

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jared Hendrix, as chairman of the North Dakota for Term Limits Sponsoring Committee, and North Dakota for Term Limits, Petitioners, vs. Alvin A. Jaeger, in his official capacity as North Dakota Secretary of State, Respondent.	Supreme Court Case No: 20220233
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RESPONDENT’S RESPONSE TO PETITION FOR WRIT OF MANDAMUS

ORAL ARGUMENT REQUESTED

David R. Phillips
Special Assistant Attorney General
ND Bar # 06116
300 West Century Avenue
P.O. Box 4247
Bismarck, ND 58502-4247
(701) 751-8188
dphillips@bgwattorneys.com

Matthew A. Sagsveen
North Dakota Solicitor General
ND Bar # 05613
Office of Attorney General
500 N. 9th Street
Bismarck, ND 58501-4509
masagsve@nd.gov

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1] North Dakota Secretary of State Alvin A. Jaeger provides the following issues presented for review:

1. Whether the Court should deny the requested writ of mandamus because the sponsoring committee did not submit a sufficient number of valid signatures in support of the initiative?
2. Whether the Court should deny the requested writ of mandamus because the Secretary of State properly deemed invalid the circulator affidavits notarized by Zeph Toe based on irregularities and fraud?
3. Whether the Court should deny the requested writ of mandamus because the Secretary of State properly deemed invalid signatures that did not comply with the requirements of North Dakota law?
4. Whether the Court should deny the requested writ of mandamus because the Secretary properly deemed invalid signatures obtained in violation of North Dakota's statutory ban on paying circulators based on the number of signatures gathered?

STATEMENT OF THE CASE

I. Nature Of The Case

[¶2] In this action, Petitioners Jared Hendrix, as chairman of the North Dakota for Term Limits Sponsoring Committee ("Hendrix"), and North Dakota for Term Limits (collectively "Petitioners") challenge the North Dakota Secretary of State Alvin A. Jaeger's ("Secretary Jaeger" or "Respondent") rejection of certain signatures submitted in support of the Term Limits Initiative, with his rejections bringing the total number of

valid signatures to only 17,265, well below the 31,164 threshold required by the North Dakota Constitution for placement of the measure on the November 8, 2022 ballot.

[¶3] Upon receipt of the petitions with signatures by the Secretary of State's office, Secretary Jaeger and his staff conducted a thorough review of every petition and every signature contained on the petitions, in the same manner as has been done for dozens of petitions over the last 30 years that Secretary Jaeger has served as the North Dakota Secretary of State. That standard review process revealed an unprecedented level of irregularities and indications of likely fraud which were evident on the face of the petition documents including relating to notary public named Zeph Toe ("Toe") and his notarization of circulator affidavits purportedly signed by at least by four circulators: Chloe M. Lloyd, Ritchell Aboah, Ramona Morris, and Wayne Williams. After finding numerous indications that multiple circulators did not actually appear before Toe when they signed their circulator affidavits, that signatures of circulators notarized by Toe were forged, that circulator affidavits notarized by Toe were altered by others, and other serious irregularities, Secretary Jaeger concluded that he could not with confidence state that any of the circulator affidavits notarized by Toe were without error or fraud. As the constitutional officer charged with ascertaining the sufficiency of petitions, Secretary Jaeger determined the irregularities relating to Toe were so pervasive and indicative of fraud that all circulator affidavits notarized by Toe were untrustworthy and none of them

could be counted, thereby invalidating 15,740 signatures on this basis.¹ All North Dakotans have a right and an interest in the North Dakota Constitution being subject to amendment only by lawful, not fraudulent processes.

¶4 Secretary Jaeger also found other irregularities, referred to as “signature-level issues”, requiring invalidation of signatures. For example, some signatures had missing or incomplete addresses, out of state addresses, missing dates, circulators who were not citizens, circulators who were not qualified electors, and similar issues. In total, Secretary Jaeger invalidated 4,537 signatures on the basis of various violations of North Dakota law. Petitioners claim 1,850 out of the 4,537 signatures excluded for signature-level issues were substantially compliant and should have been counted. Therefore, this issue impacts a total of only 1,850 signatures. Even if Petitioners were to succeed on this issue, the number of signatures affected is too low to change whether the term limits measure is placed on the ballot. Therefore, the Court need not consider the signature-level issues. However, if the Court does consider the signature-level issues, Petitioners failed to present sufficient evidence of their claim. The District Court excluded their spreadsheet exhibits analyzing the specific signatures Petitioners claim should have been counted as well as the supporting documentation at the evidentiary hearing. The Petitioners offered no affidavits or live testimony explaining or providing foundation for the exhibits or the bases of their claims. Further, the Secretary’s decisions with respect to

¹ Toe notarized circulator affidavits in 751 petition packets, affecting a total of 21,684 signatures. District Court Findings (Sct.Dkt.26:9-10:¶34). However, 5,944 of those signatures were deemed by Secretary Jaeger to be insufficient for reasons regardless of Secretary Jaeger’s decision to exclude all Toe-related signatures. *Id.* Petitioners in this action do not specifically challenge Secretary Jaeger’s decision to invalidate that group of 5,944 signatures. Therefore, the issue in this case relating to Toe impacts a total of 15,740 signatures.

the signature-level issues are supported by the record and were made in accordance with North Dakota law.

[¶5] Additionally, during the Secretary of State's review of the term limits petitions, he was notified that some of the circulators were paid or offered pay on a basis related to the number of signatures obtained for circulating the initiative in violation of North Dakota's ban on per-signature payments, N.D.C.C. § 16.1-01-12(1)(j). Under that statute, any signature obtained in violation of the ban "is void and may not be counted." *Id.* Secretary Jaeger received audio recordings in which circulators who were hired to circulate the term limits petition by Charles Tuttle ("Tuttle") and his fiancé Jessica Jaworski ("Jaworski") admitted they were paid or offered bonuses based on the number of signatures obtained. At the request of Secretary Jaeger, the North Dakota Bureau of Criminal Investigation ("BCI") conducted an investigation into the pay-per-signature violations. During that investigation, Jaworski admitted to Supervisory Special Agent Mark Nickel ("SSA Nickel") that circulators were paid a bonus if they obtained a certain number of signatures within a certain period of time and that the bonuses were documented on timesheets. Circulators also admitted to Nickel that they were paid or offered bonuses based on the number of signatures collected. The foregoing was known to Secretary Jaeger at the time of his decision to invalidate the signatures collected by circulators hired by Tuttle and Jaworski. Additionally, after Secretary Jaeger's decision, BCI executed a search warrant to search Tuttle and Jaworski's residence and obtained copies of the circulator timesheets, which confirmed circulators were indeed paid the illegal bonuses. R.Exh.41-49. 8,274 signatures were invalidated for violating the pay-

per-signature ban.² This issue (which impacts 8,274 signatures), considered alone or along with the signature-level issues discussed above (which impacts 1,850 signatures), does not impact sufficient signatures to place this measure on the ballot, regardless of this Court's decision on the merits. Only the issue relating to the notary Toe impacts enough signatures to affect whether the term limits measure is placed on the ballot. Therefore, the Court need not consider the pay-per-signature issue. However, if the Court does consider the pay-per-signature issue, significant evidence was obtained prior to Secretary Jaeger's decision on the issue, and even more evidence found after his decision, to establish the law was violated and the signatures obtained in violation of the law are void and cannot be counted. Further, the pay-per-signature ban is constitutional and is an important safeguard against fraud in the collection of signatures in North Dakota.

