

**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.

**REPLY IN SUPPORT OF EMERGENCY APPLICATION TO VACATE
EIGHTH CIRCUIT STAY OF SECOND PRELIMINARY INJUNCTION**

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

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

Counsel of Record for Applicants

OCTOBER 3, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

INTRODUCTION 1

I. *Purcell* Dictates That Voting Schemes That Are Familiar To Voters
Should Remain In Place Once An Election Has Begun 2

II. Plaintiffs Are Likely To Succeed On The Merits 5

 A. The District Court Correctly Concluded that Requiring One to
Reside within a Physical Residential Property with a Street
Address is Facially Unconstitutional..... 5

 B. The District Court Correctly Found that Requiring Plaintiffs to
Pay for Voter ID is Facially Unconstitutional 7

III. Plaintiffs, Not the State, Will Suffer Irreparable Harm 8

IV. The State Has Not Shown It Will Suffer Irreparable Harm 11

V. The Balancing of the Harms Favors Plaintiffs 14

VI. This Court Will Likely Grant Certiorari Following Final Disposition
From the Eighth Circuit 15

CONCLUSION..... 15

TABLE OF AUTHORITIES

Cases

<i>ACLU of Ky. v. McCreary County, Ky.</i> , 354 F.3d 438 (6th Cir. 2003).....	8
<i>Brakebill v. Jaeger</i> , No. 1:16-cv-008, 2016 WL 7118548 (D.N.D. Aug. 1, 2016).....	passim
<i>Brakebill v. Jaeger</i> , No. 1:16-cv-008, 2018 WL 1612190 (D.N.D. Apr. 3, 2018)	passim
<i>Brakebill v. Jaeger</i> , No. 18-172, 2018 WL 4559487 (8th Cir. Sept. 24, 2018).....	passim
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992)	5
<i>Collier v. Menzel</i> , 176 Cal. App. 3d 24 (Cal. Ct. App. 1985)	6, 9
<i>Common Cause/Ga. v. Billups</i> , 554 F.3d 1340 (11th Cir.2009)	11
<i>Connecticut v. Massachusetts</i> , 282 U.S. 660 (1931).....	13
<i>Connection Distrib. Co. v. Reno</i> , 154 F.3d 281 (6th Cir. 1998).....	9, 14
<i>Crawford v. Marion Cty. Election Bd.</i> , 553 U.S. 181 (2008)	5, 8, 15
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972)	7
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).....	8
<i>Gonzalez v. Arizona</i> , 677 F.3d 383 (9th Cir. 2012).....	5, 6
<i>Harper v. Va. Bd. of Elections</i> , 383 U.S. 663 (1966).....	5, 15
<i>Indep. Living Ctr. of S. Cali., Inc. v. Maxwell-Jolly</i> , 572 F.3d 644 (9th Cir. 2009)...	14
<i>Iowa Utils. Bd. v. FCC</i> , 109 F.3d 418 (8th Cir. 1996)	13
<i>Joelner v. Vill. of Wash. Park</i> , 378 F.3d 613 (7th Cir. 2004)	14
<i>Kramer v. Union Free Sch. Dist. No. 15</i> , 395 U.S. 621 (1969).....	7
<i>New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.</i> , 434 U.S. 1345 (1977)	13

<i>Obama for Am. v. Husted</i> , 697 F.3d 423 (6th Cir. 2012).....	9
<i>O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft</i> , 342 F.3d 1170 (10th Cir. 2003).....	14
<i>Pitts v. Black</i> , 608 F. Supp. 696 (S.D.N.Y. 1984)	6
<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006)	2, 4
<i>Quinn v. Millsap</i> , 491 U.S. 95, 107 (1989)	6
<i>Turner v. Fouche</i> , 396 U.S. 346 (1970)	6

Statutes

52 U.S.C. § 20505(a)(1)	12
Iowa Code Ann. § 49.78	12
N.D. Cent. Code § 16.1-01-04.2	6
N.D. Cent. Code § 16.1-01-04.1(2)(b).....	6
N.D. Cent. Code Ann. § 16.1-05-08	12
N.D. Cent. Code § 39-06-03.1	8

