

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Spirit Lake Tribe, on its own behalf and)
on behalf of its members,)
Dion Jackson, Kara Longie, Kim Twinn,)
Terry Yellow Fat, Leslie Peltier, and)
Clark Peltier,)
)
Plaintiffs,)
)
vs.)
)
Alvin Jaeger, in his official capacity as the)
Secretary of State,)
)
Defendant.)

Case No. 1:18-cv-00222

**MEMORANDUM IN SUPPORT OF
DEFENDANT’S MOTION TO DISMISS**

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I. Introduction and Statement of the Case

The Plaintiffs, certain individual Plaintiffs¹ and the Spirit Lake Tribe (“Spirit Lake”), on its own behalf and on behalf of its members (collectively the “Plaintiffs”), filed a complaint against the North Dakota Secretary of State (“Secretary”) on October 30, 2018, seven days before the November 6, 2018 general election (“Election Day”). The Plaintiffs allege the Secretary’s implementation of a portion of North Dakota law, N.D. Cent. Code §§ 16.1-01-04.1(2)(b), 3(b), violates their constitutional rights. Doc. 1. This law requires a person who wishes to vote, to verify their residential street address before they are allowed to vote. Plaintiffs classify their challenge to the residential address requirement, codified at N.D. Cent. Code § 16.1-01-04.1, as an as-applied challenge. Doc. 1, at ¶¶ 2, 6.

The Plaintiffs allege that their challenge to the implementation of North Dakota law is a corollary to the Eighth Circuit Court of Appeal’s decision in *Brakebill v. Jaeger*, 905 F.3d 553 (8th Cir. 2018), because the Eighth Circuit “explicitly acknowledged that ‘a court might have authority to enter a narrower injunction to relieve certain voters of an unjustified burden,’² and [the court also] indicated that ‘if any resident of North Dakota lacks a current residential street address and is denied an opportunity to vote on that basis, the courthouse doors remain open.’” Doc. 1, at ¶ 14.³ The Eighth Circuit in *Brakebill* had stayed this court’s order in *Brakebill v. Jaeger*, No. 1:16-cv-00008-DLH-CSM, 2018 WL 1612190 (D.N.D. Apr. 3, 2018), concluding in part:

On the merits of the facial challenge to the statutory requirement of a residential street address, however, we conclude that the Secretary has established a likelihood of success on appeal. A plaintiff seeking relief that

¹ The individual Plaintiffs are Dion Jackson, Kara Longie, Kim Twinn, Terry Yellow Fat, Leslie and Clark Peltier.

² The Eighth Circuit actually reasoned that “*Crawford* left open the possibility that a subset of voters might bring as-applied challenges against a regulation, and that a court might have authority to enter a narrower injunction to relieve certain voters of an unjustified burden.” *Brakebill v. Jaeger*, 905 F.3d 553, 559 (8th Cir. 2018) (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008)).

³ Only one individual Plaintiff, Twinn, alleges that she does not have a residential street address.

would invalidate an election provision in all of its applications bears “a heavy burden of persuasion,” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 200, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) (opinion of Stevens, J.), as facial challenges are disfavored. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-51, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008). Even assuming that a plaintiff can show that an election statute imposes “excessively burdensome requirements” on *some* voters, *Crawford*, 553 U.S. at 202, 128 S.Ct. 1610 (opinion of Stevens, J.) (internal quotation marks omitted), that showing does not justify broad relief that invalidates the requirements on a statewide basis as applied to *all* voters. As the lead opinion in *Crawford* explained, “[w]hen evaluating a neutral, nondiscriminatory regulation of voting procedure, we must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.” *Id.* at 203, 128 S.Ct. 1610 (internal quotation marks and brackets omitted).

Brakebill, 905 F.3d at 558. The Eighth Circuit in *Brakebill* also held that N.D. Cent. Code § 16.1-01-04.1(2)(b) was not invidious on its face because the law does not require a voter to present identification that shows an interest in property. *Id.* at 559.

Spirit Lake claims that North Dakota’s residential address requirement may reduce Spirit Lake’s ability to leverage its collective sovereign and political power if its members are allegedly unable to vote. Doc. 1, at ¶ 17. Spirit Lake further alleges that it has expended resources to assist its members and inform them of the “new residential street address requirement for voting.” Doc. 1, at ¶¶ 20-22, 136. Although North Dakota election laws have required a voter to present an ID with a residential address on it since 2003 (see N.D. Cent. Code §§ 16.1-02-12(2) (2003); 16.1-02-13(2) (2003)), Spirit Lake is critical of the State for not providing resources to assist Spirit Lake and its members with complying with what it alleges is the new residential address requirement. Doc. 1, at ¶ 23.

