IN THE SUPREME COURT

STATE OF NORTH DAKOTA 20120112

North Dakota State Board of Higher Education, Applicant, vs. Al Jaeger, Secretary of State, In his official capacity, Fighting Sioux Ballot Measures aka Committee For Understanding and Respect, Respondents, and North Dakota Legislative Assembly, Intervenor.	Supreme Court No. 20120112 FILED IN THE OFFICE OF THE CLERK OF SUPREME COURT MAR 9 2012 STATE OF NORTH DAKOTA

THE NORTH DAKOTA LEGISLATIVE ASSEMBLY'S RESPONSE IN OPPOSITION TO THE NORTH DAKOTA STATE BOARD OF HIGHER EDUCATION'S APPLICATION FOR WRIT OF INJUNCTION UNDER ORIGINAL JURISDICTION

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ISSUES

The 2011 Legislative Assembly enacted, then repealed, N.D.C.C. § 15-10-46. A referral measure to "repeal the repeal" was presented to the Secretary of State. The State Board of Higher Education seeks a writ enjoining Secretary Jaeger from placing the referral measure on the primary ballot; the Board claims the Assembly lacked the constitutional authority to pass the Act. Yet legislative authority is vested in the Assembly. Does the Court lack jurisdiction? Is N.D.C.C. § 15-10-46 constitutional?

BACKGROUND

Much has been discussed concerning the background of the underlying controversy over the University of North Dakota ("UND") nickname and logo. Indeed, law review articles on the topic have already been written. *See, e.g.*, Wayne Stenehjem and Matthew Sagsveen. *Let's Go Sue*: The Attorney General's Historical Perspective on *State of North Dakota v. NCAA*, 86 N.D.L.REV. 711 (available at: http://law.und.edu/law-review/issues/86/86-4.cfm). The issue before the Court, however, goes far beyond the nickname and logo issue. The issue, at its core, is further defining within our precedent "the line that marks the distinction between administrative and legislative functions" of the Board and the Assembly. *Nord v. Guy*, 141 N.W.2d 395, 402 (N.D. 1966).

A. Procedural History

The North Dakota Legislative Assembly ("Assembly") enacted N.D.C.C. § 15-10-46 (the "Act") in the 2011 legislative session. The Act provided:

> The intercollegiate athletic teams sponsored by the university of North Dakota shall be known as the university of North Dakota fighting Sioux. Neither the university of North Dakota nor the state board of higher education may take any action to discontinue the use of the fighting Sioux nickname or the fighting Sioux logo in use on January 1, 2011. Any actions taken by the state board of higher education and the university of North Dakota before August 1, 2011, to discontinue the use of the fighting Sioux nickname and logo are preempted by this section. If the national collegiate athletic association takes any action to penalize the university of North Dakota for using the fighting Sioux nickname or logo, the attorney general shall consider filing a federal antitrust claim against that association.

N.D.C.C. § 15-10-46 (repealed by S.L. 2011 Sp., ch. 580, § 2).

The constitutionality of the Act and the cost of retiring the nickname and logo were debated during the standing committee hearings on the bill. *2011 Senate Standing*