Other Authorities

Amended Complaint, <i>Brakebill v. Jaeger</i> , No. 1:16-cv-008 (D.N.D. Dec. 27, 2017), ECF No. 77	8
Declaration of Dorothy Herman, <i>Brakebill v. Jaeger</i> , No. 1:16-cv-008 (D.N.D. June 20, 2016), ECF No. 44-11	8
Declaration of Elvis Norquay, <i>Brakebill v. Jaeger</i> , No. 1:16-cv-008 (D.N.D. Feb. 16, 2018), ECF No. 90-13	9
Declaration of Lucille Vivier, <i>Brakebill v. Jaeger</i> , No. 1:16-cv-008 (D.N.D. Apr. 24, 2018), ECF No. 109-1	10

Defendant’s Motion for Expedited Review, *Brakebill v. Jaeger*, No. 1:16-cv-008
(Mar. 9, 2018), ECF No. 95..... 4, 5

North Dakota Department of Transportation, *Drivers License Sites* (Rev. Sept. 1,
2018),[https://www.dot.nd.gov/divisions/driverslicense/docs/Drivers%20Lic%20Sites.
pdf](https://www.dot.nd.gov/divisions/driverslicense/docs/Drivers%20Lic%20Sites.pdf)..... 3, 4

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

In opposing the Plaintiffs' application, the Secretary fails to challenge any of the District Court's factual findings as clearly erroneous; indeed, he ignores those findings entirely. Instead, he argues that all Native Americans reside at a physical, residential property; that the address to that property is easily determined; and that once determined Native Americans can easily obtain an ID and other documentation reflecting that address. This ignores the many significant burdens incurred by Plaintiffs to maintain a physical, residential property (such as the fact that residential addresses do not exist on many reservations), as well as the burdens to secure an ID and other required documents that show Plaintiffs reside at a physical, residential property. Absent modification from the Court's order, the burdens imposed by North Dakota's voter-ID law are unreasonable and discriminatory. They grant the right to vote to some bona fide residents of requisite age and citizenship, but deny that right to others. They cannot stand.

The Secretary also protests that he will be irreparably harmed by the District Court's order, by being forced to permit voters to vote out of precinct. But he is misinterpreting the order to inflict self-imposed harms. Nothing in Order requires the State to permit out of precinct voting. The Secretary goes on to raise unfounded concerns about fraud, how perpetrators "could" set up a P.O. Box, and presumably obtain a North Dakota voter ID (even though such IDs are not available to non-North Dakota residents). Most tellingly, the Secretary has failed to show there was

an actual fraud problem in North Dakota, let alone a significant enough problem to justify disenfranchising thousands of voters. On the other hand, Plaintiffs are among those that have *already* been disenfranchised.

If the Eighth Circuit’s stay is not vacated, Plaintiffs—all of whom have lived in their communities for at least six years (some much longer), are known in their communities, and have voted many times before—will face unreasonable obstacles to vote again in 2018 (and beyond). Some, moreover, like Plaintiff Elvis Norquay, will be forced to choose between incurring substantial costs to overcome these obstacles, or being disenfranchised yet again. Plaintiffs seek relief to prevent these inequitable consequences.

I. *Purcell* Dictates That Voting Schemes That Are Familiar To Voters Should Remain In Place Once An Election Has Begun

The Secretary first asserts that, because the Eighth Circuit “ensure[d] that a State could enforce its ballot-integrity measures in an upcoming election,” the stay entered below is analogous to what this Court did in *Purcell v. Gonzalez*, 549 U.S. 1 (2006). Opp. at 19. Not so. In *Purcell*, the Court restored the voting scheme that voters were familiar with because of its use in Arizona’s most recent primary election. Here, the stay entered below displaces the voting scheme used in North Dakota’s June primary election. Voters are familiar with the scheme not only because of that use, but also because it was the subject of extensive media coverage described on the Secretary’s informational website. Appl. at 10-11 and n.3.

This is a critical distinction. The impending election, combined with the limited hours at most Drivers License Sites (“DLSs”), will leave many voters who

lack a qualifying ID almost no opportunity to obtain one. The District Court found that an estimated 18,213 eligible voters (2,305 Native Americans and 15,908 others) lack both a qualifying ID and the documents necessary to obtain such ID. Order, *Brakebill v. Jaeger*, No. 1:16-cv-008, 2018 WL 1612190, at *3 (D.N.D. Apr. 3, 2018), ECF No. 99. The court also found that “Drivers License Sites are not easily accessible” due to their limited locations and hours of operation. Order, *Brakebill v. Jaeger*, No. 1:16-cv-008, 2016 WL 7118548, at *6 (D.N.D. Aug. 1, 2016), ECF No. 50. Since then, both the locations and their hours have been reduced, making it even harder to obtain qualifying ID. *See Id.*; *See also* North Dakota Department of Transportation, *Drivers License Sites* (Rev. Sept. 1, 2018), <https://www.dot.nd.gov/divisions/driverslicense/docs/Drivers%20Lic%20Sites.pdf>.