The individual Plaintiffs each allege certain irregularities exist with respect to their address and their voting address maintained by the State, and these irregularities violate their constitutional rights. One of the individual Plaintiffs, Dion Jackson, alleges the Secretary violated his constitutional rights because his absentee ballot was rejected by the Benson County Auditor before Election Day, whereas individual Plaintiffs Kara Longie, Terry Yellow Fat, Leslie Peltier and Clark Peltier allege the Secretary violated their

constitutional rights because they were fearful of being able to vote since the Secretary's online search tool did not list their exact or correct address, or they did not know their address. One Plaintiff, Kim Twinn, does not allege an issue with her address but simply alleges the Secretary violated her constitutional rights because she does not possess identification with her address on it. The individual Plaintiffs compare address information obtained through searches on the "North Dakota GIS Hub Explorer" (Doc. 1, at ¶¶ 36, 47, 78), and the Secretary of State website's "My Voting Information" online search tool (Doc. 1, at ¶¶ 33, 46, 60), with searches of addresses from Google Maps⁴ (Doc. 1, at ¶¶ 37, 48). The individual Plaintiffs claim the Secretary has previously indicated that North Dakota GIS Hub Explorer is an authoritative source for "911 addresses" and the failure of this tool to identify addresses indicates flaws in the system and will result in the individual Plaintiffs and others being denied the right to vote on Election Day or alternatively that the individual Plaintiffs' fear being denied the right to vote. Doc. 1, at ¶¶ 8, 38, 47, 51, 78, 90, 125.

All of the Plaintiffs allege a myriad of additional issues that do not relate to the Plaintiffs in this case, but rather other Native American tribes in North Dakota or other individuals. Doc. 1, at ¶¶ 103-121, 123, 128, 133, 137, 142, 143, 144, 148-53, 157-9. Plaintiffs, however, do not allege that any of the supposed issues as to other Native American tribes or individuals have resulted in section 16.1-01-04.1 being unconstitutional as applied to those sovereign entities or individuals—who are not parties to this lawsuit—or that individuals were denied the right to vote.

The Plaintiffs' complaint in this case seeks prospective injunctive and declaratory relief for the Plaintiffs, and ostensibly other Native American voters, in certain North Dakota counties where Indian reservations are present. Doc. 1. Specifically, the Plaintiffs

⁴ It is unclear what significance Plaintiffs' Google Maps searches have as this online search tool is not used as a basis for identifying residential street addresses or for verifying such addresses for purposes of voting.

are seeking relief for a class of voters in Benson, Dunn, Eddy, McLean, Mercer, Mountrail, Nelson, Ramsey, Richland, Rolette, Sargent, and Sioux Counties. *Id.* The Plaintiffs limit the relief they are requesting to the following class of potential voters:

- (1) Voters with IDs with residential addresses that the State considers “invalid”;
- (2) voters with no access to an accurate residential address to place on a qualifying ID;
- (3) voters with no access to documentation of their residential address;
- (4) voters whose addresses are unassigned; and
- (5) voters unable to determine their address and obtain a qualifying ID before Election Day.

Doc. 9.

The Plaintiffs’ complaint was followed by an Emergency Motion for Temporary Restraining Order (“TRO”) and Memorandum asking the court to enjoin the proof of residential address requirement and allow voters to identify their residence on a precinct map instead. Docs. 8, 9. The motion for TRO was denied. Doc. 33.

The Secretary and Plaintiffs (collectively the “Parties”) subsequently entered into a stipulation that resolved any actual or perceived irregularities regarding the individual Plaintiffs’ addresses and the addresses maintained in the Central Voter File and poll books. Doc. 34.⁵ This court entered an order adopting the stipulation. Doc. 35. None of the six individual Plaintiffs were impeded from voting on Election Day.

