

**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,

vs.

Alvin Jaeger, in his capacity as North
Dakota's Secretary of State, and Terry B.
Jones,

Respondents.

SUPREME COURT NO. 20200251

**RESPONDENT TERRY B. JONES' RESPONSE TO PETITION
FOR WRIT OF MANDAMUS**

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Should the Petition be dismissed because there are no issues of material fact and as a matter of law Terry Jones was a resident of North Dakota prior to November 3, 2019 and he has at all times since then remained a resident of North Dakota?
2. Should the Petition be dismissed for failure to state a claim?
3. Is the Petition frivolous?

STATEMENT OF THE CASE

INTRODUCTION.

[¶1] Before the Court is the Democratic-NPL Party's and Kenton Onstad's ("Democratic-NPL") frivolous attempt to obtain from this Court a declaration changing Respondent Terry Jones' residence from North Dakota to Wyoming based the Democratic-NPL's intentional misrepresentations of facts and North Dakota law.

[¶2] The Democratic-NPL's factual assertions either intentionally misrepresent the documents or are legally irrelevant to the determination of the issues raised by the Petition. It is not relevant that Mr. Jones owns real property in Wyoming, that he uses a cell phone first issued in Wyoming, that he uses a post office box in New Town as a mailing address or that he previously provided to his constituents the option of contacting him via fax at a business office in Wyoming. None of these facts are legally significant concerning the union of Mr. Jones' actions and intent to become a North Dakota resident in 2015 and to remain a North Dakota resident since that time.

[¶3] What is most glaring is the Democratic-NPL's willful misrepresentation of the factual record concerning Jones Brothers Enterprises, LLC's, annual reports in Wyoming. The Democratic-NPL dishonestly asserts that Mr. 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 . . . [and that] Jones . . . in 2019 and 2020, attested that his address is 203 2nd Street in Otto, Wyoming (app. 9-10)[.]" (Petition for Prerogative Writ at ¶ 23.) Mr. Jones did neither.

[¶4] The only certification by Mr. Jones concerning residing in Wyoming was completed by him in 2004. (Appendix of Exhibits ("A") at 8.) At that time Mr. Jones certified that he was qualified to serve as registered agent for Jones Brothers. (Id.) He

attested that at that time he was “[a]n individual who resides in [Wyoming] and whose business office is identical with the registered office[.]” (Id.) Subsequently, in 2015, Mr. Jones stopped residing in Wyoming and he became a legal resident of North Dakota. (Supplemental Appendix (“SA”) at 4 ¶ 7.) Jones Brothers mistakenly failed to file a change of registered agent form with the Wyoming Secretary of State. (Id. at 5 ¶ 20.) Instead, in 2019 and 2020, Jones Brothers completed its annual reports in Wyoming certifying that Mr. Jones was still its registered agent. (Id.) Contrary, however, to the Democratic-NPL’s willful misrepresentation of the facts, Jones Brothers’ annual reports were not completed by Mr. Jones nor executed by him. (Id. at 7-8 ¶ 22.)

[¶5] In addition to intentionally misrepresenting the undisputed facts, the Democratic-NPL also intentionally misrepresents North Dakota law. The Democratic-NPL ignores that North Dakota law recognizes that a person may have two or more actual residences, as distinguished from his single legal residence, and that in determining a person’s legal residence, the most significant factor is the person’s declaration of intent. The Petition is devoid of any evidence challenging Mr. Jones clearly stated intent, through his multiple actions, including owning a home in North Dakota and voting in North Dakota, to become and remain a North Dakota resident. (SA at 4-6.)

[¶6] As is set out in detail in the Affidavit of Terry B. Jones, as a matter of law, Mr. Jones, through the unity of his actions and intentions, became a resident of North Dakota prior to November 3, 2019, the qualifying date for the 2020 election, and he has remained a resident since then. (SA at 4-6.)

[¶7] The Petition is frivolous. This Court should award Mr. Jones his costs and fees for having to make this response.

PROCEDURAL POSTURE.

[¶8] The Democratic-NPL filed with this Court its Petition for Prerogative Writ of Mandamus on September 16, 2020, naming as Respondent North Dakota Secretary of State Alvin Jaeger.

[¶9] On September 17, 2020, this Court ordered that Terry Jones be added as a Respondent.

[¶10] Mr. Jones admitted service of the Petition on September 18, 2020.

STATEMENT OF THE FACTS

[¶11] Mr. Jones has completed an Affidavit in opposition to the Petition. The Affidavit sets forth facts which are not in dispute in this matter. Rather, the only dispute is the legal conclusion from the undisputed facts. The Affidavit establishes, as a matter of law, that Mr. Jones' legal residence is undeniably in North Dakota. There are no facts which support the Democratic-NPL's allegations that Mr. Jones does not meet the one-year residency requirement.