[¶6] The term limits petitions are tainted with an unprecedented level of likely fraud, irregularities, and illegal conduct. Secretary Jaeger faithfully carried out his constitutional and statutory duties, used his constitutionally authorized discretion, and applied his 30 years of experience to correctly determine a total of 29,101 signatures submitted for review were invalid. With only 17,265 valid signatures accepted by Secretary Jaeger, the Petitioners failed to satisfy the constitutional requirement of 31,164

² The District Court Findings incorrectly state that Secretary Jaeger rejected 7,793 signatures on this basis. Sct.Dkt.26:12:¶45. The actual number of signatures rejected on this basis is 8,274, as shown in the total cell on R.Exh. 5, page 115, in the column entitled "Signatures Before Approval Date". Oliver explained in her live testimony that this column was otherwise empty and the Secretary of State office's software did not have a data entry option for violation of the pay-per-signature statute. Therefore, Secretary of State staff entered the signatures invalidated for the pay per signature violation under the column entitled "Signatures Before Approval Date". The discrepancy between the District Court's finding that 7,793 signatures were invalidated on this basis, and the actual number of 8,274, is inconsequential to the issues presented to the North Dakota Supreme Court and does not have the potential to alter the outcome of this case.

signatures, and the term limits measure should not be placed on the November 8, 2022, ballot. The Petition For Writ of Mandamus should be denied.

II. Course of Proceedings and Disposition Below

¶7 Petitioners filed a Petition for Writ of Mandamus in the North Dakota Supreme Court on August 12, 2022, seeking a writ of mandamus requiring Secretary Jaeger to accept as valid certain signatures in support of the Term Limits Initiative and requiring him to place the initiative on the November 8, 2022, ballot. Sct.Dkt.1. On August 17, 2022, the North Dakota Supreme Court issued an Order directing the Honorable James S. Hill, Judge of the district court, South Central Judicial District (“District Court”), to hold an evidentiary hearing and make findings of fact on the following issue: the Respondent’s disqualification of petition signatures. Sct.Dkt.14. The District Court held an evidentiary hearing on August 23, 2022 and issued an *Order Regarding Factual Findings Regarding Respondent’s Disqualification Of Petition Signatures* (“District Court Findings”) on August 25, 2022. Sct.Dkt.26. The only witnesses who testified live and were subject to cross-examination at the evidentiary hearing were Secretary Jaeger, who was first elected as North Dakota Secretary of State in 1992 and has served continuously since then, and Lee Ann Oliver (“Oliver”), an election specialist employed by the Secretary of State’s office since 1989. District Court Findings (Sct.Dkt.26:3:¶9); R.Exh.1:1:¶ 3; R.Exh.32:1:¶ 3. Pursuant to a stipulation by the parties, the Court also admitted affidavits from Secretary Jaeger, Oliver, and SSA Nickel, as well as affidavits offered by Petitioners. District Court Findings (Sct.Dkt.26:3:¶9); R.Exh.1; R.Exh.32; R.Exh.38; P.Exh.17; P.Exh.19; P.Exh.27; P.Exh.29; P.Exh.30. Various other exhibits were admitted by the District Court. *See* District Court Findings (Sct.Dkt.26); *see also* Sct.Dkt.25. With respect

to Secretary Jaeger and Oliver, the District Court noted, “[t]heir demeanor and the totality of their in-court testimony and statements in their respective affidavits made both strong witnesses. Their knowledge of North Dakota election law was extensive. The Court viewed both with a high degree of credibility.” District Court Findings (Sct.Dkt.26:4:¶9). [¶8] With respect to all of the determinations of Secretary Jaeger that Petitioners challenge in this action, the District Court found Secretary Jaeger’s determinations were factually substantiated by the record. *See* District Court Findings (Sct.Dkt.26). The Statement of Facts, below, is supported by the witness testimony in the District Court evidentiary hearing, the affidavits, and other exhibits admitted by the District Court, and is supported by the District Court Findings.

STATEMENT OF THE FACTS

I. Term Limits Initiative and Review

[¶9] On July 1, 2021, the North Dakota for Term Limits Sponsoring Committee (“Sponsoring Committee”) submitted to Secretary Jaeger a Term Limits Initiative for review and approval for circulation. District Court Findings (Sct.Dkt.26:4:¶14); Petitioner’s Exhibit (“P.Exh.”) 1. The Term Limits Initiative seeks to add a new article to the North Dakota Constitution, placing term limits on the Governor and members of the North Dakota Legislative Assembly. District Court Findings (Sct.Dkt.26:4:¶14); Respondent’s Exhibit (“R.Exh.”) 4, p. 5. On July 16, 2021, Secretary Jaeger approved the petition for circulation. District Court Findings (Sct.Dkt.26:5:¶15); P.Exh. 1. For constitutional amendments, signatures totaling 4% of the State’s resident population according to the most recent federal decennial census, or 31,164 signatures, are required.

N.D. Const., Art. III, Sec. 9; District Court Findings (Sct.Dkt.26:5:¶15); R.Exh. 1, pp. 3-4, ¶g.

[¶10] On February 15, 2022, the Sponsoring Committee submitted to the Secretary of State's office 1,441 petition packets for review, containing 46,366 signatures. District Court Findings (Sct.Dkt.26:5:¶16); R.Exh.21. Under N.D.C.C. § 16.1-01-10, Secretary Jaeger had a reasonable period, not to exceed 35 days (until March 22, 2022), in which to pass upon the sufficiency of the petitions.

[¶11] Oliver, an election specialist employed by the Secretary of State's office since 1989, testified at the evidentiary hearing in the District Court and also submitted an affidavit in this case. District Court Findings (Sct.Dkt.26:3:¶9); R.Exh.1. Oliver indicated the Secretary of State's office applied its standard review process to the term limits petitions, with the same process having been followed for more than 90 initiatives during the 30 years that Respondent Alvin Jaeger has served as Secretary of State. R.Exh. 1, pp. 6-9, ¶¶ 7-13.

[¶12] As part of the normal petition review process, Oliver and other staff at the Secretary of State's office checked the term limits petitions and all the signatures thereon for compliance with state law. R.Exh. 1, pp. 7-8, ¶ 11. For example, they made sure the petitions were in their entirety (see N.D.C.C. § 16.1-01-09(4)); checked whether the notary and circulator have the same last name, and, if they do, determined whether they are spouses (see N.D.C.C. § 44-06.1-23(6)(b)); made sure the dates put in by the petition signers are not after the notarial date (see N.D.C.C. ch. 44-06.1); and numerous other checks as discussed in Oliver's affidavit (R.Exh. 1, pp. 7-8, ¶ 11) and her live testimony at the evidentiary hearing in the District Court.

