IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

Self Advocacy Solutions N.D., League of Women Voters of North Dakota, Maria Fallon Romo, Plaintiffs, vs. Alvin Jaeger, in his official capacity as Secretary of State, and Debbie Nelson in her official capacity as County Auditor of Grand Forks County, Defendants.	Case No. 3:20-cv-00071 **RESPONSE OF DEBBIE NELSON, COUNTY AUDITOR OF GRAND FORKS COUNTY, IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

Defendant, Debbie Nelson, in her official capacity as Grand Forks County Auditor, submits this Response in Opposition to Plaintiffs' Motion for a Preliminary Injunction. Plaintiffs are asking this Court to issue an order effectively amending and rewriting the statutory provisions governing absentee ballots in North Dakota to require election officials to "contact voters whose ballots are impaired by signature issues to inform them of the impairment and provide those voters a meaningful opportunity to contest and cure signature issues in time to have their ballots counted in the election." Ms. Nelson opposes the Motion for a Preliminary Injunction on the basis that the Motion is not timely given that the election will be held on June 9, 2020, and further that the Plaintiffs have not demonstrated that a preliminary injunction is warranted.

FACTUAL BACKGROUND

Plaintiffs initiated this action seeking declaratory and injunctive relief by way of a Complaint dated May 1, 2020. Self Advocacy Solutions, N.D. ("SAS") is a nonprofit organization purported to

be located in Grand Forks, North Dakota, with members throughout the State of North Dakota. SAS declares its mission is to promote human and civil rights for people with disabilities. (Dist. Ct. Doc. ID #1, Complaint at ¶16). SAS does not, however, in their Complaint, identify any specific members from Grand Forks County that have been adversely affected by noncorresponding signatures on an absentee ballot and ballot application. Similarly, SAS does not allege in their Motion that any of their members have been affected by noncorresponding signatures on an absentee ballot and ballot application.

Plaintiff League of Women Voters of North Dakota ("LWVND") purports to be a nonpartisan political organization based in Fargo, North Dakota with members living throughout the State of North Dakota. (Dist. Ct. Doc. ID #1, Complaint at ¶18). LWVND conducts its activities through two local chapters, one serving the greater Fargo region, another serving Bismarck-Mandan. (Dist. Ct. Doc. ID #1, Complaint at ¶19). LWVND's mission is to encourage informed and active participation in government, work to increase understanding major public policy issues, and influence public policy through education and advocacy. (Dist. Ct. Doc. ID #1, Complaint at ¶18). LWVND identifies no chapter in Grand Forks County, and has identified no members in Grand Forks County having been adversely affected by any noncorresponding signature between absentee ballots and absentee ballot applications. LWVND has identified no members having been adversely affected by noncorresponding signatures between absentee ballots and absentee ballot applications in the State of North Dakota.

Plaintiff Maria Fallon Romo is a Grand Forks, North Dakota resident who voted by absentee ballot in the 2018 election. (Dist. Ct. Doc. ID #1, Complaint at ¶¶ 9,10). Ms. Romo's vote was not included in the final vote tally due to noncorresponding signatures on her absentee ballot application and her absentee ballot. (Dist. Ct. Doc. ID #1, Complaint at ¶11). Initially, the precinct election judges determined that her ballot did not contain corresponding signatures. (Declaration of Debbie Nelson at ¶7). The signatures were then reviewed by the Grand Forks County Canvassing Board and it was again determined that her signature on the ballot did not correspond with the signature on the ballot application. (Declaration of Debbie Nelson at ¶10). Consequently, Ms. Romo's ballot was not included within the final vote tally for the 2018 election. (Declaration of Debbie Nelson at ¶10). Ms. Romo contends that she will be voting through an absentee ballot for the 2020 election and that she

"fears" that her ballot may not be included in the final vote tally for the 2020 election for the same reason. (Dist. Ct. Doc. ID #1, Complaint at ¶¶14,15).

Defendant Alvin Jaeger is the North Dakota Secretary of State. By the Provisions of N.D.C.C. § 16.1-01-01, he is the state supervisor of elections.

Defendant Debbie Nelson is the County Auditor for Grand Forks County, North Dakota and is the Grand Forks County elections administrator under the provisions of North Dakota Century Code § 16.1-01-01. She also is a member of the Grand Forks County Canvassing Board under N.D.C.C. § 16.1-15-15.

Plaintiffs have named no other county auditors as Defendants in this action. Plaintiffs have named no counties as Defendants in this action except insofar as Debbie Nelson is named in her official capacity as County Auditor of Grand Forks County. Plaintiffs have named no canvassing boards or other board members as parties in this action.

Plaintiffs contend that the provisions of North Dakota Century Code § 16.1-07-09 and §16.1-07-12 mandating the signature verification process for absentee ballots are unconstitutional as they do not provide voters with notice and opportunity to cure noncorresponding signatures. (Dist. Ct. Doc. ID #11-1, Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 10).