[¶12] Mr. Jones first moved to North Dakota in 2012 to seek construction opportunities for his family business, Jones Brothers Enterprises as part of North Dakota's oil boom. (SA at 3 ¶ 3.)

[¶13] In the Spring of 2012 Mr. Jones became involved, along with Jones Brothers, in the permitting and construction of a water depot near New Town. From 2012 until the depot became operational in 2015, Mr. Jones worked more than full time on the depot in North Dakota. After the depot began operations, until approximately August 2019, Mr. Jones operated and managed the depot full time in North Dakota. (SA at 3-4 ¶ 4.) Since August of 2019, Mr. Jones has been working in North Dakota to develop other business opportunities for Jones Brothers in the oil patch in North Dakota. (SA at 4 ¶ 5.)

[¶14] From 2013 until August 2019, Mr. Jones lived and made his home at 9090 41st St. NW, New Town. This became his legal residence in January 2015. (SA at 4 ¶ 7.) From August 2019 until August 2020, Mr. Jones' legal residence and home was 3964 89th Ave NW #314, New Town. (SA at 4 ¶ 6.) Mr. Jones now resides in a house which he and his wife Kelly purchased in July 2020 and then renovated, located at 413 Eagle Drive, New Town. (Id.) All of these homes have contained Mr. Jones' personal possessions, clothing, furniture, and items of sentimental value. (Id.)

[¶15] Since at least January 2015, it has been Mr. Jones' sole intent to be a legal resident of North Dakota and at that time he abandoned his prior residency in the State of Wyoming. Mr. Jones' intent has manifested in the following actions since 2015 where he has made filings of record reflecting his intent to become a North Dakota resident:

- a. Mr. Jones applied for and received a North Dakota driver's license.
- b. Mr. Jones started voting in State and local elections solely in New Town, North Dakota, casting ballots on November 8, 2016, Nov 6, 2018, and June 9, 2020. During this time, Mr. Jones has not voted anywhere other than North Dakota.
- c. Mr. Jones has completed and filed a North Dakota income tax return as a resident of North Dakota, paying income taxes on all of his income, whether generated in North Dakota or elsewhere in 2015, 2016, 2017, 2018, and 2019.
- d. Mr. Jones has two vehicles that have been titled and insured in North Dakota since 2017. A third vehicle was titled and insured in North Dakota in 2019.
- e. Mr. Jones' cattle brand is registered in North Dakota.
- f. In 2017 Mr. Jones applied for and received a North Dakota Concealed Weapon License applying as a North Dakota resident.
- g. Mr. Jones' CDL Medical Examiner Certificate lists a New Town, North Dakota, address and it was completed by a North Dakota doctor.
- h. On January 22, 2016, Mr. Jones registered Jones Brother Enterprises, LLC, as a foreign limited liability company in the State of North Dakota and he has been the registered agent in North Dakota from that time to the present.
- i. On May 7, 2019, Mr. Jones filed with the North Dakota District Court a Verified Complaint in which he swore under oath that he was a resident of Montrail County, North Dakota.

(SA at 4-5 ¶ 7.)

[¶16] In addition to the above-listed filings of record, Mr. Jones' personal choices also

reflect his decision to become a North Dakota resident. In 2016 Mr. Jones decided to serve the State of North Dakota and his community by standing for election to the North Dakota Legislative Assembly. (SA at 5 ¶ 8.) Mr. Jones was elected and his qualifications to serve, including his qualifications as a North Dakota resident, were not challenged. (Id.) After Mr. Jones was elected, he served his community and the State of North Dakota in the Legislature.

[¶17] Similarly, on March 2, 2020, Mr. Jones completed an Affidavit of Candidacy where he again swore under oath that he was a resident of North Dakota qualified to stand for reelection. (SA at 5 ¶ 9.)

[¶18] Since 2013 Mr. Jones has held leadership positions in his local church in New Town. In September 2019 Mr. Jones was asked to be the Branch President (Pastor) for the New Town congregation, a position he still holds and fulfills faithfully. (SA at 5 ¶ 10.)

[¶19] In 2014 Mr. Jones' wife, Kelly Jones, and three of their children that were still living at home, moved to North Dakota and lived with him for a year and a half. The oldest son was in online school. The two younger ones attended school in Stanley for one quarter. Then all three did online school for a year. Mr. Jones and Ms. Jones decided that was too much online time for children and Ms. Jones took the kids back to Wyoming to finish high school with their friends. Subsequently, in 2019, after the kids had all graduated, Ms. Jones moved to North Dakota and she also now is a North Dakota resident. (SA at 5 ¶ 11.)

[¶20] Mr. Jones and Ms. Jones purchased a home in North Dakota which they renovated. That is where they currently reside. (SA at 5 ¶ 12.)

