

IN THE SUPREME COURT
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,

v.

Alvin Jaeger, in his capacity as North
Dakota's Secretary of State,

Respondent.

Supreme Ct. No. 20200251

RESPONSE BRIEF OF RESPONDENT

State of North Dakota
Wayne Stenehjem
Attorney General

By: Matthew A. Sagsveen
Solicitor General
State Bar ID No. 05613
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email masagsve@nd.gov

Attorneys for Respondent.

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INTRODUCTION

[¶1] Kenton Onstad (“Onstad”)¹ petitions the North Dakota Supreme Court for a Prerogative Writ of Mandamus (“Petition”), requesting that the Court order the Secretary of State, Alvin Jaeger (the “Secretary”), to remove Terry B. Jones (“Jones”) from the 2020 general election ballot (the “ballot”) because Jones is allegedly not eligible to hold the office of Representative for District 4. Jones is presently seeking election to a second term as the Representative for District 4, in the North Dakota House of Representatives.

[¶2] Onstad claims in his Petition that Jones is not qualified to be on the ballot and hold an elective office because he fails to meet the residency requirements in N.D. Const. art. IV, § 5. Onstad argues the Secretary is mandated to remove Jones from the general election ballot because Jones’ alleged lack of eligibility to hold office in North Dakota should be construed as a *per se* mistake or error under N.D.C.C. § 16.1-01-08. Onstad further contends that removing Jones from the ballot is compelled in this case even more so than the removal of Travisia Martin’s name from the ballot was compelled in this Court’s recent decision in *Berg v. Jaeger*, 2020 ND 178, ___ N.W.2d ___. Onstad misconstrues *Berg* and the Secretary’s statutory authority.

[¶3] The critical distinction overlooked by Onstad is that it was the Court in *Berg*, not the Secretary, that determined it would be erroneous to place Travisia Martin’s name on the ballot. The Court did not conclude the Secretary is mandated to

¹Onstad is petitioning the Court as an individual resident and elector of North Dakota District 4, and as Chairman of the District 4 Democratic-NPL Party.

accept allegations of ineligibility as a *per se* error, nor did the Court determine the Secretary has the authority to adjudicate a candidate's eligibility to hold office. Furthermore, even if the Legislature does not have jurisdiction to adjudicate Onstad's claims that Jones is ineligible to hold office, that does not mean that the Secretary is vested with such jurisdiction. Questions of eligibility are for the Court to determine.

[¶4] Finally, the ballots for the November general election were already certified prior to Mr. Onstad's question of Secretary Jaeger, which the Secretary received on September 8 by email. The 2020 general election is underway. To comply with federal and state law, the appropriate election officials from each county are required to begin providing ballots on September 18, 2020, to all military and overseas voters who have applied for a ballot by that date. N.D.C.C. § 16.1-07-23. Section 16.1-01-08, N.D.C.C., does not authorize the Secretary to halt the 2020 election in whole or in part, recall or replace any ballots already mailed, or reject any ballots that are already submitted.

STATEMENT OF THE CASE AND FACTS

[¶5] Onstad filed his Petition requesting that Jones be removed from the 2020 general election ballot for the office of the North Dakota House of Representatives, Legislative District 4, and declare that Jones is ineligible to be elected to office, on September 16, 2020. Docket # 1. Onstad alleges that on September 8, he sent a letter (App., 19) to the Secretary with evidence of Jones' Wyoming residence. Pet., ¶ 13.

[¶6] The Secretary responded to Onstad's letter on September 9, 2020.

App., 18. The Secretary stated:

In the [September 8] letter, you referenced Section 5 of Article IV of the North Dakota Constitution as a basis for your request. However, Section 12 of Article IV states that “Each house is the judge of the qualifications of its members.” Therefore, I am unable to comply with your request.

Additionally, last Friday I forwarded to the County Auditors my certification of the ballot for the November General Election and the preparation of the ballot is well underway.

Id. The Secretary has certified Jones as a candidate for Representative, Legislative District 4. App. 30.

STANDARD OF REVIEW

[¶7] 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. A writ of mandamus may be issued:

[B]y the supreme and district courts to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is precluded unlawfully by such inferior tribunal, corporation, board, or person.