For the 2018 election, a total of 334 ballots were rejected statewide due to signature mismatches. (Dist. Ct. Doc. ID #11-1, Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 5). Plaintiffs allege that there is a significant variation in how absentee ballots are reviewed and handled as a result of mismatched signatures. *Id* at 3. For example, Plaintiffs identify that certain counties rejected every ballot that was deemed to have mismatched signatures (McKenzie, McLean, Traill and Kidder Counties). Plaintiffs assert that Pembina County rejected ballots which had been signed by an attestor pursuant to N.D.C.C. § 16.1-07-06(2). Plaintiffs further allege that Dickey County applied a "situation in history" evaluation to determine whether a ballot should be counted. *Id.*

Many counties reported no signature-based ballot rejections in 2018. Morton County rejected 1.114% of the absentee ballots on the basis of signature mismatches. Nelson County

rejected 1.74% of the absentee ballots for alleged signature mismatches. A total of 21 ballots were rejected in Grand Forks County due to signature mismatches out of a total of 5,236 absentee ballots, representing a 0.4% rejection rate (21 ÷ 5,236 = 0.004) or an overall rejection rate of 21 ballots out of a total ballot count of 28,231 yielding a .07% rejection rate (21 ÷ 28,231 – 0.0007). (Dist. Ct. Doc. ID #11-2, Table 1 – Exhibit 1 to Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction). Despite the identification of counties having a larger rate of absentee ballot rejection and despite the identification of several counties determining that ballots would not be included in the final vote tally because of noncorresponding signatures, Plaintiffs have not included any other counties or canvassing boards as defendants in this action.

Plaintiffs have submitted a Declaration by Courtney Culver, a former North Dakota resident, in support of their Motion for Preliminary Injunction. Ms. Culver alleges that her vote was set aside due to signature mismatches in the 2018 election. However, Ms. Culver affirmatively states that she is now a Minnesota registered voter. She makes no representation that she is seeking to vote in the 2020 election in Grand Forks County or in North Dakota. (*See* Dist. Ct. Doc. ID #11-18, Culver Declaration, Exhibit 15 to Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction).

LAW AND ARGUMENT

I. Plaintiffs' Motion for Preliminary Injunction filed less than one month prior to the June 9, 2020 election is barred by Laches.

Laches bars a request for equitable relief when two elements can be proved: (1) lack of diligence by the party against whom the defense is asserted; and, (2) prejudice to the party asserting the defense. *See Costello v. United States*, 365 U.S. 265, 282 (1961); *Galliher v. Cadwell*, 145 U.S. 368, 372, 12 S.Ct. 873, 874, 36 L.Ed. 738; *Southern Pacific Co. v. Bogert*, 250 U.S. 483, 488—490, 39 S.Ct. 533, 535, 63 L.Ed. 1099; *Gardner v. Panama R. Co.*, 342 U.S. 29, 31, 72 S.Ct. 12, 13, 96 L.Ed. 31; *See also Brown-Mitchell v. Kansas City Power & Light Co.*, 267 F.3d 825, 827 (8th Cir. 2001).

Many courts have found that laches bars a last-minute challenge to longstanding election laws during or on the eve of elections. *See Perry v. Judd*, 471 Fed. Appx. 219 (4th Cir. 2012)(laches barred "last-minute lawsuit" challenging Virginia election laws and seeking injunctive relief where

the laws had been "on the books for years"); *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990)(laches barred claim when plaintiff waited 11 weeks to file suit as election approached); *Soules v. Kauaians for Nukolii Campaign Committee*, 849 F. 2d 1176 (9th Cir. 1988)("The record establishes without dispute that appellants knew the basis for their alleged equal protection challenge well in advance of the proposed special election… [and] district court did not error in barring…relief on the ground of laches."). *Marshall v. Meadows*, 921 F. Supp. 1490, 1493-94 (E.D. Va. 1996)(laches barred challenge to Virginia open primary law when plaintiffs filed suit 95 days before the challenged primary was scheduled to take place); *Marcellus v. Va. State Board of Elections*, 2015 U.S. Dist. LEXIS 120584 (E. D. Va. 2015)(finding laches when plaintiffs challenge statute that had been in effect for 14 years).

In *Perry v. Judd*, the Fourth Circuit affirmed the denial of an emergency motion seeking injunctive relief on the basis of laches. 471 Fed. Appx. 219 (4th Cir. 2012). In addressing the emergency motion stemming from a constitutional challenge of two Virginia statutes setting forth requirements for circulation of petitions for ballot access, the Court concluded that "[p]laintiffs had every opportunity to challenge [the Virginia statutes] at a time when the challenge would not have created the disruption that this last-minute lawsuit has. [Plaintiffs'] request contravenes repeated Supreme Court admonitions that federal judicial bodies not upend the orderly progression of state electoral processes at the eleventh hour. [Plaintiffs] knew long before now the requirements of Virginia's election laws. There was no failure of notice. The requirements have been on the books for years." *Perry*, 471 Fed. Appx. at 220-21. The Court went on to state that eleventh hour changes to an otherwise orderly election process are "not just caution lights to lower federal courts; they are sirens." *Id.* at 228.

