*

274. And indeed, as explained above, this distance has since increased based on the August 28, 2017 revisions to North Dakota DLS locations.

275. “On the average, Native Americans in North Dakota must travel twice as far as non-Natives to visit a Driver’s License Site.” *Id.* at 8.

276. "This translates to more than 70 minutes of travel time for a round trip. For Native Americans in North Dakota living on a reservation, the travel distance can be as great as 60 miles one way." *Id* at 13.

277. "44.1% of Native Americans lacking a qualifying voter ID reported they would have difficulty taking time off from work to travel to a Driver's License Site (compared to 26.2% of non-Native Americans), and 36.7% of Native Americans said it would be a problem to travel even six miles each way to a site (compared to 17.3% of non-Native Americans)." *Id.* at 14.

278. It will be overly burdensome or impossible for many Native Americans to access a DLS.

2. Native Americans are less likely to have access to transportation in North Dakota

279. "Many [Native Americans] lack means of transportation. According to the Barreto/Sanchez Survey, only 73.9% of Native Americans in North Dakota lacking a qualifying voter ID own or lease a car (as compared to 88% of non-Native Americans); and 47.3% of Native Americans in North Dakota believe it would be a hardship if they had to rely on public transportation to get a Driver's License Site (as compared to 23.1% of non-Native Americans)." *Id.* at 13 (emphasis in original).

280. "Many Native American lack access to transportation and have no car registration showing their current address." Doc. 50 at 11.

281. The 2006-2010 American Community Survey shows that 4.8% of White households in North Dakota lacked access to a vehicle, while 10.5% of Native American

households did not have access to a vehicle. Native American households are twice as likely to be unable to access a motor vehicle. Doc. 44-4 ¶ 20.

282. In four counties in North Dakota, 8% or more of households lack access to a motor vehicle. Those counties include Sioux (12.5%); Benson (8.4%); Pierce (8.3%); and Rolette (8.2%). Sioux, Benson, and Rolette counties have the largest percentages of Native American residents of North Dakotan counties. *Id.* at ¶ 21.

283. In sum, “a successful visit to a [Driver’s License] site requires . . . a means of transportation, money to pay for transportation, and the free time to travel the often significant distances to such sites The undisputed evidence before the Court reveals that overcoming these obstacles can be difficult, particularly for an impoverished Native American.” Doc. 50. at 12 (emphasis in original, referring to declarations of Plaintiff’s expert witnesses).

284. “The undisputed evidence in this case has established that travel to a Driver’s License Site to obtain a non-driver’s ID card (or a driver’s license) is substantially burdensome for Native Americans.” *Id.* at 14 (emphasis in original).

3. The Costs of Obtaining Documentation Is Overly Burdensome For Native Americans

285. High rates of poverty and unemployment and the lack of access to transportation among Native Americans in North Dakota prevent, and will continue to prevent, many Native Americans from travelling to a DLS and obtaining a requisite ID for voting.

286. HB 1369 increases the proof of identity that a person had to show to get an ID under HB 1332 from three requirements to four: name, date of birth, legal presence in the

United States, and citizenship. *See* N.D. Cent. Code § 39-06-07.1 (adding proof of citizenship).

287. A renewal for a non-commercial driver's license is \$15 and "a new license can cost as much as \$25 (\$5 to take the written test, \$5 to take a road test, and \$15 for the license fee)." *See* Doc. 50 at 14.

288. "Many impoverished Native Americans do not have the disposable income to pay for these fees." *Id.* at 15.

289. HB 1369 maintains HB 1332's fee waiver for the issuance or renewal of a non-driver ID card for eligible applicants that do not already have a North Dakota Driver's license. If, however, an eligible applicant for a non-driver ID already has a driver's license, is seeking a replacement for an unexpired non-driver ID, or is seeking a duplicate non-driver ID, there is an \$8 fee. *See* N.D. Cent. Code § 39-06; 49; 39-06-03.1.

290. However, the North Dakota DLs apply the non-driver fee waiver inconsistently.

291. For example, on the North Dakota Department of Transportation's website, it provides that the only time there is no fee associated with obtaining a non-driver ID card is when you are *renewing* an ID and do not possess a North Dakota driver's license. N.D. Dep't of Transp., *ID Card Requirements*, <https://www.dot.nd.gov/divisions/driverslicense/idrequirements.htm> (last visited Nov. 29, 2017). The law, however, is supposed to waive the fee for issuance or renewal of a non-driver ID, not just for the renewal. *See* N.D. Cent. Code §§ 39-06-03.1, 39-06-49.

292. According to the DOT website, even when you do not have a North Dakota driver's license, you still have to pay eight dollars for a non-driver ID. *ID Card Requirements, supra*.

293. What's more, for someone seeking a license or non-driver ID, proof of a physical residential address is required. Doc. 44-2 ¶ 75.

294. The Department of Transportation does not accept a P.O. Box as proof of a residential address. *Id.*

295. Many qualified Native American voters will have a hard time furnishing one or more of the limited, acceptable forms of proof of residential address in order to obtain a qualifying ID in North Dakota. *Id.*

296. Individuals without a physical residential address will not be able to obtain a free non-driver ID.

297. Additionally, obtaining the required documentation to prove identity costs time and money.

298. For example, obtaining a North Dakota birth certificate and driver's license or non-driver ID presents a conundrum for many Native American voters: the North Dakota Department of Health ("DOH") requires an ID to obtain a certified copy of a birth certificate, but the applicant needs the birth certificate to procure the state ID necessary to obtain the birth certificate; other forms of ID accepted by DOH are either expensive or have limited availability.

299. The least expensive document to prove identity is a North Dakota birth certificate, which costs \$7. Doc. 50 at 10.

300. If a voter is born out of state, however, the cost is likely more.

301. Native Americans disproportionately lack birth certificates. Indeed, “32.9% of Native Americans who presently lack [a] qualifying voter ID do not have a birth certificate.” *Id.*

302. “Impoverished Native Americans, such as Plaintiff Lucille Vivier, lack the disposable income necessary to obtain a birth certificate, and make the difficult decision not to spend their limited resources on a birth certificate.” *Id.*

303. Additional documentation – and additional costs – are required if the person’s name has changed, for example due to marriage.