N.D.C.C. § 32-34-01. “A petitioner for a writ of mandamus must show a clear legal right to performance of the act sought to be compelled and must establish no plain, speedy, and adequate remedy exists in the ordinary course of law.” *Berg*, 2020 ND 178, ¶ 9, ___ N.W.2d ___ (quoting *Riemers v. Jaeger*, 2018 ND 192, ¶ 7, 916 N.W.2d 113. “To be enforceable by mandamus, the law must require an act to be done; mandamus cannot compel an official’s discretionary actions.” *Id.* (citing *Eichhorn v. Waldo Twp. Bd. of Supervisors*, 2006 ND 214, ¶ 19, 723 N.W.2d 112).

LAW AND ARGUMENT

I. The Secretary does not have statutory authority to remove a candidate's name from a ballot based upon mere allegations the candidate is ineligible to hold office.

[¶8] Onstad argues that the Secretary should remove Jones' name from the 2020 general election ballot because it is allegedly undisputed Jones is ineligible to hold office, and this Court held in *Berg* that it would be erroneous to place an ineligible candidate's name on the general election ballot. Pet., ¶¶ 17-25 (citing *Berg*, 2020 ND 178, ¶ 30, ___ N.W.2d ___). The Secretary, however, has neither the statutory authority to accept Onstad's allegations as true, nor the legal obligation to do so. Furthermore, this Court's decision in *Berg* should not be construed as mandating the removal of a candidate's name from a ballot based upon mere allegations.

[¶9] The Secretary, as the supervisor of elections, has broad powers under the law. N.D.C.C. § 16.1-01-01(1). In this role, the Secretary may examine an election ballot, electronic voting system, or device used in connection with any election for the purpose of determining sufficient compliance with the law and established criteria and standards adopted by the Secretary. *Id.* The Secretary has the authority to direct changes if a ballot is not in sufficient compliance with the law or established criteria. *Id.*

[¶10] The Secretary also has a duty to investigate certain matters related to elections under N.D.C.C. § 16.1-01-08. The Secretary shall investigate issues such as errors and omissions which have, or are about to occur, in the placing of any name on a ballot, or printing a ballot (N.D.C.C. §§ 16.1-01-08(1) & (2))

including any wrongful act by election officials or neglect of duty. N.D.C.C. §§ 16.1-01-08(3) & (4). All of the Secretary's remaining remedies in the section relate to election officials:

If required, the secretary of state shall order the officer or person charged with such error, wrong, or neglect to correct the error, desist from the wrongful act, or perform any required duty. The secretary of state may call upon any county auditor for aid in investigation and correction of the problem. The secretary of state shall cause any person who violates the secretary of state's order to be prosecuted, if the violation constitutes an offense pursuant to this chapter. If the administrative remedies fail to correct the problem, or if the secretary of state refuses to act, any person may petition the supreme court, or the district court of the relevant county where the election of a county officer is involved, for an order compelling the correction of the error, wrong, neglect, or act.

N.D.C.C. § 16.1-01-08 (emphasis added).

[¶11] There is no provision of law in N.D.C.C. Title 16.1, however, which mandates the Secretary to accept as true or undisputed, allegations that a candidate is ineligible for office. See *e.g. Berg*, 2020 ND 178, ¶ 5, ___ N.W.2d ___. There is also no law, and Onstad fails to cite any, which mandates the Secretary to adjudicate a candidate's eligibility to hold office. *Id.*

[¶12] The Court in *Berg* did not disagree with the Secretary's conclusion that he did not have the authority to remove a candidate from the ballot under N.D.C.C. §§ 16.1-01-01 or 16.1-01-08; the Court ordered the district court to hold an evidentiary hearing regarding the candidate's eligibility. See *Berg*, 2020 ND 178, ¶ 6, ___ N.W.2d ___. Only after the evidentiary hearing, where the district court concluded the candidate was ineligible to hold office, did this Court hold it would be erroneous for the Secretary to place the ineligible candidate's name on the general election ballot. *Id.* at ¶ 30.

[¶13] The Secretary is not mandated as a matter of law, nor by this Court's decision in *Berg*, to remove Jones' name from the ballot based upon Onstad's mere allegations that Jones is ineligible to hold office.

II. The Secretary does not have jurisdiction over Onstad's request to remove Jones from the 2020 general election ballot.