A party requesting a preliminary injunction must generally show reasonable diligence, *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018), and that is as true in election law cases as elsewhere. *Id.; Lucas* v. *Townsend*, 486 U. S. 1301, 1305 (1988)(Kennedy, J., in chambers); *Fishman* v. *Schaffer*, 429 U.S.1325, 1330 (1976)(Marshall, J., in chambers). Here, Plaintiffs challenge the statute on its face, and the provisions at issue have been part of North Dakota's election law for decades. Plaintiffs have offered no explanation for failing to assert their challenge at an earlier date. Indeed, the organizational Plaintiffs contend that their respective missions include educating the

public on voting processes and procedures. (*See* Dist. Ct. Doc. ID #11-19, Exhibit 16 to Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, "SAS works to advance its mission by empowering and elevating the voices of people with disabilities, including by ensuring that people with disabilities have a voice in the political process and can exercise their right to vote.")(*See also* Dist. Ct. Doc. ID #11-20, Exhibit 17 to Plaintiffs Memorandum in Support of Preliminary Injunction, "LWVND educates its member and the public about how to vote by absentee ballot at monthly meetings, online, and during programming on community access channels.) These Declarations suggest that these organizational Plaintiffs should have been acutely aware of the election laws and particularly able to bring these claims well in advance of the election. Instead, Plaintiffs did not commence their action until May 1, 2020, or submit their Motion for Preliminary Injunction until May 11, 2020, with full knowledge of the impending election on June 9, 2020.

Aside from the fact that the statutes challenged by Plaintiffs in this matter have been the law in North Dakota since 1981, North Dakota Governor Doug Burgum issued Executive Order 2020-13, waiving the requirement for counties to maintain a physical polling location in light of the health concerns surrounding COVID-19, on March 26, 2020. Plaintiffs' seek to bolster their challenge to the statutory scheme as a result of the Governor's March 26, 2020 executive order; however, Plaintiffs delay of 5 weeks following the issuance of the Order prior to commencing their suit is similarly inexcusable. Plaintiffs also inexplicably waited another 10 days after the filing of its suit to seek its requested relief from this Court. By the time the subject Motion was filed by Plaintiffs, 46 of the 75 days between the Governor's issuance of Executive Order 2020-13 and the June 9, 2020 primary election had already elapsed. As of the date of this Response, only 18 days remain until the election. Furthermore, the Plaintiffs Reply brief is not due until May 25, 2020. Following the complete briefing of this matter, only 14 days would remain for the Court to issue its order, and for the State and Auditor Nelson to evaluate the substance of the order and implement its contents, all while trying to conduct a mail in election during the midst of a global pandemic.

The above facts alone establish that Plaintiffs have inexcusably delayed the assertion of their request for injunctive relief. This is even further demonstrated by evidence submitted by the Plaintiffs in support of their Motion for a Temporary Restraining Order. Plaintiffs' Exhibit 9 unequivocally demonstrates that Plaintiffs' counsel was gathering evidence and information

concerning absentee ballots as early as February 7, 2019, if not earlier. (Dist. Ct. Doc. ID #11-12, Exhibit 9 to Plaintiffs Memorandum in Support of Motion for Preliminary Injunction). Plaintiffs' counsel was specifically soliciting records from the Barnes County Auditor relating to ballots rejected by the Barnes County Canvassing Board as well as other voting materials. *Id*. The exhibit includes email correspondence with Barnes County Auditor Beth Didier. Thus, it is uncontroverted that Plaintiffs have been considering this case for more than a year, but waited until less than a month before the primary election to pursue a preliminary injunction upending the long-standing election procedures put in place by the North Dakota Legislature. Curiously, Plaintiffs fail to include the Barnes County Auditor, Barnes County, or the Barnes County Canvassing Board as a party to this litigation.

Finally, Plaintiffs' requested relief would cause significant prejudice to the Defendants. (Declaration of Debbie Nelson at ¶¶ 21,22). "Ballots and elections do not magically materialize. They require planning, preparation, and studious attention to detail if the fairness and integrity of the electoral process is to be observed." *Perry*, 471 Fed. Appx. at 226. Last-minute challenges to election laws prejudice not only governmental defendants who must administer and supervise the elections, but also prejudice the voting public, since governmental defendants "are charged with ensuring the uniformity, fairness, accuracy, and integrity of [the state's] elections." *Id.* at 227. Disruption to state electoral processes, as sought by the Plaintiffs in this matter, is thus directly against the public interest in having an orderly and fair election. *Id.* at 227.

The addition of new procedures at this late stage, particularly after the ballot applications and ballots themselves have been widely distributed, would prove to be a monumental undertaking and would severely prejudice the Defendants and the citizens of North Dakota. Also, contact information that could expedite and facilitate the carrying out of the relief requested by the Plaintiffs, such as a telephone number, was not provided by all voters. The lack of a telephone number on a ballot application was not grounds for rejection of the application in Grand Forks County and ballots have already been widely distributed. (Declaration of Debbie Nelson at ¶19). In addition, the ballot application did not solicit email addresses from prospective voters, nor are email addresses available or maintained in the central voter file. (Declaration of Debbie Nelson at ¶19). The only form of contact information required on the ballot application is a mailing address, which required time for

delivery and reply which could either severely delay the certification of the election results, or prove the relief requested by Plaintiffs to be futile if elections are certified prior to deliver of notice or receipt of a contest.