In particular, the Rolla DLS, which is closest to the Turtle Mountain Reservation and to Plaintiffs’ residences, has the shortest hours of any site in the State, open only *one day a month*—the first Wednesday of every month—and for scarcely three hours in the middle of the day (10:20 am to noon and 1 pm to 2:35 pm). *Id.* That means that between September 24, the date the Eighth Circuit entered the stay and Election Day (November 6) the Rolla DLS is open for a total of just over 3 midday hours on a single weekday—today. By the time this Court decides the pending Application, then, the Rolla DLS will almost surely have closed until after the election. Plaintiffs and other voters near Rolla will therefor have to travel even further to obtain a qualifying ID.

And Rolla is not alone. Sites at Bowman, Linton (nearest to the Standing Rock Reservation), and Oakes (nearest to the Lake Traverse Reservation) also are open only a single day and for limited hours between the stay entered below and Election Day. *Id.* Six more DLS locations are open only two or three days during that span. *Id.* So while the stay below was entered six weeks before the election, the reality is that limited DLS availability will leave many voters with three days (and perhaps as little as three hours) to actually obtain a qualifying ID before Election Day. These facts belie the Eighth Circuit’s assertion, echoed by the Secretary here, that “there is still sufficient time before election activity to make a stay permissible.” Opp. at 19 (quoting Opinion, *Brakebill v. Jaeger*, No. 18-172, 2018 WL 4559487, at *5 (8th Cir. 2018)).

Finally, in *Purcell* it was the plaintiffs who waited for months to seek relief, and this Court cited both “the imminence of the election *and the inadequate time to resolve the factual disputes*” as grounds for restoring the voting scheme that voters were familiar with. *Purcell*, 549 U.S. at 5-6 (emphasis added). Here, the Secretary alone is responsible for the delay that now leaves Plaintiffs and so many others with so little time to obtain a qualifying ID. As the District Court explained, “[t]he 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.” Order, 2018 WL 1612190, at *2. This delay of six to nine months required the Secretary to seek “expedited review” in the District Court. *Id.*; *see also* Def.’s Mot. for Expedited Review, *Brakebill v. Jaeger*, No. 1:16-cv-008 (Mar. 9,

2018), ECF No. 95 (Applicant’s App. F). On appeal, moreover, although the Eighth Circuit “[t]he Secretary complicated the timing question by waiting until August 16 to file a renewed motion,” again necessitating expedited review. Op., 2018 WL 4559487, at *5. Plaintiffs and other voters who reasonably relied upon District Court’s orders should not be disenfranchised because the Secretary’s repeated and prolonged delays.

II. Plaintiffs Are Likely To Succeed On The Merits

A. The District Court Correctly Concluded that Requiring One to Reside within a Physical Residential Property with a Street Address is Facially Unconstitutional

In arguing that Plaintiffs are unlikely to succeed on the merits of their appeal, the Secretary makes the same fatal flaw the Eighth Circuit did. Opposition at 25-26. He ignores the first step in the equal protection analysis – whether the voting restriction is a “reasonable, nondiscriminatory” one. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). Only if the restriction is reasonable and nondiscriminatory does the Court turn to whether the law places excessively burdensome requirements on individual Plaintiffs. *See id.* at 198 (“The fact that most voters already possess a valid driver’s license, or some other form of acceptable identification, would not save the statute under our reasoning in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification.”); *see also Gonzalez v. Arizona*, 677 F.3d 383, 409 (9th Cir. 2012) (noting law fell outside of “*Harper’s* rule” because it was related to voter qualifications).

North Dakota’s “current residential street address” requirement is both unreasonable and discriminatory. To be qualified to vote in North Dakota, one must reside at a physical, residential property, and that property must have a street address. N.D. Cent. Code § 16.1-01-04.2. Voters must also show their “current residential street address” on their voter ID. *Id.* at §§ 16.1-01-4.2(2); 16.1-01-04.1(2)(b). By requiring a street address on the residence and ID, North Dakota is denying the right to vote to qualified electors who are homeless, lack a street address, or who are moving frequently from house to house due to a lack of housing. *See Collier v. Menzel*, 176 Cal. App. 3d 24, 33 (Cal. Ct. App. 1985) (finding homeless were unconstitutionally denied their right to vote because they lacked a residential address); *Pitts v. Black*, 608 F. Supp. 696, 699 (S.D.N.Y. 1984) (same); cf. *Quinn v. Millsap*, 491 U.S. 95, 107, 109 (1989) (rejecting property requirements for eligibility to governor’s board); *Turner v. Fouche*, 396 U.S. 346, 363-64 (1970) (rejecting property requirements for eligibility to school board).