[¶13] The review of all the petitions and signatures took the entire 35-day period allowed by law (until March 22, 2022 pursuant to N.D.C.C. § 16.1-01-10). R.Exh. 1, p. 6, ¶ 9. The review took longer than for any petition submitted during the Secretary's 30 years in office because there were more signatures submitted and so many irregularities were discovered during the review. R.Exh. 1, pp. 6-7, ¶ 9. The initial review of the term limits petition revealed numerous irregularities that gave serious concerns, which were brought to the personal attention of Secretary Jaeger. R.Exh. 1, pp. 9-11, ¶¶ 14-15. The specific irregularities and concerns at issue in the Petition for Writ of Mandamus before this Court are discussed in more detail below.

[¶14] On March 17, 2022, a meeting to discuss the Term Limits Initiative petitions took place between Petitioner Hendrix, Secretary Jaeger, Deputy Secretary of State Jim Silrum, Oliver, Attorney General Drew Wrigley, an Assistant Attorney General, and a Bureau of Criminal Investigation investigator. District Court Findings (Sct.Dkt.26:5:¶17); R.Exh. 1, pp. 11-12, ¶ 17. Hendrix was informed at the meeting that at least 7,240 signatures had been invalidated already, the process was ongoing, and Secretary Jaeger expected additional invalid signatures to emerge during the review. District Court Findings (Sct.Dkt.26:5:¶18).

[¶15] On March 22, 2022, Secretary Jaeger sent the Sponsoring Committee a letter, indicating the Sponsoring Committee had failed to submit enough valid signatures for the term limits measure to be placed on the ballot. District Court Findings (Sct.Dkt.26:5-6:¶19); R.Exh. 21. The letter also states, “Additionally, as required by N.D.C.C. § 16.1-01-10, I must report all violations to the Attorney General,” which the Secretary did by letter dated, March 29, 2022. District Court Findings (Sct.Dkt.26: 6:¶20); R.Exh. 21,

page 1; R.Exh. 22. A summary of the rejected signatures is attached to the March 22, 2022 letter. District Court Findings (Sct.Dkt.26: 6:¶20); R.Exh. 21, page 2.

[¶16] On request by the Sponsoring Committee, Secretary Jaeger returned copies of the petitions to the Sponsoring Committee and provided the basis of his rejections. District Court Findings (Sct.Dkt.26: 6:¶¶21-22); R.Exh. 1, pp. 12-13, ¶¶ 20-24; R.Exh. 23, 24, 25.

[¶17] According to Article III, Section 6 of the North Dakota Constitution, Secretary Jaeger was required to allow the Sponsoring Committee twenty days for correction of insufficient petitions. During the correction period, an attorney for the Sponsoring Committee sent to Secretary Jaeger letters attempting to convince Secretary Jaeger to change his mind. R.Exh. 1, p. 13, ¶¶ 25-26; R.Exh. 26, 27, 28. The Sponsoring Committee also provided affidavits of Zeph Toe and a circulator claiming they performed their duties in accordance with North Dakota law. P.Exh.17; P.Exh.19. However, those affidavits conflicted with the face of the petition documents, which contained obvious indications of fraud that cannot be overcome with a general denial in a subsequent affidavit. With respect to the affidavits submitted to Secretary Jaeger in an apparent attempt at correction, the District Court stated in its findings, “Secretary Jaeger rejected those affidavits as also being untruthful. This Court does as well, based on the record in this case.”

II. Categories of Invalidation Determinations Raised by Petitioner

[¶18] Petitioners have identified three categories of invalidated signatures for which they are challenging Secretary Jaeger’s decision: 1) petitions containing circulator affidavits notarized by Toe, 2) signature-level issues, and 3) pay-per-signature violations.

a. Petitions Containing Circulator Affidavits Notarized by Zeph Toe

[¶19] In addition to the Secretary of State’s role in elections, he also is the state official responsible for commissioning and regulating notaries public. R.Exh. 32, ¶ 7. By state law (N.D.C.C. ch. 44-06.1; N.D.C.C. § 16.1-01-09(4)), a petition must be circulated in its entirety beginning with the listing of the Sponsoring Committee through the signature pages and ending with an affidavit. *Id.* Below the line on the circulator’s affidavit, where the circulator affixes his or her signature, a notarial certificate appears, which reads:

“Subscribed and sworn before me on _____, 20____, at _____, North Dakota.”

Id. at ¶ 8. After that, the notary public signs as the notarial officer and affixes his or her notary stamp, meaning the notary completed the notarial act according to the provisions in N.D.C.C. § 44-06.1-23(6)(a), which reads:

6. A notary public may not notarize a signature on a document if:

a. The document was not first signed or re-signed in the presence of the public, in the case of a verification on oath or affirmation, or in the case of an acknowledgment, was not acknowledged in the presence of the notary public.

R.Exh. 32, ¶ 8; *see also* N.D.C.C. §§ 44-06.1-04, 44-06.1-05, 44-06.1-06; and 44-06.1-14(4). Since the affidavit is a sworn statement, the circulator must sign or re-sign it in the presence of the notary public. R.Exh. 32, ¶ 9.

[¶20] When notaries public are commissioned by the Secretary of State, they become officers of the state. R.Exh. 32, ¶ 10. In that process, an Oath of Office is taken by the applicant, i.e., “I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of North Dakota, and that I will faithfully discharge the duties of the office of notary public according to the best of my ability, so

help me God (or under pains and penalties of perjury).” *Id.* (citing N.D. Const. Art. XI, Sec. 4).

[¶21] Notaries public serve a critical role in the signature gathering process. R.Exh. 32, ¶ 11. Circulators gather the signatures and then certify by affidavit that each signature contained on the petition was executed in the circulator’s presence, that to the best of the circulator’s knowledge and belief each individual who signed is a qualified elector, and that each signature is the genuine signature of the individual whose name it purports to be. *Id.* The notary certifies the circulator did indeed make the sworn attestation. *Id.* If the notary does not faithfully execute his duties and cannot be trusted, it calls into question whether the circulator made the required attestation, and in turn calls into question the information contained on the attestation about the signers and signatures. *Id.*

[¶22] During the review of the term limits petitions submitted by the Sponsoring Committee, numerous irregularities and unlawful acts by Toe were noted with the affidavits on petitions circulated by at least by four circulators. R.Exh. 32, ¶¶ 12-18. Secretary Jaeger prepared spreadsheets of these issues, with the relevant petitions attached, and they were admitted at the evidentiary hearing as Respondent’s Exhibits 33, 34, 35, and 36. Examples of the issues with Toe-notarized affidavits of circulator Chloe Lloyd (“Lloyd”) include: her purported signatures on different affidavits appear extremely inconsistent (indicating the affiant did not complete the sworn statement in Toe presence or another individual signed Lloyd’s name), her purported signatures vary wildly even on the same day, her address has been altered by adding, “Dickinson ND 58601” in different handwriting and different colored ink (indicating the affiant did not

provide a complete address when executing the notarial certificate), and her residential address varies on different affidavits. R.Exh.33. Lloyd's affidavits notarized by notaries other than Toe do not contain these irregularities. *Id.*; District Court Findings, (Sct.Dkt.26:8:¶28).