304. HB 1369 maintains the lack of waiver or exemption under HB 1332 and HB 1333 from the underlying documentation required for an applicant to obtain a non-driver ID card, or from the costs and fees associated with obtaining this underlying documentation.

305. Nor does HB 1369 address any fees that will be imposed on voters who must obtain the requisite underlying documentation from out-of-state agencies.

306. Similarly, North Dakota has not provided any funding to offset the cost faced by prospective voters for purchasing new tribal ID cards that have residential addresses.

307. For example, a new Turtle Mountain tribal ID card is \$10 and a replacement ID is \$15.

308. Even though the state advertises the non-driver IDs as “free,” there is a disproportionate cost to obtain the ID for some voters.

309. There is the burden of time, transportation, and cost to obtain an ID and the documentation needed to get one, and many Native American voters will find it impossible

to overcome all these hurdles to obtain the required ID and documentation due to social and historical conditions that led to their economic circumstances.

310. Due to the costs involved in obtaining a qualifying ID, many Native American voters have been, and will continue to be, disproportionately burdened and disenfranchised.

X. THE SECRETARY OF STATE'S CAMPAIGN FOR HB 1332 AND 1333 PROVIDED INADEQUATE NOTICE OF ID REQUIREMENTS

311. In March of 2014, the Secretary of State announced a statewide advertising campaign, utilizing federal funds, to educate the North Dakota public on the requirements of HB 1332 - then the new voter ID law.

312. The Secretary of State's campaign to educate qualified electors about HB 1332 and 1333's requirements was insufficient. Not all qualified electors heard or saw the educational materials, and electors who did hear or see the materials found them misleading.

313. "21.4% of Native Americans [we]re not at all aware of the new voter ID laws [under HB 1332 and HB 1333], and only 20.8% have heard about the law." Doc. 44-1 ¶ 43.

314. The State's education materials left qualified electors believing that their tribal ID was a qualifying form of ID, when many tribal IDs do not contain a residential address as required under HB 1332 and 1333. Because electors believed they had qualifying ID, they did not attempt to obtain a new ID before attempting to vote and were ultimately denied the right to vote due to lack of a qualifying ID.

315. There is no known additional campaign to alert voters that they need a specific type of ID to vote pursuant to HB 1369.

XI. NATIVE AMERICANS ARE DISPROPORTIONATELY BURDENED BY A LACK OF A FAIL-SAFE VOTING OPTION

316. The Secretary of State stated that the total number of individuals who utilized the affidavit provision in the election before the adoption of HB 1332 was 10,517. *Hearing Minutes on H.B. 1332 Before the S. Appropriations Comm.*, 63rd Leg. Assemb. (N.D. Apr. 2, 2013) (statement of Al Jaeger, N.D. Sec'y of State).

317. In compliance with this Court's ruling that a "fail-safe" provision be provided for the November 2016 General Election, North Dakota provided an affidavit provision, which was utilized by over 16,000 individuals as stated in the legislative hearings for HB 1369. NDACo Legislative Blog, *ND Legislative Approves New Voter ID Law Allows for Set Aside Ballots*, <http://ndcounties.blogspot.com/2017/04/> (Apr. 26, 2017)

318. As explained above, *see* above discussion at ¶¶ 118-127, Native Americans disproportionately relied on the affidavit and voucher "fail-safe" provisions that were first removed by HB 1332 and whose absence is maintained by HB 1369.

319. Native Americans therefore are disproportionately burdened by the continued elimination of those provisions.

320. The Secretary of State's office and North Dakota Association of Counties endeavored to track the number of people who attempted to vote, and were disenfranchised, in the June 2014 primaries when there was no voucher or affidavit option.

321. Chart 6 below provides the number of people denied the right to vote in North Dakota counties where reservations are located, and the number of those who returned to vote with qualifying ID in the 2014 primary election.

Chart 6

COUNTY	Number with ID, But Not Updated	Number with No ID	Number who Returned to Vote	Comments
Benson	0	6	1	One returned with ID and voted – several attempted to use a Tribal ID with no physical address listed
Dunn	No Response			
McKenzie	No Response			
McLean	No Response			
Mercer	0	0	0	
Mountrail	No Response			
Ramsey	0	0	0	There were a few tribal members who had tribal IDs with no residential address, but they all had driver's licenses, so they were able to vote successfully.
Richland	0	1	0	
Rolette	20	35	0	30-35 of the people turned away only had tribal IDs that did not have their residential address on it. The remaining 15-20 had drivers' licenses but their records did

				not place them in the precinct in Rolette County.
Sargent	0	2	0	One individual claimed not to have an ID. The other attempted to use their passport to vote in person.
Sioux	0	4	4	All returned with ID and voted.
Ward	0	2	0	Long term residents had not yet obtained ND IDs.

322. During the 2014 general election, voters were turned away from polling locations because they did not meet the requirements set forth by the voter ID law and the Secretary of State's office.

323. After the 2014 primary election, the Secretary of State noted that the number of problems were higher with tribal IDs during that election.

324. Since this lawsuit was filed, the Secretary of State, upon our knowledge and belief, has stopped attempting to track the number of people who attempted to vote and were disenfranchised.

325. Following the 2014 general election, the North Dakota Association of Counties surveyed all 53 county auditors, over 25 of which responded.

326. In the counties that responded to the survey, around 1200 voters were disenfranchised due to improper voter ID. (In addition, an unknown number of voters were disenfranchised in the over 25 counties that did not respond to the survey),

327. Upon our knowledge and belief, the North Dakota Association of Counties has not surveyed its county auditors since this lawsuit was filed.