Committee Minutes, Senate Education Committee Hearing on HB 1263, 2011 Leg., 62nd Sess., p. 2 (N.D. 2011) (statement of Senator Flakoll), Intervenor Appendix ("App.") 1-18; *2011 House Standing Committee Minutes, House Education Committee Hearing on HB 1263*, 2011 Leg., 62nd Sess., p. 18 (N.D. 2011) (statement of Chairman R. Kelsch), Intervenor App. 19-41; *2011 Senate Standing Committee Minutes, Senate Education Committee Work on HB 1263*, 2011 Leg., 62nd Sess., p. 2 (N.D. 2011) (statements of Senators Marcellais and Flakoll), Intervenor App. 42-43; *2011 Testimony on HB 1263 House Education Committee*, 2011 Leg., 62nd Sess., Testimony Attachment 2 (testimony of Rep. David Monson) (stating: "Well, I say that the board of higher education may be in the constitution, but they aren't one of the three branches of government") and Testimony Attachment 3 (testimony of Sen. David Hogue) (stating: "I do offer testimony in support of the legislative assembly's constitutional authority to pass into law any one or all three of these bills"), Intervenor App. 44-50. The statute was repealed by the Assembly during the 2011 special session. The Assembly also received testimony concerning the cost of retiring the logo and nickname during the repeal debate. *2011 Special Session House Standing Committee Minutes, House Education Committee on SB 2370*, 2011 Special Leg., 62nd Sess., pp. 2-3 (statement of Dr. Robert Kelley), Intervenor App. 51-55; *Fiscal Note, SB 2370*, 2011 Special Leg., 62nd Sess., Intervenor App. 56-57.

The Sponsoring Committee's referral measure to "repeal the repeal" was presented to Secretary Jaeger on February 7, 2012. It was approved as to form prior to its circulation. The Act was resurrected pursuant to Article III, § 5 of the state constitution when it was submitted with the requisite number of signatures.

The Board filed an Application for Writ of Injunction Under Original Jurisdiction on February 17, 2012 ("Application"). The Board argues the Assembly does not, did not, and cannot have the constitutional authority to enact legislation concerning the nickname and logo of a North Dakota public university. The Board argues because the Act is unconstitutional, the Court should enjoin Secretary Jaeger from placing the referral measure on the primary ballot.

B. A Board Born of Controversy

The Legislative Council prepared a detailed report of the history of higher education administration for the Higher Education Committee in March 2012. *See* Affidavit of Jim W. Smith, Intervenor App. 58-66. The present framework of the Board was created in 1938 by an initiated constitutional measure. *Id.* at 62-63. The initiated measure came after controversy erupted over the firing of seven faculty members by the Board's pre-cursor, the Board of Administration. *Id.* The voters approved the constitutional amendment and a constitutional body to be known as the Board of Higher Education was created under then Article 54 of the constitution (now Article VIII, Section 6). *Id.* at 63.

It can reasonably be said the current framework of the Board exists as a reaction to control over the universities by the executive branch. *Id.* at 62-63. The Board is firmly within the executive branch of government. But its authority operates more autonomously than other executive branch offices. It does not, however, have legislative authority—such is reserved to the legislative branch and the people through the initiated measure process.

Chapter 15-10 of the Century Code sets forth legislative controls over the Board. For example, statutes have been enacted to provide for free tuition for children of firefighters killed in the line of duty, requiring faculty to be proficient in the English language, and placing regulations on political advertisement within campus housing. N.D.CC. §§ 15-10-18.5, 15-10-42, and 15-10-17.3. Outside of Chapter 15-10, there are many other general statutes that effect how public universities within North Dakota operate, anti-discrimination laws, laws against smoking in public places, requirements to procure worker's compensation insurance. The Board's position in the present matter is a direct affront to the constitutional authority of the Assembly to enact any laws applicable to the public universities of North Dakota. This is the reason the Assembly has intervened in this controversy.

C. History of the Act

The Assembly did not repeal the Act because it believed the statute was unconstitutional. It repealed the Act for perceived difficulties facing UND from threats of the NCAA. Wayne Stenehjem and Matthew Sagsveen, *Let's Go Sue*, 86 N.D.L.REV. at 744-45 (available at: http://law.und.edu/law-review/issues/86/86-4.cfm). Legislators from both parties realized that UND, in particular its student-athletes, would be potentially punished by an arbitrary, irrational, and double-standard NCAA position as to the nickname and logo. A meeting with the NCAA occurred in August 2011, attended by the Governor, legislative leaders, and Board leaders. *Id.* The purpose was to convince the NCAA to back down from previous demands placed on UND. The NCAA refused. After the meeting with the NCAA, during a special legislative session, the Assembly repealed the Act. *Id.*