[¶23] Examples of the issues with Toe-notarized affidavits of circulator Ritchell Aboah ("Aboah") include: his purported signatures on different affidavits appear extremely inconsistent (indicating the affiant did not complete the sworn statement in Toe presence), and his residential address varies on different affidavits. R.Exh.34. As an illustration, Aboah purportedly did not know whether he lived on a street or an avenue as his address sometimes was written with one and then the other. *Id.*

[¶24] Examples of the issues with Toe-notarized affidavits of circulator Ramona Morris ("Morris") include: her residential address is shown as a Minnesota address on the affidavit for some petitions, but that address is crossed out and replaced with a North Dakota address (raising concerns because only a qualified North Dakota elector may circulate petitions, and this indicates the affiant did not complete her sworn statement in Toe's presence when he executed the notarial certificate or Toe improperly notarized the signature of a Minnesota resident), and her purported signatures on different affidavits appear extremely inconsistent (indicating the affiant did not complete the sworn statement in Toe's presence or another individual signed as Morris). R.Exh.35.

[¶25] Examples of the issues with Toe-notarized affidavits of circulator Wayne Williams ("Williams") include: the handwriting in Toe's notary certificate (the date) on various petitions are inconsistent. In some petitions, different handwriting is filled in and then crossed out and replaced with different handwriting (raising concerns that the affiant

did not complete the sworn statement in Toe's presence when he executed the notarial certificate), and Williams' purported signatures on different affidavits appear inconsistent (indicating the affiant did not complete the sworn statement in Toe's presence). R.Exh.36.

[¶26] At the evidentiary hearing, Secretary Jaeger was examined and cross-examined at length regarding the irregularities in Respondent's Exhibits 33, 34, 35, and 36 and about his process in determining whether the petitions were valid. Secretary Jaeger testified that, because of the numerous unlawful acts noted, he will be proceeding with an administrative action to revoke Toe's commission as a notary public. *See* R.Exh. 32, ¶ 13.

[¶27] With respect to the Toe-notarized affidavits, the District Court states in its Findings:

Secretary Jaeger testified that although he is not a handwriting expert, he has been a part of dozens of initiated measures over the last thirty (30) years and his staff has extensive experience ascertaining the validity of signatures and petitions, with having reviewed over one million signatures. Numerous people in Secretary Jaeger's office reviewed the various petition affidavits in question. After the review and taking into account the work of his office in the review process, Secretary Jaeger concluded the signatures were likely fraudulent. Based on the totality of the information available to the Office of Secretary of State at the time of review, this Court agrees with that finding by the Secretary of State.

District Court Findings (Sct.Dkt.26:8-9:¶30).

[¶28] Additionally, with respect to Secretary Jaeger's conclusion the circulator affidavits notarized by Toe were likely forged, the District Court found:

By a review of the subject petitions, the Court finds that these actions by Secretary Jaeger are factually substantiated. Most notably, Secretary Jaeger testified that these numerous errors were more than he had ever seen by a single notary in his thirty years as Secretary of State. Because of these obvious errors, Secretary Jaeger could not, with confidence, state that the other petitions notarized by Toe were without errors or fraud. Therefore, he determined all

affidavits notarized by Toe were untrustworthy and none of them could be counted.

District Court Findings (Sct.Dkt.26:9:¶32).

[¶29] The District Court stated, “the Court finds the exclusion of the entirety of the Toe’s notarized petitions was appropriate. The Court finds that the numerous errors contained within Toe’s notarized petitions show likely fraud. Their exclusion was appropriate.” District Court Findings (Sct.Dkt.26:10:¶36).

b. Signature-Level Issues

[¶30] When Secretary Jaeger’s staff initially determines the validity of each signature on a petition, the petition database (a module of the election management system called ND VOICES used by the Secretary of State's office for the purpose of administering elections) is updated to record the findings for each petition, the reason for each signature invalidation, the total number of invalidated signatures, and the remaining number of potentially valid signatures. R.Exh. 1, pp. 8-9, ¶ 12. Respondent’s Exhibit 5 is a printout from the petition database which summarizes what was found on each petition submitted. The reasons for the signature-level invalidations are all based upon the North Dakota Constitution and statutes.

[¶31] With respect to the signature-level issues, the District Court found:

During the evaluation of the petitions and signature, Secretary Jaeger and his office created numerous spreadsheets. These spreadsheets outline the various reasons why certain signatures or petitions were deemed insufficient by Secretary Jaeger and therefore, invalid towards the total for the signatures required for the initiative to be placed on the ballot. The Court finds these spreadsheets helpful and accurate. Upon review of the various documents admitted into evidence, the Court concludes that the various petitions did contain errors outlined above which would invalidate the individual signatures.

Although not testified to at length during the evidentiary hearing, in every instance, the record did, and continues, to support the reasons cited by Secretary Jagger. He was factually correct in his analysis. Therefore, the Court finds that the 4,537 signatures containing flaws were properly excluded.

District Court Findings (Sct.Dkt.26:11:¶¶ 38-39).

[¶32] While the specific signatures and reasons for invalidation are clear from the record produced by Secretary Jaeger, including Respondent's Exhibit 5, the signature decisions being challenged and the reasons for the challenges are not clear. The spreadsheets and supporting documents sought to be introduced by Petitioners at the evidentiary hearing to explain which 1,850 signatures they allege should have been counted (P.Exh. 21(A)(B)and(C), 23(A)(B)and(C), and 24(A)(B)and(C)) and the reasons for Petitioner's arguments, were excluded by the District Court. The Petitioners offered no affidavits or live testimony explaining or providing foundation for the exhibits or the bases of their claims.

c. Pay-Per-Signature Violations

[¶33] As noted in the District Court Findings, Secretary Jaeger's decisions were "[b]ased on a review of the petitions by [his] office and an investigation by the Attorney General's Bureau of Criminal Investigation..." District Court Findings (Sct.Dkt.26:6-7:¶24) (quoting R.Exh. 21, p. 1).

[¶34] On February 28, 2022, the Secretary of State's office received an email from Patrick Finken, chair of the Brighter Future Alliance with the subject line: Term Limit Signature Gathering. R.Exh. 37. The email states, "It has come to me [sic] attention that some of the signature gatherers were paid by the signature or with bonuses based on the number of signatures gathered. The individual who reached out to me recorded a few

discussions with gatherers on this topic. The gatherers were aware of the recording. I would be happy to provide you the information I have.” *Id.* Upon receiving the recordings, which were made by Jamal Omar, the Deputy Secretary of State Jim Silrum forwarded the Patrick Finken email and the recordings to the North Dakota Deputy Attorney General, pursuant to N.D.C.C. § 16.1-01-10, which states in part, “all violations of law discovered by the secretary of state must be reported to the attorney general for prosecution.” R.Exh. 32, ¶ 21. The Bureau of Criminal Investigation conducted an investigation of the alleged violation of law. *Id.*

[¶35] US Term Limits contracted with Charles Tuttle to oversee the collection of signatures by him and his team beginning with the ND State Fair in 2021. R.Exh. 38, ¶ 10. In the audio recordings made by Jamal Omar, circulators who were hired to circulate the term limits petition by Tuttle and Jaworski admitted they were paid or offered bonuses based on the number of signatures obtained. *Id.* at ¶¶ 4-7. Further, during the BCI investigation, Jaworski admitted to SSA Nickel that circulators were paid a bonus if they obtained a certain number of signatures within a certain period of time and that the bonuses were documented on timesheets. *Id.* at ¶ 9. Circulators also admitted to Nickel that they were paid or offered bonuses based on the number of signatures collected. *Id.* at ¶¶ 11-17. Further, after Secretary Jaeger’s decision, BCI searched Tuttle and Jaworski’s residence pursuant to a search warrant and obtained copies of the circulator timesheets, which confirmed that circulators were indeed paid the illegal bonuses. R.Exh. 41 through 49. According to N.D.C.C. § 16.1-01-12(1)(j), it is unlawful to pay or offer to pay any individual on a basis relating to the number of signatures obtained for circulating an

initiative, and any signature obtained in violation of the statute is void and may not be counted.

