

**SUPREME COURT
OF THE
STATE OF NORTH DAKOTA**

Michael J. Haugen, Jacob Stutzman,
Trent Barkus, and Brighter Future
Alliance;

Petitioners,

vs.

Alvin Jaeger, in his official capacity as
North Dakota Secretary of State.

Respondent.

Case No. _____

PETITION FOR WRIT OF
INJUNCTION

PETITION

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TABLE OF CONTENTS

	Paragraph Numbers
I. INTRODUCTION.....	1
II. STATEMENT SUPPORTING ORIGINAL JURISDICTION	5
III. ISSUE FOR REVIEW.....	7
IV. STATEMENT OF THE CASE	8
V. STATEMENT OF THE FACTS	12
VI. ARGUMENT.....	10
A. Standard of Review.....	23
B. The Secretary of State’s Role in Approving Ballot Measures.....	11
C. The Court Should Issue a Writ Because the Petitions for Measure 3 Failed to “Set Forth the Full Text of the Measure.”	30
D. Measure 3’s Ballot Title Does Not “Fairly Represent the Substance of the Constitutional Amendment.”	16
VII. CONCLUSION	41

TABLE OF AUTHORITIES

Paragraph Numbers

Cases

<i>Cottonwood Dev. v. Foothills Area Coalition of Tucson, Inc.</i> , 653 P.2d 694 (Ariz. 1982).....	30
<i>Dyer v. Hall</i> , 199 N.W. 754 (N.D. 1924)	<i>passim</i>
<i>Haugland v. Meier</i> , 335 N.W.2d 809 (N.D. 1983)	29
<i>Kerr v. Bradbury</i> , 89 P.3d 1227 (Or. Ct. App. 2004).....	30
<i>Larkin v. Gronna</i> , 285 N.W. 59 (N.D. 1939)	23, 28
<i>McCarney v. Meier</i> , 286 N.W.2d 780 (N.D. 1979)	24
<i>Mun. Servs. Corp. v. Kusler</i> , 490 N.W.2d 700 (N.D. 1992)	6, 29
<i>State ex rel. Baker v. Hanna</i> , 154 N.W. 704 (N.D. 1915)	24
<i>State ex rel. Wefald v. Meier</i> , 347 N.W.2d 562 (N.D. 1984)	6
<i>Wilson v. Cty. of Napa</i> , 9 Cal. App. 5th 178, 185 (2017), <i>as modified</i> (Mar. 13, 2017)	30

Constitutional Provisions

N.D. Const. art. II	8
N.D. Const. art. III.....	<i>passim</i>
N.D. Const. art. VI.....	5

Statutes

N.D.C.C. § 16.1-01-08 5
N.D.C.C. § 16.1-01-09 17, 26, 36
N.D.C.C. § 16.1-01-10 27
N.D.C.C. § 16.1-07-19 *passim*

Other Authorities

N.D. Legislative Council, *Measures Before Voters* (July 2019),
<https://www.legis.nd.gov/files/resource/library/measuresbeforethevoters.pdf>..... 12

I. INTRODUCTION

[1] On the afternoon of August 11, 2020, the North Dakota Secretary of State announced that Initiated Ballot Measure 3 (“Measure 3”) would appear on the November 3, 2020 general election ballot. The measure would amend North Dakota’s constitution to significantly change the state’s system of elections. Among other provisions, it would create a new system of “instant runoff voting” for certain elections, it would define specific criteria for redistricting legislative districts and give power to draw those districts to an unelected state commission, and it would tie certain new constitutional rights to a particular section of the North Dakota Century Code, thus allowing future constitutional changes to be made by the legislative assembly and not by the people.

[2] The state constitution requires that if North Dakota citizens are asked to make these significant changes to the state constitution, they should know that is what they are being asked to do. Indeed, to protect citizens from fraud in the initiative process, the state constitution requires that “the full text of the measure” must appear on the ballot petitions that electors are asked to sign. *See* N.D. Const. art. III, § 2. This Court held long ago that if statutory provisions are to be enshrined in the state constitution, the initiative petitions must set forth the full text of the statute and not simply incorporate the statute by reference. *Dyer v. Hall*, 199 N.W. 754, 757 (N.D. 1924). As *Dyer* explained, this requirement guards against “frauds [that] may be practiced in procuring signers to initiative and referendum petitions.” *Id.* at 757.