The Assembly took a position on the Act—one that is principally in line with the Board's desire to retire the logo and nickname. At the same time, the Assembly respects the explicit constitutional rights of the citizens of North Dakota to refer a measure to the general electorate. The question for the Court is two-fold: 1) whether the Court has jurisdiction to quash a referral measure prior to the primary election, and 2) if the Court has original jurisdiction, whether the Act is constitutional. The Assembly first takes the position that the Court lacks original jurisdiction and should decline discretionary original jurisdiction because Secretary Jaeger complied with his constitutional obligations and the referral measure must be placed on the primary ballot. If the Court determines it has jurisdiction, the Assembly argues the Act is constitutional.

LAW AND ARGUMENT

I. The Court Lacks Jurisdiction.

A. The Board Disregard's the Secretary of State's Constitutional Authority

Article III of the constitution provides the framework for citizen referred measures. The constitutionally appointed official to determine the validity of a citizen referral measure, the Secretary of State, has approved the subject ballot referral as to form. The Secretary's constitutional obligation is to ensure constitutional mandates have been complied with and to approve the referral measure "as to form"—nothing more, nothing less. Article III, § 2. Here, the Secretary has approved "as to form" the subject referral. Because the form requirements have been complied with, the measure should be placed on the primary ballot.

Article II, section 7 of the state constitution provides authority for original review of the Secretary by the supreme court. But such is limited in terms of scope: "All

decisions of the secretary of state in the petition process are subject to review by the supreme court in the exercise of original jurisdiction." (emphasis supplied). The supreme court cannot invalidate a citizen driven ballot referral before the citizenry have an opportunity to exercise their rights under the constitution and vote. *Municipal Srvs. Corp. v. Kusler*, 490 N.W.2d 700, 706 (N.D. 1992). The Board's attempt to circumvent the clear constitutional intent to provide the true fourth branch of government (i.e., the people) the opportunity to "weigh in" cannot be superseded by the supreme court as a matter of constitutional law. The issue of constitutionality is not reviewable at present.

The Secretary of State has no obligation to determine whether a referral measure would be constitutional. *Municipal Srvs.*, 490 N.W.2d at 706. The constitution "limits the Secretary's review to whether the petition 'is in proper form and contains the names and addresses of the sponsors and the full text of the measure.' It does not authorize a review of the substance or merits of the text of the measure." *Id.* at 705. The Secretary has to determine whether the form of the referral measure, as presented, is within the requirements of the constitution and the requisite number of valid signatures is met. If these are met, then the Secretary has a constitutional duty to place the measure on the ballot. The constitution does not grant the Court original jurisdiction to review the "petition process" *and* the constitutionality of the referral measure. For purposes of argument only, even if the Act is unconstitutional, the supreme court lacks authority to invalidate the referral process. The constitution is clear in giving the supreme court original jurisdiction to review only the "petition process." N.D. Const., Art. III, § 7.

The Court has "original jurisdiction with authority to issue, hear, and determine such original and remedial writs as may be necessary to properly exercise its

jurisdiction." N.D. Const., Art. VI, § 2. The Board alternatively seeks review of the referral through this enumerated power of the supreme court. But such power seemingly conflicts with specific review granted to the supreme court to review the "petition process" of the Secretary of State. The Board's alternative argument ignores the constitutional duty of the Secretary to place the referral measure on the ballot if it is compliant. The supreme court has the authority under both articles of the constitution (III and VI) to entertain original jurisdiction. But it would seem the specific provision as to review of referral measures would exclusively apply to the question of whether the referral measure is proper and should be placed on the primary ballot. Certainly if the drafters of the state constitution wanted to place additional authority in the supreme court to review the work of the Secretary in complying with the constitutional process of certifying a referral measure they would have.