**XII. THE STATE'S INTERESTS ARE NOT OUTWEIGHED BY THE
DISPROPORTIONATE BURDEN ON NATIVE AMERICANS' ABILITY TO VOTE**

328. The state has identified four reasons why the voter ID law was purportedly necessary despite its sound election administration: (1) to prevent and cut down on voter fraud; (2) to streamline the voting process; (3) to cut down on the perception that the affidavit ballots get mixed in with the other ballots and they cannot be retrieved; and (4) to make the election process fair, open, and honest.

329. Voter ID laws only address one type of fraud: in-person voter fraud.

330. The legislative record, however, is devoid of any evidence of in person voter fraud in North Dakota.

331. Moreover, North Dakota "failed to present any evidence showing that 'fail-safe' provisions . . . have resulted in voter fraud in the past, or are particularly susceptible to voter fraud in the future." Doc. 50 at 22.

332. In his September 5, 2017 letter to the Presidential Advisory Commission on Election Integrity, Secretary of State Alvin A. Jaeger admitted that "[i]f convictions exist [for election-related crimes including voter fraud], this office is not aware of them." Letter from Alvin A. Jaeger, N.D. Sec'y of State to The Presidential Advisory Commission on Election Integrity (Sep. 5, 2017) (on file at: <https://www.scribd.com/document/358292085/Sos-00435420170907141608>).

333. Regardless of its effectiveness, the very strict approach that North Dakota took results in disenfranchisement of significant numbers of qualified Native American and other voters.

334. The strict approach that North Dakota took was intended to disproportionately burden and disenfranchise Native American voters.

335. An election where a large percentage of voters cannot vote because of obstacles created by the state, which are restrictive and not necessary, is not free, fair, and open.

XIII. HISTORY OF DISCRIMINATION IN NORTH DAKOTA

336. North Dakota has a long history of discrimination against Native Americans generally, and of denying Native Americans the right to vote in particular.

A. Discrimination in Voting

337. This Court has recognized the history of discrimination in North Dakota against Native Americans with regard to voting. *See Spirit Lake Tribe v. Benson Cty., N.D.*, No. 2:10-cv-095, 2010 WL 4226614, at *3 (D.N.D. 2010); Consent Judgment and Decree, *United States v. Benson Cty.*, Civ. A. No. A2-00-30 (D.N.D. Mar. 10, 2000) ; *State ex rel. Tompton v. Denoyer*, 72 N.W. 1014, 1019 (N.D. 1897)

338. In 1897, Native American voters in North Dakota had to take their quest to get a voting precinct on the Spirit Lake Reservation to the North Dakota Supreme Court because the County had denied them the right to have a precinct on the reservation. *Denoyer*, 72 N.W. at 1015. At that time, North Dakota Code had, under “section 480, Rev. Codes,” a provision that did not allow Native Americans to be voters “unless they had entirely

abandoned their tribal relations, and were in no manner subject to the authority of any Indian chief or Indian agent.” *Id.* at 1019.

339. Additionally, in the late 19th Century, an Amendment to North Dakota’s initial Constitution, adopted and ratified in 1898, provided that only “[c]ivilized persons of Indian descent” who “severed their tribal relations two years next preceding such election” were eligible to vote. N.D. Const., art. V, § 121 (1898). Thus, in order to vote, Native Americans had to be “civilized” and had to have explicitly “severed their tribal relations.” *Id.* This insidious classification only applied to Native Americans and was not removed until 1922.

340. The North Dakota Constitution also established an educational test requirement as a precondition for voting. The requirement stated “the legislature shall by law establish an educational test as a qualification, and may prescribe penalties for failing, neglecting, or refusing to vote at any general election.” N.D. Const. art. II, §§ 121, 127 (ratified by vote on Nov. 8, 1898). Literacy tests were a common method used to disenfranchise minority voters, and were addressed by the Voting Rights Act. *See South Carolina v. Katzenbach*, 383 U.S. 301, 312, 316 (1966) (discussing the discriminatory use of literacy tests and the Voting Rights Act’s ban of such tests).

341. Indeed, racism against Native Americans by the state of North Dakota persisted into the 20th century. In 1920 in *Swift v. Leach*, 178 N.W. 437 (N.D. 1920), the North Dakota Supreme Court was asked to apply the “civilized persons” constitutional provision to Native American voters. While the Court found that the Native American plaintiffs were eligible voters in that case, it required the local Superintendent of the Bureau of Indian Affairs, as well as other witnesses, to testify that the Natives “live just the same as white

people” to show that they were “civilized” and had “severed” their tribal relationship. *Id.* at 438-40. This was despite the Appellant’s argument that the Native Americans, by being dependent on the federal government, could not be “civilized persons.” *Id.* at 441.

342. Indeed, discrimination against Native Americans persists today.

343. Discrimination against Native American voters in North Dakota is not a relic of the 19th and early 20th Centuries. In 2000, the Justice Department filed an action against Benson County, North Dakota in this Court to enforce Section 2 of the Voting Rights Act because Benson County’s at large elections that gave Native Americans less opportunity to participate in the political process. *See* Consent Judgment at preamble, *Benson Cty.*

344. The parties entered into a consent decree, and Benson County agreed to change the way it conducted elections from one at-large district to five separate districts, with two majority Native American districts. *Id.* ¶ 6.

345. The Spirit Lake Tribe had to sue again in 2010 to keep a polling place on its reservation, some 100 years after that Tribe first sued to establish a polling place on its reservation. This Court found that the removal of Spirit Lake’s polling place was likely a violation of Section 2. *Spirit Lake Tribe*, 2010 WL 4226614, at *3. After a preliminary injunction hearing, the polling place was reestablished on the reservation. *Id.*, at *6.

B. Discrimination in Other Areas

346. Native Americans in North Dakota face discrimination in other arenas as well, which hinders their ability to participate effectively in the political process.