The Secretary requests that Plaintiffs’ complaint be in all things dismissed because the court does not have jurisdiction over Spirit Lake’s claim, Spirit Lake does not have standing, and the individual Plaintiffs’ claims are moot. The individual Plaintiffs’ claims are moot under Article III because they do not present a case or controversy for this Court to resolve since Election Day has passed and the individual Plaintiffs were not denied the right to vote; they were able to vote through application of North Dakota law using options available to all voters under the law. Furthermore, Plaintiffs fail to state a claim for which

⁵ The Secretary’s references to the stipulation are confined to his jurisdiction arguments, *see infra*, and such references should not convert the Rule 12(b)(1) motion into a Rule 56 motion.

relief can be granted under 42 U.S.C. § 1983 and therefore their complaint should be dismissed.

II. Facts and Background

A. The Secretary of State

The North Dakota Secretary of State is the supervisor of elections in North Dakota. N.D. Cent. Code § 16.1-01-01. In this capacity, the Secretary hires personnel to administer N.D. Cent. Code Title 16.1, and supervise the conduct of elections. N.D. Cent. Code § 16.1-01-01. The Secretary and his staff have broad requirements under state law. It requires the Secretary to:

- a. Develop and implement uniform training programs for all election officials in the state.
- b. Prepare information for voters on voting procedures.
- c. Publish and distribute an election calendar, a manual on election procedures, and a map of all legislative districts.
- d. Convene a state election conference of county auditors at the beginning of each election year and whenever deemed necessary by the secretary of state to discuss uniform implementation of state election policies.

- f. Investigate or cause to be investigated the nonperformance of duties or violations of election laws by election officers.
- g. Require such reports from county auditors on election matters as deemed necessary.⁶

- j. Establish standards for voting precincts and polling places, numbering precincts, precinct maps, maintaining and updating pollbooks, and forms and supplies, including but not limited to, ballots, pollbooks, and reports.

Id.

⁶ County auditors administer elections in each county, and they are responsible to the Secretary of State for the proper administration within the auditor's county of state laws, rules, and regulations concerning election procedures. N.D. Cent. Code § 16.1-01-01(4) and (5)a.-j.

B. The Plaintiffs

The Plaintiffs include Spirit Lake and six individuals: Dion Jackson and Kara Longie; Kim Twinn; Terry Yellow Fat; and, Leslie and Clark Peltier.

1. Spirit Lake

Spirit Lake is a federally recognized tribe with an enrollment of 8,001 members. Doc. 1, at ¶ 16; see, e.g., *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732 (8th Cir. 2001). Approximately 3,776 of Spirit Lake's members live on the Spirit Lake Reservation, and 2,569 of the residents living on the Spirit Lake Reservation are eighteen years old or older. Doc. 1, at ¶ 16. Spirit Lake alleges that it is asserting claims on its own behalf and on behalf of its members as *parens patriae*. *Id.* Spirit Lake alleges that its sovereign interests are impacted by its members' ability to vote:

If Spirit Lake Tribe members are unable to vote, the collective political power of the Spirit Lake Tribe is reduced. Spirit Lake Tribe advocates on behalf of all its members to local, state, and federal representatives. If some of its members are unable to vote, the Spirit Lake Tribe's overall ability to advocate effectively for crucial resources for the Spirit Lake Tribe and the Reservation will be diminished.

Id. at ¶ 17. Spirit Lake alleges that parts of the reservation do not have road signs, houses do not have numbers, houses may not have street addresses, and mail service is limited.

Id. at ¶ 18.

Spirit Lake also alleges it has recently extended its enrollment office hours for members to request tribal IDs, waived the cost of IDs, assisted members with determining their proper street address, and expended resources on a public information campaign to inform members about North Dakota law. *Id.* at ¶¶ 20, 22. Spirit Lake further alleges that the State of North Dakota has not provided Spirit Lake with any resources, financial or otherwise, to assist members in complying with North Dakota law. *Id.* at ¶ 23.

Spirit Lake alleges that it has identified some tribal IDs that did not have a residential street address assigned, although there is no allegation that those individuals live on the reservation or whether they even live in North Dakota. *Id.* at ¶ 26. Finally,

Spirit Lake alleges it identified a group of Spirit Lake's members who had an incorrect street address assigned. *Id.* at ¶ 27.

