

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

ELIZABETH JANE SINNER, WHITNEY
OXENDAHL, CAROL SAWICKI, LOIS
ALTENBURG, and NORTH DAKOTA
VOTERS FIRST,

Plaintiffs,

v.

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

Defendant.

Case No. 3:20-cv-00076-PDW-ARS

**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY
INJUNCTION**

INTRODUCTION

The people of North Dakota have a fundamental right guaranteed by their Constitution to adopt constitutional amendments through ballot initiatives. Plaintiffs have a fundamental right guaranteed by the First and Fourteenth Amendments of the U.S. Constitution to advocate for such initiatives. In the current COVID-19 pandemic, North Dakota law unduly burdens Plaintiffs' rights. Plaintiffs seek a preliminary injunction against this unconstitutional application of North Dakota's requirements for constitutional amendments.

Plaintiffs are a sponsor, volunteer canvasser, and supporters of a constitutional initiative for the November 2020 election ("Proposed Amendment") that would create an independent commission for legislative redistricting, establish open primary elections using instant runoff voting, require that voting machines produce a paper record of each vote cast and require a random audit of election results, and give qualified military-overseas voters more time to vote. Voters

signing a petition to place the Proposed Amendment on the November 2020 ballot must sign the petition in-person in the presence of the circulator, and the circulator must sign an affidavit in the presence of a notary. Given the COVID-19 pandemic, and the public-health restrictions imposed by federal, state, and local authorities on in-person contact to reduce the spread of the virus, the signature-gathering requirements have become dangerous and unnecessarily difficult to satisfy.

Circulators cannot circulate petitions and witness the signing of petitions without coming within six feet of a voter, the recommended safe distance to avoid transmitting or contracting the virus. A substantial number of North Dakotans are at high risk if they contract the virus and have been advised to avoid all contact, preventing them from signing Plaintiffs' petition. The public events, gatherings, and businesses at which canvassers collect signatures have all been canceled or strictly limited due to COVID-19. And any effort to engage in door-to-door canvassing would be contrary to public health guidelines and restrictions, and would undermine efforts to reduce the spread of the virus. As a result of the current health crisis and the understandable restrictions imposed to combat it, Plaintiffs are unduly burdened by North Dakota's signature gathering requirements. Because Plaintiffs cannot comply with both North Dakota's in-person signature gathering requirements while avoiding in-person interactions such as canvassing for voters' signatures, they seek relief from this Court—as applied to them in the context of the current pandemic crisis—to protect Plaintiffs' Constitutional rights.

The burden presented by North Dakota's in-person signature requirement is particularly severe and irreparable as applied to Plaintiffs, because redistricting ordinarily occurs once a decade, following the decennial census (in this cycle, redistricting will occur in 2021). Thus, if Plaintiffs cannot get their Proposed Amendment on the ballot in November 2020, they may be

unable to reform the state’s redistricting process before the new district plans are drawn in 2021, potentially delaying reform until after the 2030 census.

As explained below, Plaintiffs seek the ability to gather signatures using secure, reliable, and verifiable electronic means. This as-applied relief is carefully tailored to the reality of the current crisis, but also accomplishes the state’s objectives of ensuring that supporting signatures are verified and that the initiative has demonstrated widespread support among voters.

FACTUAL BACKGROUND

I. Petition Signature Gathering Requirements

Under the North Dakota Constitution, “the people reserve the power . . . to propose and adopt constitutional amendments by the initiative.” N.D. Const. art. 3, § 1. The initiative and referendum provision of the Constitution is “self-executing . . . [and] laws may be enacted to facilitate and safeguard, but not to hamper, restrict, or impair these powers.” *Id.*

Initiative petitions must be filed with the Secretary of State “not less than one hundred twenty days before the statewide election at which the measure is to be voted upon”—this year by July 6, 2020—and must be proposed by four percent of the legal voters, which comes to 26,904 valid signatures. *Id.* §§ 5, 9. Each copy of the petition “must remain in the physical possession” of the circulator, who must witness the signatures, and each copy must be accompanied by an affidavit signed by the circulator stating “that the electors who have signed the petition did so in their presence.” *Id.* § 3; North Dakota Secretary of State, *Initiating and Referring Law in North Dakota* 5, <https://vip.sos.nd.gov/pdfs/Portals/initiating.pdf>. The circulator’s affidavit must be signed in the presence of a notary public. N.D. Cent. Code Ann. §16.1-01-09(1). Petition signatures may not be electronically collected. *Id.* § 16.1-01-09(2). Finally, the Secretary of State must determine the sufficiency of the signatures within 35 days of receipt. *Id.* § 16.1-01-10.

