

SUPREME COURT
OF THE
STATE OF NORTH DAKOTA

Kenton Onstad, individually in his)
capacity as a resident and elector of)
North Dakota District 4 and as chair of)
the District 4 Democratic-NPL Party)
)
Petitioner)
)
vs.)
)
Alvin Jaeger, in his capacity as)
North Dakota's Secretary of State,)
)
Respondent)

PETITION FOR PREROGATIVE WRIT OF MANDAMUS COMPELLING
RESPONDENT TO REMOVE TERRY B. JONES FROM THE GENERAL ELECTION
BALLOT AS A CANDIDATE FOR THE HOUSE OR REPRESENTATIVES
FOR LEGISLATIVE DISTRICT 4

PETITION

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STATEMENT OF ORIGINAL JURISDICTION

[1] This Petition respectfully asks this Court to invoke its original jurisdiction. The North Dakota Supreme Court has original jurisdiction to hear and rule on original and remedial writs as it deems necessary. N.D. Const. art. VI § 2; N.D.C.C. § 27-02-04. This includes writs of mandamus. N.D.C.C. § 32-34-01. The Petition seeks relief to protect the integrity of North Dakota’s upcoming general election and the rights of its voters. As such, the issue before this Court is *publici juris*, giving rise to original jurisdiction.

It is well settled that the power of this court to issue writs in the exercise of its original jurisdiction extends only to those cases in which the question presented is *publici juris*, wherein the sovereignty of the State, the franchises or prerogatives of the State, or the liberties of its people are affected. [internal citation omitted] To warrant the exercise of this court’s original jurisdiction, the interests of the State must be primary, not incidental, and the public, the community at large, must have an interest or right which may be affected. [internal citation omitted]

State ex rel. Wefald v. Meier, 347 N.W.2d 562, 564 (N.D. 1984).

[2] Further, jurisdiction is authorized by N.D.C.C. § 16.1-01-08, which states in regard to correcting ballot errors, “[I]f the secretary of state refuses to act, any person may petition the supreme court ... for an order compelling the correction of the error, wrong, neglect or act.”

ISSUE PRESENTED

[3] Whether it is erroneous to place the name of Terry B. Jones (“Jones”) on the ballot as a candidate for the North Dakota House of Representatives, Legislative District 4 given the publicly-available evidence that he has not been a

North Dakota resident for one year immediately prior to the November 3, 2020 election as required by N.D. Const. art. IV, § 5.

STATEMENT OF THE CASE AND RELIEF SOUGHT

[4] This is a Petition for a prerogative writ of mandamus seeking declaratory relief pursuant to Rule 21 of the North Dakota Rules of Appellate Procedure. N.D.R.App.P. 21. The Petitioner, Kenton Onstad, individually in his capacity as a resident and elector of North Dakota Legislative District 4, and as chairman of the District 4 Democratic-NPL Party, prays that this Court exercise its original jurisdictional authority to compel the removal of Jones from the general election ballot for the office of North Dakota House of Representatives, Legislative District 4 and declare that Jones is ineligible to be elected to office as a member of the North Dakota House of Representatives because Jones has not been a North Dakota resident for one year immediately prior to the November 3, 2020 election as required by N.D. Const. art. IV, § 5.

STATEMENT OF RELEVANT FACTS

[5] Jones is a founding organizer and member of Jones Brothers Enterprises, LLC (“the Wyoming LLC”). Jones’ Wyoming LLC was organized on or about February of 2004 for the purposes of engaging in farming, ranching, construction, and recreation. App. 6.

[6] On February 21, 2004, Jones signed the articles of organization for his Wyoming LLC, listing an address of “203 2nd Street, Otto, WY 82434[.]” App. 7.

[7] The same day, Jones voluntarily consented to serve as the registered

agent for his Wyoming, LLC, asserting that he was “[a]n individual who resides in” Wyoming. App. 8. Under Wyoming law, an individual may only¹ serve as a registered agent for a Wyoming business entity if he or she “resides in” the state of Wyoming. Wyo. Stat. Ann. § 17-28-101(a)(ii)(A).