2. Dion Jackson and Kara Longie

Both Dion Jackson ("Jackson") and Kara Longie ("Longie") are enrolled members of Spirit Lake, and they live on the Reservation. *Id.* at ¶¶ 28, 39. Jackson alleges that he has lived at his current address for two years, which he alleges is 8225 34th St. NE, Tokio, ND 58379. Although this is the address listed on his non-driver's ID, he alleges his absentee ballot application was rejected because "the address on the application '[did] not match the address in the ND DOT database or is an invalid address.'" *Id.* at ¶¶ 29-32. Jackson alleges his residential address does not appear on the Secretary of State's "My Voting Information" online search tool, and the North Dakota GIS Hub Explorer lists his street as "Unknown2." *Id.* at ¶¶ 33, 34, 36. Jackson also alleges that the online search tool Google Maps does not list his address correctly. Finally, Jackson alleges that the Benson County Auditor's rejection of his absentee ballot application for an invalid address constitutes a denial of his right to vote. *Id.* at ¶¶ 37-38.

Longie also alleges that her address is 8225 34th St. NE, Tokio, ND 58379, and this is the address listed on her non-driver's identification. *Id.* at ¶¶ 41, 42. Longie alleges that when she entered her ID number and birthdate into the "My Voting Information" online search tool, her address is listed as 8225 34th St. NE, *Warwick*, ND 58531. *Id.* at ¶ 46. Longie alleges she fears she will not be able to vote because Jackson's absentee ballot application was rejected. *Id.* at ¶¶ 50-51.

The Benson County Auditor subsequently issued supplemental documentation to Jackson and Longie listing their current residential address, and they were permitted to vote. Doc. 34.

3. Leslie and Clark Peltier

Leslie and Clark Peltier (the "Peltiers") are enrolled members of the Turtle Mountain Band of Chippewa Indians, and they live in a rural area outside their reservation

on reservation trust land, about 11 miles northwest of Belcourt, North Dakota. Doc. 1, at ¶¶ 52, 55. The Peltiers allege their residential street address is 10296 40th Ave NE, Belcourt, ND 58316, but they allege this address is inconsistent with the address in the “My Voting Information” online search tool, which identifies their address associated with neighboring St. John, North Dakota, rather than Belcourt. *Id.* at ¶¶ 58, 60. The Peltiers have previously voted in St. John. *Id.* at ¶ 59.

The Peltiers allege a fear that although they have voted in past elections, they will not be permitted to vote on Election Day, “because the residential address on their IDs does not match the assigned 911 address for their home in the State’s files.” *Id.* at ¶ 63.

The Parties have verified, through a stipulation, that the Peltiers’ address in the State’s Central Voter file is 10296 40th Ave. NE, St. John, ND, 58369, and it will be reflected in the pollbooks of Rolette County. Doc. 34.

4. Kim Twinn

Kim Twinn (“Twinn”) is an enrolled member of the Northern Cheyenne Tribe and she resides in Fort Yates, North Dakota, on the Standing Rock Reservation. Doc. 1, at ¶¶ 64, 65. Twinn alleges her residential street address is 8746 Highway 24, Fort Yates, ND 58538. *Id.* at ¶ 66. Twinn alleges that although she wishes to vote on Election Day, she “has not identified any way to obtain an identification or supplemental documentation of her residential address that would allow her to vote on Election Day.” *Id.* at ¶¶ 70, 71.

The Parties stipulated that the Secretary will instruct the Sioux County Auditor to permit Twinn to cast a ballot at her designated voting location, with her Northern Cheyenne Tribe enrollment certificate at the Sioux County Courthouse (FY East), Fort Yates, ND. Doc. 34.

5. Terry Yellow Fat

Terry Yellow Fat (“Yellow Fat”) is an enrolled member of the Standing Rock Sioux Tribe, and resides in Fort Yates, North Dakota. Doc. 1, at ¶ 72. Yellow Fat alleges his residential street address is 1343 92nd Street. *Id.* at ¶ 74. Yellow Fat alleges that when

his address is input into the North Dakota GIS Hub Explorer online search tool, Yellow Fat's address is listed as 93rd St. *Id.* at ¶ 78. Yellow Fat alleges that he does not possess any identification that lists his current residential street address. *Id.* at ¶ 81. Yellow Fat further alleges that although he wishes to vote in the 2018 election, he "cannot meet the new residential address documentation requirement because the 911 coordinator has not issued him an accurate address." *Id.* at ¶ 83.