B. The Board Improperly Seeks Declaratory Relief

The Board's attempt to achieve a grant of a writ of injunction, bypassing normal procedures for an injunction, is extreme and should be refused. In seeking such remedy, the Board seeks to effectively bypass what would ordinarily be a very intense examination of the constitutionality of the Act—first by the district court and then possibly by this Court. If the writ of injunction is granted, the Assembly (or the voters) will have effectively been denied substantive and procedural due process rights at the expense of expediency and perceived public urgency. The typical process of developing a defense to any litigation necessarily includes the discovery phase of litigation—such is unavailable here.

The Application is improper. The Application first requests an "order" from the Court "declaring" the Act unconstitutional. Such is more in line with a declaratory judgment action than an application for a writ of injunction under original jurisdiction. The Application next seeks an order "enjoining" the Secretary of State from placing the referral measure on the primary ballot. This request is in line with a request for an injunction, but the request depends on the initial request for a declaration—that the Act be held unconstitutional. The Court does not have original jurisdiction to hear a declaratory judgment action that has been improperly and incorrectly billed as an Application for Writ of Injunction. The precedence for accepting original jurisdiction cases must remain a high and almost unattainable standard.

C. Separation of Powers

As pointed out above, this dispute has an unusual twist in that it involves a referral measure to "repeal the repeal." Most appellate court review of the propriety of barring citizens from considering a referred or initiated measure because of a purported constitutional issue do not address the special situation present here, that is: the law is in effect presently and may be affirmed by the citizens or may be declined by the citizens after the primary election. Typically a "ripeness" argument is brought forward, but here, the law is in place pending approval or disapproval of the citizens in the June primary. *See Municipal Srvs.*, 490 N.W.2d at 706. An element of "ripeness" does exist, however. The outcome of the referred measure is far from certain. And it is quite unclear whether there is actually "irreparable" harm that would be done to UND if the Act is allowed to remain until the referral measure is voted on; typically a moving party would provide evidence of harm, but no evidence in the form of affidavit, or otherwise, has been

presented here. If the constitutional merits are addressed by the Court, it would potentially issue an advisory opinion.

Here, the result of the "repeal the repeal" is the reinstatement of N.D.C.C. § 15-10-46 which contains the requirement that the logo and Fighting Sioux nickname be used by the University of North Dakota. The "repeal the repeal" measure results in an analogous situation to an initiated measure to enact N.D.C.C. § 15-10-46. In this case, there is a law in effect that has consequences and a review of the propriety of issuing an order preventing a vote on the law under the "ripeness" doctrine is confusing at best. The application for an order preventing a vote on the measure should be examined under the separation of powers under the state Constitution.

Article XI, § 26 of the state constitution provides that the legislative, executive, and judicial branches are co-equal branches of government. In the case of a referred measure that is in proper form, we are dealing exclusively with the legislative branch of the government. The people are exercising the legislative powers they reserved under Article III, Section 1. In *Anderson vs. Byrne*, 242 N.W.2d 687 (N.D. 1932), this Court reviewed a constitutional challenge to an initiated measure and held that the court did not have the power to declare an otherwise valid initiative unconstitutional prior to the peoples' vote on the measure. This Court observed, "The courts, therefore, can no more prevent, when all statutory requirements have been complied with, the people from voting upon a proposed initiative measure, than it could prevent the Legislative Assembly, when convened, from voting upon the same measure." *Id.* at 232. Here, as in *Anderson* this court should dismiss the Application

The public policy of our state constitution is to allow the citizens of this state to pass legislation and amend the constitution. The Board seeks to short-circuit the process and deny the citizens their constitutional right to vote. While the Assembly and the Board agree principally that the nickname and logo should be retired, the Assembly urges the supreme court to permit Secretary Jaeger to place the referral measure on the primary ballot. The referral process should not be impeded by judicial fiat—especially when the outcome of the vote is unknown.

II. THE ACT IS CONSTITUTIONAL

Should the Court determine it has original jurisdiction and must issue a declaratory judgment on the constitutionality of the Act, it must be found constitutional.