[8] Since its organization in 2004, Jones’ Wyoming LLC has submitted “Limited Liability Company Annual Report[s]” (“Annual Reports”) to the Wyoming Secretary of State in accordance with Wyoming law. App. 8-9. Of pertinence to this case are the 2019 and 2020 Annual Reports of Jones’ Wyoming LLC, which like the Wyoming LLC’s articles of organization set forth 203 2nd Street in Otto, Wyoming as Jones’ address. *Id.* These documents also list what is apparently an adjoining address, 203 1st Street South in Otto, Wyoming, as the mailing address for Jones’ Wyoming LLC. *Id.*

[9] Publicly-available tax documents from Big Horn County, Wyoming demonstrate that Jones and his spouse own several parcels of residential property in Otto, Wyoming, including two adjoining parcels (51950940200419 and 51950940200519) on the corner of Second Street West and First Street South in that community. App. 11-16. The tax classification for these parcels, the addresses of which are apparently held out as both 203 1st Street South and 203 2nd Street in that community of approximately 50 people, is explicitly deemed residential. App.

¹ That is unless the “individual” is “[i]n the business of serving as a registered agent for more than ten (10) entities” or a “[r]egistered as a commercial agent” in accordance with Wyoming law, factual circumstances which are inapposite to this case. Wyo. Stat. Ann. § 17-28-101(a)(ii)(D).

11,14. These tax documents further indicate that payments of property taxes levied on Jones' residential parcels for the year 2019 were made on September 25, 2019, October 7, 2019, and again on June 23, 2020. App. 12, 15.

[10] Jones is serving his first term in the North Dakota Legislature as a Representative from District 4. As of September 16, 2020, Jones' most recent legislative biography on the North Dakota Legislative Branch's website invites members of the public to reach him on his cell phone by first dialing its Wyoming area code. App. 17. Likewise, his constituents are encouraged to send correspondence via facsimile to 307-762-3512 (*id.*), which a publicly-available directory of trucking companies and freight brokers identifies as being affiliated with Jones' Wyoming LLC. *See Partner Carrier, Jones Brothers Enterprises LLC aka Terry Burton Jones*, (September 16, 2020, 9:32 a.m.), <https://partnercarrier.com/WY/OTTO/JONES-BROTHERS-ENTERPRISES-LLC-USDOT-1198784>.

[11] Conversely, Jones' legislative biography does not list an address within North Dakota at which Jones resides, instead setting forth a post office box in New Town, North Dakota as a means for reaching Jones via U.S. mail. App. 17.

[12] Jones is presently seeking election to a second term in the North Dakota House of Representatives from District 4, having won North Dakota's June primary election with 1,768 votes after running unopposed. North Dakota Secretary of State, *Legislative District Results*, (September 16, 2020, 10:09 a.m.), <https://results.sos.nd.gov/resultsSW.aspx?text=Race&type=LG&map=DIST>.

[13] On September 8, Petitioner electronically sent a letter to Respondent and provided him with evidence of Jones' Wyoming residency. App. 19. Petitioner indicated in his letter that Jones should "be removed from the ballot" because he has not been a resident of the state for one year immediately prior to the upcoming general election.² *Id.* See also N.D. Const. art. IV, § 5. Petitioner also requested that Respondent "investigate the error that would occur if [. . .] Jones' name were placed on the November ballot." *Id.*

[14] Respondent refused, indicating on September 9, 2020 that he was "unable to comply" with Petitioner's request to remove Jones "from the General Election ballot as a candidate for the House of Representatives for Legislative District 4" because "Section 12 of Article IV" of the North Dakota Constitution "states that 'Each house is the judge of the qualifications of its members.'" App. 18 (internal citations omitted). Respondent has certified Jones as a candidate for Representative, Legislative District 4. App. 30.