The Parties have stipulated that the Sioux County Auditor has issued supplemental documentation to Yellow Fat that lists his current residential address as 1392 92nd St. Fort Yates, ND 58538. Doc. 34. Yellow Fat will be able to cast a ballot with his supplemental documentation and his tribal ID at Sioux County Courthouse (FY West), Fort Yates, North Dakota. *Id.*

C. The Central Voter File System.

Plaintiffs' complaint attempts to explain, based on information and belief, how the state addressing system works with respect to the "GIS mapping system"⁷ and an individual's ability to vote on Election Day in conjunction with North Dakota's residential street address requirements. Doc. 1, at ¶¶ 89-101. Plaintiffs allege that "the state verifies a voter's precinct by checking the house number and street name provided against a state GIS mapping system" and the GIS mapping system determines whether the address is invalid or incorrect. Doc. 1, at ¶¶ 89-90. Plaintiffs' description of the system is inaccurate.

The State of North Dakota utilizes the Centralized Voter File ("CVF"), which is a collection of databases linked together by a centralized statewide system. N.D. Cent. Code § 16.1-02-01. State law requires that the CVF contain the following information:

1. The complete legal name of the individual.
2. The complete residential address of the individual.

⁷ Plaintiffs' complaint does not identify "GIS mapping system" but refers to the GIS Hub Explorer throughout its complaint. The Secretary believes Plaintiffs are in fact referring to the GIS Hub Explorer as the "GIS mapping system" and addresses it as one in the same.

3. The complete mailing address of the individual, if different from the individual's residential address.
4. The unique identifier generated and assigned to the individual.
5. A designation showing whether the individual's ability to vote in a precinct has been inactivated as a result of death or because the individual is no longer a resident of the precinct according to section 16.1-01-04.
6. The county, legislative district, city or township, school district, county commissioner district, if applicable, precinct name, and precinct number in which the individual resides.
7. Beginning in 2008, four years of an individual's voting history, if applicable.
8. Date of birth.
9. The individual's driver's license or nondriver identification card number issued by the department of transportation.
10. Any other information requested of and obtained from the individual deemed necessary by the secretary of state for the proper administration of the central voter file.

N.D. Cent. Code § 16.1-02-12.

The CVF is established in cooperation with the North Dakota Department of Transportation (“DOT”) and county auditors. N.D. Cent. Code § 16.1-02-03. A portion of the databases are maintained by the State while other portions are maintained by the 53 county auditors, who are required to have access to the CVF to update and make changes to the information contained in the CVF (among other things), and they are the chief custodians of the CVF records in each county. N.D. Cent. Code § 16.1-02-01. The CVF is created from the records maintained by the DOT and the county auditor’s precinct pollbooks used and created in the respective county from elections. N.D. Cent. Code § 16.1-02-03(1)-(2). An existing or potentially new voter’s information is continually updated and changed in the CVF through the DOT records, when a relevant update or change is made to the records maintained by the DOT. N.D. Cent. Code § 16.1-02-09. The DOT is required to provide, among other information, the complete residential address including both the previous and current residential addresses, if changed. *Id.*

Such updates or changes most commonly occur when an individual submits information to obtain a license or a non-driver's ID.

If an individual's information has not been previously populated into the CVF through DOT records or the county auditor's pollbooks following an election, the law requires a county auditor to enter "the name and required information of each individual who voted at the last election who is not already contained in the [CVF]." N.D. Cent. Code § 16.1-02-05(1). Therefore, an individual can have their information populated into the CVF through their existing information with the DOT or county auditor, by updating their information in-person or through the DOT website,⁸ or with the county auditor prior to an election, or by voting on election day with the requisite information and thereafter being entered onto the CVF by the county auditor.

The State does not rely upon the GIS mapping system for the administration of elections, or to make an authoritative determination as to verify a voter's precinct as Plaintiffs allege.⁹ The county auditor is the chief custodian of the CVF records in their respective counties pursuant to section 16.1-02-01 and the counties maintain a portion of the database within the CVF specific to that county, which contains the possible address ranges in that county. The address ranges in that county are available to the county auditor who may consult the 9-1-1 system for rural addressing. Under N.D. Cent. Code § 57-40.6-10(1)(a), "[t]he governing body of the local governmental unit . . . shall designate a governing committee that shall: Designate an emergency services communication system coordinator [9-1-1 coordinator]." The governing committee also shall "provide for a written plan for rural addressing" N.D. Cent. Code § 57-40.6-10(d). The 9-1-1 coordinator must provide to the county auditor information to verify and correct names and addresses used for official purposes. N.D. Cent. Code § 57-40.6-

⁸ Driver's License Address/Email Change System, <https://apps.nd.gov/dot/dlts/dlos/addressWelcome.htm>, (last visited Jan. 7, 2019).