[¶14] The Secretary determined he was unable to comply with Onstad's request because, under Section 12 of Article IV of the Constitution, "[e]ach house is the judge of the qualifications of its members." App. 18. Onstad argues the Secretary's refusal to entertain the request to remove Jones was based upon an erroneous reading of the Constitution, because the provision provides that election contests are subject to judicial review as provided by law. Pet., ¶¶ 26 – 35 (citing N.D. Const. art. IV, § 12). But Onstad's claim of legal error does not aid his argument.

[¶15] Onstad's position that election contests are subject to judicial review (Pet., ¶ 30) should not be construed as vesting the Secretary with the authority to adjudicate Jones' eligibility. Rather, Onstad's argument should be construed as an acknowledgement that only a court has jurisdiction to adjudicate Onstad's contest. The Constitution does not provide that the Constitution vests the Secretary with the authority to adjudicate election contests. The Court cannot read Section 12 of Article IV as mandating the Secretary to adjudicate Jones' eligibility to hold office, or correct an alleged ballot error.

III. The Secretary does not have statutory authority to correct an alleged ballot error after an election has begun.

[¶16] State and federal law mandate that election officials from each county are

required to begin providing ballots on September 18, 2020, to all military and overseas voters who have applied for a ballot by that date. N.D.C.C. § 16.1-07-23. The 2020 general election has begun.

[¶17] Even if this Court, or a trial court, adjudicates Jones' eligibility, the provisions of N.D.C.C. § 16.1-01-08, which call for the Secretary to correct an error on the ballot, are not applicable after the ballot has been printed and after an election has begun. Subsection 1 refers to an error or omission "which has occurred or is about to occur in the placing of any name on an official election ballot." N.D.C.C. § 16.1-01-08(1). Subsection 2 refers to "[a]ny error which has been or is about to be committed in printing the ballot." N.D.C.C. § 16.1-01-08(2). Neither of these subsections, nor any other provision of N.D.C.C. § 16.1-01-08, authorize the Secretary to halt an election that has already begun, or correct a judicially determined ballot error.

IV. Courts should refrain from interfering with an election that is underway, including alleged errors on a ballot that has already been made available to some voters.

[¶18] Courts should not lightly interfere with elections that have already begun. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); *Benisek v. Lamone*, 138 S.Ct. 1942, 1945 (2018). In addition to needlessly chaotic and disruptive effect that will arise to an election already underway should the Court require the Secretary to "correct" the ballot for District 4, there are practical, if not impossible, difficulties with the Secretary being asked to correct a ballot after an election is already underway and voting has begun. There are other remedies available to Onstad should it ultimately be determined that Jones does not satisfy North Dakota's residency

requirements, rather than the untimely remedy sought in this Petition. For this reason, the Secretary cannot represent that he will be able to abide by any Order of the Court directing the removal of Jones' name from already completed and distributed ballots at this late juncture, as he represented in *Berg*, and respectfully requests that the Court deny this Petition.

CONCLUSION

[¶19] The Secretary requests that this petition, filed after the ballots had already been certified in compliance with federal and state law, be denied for that reason alone.

Dated this 18th day of September, 2020.

State of North Dakota
Wayne Stenehjem
Attorney General

By: /s/ Matthew A. Sagsveen
Matthew A. Sagsveen
Solicitor General
State Bar ID No. 05613
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email masagsve@nd.gov

Attorneys for Respondent.

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CERTIFICATE OF COMPLIANCE

Supreme Ct. No. 20200251

[¶1] The undersigned certifies pursuant to N.D. R. App. P. 32(a)(8)(A), that the Response Brief of Resondent contains 12 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 word processing software in Arial 12 point font.

Dated this 18th day of September, 2020.

State of North Dakota
Wayne Stenehjem
Attorney General

By: /s/ Mathew A. Sagsveen
Matthew A. Sagsveen
Solicitor General
State Bar ID No. 05613
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email masagsve@nd.gov

Attorneys for Respondent.

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CERTIFICATE OF SERVICE

Supreme Ct. No. 20200251

[¶1] I hereby certify that on September 18, 2020, the following documents:
RESPONSE BRIEF OF RESPONDENT and CERTIFICATE OF COMPLIANCE
were filed electronically with the Supreme Court through the E-Filing Portal and served on the following:

McLain Joseph Schneider – mac@schneiderlawfirm.com

State of North Dakota
Wayne Stenehjem
Attorney General

By: /s/ Mathew A. Sagsveen
Matthew A. Sagsveen
Solicitor General
State Bar ID No. 05613
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email masagsve@nd.gov

Attorneys for Respondent.