II. North Dakota Voters First

North Dakota Voters First (“NDVF”) is a 501(c)(4) organization founded in February 2020 to sponsor the Proposed Amendment, which establishes a nonpartisan redistricting process, among other reforms. Ex. 1 (Sawicki Dec.) ¶ 4. On April 30, 2020, the Secretary of State approved the proposed language for the initiative, at which point NDVF could collect signatures. *Id.*

III. The COVID-19 Pandemic’s Impact

A. The Pandemic and the Measures Addressing It

The Governor declared a State of Emergency in North Dakota on March 13, 2020. Ex. 2 (E.O. 2020-03). In that Executive Order, the Governor stated that “proactively implementing preparedness, containment and mitigation measures to slow the transmission and reduce the impact of the virus is in the best interest of North Dakota and its citizens.” *Id.*

Over the course of only a few days in late March, the Governor issued a series of executive orders to combat the virus. In an Executive Order issued on March 19, 2020, the Governor noted that “in order to reduce the spread of COVID-19, to protect and save lives, it is necessary and reasonable to accelerate the social distancing recommendations issued by the United States Centers for Disease Control and the North Dakota Department of Health,” and mandated that restaurants, bars, breweries, cafes, and all other on-site dining establishments close to on-site patrons. Ex. 3 (E.O. 2020-06). The Executive Order also directed all recreation facilities, health clubs, athletic facilities, and theaters, including movie theaters and music or entertainment venues, to close and cease operations. *Id.* Finally, the Governor mandated that state agencies and offices rapidly move all non-essential staff members to remote work and closed the North Dakota Capitol to visitors unless by appointment. *Id.* On March 20, 2020, the Governor issued a fifth Executive Order expanding a previous one suspending certain licensing requirements for hospitals and health care

facilities to include telehealth procedures. Ex. 4 (E.O. 2020-05). On March 22, 2020, a tenth Executive Order closed all public and non-public K-12 schools and ordered a transition to distance learning. Ex. 5 (E.O. 2020-10). On March 27, 2020, Governor Burgum issued Executive Orders expanding the March 19, 2020 Order to cover salons, barber shops, and tattoo, tanning, and massage facilities. Ex. 7 (E.O. 2020-06.1); Ex. 8 (E.O. 2020-06.2); Ex. 9 (E.O. 2020-06.3).

Recognizing the need to balance public participation in a democracy with the efforts to contain COVID-19, the Governor also issued executive orders addressing voting and public meetings. On March 26, 2020, he issued a thirteenth Executive Order regarding voting, which was intended to remain in place for the duration of the emergency. This order sought “[t]o maintain the mitigating measures recommended by federal and state health officers, including the exercise of social distancing and eliminating any group gathering of more than 10 people.” Ex. 6 (E.O. 2020-13). The order “strongly encouraged” all county commission boards to authorize vote by mail for the June 2020 election and establish secure mail ballot drop locations, suspended requirements regarding in-person polling places, expanded the time period in which counties can open and process mail ballots, and mandated that the Secretary of State send mail ballot application forms, instructions, and return envelopes to all individuals listed in the State’s Central Voter File. *Id.* On March 30, 2020, the Governor issued a sixteenth Order enabling remote participation in public meetings to promote social distancing. Ex. 10 (E.O. 2020-16).¹

On April 2, 2020 Governor Burgum issued—and on April 7, 2020 largely reaffirmed—an Executive Order strongly encouraging North Dakota school boards to authorize vote by mail for

¹ On March 30, 2020, Governor Burgum again stressed the importance of social distancing during the COVID-19 pandemic, stating that recent deaths due to the virus were “a harsh but important reminder that we need to take this virus seriously and do our part to prevent the spread.” *Burgum Stresses Social Distancing, Staying Home as ND Records Two Additional Deaths Related to COVID-19*, N.D. Dep’t of Health (March 30, 2020), <https://www.health.nd.gov/news/burgum-stresses-social-distancing-staying-home-nd-records-two-additional-deaths-related-covid>.

the 2020 annual election and any school district special election, and to establish secure mail ballot drop locations. For school boards that did so, the two Orders lifted some polling place requirements and expanded the time period in which school board appointed election judges can open and process mail ballots. Ex. 11 (E.O. 2020-19); Ex. 12 (E.O. 2020-19.1).

North Dakota has taken additional actions to protect vulnerable populations from COVID-19. On April 6, 2020, Governor Burgum issued his twenty-second Executive Order, suspending visitation in North Dakota long-term care facilities, such as nursing homes and basic care facilities, with limited exceptions for end-of-life or compassionate care for residents with terminal conditions. Ex. 13 (E.O. 2020-22). And on April 26, the North Dakota Department of Health issued an order stating, among other things, “increased transmission of [COVID-19] poses a substantial threat to public health and the health care system.” Ex. 14 (Dep’t of Health Order #2020-07).