[3] Measure 3 fails to meet the constitutional requirements for transparency in the petition process because it indisputably did not include “the full text of the measure” on any of the initiative petitions. Section 1 of the petition governs overseas military ballots for “elections covered in N.D.C.C. section 16.1-07-19.” The statute is only cited by reference; the statute’s text is not provided on the petition. Thus, under *Dyer*, Measure 3 failed to comply with the requirement that the full text of the measure must appear on the petition on the ballot, and the Secretary of State should be ordered to reject the petitions supporting the measure for that reason alone.

[4] In addition, the petition title—which purports to provide a summary of the measure—fails to accurately describe the measure as drafted. The title does not identify the statute incorporated into the constitution, nor does it explain that, if the measure is adopted, the legislative assembly could alter the new constitutional rights of military voters by amending the statute without going back to the people. The measure also fails to describe the significant constitutional changes created by instant-runoff voting and fails to inform voters of the criteria that will be used in re-drawing legislative districts. Because it did not provide this information, the petition title failed to comply with the constitutional requirements.

II. STATEMENT SUPPORTING ORIGINAL JURISDICTION

[5] “All decisions of the secretary of state in regard to any petition are subject to review by the supreme court.” N.D. Const. art. III, § 6. This court “shall . . . have 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. In addition, N.D. Cent. Code § 16.1-01-08 provides that where any error “has been or is about to be committed in printing the ballot,” the Secretary of State has a responsibility to correct the error and, if the Secretary of State does not act to correct the error, “any person may petition the supreme court . . . for an order compelling the correction of the error, wrong, neglect, or act.”

[6] This Court has original jurisdiction to issue writs as to constitutional amendments that may appear on the ballot. *See State ex rel. Wefald v. Meier*, 347 N.W.2d 562, 564 (N.D. 1984) (“Few matters encompass more public interest than this process which reserves unto the people the power to govern themselves. . . . We conclude, therefore, that this is a matter of public interest which warrants our exercise of original jurisdiction.”) (internal citation omitted); *Mun. Servs. Corp. v. Kusler*, 490 N.W.2d 700, 701 (N.D. 1992) (noting the Supreme Court’s “authority to review the Secretary’s decisions on [petition] matters is without limitation or qualification”).

III. ISSUE FOR REVIEW

[7] Whether the Court should issue a writ of injunction requiring the Secretary of State to find the petitions supporting Measure 3 to be insufficient under Art. III, § 6 because (1) none of the petitions contain the full text of the proposed constitutional amendment including statutes cited therein; and (2) the petition title for Measure 3 does not accurately summarize the measure.

IV. STATEMENT OF THE CASE

[8] Petitioners Jacob Stutzman, Michael J. Haugen, and Trent Barkus are North Dakota residents and “qualified elector[s]” as that term is used in the state constitution. *See* N.D. Const. art. II. Both Stutzman and Haugen are retired from the United States military. Barkus served in the United States Navy and is a member of the Naval Reserves. Petitioner Brighter Future Alliance is a nonprofit corporation interested in furthering the common welfare of the citizens of North Dakota. As an organization formed to protect the rights and interests of North Dakota citizens, Brighter Future Alliance has an interest in protecting the rights of the citizens of North Dakota to receive accurate and truthful information when considering amendments to the state constitution.

[9] Petitioners seek a writ of injunction requiring the North Dakota Secretary of State to reject the petitions supporting Measure 3, and prohibiting Measure 3 from appearing on the general election ballot in 2020 without petitions that comply with the state constitution. This petition is timely because it is filed more than seventy-five days before the November 3, 2020 election. N.D. Const. art. III, § 7.