[¶21] Mr. Jones and Ms. Jones maintain checking accounts and their mortgage with a local bank in New Town. Mr. Jones' checks reflect his post office box address in New

Town. (SA at 6 ¶ 13.)

[¶22] Mr. Jones receives his medical, dental, and eye care in North Dakota. (SA at 6 ¶ 14.)

[¶23] Mr. Jones has had a North Dakota land telephone line since 2013 which now rings to his cell phone even though his cell phone has an area code prefix from the location where it was originally placed into service. Mr. Jones has had no reason to change the cell phone number because many family members, friends, business associates, and legislative colleagues use this number to contact him. (SA at 6 ¶ 15.)

[¶24] These facts are not contested, and they establish as a matter of law that Mr. Jones is a resident of North Dakota and that he was a resident prior to November 3, 2019.

[¶25] The Democratic-NPL makes allegations of fact as part of the Petition. These facts, however, are not in dispute except as to the Democratic-NPL's misrepresentations.

[¶26] The Democratic-NPL references the Articles of Organization for Jones Brother Enterprises, LLC, which were completed in Wyoming in 2004. (A at 6.) As part of the Articles, Mr. Jones was appointed by Jones Brothers to act as the registered agent for Jones Brothers. (A at 8.) On February 21, 2004, Mr. Jones certified that he was at that time “[a]n individual who resides in this state and whose business office is identical with the registered office[.]” This certification was true when it was made by Mr. Jones in 2004. (A at 8.) This statement has no bearing on the subsequent change of Mr. Jones' legal residence from Wyoming to North Dakota in 2015.

[¶27] On January 7, 2019, and January 6, 2020, Jones Brothers Enterprises completed its annual reports for the State of Wyoming. (A at 9-10.) The annual report forms are available online and they are pre-populated with information by the Wyoming Secretary of

State including continuing to list Mr. Jones as the registered agent. (Id.) Jones Brothers is directed to “Please review the current Registered Agent information and, if it needs to be changed or updated, complete the appropriate Statement of Change form available from the Secretary of State’s website” (Id.)

[¶28] Kelly Jones completed the forms online without making any changes to the preprinted forms. Ms. Jones then electronically signed the forms on behalf of Jones Brothers. (A at 9-10; SA at 7 ¶ 19.)

[¶29] Neither Mr. Jones nor Ms. Jones was aware that Jones Brothers Enterprises was required to make a change to its annual report by filing a new registered agent form based upon Mr. Jones’ decision to become a resident of North Dakota. (SA at 7 ¶ 20.) Once this issue was brought to the attention of Jones Brothers, it filed a Change of Entity’s Registered Agent and Office form with the Wyoming Secretary of State. (SA at 11.) Mr. Jones is no longer listed as the registered agent for Jones Brothers in Wyoming. (Id.)

[¶30] Jones Brothers erred in continuing to list Mr. Jones as registered agent after he moved his residence from Wyoming to North Dakota. An error by Jones Brothers, however, on a pre-printed form that Mr. Jones did not review nor execute, does not nullify Mr. Jones’ choice to become a legal resident of North Dakota nor does it negate his clear actions, demonstrating his unmistakable intent to become a legal resident of North Dakota. (SA at 7 ¶ 21.)

[¶31] It is striking the intentional misrepresentation which is made by the Democratic-NPL concerning this issue. It falsely asserts: “Jones conceded as a matter of law in both 2019 . . . and 2020 . . . that as a registered agent for his Wyoming LLC he ‘resides in’ the state of Wyoming . . . [and] attested that his address is 203 2nd Street in Otto, Wyoming . .

..” (Petition for Prerogative Writ at ¶ 23.) These allegations are false and malicious. Mr. Jones did not concede anything as part of the 2019 and 2020 annual reports filed by Jones Brothers in Wyoming. Mr. Jones did not attest that his address was in Wyoming. The forms were completed and submitted by Jones Brothers, not by Mr. Jones. They were executed by Ms. Jones in error. Mr. Jones did not execute them. (SA at 7-8 ¶ 22.) It is an intentional, material, misstatement of fact to claim that Mr. Jones ever conceded in 2019 or 2020 that he was still a resident of Wyoming. The Democratic-NPL’s entire case is premised on this misrepresentation.

[¶32] As noted above, Jones Brothers is registered as a foreign LLC in North Dakota. (SA at 8 ¶ 23.) Like in Wyoming, Jones Brothers is required to have a registered agent in North Dakota. The registered agent must reside in North Dakota. In late 2015 or early 2016, Mr. Jones completed the paperwork necessary to become the registered agent for Jones Brothers in North Dakota. (Id.) Mr. Jones is the registered agent for Jones Brothers in North Dakota and has been since 2016. Unlike the Wyoming annual reports, which were filed in error, the North Dakota filing is accurate, unchanged, uncorrected and consistent with Mr. Jones’ intentions to be a resident of North Dakota. (SA at 8 ¶ 23.)