1. Education

347. The “past federal policy was to assimilate American Indians into United States culture, in part by deliberately suppressing, and even destroying, traditional tribal religions and culture in the 19th and early 20th centuries.” *Bear Lodge Multiple Use Ass’n v. Babbitt*, 175 F.3d 814, 817 (10th Cir. 1999). “By the late 19th Century federal attempts to replace traditional Indian religions with Christianity grew violent. In 1890 for example, the United States Cavalry shot and killed 300 unarmed Sioux men, women and children en route to an Indian religious ceremony called the Ghost Dance[.]” *Id.*

348. Indeed, the government administered Indian trust funds to pay Christian denominations to educate the Indians about Christianity – a policy upheld by the Supreme Court. *Reuben Quick Bear v. Leupp*, 210 U.S. 50, 81-82 (1908).

349. Native Americans in North Dakota were not exempt from this overt discrimination and cultural assimilation.

350. Christian and government boarding schools were set up all over in North Dakota to indoctrinate the Native Americans into Christianity, or “civilization.” *See e.g.* U.S. Dep’t of Interior, *Extracts from the Annual Report of the Secretary of the Interior For Fiscal Year, 1927* 45 (1927), <https://babel.hathitrust.org/cgi/pt?id=umn.31951t003938445;view=1up;seq=1>.

351. There were at least 19 boarding or day schools in North Dakota for Native Americans. W.A. Jones, *Report of the Commissioner of Indian Affairs* 18, 20, 23 (Oct. 15, 1903).

352. In 1921, the federal government recognized the disparity in Native American education in *The Problem of Indian Administration*. Lewis Meriam, Tech. Dir. for Inst. for

Gov't Research, *The Problem of Indian Administration, Report of a Survey made at the request of Hubert Work, Secretary of the Interior, and submitted to him, Feb. 21, 1928*, https://www.narf.org/nill/documents/merriam/b_meriam_letter.pdf (hereinafter "Meriam Report"). The Meriam Report showed that the theory of removing Native children "as far as possible" from their home environment did not work, and that Native schools in general were "distinctly below the accepted social and educational standards of school systems in most cities and the better rural communities." Meriam report at 346 . For instance, in 1920 in North Dakota the rural illiteracy rate was only 2.2%, but the Native Americans had an illiteracy rate of 29.6%. *Id.* at 357.

353. While many Native Americans attended federal schools, the effects of discrimination were still felt. The 1969 report by the Senate Committee on Labor and Public Welfare, entitled *Indian Education: A National Tragedy – A National Challenge*, highlighted the failure of public schools. Special Subcomm. on Indian Educ., 91st Cong., S. R. No. 91-501 (1969), https://ia801305.us.archive.org/30/items/ERIC_ED034625/ERIC_ED034625.pdf (hereinafter "Kennedy Report").

354. The Kennedy Report found that Indian children in public schools were subjected to humiliating stereotypes, faced language discrimination, felt a sense of powerlessness, experienced depression, and generally did not receive education relevant to their cultures. Evidence showed that dropout rates were higher and reading levels lower among Indian children. *Id.* at 23-31.

355. The Kennedy Report also found that Indian people were generally prevented from serving on school boards. *Id.*

356. The effects of discrimination in the educational setting are still felt by Native Americans in North Dakota.

357. The North Dakota Native Education Division in the North Dakota Department of Public Instruction has noted that Native American students constitute approximately 8.9% of the total North Dakota enrolled student population.

358. The North Dakota Native Education Division found that

[f]or many Native students, the dominant culture of the public school is incompatible with their own cultures and languages. There are differences in distinct and various ways of acquiring knowledge, forms of communication, familial structures, and sociological, cultural, and linguistic modes [sic] learning of Native learners, which can cause problems for Native American students in the school environment. Socio-economic issues also complicate the learning environment as well. The consequences of these issues are realized by low achievement scores, [and] high dropout and transfer rates. For example, the 1999 dropout rate for Native American students [in North Dakota] was 42.2 percent. The economic conditions of many Native communities reveal high incidences of poverty, unemployment, and health problems for Native children and their families.

Educational Condition, N.D. Dep't of Pub. Education.,

[https://web.archive.org/web/20151225031658/https://www.nd.gov/dpi/SchoolStaff/IME/Programs Initiatives/IndianEd/resources/EducationalCondition/](https://web.archive.org/web/20151225031658/https://www.nd.gov/dpi/SchoolStaff/IME/Programs%20Initiatives/IndianEd/resources/EducationalCondition/) (last visited Dec. 7, 2017).

359. According to the 2009-2013 American Community Survey 5-Year Estimates, Native American residents in North Dakota are far more likely to lack a high school diploma than other groups in the state as a whole—18.6% of Native American residents over the

age of 25 lack a high school diploma compared to 9.1% of the state as a whole and only 8.4% of White residents.

360. According to the U.S. Department of Education Office of Civil Rights, Native American students receive out of school suspensions at much higher rates than their White counterparts.

361. From 2011-2012, 9% of male Native Americans were given out of school suspensions in North Dakota, while only 2% of White male students were given out of school suspension. Likewise, 6% of female Native American students were given out of school suspensions in 2011-2012, while only 1% of White female students were given out of school suspensions.

362. The kindergarten retention rate in North Dakota shows similar disparity. According to the U.S. Department of Education Office of Civil Rights, between 2011-2012, 8% of Native American kindergarten students in North Dakota were retained an extra year in North Dakota compared to 4% of their White counterparts.

363. Thus, as the North Dakota Native American Education division documented, the effects of historical discrimination in North Dakota continue to have a negative impact on Native Americans.

2. Loss of Land

364. The loss of Native American land through the discriminatory allotment policies also still plagues Native Americans. According to the 1948 Hoover Commission's evaluation of the allotment policy: "Two-thirds of Indian-owned land, including much of the best land, was alienated before the Allotment policy was abandoned. If the 90 million acres

lost through the process had remained in Indian ownership, the problem of poverty among most tribes could be solved with less difficulty and with more certainty today.” Kennedy Report at Appendix I, 149-150.