[10] The Court should issue a writ because the petitions supporting Measure 3 plainly did not comply with the requirement that any ballot petition set forth “the full text of the measure.” Measure 3 seeks to enshrine a section of North Dakota Century Code, N.D.C.C. § 16.1-07-19, into the constitution itself such that the constitutional rights created by that particular section are tied to that section of

the North Dakota Century Code. This Court held in *Dyer v. Hall*, 199 N.W. 754 (N.D. 1924) that when a constitutional amendment seeks to incorporate a statute, the ballot petition must set forth the full text of the statute. Because *none* of Measure 3's petitions set forth the text of section 16.1-07-19, the Court should issue a writ requiring the Secretary of State to find the petitions insufficient and prohibiting the Secretary of State from including Measure 3 on the ballot based on the petitions submitted.

[11] Apart from Measure 3's failure to comply with the constitutional requirement to set forth the "full text of the measure," the petition title fails to accurately describe the substance of Measure 3. The title does not identify the statute which Measure 3 would incorporate into the constitution, nor does it indicate that, by incorporating a statute into the constitution, the changes enacted by Measure 3 could allow the legislative assembly to change the scope and nature of rights created by the constitution. This fundamentally alters the rights of the people created by Article III, § 1 without ever informing the petitioners or the electorate that that is what they are doing. In addition, the summary fails to accurately reflect the significant changes created by Measure 3 with respect to instant-runoff voting and the criteria used for redistricting. The title therefore does not provide an accurate summary of the amendment.

V. STATEMENT OF THE FACTS

[12] The North Dakota Constitution makes clear that the people of the state "reserve the power to propose and enact laws by the initiative," take other legislative

actions, call constitutional conventions, “and adopt constitutional amendments by the initiative.” N.D. Const. art. III, § 1. Throughout the state’s history, the people have proposed a number of constitutional amendments through the initiative petition process.¹

[13] In March 2020, a sponsoring committee sought the Secretary of State’s approval as to the form of an initiated petition to enact significant changes to North Dakota’s system of elections. *See* Petition, App. at 3–10.

[14] Section 1 of the petition, titled “Help Our Heroes Vote,” provides: “In order to provide military-overseas voters with ample opportunity to vote, on or before the business day preceding the sixtieth day before an election, the secretary of state shall transmit ballots and balloting materials to all covered voters who submit a valid military-overseas ballot application. This shall apply for all elections covered in N.D.C.C. section 16.1-07-19.” *Id.* at 4.

[15] The petition purported to provide the “Full Text of the Measure.” But the language of section 16.1-07-19 was not set forth in the measure. Rather, the statute was only incorporated by reference. The “petition title” also did not include the statute’s language, nor did it mention that Section 1 of the petition incorporates a state statute into the constitution. *Id.*

¹ *See* N.D. Legislative Council, *Measures Before Voters* (July 2019), <https://www.legis.nd.gov/files/resource/library/measuresbeforethevoters.pdf> (showing eleven constitutional amendments by petition in the last twenty years, with seven of those in the last ten).

[16] The petition title also did not explain that the system of instant-runoff voting would be new and significantly change North Dakota elections. And although the petition title indicated that an Ethics Commission would re-draw legislative districts according to defined criteria, the petition title did not identify those criteria or explain their relative significance. *See* Petition Title & § 2(C), App. at 4, 6.

[17] As required by Article III, Section 2 of the North Dakota Constitution, the Secretary of State reviewed the petition and approved it “as to form.” The secretary also provided the sponsoring committee with language received from the attorney general, which the committee was to include as a “Petition Title.” Under North Dakota law, the petition title is to be a “short and concise statement that fairly represents the measure.” N.D.C.C. § 16.1-01-09(1)(b). The “Petition Title” provided to the sponsoring committee consisted of nine sentences (many with multiple subparts separated by semicolons) and comprised 311 words. *See* Petition, App. at 4. After receiving approval as to form, the sponsoring committee circulated the petition for signatures.