That the strict way North Dakota has defined residence for purposes of voting is facially unconstitutional is clear for two reasons.

First, the Secretary argues that an “interest” in property is not required because a child can live in his or her parents’ home, a friend can sleep on a couch, a homeless person can live at a shelter, and so on. Opp. at 28. Yet, the underlying assumption in every example the Secretary gives is that there is a *physical, residential property* that someone can reside in. That is insufficient because some voters –such as the homeless, a point the State conceded at oral argument, Oral

Argument at 21:16, Brakebill v. Jaeger, No. 18-1725 (Sept. 10, 2018) <http://media-oa.ca8.uscourts.gov/OAaudio/2018/9/181725.MP3>, may not have any such property. Those people will never be able to satisfy the State's requirements, despite being qualified to vote. Therefore, the law is unconstitutional.

Second, as the District Court found many Native Americans do not have current residential street addresses and therefore would be disenfranchised. Order, 2018 WL 1612190, at *4; Order, 2016 WL 7118548, at *5, 7. As noted, the Secretary has not even argued here, that this finding was clearly erroneous. Given the finding, the State's definition of residence "grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others" and thus the Court must determine whether the exclusions are necessary to promote a compelling state interest and whether the statute is tailored to serve that interest. *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969). "And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference." *Dunn*, 405 U.S. at 343. The Eighth Circuit conducted none of this analysis and the State has not shown why less restrictive means of determining whether an elector is a resident of a precinct, like pointing to a map, cannot be used.

B. The District Court Correctly Found that Requiring Plaintiffs to Pay for Voter ID is Facially Unconstitutional

The District Court twice found that North Dakota charges for IDs despite the apparent wording of N.D. Cent. Code § 39-06-03.1. Order, 2016 WL 7118548, at *5;

Order, 2018 WL 161219, at *6. This factual finding is “not clearly erroneous.” Op., 2018 WL 4559487, at *7 (Kelly, J. dissenting). Plaintiffs’ expert testified how eligible North Dakota voters are charged for IDs, and provided a link to the DOT website. Doc. 44-2 at 29-30; *see also* Amended Complaint, *Brakebill v. Jaeger*, No. 1:16-cv-008 (D.N.D. Dec. 27, 2017), ECF No. 77¶ 291 (Applicant’s App. I). Additionally, the Secretary does not dispute that Plaintiff Dorothy Herman was charged \$8 for a North Dakota non-driver’s ID card that was supposed to be free under the law. Herman Decl. at 3, *Brakebill v. Jaeger*, No. 1:16-cv-008 (D.N.D. June 20, 2016), ECF No. 44-11 (Applicant’s App. D). The fact that some voters may already possess acceptable identification does not save the statute under this Court’s precedent, because the State requires voters to pay a tax or a fee to obtain a voter ID. *Crawford*, 553 U.S. at 198. Thus, the dissent properly recognized that requiring a fee for a voter ID “demonstrate[s] that North Dakota has erected unconstitutional barriers for prospective voters.” Op., 2018 WL 4559487, at *7, (Kelly, J. dissenting).

III. Plaintiffs Will Suffer Irreparable Harm

To begin with, plaintiffs, all of whom have been disenfranchised by the ID plus residential address requirement, must maintain an interest in property in order to vote and have been forced to pay for IDs (some numerous times). Being subjected to these unconstitutional requirements constitutes irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *ACLU of Ky. v. McCreary County, Ky.*, 354 F.3d 438, 445 (6th Cir. 2003); *See also Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *accord Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th

Cir. 1998) (citation omitted) (“[w]ith regard to the factor of irreparable injury, for example, it is well-settled that loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