[15] As discussed *infra*, Respondent's erroneous conclusion is based on the incomplete reading of that constitutional provision. The remainder of the third sentence of N.D. Const. art IV, § 12 specifically declares that "election contests are

² The letter also indicated Petitioner's belief that Jones "should also be removed from his current seat in the state legislature." App. 19. The request for relief in this Petition relates only to the error that has occurred by placing Jones on the November general election ballot and does not ask the Court to take any action with regard to the remainder of Jones' term in the North Dakota House of Representatives. See discussion *infra*.

subject to judicial review as provided by law.”

[16] Petitioner, having therefore exhausted his administrative remedies in accordance with N.D.C.C. § 16.1-01-08, now respectfully urges this Court to exercise its authority to compel the removal of Jones, a statutorily ineligible candidate, from the general election ballot for the office of North Dakota House of Representatives, Legislative District 4.

LAW AND ARGUMENT

I. Because Jones has not been a North Dakota resident for one year immediately prior to the November 3, 2020 general election, he is constitutionally ineligible to hold the office of Representative from District 4.

[17] Jones is constitutionally ineligible to hold the office of Representative from District 4, and it would therefore be erroneous to place his name on the ballot. *Berg v. Jaeger*, 2020 ND 178, ¶30, __N.W.2d__ .

[18] Eligibility to hold elective office in the legislative branch is governed by N.D. Const. art. IV, § 5, which declares that “[e]ach individual elected or appointed to the legislative assembly must be, on the day of the election or appointment, a qualified elector in the district from which the member was selected and must have been a resident of the state for one year immediately prior to that election.” As a separate matter, “[a]n individual may not serve in the legislative assembly unless the individual lives in the district from which selected.” N.D. Const. art. IV, § 5.

[19] Under this constitutional provision, being a resident means having a

legal residence “entitling one to vote or to hold office in the state of North Dakota.” *State ex rel. Sathre v. Moodie*, 65 N.D. 340, 258 N.W. 558, 562 (1935).

Several factors relevant to determining a legal residence are set forth in N.D.C.C. § 54-01-26:

Every person has in law a residence. In determining the place of residence, the following rules must be observed:

1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose and to which the person returns in seasons of repose.
2. There can be only one residence.
3. A residence cannot be lost until another is gained.
-
7. The residence can be changed only by the union of act and intent.

[20] “A legal residence is the place where an individual has established his home, where he is habitually present, and which he intends to return to when he is away for business or pleasure.” *Dietz v. City of Medora*, 333 N.W.2d 702, 705 (N.D. 1983). “Every person has only one legal residence, as distinguished from the possibility of several actual physical residences.” *Id.* The totality of the facts and circumstances are considered when determining the issue of legal residence. *Id.*

[21] Where a candidate “is not eligible to hold the office” he or she seeks due to failure to meet residency requirements, it is “erroneous to place [his or] her name on the ballot.” *Berg*, 2020 ND 178, ¶30, __N.W.2d__. “[A]ny person” may “petition . . . this Court ‘for an order compelling the correction of [such an] error’ if the error ‘has occurred or is about to occur in the placing of any name on an official election ballot.’” *Id.* (quoting N.D.C.C. § 16.1-08-01) (emphasis added).

[22] Even more so than in *Berg*, where this Court was initially presented with the solitary allegation that a candidate for statewide office “was ineligible to hold elective office because she voted in Nevada in the November 2016 election” (*id.* at ¶3), factual evidence in this case abounds³ that Jones has not been a North Dakota resident for one year immediately prior to the November 3, 2020 general election.