[¶33] The Democratic-NPL next notes that Mr. Jones and Ms. Jones own property in Otto, Wyoming. Nothing about their ownership of property in Wyoming, however, has any relevance to Mr. Jones becoming a resident of North Dakota. Mr. Jones and Ms. Jones own a residence at 203 1st Street South, Otto, Wyoming. Their son, Carlin Jones, his wife and family live at this residence. Their son Bryce Jones and his wife have placed a manufactured home on their lot located at 301 1st Street, Otto Wyoming. The other “residential” parcels are vacant lots. Mr. Jones and Ms. Jones also own a farm/ranch in

Wyoming which is being worked by their sons. None of this is unusual or has any relevance to Mr. Jones' choice to become a North Dakota resident. (SA at 8 ¶ 24.)

[¶34] The Democratic-NPL claims it is relevant to the Petition that Mr. Jones continues to maintain the same cell phone number including the area code assigned when he lived in Wyoming. This is nonsense. Mr. Jones has had the same cell phone number for over 20 years and nothing in law requires it be changed as part of his change of residence to North Dakota. (SA at 8 ¶ 25.)

[¶35] The Democratic-NPL also asserts it is significant that Mr. Jones previously used Jones Brothers' fax number (and machine), which was located in Jones Brothers' Wyoming office, for his personal (legislative) business. This also is nonsense. North Dakota legislators are citizen legislators and responding to constituents and other legislative duties are routinely carried out at their places of business. At the time Mr. Jones' legislative biography was completed, his office support was still primarily in Wyoming. Based on the number of hours Mr. Jones was working at the depot, it was not prudent for him to receive faxes at his residence in New Town. The decision to have faxes directed to his business office was made to increase his productivity and the public's ability to communicate with him. Certainly, it has no bearing on Mr. Jones' choice to become a resident of North Dakota. (SA at 9 ¶ 26.)

[¶36] The Democratic-NPL erroneously attempts to draw conclusions about Mr. Jones' residency based on the fact that he utilizes a post office box in New Town. Most homes in New Town, however, are required to have a post office box because the United States Postal Service does not deliver mail to the door of every residence. From 2013 until 2019 Mr. Jones resided at 9090 41st St NW, New Town. Delivery was not available at his house.

There were also not enough boxes available at the post office, so Mr. Jones used the service at Mail and More on Main Street of New Town until it went out of business. By then the post office had more boxes so Mr. Jones got a post office box there. After Mr. Jones moved to 3964 89th Ave NW, he chose to continue to use his post office box because he knew living at the apartment was temporary until he could find a home to purchase in New Town. When Mr. Jones purchased his current house in New Town, he was told that he cannot get delivery at that address, so he continues to receive his mail via a post office box. Mr. Jones' choice to use a post office box in New Town for his mail has absolutely no bearing on his choice to be a North Dakota resident. (SA at 9 ¶ 27.)

[¶37] In its letter to Secretary of State Jaeger, the Democratic-NPL falsely asserts that Mr. Jones has spent the majority of his time in Wyoming over the last year. This is false. Mr. Jones spent the start of this year working on business projects in North Dakota. Because of COVID and the quarantine, Mr. Jones chose to spend time in Wyoming helping family for approximately two months. Otherwise, his time has been spent in North Dakota, except for occasional visits to see his children and grandchildren. Mr. and Ms. Jones have 6 children and 4 grandchildren who reside in Wyoming. (SA at 10 ¶ 28.)

LAW AND ARGUMENT

I. **THE PETITION SHOULD BE DISMISSED BECAUSE THERE ARE NO ISSUES OF MATERIAL FACT AND AS A MATTER OF LAW TERRY JONES WAS A RESIDENT OF NORTH DAKOTA PRIOR TO NOVEMBER 3, 2019 AND HE HAS AT ALL TIMES SINCE THEN REMAINED A RESIDENT OF NORTH DAKOTA.**

A. **Standard of Review.**

[¶38] The Petition requests this Court exercise its original jurisdiction under Article VI, Section 2, of the North Dakota Constitution and issue a writ of mandamus directed to the North Dakota Secretary of State. The procedures for the request for a writ of mandamus

are set out in N.D.C.C. Chapter 32-34. Under Chapter 32-34, if the Petition and responses of the Respondents raise issues of fact, then an evidentiary hearing before the Court is required, unless the Court in its discretion orders the matter be decided by a jury. N.D.C.C. § 32-34-06. “If the answer raises only questions of law or puts in issue only immaterial statements not affecting the substantial rights of the parties, the court must proceed to hear . . . the argument of the case.” N.D.C.C. § 32-34-10.

[¶39] Here, there are only questions of law before the Court. This Court should find as a matter of law that Mr. Jones is a resident of North Dakota and that he has been a resident since prior to November 3, 2019.