The Secretary, however, claims Plaintiffs “concede . . . that they now have qualifying identification cards that include their residential address.” Opp. at 21. That is incorrect. Plaintiffs explained –in the same sentence the Secretary cites in making this argument – that “Plaintiff Elvis Norquay does not have a current residential address or qualifying ID due to his intermittent homelessness.” Appl. at 16. Indeed, Mr. Norquay is very likely to be disenfranchised under the decision below, because he is indigent and lacks access to reliable transportation. Norquay Decl. ¶¶ 7, 11, *Brakebill v. Jaeger*, No. 1:16-cv-008 (D.N.D. Feb. 16, 2018), ECF No. 90-13 (Applicant’s App. H). And under the Eighth Circuit’s ruling, he would be forced to travel a significant distance (farther than voters who vote in the precincts where they reside) to his old precinct to vote, something he simply may not be able to do. Imposing such a burden is unconstitutional. *See Collier*, 176 Cal. App. 3d at 33-4 (“Requiring appellants to travel to their former place of residence unnecessarily burdens their right to vote, particularly in view of their alleged indigent status, and, consequently, their restricted mobility.”). In contrast, if this Court reinstates the District Court’s Order, such that “PO Boxes or other addresses” can be used, he will be able to use his current ID which lists an “other address” and be able to explain to poll workers the proper district where he actually resides.

Even if Mr. Norquay makes it to the ballot box he will suffer irreparable injury by being forced to vote out-of-precinct for candidates and measures in which he has no stake. The Secretary decries hypothetical out-of-precinct voting while at the same time demanding that homeless electors like Plaintiff Norquay vote using their “*former* address”. Opp. at 20 (emphasis added). In short, if the Eighth Circuit’s stay is not vacated Mr. Norquay will either have to expend resources he does not have and face likely¹ disenfranchisement to travel to an out-of-precinct ballot box, or, if he makes it to the ballot box he will be forced to vote out-of-precinct. Both scenarios leave Plaintiff Norquay irreparably harmed.

Others similarly situated to Plaintiffs, the homeless, and those who lack a “current residential street address” will also be disenfranchised and suffer irreparable injury. The District Court found that at least 2,305 Native American voters and 15,908 non-Native eligible voters stand to be disenfranchised. Order, 2018 WL 1612190, at *4. The Secretary never disputes that thousands of voters lack qualifying IDs. Instead, the Secretary repeatedly refers to how “97% of the voters listed in the North Dakota Central Voter File have a valid driver’s license or non-driver’s ID issued by the Department of Transportation” and refers to such evidence as “undisputed.” Opp. at 8, 27. In fact, the reliability and relevance of this number

¹ Additionally, in 2016, Plaintiff Vivier was denied the right to vote for a second time under the state’s restrictive laws. Vivier Decl. at 3-4, *Brakebill v. Jaeger*, No. 1:16-cv-008 (D.N.D. Apr. 24, 2018), ECF No. 109-1 (Applicant’s App. G). Thus, it is likely that Plaintiff Vivier, Norquay, and the other Plaintiffs will face disenfranchisement from the State’s restrictive laws again without the District Court’s order providing for more acceptable forms of IDs that include non-traditional addresses.

was well litigated. The District Court properly disregarded the Secretary's assertion since, first, as Plaintiff's expert pointed out, the number was not supported with any underlying data or methodology. *See e.g. Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1354 (11th Cir.Cir.2009) (discussing problems with these types of match lists). Second, the number is misleading because it is only a percentage of those who have voted before, rather than a percentage of all qualified electors. By definition, it underestimates the problem. Third, even if taken at face value, Defendant's asserted number still exposes that 2.5% of North Dakota's qualified electors lack valid ID. Assuming North Dakota's voting age population is 583,001 (as reported by the North Dakota Census Office), and assuming all those voters are in the Central Voter File (which they are not), at least 14,575 people do not have qualifying ID. In sum, the District Court's finding that thousands of qualified voters stand to be disenfranchised remains uncontested. These voters will suffer irreparable harm if the Eighth Circuit order is not vacated and the District Court's Order, which expands available voter ID options, is not reinstated.

IV. The State Has Not Shown It Will Suffer Irreparable Harm

The irreparable harm the State points to is not only entirely speculative but is also self-inflicted and avoidable. The Secretary first claims the potential dilution of voters through out-of-precinct voting is an irreparable harm. Yet "nothing in the district court's injunction requires a voter to vote in the precinct attached to his current mailing address." *Op.*, 2018 WL 4559487, at *8 (Kelly, J. dissenting). The District Court merely required the State to accept an ID "that includes a current

mailing address (P.O. Box or other address in North Dakota)” as a valid form of ID for voting purposes. Order, 2018 WL 1612190, at *7. The State can still ask qualified voters where they reside, and can require them to vote in the appropriate precinct for their residence. Indeed, the National Voter Registration Act (NVRA) *requires* every state that registers voters to allow voters to draw a map showing where they reside if they do not have a residential address. 52 U.S.C. § 20505(a)(1).