A. Board's Burden of Proof

The Board has the burden to prove the Act is unconstitutional. *Nord*, 141 N.W.2d at 400. Four of the five justices must hold the Act is unconstitutional. N.D. Const. Art. VI, § 4. "Every statute must be held constitutional, unless it is clearly violative of some constitutional provision. . . ." *Nord*, 141 N.W.2d at 400 (quoting *State ex. Rel. Kaufman v. Davis*, 229 N.W. 105 (N.D. 1930)) (emphasis added). Indeed, "[a]ny doubt as to [an Act's] constitutionality must, where possible, be resolved in favor of its validity." *Benson v. N.D. Workmen's Comp. Bureau*, 283 N.W.2d 96, 98 (N.D. 1979). The Board has the burden to prove the Act is unconstitutional "beyond reasonable doubt." *In re Craig*, 545 N.W.2d 764, 766 (N.D. 1996). And lest it be forgotten, "[o]ne who attacks a statute on constitutional grounds, defended as that statute is by a strong presumption of constitutionality, should bring up his heavy artillery or forego the attack entirely." *S. Valley Grain Dealers Ass'n v. Bd. of Cnty. Comm'rs*, 257 N.W.2d 425, 434 (N.D. 1977).

The Court should reject the Board's direct assault on the constitutional authority of the Assembly. The Assembly is currently aware, generally, of the *potential* consequences facing UND's athletic teams as a result of the referral measure reviving the Act until a vote occurs. *See* Letter to UND Provost Dr. Paul Lebel from NCAA, dated February 29, 2012. Intervenor App. 76. Yet such concerns are secondary in a constitutional analysis. The "validity [of a statute] must be tested [ ] not by what has been or is being done under it, but by the things which may be done under it." *Nord*, 141 N.W.2d at 400. A finding of unconstitutionality by the supreme court would call into question the authority of the Assembly over the Board as to numerous other issues.

B. The Act is Constitutional

A plain reading of the state's constitution supports the Assembly's position of supremacy over the Board as to the constitutionality of the Act. *See Bulman v. Hulstrand Constr. Co., Inc.*, 521 N.W.2d 632, 636 (N.D. 1994) ("The intent and purpose of a constitutional provision is to be determined, if possible, from the language itself"). While much hinges on the interpretation of phrases and words in the 1938 constitutional amendment, which are addressed below, the rest of the constitution cannot be ignored:

> All colleges, universities, and other educational institutions, for the support of which lands have been granted to this state, or which are supported by a public tax, *shall remain under the absolute and exclusive control of the state*. . . .

N.D. Const., Article VIII, Section 5 (emphasis added).

> While the legislative power of this state shall be vested in a legislative assembly consisting of a senate and a house of representatives, the people reserve the power to propose and enact laws by the initiative. . . .

N.D. Const., Article III, Section 1.

> The legislative, executive, and judicial branches are coequal branches of government. . . .

N.D. Const., Article XI, Section 26.

The Board bypasses a discussion of the inherent constitutional authority of the Assembly to enact legislation in the state of North Dakota. It instead focuses on the constitutional authority of the Board found in Article VIII, Section VI of the constitution. There can be no doubt that the Board has limited constitutional authority. But such authority cannot be read in isolation and must be read in conjunction with the rest of the constitution. *Kelsh v. Jaeger*, 2002 ND 53, ¶ 19, 641 N.W.2d 100.

The framework of a democratic government in the United States is found in the co-equal branches of government; North Dakota has adopted this framework. Each branch has authority and is balanced and checked to some extent by the other two branches. The Assembly is limited by the constitution to pass laws effecting the administration and management of the public universities—the general day-to-day workings, the hiring and firing of employees, the courses to be taught, grants to apply for. *Nord*, 141 N.W.2d at 401-02. The Assembly respects that limitation. But this limitation does not expand to workings of public universities that affect the state as a whole. The Board acknowledges that the issue over the nickname and logo is such that has had an effect on the state as a whole. Board's Application, at p. 4. The Assembly has a constitutional duty to effect policy and law over public universities within its constitutional bounds. The Assembly enacted N.D.C.C. § 15-10-46 within its inherent constitutional authority.