Moreover, Plaintiffs seek both notice of ballot rejections on the basis of non-corresponding signature, and an opportunity to cure ballot issues. However, Plaintiffs present this Court and the Defendants with no guidance as to how the allegedly "benign" penmanship issues are to be cured or resolved. To the extent that state law does not provide guidance or standards to determine whether signatures "correspond" or "were signed by the same person," Plaintiffs' Motion provides this Court with no basis to suggest what "guidance or standards" can be used to determine whether a voter has "cured" noncorresponding signatures. Despite Plaintiffs' efforts to minimize the significance of the necessity of the existing procedures, signature mismatches between ballot applications and voter affidavits are far more than "benign penmanship issues." The governmental defendants are charged with maintaining the integrity of the election process, and the legitimate interest in assuring that fraudulent or unauthorized votes are not cast in the mail in election is of utmost importance.

Plaintiffs' assertion of their claims and request for a preliminary injunction in this matter on the eve of the primary election, and after more than a year of gathering supporting information, are unequivocally delayed. Plaintiffs seek to challenge statutory provisions that have been a part of North Dakota's election laws for decades, and yet they waited until after the start of the 2020 primary election to bring their suit. This delay is not excusable. Furthermore, if granted, the Plaintiffs' requested relief requiring the addition of unspecified and untested election procedures, apparently to be legislated by the Court, would severely prejudice the governmental defendants charged with carrying out and finalizing a primary mail in election in the next 18 days. For these reasons, Plaintiffs' Motion for Temporary Restraining Order should be denied.

II. Plaintiffs are not Entitled to a Preliminary Injunction.

"A preliminary injunction is an extraordinary remedy for which the movant bears a heavy burden." *Sturgis Area Chamber of Commerce v. Sturgis Rally & Races, Inc.*, 2000 DSD 26, ¶ 28, 99 F. Supp. 2d 1090, 1096 (D.S.D. 2000)(citing *Dakota Indus., Inc. v. Ever Best Ltd.*, 944 F.2d 438, 440 (8th Cir.1991)). A preliminary injunction is appropriate where the moving party demonstrates the following: (a) there is a substantial likelihood of success on the merits; (b) the preliminary

injunction is necessary to prevent irreparable injury; (c) the threatened injury outweighs the harm that the preliminary injunction would cause to the non-movant; and (d) the preliminary injunction would not be adverse to the public interest. *Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 601 (8th Cir.1999)(citing *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1178–79 (8th Cir.1998); *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 114 (8th Cir.1981)(en banc)). When weighing these factors, "no single factor is in itself dispositive." *Calvin Klein Cosmetics v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 667 (8th Cir.1987). "[A]ll factors must be considered to determine whether the balance weighs towards granting the injunction." *Id.* "[G]ranting a preliminary injunction requires that a district court, acting on an incomplete record, order a party to act, or refrain from acting, in a certain way." *Hughes Network Sys. v. InterDigital Comm'cns Corp.*, 17 F.3d 691, 693 (4th Cir.1994). Therefore, preliminary injunctions are "to be granted only sparingly." *Toolchex, Inc. v. Trainor,* 634 F.Supp.2d 586, 590–91 (E.D.Va.2008)(quoting *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 524 (4th Cir.2003)).

Furthermore, in cases relating to elections courts should consider the proximity of the election and the potential for any voter confusion or impediment to the execution of the election from last-minute changes to the election processes. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). Even in cases where a Plaintiff is likely to prevail, "issuing an injunction on the eve of an election is an extraordinary remedy with risks of its own." *Colón- Marrero v. Conty-Pérez*, 703 F.3d 134, 139 n. 9 (1st Cir. 2012). Last-minute challenges to longstanding election procedures have long been disfavored because they threaten to disrupt the orderly administration of elections, which is essential to the functioning of our participatory democracy. If this Court grants the relief sought by Plaintiffs, adding brand new untested processes to long established election procedures at the eleventh hour in an already tumultuous time will introduce uncertainty and confusion under extreme time pressure at best, and it risks undermining the integrity of the State's election process. Here, Plaintiffs' motion should be denied because they have not demonstrated the elements necessary to support their request for this extraordinary relief, and denying Plaintiffs' Motion for Preliminary Injunction will ensure at least an opportunity for careful deliberation before upending the State's election processes in the middle of the ongoing primary election.

A. Plaintiffs Have Not Shown a Substantial Likelihood of Success on the Merits of Their Claims As They Lack Standing.

A party invoking federal jurisdiction bears the burden of establishing standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498–99, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343 (1975. "[S]tanding is to be determined as of the commencement of suit…" *Lujan*, 504 U.S. at 570, n.5; *see also Atkinson v. Wal-Mart Stores*, 349 Fed. Appx. 426, 428 (11th Cir. 2009). "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action....'" *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973). *See Data Processing Service v. Camp*, 397 U.S. 150, 151—154, 90 S.Ct., 827, 829—830, 25 L.Ed.2d 184 (1970).