On April 29, 2020, Governor Burgum issued another Executive Order allowing some businesses to reopen if they adopt and follow general and industry-specific standards outlined in the Governor’s ND Smart Restart Protocol. Ex. 15 (E.O. 2020-06.4). These restrictions include occupancy limits, physical distancing standards (marking six-foot increments for lines), and limits on the number of people allowed to gather at one time.²

Local governments in North Dakota have also put in place limiting measures in light of the COVID-19 pandemic.³ Courts, including this Court, have also responded to the pandemic by

² *Restaurants, Bars, Breweries, Distilleries, and Food Trucks*, NDResponse.gov, <https://ndresponse.gov/covid-19-resources/covid-19-business-and-employer-resources/nd-smart-restart/nd-smart-restart-protocols/restaurants-bars>; *Movie Theaters*, NDResponse.gov, <https://ndresponse.gov/covid-19-resources/covid-19-business-and-employer-resources/nd-smart-restart/nd-smart-restart-protocols/movie-theaters>; *Standards for All Industries*, NDResponse.gov, <https://ndresponse.gov/sites/www/files/documents/covid-19/ND%20Smart%20Restart/Standards%20for%20all%20Industries.pdf>.

³ *What can you do?*, City of Fargo, <https://fargond.gov/city-government/departments/fargo-cass-public-health/coronavirus-disease-2019-covid-19>; see also *City Facilities Will Be Reactivated on May 4 Utilizing “Reopening Fargo Phase One” Plan* (May 1, 2020), City of Fargo, <https://fargond.gov/news-events/city-news-room/post-detail?id=5eace3395aeb770bc651ab1>.

issuing orders to limit in-person contact. *See* Ex. 16 (D.N.D. Admin. Order); Ex. 17 (N.D. Sup. Ct. Admin. Order 25). On April 15, 2020, the North Dakota Supreme Court amended its order to extend those suspensions through July 1, 2020. Ex. 17 (N.D. Sup. Ct. Admin. Order 25).

As of May 7, 2020, the United States had 1,193,813 reported cases of COVID-19 and 70,802 reported deaths.⁴ North Dakota had 1,323 reported cases and 31 reported deaths.⁵

B. The Effect of COVID-19 on NDVF's Ballot Initiative

As a result of these orders and public health advisories to socially distance and avoid in-person contact, NDVF has not been able to start collecting signatures. Ex. 1 (Sawicki Dec.) ¶ 9. As NDVF's Chair explains, "the cancellation of large sports, entertainment and other events is a very serious blow to the petition drive. These events provide the most productive venues for collecting signatures. The concentration of many people in one place makes it possible to gather a large number of signatures in a short time." *Id.*; Ex. 18 (Oxendahl Dec.) ¶¶ 4, 7; Ex. 19 (Altenburg Dec.) ¶ 10. Although circulators also obtain signatures at restaurants and bars, these venues are subject to strict limitations on the number of patrons as well as social distancing requirements. Ex. 1 (Sawicki Dec.) ¶ 10; Ex. 15 (E.O. 2020-06.4). Moreover, NDVF is concerned for the health of the canvassers, as "each volunteer soliciting signatures would be exposed to many individuals. Those who wish to sign would have to take the clipboard and pen from the volunteer and pass it back when they are done. Under the current circumstances, the risk that volunteers will become infected with COVID-19 is unacceptably high." Ex. 1 (Sawicki Dec.) ¶ 13 (also noting that citizens

⁴ *Coronavirus Disease 2019 (COVID-19)*, Centers for Disease Control, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited May 7, 2020 at 9:50 AM Central).

⁵ *Coronavirus Cases*, N.D. Dep't of Health, <https://www.health.nd.gov/diseases-conditions/coronavirus/north-dakota-coronavirus-cases> (last visited May 7, 2020 at 9:50 AM Central).

would be “reticent to engage with volunteers seeking signatures on NDVF’s petition,” *id.* ¶ 12); Ex. 18 (Oxendahl Dec.) ¶ 7.

Even if NDVF could continue gathering signatures, many potential signers are inaccessible to canvassers because they are complying with social distancing and quarantine restrictions. Ex. 20 (Sinner Dec.) ¶¶ 3-6; Ex. 21 (Quamme Dec.) ¶¶ 4-6; Ex. 19 (Altenburg Dec.) ¶¶ 3, 10. This is especially true for North Dakotans whose age or immunocompromised status puts them at heightened risk of contracting COVID-19 and suffering severe health problems or death.