[23] The indisputable facts indicating that Jones has been a resident of Wyoming and not North Dakota for the last ten months are as follows: 1) Jones owns (app. 6) his namesake Wyoming LLC, which is operated out of its principal office in Otto, Wyoming (app. 9-10); 2) Jones conceded as a matter of law in both 2019 (app. 9) and again in 2020 (app. 10) that as registered agent for his Wyoming LLC he “resides in” the state of Wyoming (see Wyo. Stat. Ann. § 17-28-101(a)(ii)); 3) Jones, in public submissions to the Wyoming Secretary of State in 2019 and 2020, attested that his address is 203 2nd Street in Otto, Wyoming (app. 9-10); 4) Jones’ address as listed in these public submissions correspond to parcels of residential property owned by Jones and his spouse in Otto, Wyoming (app. 11-16); 5) public records demonstrate that Jones and his spouse paid property taxes for that residential property in Otto, Wyoming as recently as June of 2020 (app. 12); 6) Jones currently urges those with public business to contact him, in his

³ To the extent the Court may disagree, it may order an evidentiary hearing at which Jones can be examined regarding the facts set forth in this petition relating to his residency. *See* N.D.C.C. § 27-02-17. *See also Berg*, 2020 ND 178, ¶13, __ N.W.2d__.

capacity as a North Dakota Representative, at his Wyoming cell phone number (app. 17); and 7) Jones likewise solicits fax correspondence from constituents and others at a Wyoming number associated with his Wyoming LLC. *Id.* Conversely, Jones has not deigned to list a residential address within North Dakota at which he can be reached by those who he currently represents in the North Dakota Legislature. *Id.*

[24] As in *Berg*, Jones has “consciously availed [him]self of” his Wyoming “address in order to” serve as a registered agent for his Wyoming LLC. *Berg*, 2020 ND 178, ¶13, __N.W.2d__ . “In doing so, [h]e specifically chose not to avail [him]self of the rights of citizenship in North Dakota, but instead to avail [him]self of the rights of citizenship in” Wyoming. *Id.* While Petitioner has no doubt that Jones’ “intent was clearly to” act legally by truthfully asserting he was a Wyoming resident for purposes of serving as the Wyoming LLC’s registered agent, Jones nevertheless “indicated that [his Wyoming] address was intended by [him] to be [his] legal residence for the purpose of [acting as a registered agent] and enjoying all the civil rights and privileges that come therewith.” *Id.* By repeatedly asserting that he was a Wyoming resident “and availing [him]self of the rights of citizenship [in Wyoming]” in 2019 and 2020, Jones has “removed any doubt” that this Court should “have regarding [his] intended residency” for the year prior to the forthcoming general election. *Id.*

[25] A person can only have one residence. N.D.C.C. § 54-01-26(2). Jones’ public attestations regarding his Wyoming residence and the other incontrovertible

evidence set forth above demonstrate that he “is not eligible to hold the office of” Representative from Legislative District 4 because he has failed to satisfy the constitutional requirement of residency in North Dakota in the year preceding the upcoming general election. *Berg*, 2020 ND 178, ¶30, __N.W.2d__. “[I]t would” therefore “be erroneous to place [his] name on the ballot.” *Id.*

II. Respondent’s refusal to perform his duty to correct the ballot error of Jones’ placement on the ballot is based on an incorrect and incomplete reading of Article IV of the North Dakota Constitution.

[26] Respondent’s refusal to correct the error of placing Jones on the general election ballot is based on an unsound and incomplete reading of N.D. Const. art. IV.

[27] The determinative constitutional provision setting forth legislative residency requirements makes a clear distinction between qualifications to be “*elected . . . to the legislative assembly*” and those required to begin or continue to “*serve in the legislative assembly[.]*” N.D. Const. art. IV, § 5. The residency requirement to be *elected* to the legislative assembly is, in all material respects except save its length, identical to the residency requirement to be elected to statewide office that was at issue in *Berg*. See *Berg*, 2020 ND 178, ¶20, __N.W.2d__. (“For candidates seeking an elected office in the executive branch, N.D. Const. art. V, § 4, imposes a five-year residency requirement. By contrast, N.D. Const. art. IV, § 5, imposes only a one-year residency requirement for candidates seeking election to the legislative assembly.”).