In order to establish standing, a Plaintiff must establish the following three elements: (1) injury in fact; (2) causation; and (3) redressability. *United States v. Hays*, 515 U.S. 737, 742-743 (1995)(citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). A "plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017)(quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)). "[A]t the pleading stage, the plaintiff must clearly…allege facts demonstrating each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)(internal quotation omitted). Because the elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported ... with the manner and degree of evidence required at the successive stages of the litigation." *Lujan* , 504 U.S. at 561, 112 S. Ct. at 2136.

The Supreme Court has "repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing…" *Hays*, 515 U.S. at 743. "For an injury to be particularized, it must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560. "A 'concrete' injury must be '*de facto;*' that is, it must actually exist. *Spokeo, Inc. v.*

Robins, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 (2016), *as revised* (May 24, 2016)(citing Black's Law Dictionary 479 (9th ed. 2009)).

1. SAS and LWVND Lack Standing Because They Have Not Suffered Or Pled Any Injury In Fact.

An organization has standing in its own right to seek judicial relief to address an injury to the organization itself, and to vindicate the independent rights and immunities of the organization. *Warth v. Seldin*, 422 U.S. 490, 511, 95 S. Ct. 2197, 2211, 45 L. Ed. 2d 343 (1975). However, neither Self Advocacy Solutions N.D., nor the League of Women Voters of North Dakota have alleged or pled an injury to itself in this matter.

An organization may alternatively establish standing as a representative through the assertion of the rights of its members. *Id. (citing National Motor Freight Assn. v. United States*, 372 U.S. 246, 83 S.Ct. 688, 9 L.Ed.2d 709 (1963)). "The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy." *Id.* (*citing Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). In order to establish standing on this basis, the organization must allege that members of the organization, or any single member, "suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Id.* In *Lujan*, the Supreme Court held that the organization lacked standing because it failed to "submit affidavits ... showing, through specific facts ... that one or more of [its] members would ... be 'directly' affected" by the allegedly illegal activity. 504 U.S. at 556.

Here, neither SAS, nor LWVND have made any allegations that any of its members have been or will be directly injured by the challenged election procedures contained within N.D.C.C. § 16.1-07-12. Plaintiff SAS is a nonprofit organization with its headquarters in Grand Forks County, North Dakota. (Dist. Ct. Doc. ID #1, Complaint at ¶16). However, SAS presents no evidence that any of its members has had a ballot rejected for inconsistent signatures, nor can SAS provide any reasonable basis that any member will have such events occur at the June 9, 2020 election. Instead, Allen Lee Marx Junior, President of President of SAS states that "I believe many SAS members are at particular risk of being deprived of their right to vote because of signatures that election official deem to not "'correspond;'" and that "[i]f voters whose signatures do not "match" are not provided

with notice or any opportunity to fix signature issues or otherwise verify their absentee ballots, our membership who cannot produce consistent signatures will always be at greater risk of being disenfranchised when they vote by mail." Neither of these speculative assertions gives rise to injury that can form the basis of representative standing for Self Advocacy Solutions, N.D. (Dist. Ct. Doc. ID #11-19, Exhibit 16 to Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction). LWVND similarly has failed to present any allegation or evidence of an actionable injury on behalf on any of its members, stating only that "I believe that if more people knew that the signature matching process rejects people's ballots without informing them or giving them an opportunity to fix the issue, these voters would lose faith in the system, which would make our work even harder;" and " many of our members are older and some have physical disabilities or medical conditions that make writing difficult. I believe these members are at increased risk of being disenfranchised by a signature issue." (Plaintiffs Ex. 17, Declaration of Jan Renae Lynch, President of League of Women Voters of North Dakota).

In the absence of any evidence or allegation of injury in fact to the organizations themselves, or to their individual members, neither organizational plaintiff in this matter can establish standing which warrants the invocation of federal-court jurisdiction or justifies the exercise of the court's remedial powers on their behalf. *See Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962).

2. The Injury Claimed by The Plaintiffs Is Not Traceable to the Conduct of Grand Forks County Auditor Debbie Nelson, and Could Not Be Redressed by Auditor Nelson.

None of the Plaintiffs, including the individual Plaintiff, can demonstrate the second and third elements of standing: That their injury is traceable to Grand Fork County Auditor Debbie Nelson's conduct, and that it would be redressed by a favorable decision on their Motion for Preliminary Injunction. Plaintiffs' lawsuit complains of actions taken by canvassing boards in their review of absentee ballot applications and returned ballots. In her capacity as Grand Forks County Auditor, Debbie Nelson sits on the five-person canvassing board as a single member, but, has no independent authority to accept or reject a ballot on the basis of signature conformity. Furthermore, Auditor Nelson has no authority to alter, revise, ignore, or in any way deviate from the statutory procedure laid out by the North Dakota Legislature governing the administration of State elections.