365. Likewise, Senator Robert Kennedy recognized in 1968 that the “Allotment Act succeeded in the period of the next 40 years in diminishing the Indian tribal economic base from 140 million acres to approximately 50 million acres of the least desirable land. Greed for Indian resources and intolerance of Indian cultures combined in one act to drive the American Indian into the depths of a poverty from which he has never recovered.” *Id.* at 150.

366. For instance, in 1882 the Turtle Mountain Reservation constituted 22 townships in North Dakota, but by 1884 it was reduced to two townships and the remainder was opened up to the public domain.

367. Likewise, the Great Sioux Reservation, which covered parts of Wyoming, Montana, Nebraska, Colorado, North Dakota, and South Dakota, was diminished greatly by 1890, with some nine million acres of land lost even by that time.

3. North Dakota Indian Affairs Commission

368. The State of North Dakota also effected discrimination in North Dakota through the North Dakota Indian Affairs Commission, which from its inception made several recommendations to purportedly “assimilate” Native Americans into mainstream culture. This was despite the fact that the Commission was established to facilitate relationships with North Dakota Tribes. As the North Dakota Indian Affairs Commission has recognized, it has at times embraced the negative rhetoric of termination, assimilation, and relocation

for Indian tribes. It was not until 1959 and the roots of self-determination that the tribes within North Dakota acquired representation on the Commission.

4. Lending Discrimination

369. Federal judicial intervention has been necessary to eliminate numerous other devices intentionally used to discriminate against Native Americans in North Dakota. One notable example includes lending discrimination directed at Native Americans. In 2010, Native American farmers settled a class-action lawsuit alleging that they had been systematically denied farm loans. The lead plaintiff, Marilyn Keepseagle was from the Standing Rock Sioux Reservation. Evidence in the lawsuit showed that farm agents discriminated against Native farmers systematically. *Keepseagle v. Vilsack*, 118 F. Supp. 3d. 98 (D.D.C. 2015), *appeal denied*, 2015 WL 9310099 (D.C. Cir. 2015). In 2014, the Department of Housing and Urban Development settled a suit on behalf of a Native American couple from North Dakota who were refused a loan because their property was located on the reservation. See News Release, U.S. Dep't of Housing and Urban Dev., HUD Reaches Settlement with US Bank Resolving Allegations of Lending Discrimination Against Native American Couple (Sept. 15, 2014) (available at: <https://archives.hud.gov/news/2014/pr14-106.cfm>).

370. As the unemployment, poverty, education and other statistics above show, Native Americans in North Dakota have been subject to social and historical discrimination that still impacts them to this day.

371. This social and historical discrimination hinders North Dakota Native Americans' ability to participate effectively in the political process because they are now less able, and

often unable, to obtain the necessary documentation and qualifying ID that continues to be a prerequisite to vote.

372. The Legislature was aware of these social and historical factors and intended to use these disadvantages to hinder Native American's ability to vote.

CAUSES OF ACTION

I. COUNT ONE: THE VOTER ID REQUIREMENTS IN HB 1369 WERE ENACTED FOR THE PURPOSE OF DENYING OR ABRIDGING THE RIGHT TO VOTE ON THE ACCOUNT OF RACE IN VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT

373. The Plaintiffs re-allege and incorporate by reference the allegations set forth in all preceding paragraphs of this complaint.

374. Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, prohibits the enforcement of any voting qualification or prerequisite to voting or any standard, practice, or procedure that has the purpose of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

375. HB 1369 violates Section 2 because it was passed with the purpose to deny and abridge the right to vote on account of race.

376. Without an order enjoining the implementation and enforcement of HB 1369, Defendants will continue to violate Section 2, resulting in the denial of the right of qualified Native American electors in North Dakota to vote.

II. COUNT TWO: THE VOTER ID REQUIREMENTS OF HB 1332, HB 1333, AND HB 1369 VIOLATE SECTION 2 OF THE VOTING RIGHTS ACT BECAUSE THEY HAVE THE RESULT OF DENYING OR ABRIDGING THE RIGHT TO VOTE ON ACCOUNT OF RACE.

377. The Plaintiffs re-allege and incorporate by reference the allegations set forth in all preceding paragraphs of this complaint.

378. Section 2 of the Voting Rights Act prohibits the enforcement of any voting qualification or prerequisite to voting or any standard, practice, or procedure that has the result of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

379. HB 1332, HB 1333, and HB 1369 require an ID that Native Americans disproportionately lack, and obtaining and maintaining such an ID current is unreasonably burdensome for Native Americans. Furthermore, Native Americans are disproportionately less likely to possess the supplemental documentation permitted under HB 1369.

380. Accordingly, North Dakota's implementation and enforcement of HB 1332, HB 1333, and HB 1369 continues to result in a denial or abridgement of equal opportunities for Native American voters to participate in the political process, in violation of Section 2 of the Voting Rights Act.

381. Without an order permanently enjoining the implementation and enforcement of HB 1332, 1333, and 1369, Defendants will continue to violate Section 2, resulting in the denial of the right of qualified Native American electors in North Dakota to vote.

III. COUNT THREE: THE LACK OF "FAIL-SAFE" VOTING MECHANISMS IN HB 1332, HB 1333, AND HB 1369 HAS THE RESULT OF DENYING OR ABRIDGING THE RIGHT TO VOTE ON ACCOUNT OF RACE IN VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT.

382. The Plaintiffs re-allege and incorporate by reference the allegations set forth in all preceding paragraphs of this complaint.

383. Section 2 of the Voting Rights Act prohibits the enforcement of any voting qualification or prerequisite to voting or any standard, practice, or procedure that has the result of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

384. HB 1332 and 1333 eliminated the voucher and affidavit processes that a qualified elector previously could use to prove his or her qualifications without having a qualifying ID. HB 1369 failed to restore the of voucher and affidavit processes and otherwise lacks an effective “fail-safe” provision.