[18] By June 2020, as the deadline to submit signatures approached, the Secretary of State’s office had received numerous complaints that circulators gathering signatures on the petitions were using deceptive tactics. *See, e.g.,* Additional Correspondence with Secretary of State Regarding Petition for Measure 3, App. at 22–44. For example, one circulator allegedly attempted to gain a signature on the petition by telling the citizen that Secretary of State Al Jaeger supported the

measure. *See* E-mail from B. Pelton to A. Jaeger (June 13, 2020), App. at 17. Other circulators told North Dakota voters that the petition did nothing more than extend the time for military personnel to vote. *See, e.g.*, App. at 24–44. Several of the North Dakotans who complained requested that their names be removed from the petition, which the Secretary of State informed them he could not do under state law. *See, e.g.*, App. at 24–25, 24–39, 41, 43.

[19] One of the petitioners here, Jacob Stutzman, also was one of the citizens deceived into signing the petition under false pretenses. *See* Decl. of Jacob Stutzman, App. at 11–14. Stutzman was approached as he was entering a Wal-Mart in Bismarck, and was asked by a man if he was willing to help military service members. *Id.* ¶ 2. Stutzman was told the measure would make it easier for military members serving overseas to vote in elections. *Id.* ¶ 4. Stutzman served in the United States Army and was sympathetic to members of the military voting overseas. *Id.* Stutzman reviewed the language for Section 1 titled “Help Our Heroes Vote,” but it did not include the language of N.D.C.C. section 16.1-07-19 and the circulator did not show Stutzman the statute or the next two pages of the petition regarding open primaries, instant-runoff voting, and legislative districts. *Id.* ¶¶ 5–7. Because the petition did not include the full text of N.D.C.C. section 16.1-07-19, Stutzman also did not know which elections Section 1 affected. *Id.* ¶ 6. After discovering the true nature of Measure 3, Stutzman attempted many times to contact the organization that sponsored the measure and requested his name be removed from the petition, but never was able to confirm that it was in fact removed. *Id.* ¶¶ 8–9.

[20] Secretary Jaeger himself acknowledged that the circulators' conduct and the language in Measure 3 were confusing North Dakotans. In response to a complaint that a circulator claimed that the measure was "supported by the Secretary of State," Secretary Jaeger wrote an email explaining, "I am very much opposed to this petition. We have heard of their misleading tactics, but this is a first. . . . They would actually be disenfranchising the military and the state's voters with the first section. . . . The citizens of the state have to be warned about what is in the petition. It is about a lot more than military voting." E-mail from Al Jaeger to Brady Pelton (June 14, 2020), App. at 18. In addition to this complaint, the Secretary of State's office received many emails and phone calls complaining about the petition's confusing language and the circulators' tactics. *See, e.g.*, App. at 22–44.

[21] On July 6, 2020, the sponsoring committee submitted signatures and final petitions to the Secretary of State. During the review period, Petitioner Stutzman notified the Secretary of State's office that the petitions did not contain the "full text of the measure" because it did not include the text of N.D.C.C. section 16.1-07-19 but rather cited only to the statute by reference. *See* Stutzman Decl. ¶ 10 & Ex. 1, App. at 12, 14. The Secretary of State also confirmed to petitioners that *none* of the petitions submitted in support of Measure 3 contain the text of N.D.C.C. section 16.1-07-19. *See* Finken Decl. ¶ 4, App. at 15.

[22] Yet even after acknowledging that the petitions failed to comply with Article III of the constitution, the Secretary of State announced on August 11, 2020 that the petition was approved to appear on the November 3, 2020 ballot as

“Measure 3.” Petitioners thus filed this action for a writ to compel the Secretary of State to find the petitions insufficient and not to include Measure 3 on the ballot based on the existing petitions and signatures.