The "causation piece of Article III standing is vital." *Samuels v. Fed. Hous. Fin. Agency*, 54 F. Supp. 3d 1328, 1334 (S. D. Fla. 2014)(declining to find standing based on diversion of resources because it was not "fairly traceable to the defendant's allegedly unlawful conduct"). Notably, neither Plaintiffs' Compliant, nor their Motion for Preliminary Injunction allege any independent wrong doing on the part of Grand Forks County Auditor Debbie Nelson, and the claims asserted relate only to the potential results of the mandated election procedures and processes laid out by N.D.C.C. § 16.1-07-12, as drafted and adopted by the North Dakota Legislature. Plaintiffs have not alleged that Auditor Nelson has any authority to deviate from the statutory election procedures, or even that Auditor Nelson plays any independent role in the verification of votes by signature comparison. In fact, in their Compliant, Plaintiffs' specifically acknowledge that Grand Forks County Auditor Debbie Nelson is merely "responsible to the secretary of state for the proper administration within the auditor's county of state laws, rules, and regulations concerning election procedures." ¶22 (citing N.D.C.C. §16.1-01-01(4)). Although Plaintiffs correctly identify that Auditor Nelson is a member of the canvassing board which evaluates the mail in ballots, Nelson is merely one member of that panel, and Plaintiffs have not named the canvassing board as a party to the suit.

Related to this lack of causation, Plaintiffs' lawsuit also fails to demonstrate the third prong of standing, redressability. Plaintiffs cannot show that a favorable ruling would provide relief. An injunction against Grand Forks County Auditor Debbie Nelson requiring the use of additional unknown procedures in the upcoming election would create a disparity within the state. The Plaintiffs cannot effect an injunction in other counties through a ruling in their favor against Auditor Nelson. As pled by Plaintiffs, the requested relief creates an island within the state, effecting only Grand Forks County. Any such result would be absurd, and would undoubtably create inconsistency or confusion in the execution of the statewide election.

B. Plaintiffs Cannot Show That They Will Suffer Irreparable Harm.

Plaintiffs have not shown that they will suffer irreparable harm. "A showing of irreparable harm is the 'sine qua non' of injunctive relief." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000)(citations omitted). When a plaintiff has not shown a likelihood of success on the merits, claims for irreparable injury based on an alleged constitutional injury have no merit. *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002). Here, Plaintiffs have

failed to a likelihood of success of the merits, and therefore have failed to show irreparable harm.

Plaintiffs fail to demonstrate how they will "suffer imminent, irreparable harm" when there is no showing, demonstration, or suggestion that signatures on the voter's affidavit will in fact be so different from the ballot application as to effectuate a rejection of their ballot for the June 9, 2020 election. Plaintiffs engage in pure speculation in this regard. In fact, Plaintiffs' own 2018 statistics for Grand Forks County demonstrate that the risk is very low for voter's ballots to be rejected due to inconsistent signatures. Yet, Plaintiffs postulate that ballot rejections in the June 2020 election "could impact the outcome of elections in North Dakota." However, Plaintiffs cannot point to a single election in which there were sufficient ballots rejected for mismatched signatures that would have altered the outcome of any election in the State of North Dakota, in 2018 or otherwise. (Dist. Ct. Doc. ID #11-2, Table 1 – Exhibit 1 to Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction).

C. The Damage to the Defendant Outweighs Any Alleged Injury to Plaintiffs.

Even if this Court finds that Plaintiffs' will suffer an irreparable injury absent the granting of the requested injunctive relief, any injury to the Plaintiffs is out weighted by the damage to Defendants. "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 133 S. Ct. 1, 3, 183 L. Ed. 2d 667 (2012)(quoting *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S. Ct. 359, 363, 54 L. Ed. 2d 439 (1977). The Supreme Court has repeatedly recognized the particular harm caused by upsetting a state's election process with last minute changes. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); *Benisek v. Lamone*, 138 S. Ct. 1942 (2018).

The 2020 primary mail-in election is well underway. Plaintiffs boldly argue that implementing a notice and cure procedure for absentee voters would not impose any significant fiscal administrative burden on the State. (Dist. Ct. Doc. ID #11-1, Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 15). However, they are remarkably silent as to fiscal administrative burdens that may be placed upon local election officials. The Declaration of Grand Forks County Auditor Debbie Nelson describes the difficulties involved in changing election

procedures in the middle of an election, particularly in light of the proximity to election day, the taxed resources of the County, and the efforts already undertaken to commence the mail in election procedures. (Declaration of Debbie Nelson at ¶7).

D. An Injunction Would be Adverse to the Public Interest.

The issuance of an injunction less than three weeks before the June 9, 2020 primary election would be against the public interest. The Supreme Court has repeatedly recognized the importance of not upsetting a state's election process with last minute changes to its process. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); *Benisek v. Lamone*, 138 S. Ct. 1942 (2018). "A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

The Supreme Court in *Reynolds v. Sims* determined that the district court acted in a "most proper and commendable manner" when it declined to grant injunctive relief in order to allow the Alabama legislature to address claims of statutory shortcomings. 377 U.S. at 586. The Supreme Court similarly found in *Purcell v. Gonzalez*, that "given the imminence of the election and the inadequate time to resolve the factual disputes, [the Court's] action…shall of necessity allow the election to proceed without an injunction…" 549 U.S. at 5-6. In his concurrence, Justice Stevens expressed his praise of the majority ruling, stating that "[g]iven the importance of the constitutional issues, the Court wisely takes action that will enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation." *Id.* at 6.