07(2). Since the 9-1-1 coordinator is tasked with ensuring that address and mapping data are updated in the mapping system, which must follow the plan set forth for rural addressing, the 9-1-1 coordinator possesses the ability to assign addresses for individuals residing in rural areas who may not otherwise know their address, and the 9-1-1 coordinator communicates that information to the county auditor pursuant to State law.

It follows that if an individual is unaware of their residential street address, the person may contact the 9-1-1 coordinator in the county where that individual resides to determine the correct address. Once the 9-1-1 coordinator updates an address, the information is shared with the county auditor, or at the county auditor's request. An individual may also get a license or non-drivers ID with the DOT that reflects a residential address. Updates may be made by contacting the DOT, as previously explained. Updates to a residential address for purposes of voting may also be made by contacting the county auditor. Contacting the DOT to update information or obtain an ID, contacting the county auditor, or a 9-1-1 coordinator in the respective county where an individual lives to determine an address an individual is otherwise unaware of, are all considered self-help methods for individuals to determine an accurate residential street address for purposes of voting in the elections. These self-help methods were available prior to, and during, the Election Day, and continue to be available thereafter.

III. Argument

A. Motion to Dismiss standard.

The Secretary files this motion under both Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). A motion to dismiss for lack of subject matter jurisdiction may make either a "facial attack or a "factual attack" on a complaint. *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993); *Osborn v. United States*, 918 F.2d 724, 729, n.6 (8th Cir. 1990). "In a facial challenge to jurisdiction, all of the factual allegations concerning jurisdiction are presumed to be true and the motion is successful if the plaintiff fails to allege an element necessary for subject

matter jurisdiction.” *Titus*, 4 F.3d at 593. For a factual attack, the Eighth Circuit has explained:

[T]here is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the plaintiff’s allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

Osborn, 918 F.2d at 729-730 (quoting *Mortenson v. First Fed. Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977)). To the extent the Secretary’s reference to the Parties’ stipulation (Doc. 34) is construed as a reference outside the pleadings, the Secretary requests that the court construe such reference as a factual versus facial challenge to jurisdiction, and not convert the Secretary’s 12(b)(1) motion to a Rule 56 motion.

“To state a claim under the Federal Rules of Civil Procedure [with respect to Rule 12(b)(6) of the Federal Rules of Civil Procedure], a complaint must contain ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’” *Zink v. Lombardi*, 783 F.3d 1089, 1098 (8th Cir. 2015) (citing Fed.R.Civ.P. 8(a)(2)). A complaint must also contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face” to survive a motion to dismiss. *Zink*, 783 F.3d at 1098 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). “A pleading need not include ‘detailed factual allegations,’ but it is not sufficient to tender ‘naked assertion[s]’ that are ‘devoid of further factual enhancement.’” *Zink*, 783 F.3d 1098 (citations omitted) (alterations in original). And, a “complaint must do more than allege ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action.’” *Id.*

B. The Secretary has Eleventh Amendment immunity.

Since the Plaintiffs’ suit under 42 U.S.C. § 1983 is against the Secretary in his official capacity, Eleventh Amendment immunity applies. See *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 (1989); *Pennhurst State Sch. Hosp. v. Halderman*, 465 U.S. 89 (1984). If this court determines the Plaintiffs are entitled to any relief, it may be prospective, injunctive

relief only under *Ex Parte Young*, 209 U.S. 123 (1908), that would address the alleged Constitutional violation. *Will*, 491 U.S. at 71, n.10 (quoting *Kentucky v. Graham*, 473 U.S. 159, at 167, n.14).

C. The District Court does not have jurisdiction over Spirit Lake’s claims because Spirit Lake does not have an actionable claim under 42 U.S.C. § 1983.

Spirit Lake asserts that this court has jurisdiction to hear its claims under 28 U.S.C. § 1331, 28 U.S.C. § 1343, and 28 U.S.C. § 1362. Spirit Lake, however, cannot assert a claim on its own behalf under section 1983.