[¶36] With respect Secretary Jaeger’s exclusion of signatures obtained in violation of the pay-per-signature ban, the District Court found “it was a factual based decision within the authority of the North Dakota Secretary of State based upon credible evidence.” District Court Findings (Sct.Dkt.26:12:¶45).

LAW AND ARGUMENT

I. Jurisdiction and Standard of Review

[¶37] The North Dakota Supreme Court has original jurisdiction to review decisions by the Secretary involving “petitions or the petition process[.]” *Husebye v. Jaeger*, 534 N.W.2d 811, 813 (N.D. 1995); *Thompson v. Jaeger*, 2010 ND 174, ¶ 5, 788 N.W.2d 586, 589 (“We have jurisdiction to review the Secretary of State's decision under N.D. Const. Art. III, §§ 6 and 7.”).

[¶38] The North Dakota Supreme Court’s standard of review is de novo to the extent the Secretary’s “decision involves a question of law”. *Zaiser v. Jaeger*, 2012 ND 221, ¶ 19, 822 N.W.2d 472, 478–79. But to the extent the Secretary’s “decision involves the exercise of some discretion” – for example, his duty to pass on the sufficiency of petitions – the standard of review is deferential and the decision will not be overturned absent an abuse of discretion. *Id.*; *Hernett v. Meier*, 173 N.W.2d 907, 918 (N.D. 1970) (holding, “[s]o the Constitution places upon the Secretary [] the duty of determining, in the first place, whether the petitions conform to the requirements of the Constitution and the laws of this State. In the discharge of such responsibility placed upon him, the Secretary [] must exercise a certain amount of discretion. Can we say that he has abused

this discretion in passing upon the petitions here under consideration?”). Secretary Jaeger’s exercise of discretion in adjudging the validity of petition signatures is an imperative part of the constitutional authority granted to him by Article III. Without that discretion, the Secretary of State’s office would function as a mere calculator of proffered signatures, and North Dakotans would lack a vital bulwark against fraudulent changes to our Constitution and state laws.

II. Secretary Jaeger’s Constitutional and Statutory Role

[¶39] The North Dakota Constitution recognizes the power of “the people . . . to propose and adopt constitutional amendments by the initiative[.]” N.D. Const. Article III, § 1. “The right to initiate and refer laws as a check on the legislative process is part of the fabric of our liberty, which is reserved to the people of North Dakota in the self-executing and mandatory provisions of N.D. Const. art. III.” *Zaiser v. Jaeger*, 2012 ND 221, ¶ 2, 822 N.W.2d 472, 474 (citing *Thompson v. Jaeger*, 2010 ND 174, ¶ 11, 788 N.W.2d 586). “The [] constitutional provisions [to initiate or refer laws] must be liberally construed in favor of the people’s exercise of that right.” *Thompson v. Jaeger*, 2010 ND 174 at ¶ 11 (citation omitted). “However, the people of North Dakota have also specified mandatory requirements for their exercise of the right to initiate laws, including a requirement that petition circulators ‘swear thereon that the electors who have signed the petition did so in their presence.’” *Zaiser*, at ¶ 2 (citing N.D. Const. art. III, § 3).

[¶40] “North Dakota law designates the secretary of state as the supervisor of elections.” *Bolinske v. Jaeger*, 2008 ND 180, ¶ 7, 756 N.W.2d 336, 339 (citing N.D.C.C. § 16.1–01–01(1) (setting forth powers and duties of the Secretary). With this designation comes the responsibility to safeguard elections from fraud and

mistakes and to protect the democratic process in North Dakota. The Secretary is delegated with the responsibility to “pass on the sufficiency of each petition” in support of an initiative. N.D. Const. art. III, § 6; N.D.C.C. § 16.1-01-10. The Secretary’s review of petitions is both constitutional and statutory. *Id.* Article III states, “[t]his article is self-executing and all its provisions are mandatory. Laws may be enacted to facilitate and safeguard, but not to hamper, restrict, or impair these powers.” Section 16.1-01-10 “was intended by the legislature to safeguard and facilitate the use of the initiative and referendum for the benefit of the people of the state by discouraging fraud and abuse and minimizing mistakes that might occur in the use of the right.” *Dawson v. Meier*, 78 N.W.2d 420, 424 (N.D. 1956). The Secretary’s mandated review of petitions includes not only inspecting the petitions themselves but also includes abundant discretion to investigate – including with the assistance of the Attorney General’s Office – where there appear to be discrepancies in the petitions. *Zaiser*, at ¶ 12 (quoting N.D.C.C. § 16.1-01-10) (holding, Secretary has discretion to utilize “other accepted information-gathering techniques.”); *see also*, N.D.C.C. §16.1-01-01 (setting forth the Secretary’s duty to “examine [] any election ballot or other material [] for the purpose of determining compliance with the law[.]”).

**III. Secretary Jaeger Did Not Err by Invalidating All Signatures on Petitions
Containing Circulator Affidavits Notarized by Zeph Toe**

[¶41] Secretary Jaeger did not err when he invalidated signatures on petitions containing circulator affidavits notarized by Toe.

**a. Secretary Jaeger’s Decision Was Based On Unprecedented
Indications of Fraud Centered Around a Single Notary Public and Is
Supported by The Factual Findings of The District Court**

[¶42] The uniquely high number of irregularities, unlawful conduct, and fraudulent acts of notary Toe are discussed in Secretary Jaeger’s affidavit (*see* R.Exh. 32 through 36), and Secretary Jaeger testified at length in that regard at the evidentiary hearing, in direct and cross-examination. The District Court agreed, finding likely fraud in the affidavits notarized by Toe, and finding that Secretary Jaeger’s exclusion of all Toe-notarized affidavits was appropriate under the circumstances.

b. Secretary Jaeger’s Decision Was Lawful and Was Made Pursuant to His Constitutional Duties

[¶43] Petitioners cite to several cases in other jurisdictions for the proposition that “otherwise valid signatures should be counted”. However, those out-of-state cases are not binding on this Court. Moreover, the signatures on the petitions wherein the circulator’s affidavit are notarized by Toe are not “otherwise valid”. The circulators’ attestations are the only way the Secretary of State, this Court, and the people of North Dakota are assured petition signatures were gathered lawfully. The notarial act provides assurance the circulator in fact made the sworn attestation, . . . the notary public certifies the circulator appeared before him and signed the sworn affidavit. In this case, the unlawful acts and indications of fraud were so pervasive and serious on the affidavits notarized by Toe, that assurance was completely undermined. The Secretary could not trust any of the Toe-notarized affidavits, and the District Court agreed with that determination.