"A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 780, 103 S. Ct. 1564, 1565, 75 L. Ed. 2d 547 (1983). Both common sense and constitutional law support the conclusion that governmental entities must play a significant role in the structuring and carrying out of elections and "as a practical matter, there must

be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974). "Election laws will invariably impose some burden upon individual voters. Each provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.'" *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 2063, 119 L. Ed. 2d 245 (1992)*(quoting Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S.Ct. 1564, 1569–1570, 75 L.Ed.2d 547 (1983).

Moreover, in addition to the government's interest in safeguarding the integrity of the election, "public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process. As the Carter–Baker Report observed, the "'electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.'" *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197, 128 S. Ct. 1610, 1620, 170 L. Ed. 2d 574 (2008)(quoting Building Confidence in U.S. Elections § 2.5 (Sept.2005), App. 136–137 (Carter–Baker Report)(footnote omitted)). Plaintiffs have never attempted to explain what a "meaningful opportunity to cure" a ballot signature nonconformance entails, and have also failed to demonstrate how such a "meaningful opportunity to cure" can occur within the short window before the canvassing board must certify election results. (Dist. Ct. Doc. ID #11-1, Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 9).

Lastly, Plaintiffs postulate that voting by mail, essentially absentee voting, "will remain a central feature of North Dakota elections - if not the only means of voting - in 2020 and potentially beyond." (Dist. Ct. Doc. ID #11-1, Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 7). Such postulation warrants a full vetting of options and responses that cannot be adequately undertaken by a nonlegislative body, and certainly not so within a matter of days before the June 9, 2020 election. If in fact the mail-in election only scheme is something that could extend beyond June 2020 election, there exists even more reason that the North Dakota Legislature should be provided with an opportunity to address the issue. For the reasons stated herein, Plaintiffs' Motion

for Temporary Restraining Order should be, in all things, denied.

CONCLUSION

Based upon the foregoing, Defendant, Debbie Nelson, Grand Forks County Auditor, respectfully asserts that Plaintiffs' Motion for a Preliminary Injunction should be, in all things, denied. Plaintiffs' Motion is simply too close in time to the June 9, 2020 election and further the Plaintiffs have not demonstrated that a preliminary injunction is warranted.

Date: May 22, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2020 a true and correct copy of the foregoing

- **RESPONSE OF DEBBIE NELSON, COUNTY AUDITOR OF GRAND FORKS COUNTY, IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

Self Advocacy Solutions N.D., League of Women Voters of North Dakota, Maria Fallon Romo, Plaintiffs, vs. Alvin Jaeger, in his official capacity as Secretary of State, Debbie Nelson, in her official capacity as County Auditor of Grand Forks County, Defendants.	Case No. 3:20-cv-00071 **DECLARATION OF DEBBIE NELSON**

Pursuant to 28 U.S.C. § 1746, I, Debbie Nelson, make the following declaration:

1. I am over the age of 21 years and I am under no legal disability which would prevent me from giving this Declaration.

2. I make this Declaration upon my own personal knowledge.

3. I am the Auditor for Grand Forks County, North Dakota and have been so at all times relevant to this litigation.

4. My role as County Auditor includes overseeing the processing of absentee ballot applications and absentee ballots.

5. As provided by state law, I act as the election official for Grand Forks County. I acted in that capacity during the 2018 elections and am doing so currently for the 2020 elections.

6. I have acted in good faith and, to the best of my ability, in accordance with the provisions of North Dakota law regarding elections.

7. In the 2018 election there were 21absentee ballots which were timely received by Grand Forks County but which were not included in the vote tally due to discrepancies between the signatures appearing on the absentee ballot application and the ballot envelope. These apparent discrepancies or inconsistencies in signatures were first identified, and the ballots rejected, by election judges at the respective precincts. These ballots were then submitted to the Grand Forks County Canvassing Board for further consideration pursuant to N.D.C.C. § 16.1-07-12.

8. As provided by N.D.C.C. § 16.1-07-12, the first review of signatures for absentee voters occurs at the polling place when the election judges, one appointed by each of the two major parties, review and compare the signatures on the absentee ballot application and the voter's affidavit. If they conclude that the signatures do not match, are inconsistent, or are not corresponding, the ballot is set aside for consideration by the County Canvassing Board.

9. The County Canvassing Board, which includes individuals appointed by each of the major political parties, will review the signatures on the absentee ballot application and voter's affidavit to determine whether the signatures are consistent and corresponding. If the members of the County Canvassing Board, in the exercise of their best judgment, cannot reasonably conclude that the signatures are consistent and corresponding, the ballot will not be counted in the final election tally.

10. The Grand Forks County Canvassing Board collectively determined, in their best reasoned judgment, that 21 absentee ballots in the 2018 election, which had previously been rejected by the election judges, contained inconsistent or noncorresponding signatures. Therefore, as a result

of the action taken by both the election judges and the Grand Forks County Canvassing Board, these 21 ballots were not included in the final 2018 vote tally.

11. I did not make any determinations in my capacity as County Auditor that ballots would not be included in the 2018 final vote tally because of inconsistent or noncorresponding signatures. Decisions finding that signatures were inconsistent or noncorresponding were made collectively by an initial review of the polling site election judges, then a final decision was made collectively by the County Canvassing Board.