385. Native Americans disproportionately relied on the voucher and affidavit process to vote in North Dakota and the elimination of these fail-safe methods resulted in an adverse discriminatory impact on Native American voters.

386. Additionally, the “set-aside” system adopted by North Dakota in lieu of a “fail-safe” method requires burdensome travel that Native Americans are disproportionately unable to make.

387. Accordingly, North Dakota’s implementation and enforcement of HB 1332, HB 1333, and HB 1369 continues to result in a denial or abridgement of equal opportunities for Native American voters to participate in the political process, in violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301.

388. Without an order permanently enjoining the implementation and enforcement of HB 1332, 1333, and 1369, Defendants will continue to violate Section 2, resulting in the denial of the right of qualified Native American electors in North Dakota to vote.

IV. COUNT FOUR: HB 1332, HB 1333, AND HB 1369 PLACE UNCONSTITUTIONAL BURDENS ON QUALIFIED ELECTORS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

389. The Plaintiffs re-allege and incorporate by reference the allegations set forth in all preceding paragraphs of this complaint.

390. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides in relevant part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const., amend. XIV, § 1.

391. The Fourteenth Amendment prohibits the imposition of severe burdens on the fundamental right to vote unless they are “narrowly drawn to advance a compelling state interest.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citation omitted).

392. The burdens of HB 1332 and 1333 on qualified North Dakota electors, especially qualified Native American electors in North Dakota, were severe. HB 1369 fails to alleviate those burdens.

393. Here, as set forth above, Plaintiffs’ right to vote is burdened by the arbitrary and unjustified imposition of a strict voter ID law with no fail-safe provision and no provision to protect the right of indigent qualified electors to vote. Plaintiffs, as well as many other qualified electors do not possess a qualifying ID or supplemental documentation and face significant obstacles to procuring these items. This has resulted, and will continue to result in, disenfranchisement of Plaintiffs and other qualified voters. After observing and documenting evidence of disenfranchisement, the State did not attempt to protect the rights of these voters but rather tightened the restrictions on qualified electors.

394. After this Court enjoined HB 1332 and 1333 for lack of a “fail-safe” provision, holding there was a substantial likelihood that Plaintiffs would succeed on the merits, the State enacted new legislation, HB 1369, that also lacked any meaningful “fail-safe” provision.

395. The State’s interest is not compelling, and the law is not narrowly tailored to advance the State’s asserted interest.

396. HB 1332 and 1333 did not actually further a compelling State interest. HB 1369 does not either.

397. Additionally, HB 1332, 1333, and 1369 are not reasonable restrictions on the right to vote.

398. Without an order permanently enjoining the implementation and enforcement of HB 1332, 1333 and HB 1369 Defendants will continue to violate the Equal Protection Clause, resulting in the denial of the right of qualified Native American electors in North Dakota to vote.

V. COUNT FIVE: HB 1369 EXCLUDES NON-PROPERTY HOLDERS FROM VOTING IN ELECTIONS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

399. The Plaintiffs re-allege and incorporate by reference the allegations set forth in all preceding paragraphs of this complaint.

400. The Equal Protection Clause provides in relevant part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

401. HB 1369 violates the Equal Protection Clause because it excludes non-property holders from voting in elections by requiring that “[e]very qualified elector may have only one residence, shown by an actual fixed permanent dwelling, establishment, or any other abode to which the individual returns when not called elsewhere for labor or other special or temporary purposes” and that a “street address verified by the individual as provided in section 16.1-01-04.1 when requesting a ballot to vote must be the address of residence for the individual.” HB 1369 § 3.

402. Without an order permanently enjoining the implementation and enforcement of HB 1332, 1333, and 1369, Defendants will continue to violate the Equal Protection Clause, resulting in the denial of the right of qualified Native American electors in North Dakota to vote.

VI. COUNT SIX: HB 1369 VIOLATES THE FIFTEENTH AMENDMENT.

403. The Plaintiffs re-allege and incorporate by reference the allegations set forth in all preceding paragraphs of this complaint.

404. HB 1369 violates the Fifteenth Amendment to the Constitution of the United States because it purposely denies and abridges the right to vote to Plaintiffs and other minority voters on the account of race and ethnic origin. U.S. Const. amend. XV, § 1.

405. Without an order enjoining the implementation and enforcement of HB 1369, Defendants will continue to violate the Fifteenth Amendment, resulting in the denial of the right of qualified Native American electors in North Dakota to vote.

VII. COUNT SEVEN: HB 1332, HB 1333, AND HB 1369 VIOLATE THE NORTH DAKOTA EQUAL PROTECTION CLAUSE IN ARTICLE I OF THE NORTH DAKOTA CONSTITUTION.

406. The Plaintiffs re-allege and incorporate by reference the allegations set forth in all preceding paragraphs of this complaint.

407. North Dakota Constitution article I, section 21 provides the State's guarantee of equal protection to its citizens. Section 21 states: "No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens." In North Dakota, strict scrutiny is applied to "an inherently suspect classification or infringement of a fundamental right." *Hector v. City of Fargo*, 844 N.W. 2d 542, 554 (N.D. 2014) (quoting *Gange v. Clerk of Burleigh Cty. Dist. Court*, 429 N.W.2d 429, 433 (N.D. 1988)). A law that significantly interferes with such a right must "'promot[e] a compelling [state] interest and that the distinctions drawn by the law [must be] necessary to further its purpose'". *Id.*

408. Article II, section 1 of the North Dakota Constitution provides that "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."

409. The right to vote is a fundamental right and the most essential part of a functional democratic system. North Dakota's "whole election system . . . is built up and founded on the fundamental principle that every elector shall be given the opportunity to vote for or against any candidate." *Stern v. City of Fargo*, 122 N.W. 403, 408 (N.D. 1909).

410. HB 1332 and 1333 severely burdened and significantly interfered with the fundamental right of qualified Native American and other North Dakota electors to vote. HB 1369 preserves that burden and interference and does not actually further a compelling

interest, is not narrowly tailored to a compelling interest, and is not carried out by the least restrictive means.