[¶44] In *Zaiser v. Jaeger*, 2012 ND 221, 822 N.W.2d 472, the Secretary of State determined several petitions contained forged elector signatures, which the circulators knew to be and admitted were forgeries. This meant the sworn circulator affidavits that were part of each petition were likewise false and invalid. The *Zaiser* court cited other

courts' decisions that "held [] petition circulators' false affidavits invalidate all the signatures in the petition." *Id.* at ¶ 23 (citing *Brousseau v. Fitzgerald*, 138 Ariz. 453, 675 P.2d 713, 715–16 (1984); *Sturdy v. Hall*, 201 Ark. 38, 143 S.W.2d 547, 550–52 (1940); *Citizens Comm. v. District of Columbia Bd. of Elections and Ethics*, 860 A.2d 813, 816–17 (D.C.2004); *Montanans for Justice v. State ex rel. McGrath*, 2006 MT 277, ¶¶ 83–84, 334 Mont. 237, 146 P.3d 759; *Taxpayers Action Network v. Secretary of State*, 2002 ME 64, ¶¶ 18–19, 795 A.2d 75; *McCaskey v. Kirchoff*, 56 N.J.Super. 178, 152 A.2d 140, 142–43 (N.J.Super.Ct.App.Div.1959); *In re Glazier*, 474 Pa. 251, 378 A.2d 314, 315–16 (1977); *State ex rel. Gongwer v. Graves*, 90 Ohio St. 311, 107 N.E. 1018, 1022 (1913)).

[¶45] In *Zaiser*, the North Dakota Supreme Court quoted at length from the Arizona and Ohio supreme courts and agreed with those courts' rationales for the "essential nature of a circulator's affidavit under our constitutional requirement for the contents of a circulator affidavit and the statutory framework for that affidavit." *Id.* at ¶ 26. Quoting and agreeing with the rationale of *Brousseau v. Fitzgerald*, the Court stated:

Defects either in circulation or signatures deal with matters of form and procedure, but the filing of a false affidavit by a circulator is a much more serious matter involving more than a technicality. The legislature has sought to protect the process by providing for some safeguards in the way nomination signatures are obtained and verified. Fraud in the certification destroys the safeguards unless there are strong sanctions for such conduct such as voiding of petitions with false certifications.

....

The authorities agree that statutory circulation procedures are designed to reduce the number of erroneous signatures, guard against misrepresentations, and confirm that signatures were obtained according to law. To allow the integrity of the nominating petition process to be violated ... through ... certification of the petitions by persons other than the actual circulators without any sanction other than the inconvenience of showing that the signatures were in fact authentic would render the circulation requirement meaningless and possibly lead to additional

falsehood and fraud by others. We believe that there is a real difference between mere omissions or irregularities and fraud.... We hold that petitions containing false certifications by circulators are void, and the signatures on such petitions may not be considered in determining the sufficiency of the number of signatures to qualify for placement on the ballot.

Zaiser, 2012 ND 221 at ¶ 24 (quoting *Brousseau v. Fitzgerald*, 138 Ariz. 453, 455, 675 P.2d 713, 715-16 (1984)). Quoting and agreeing with the rationale of *State ex rel.*

Gongwer v. Graves, the Court stated:

It is insisted, however, that all the names upon any part of a petition should not be rejected because one or more is forged, false, or fraudulent, and that is true if the verification to that part is not a perjury. These petitions and each separate part thereof depend for their efficiency and their validity upon the affidavit of the circulator that each of the signatures attached to such part was made in the presence of affiant; that to the best of his knowledge and belief it is the signature of the person it purports to be; that he believes the person who signed it to be an elector.... If it appears from the evidence that the affidavit so attached to any petition or part of a petition is knowingly and intentionally false, then the affidavit is a perjury and can serve no purpose whatever; the whole part of the petition dependent thereon for its validity must fall.

The Constitution requires an affidavit to each part of a petition, and without that affidavit it would be as worthless as blank paper, no matter if every signature thereon were genuine. An affidavit proven to be willfully, corruptly, and intentionally false is worse than no affidavit at all, for it brands the whole part of the petition to which it is attached with the indicia of fraud. If no affidavit is fatal to the whole petition or any separate part thereof, although the lack of such affidavit is due to innocent mistake, oversight or inadvertence of the person circulating the same, and if all the signatures appearing thereon must be rejected without reference to whether they are genuine or not, upon what rule can it be said that it is the duty of the secretary of state, where it appears that the affidavit to any part of a petition is willfully, corruptly, and intentionally false, to determine upon other evidence the genuineness of signatures appearing thereon and, if he finds that there are some genuine signatures upon that particular part, to include them in the count? Such a holding would be an invitation to commit fraud and perjury.

It is not sufficient that some of the signatures on some of the parts of a petition are genuine, nor is it absolutely necessary to the validity of the petition or any part thereof that every signature thereon should be genuine;

but it is absolutely necessary to the validity of the petition or any part thereof that the circulator, when he makes affidavit certifying the signatures on these petitions, should believe that he is stating the truth. If it later appear that some one has imposed upon him and signed or forged the name of another, the circulator may still believe in the truth of his affidavit and it will support every genuine signature upon it, and only the ones not genuine will be stricken therefrom. But if the circulator knew that a signature appearing on such part of a petition is not genuine, if he knew that such signature was not written on the petition in his presence, if he knew that the person whose signature it purports to be was not an elector, if he knew that the person signing said petition did not sign it with knowledge of its contents, yet, notwithstanding his knowledge, he willfully, corruptly, and intentionally makes a false and perjured affidavit to the contrary, then such affidavit is worthless, and the petition or part of a petition to which it is attached does not fill the requirement of the Constitution, and the genuine signatures thereon cannot be counted for the reason that part of the petition lacks the affidavit required by the Constitution.

Zaiser, 2012 ND 221 at ¶ 25, 822 N.W.2d 472 (quoting *State ex rel. Gongwer v. Graves*, 90 Ohio St. 311, 321, 107 N.E. 1018, 1022 (1913)). The North Dakota Supreme Court stated:

We agree with the rationale of those cases describing the essential nature of a circulator's affidavit under our constitutional requirement for the contents of a circulator affidavit and the statutory framework for that affidavit. The legislature has explicitly recognized the seriousness of forged signatures in the initiative process and made it unlawful for a person to “[s]ign a name other than that person's own name to an initiative ... petition.” N.D.C.C. § 16.1–01–12(9). Under those decisions and our constitutional and statutory provisions, the validity of submitted petitions depends upon the veracity of the circulators' averment that each of the signatures in the petition was made in the circulators' presence and each signature was the genuine signature of the individual whose name it purports to be. The rationale of those decisions is consistent with this Court's statement in *Dawson* that “[s]ignatures on copies of a petition may not be counted where the attached affidavit is not signed by an affiant.” *Dawson*, 78 N.W.2d at 422, Syll. 10. We conclude the Secretary of State may not count elector signatures on petitions with circulator's affidavits that do not comply with the requirements of N.D. Const. art. III, § 3, and N.D.C.C. § 16.1–01–09(3).

Zaiser, 2012 ND 221 at ¶ 26, 822 N.W.2d 472.