VI. ARGUMENT

A. Standard of Review.

[23] “When the people decree that proposed legislation or amendments to the constitution are to be submitted in a certain form and manner, it is the duty of the officials charged with the oversight of the submission to see that these rules are observed.” *Larkin v. Gronna*, 285 N.W. 59, 63 (N.D. 1939). Where officials fail to enforce those requirements, “[i]n appropriate proceedings they can be enjoined from submitting a measure.” *Id.*

[24] The Secretary of State’s failure to enforce legal requirements presents a question of law —i.e., interpretation of the constitution—so this Court reviews the Secretary of State’s decision without deference. *See McCarney v. Meier*, 286 N.W.2d 780, 783 (N.D. 1979) (rejecting argument for abuse of discretion standard of review and noting “[w]e do not agree that there is a burden of proof upon anyone in this case where the principal question is entirely one of law”); *State ex rel. Baker v. Hanna*, 154 N.W. 704, 705 (N.D. 1915) (“That a question of law may arise . . . upon the sufficiency of the petition vests no discretion in said official in acting under it.”). However, the burden is on the party attacking petitions to show that they are not in compliance with the state constitution. N.D. Const. art. III, § 6.

B. The Secretary of State’s Role in Approving Ballot Measures.

[25] The Secretary of State’s constitutional duty to review initiative petitions involves two parts. First, the Secretary of State conducts a preliminary review under Article III, § 2 to review the proposed petition “as to form” before it is circulated for signatures. Second, after receiving signed petitions, the Secretary of State performs a final review under Article III, § 6 where the Secretary of State is required to “pass upon each petition” for sufficiency, and notify the sponsoring committee if any petition is “insufficient.”

[26] The initial review under Article III, § 2 must be completed “in not less than five, nor more than seven, business days.” N.D.C.C. § 16.1-01-09(1)(c). After a review of the form during this brief time period, the Secretary of State is required only to “approve the petition for circulation,” not to approve the measure for placement on the ballot. N.D. Const. art. III, § 2. The petitions may be circulated “if it is in proper form and contains the names and addresses of the sponsors and the full text of the measure.” *Id.*

[27] The Secretary of State’s obligation to “pass upon each petition” under Article III, § 6 is more thorough and takes more time. For this review, the Secretary of State has “a reasonable period, not to exceed thirty-five days, in which to pass upon the sufficiency of any petition.” N.D.C.C. § 16.1-01-10. Only after this review can the Secretary of State notify petitioners that he intends to place the measure on the ballot.

[28] This Court has long held that the Secretary of State’s review for sufficiency involves more than simply verifying signatures on the petitions. This Court previously described the Secretary of State’s duty during the final review to “pass upon” petitions as the duty “to determine sufficiency in accordance with the standard set, to weigh and determine the essential facts for and against.” *Larkin*, 285 N.W. at 65. This duty “is not confined to but one feature of the petition, such as the number of signers,” but also includes deciding whether each petition meets the “constitutional requirements in form,” such as “whether it has a title, whether the ballot title fairly represents the subject matter of the measure, and *whether the petition contains the full text of the measure.*” *Id.* (emphasis added). “The constitution provides that if the secretary of state determines the petition is insufficient in *any* of the particulars required in order to have it placed upon the ballot, it is his duty to so notify the committee and allow the committee time for correction or amendment.” *Id.*

[29] There is nothing in the constitution’s text or structure to suggest that the Secretary of State’s abbreviated review to approve petitions for “circulation” somehow prevents the Secretary of State from performing the duty defined by this Court in *Larkin* “to determine sufficiency in accordance with the standard set, to weigh and determine the essential facts for and against.” *Id.* Even if the Secretary of State makes a mistake in conducting the initial review and wrongly approves a petition’s form for circulation, the Secretary still has a duty to prevent “insufficient” petitions from placing a measure on the general election ballot. *See Mun. Servs.*

Corp., 490 N.W.2d at 701 (considering form of petitions approved by Secretary of State under Art. III, § 2, in deciding whether to allow ballot measure to appear on the ballot); *Haugland v. Meier*, 335 N.W.2d 809, 811 (N.D. 1983) (ordering Secretary of State not to permit referendum on ballot based on insufficient form under Art. III, § 6 where “we have in this case a challenge of the approval of the form of the petition at a time when a determination of insufficiency still affords time for correction or amendment”).