411. Without an order permanently enjoining the implementation and enforcement of HB 1332, 1333, and HB 1369 Defendants will continue to violate the North Dakota Equal Protection Clause, resulting in the denial of the right of qualified Native American electors in North Dakota to vote.

VIII. COUNT EIGHT: HB 1369 VIOLATES THE EQUAL PROTECTION CLAUSE IN ARTICLE I OF THE NORTH DAKOTA CONSTITUTION BECAUSE IT EXCLUDES NON-PROPERTY HOLDERS FROM VOTING

412. The Plaintiffs re-allege and incorporate by reference the allegations set forth in all preceding paragraphs of this complaint.

413. North Dakota Constitution Article I, sections 21 and 22 provide the State's guarantee of equal protection to its citizens. Section 21 states: "No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens."

414. HB 1369 violates North Dakota's equal protection guarantee because it excludes non-property holders from voting in elections by providing that "[e]very qualified elector may have only one residence, shown by an actual fixed permanent dwelling, establishment, or any other abode to which the individual returns when not called elsewhere for labor or other special or temporary purposes" and that a "street address verified by the individual as provided in section 16.1-01-04.1 when requesting a ballot to vote must be the address of residence for the individual." HB 1369 § 3.

415. Without an order permanently enjoining the implementation and enforcement of HB 1332, 1333, and 1369, Defendants will continue to violate the North Dakota Constitution, resulting in the denial of the right of qualified Native American electors in North Dakota to vote.

IX. COUNT NINE:HB 1332, HB 1333, AND HB 1369 VIOLATE ARTICLE II OF THE NORTH DAKOTA CONSTITUTION BY IMPOSING NEW VOTER QUALIFICATIONS

416. The Plaintiffs re-allege and incorporate by reference the allegations set forth in all other paragraphs of this complaint.

417. Under the North Dakota Constitution, “[e]very 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.” N.D. Const., art. II, § 1.

418. The North Dakota Supreme Court has stated that “where the Constitution prescribes the qualifications of electors the Legislature is powerless to add or subtract from those qualifications.” *Spatgen v. O’Neil*, 169 N.W. 491, 494 (N.D. 1918).

419. The requirements in HB 1332 and 1333 mandating possession of a specific form of state or tribally issued ID in order to vote was an elector qualification added by the legislature that is not in the North Dakota constitution. HB 1369 preserves those requirements and, so, is likewise an elector qualification added by the legislature that is not in the North Dakota constitution. N.D. Cent. Code § 16.1-01-04(4).

420. Additionally, North Dakota’s requirement that “[e]very qualified elector may have only one residence, shown by an actual fixed permanent dwelling, establishment, or any other abode to which the individual returns when not called elsewhere for labor or other

special or temporary purposes” is an elector qualification added by the legislature that is not in the North Dakota constitution. *Id.* § 16.1-01-04.2.

421. Finally, North Dakota Code’s requirement that a “street address verified by the individual as provided in section 16.1-01-04.1 when requesting a ballot to vote must be the address of residence for the individual” is an elector qualification added by the legislature that is not in the North Dakota constitution. *Id.* § 16.1-01-04.2(2.)

422. Because the legislature cannot add additional qualifications to those contained in the North Dakota Constitution, these additional qualifications are unconstitutional.

423. Without an order permanently enjoining the implementation and enforcement of HB 1332, HB 1333, and HB 1369 Defendants will continue to violate the North Dakota Constitution, resulting in the denial of the right of qualified Native American electors in North Dakota to vote.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court enter an order:

424. Permanently enjoining HB 1332, 1333, and 1369;

425. Declaring HB 1369 unconstitutional under Fourteenth and the Fifteenth Amendments of the U.S. Constitution and enjoining Defendants from enforcing the requirements of those provisions;

426. Declaring that HB 1369 violates Section 2 of the Voting Rights Act, and

a. enjoining Defendants from enforcing the requirements of HB 1369; and

b. authorizing the appointment of Federal observers by the Director of the Office of Personnel Management in accordance with Section 8 of the Voting Rights Act to serve for

such period of time as the Court shall determine is appropriate to enforce the guarantees of the Fifteenth Amendment to the U.S. Constitution, as provided by 52 U.S.C. § 10302(a);

427. Declaring HB 1369 unconstitutional under the Equal Protection Clause of the North Dakota Constitution;

428. Declaring HB 1369 unconstitutional under article II, section I of the North Dakota Constitution;

429. Awarding Plaintiffs' attorney fees and costs as allowed and required by law, including, but not limited to, 42 U.S.C. § 1988, 52 U.S.C. § 10310, and the Private Attorney General Doctrine; and

430. Ordering such additional relief as the interests of justice may require, together with the costs and disbursements in maintaining this action.

Respectfully submitted: December 13, 2017

/s/ Matthew Campbell

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

Jacqueline De León, CA Bar No. 288192, DC Bar No. 1023035
jdeleon@narf.org
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
Telephone: (303) 447-8760

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
Telephone: (202) 785-4166

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

Richard de Bodo, CA Bar No. 128199
rich.debodo@morganlewis.com
Morgan, Lewis & Bockius LLP
2049 Century Place East, Suite 700
Los Angeles, CA 90067
Phone 1.310.255.9055
Fax 1.310.907.2000

Tom Dickson, ND Bar No. 03800
tdickson@dicksonlaw.com
Dickson Law Office
P.O. Box 1896
Bismarck, North Dakota 58502
P: (701) 222-4400
F: (701) 258-4684

APPENDIX J

**UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION**

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

Plaintiffs,

vs.

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

Defendants.

Civil No. 1:16-cv-8

Declaration of Richard Brakebill

I, Richard Brakebill, declare as follows:

1. I am an enrolled member of the Turtle Mountain Band of Chippewa Indians. I have personal knowledge of the facts set forth in this declaration and could and would competently testify to those facts if asked to do so.