Prior to the COVID-19 pandemic, NDVF anticipated obtaining the number of signatures required for ballot access. Ex. 1 (Sawicki Dec.) ¶ 5. However, “[t]he COVID-19 pandemic, and the orders and recommendations that address it, have made it dangerous and unnecessarily difficult for NDVF to collect the requisite number of signatures by the statutory deadline.” *Id.* ¶ 9. As Ms. Sawicki states, “it will be difficult, if not impossible, to obtain a signature from an individual while maintaining a separation of at least six feet.” *Id.* ¶ 11. Ms. Sawicki further explains that “[t]he impediments to collecting the requisite signatures on NDVF’s petition all stem from the requirement that petitions be signed in person. Allowing electronic signatures would remove these impediments, and afford the people of North Dakota the opportunity to vote on these important reforms.” *Id.* ¶ 14.

LEGAL STANDARD

District courts have “broad discretion when ruling on preliminary injunction requests.” *CDI Energy Servs. v. W. River Pumps, Inc.*, 567 F.3d 398, 401 (8th Cir. 2009) (quoting *Coca-Cola Co. v. Purdy*, 382 F.3d 774, 782 (8th Cir. 2004)). The court considers four factors in considering whether to grant a preliminary injunction: (1) “the likelihood of success on the merits,” (2) “the

presence or risk of irreparable harm,” (3) “the balancing of the harms of granting or denying an injunction,” and (4) “the public’s interest.” *Id.*

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits of their Claims.

Plaintiffs are likely to succeed on the merits of their First and Fourteenth Amendment claims because North Dakota’s in-person signature requirements—specifically, the “wet” signature requirement and the in-person witnessing and notarization requirements—constitute a severe burden as applied during the COVID-19 pandemic. Compl. ¶¶ 92-100, ECF No. 1. Without an order from this Court, the North Dakota laws governing initiated measures will severely and unnecessarily burden the ability of Plaintiff NDVF to gain access to the ballot, the ability of Plaintiffs Whitney Oxendahl and Lois Altenburg to circulate petitions, and the ability of North Dakotans like Plaintiff Jane Sinner to freely speak in support of NDVF and associate with others to place it on the 2020 ballot. In addition to exacerbating a public health emergency, these severe burdens violate the Plaintiffs’ First and Fourteenth Amendment rights of ballot access, free speech, and freedom of association.

The North Dakota Supreme Court has recognized that “the people’s power to initiate or refer legislation is a fundamental right.” *Thompson v. Jaeger*, 2010 ND 174, ¶ 11, 788 N.W.2d 586. And the Supreme Court has long recognized that circulation of petitions is “core political speech” for which First Amendment protection is “at its zenith.” *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186 (1999). Although a state may regulate the initiative process, it may only do so to the extent that the regulation “does not restrict political speech.” *Hoyle v. Priest*, 265 F.3d 699, 704 (8th Cir. 2001). When analyzing the constitutionality of an electoral regulation, the Court “must weigh ‘the

character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). The Court should apply “a sliding standard of review to balance these two interests. Severe burdens on speech trigger an exacting standard in which regulations must be narrowly tailored to serve a compelling state interest, whereas lesser burdens receive a lower level of review.” *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616 (8th Cir. 2001); *see also Green Party of Ark. v. Martin*, 649 F.3d 675, 680 (8th Cir. 2011).

A burden that “operate[s] to freeze the political status quo” is severe and warrants strict scrutiny. *Martin*, 649 F.3d at 685 (quoting *Jenness v. Fortson*, 403 U.S. 431, 438 (1971)). Likewise, “a law severely burdens voting rights if the burdened voters have few alternate means of access to the ballot,” and such a “law impermissibly restricts ‘the availability of political opportunity.’” *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998) (quoting *Anderson*, 460 U.S. at 789). Indeed, “[t]he hallmark of a severe burden is exclusion or virtual exclusion from the ballot.” *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016).

Even where a burden is less than severe and thus subject to less exacting scrutiny, the court’s review is “not . . . rational-basis inquiry.” *Green Party of Ark. v. Daniels*, 733 F. Supp. 2d 1055, 1062 (E.D. Ark. 2010). Rather, “the Court must evaluate the precise interests advanced by the State,” which must be “reasonable and nondiscriminatory,” and “must consider the extent to which the State’s interest require the burden” imposed.” *Id.*; *see also Burdick*, 504 U.S. 434 (quoting *Anderson*, 460 U.S. at 789). In doing so, courts do not consider each regulation in

isolation, but rather “evaluate the combined effect of the statutory requirements.” *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F. Supp. 690 (E.D. Ark. 1996) (citing *Republican Party of Ark. v. Faulkner County, Ark.*, 49 F.3d 1289, 1295, 1297 (8th Cir. 1995)).