C. The Court Should Issue a Writ Because the Petitions for Measure 3 Failed to Set Forth “the Full Text of the Measure.”

[30] The constitution requires that any petition to amend the state constitution by ballot measure must “contain[] . . . the full text of the measure.” N.D. Const. art. III, § 2.² This Court has required that if a petition to amend the

² This requirement is not unique to North Dakota. Many courts have held that proponents of a ballot measure must include the precise and complete language of the ballot referendum in order for the referendum to be valid. *See, e.g., Wilson v. Cty. of Napa*, 9 Cal. App. 5th 178, 185 (2017), *as modified* Mar. 13, 2017 (petition violated requirement that it contain the full text of the measure where it did not include best-management practices plan that was incorporated into the measure by reference; “[a] person presented with the petition could not ascertain from the petition itself the content of the best management practices to which the proposed initiative refers but would be required to do extraneous research to learn what practices the measure would require of a permit applicant”); *Kerr v. Bradbury*, 89 P.3d 1227, 1230–31 (Or. Ct. App. 2004) (finding that petition failed to include “full text of the proposed law” when petition did not include text of Oregon statutes as they would read if the petition was enacted); *Cottonwood Dev. v. Foothills Area Coalition of Tucson, Inc.*, 653 P.2d 694, 697 (Ariz. 1982) (“[I]t is imperative that petitions ‘be attached to a full and correct copy’ of the measure to be referred, so that prospective signatories have immediate access to the exact wording of the public action which is to be suspended, and possibly reversed.”).

constitution incorporates a statute, the petition must include the full statutory text to meet the requirement of Article III, § 2.

[31] In *Dyer v. Hall*, 199 N.W. 754 (N.D. 1924), this Court considered a proposed amendment to the state constitution that significantly revised and reformed state banking laws, repealing certain statutory provisions and incorporating other statutes. The ballot measure did not contain the entire text of the statutes, but rather cited them only by reference. After reviewing the petition, the Secretary of State refused to place the petition on the ballot because it did not provide the full text of the statutes and, as a result, did not set forth “the full text of the measure.” *Id.* at 756. This Court upheld the Secretary of State’s determination, holding that mere citations to the statutes at issue were not sufficient; the ballot measure did not “contain the full text of the measure proposed” as required by the constitution unless the statutory text was itself included. *Id.* at 757.

[32] “The reason for this requirement is obvious,” the Court explained:

The average voter does not have conveniently at hand the text of the Constitution or the statutes of this state; if, therefore, he is to have an opportunity to know fully and intelligently what he is doing when he signs or declines to sign a petition, or votes on a proposed amendment, it is only if the full text of the proposed amendment to the Constitution be inserted in the petition, . . . that he will be able to do so.

Id. at 756. Because the proposed amendment effectively sought to make the statutes “part of the Constitution,” the constitution required that citizens have the right to review them. *See id.*

[33] The same analysis applies here. Measure 3 seeks to make N.D.C.C. section 16.1-07-19 “part of the Constitution” by incorporating the statute in a new constitutional provision. Because the full text of that statute was not included with the petition, North Dakota electors signing the petition did not have the opportunity “to know fully and intelligently” what they were doing when signed the petition, and voters will not fully know what they are enacting if they vote for the petition.

[34] If electors and voters had access to the text of the statute, they may be surprised to see that section 16.1-07-19 does not refer to the same elections as those affected by Sections 3 and 4 of the same ballot measure. Where section 16.1-07-19 covers all state and local candidate elections, Sections 3 and 4 apply only to primary and general elections for “statewide, legislative assembly, and United States congressional offices.” But because the measure does not contain the full text of the statute incorporated into Section 1, there is no way for the electorate to know that different sections of Measure 3 apply to different groups of elections.