B. Jones is a Resident of North Dakota.

[¶40] “The term “resided,” as used in the Constitution, means having had a legal residence; that is, a 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). A residence can be changed only by the union of act and intent. N.D.C.C. § 54-01-26(7); *Mittelstadt v. Bender*, 210 N.W.2d 89, 93 (N.D. 1973). A person's intent to change domicile must be determined from person's conduct and declarations. *Matter of Estate of Burshiem*, 483 N.W.2d 175, 180 (N.D. 1992). Domicile and legal residence are synonymous. *Keating v. Keating*, 399 N.W.2d 872, 875 (N.D.1987). “A person's intention is the paramount factor in determining legal residence.” *McComb v. Aboelessad*, 535 N.W.2d 744, 748 (N.D. 1995) (quoting *Graham v. Graham*, 9 N.D. 88, 81 N.W. 44, 45 (1899)); See also *Dietz v. City of Medora*, 333 N.W.2d 702, 705 (N.D. 1983)(“intent is an important consideration[.]”); *Wehrung v. Ideal Sch. Dist. No. 10*, 78 N.W.2d 68, 70 (N.D. 1956)(“Residence is a question of fact in which the intention of the party enters as an important element.”).

[¶41] While intent is of paramount importance, it is often proven by circumstantial evidence of acts and omissions. *Moodie*, 258 N.W. 558. “Any act, event, or circumstance in the life of an individual may be evidence from which the state of mind, or *animus manendi*, may be inferred with more or less precision; and it is impossible to formulate any general rule by which the weight due to any particular point of evidence may be determined.” *Schillerstrom v. Schillerstrom*, 75 N.D. 667, 684, 32 N.W.2d 106, 115 (1948) (citing 28 C.J.S., Domicile, § 18).

[¶42] A person’s actions and intentions may conflict at times and no single act is determinative. Accordingly, all facts and circumstances may be considered when determining whether or not there has been a change of legal residence. *See Dietz*, 333 N.W.2d at 705; *In Re Murphy*, 292 B.R. 403 (Bankr. D.N.D. 2003). “Evidence that has been considered by other courts regarding the issue of legal residence includes declarations, payment of taxes, licenses, business connections, property ownership, burial plans, church membership, and membership in clubs.” *Dietz*, 333 N.W.2d at 705 (citing 25 Am.Jur.2d Domicile §§ 92–100).

[¶43] Here, the relevant facts are set out in the Affidavit of Kenton Onstad dated September 16, 2020, and the Affidavit of Terry B. Jones dated September 20, 2020. There are no issues of material fact in dispute between the two Affidavits. Accordingly, the issue of whether Mr. Jones is qualified as a resident of North Dakota is a question of law.

[¶44] In *Dietz*, this Court noted that “[a] person may have two or more actual residences, as distinguished from his single legal residence.” *Id.* at 704. Whether a location is an “actual” residence is based on whether or not a person “live[s], reside[s], or dwell[s] [at the location].” *Id.*

[¶45] A person’s legal residence is determined by N.D.C.C. § 54-01-26, which provides in part:

54-01-26. Residence - Rules for determining.

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.

[¶46] “Every person has only one legal residence, as distinguished from the possibility of several actual physical residences.” *Dietz* 333 N.W.2d at 704. A person does not lose his legal residency for voting eligibility solely because of temporary absences from the area. *Id* at 705.

[¶47] It is well established that the burden of proving a change of legal residence is on the person alleging the change. *See Keating v. Keating*, 399 N.W.2d 872, 875 (N.D.1987); *Dietz*, 333 N.W.2d at 705; *McEwen v. McEwen*, 50 N.D. 662, 197 N.W. 862, 865 (1924).

[¶48] Here, Mr. Jones’ residency in North Dakota has already been conclusively established as a matter of law. First, the State of North Dakota has allowed Mr. Jones to vote in three consecutive elections. A vote is presumed to be a lawful act. *See Kadlec v. Pavik*, 9 N.D. 278, 83 N.W. 5, 5 (1900). Second, Mr. Jones’ prior election to the North Dakota House of Representatives was certified, he took the oath of office, and served as a Representative. These official acts also are all presumed valid. Finally, the State of North

Dakota has accepted Mr. Jones' residential tax returns, his residential application for a North Dakota Concealed Weapon License, and issued to him a North Dakota driver's license.

[¶49] The Democratic-NPL therefore has the burden of proof of establishing that Mr. Jones' residency changed from North Dakota to Wyoming.