In *Esshaki v. Whitmer*, the court enjoined Michigan requirements governing collection of signatures for candidate ballot access as severe burdens unsupported by a compelling state interest in light of the COVID-19 pandemic. The court reasoned that the emergency orders requiring social distancing “ha[ve] pulled the rug out from under [candidates’] ability to collect signatures,” have “shuttered” locations and events at which signatures are normally gathered, and have left only “prohibitively expensive” means to obtain signatures. Ex. 22 (Slip Op. at 21), No. 2:20-cv-10831-TGB-EAS (E.D. Mich. Apr. 20, 2020), ECF No. 23. The court noted that “[a]bsent relief, Plaintiff[] lack[s] a viable, alternative means to procure the signatures he needs” and thus “faces virtual exclusion from the ballot.” *Id.* The court thus “ha[d] little trouble concluding that the unprecedented—though understandably necessary—restrictions on daily life . . . when combined with the ballot access requirements . . . have created a severe burden on Plaintiff’s exercise of his free speech and free association rights under the First Amendment, as well as his due process and equal protection rights under the Fourteenth Amendment—as expressed in his effort to place his name on the ballot for elective office.” *Id.* at 21-22 (footnote omitted). The court’s injunction required the state, among other things, to implement a “user-friendly” system to “permit signatures to be gathered through the use of electronic mail” and to permit the signature to be “appropriately witnessed . . . through digital means” similar to other witnessing requirements relaxed by the state due to the pandemic.⁶ *Id.* at 35-36.

⁶ Courts have also granted other forms of relief from signature gathering requirements as a result of the COVID-19 pandemic. See *Faulkner v. Va. Dep’t of Elections*, CL 20-1456 (Va. Cir. Ct. Mar. 25, 2020) (reducing signature requirement 65% in light of COVID-19); *DNC v. Bostelmann*, No. 20-cv-249-wmc, 2020 WL 1638374, at *22 (W.D. Wis. Apr. 2, 2020) (ordering, as modified on appeal, extension of deadline to request absentee ballot,

Here, Plaintiffs do not mount a facial challenge to North Dakota’s initiative signature-gathering requirements. Rather, Plaintiffs contend that the specific in-person signature requirements are unconstitutional as applied to Plaintiffs during the current COVID-19 pandemic. As Plaintiffs explain below, North Dakota’s requirements of “wet” signatures, that the signing be witnessed in-person, that the circulator’s affidavit be notarized in-person, constitute unconstitutional burdens on Plaintiffs’ First and Fourteenth Amendment rights when combined with the restrictions on in-person contact and closure of public gatherings imposed by the Governor’s Executive Orders, the recommendations by national and state public health authorities to deal with COVID-19, and the risks of the contracting the disease. Plaintiffs seek relief limited in scope to the current crisis.

A. The COVID-19 Pandemic and Response Has Created Severe Burdens for Plaintiffs’ Right to Access the Ballot, and to Circulate and Sign Petitions.

North Dakota’s in-person signature gathering requirements, in the context of the restrictions imposed as a result of the COVID-19 pandemic, create severe burdens for Plaintiffs. The requirements necessitate close in-person contact between the canvasser and the voter, and the canvasser and a notary public. These requirements—that the voter make a “wet” signature on a paper petition, that the circulator witness that signing in-person, and that the circulator’s affidavit be notarized in-person, create insurmountable hurdles in light of the current pandemic. These requirements place a severe burden on potential signers like Jane Sinner and Lois Altenburg, on canvassers like Whitney Oxendahl, and on the NDVF campaign.

In the context of the COVID-19 pandemic and the public health restrictions, North Dakota’s in-person signature requirements impose severe burdens, including:

deadline to postmark absentee ballot to election day, and deadline for absentee ballots to be received to six days after election, in light of severe burdens caused by COVID-19).

- NDVF cannot reasonably satisfy the in-person signature requirements while social distancing recommendations are in place. *See* Ex. 1 (Sawicki Dec.) ¶¶ 9-14.
- Plaintiff Whitney Oxendahl wants to collect signatures for NDVF, but cannot do so given social distancing recommendations and widespread fears regarding coronavirus. Ex. 18 (Oxendahl Dec.) ¶¶ 6-7.
- Plaintiff Jane Sinner wants to sign the NDVF petition. But she is immunocompromised due to her severe asthma, and would have to disregard concerns for her own health, as well as guidance from the CDC and North Dakota Department of Health, to have her signature on the NDVF petition witnessed by a circulator. Ex. 20 (Sinner Dec.) ¶ 5.
- Plaintiff Lois Altenburg intended to collect signatures for the NDVF campaign and sign NDVF’s petition. Ex. 19 (Altenburg Dec.) ¶¶ 7-8. However, because of her “age, and [her] husband’s health conditions, particularly his COPD, it would be dangerous for [her and her husband] to come into contact with people while the COVID-19 pandemic continues.” *Id.* ¶ 3. Thus, Ms. Altenburg cannot meet with a circulator to witness her signature, and neither can her husband.
- Beverly Quamme lives in Sheyenne Crossings, a continuing care facility in Fargo with assisted living apartments, nursing home care, and memory care. Ex. 21 (Quamme Dec.) ¶ 2. To prevent the spread of COVID-19 in their community, Sheyenne Crossings has “completely banned third party visitation and recommends that no one leave their unit.” *Id.* Mrs. Quamme cannot meet with a circulator to witness her signature, and neither can her husband, who lives with her and has stage IV cancer. *Id.* ¶ 2.