12. No elected position in the 2018 Grand Forks County election would have been altered if all of the 21 ballots rejected due to inconsistent or noncorresponding signatures were cast for the unsuccessful candidate having received the highest votes in the final vote tally. In other words, had the ballots containing inconsistent or noncorresponding signatures been counted, the outcome of the 2018 elections would not have been altered.

13. I do not have any authority in my role as Grand Forks County Auditor to act outside of the directions, limitations or restrictions imposed by the NORTH DAKOTA CENTURY CODE regarding elections.

14. I do not have the authority to make any changes in state law relative to the role of the County Auditor, election officials, or County Canvassing Board nor does Grand Forks County have such authority or jurisdiction to do so.

15. I do not prepare the form used as an Application for Absentee Ballot. That form is provided by the North Dakota Secretary of State's Office. I have no authority to utilize a different form or to modify the form to be used by voters in Grand Forks County.

16. As Grand Forks County Auditor, I have no authority or jurisdiction in any other

county in the State of North Dakota.

17. I do not have first hand knowledge of how other counties may handle the absentee ballot application process as far as comparing signatures.

18. Under current law, the Canvassing Board meets six days after the election date. During that time, I, along with the staff of the Grand Forks County Auditor's office, am extremely busy with post-election administration matters. Giving notice to residents casting absentee ballots for an election that their ballot was not included in the final vote tally due to inconsistent or noncorresponding signatures would impose a new and additional burden that does not currently exist under North Dakota law and would be difficult and burdensome to comply with.

19. In many instances the County may only have a mailing address and would not have other contact information allowing me or my staff to make timely contact with a voter. The central voter records are maintained by the Secretary of State's Office. The central voter records do not provide information such as telephone numbers or email addresses for all voters. Not all voters have or will provide phone numbers.

20. I am uncertain as to what would constitute adequate notice to be given to voters. For example, would notice be allowed to be made by a phone call? If so, how would that notice be documented? Is there a particular script or format that must be used if oral notice is allowed? Is notice required by certified mail? How would any delays in delivery of mail be addressed? Is there a particular form of written notice that must be used? I would be seeking additional detail, direction and guidance to meet any such requirement that may be imposed upon me as the Grand Forks County Auditor. I do not believe there is adequate time for training and implementation of any such requirements for the 2020 elections.

21. My staff is currently at their maximum capacity and has been augmented by additional personnel from other departments to prepare for the 2020 election. Any additional efforts required of my staff for the 2020 election may prove to be a practical impossibility. After election day, my staff must process all ballots and work quickly toward final certification. Post-election day obligations to provide notice to all voters and/or an opportunity to cure inconsistent or noncorresponding signatures could be extremely time consuming and burdensome on an already over-burdened staff.

22. If the Court were to change the rules or procedures regarding the handling of absentee ballot applications and absentee ballots now, additional training will be required within the very short time period remaining before the June 9, 2020 election or the date of the Canvassing Board meeting. My staff is already stretched to the limit in attempting to keep up with the flood of absentee ballot applications and ballots we have received for this election. Because of the COVID-19 pandemic, our office has received significantly more absentee ballot applications than we have in any prior year. My staff, augmented with employees from the City of Grand Forks and County of Grand Forks have worked hundreds of hours in preparation for the June 9, 2020 election based upon current law and procedure. To require additional procedures or processes for the June 9, 2020 ballot will force me to divert valuable staff resources away from the numerous duties which must be performed to administer the June 9, 2020 election as well as to provide administrative services on behalf of Grand Forks County and its residents.

23. As of May 19, 2020 my office has received and processed 13,415 applications for mail/absentee ballots for the 2020 election. I anticipate receiving several thousand more and the total number of absentee ballot application forms in Grand Forks County alone may exceed 20,000.

24. The purpose of comparing the signatures between the absentee ballot application and the ballot is to reasonably insure that the ballots are cast by the same voter that made application to vote absentee and to protect against voter fraud. The ultimate goal is to protect the integrity of the voting process.

25. I was not aware of either Plaintiff organizations prior to the initiation of this litigation. To the best of my knowledge, neither organization has contacted my office or staff regarding any issues related to absentee ballots or signature comparisons prior to the filing of this lawsuit.

26. In my role as Grand Forks County Auditor and during my involvement with multiple elections, neither myself nor Grand Forks County has adopted any specific policies, practices or procedures regarding the evaluation of signatures appearing on an absentee voter's affidavit and an absentee voter ballot. Rather, I, along with Grand Forks County, have relied upon and acted in accord with state statute.

27. I have not attempted, nor am I aware of anyone else on the County Canvassing Board, to fulfill the statutory obligations in comparing signatures as an expert in forensic handwriting analysis. Rather, I, and members of the Grand Forks County Canvassing Board, have, at all times, utilized our best judgment in a reasonable manner.

FURTHER DECLARANT SAYETH NOT.

I declare under penalty of perjury that the foregoing is true and correct.

Date: 5/21/2020

Debbie Nelson

DEBBIE NELSON