[35] Finally, the serious concerns expressed by the Court in *Dyer* about fraud in procuring signatures are very much present here. In *Dyer*, the Court noted “the comparative ease with which frauds may be practiced in procuring signers to initiative and referendum petitions.” 199 N.W. at 757. Requiring petitioners to include the entire text of statutes incorporated by reference into the state constitution is one method used by the constitution’s framers to “lessen the possibility of fraud or imposition in procuring signatures.” *Id.* Here, where there is evidence of actual “fraud or imposition in procuring signatures,” see *Stutzman Aff.* ¶¶ 3–5 & Ex. 1,

Add. at 11–14, the Court should require strict compliance with the constitution’s disclosure requirements.

D. Measure 3’s Ballot Title Does Not “Fairly Represent the Substance of the Constitutional Amendment.”

[36] Each ballot petition is required to include a title that fairly represents the measure. *See* N.D.C.C. §16.1-01-09(1)(b). Here, the petition title failed to fairly summarize the measure in three ways.

[37] First, like the text of the measure, the title does not provide the text of section 16.1-07-19. It also fails to even refer to the statute or otherwise identify that the rights of military voters apply only in elections covered by section 16.1-07-19. Without this reference, voters lack complete information about the rights created under the new constitutional amendment, and also do not know that Section 1 applies differently than Sections 3 and 4 of the measure do.

[38] The Secretary of State’s failure to include any reference to section 16.1-07-19 also is significant because the amendment incorporates that section into the constitution such that the legislative assembly, and not the voters, could change the constitution simply by removing or revising that section. The fact that the measure makes certain constitutional rights contingent on a statute is significant and should be disclosed in the title. If the people are ceding to the legislature their right to make a constitutional change, they should be fully informed they are doing so.

[39] Second, the title does not accurately identify the significant changes that Measure 3 would make to North Dakota’s system of elections through instant-

runoff voting. The fourth sentence of the title describes the “new process” for state primary elections, but nowhere does the title identify the system of instant-runoff voting as “new,” explain that the current system requires only a plurality of votes for a candidate to be elected, or clarify that the amendment would apply a new process for all general elections for statewide, legislative assembly, and United States congressional office, while leaving a separate process in place for other types of elections. Without this additional explanation, the title does not accurately describe the new amendment.

[40] Third, with respect to redistricting changes, the title states only that the Ethics Commission would be required to draw new legislative districts based on “certain criteria,” without identifying the criteria. The measure’s failure to identify the criteria in the title is significant because voters have a right to know the criteria that will be used to create new districts, and the order in which those criteria will be considered—not just that some criteria exist. This is particularly true because, without this measure, after “comply[ing] with the United States Constitution and applicable federal law,” the legislative assembly has flexibility and may choose to draw districts in such a way as to “maximize the number of politically competitive districts” or instead to favor keeping cities and townships together in one district. If Measure 3 is enacted, however, the Ethics Commission will be constitutionally required to favor keeping townships and cities together over maximizing the competitiveness of the district. *See* Petition at § 2(C), App. at 6. If the people are

asked to choose one of these values over the other, they should at least be aware of that choice.

VII. CONCLUSION

[41] For the foregoing reasons, the Court should issue a writ of injunction prohibiting the Secretary of State from placing Measure 3 on the November 3, 2020 general election ballot. Petitioners respectfully request the Court set an expedited hearing to consider this petition.

Dated: August 12, 2020

/s/ David W. Asp

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CERTIFICATE OF COMPLIANCE

The undersigned, as the lawyer for the Petitioner and as author of this Petition, hereby certifies, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that this Petition was prepared with proportional type face and the total number of words in this Petition, excluding words in the Table of Contents, Table of Authorities, signature blocks, Certificate of Service, and this Certificate of Compliance, totals 4,768. The total page number for this Petition, excluding this certificate, is 18 pages.

Dated: August 12, 2020

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PROOF OF SERVICE BY MAIL

I hereby certify that I caused a true and correct copy of the foregoing documents:

- PETITION; and
- APPENDIX

to be delivered via mail, UPS Second Day Air, on the 12th day of August, 2020, to the following persons:

Alvin Jaeger
NORTH DAKOTA SECRETARY OF
STATE'S OFFICE
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