[¶50] The Democratic-NPL must prove three elements to show Mr. Jones has abandoned his North Dakota Residency: "(1) abandonment of the old domicile, (2) actual removal to a new domicile, and (3) intent to change from the old to the new and to remain at the new domicile." *Dietz*, 333 N.W.2d at 704. All of the facts and circumstances of life of an individual may be used when considering the factual issue of whether or not there has been a change of legal residence. *Id.*

[¶51] Here, as a matter of law, the Democratic-NPL fails to assert facts which can meet the elements of its claim that Mr. Jones' residence, once established in North Dakota, was abandoned in favor of residence in Wyoming.

[¶52] The Democratic-NPL fails to assert any facts establishing Mr. Jones has abandoned his previously established domicile in North Dakota. The undisputed facts establish that since 2015 Mr. Jones has maintained his legal domicile in North Dakota at the addresses listed above. Mr. Jones has for all times relevant lived at these addresses full-time and he has kept his personal possessions, clothing, furniture, and items of sentimental value at these locations. The Petition does not allege that Mr. Jones has at any time abandoned his domicile in North Dakota.

[¶53] The undisputed evidence also establishes that Mr. Jones once maintained a domicile in Wyoming, but that he abandoned his Wyoming domicile. There is no evidence in the

record establishing that Mr. Jones continued after 2015 to maintain an actual residence in Wyoming – “a place where he is habitually present and which he intends to return to when he is away for business or pleasure”. *Dietz*, 333 N.W.2d at 705. The undisputed facts establish the exact opposite.

[¶54] This Court should conclude, as a matter of law, that Mr. Jones purposefully abandoned his former domicile in Wyoming and that for purposes of his qualification for standing for office, has consistently, from prior to November 3, 2019, maintained his domicile in North Dakota.

[¶55] The Democratic-NPL fails to assert any facts establishing Mr. Jones’ actual removal to a new domicile outside of North Dakota after he established his home in North Dakota. The Democratic-NPL alleges Mr. Jones, along with Ms. Jones, owns real property in Wyoming, but this fact is irrelevant to the inquiry before this Court – which is whether Mr. Jones, after establishing his domicile in North Dakota, established a new domicile in Wyoming. The undisputed evidence establishes the contrary. After Mr. Jones abandoned his domicile in Wyoming, he established a new domicile in North Dakota and has acted consistently with that decision ever since.

[¶56] Finally, the Democratic-NPL fails to assert any facts establishing that Mr. Jones intended to change his domicile from North Dakota back to Wyoming. The Democratic-NPL urges this Court to infer that Mr. Jones intended to change his domicile from North Dakota to Wyoming based on 1) the Jones Brothers’ annual reports completed by Ms. Jones which were filed with the Wyoming Secretary of State; 2) Mr. Jones’ ownership of real property in Wyoming; 3) Mr. Jones previous use of a Wyoming fax number; 4) Mr. Jones’ use of his Wyoming cell phone number in North Dakota; and 5) Mr. Jones’ use of a post

office box in New Town.

[¶57] All of these facts are legally irrelevant to the Democratic-NPL's burden to show Mr. Jones intended to change his domicile back to Wyoming.

[¶58] The fact that Jones Brothers failed to take proper action in Wyoming to remove Mr. Jones as its registered agent after Mr. Jones moved to North Dakota is not evidence of Mr. Jones' intent. The fact that Ms. Jones executed a pre-populated form on behalf of Jones Brothers which continued to list Mr. Jones as the registered agent is also not evidence of Mr. Jones' intent. Even if the Democratic-NPL could establish that Mr. Jones approved of his continued listing as the registered agent in Wyoming, that fact by itself does not unsettle his otherwise clearly established legal residence in North Dakota. "A person cannot live in one place and by force of imagination constitute some other his place of abode. The intent and the fact, as already stated, must concur." *Moodie*, 258 N.W. at 563 (quoting *State v. Savre*, 129 Iowa, 122, 105 N. W. 387, 3 L. R. A. (N. S.) 455, 113 Am. St. Rep. 452).

[¶59] This case is analogous to *George v. Compson*, 251 N.W.2d 743 (N.D. 1977). George moved from Minnesota to Valley City in September 1972. He was employed in Valley City and took classes at the community college where he later requested resident tuition status. George had voted in North Dakota in 1972 and 1974, possessed a resident fishing license, and filed taxes as a North Dakota resident. Conversely, George maintained a Minnesota Driver's license, his car had Minnesota license plates, and he had not yet registered it in North Dakota. *Id.* at 745. While the case included "[v]arious acts [that] may be construed to establish or disprove residency" this Court concluded George "proved sufficient union of act and intent to establish his residence." *Id.* at 746.

[¶60] This Court held that maintaining an out of state driver's license, license plates, and registration were inconsequential when placed in the context that George had maintained a dwelling, worked, and voted in North Dakota during his three year period of residency. *George*, 251 N.W.2d at 746. Similarly, the annual reports filed by Jones Brothers erroneously identify him as registered agent are inconsequential in the broader context of his significant acts manifesting a clear and settled intent to make a permanent residence in New Town, North Dakota.