[¶46] Because the affidavit requirements are extremely serious and affect the integrity of the initiative process, the *Zaiser* Court held it would have been error for the Secretary to count otherwise valid signatures on the petitions containing false affidavits. The same principle applies to false notarizations of circulator affidavits. If the notary has engaged in fraud, as in the present case, there is no basis to believe the circulator actually appeared and attested the petition signatures were gathered according to law. This in turn corroded any assurance the petition signatures were valid. Secretary Jaeger had lost all trust in Toe based on the numerous illegalities discovered and could not count as valid any Toe-notarized affidavit. To do otherwise would have risked placing a fraudulent measure before the voters in November.

IV. Secretary Jaeger Did Not Err by Invalidating Signatures Based on the Various Signature-Level Issues Discovered

[¶47] Secretary Jaeger did not err when he invalidated signatures based on the various signature-level issues discovery in his office’s normal petition review process.

a. The Signature-level Issues Do Not Impact the Outcome of This Case

[¶48] As an initial matter, the signature-level issues impact only 1,850 signatures in this case. This is not a sufficient number of signatures alone or in combination with the signatures invalidated due to the pay-per-signature ban to change whether the term limits measure may appear on the ballot, regardless of whether the Court upholds or reverses Secretary Jaeger’s decision with respect to these signatures.

[¶49] The North Dakota Supreme Court has explained, “[w]e do not render advisory opinions, and we will dismiss an appeal if the issues become moot or so academic that no actual controversy is left to be decided.” *State v. Hansen*, 2006 ND 139, ¶ 7, 717 N.W.2d 541 (citing *In Interest of E.T.*, 2000 ND 174, ¶ 5, 617

N.W.2d 470; *Sposato v. Sposato*, 1997 ND 207, ¶ 8, 570 N.W.2d 212; *Ashley Educ. Ass'n v. Ashley Pub. Sch. Dist.*, 556 N.W.2d 666, 668 (N.D. 1996)). Since the signature-level issues do not change whether the term limits initiative will be placed on the November ballot, regardless of whether the Court upholds or reverses Secretary Jaeger's decision, the Court should decline to address the issue as seeking merely an advisory opinion.

b. Petitioners Have Not Met Their Burden of Proof With Respect to The Signature-Level Issues

[¶50] If the Court does address the signature-level issues, Secretary Jaeger correctly excluded the signatures, and Petitioners have not met their burden to prove otherwise. The Secretary of State's office's determination of each of the signature-level issues is shown in Respondent's Exhibit 5 (R.Exh. 5), and each determination is grounded in provisions in the North Dakota Constitution and North Dakota Century Code. The District Court found Secretary Jaeger made a factually correct analysis. Petitioners have apparently conducted their own review of the signature-level issues. However, the District Court did not admit into evidence the spreadsheets and supporting documentation explaining which signature decisions are being challenged and the reasons for each challenge. The Petitioners offered no affidavits or live testimony explaining or providing foundation for the exhibits or the bases of their claims. Petitioner's Exhibits 21(A)(B)and(C), 23(A)(B)and(C), and 24(A)(B)and(C) were all excluded, and Petitioners have wholly failed to establish the 1,850 signature-level issues were incorreced decided by Secretary Jaeger. Further, as explained in Oliver's affidavit, it appears Petitioners misunderstood the Secretary of State's spreadsheets as to the reasons for invalidation, and for various signatures identified by Petitions, the Petitioners have incorrectly stated the reason the Secretary of State's office invalidated a particular signature. R.Exh.1, pp. 14-

15, ¶¶ 28-29. Additionally, with respect to address issues, it should be noted that the Secretary of State conducts a random sampling of signatures contained in petitions pursuant to N.D.C.C. § 16.1-01-10 (often by way of mailing postcards), and must have a complete address to be able to send postcards that the postal service will actually deliver to signers.

V. Secretary Jaeger Did Not Err by Invalidating Signatures Based on Violations of the Pay-Per-Signature Ban

[¶51] Secretary Jaeger did not err when he invalidated signatures that were obtained in violation of North Dakota’s pay-per-signature ban.

a. The Pay-Per-Signature Issue Does Not Impact The Outcome Of This Case

[¶52] As an initial matter, the pay-per-signature issue impacts only 8,274 signatures, which is not sufficient alone or in combination with the signatures invalidated due to the signature-level issues to place the term limits measure on the ballot, regardless of whether the Court upholds or reverses Secretary Jaeger’s decision with respect to these signatures. Therefore, the Court need not decide the issue as it would constitute merely an advisory opinion. *See State v. Hansen*, 2006 ND 139, ¶ 7, 717 N.W.2d 541.

[¶53] Additionally, in this case, Petitioners argue the pay-per-signature ban is unconstitutional as applied. The North Dakota Supreme Court has previously explained:

As a general rule a court will inquire into the constitutionality of a statute only to the extent required by the case before it and will not anticipate a question of constitutional law in advance of the necessity of deciding it, and will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.

State v. Anderson, 2022 ND 144, ¶ 11, 977 N.W.2d 736 (citing *State v. King*, 355 N.W.2d 807, 809 (N.D. 1984); *Tooz v. State*, 76 N.D. 599, 38 N.W.2d 285).

[¶54] The Court should decline to address the pay-per-signature issue and the constitutionality of the statute, as Petitioners are merely seeking an advisory opinion that does not affect whether the term limits petition should be placed on the November ballot.

b. The Pay-Per-Signature Ban Was Violated

[¶55] If the Court does address the pay-per-signature issue, Secretary Jaeger correctly excluded the signatures collected in violation of the ban found in N.D.C.C. § 16.1-01-12(1)(j). The pay-per-signature statute states in its entirety:

Pay or offer to pay any individual, measure committee, or other organization, or receive payment or agree to receive payment, on a basis related to the number of signatures obtained for circulating an initiative, referendum, or recall petition. This subsection does not prohibit the payment of salary and expenses for circulation of the petition on a basis not related to the number of signatures obtained, as long as the circulators file the intent to remunerate before submitting the petitions and, in the case of initiative and referendum petitions, fully disclose all contributions received pursuant to chapter 16.1-08.1 to the secretary of state upon submission of the petitions. The disclosure of contributions received under this section does not affect the requirement to file a pre-election report by individuals or organizations soliciting or accepting contributions for the purpose of aiding or opposing the circulation or passage of a statewide initiative or referendum petition Page No. 11 or measure placed upon a statewide ballot by action of the legislative assembly under chapter 16.1-08.1. Any signature obtained in violation of this subdivision is void and may not be counted.

N.D.C.C. § 16.1-01-12(1)(j) (emphasis added).