[28] This Court recently held in *Berg* that where a candidate for statewide

office was not “a resident of this state for the five years preceding election to office[.]” (N.D. Const. art. V, § 4) “it would be erroneous to place her name on the ballot.” *Berg*, 2020 ND 178, ¶30, __N.W.2d__. The same result must be reached here under the one-year residency requirement for candidates for the legislative assembly. Jones, a candidate for election to a second term in the North Dakota House of Representatives, has not been “a resident of the state for one year immediately prior to” the upcoming November election and is therefore constitutionally ineligible. N.D. Const. art. IV, § 5. *See* discussion *supra*.

[29] Nevertheless, Respondent relies on a glaringly incomplete reading of the third sentence of N.D. Const. art. IV, § 12 as the reason for refusing to perform his duty of investigating and correcting the error of placing Jones on the ballot. Specifically, Respondent believes he is “unable to comply” with Petitioner’s request to remove Jones “from the General Election ballot as a candidate for the House of Representatives for Legislative District 4” because “Section 12 of Article IV” of the North Dakota Constitution “states that ‘Each house is the judge of the qualifications of its members.’” App. 18 (internal citations omitted).

[30] N.D. Const. art. IV, § 12 does not end as abruptly as Respondent believes. Rather, that sentence continues on, making patently clear that “election contests are subject to judicial review as provided by law.” N.D. Const. art. IV, § 12.

[31] Sections V and 12 of article IV of the North Dakota Constitution must be read together to give each meaning.

In ascertaining both the intent and general purpose, as well as the meaning, of a constitution or a part thereof, it should be construed as a whole. As far as possible, each provision should be construed so as to harmonize with all the others, with a view to giving effect to each and every provision in so far as it shall be consistent with a construction of the instrument as a whole.

State ex rel. Sanstead v. Freed, 251 N.W.2d 898, 908 (N.D. 1977) (quoting 16 C.J.S. Constitutional Law § 23, 91-96).

[32] Thus, construing these constitutional provisions as a whole for purposes of giving effect to both section 5 and 12 of article IV demonstrates the intention of the framers to subject the issue of residency as it relates to being “*elected . . . to the legislative assembly*” (N.D. Const. art. IV, § 5) to “judicial review” (N.D. Const. art. IV, § 12). On the other hand, whether the residency requirement necessary to begin or continue to “*serve in the legislative assembly*” (N.D. Const. art. IV, § 5) has met by any given member of the North Dakota House or Senate during his or her term is a matter to be judged by “[e]ach house” given that it deals with “the qualifications of its members[.]” N.D. Const. art. IV, § 12.

[33] Jones’ status as a sitting member of the North Dakota House of Representatives is irrelevant to this action, as Petitioner is not seeking removal of Jones from that house of the legislative assembly due to his status as a Wyoming resident. Whether Jones “may” continue to “*serve in the legislative assembly*” given the compelling evidence that he no longer “lives in the district from which” he was “selected” (N.D. Const. art. IV, § 5) is a matter for the North Dakota

House of Representatives to judge. See N.D. Const. art. IV, § 12 (emphasis added).

[34] However, whether Jones can be “*elected . . . to the legislative assembly*” in November given the constitutional infirmities related to his Wyoming residency is another matter, one that is specifically subject to this Court’s review. N.D. Const. art. V, § 4 (emphasis added). *See also* N.D. Const. art. IV, § 12. The fact that Jones does not meet the constitutional residency requirement “to hold the office” of District 4 Representative renders the placement of his name on the ballot erroneous. *Berg*, 2020 ND 178, ¶30, __N.W.2d__.

[35] Respondent therefore has the duty to correct the ballot error that has occurred as a result of Jones’ placement on the ballot. See N.D.C.C. § 16.1-01-01(1) (noting that Respondent “shall direct proper changes to be made” where “any ballot . . . is not in sufficient compliance with the law”). This Court should respectfully compel Respondent to do so by issuing a prerogative writ of mandamus.