[¶61] The limited act of filing Jones Brothers' annual reports, assuming the filing of the annual reports are attributable to Mr. Jones, are insufficient as a matter of law to reestablish Mr. Jones' residence in Wyoming. This Court has previously held that limited acts manifesting an intent to reestablish residence are insufficient to establish residence as a matter of law in the absence of compelling proof of residence such as home ownership or voting. See e.g., *Summers v. Summers*, 74 N.D. 741, 745, 24 N.W.2d 688, 690 (1946) (Defendant was a legal resident of Benson County despite two lengthy absences when she lived and worked out of state but committed no other act to acquire out of state residence.); *Northwestern Mortgage & Sec. Co. v. Noel Const. Co.*, 71 N.D. 256, 300 N.W. 28, 31 (1941) (Individual remained a North Dakota resident despite intent to abandon his North Dakota domicile, and acts in furtherance of abandonment, when he had not yet perfected domicile in another state); *In re Lippert*, 113 B.R. 576 (Bankr. D.N.D. 1990.) (An individual's intent to abandon residence was "evolving" but had not yet "crystalized" when he had been working in a new job outside the jurisdiction two weeks and had not secured permanent housing.); *Keating*, 399 N.W.2d 872 (A party retained residence despite taking steps in furtherance of a permanent move to South Dakota because he had not yet

physically moved.); *Bernhardt v. Dittus*, 265 N.W.2d 684, 686 (N.D.1978) (Intent to relocate in the near future did not unsettle legal residence in the absence of proof of relocation to new physical residence). When viewed in light of Mr. Jones' other acts which clearly establish his intent to be a resident of North Dakota, the filings with the Wyoming Secretary of State are immaterial as a matter of law.

[¶62] Similarly, the fact that Mr. Jones owns property in Wyoming is neither determinative nor compelling to the question of whether by union of act and intent Mr. Jones has abandoned his residency in North Dakota. A person may have two or more physical residences, but these remain distinct from the person's domicile legal residence. See *Matter of Estate of Burshiem*, 483 N.W.2d 175 (N.D. 1992); *B.R.T. v. Executive Director of Social Service Bd. North Dakota*, 391 N.W.2d 594 (N.D. 1986). The fact that Mr. Jones has consistently maintained his home in North Dakota and now owns a residence in New Town is compelling evidence of the continuation of his legal residence in North Dakota. See *McEwen v. McEwen*, 50 N.D. 662, 197 N.W. 862, 866 (1924) (“To effect a change of domicile there must be actual residence in the new place and an accompanying intent to make it the real, true, fixed home.”); See also, *McComb v. Aboelessad*, 535 N.W.2d 744, 749 (N.D. 1995)(legal residence established despite having only resided within the state for a few months when the individual purchased a home, secured a professional license, and attained employment); *Wehrung*, 78 N.W.2d at 70 (residence established based on home ownership and intent to return despite temporarily living and working in another jurisdiction); *Schillerstrom*, 32 N.W.2d at 115 (“Residence itself raises a presumption of intention to reside in the same place, which is increased when the residence is continued for a long period, and may even be conclusive in the absence of

explanatory circumstances.”)

[¶63] Mr. Jones’ ownership of property in Wyoming is immaterial as a matter of law.

[¶64] Equally unavailing are the Democratic-NPL’s assertions concerning Mr. Jones’ use of his cell phone which was initially issued in Wyoming, a Wyoming fax number and the fact that he utilizes a post office box in New Town. These signify nothing and are frivolous allegations.

[¶65] Mr. Jones’ voting history in North Dakota is conclusive as to the issue of his residence in North Dakota. It is well established in North Dakota that the act of voting is strong proof of intent of residence in that jurisdiction. See *Berg v. Jaeger*, 2020 ND 178, ¶ 13 (Martin “availed herself of these rights specifically to the exclusion of exercising many of those rights in North Dakota, including the right to vote.”); See also, *Moodie*, 258 N.W. at 562 (registering as a voter and voting in primary and general elections in Minnesota was strong circumstantial proof of Moodie’s domicile in Minnesota.); *State v. Stoelting*, 53 N.D. 736, 208 N.W. 101, 103 (1926) (Holding registration and voting is strong circumstantial proof of residence); *Kadlec v. Pavik*, 9 N.D. 278, 83 N.W. 5, 5 (1900) (Holding that when a party casts a vote in a jurisdiction the presumption of alienage disappears “and the opposite presumption prevails, because the law will not presume that a party has committed an unlawful act.”); *Nelson v. Gass*, 27 N.D. 357, 146 N.W. 537, 542 (1914) (Analyzing the legal residence of transient farm laborers the Court found the fact an individual had voted in another jurisdiction was “quite persuasive” proof of residence in that jurisdiction.); *Schillerstrom*, 32 N.W.2d at 113 (Fact that the party did not vote out of state during a temporary move was compelling proof that she remained domiciled in North Dakota); *Mittelstadt*, 210 N.W.2d at 93 (“Had the [Parties] voted in some other

election, they would have disclosed an intent to establish a new residence.”).