C. Legislative Authority over the "Work" of Public Universities

The Assembly has the authority to statutorily limit the organization or re-organization of UND's work. N.D. Const. Art. VIII. § 6(6)(b). There is little doubt that the athletic department, student athletes, and alumni of any university would include the nickname and logo as part of the "work" of that university—the work to establish itself as an athletic powerhouse, the work of increasing alumni contributions, the work of establishing goodwill in the community, the work to increase the subjective (but real) perception of the university on a state, regional, national and international level. Whether this work is in the name of the Fighting Sioux, the Flickertails, or "ND," it remains that the identity of an institution of higher learning is quantified in large part by its nickname and logo. And it takes plenty of work to establish tradition, prestige, good will, and notoriety. It is this work that the Assembly has a constitutional right to administer.

Athletic identity, and by extension, identity of university athletics through a nickname and logo, is a primary purpose to most universities—especially universities competing in Division I NCAA athletics. While the primary purpose of an institution of higher learning is learning, such is not the exclusive purpose of a university. Competition, teamwork, and—dare it be said—recreation does assist in producing a better rounded graduate. A cause must have an identity. The identity that is being stripped by the NCAA from UND is the Fighting Sioux name and logo. The Assembly has the constitutional authority to enact legislation to preserve the identity of the state's namesake university.

One cannot ignore the "work" that went into forming the logo and nickname over the years. "Work" can be defined in different ways depending on the context, here it can

be defined as follows: "1: activity in which one exerts strength or faculties to do or perform something: a : sustained physical or mental effort to overcome obstacles and achieve an objective or result . . . c: a specific task, duty, function, or assignment often being a part or phase of some larger activity." Webster's New Collegiate Dictionary (1981) P. 1340. Individuals have "worked" on the nickname and logo of UND since its inception in the 1930s (*e.g.*, artistic designs, merchandise, alumni and student associations, websites). *See, e.g.* History of the Fighting Sioux Nickname and Logo, prepared by N.D. Legislative Council. Intervenor App. 71-75. Such work, however, must occur within the confines of statutory limitations. The Board, therefore, is limited by statute, as to what it can dictate UND to do as to the logo and nickname.

The Board does not have complete and unfettered autonomy. N.D. Const., Art. VIII, § 6(6)(b); *see also Ellis v. North Dakota State University*, 2009 ND 59, ¶53, 764 N.W.2d 192 (Kapsner, J., dissenting) (noting "the Board is still subject to legislation"). The Court must interpret what the constitution means at Article VIII, § 6(6)(b): "The said state board of higher education shall have full authority to organize or reorganize within constitutional and statutory limitation, the work of each institution under its control, and do each and everything necessary and proper for the efficient and economic administration of said state educational institutions." *Id.* ¶53 (emphasis contained in opinion) (quoting N.D. Const., Art. VIII. § 6(6)(b)). Stated another way: the Assembly has the authority to organize and reorganize the work of the University of North Dakota through statute.

D. Property Rights

The value of the logo and nickname, from a monetary and non-monetary perspective, is significant. *See Fiscal Note, SB 2370*, 2011 Special Leg., 62nd Sess.; Board's Settlement Agreement with NCAA, at 2.j (Intellectual Property). Intervenor App. 77-88 (available at: http://www.ag.nd.gov/NCAA/SettlementAgreement.pdf); *2011 Senate Standing Committee Minutes Senate Education Committee on HB 1263*, 2011 Leg., 62nd Sess., p. 8 (statement of Earl Strinden: "Do we have any idea of the value of that logo in terms of dollars generated by it? Earl Strinden: Cannot give a dollar amount: it is substantial—one of the most popular names and logos in the country. Can tell that the revenue from the Ralph Englestad Area gift shop is very substantial"). Intervenor App. 8). The non-monetary value of the nickname and logo is also important and valuable to UND in terms of good will (i.e., tradition, history, excellence—all are associated with the nickname and logo). *See* Intervenor App. 71-75. And the value of the property in the name and logo is very important to many Native Americans. *See* Sponsoring Committee Brief. The Assembly has the constitutional duty to protect the tangible and intangible property value of the nickname and logo.