In addition, not only is the close contact necessary to solicit signatures problematic, but the exchanging of petition papers and pens back and forth among various voters and circulators would

risk exposing every voter and circulator who touched the pages and pens to a potential vector of COVID-19. *Id.*; Ex. 1 (Sawicki Dec.) ¶ 13.

The state has recognized the dangers posed by other in-person requirements during the COVID-19 pandemic. For example, the Governor issued orders allowing for voting by mail. Ex. 6 (E.O. 2020-13), Ex. 11 (E.O. 2020-19); Ex. 12 (E.O. 2020-19.1). As the Governor acknowledged, “in the interest of public health and safety and in support of the COVID-19 public health crisis and the declared state of emergency in North Dakota, it is essential to suspend the operation of certain election laws, so the right to vote in North Dakota can be exercised by all eligible citizens.” Ex. 6 (E.O. 2020-13). The Governor also praised the 33 of North Dakota’s 53 county commissions that had already authorized mail ballot elections, as “enabling voters in each of th[o]se counties to exercise their fundamental right to vote as well as practicing mitigating measures such as social distancing.” *Id.*

The in-person aspects of the signature gathering process—the required “wet” signature on paper and the in-person witness and notarization requirements—are severely burdensome as applied to Plaintiffs given the COVID-19 pandemic because the practical hurdles to gathering signatures in person, let alone the health consequences of such actions, are simply too high to overcome. As such, the net effect of these requirements and the State’s COVID-19 restrictions “operate[s] to freeze the political status quo,” *Martin*, 649 F.3d at 685, and result in NDVF’s “virtual exclusion from the ballot,” *Libertarian Party of Ky.*, 835 F.3d at 574. These in-person requirements thus pose a severe burden to Plaintiffs’ First and Fourteenth Amendment rights.

The Court must carefully review the “character and magnitude” of the burden that each rule imposes on the Plaintiffs’ First and Fourteenth Amendment rights, but ultimately “when examining [an] entire statutory scheme it is important to evaluate the combined effect of the

statutory requirements.” *Citizens to Establish a Reform Party in Arkansas*, 970 F. Supp. at 690. In this case the combined effect of requiring 26,904 wet signatures that must be witnessed (and notarized) in person, will be to prevent the proposed amendment being put forth by NDVF from being on the ballot in 2020. Importantly, if NDVF’s proposal is not on the ballot in 2020, then its redistricting reforms will not be in place in 2021 when the state’s district lines are drawn for the next decade. These requirements thus work together to “freeze the political status quo” for potentially another decade. *See Martin*, 649 F.3d at 685. The current ballot-access requirements, as applied to Plaintiffs in light of the COVID-19 pandemic, are so severe that they preserve the redistricting status quo, deny the public the right to be heard on the issue, and potentially extinguish any possibility of reform until 2031.

If signatures could be gathered electronically (without a live witness), via a service like DocuSign, then Mrs. Altenburg and Ms. Sinner would be able to support the petition by signing online, Ms. Oxendahl could circulate petition requests online, and NDVF could hire a firm to do digital outreach to voters to sign the petition. This would provide a secure avenue for the core political speech of circulating and signing petitions while adhering to the social distancing requirements due to the pandemic. Ex. 19 (Altenburg Dec.) ¶¶ 7-10; Ex. 21 (Quamme Dec.) ¶¶ 4-6; Ex. 20 (Skinner Dec.) ¶ 3, 4; Ex. 18 (Oxendahl Dec.) ¶¶ 7-8, Ex. 1 (Sawicki Dec.) ¶ 14; Ex. 23 (Levy-Pollans Dec.) ¶ 2-3.

B. The State Interests in Preventing Fraud and Ensuring Wide Support for Ballot Measures Do Not Outweigh the Plaintiffs’ Severe Burdens.