[¶66] The legally significant facts are not in dispute. Those undisputed facts conclusively establish that Jones is a resident of North Dakota and has been since prior to November 3, 2019. The Democratic-NPL has failed to demonstrate that there is a fact question concerning Mr. Jones actions and intent. As a matter of law, Mr. Jones is qualified. This Court should dismiss the Petition with Prejudice.

II. THE PETITION SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

[¶67] If this Court does not dismiss the Petition as a matter of law as is set forth above, then in that case, this Court should dismiss the Petition without prejudice for failure to state a claim rather than allow an evidentiary hearing.

[¶68] This Court has original jurisdiction to decide the Petition and to issue a writ of mandamus. N.D. Const. art. VI §2; N.D.C.C. § 32-34-01. Article VI, §2, of the North Dakota Constitution gives this Court the authority to issue, hear and determine original and remedial writs as may be necessary to properly exercise its jurisdiction. This Court’s authority is discretionary and it will determine for itself whether to exercise its jurisdiction. *Bolinske v. Jaeger*, 2008 ND 180, ¶ 4, 756 N.W.2d 336. “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. The law must require an act to be done to be enforceable by mandamus. *Berg*, at ¶ 9.

[¶69] Here, as is set forth in the Response Brief of Respondent North Dakota Secretary of State Alvin Jaeger, the Democratic-NPL does not have a legal right, at this time, to an order from this Court correcting an alleged ballot error because the election has begun.

Further delay for an evidentiary hearing will only add more confusion and disruption to the election.

[¶70] Further, the Democratic-NPL had and has a plain, speedy, and adequate remedy in the form of an election contest under N.D.C.C. Ch. 16.1-16. N.D.C.C. § 16.1-16-02 provides: in part, that “A defeated candidate or ten qualified electors may contest the nomination or election of any person . . .” Further, section 16.1-16-04 provides:

Any action to contest an election must be commenced and the complaint must be filed in the district court of the contestee's county of residence within five days after final certification of a recount by the appropriate canvassing board or within fourteen days after the final certification by the appropriate canvassing board if no recount is to be conducted. However, if the grounds for the action are the illegal payment of money or other valuable thing subsequent to the filing of any statement of expenses required by this title or if the contestee does not or cannot meet the qualifications to hold the office as required by law, the action may be commenced at any time. The contestee shall serve and file an answer within fourteen days after service of the contest summons and complaint. (Emphasis added.)

N.D.C.C. § 16.1-16-05 makes clear that an election contest may be commenced if the contestee does not or cannot meet the qualifications to hold the office as required by law.

[¶71] Because the election has begun, and because there is a legal remedy available, if this Court does not conclude as a matter of law that Jones is qualified, then in that event the Court should dismiss this matter without prejudice.

III. THE PETITION IS FRIVOLOUS

[¶72] The Petition is frivolous. It relies primarily on a material misstatement of fact. It fails to accurately apply North Dakota law and it appears it was brought for an improper purpose. This Court should find that the Petition is frivolous and award Mr. Jones his costs and attorneys' fees as allowed by law.

CONCLUSION

[¶73] This Court should dismiss the petition with prejudice, finding as a matter of law that Mr. Jones is qualified. This Court should also award Mr. Jones his costs and attorneys' fees.

Respectfully submitted September 21, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 28 pages.

Dated this 21st day of September, 2020.

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**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,

vs.

Alvin Jaeger, in his capacity as North
Dakota's Secretary of State, and Terry B.
Jones,

Respondents.

SUPREME COURT NO. 20200251

AFFIDAVIT OF SERVICE

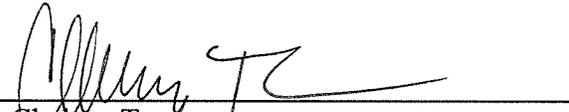
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COUNTY OF BURLEIGH)

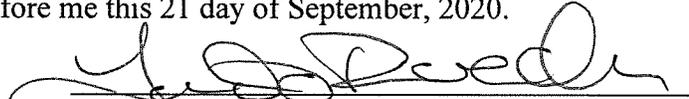
Chelsey Ternes, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter. Affiant states that on September 21, 2020, **Respondent Terry B. Jones' Response to Petition for Writ of Mandamus and Respondent Terry B. Jones' Supplemental Appendix** was filed electronically with the Clerk of Court of the North Dakota Supreme Court through the Supreme Court E-Filing Portal, and that the same documents were electronically served through the portal:

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Chelsey Ternes

Subscribed and sworn to before me this 21 day of September, 2020.


Notary Public