North Dakota has side-stepped this accommodation for homeless voters that same day registration states provide. *See*, e.g. Iowa Code Ann. § 49.78 (A registered voter who fails to establish the voter's identity under this section shall be permitted to vote upon signing an oath attesting to the voter's identity). It instead has made its same day voting requirements more stringent than the NVRA standards and leaves those without a “current residential street address” any recourse on Election Day. North Dakota law already requires poll workers to use precinct maps to confirm that a voter is in the correct precinct, and if not, to direct them to the correct precinct. N.D. Cent. Code Ann. § 16.1-05-08. The Secretary chooses to interpret the Court’s order in a manner that potentially causes chaos and strife, rather than utilizing the District Court’s less restrictive alternatives that can be implemented with current state law.

Next, the State claims that individuals “could” cast fraudulent ballots after taking the steps necessary to set up a P.O. Box in the State. While the State of North Dakota unquestionably has an interest in preventing voter fraud, there is no evidence in the record of the very specific type of fraud that the Secretary speculates

will occur. *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931) (discussing merely feared harm that may occur at some indefinite time); *see also Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996). The fraud the Secretary alleges may occur – that a perpetrator will obtain a North Dakota P.O. Box in order to commit election fraud – would only be the first step for a fraudulent elector. Putting aside there is no evidence that a P.O. Box “can easily be obtained” for an out of state voter, Opposition to Motion to Vacate, 13, obtaining a P.O. Box and other mailing address is not the only requisite to vote in North Dakota. Rather, the P.O. Box or addressing requirement must also appear on an identification (like the Tribal Ids within the state have, as the District Court found). However, none of “these [identification] documents could be issued to a non-North Dakota resident.” Dissent, at 16. The perpetrator would either need to be part of a North Dakotan tribe or obtain a North Dakota ID. The perpetrator would then have to commit a Class C Felony. There is no evidence that this type of fraud, or indeed any type of fraud, has ever occurred in North Dakota. This speculation is not irreparable harm.

Third, the Secretary points asserts the State suffers irreparable harm if it is “enjoined by a court from effectuating statutes enacted by representatives of its people.” *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). But as the Seventh Circuit has explained “there can be no irreparable harm to a government when it is prevented from enforcing an unconstitutional statute.” *Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004) (citation and quotation marks omitted); *accord Connection Distrib. Co.*, 154

F.3d at 288 (“there can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute”) (internal citations omitted). Likewise, even state laws that “offend federal law provisions, which, like state statutes, are themselves ‘enactment[s] of its people of their representatives’” then “[f]ederal courts . . . have the power to enjoin state actions.” *Indep. Living Ctr. of S. Cali., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009); accord *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 342 F.3d 1170, 1187 (10th Cir. 2003). The Secretary, therefore, is not irreparably harmed by an Order that attempts to cure the constitutional defect caused by North Dakota’s “current residential street address” requirement.

V. The Balancing of the Harms Favors Plaintiffs

The harms put forth by the Secretary are self-imposed, speculative, and outweighed by the unconstitutional burdens placed upon qualified electors in North Dakota. “It is always in the public interest to prevent the violation of a party's constitutional rights.” *Connection Distrib.* 154 F.3d at 288. Plaintiffs and other similarly situated qualified electors stand to be disenfranchised by an unconstitutional law simply because they lack an ID with a “current residential street address.” As described, this “current residential street address” requirement is unreasonably difficult, if not outright impossible, for qualified electors in North Dakota comply with.

VI. This Court Will Likely Grant Certiorari Following Final Disposition From the Eighth Circuit

The Secretary does not dispute that given the robust record, this case provides an ideal vehicle to settle the outstanding unresolved questions that arose from *Crawford*. In *Crawford*, holes in the record prevented this Court from knowing the impacts of the voter ID law. Here, the underlying facts are largely undisputed. This Court should also hear this case to clarify the bounds of *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) and affirm the “current residential street address” requirement is invidiously discriminatory. Otherwise, other States may begin implementing electoral schemes that require residential addresses. Doing so would be especially burdensome on Native American reservations given the lack of residential addressing on many reservations. In this case alone, thousands of Native Americans stand to be disenfranchised in the upcoming election and beyond.

CONCLUSION

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

Dated: October 3, 2018

Respectfully submitted,

By: /s 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

Attorneys for Applicants