III. This Court should issue a prerogative writ of mandamus ordering Respondent to correct the ballot error caused by placing Jones on the general election ballot.

[36] Given that Respondent has indicated his intention to not act on the ballot error caused by the certification of Jones’ candidacy due to an erroneous interpretation of the North Dakota Constitution, Petitioner respectfully asks that this Court exercise its original jurisdiction by issuing a prerogative writ of mandamus ordering Respondent to correct the error that occurred when Jones was

certified as a candidate on the ballot. See N.D.C.C. § 16.1-08-01 (noting that this Court may issue “an order compelling the correction of the error” if the error “*has occurred* or is about to occur in the placing of any name on an official election ballot.”) (emphasis added). *See also* app. 30 (indicating that Jones has been certified by Respondent as a candidate for the legislative assembly in District 4, effectively placing him on the ballot for the November general election).

[37] Article VI, § 2, of the North Dakota Constitution grants this Court “original jurisdiction with authority to issue, hear, and determine such original and remedial writs as may be necessary to properly exercise its jurisdiction.” *Riemers v. Jaeger*, 2018 ND 192, ¶ 5, 916 N.W.2d 113. “It is well settled that the power to exercise [this Court’s] original jurisdiction extends only to those cases where the questions presented are *publici juris* and affect the sovereignty of the state, the franchises or prerogatives of the state, or the liberties of its people.” *Id.* “The interest of the state must be primary, not incidental, and the public must have an interest or right that is affected.” *Id.* This Court has recently reaffirmed “the public interest involved with the power of the people to govern themselves in the voting process.” *Berg*, 2020 ND 178, ¶8, __N.W.2d__. (citing *Riemers*, 2018 ND 192, ¶ 6). The issue involving the constitutional eligibility of a candidate for the legislative assembly is likewise a matter of public interest meriting the exercise of this Court’s original jurisdiction.

[38] Further, a writ is properly issued where there is not a plain, speedy and adequate remedy in the ordinary course of the law. *See* N.D.C.C. § 32-34-02. As

tacitly recognized in *Berg*, the Century Code does not provide a straightforward, speedy mechanism for removal of a constitutionally ineligible candidate's name from the general election ballot prior to an election, particularly in an expedited manner that can only be afforded by this Court. Indeed, the need to invoke this Court's original jurisdiction to order Respondent or correct the ballot error that occurred due to Jones' placement on the ballot is especially acute given that residents of Legislative District 4 will soon have ballots made available to them. *See* N.D.C.C. § 16.1-07-04 (mandating the preparation, printing, and delivery absent voter ballots at least 40 days before the general election); N.D.C.C. § 16.1-07-23 (requiring transmission of ballots and balloting materials to certain military and overseas voters no later than 45 days before the general election).

[39] Apart from the writ requested in this Petition, no adequate remedy currently exists in the ordinary course of law to correct the error caused by Respondent's certification of Jones as a candidate on the ballot for the legislative assembly in District 4. Such a writ is within this Court's original jurisdictional authority, as the issue is *publici juris*. Petitioner respectfully requests that this Court issue the writ as requested in this Petition to ensure a resolution that upholds the integrity of the electoral process in North Dakota.

CONCLUSION

[40] For the reasons set forth above, the Petitioner respectfully requests that this Court issue a writ of mandamus ordering Respondent to correct the ballot error associated with the certification of Jones' candidacy for election to the

legislative assembly from Legislative District 4.

[41] Dated this 16th day of September, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned, as the lawyer for the Petitioner and as author of this Petition, hereby certifies, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that this Petition was prepared with proportional type face and the total number of words in this Petition, excluding words in the Table of Contents, Table of Authorities, signature blocks, Certificate of Service, and this Certificate of Compliance, totals 4,092. The total page number for this Petition, excluding this certificate, is 16 pages.

Dated this 16th day of September 2020.

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