2. I was born on April 30, 1963 in Belcourt, North Dakota and am a U.S. citizen. I was adopted at the age of four. At the time, my adopted parents lived in Illinois. After living in Illinois for approximately ten years, my family moved to Arkansas. I attended high school in Arkansas. After high school I enlisted in the U.S. Navy. I served in the Navy from 1981 to 1983 (stationed in San Diego), and I am an honorably discharged veteran. In 2001, I moved back to North Dakota and attended the Turtle Mountain Community College.

3. I have voted in many elections since turning 18 years of age and becoming a qualified voter. I have lived in Rolla, North Dakota for at least the last ten years and I am a qualified North Dakota voter.

4. Currently, I do not have a car or a job, but I do occasionally help my landlord at

the farm that he owns. This provides me with very minimal income. I receive about \$279 per month in general assistance. I also receive food stamps. This helps me pay for rent, utilities, groceries, and transportation. I spend the majority of my available money on rent, electricity and propane. If I have any money left over, I financially assist my girlfriend's mother.

5. Before the November 2014 election, I tried to obtain a state of North Dakota identification card ("ID") from the Rolla, North Dakota Driver's License Site, but the employees there informed me that my expired North Dakota ID was insufficient identification to obtain a new ID. They told me I needed a copy of my birth certificate, which I did not have. As a result, I was unable to obtain a North Dakota ID prior to the election.

6. Nevertheless, on November 4, 2014, I attempted to vote in the general election. I took my expired North Dakota ID as well as my tribal ID with to the polling place. When I presented these ID's, the poll workers informed me that these forms of ID were unacceptable. They explained my state ID was expired and my tribal ID did not have a residential address printed on it. They did not permit me to vote and I did not vote.

7. Since the November 2014 election, I have attempted to obtain my birth certificate. Because I was adopted at a very young age and moved to Illinois and then Arkansas, I was unsure exactly where to obtain a copy of my birth certificate. I noticed there were applications for birth certificates in the Rolette County Social Services Office. I spoke to an employee at the Rolette County Social Services Office about obtaining a birth certificate from North Dakota, and whether North Dakota was the right state for me to get a birth certificate. The employee I spoke to at the social services office advised me to get a birth certificate from the state where I was adopted—Illinois or Arkansas.

8. After my conversation at the social services office, I attempted to get my birth certificate first from Arkansas, and then from Illinois. Because I do not have Internet access, I dialed 411 on my phone and asked for the number of the Arkansas Department of Health

Vital Records. I thereafter contacted that office about obtaining a birth certificate. The Arkansas Department of Health Vital Records sent me an application. After filling out the application, I mailed it in, along with a \$12 money order. After about a week, I received the application back in the mail because I had improperly addressed the envelope. Thus, I remailed the application to the proper address with my \$12. After a few weeks, I received a response indicating the Department did not have a birth certificate on record for me.

9. After learning that Arkansas did not have a birth certificate for me, I again dialed 411 to find the contact information for the appropriate Illinois office. After several calls, I spoke to an employee in Illinois and explained that I was adopted at a very young age and moved to Illinois. She told me that, while I may have been adopted in Illinois, I should try to obtain my birth certificate from North Dakota where I was originally born.

10. The next time I was at the social services office in Rollete County, I obtained an application for a birth certificate. I filled out the North Dakota application and sent it in along with a \$7 money order to cover the fee and a copy of my expired North Dakota ID, which is required to obtain a birth certificate. After a few weeks, I finally received a copy of my birth certificate from North Dakota in February of this year.

11. I ended up having to pay a total \$19 to obtain a birth certificate. I paid for this out of my general assistance funds.

12. I intend to travel back to the Driver's License Site in Rolla to obtain a new state ID or driver's license at some point. I live about 15 minutes away from Rolla to the south and do not own a vehicle.

13. In order to obtain my state ID or license I will have to plan in advance. I typically utilize almost all of my general assistance money early in the month. However, the closest Driver's License Site in Rolla is only open on the second and fourth Tuesday of every month and for very limited hours. Since I obtained my North Dakota birth certificate, I have not had enough money to pay a friend or acquaintance the gas money to take me to the Driver's License Site. Due to the limited hours and distance to the Driver's License Site, I have so far

been unable to obtain a new state ID.

14. After being turned away from voting because my IDs did not have a residential address, I heard that the Turtle Mountain Band of Chippewas Motor Vehicle Department was issuing new tribal IDs with residential addresses printed on them. My understanding was that the tribe was charging \$10 for the new IDs. The tribal ID I used when I attempted to vote in November 2014 was issued by the Federal Bureau of Indian Affairs and did not have a residential address printed on it. After I heard that the tribe was issuing new IDs, I planned to travel to the tribal offices in Belcourt, North Dakota to get one. Belcourt is about a 20-minute drive from where I live. Because of the cost of the new tribal ID and the distance to Belcourt, I had to save up to pay for the ID and for a ride. Eventually, I was able to save enough money for the ID and to secure a ride to Belcourt. In August of last year, an acquaintance agreed to drive me to Belcourt and I paid him gas money for the trip. Once in Belcourt, I paid \$10 to obtain a new tribal ID with a residential address printed on it. My new tribal ID expires in August 2018.

15. Because of my limited income and lack of access to transportation, I have had a very difficult time obtaining a new state ID. Likewise, planning and saving for a new tribal ID was very burdensome, given that I live on a fixed income.

Executed on June 16 2016 at 9159 49th Ave NE Rolla ND

I declare under penalty of perjury that the foregoing is true and correct.



Richard Brakebill

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2016, the document titled “**Declaration of Richard Brakebill**” was electronically filed with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (“NEF”) to:

Christopher S. Joseph
Assistant Attorney General
State Bar ID No. 07450
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email csjoseph@nd.gov

DATED: June 20, 2016

By: /s Matthew Campbell
Matthew Campbell

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
Fax: (303) 443-7776