[¶56] In this case, the determination by Secretary Jaeger and the District Court that the pay-per-signature statute was violated is clearly supported by the record. The finding of Secretary Jaeger is supported by audio recordings in which circulators made admissions, as well as by the investigation of the BCI wherein circulators admitted to SSA Nickel they were offered and/or paid bonuses based on the number of signatures. Jaworski also admitted this to SSA Nickel. Further, after Secretary Jaeger's decision, it was confirmed

that illegal bonuses had actually been paid by reviewing the timesheets obtained in the execution of a search warrant. R.Exh. 41 through 49.

c. The Pay-Per-Signature Ban Is Constitutional

[¶57] Plaintiffs argue the pay-per-signature ban (N.D.C.C. § 16.1-01-12(1)(j)), is unconstitutional as applied to them. They assert it is essentially impossible to contract with professional petition signature gatherers because, they contend, simply discussing how many signatures are needed to place the initiative on the ballot makes them guilty of violating the pay-per-signature ban. They further argue the pay-per-signature ban unduly restricts their speech rights “by dramatically increasing the cost of qualifying an initiative for the ballot and making it less likely that an initiative will qualify.” Petitioners are incorrect on all counts. The pay-per-signature ban fully comports with Constitutional requirements on its face and as applied in this situation.

[¶58] “A party challenging the constitutionality of a statute must bring up the ‘heavy artillery.’ *Allied Mutual Ins. Co., v. Director, North Dakota Dep’t of Transp.*, 1999 ND 2, ¶ 7, 589 N.W.2d 201. The ‘heavy artillery’ is necessary to overcome a strong presumption of the statute's constitutionality. *Id.*” *Spring Creek Ranch, LLC v. Svenberg*, 1999 ND 113, ¶ 21, 595 N.W.2d 323, 329 (footnote omitted). While the North Dakota Supreme Court has not decided an as-applied challenge to this statute, the North Dakota Federal Courts have ruled on this issue. *Sinner v. Jaeger*, 467 F. Supp. 3d 774, 782 (D.N.D. 2020) (applying, the “pliable *Anderson-Burdick* test [to] a ballot initiative regulation []challenged on First Amendment grounds”); *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 615 (8th Cir. 2001) (Section 16.1-01-12(1)(j) does not violate the First or Fourteenth Amendments).

[¶59] The pay-per-signature ban does not violate either the state or federal constitution. The ban prevents fraud, which protects the interests of all North Dakotans to have their constitution amended by only lawful means. Any minor burden the ban may place on signature gathering does not outweigh the state’s compelling interest in preventing fraud. While it is not binding precedent on this Court, the Eighth Circuit Court of Appeals held N.D.C.C. § 16.1-01-12(1)(j)’s criminal prohibition of gathering signatures on a “per signature” basis did not violate the First or Fourteenth Amendments to the United States Constitution. *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 615 (8th Cir. 2001). As explained in the *Initiative & Referendum* case, the three-judge panel held:

Because these two regulations are designed to protect the integrity of signature gathering, do not unduly hinder the circulation of petitions, and comport with the recent Supreme Court decision in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999), we affirm.

Initiative & Referendum Inst. v. Jaeger, 241 F.3d 614, 615 (8th Cir. 2001).

[¶60] Petitioners argue the reasoning of *Initiative & Referendum* is somehow inapplicable because, they contend, this case is distinguishable and the petitioners in that case failed to provide evidence of the violation of their speech rights. However, Petitioners’ argument misses the mark entirely. *Initiative & Referendum* discussed the evidence the State had for passing the pay-per-signature ban which included the legislative history from 1986 concerning college students being paid twenty-five cents per signature and signing from the phone book, as well as a 1994 referendum that failed when approximately 17,000 questionable signatures were gathered by residents of Utah who were beyond the Secretary’s subpoena power. The *Initiative & Referendum* court stated:

In light of the State's important interest in preventing signature fraud, the evidence of fraud the State has produced, and the lack of any evidence from the appellants showing that the ban on commissioned payment burdens their ability to collect signatures, this case is distinguishable from both the *Maleng* and *Initiative* cases. The record reveals sufficient evidence regarding signature fraud to justify the State's prohibition on commission payments.

Initiative & Referendum Inst. v. Jaeger, 241 F.3d at 618.

[¶61] In 1988, the United States Supreme Court invalidated a Colorado law prohibiting paid circulators from gathering signatures for an initiative measure. *Meyer v. Grant*, 486 U.S. 414, 420 (1988). The *Meyer* Court was not presented with and did not answer the question whether a “per signature” ban, like that found in North Dakota law, would violate the First Amendment’s guarantee of the freedom of expression. *Id.* Critically for this case, North Dakota does not ban paid signature gatherers, but as discussed in the *Initiative & Referendum* case, such paid signature gatherers are expressly allowed. *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d at 615–16 (stating, “in 1987 the North Dakota legislature enacted a statute, which allowed petition circulators to be paid[.]”).

[¶62] The pay-per-signature ban is an important State policy that prevents fraud in the collection of signatures. As can be seen in this facts of this case, fraud can and does occur in the process of gathering signatures, and the State has a compelling state interest in preventing such fraud in the process that can be used to amend the North Dakota Constitution – the very document governing our democratic process and safeguarding our right to participate in elections. Petitioners have failed to show their rights are impermissibly burdened in the face of such an important State issue.

REQUEST FOR ORAL ARGUMENT

[¶63] This case involves important issues relating to the process of amending the North

Dakota Constitution by ballot initiative, and the protection of that process from fraud and unlawful conduct. Respondent respectfully requests oral argument, believing it would be helpful to the Court in understanding the facts and application of law to the facts in this case.

[¶64] Dated this 30th day of August, 2022.

By: /s/ David R. Phillips
David R. Phillips
Special Assistant Attorney General
ND Bar # 06116
300 West Century Avenue
P.O. Box 4247
Bismarck, ND 58502-4247
(701) 751-8188
dphillips@bgwattorneys.com

Matthew A. Sagsveen
North Dakota Solicitor General
ND Bar # 05613
Office of Attorney General
500 N. 9th Street
Bismarck, ND 58501-4509
masagsve@nd.gov

Attorney for Respondent Alvin
Jaeger, in his official capacity as
Secretary of State of North Dakota

CERTIFICATE OF COMPLIANCE

[¶65] The undersigned, as attorneys for the Respondent in the above matter, and as the author of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face in 12-point font and equals 38 pages, exclusive of this Certificate of Compliance.

Dated this 30th day of August, 2022.

By: /s/ David R. Phillips
David R. Phillips
Special Assistant Attorney General
ND Bar # 06116
300 West Century Avenue
P.O. Box 4247
Bismarck, ND 58502-4247
(701) 751-8188
dphillips@bgwattorneys.com

Matthew A. Sagsveen
North Dakota Solicitor General
ND Bar # 05613
Office of Attorney General
500 N. 9th Street
Bismarck, ND 58501-4509
masagsve@nd.gov

Attorney for Respondent Alvin
Jaeger, in his official capacity as
Secretary of State of North Dakota

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2022, a true and correct copy of the foregoing **RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF MANDAMUS ORAL ARGUMENT REQUESTED** was served by email to the following:

ATTORNEYS FOR PETITIONERS:

Jesse H. Walstad (#07375)
VOGEL LAW FIRM
Attorneys for Petitioners
US Bank Building
200 North 3rd Street, Suite 201
PO Box 2097
Bismarck, ND 58502-2097
jwalstad@vogellaw.com

Edward D. Greim, Pro Hac Vice
Matthew Mueller, Pro Hac Vice
GRAVES GARRETT LLC
1100 Main Street, Suite 2700
Kansas City, MO 64105
edgreim@gravesgarrett.com
mmueller@gravesgarrett.com

BY: s/ David R. Phillips
DAVID R. PHILLIPS