Two potential justifications the State may offer for ballot access restrictions in North Dakota are to prevent fraud and to ensure widespread support for ballot measures. The in-person signature requirements are not narrowly tailored to those ends, and those justifications for the current requirements do not outweigh the burdens on Plaintiffs’ First and Fourteenth Amendment

rights. That is so whether the Court characterizes the burden as severe—in which case the State must proffer compelling justifications that are narrowly tailored—or as less than severe and subject to a more flexible balancing standard. *See Initiative & Referendum Inst.*, 241 F.3d at 616. Under either level of review, North Dakota’s interests do not justify the burden imposed as-applied to Plaintiffs during the COVID-19 pandemic.

North Dakota has an interest in preventing signature fraud on ballot petitions, but regulations that seek to further that interest must be narrowly tailored to justify a severe burden, or otherwise sufficiently justified to “require the burden imposed.” These are neither. As the district court recognized in Michigan, the realities of the COVID-19 pandemic require more tailored limitations on signature gathering in order to justify the burdens imposed. *Esshaki*, Ex. 22 (Slip Op. at 22-26). On April 23, 2020, an Illinois federal court agreed, providing relief to new and independent political parties and voters who challenged Illinois’s in-person signature collection and witnessing requirements during the COVID-19 pandemic. *Libertarian Party of Illinois v. Pritzker*, No. 20-cv-2112, 2020 WL 1951687 (N.D. Ill. Apr. 23, 2020). Like the district court in Michigan, the Illinois court recognized that “[t]he combined effect of the restrictions on public gatherings” imposed in response to COVID-19 and the state’s “usual in-person signature requirements” for ballot qualification created a “nearly insurmountable hurdle” for certain candidates to qualify for the November 2020 general election ballot. *Id.* at *4.

The *Libertarian Party of Illinois* court concluded that it had the power to issue an injunction and order appropriate relief to address violations of plaintiffs’ First and Fourteenth Amendment rights resulting from “the extraordinary circumstances arising from COVID-19, combined with the ballot access restrictions.” *Id.* at *3. Specifically, the court held it had the power to compel a state “to bring its election procedures into compliance with rights guaranteed by the federal

Constitution,” including by “requir[ing] the state to disregard provisions of state law that otherwise might ordinarily apply.” *Id.* (quoting *Judge v. Quinn*, 624 F.3d 352, 355-56 (7th Cir. 2010)). The court therefore issued a narrow order enjoining, *inter alia*, the portions of Illinois law requiring in-person signatures on ballot access petitions “for the November 2020 general election only,” allowing electronic petition signatures for that election. *Libertarian Party of Ill.*, No. 20-cv-2112, Prelim. Inj. Order, ECF No. 27 at 1-2 (N.D. Ill. Apr. 23, 2020).

In addition to *Esshaki* and *Libertarian Party of Illinois*, several state courts have modified signature requirements for candidates and ballot initiatives given the burden of signature collection during the pandemic. *See Faulkner v. Va. Dep’t of Elections*, CL 20-1456 (Va. Cir. Ct. Mar. 25, 2020) (reducing signature requirement); *Goldstein v. Sec’y of Commonwealth*, No. SJC-12931, 2020 WL 1903931 (Mass. Apr. 17, 2020) (same, including ordering the acceptance of electronic rather than wet-ink original signatures); *Dennis v. Galvin*, No. SJ-2020-278 (Mass. Apr. 29, 2020) (extending relief granted in *Goldstein* to ballot initiative petitions).

Indeed, even before this pandemic, courts found the state’s interest in preventing fraud and corruption inadequate in some cases to support the burdens imposed. For example, in *Buckley*, the Supreme Court recognized that Colorado sought “to protect the integrity of the initiative process, specifically, to deter fraud and diminish corruption.” *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 204–05 (1999). But, it noted, Colorado “retains an arsenal of safeguards” including making it criminal to forge initiative-petition signatures, and deeming signatures void if the initiative has violated any laws governing circulation. *Id.* at 205.

North Dakota’s in-person requirements are not necessary to prevent fraud. The State could achieve its goal while allowing collection of digital signatures. Services like DocuSign can ensure “comprehensive security from start to finish” including by a digital audit trail, anti-tampering

control, and unalterable, systematic capture of signing data.⁷ Ex. 23 (Levy-Pollans Dec.) ¶ 3. During the present crisis, the state has recognized that fraud prevention did not preclude similar modifications in electoral procedures. *See, e.g.*, Ex. 6 (E.O. 2020-13) (encouraging vote-by-mail options); Ex. 10 (E.O. 2020-16) (enabling remote participation for public meetings to promote social distancing). Moreover, as the Supreme Court observed in *Buckley*, North Dakota has numerous other tools to deter and punish fraud or corruption in the election process.

North Dakota also has an interest in ensuring that “the ballot measures enjoy significant support of interested citizens who are registered to vote on them.” *Hoyle*, 265 F.3d. at 703. However, this goal would be undisturbed in this case, as Plaintiffs are not asking for a reduction in the number of signatures, but only a change in the method of collecting them. Moreover, the November general election serves as the ultimate determination of public support.