The constitution requires the Assembly to:

> make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control. This legislative requirement shall be irrevocable without the consent of the United States and the people of North Dakota.

N.D. Const., Art. VII, §1. And,

> [t]he legislative assembly shall provide for a uniform system of free public schools throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education, except

> that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education.

Id. at § 2. The Assembly has the duty to *maintain* the public schools established. *Id.* § 1. In maintaining UND, the Assembly made a determination regarding a valuable property right. The Assembly has the authority to institute fees and service charges to assist in financing the universities. *Id.* § 2. This authority allowed the Assembly to establish the Act because removing the nickname and logo would have to be funded by the Assembly. By requiring the name and logo to remain, the Assembly exercised its constitutional authority to protect a piece of state funded property.

Nord addressed this issue, albeit somewhat tangentially. The supreme court held unconstitutional a statute that would have allowed the Board to determine the necessity, type, and locations of new facilities at public universities. *Nord*, 141 N.W.2d at 404. The statute "attempted to delegate to the Board the power to determine what facilities shall be constructed at the different institutions, and the amount, if any, to be expended at each." *Id.* The *Nord* Court held this to be "an unconstitutional delegation of legislative authority." *Id.* The Board was improperly "granted the power to 'declare the policy of the law and fix the legal principles which are to control.'" *Id.* The *Nord* Court concluded that this delegation of legislative authority to the Board was violative of Section 25 (now Article III, § 1) of the North Dakota Constitution. *Id.*

Nord defined some of the currently contested words used in the constitution. "Control" was defined as: "'power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee'" or "'to exercise restraining or directing influence over: regulate, dominate, rule: have power over' and 'power or authority to guide or manage: directing or restraining domination.'" *Nord*, 141 N.W.2d at 402

(quoting Black's Law Dictionary, Third Ed.: Webster's Third New International Dictionary Unabridged). "Administration" was defined as "'performance of executive duties: management, direction, superintendence." *Id.* (quoting Webster's Third New International Dictionary Unabridged). *Nord* concluded that the constitution created the Board for the "'control and administration' of the said educational institutions, which in general terms means the management and supervision thereof." *Id.* (emphasis added). Every manager and supervisor has a superior: the Assembly is the Board's superior in this particular instance.

Nord held the Assembly's constitutional responsibility was to direct the Board in the use of appropriated public funds for the construction of facilities. Here, by passing the Act, the Assembly directed the Board not to expend public funds for the retirement of an ingrained logo and nickname that has great importance (and value). *Nord* supports the principle that the Assembly has the constitutional responsibility to direct the Board on the use of appropriated public funds.

E. Board Cited Case Law Distinguished

The Board focuses on foreign case law that primarily concerns employment issues. First, to state the obvious, there are no employment issues here. Second, while it may be academically interesting to learn how other states have interpreted their state constitutions, such is more appropriate for a law review article. The North Dakota Supreme Court has binding precedent interpreting the authority of the Assembly *vis a vis* the Board. And the North Dakota Constitution spells out the authority of the Assembly *vis a vis* the Board. The Nebraska Supreme Court's interpretation of the language of the

Nebraska Constitution in the late 1970s is not relevant to how the North Dakota Supreme Court should interpret the North Dakota Constitution.

The Board cites *Davidson v. State*, 2012 ND 68, 781 N.W.2d 72. While *Davidson* addressed the authority of the Board to order a name change in a settlement agreement with a private entity, it did not address the constitutionality of any statute passed by the Assembly. It is not applicable to the analysis here.