II. Plaintiffs Will Suffer Irreparable Injury Without an Injunction.

If this Court does not grant an injunction, Plaintiffs will suffer imminent and irreparable injury. Courts have routinely held that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373-74 (1976); *Johnson v. Minneapolis Park and Recreation Bd.*, 729 F.3d 1094, 1101 (8th Cir. 2013).

Here, federal and state guidance and orders in place regarding social distancing and limitations on gatherings due to COVID-19, coupled with state legal requirements for petition signature-gathering, *already* have stymied Plaintiffs’ efforts to get the proposed amendment on the ballot, and will continue to do so indefinitely. Plaintiffs’ declarations establish that given the current restrictions, they cannot meet the state constitutional and statutory requirements for petition

⁷ DocuSign, *Product security*, <https://www.docusign.com/trust/security/product-security>.

signature-gathering. Ex. 1 (Sawicki Dec.) ¶¶ 9-13; Ex. 18 (Oxendahl Dec.) ¶¶ 4-7. Far from a minimal burden, the result is that Plaintiffs are required to ignore the restrictions and federal and state guidance imposed to combat COVID-19, expose themselves to hefty fines, and risk their health and the health of others by attempting to gather signatures, or they can gather virtually no signatures at all. Neither option is viable.⁸

Further adding to the irreparable nature of the Plaintiffs injury is that, absent an injunction against the State's restrictions, the Proposed Amendment will be eliminated from the ballot in a critical year for the Amendment's actual substantive goal to ensure fairly drawn legislative districts. If Plaintiffs are not able to get the Proposed Amendment on the November 3, 2020 ballot, they may not have another opportunity to do so until *after* new district maps are drawn, potentially delaying redistricting reform in the state until 2030.

III. The Balancing of Harm to Others and the Public Interest

When, as here, the "Government is the opposing party," the remaining two factors for a preliminary injunction, "harm to the opposing party and weighing the public interest . . . merge." *Nken v. Holder*, 556 U.S. 418, 435 (2009). The public interest in this case favors a preliminary injunction, as such relief would allow North Dakotans to express their democratic will regarding the Proposed Amendment. Nationwide, independent redistricting commissions are extremely popular across party lines, with at least 60 percent of Democrats, Independents, and Republicans supporting them.⁹ NDVF's Proposed Amendment is also popular in North Dakota, with at least

⁸ See, e.g., *Fargo Mayor Says You Could Face Up To A \$1,000 Fine For Violating Social Distancing Rules*, Valley News (Apr. 15, 2020), <https://www.valleynewslive.com/content/news/Fargo-Mayor-says-you-could-face-a-fine-of-up-to-1000-for-violating-social-distancing-orders-569679921.html>.

⁹ See *New Bipartisan Poll Shows Support for Supreme Court to Establish Clear Rules for Gerrymandering*, CLC (Jan. 28, 2019), <https://campaignlegal.org/update/new-bipartisan-poll-shows-support-supreme-court-establish-clear-rules-gerrymandering>.

51% of North Dakota voters supporting the amendment.¹⁰ The people of North Dakota deserve the opportunity to vote on this important issue. It serves the public interest to allow them to do so.

In addition, Defendant will suffer no harm if an injunction is granted, as his ministerial role of ensuring the validity of petition signatures will not be impeded. Plaintiffs are asking for very limited relief in the face of a global pandemic, relief that would only apply to Plaintiffs' efforts for the November 3, 2020 election. Further, if Defendant did incur harm, it could not begin to compare to the injury suffered by Plaintiffs---the Hobson's choice of losing their fundamental constitutional rights to organize to get the Proposed Amendment on the ballot, or suffering the legal, public health, and personal risk of violating the State's or local government's directives regarding gatherings and social distancing in order to collect signatures. As a federal district court recently held, "the broader public interest is not served by preserving the current signature-gathering scheme at the cost of encouraging [campaigns] and their supporters to risk their health and criminal penalties to gather signatures." Ex. 22 (Slip Op. at 30).

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for preliminary injunction should be granted such that (1) the State should be barred from rejecting signatures because they are electronic or submitted using a service such as DocuSign, and (2) the requirements of in-person witnessing of voters' signatures and in-person notarization of canvassers' signatures be enjoined.

¹⁰ *Polling Data Memo* (May 4, 2020), <https://northdakotavotersfirst.org/polling-data-memo/>.

Dated: May 7, 2020

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CERTIFICATE OF SERVICE

I certify that on May 7, 2020, I caused a copy of the foregoing Brief and Exhibits 1-23 to be served upon counsel for Defendant by e-mail at the address below.

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