F. The Board Neglects Past Precedent

The Assembly has previously changed the names of universities. The 1983 Assembly voted to change the name of Minot State College to Dakota Northwestern University. *See* Memo on Institutions of Higher Education in North Dakota, prepared by the ND Legislative Council, November 1996. Intervenor App. 67-70. The bill was referred to the people of North Dakota and they disapproved of the name change at the 1984 primary. *Id.* at 69. The 1987 Assembly enacted House Bill No. 1300, providing for the name change of Bismarck Junior College to Bismarck State College.[1] *Id.* In 1987, the names of the state normal and teachers colleges were changed to Valley City State University, Mayville State University, Minot State University, and Dickinson State University; Lake Region Community College was changed to University of North Dakota – Lake Region. *Id.* at 69-70.

In 2009, the Assembly voted to change the name of the state forestry school at Bottineau to Dakota College at Bottineau. *See* Senate Bill No. 2389 (amending N.D.C.C. §§ 15-10-01, 15-16-01, 15-17-03 to reflect a change of name of the school of forestry at

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[1] Though Bismarck State College is not included in the constitution, SB No. 2073 in 1983 brought the three junior colleges under the jurisdiction of the Board. Intervenor App. 69.

Bottineau to Dakota College at Bottineau), Intervenor App. 89-91. Indeed, the Board expressly acquiesced to the authority of the Assembly: "It was moved by Kostelecky, seconded by Backes to approve the request of Minot State University – Bottineau to change its name to Dakota College at Bottineau, **subject to legislative approval** and with no general fund dollars being expended." Board Minutes, 3/19/09, Intervenor App. 98 (emphasis added). It is unclear why the Board believes the current dispute is any different from its previous concessions to the constitutional authority of the Assembly to change the names of public universities.[2]

The North Dakota Office of Attorney General agrees that the Assembly has the constitutional authority to change the name of public universities. In 1983, Attorney General Robert Wefald concluded:

> Accordingly, it is my opinion that the Legislature can change the name of Minot State College and that it can use the word "university" or whatever name it chooses to use for that institution located in the city of Minot as required by Article IX, Section 13(5) of our Constitution.

Attorney General Letter Opinion to Honorable Brynhild Haugland from Attorney General Robert O. Wefald, dated January 28, 1983 (AGO 83-7), Intervenor App. 102. While the change of a public university's official and formal name is perhaps not exactly the same as changing a public university's nickname and logo, a distinct parallel exists. Given the Board's past practice, and the Office of Attorney General's official position on name changes of public universities by the Assembly, this begs the question of why this action was instituted in the first place.

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[2] It is also unclear why the Board has not challenged the Assembly's constitutional authority to place a three-year limitation on UND to choose a new logo and nickname (N.D.C.C. § 15-10-46.1). The Board apparently has consented to the Assembly's constitutional authority on placing this limitation.

CONCLUSION

For all the foregoing reasons, the Board's Application for Writ of Injunction Under Original Jurisdiction should be **DENIED**.

Dated this 9th day of March, 2012.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

North Dakota State Board of Higher Education, Applicant. vs. Al Jaeger, Secretary of State, In his official capacity, Fighting Sioux Ballot Measures aka Committee For Understanding and Respect, Respondents. and North Dakota Legislative Assembly, Intervenor.	Supreme Court No. 20120112 AFFIDAVIT OF ELECTRONIC SERVICE

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Annette Kirschenheiter, being first duly sworn, deposes and says that on the 9th day of March, 2012, she forwarded a copy of the foregoing *The North Dakota Legislative Assembly's Response in Opposition to the North Dakota State Board of Higher Education's Application for Writ of Injunction Under Original Jurisdiction* and *North Dakota Legislative Assembly's Appendix* by e-mail to the following:

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Annette Kirschenheiter
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Subscribed and sworn to before me this 9th day of March, 2012.

Suzanne M Cahill
Notary Public

SUZANNE M CAHILL
Notary Public
State of North Dakota
My Commission Expires Jan. 29, 2017