Spirit Lake is a federally recognized Indian tribe.¹⁰ Doc. 1, at ¶ 16. Spirit Lake asserts claims under 42 U.S.C. § 1983 on its own behalf against the Secretary, based upon its alleged interest in its members’ ability to exercise their vote on Election Day. Doc. 1, at ¶ 17. Section 1983 claims may be brought by “any citizen[s]” or “other person[s] within the jurisdiction” of the United States to seek legal and equitable relief from persons who, under color of state law, deprive them of federally protected rights, privileges, or immunities. 42 U.S.C. § 1983. Spirit Lake, however, does not qualify as a claimant because they are not a person under section 1983.

In *Inyo County, California v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*, the United State Supreme Court held that a Tribe could not sue under section 1983 to vindicate the tribal sovereign rights claimed in that case. 538 U.S. 701, 712 (2003). The *Inyo* Court’s analysis addresses the issue of whether a tribe is considered a person under section 1983, which is central to the disposition of this case.

¹⁰ The Plaintiffs’ complaint contains allegations and seeks relief with respect to other Native American tribes, which they do not have standing to seek. Each federally recognized tribe within North Dakota is its own sovereign nation. Neither the individual Plaintiffs nor Spirit Lake represents the interests of other sovereign nations or their members. Plaintiffs’ claim for relief asks the court to declare North Dakota law unconstitutional as applied to certain counties that contain Indian reservations – not limited to Spirit Lake Indian reservation. Plaintiffs’ complaint further alleges facts for persons who are not a party to this action (Doc. 1, at ¶¶ 104 -121, ¶ 132 Fort Berthold, ¶ 134 Standing Rock, ¶ 137 unidentified individual, ¶¶ 142-143 Turtle Mountain).

Central to the Court's analysis was its comparison of state sovereign rights and tribal sovereign rights. The Court cited to *Will v. Michigan Dep't of State Police*, 491 U.S. at 71, where the Court held a State is not a "'person' amenable to suit under § 1983." *Inyo*, at 708. "'Congress did not intend to override well-established immunities or defenses under the common law,' including '[t]he doctrine of sovereign immunity.'" *Inyo*, 538 U.S. at 708 (quoting *Will*, 491 U.S. 58, at 67) (alternation in original). The *Inyo* Court further reasoned "that Native American tribes, like States of the Union, are not subject to suit under § 1983" due to their sovereign status and immunity. *Id.* at 708.

The *Inyo* Court explained, however, that "qualification of a sovereign as a person who may maintain a particular claim for relief depends not 'upon a bare analysis of the word person, but on the legislative environment in which the word appears.'" *Id.* at 711 (internal quotations and citations omitted). See generally *Georgia v. Evans*, 316 U.S. 159, 161 (1942) (holding that a State as purchaser of asphalt shipped in interstate commerce qualified as a person to sue under the Sherman Act); *Pfizer Inc. v. Gov't of India*, 434 U.S. 308, 309-20 (1978) (holding a foreign nation as purchaser of antibiotics was a person qualified to sue pharmaceutical manufacturers under United States antitrust laws). The *Inyo* Court held that section 1983 was enacted to secure private rights and since the tribe was suing to vindicate a sovereign right, that tribe did not qualify as a person under section 1983. *Id.* at 712.

Since the *Inyo* court's decision, it has been recognized that the holding in *Inyo* did not *per se* bar claims by sovereigns as "persons" under section 1983: "[i]nstead, the viability of a tribe's § 1983 suit depend[s] on whether the tribe's asserted right [is] of a sovereign nature" *Muscogee (Creek) Nation v. Oklahoma Tax Comm'n*, 611 F.3d 1222, 1234 (10th Cir. 2010); see also *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 514-15 (9th Cir. 2005) (holding that a tribe did not qualify as a person for section 1983 claim because "[t]he [t]ribe here is not suing as an aggrieved purchaser, or in any other capacity resembling a private person[.]" (internal quotations omitted)). The Eighth

Circuit has recognized that rationale applies to North Dakota. *North Dakota v. Heydinger* No. 11-CV-3232 (SRN/SER), 2016 WL 5661926, at *5 (D. Minn. Sept. 29, 2016), *aff'd sub nom. North Dakota v. Lange*, 900 F.3d 565 (8th Cir. 2018) (“Supreme Court did not issue any sort of blanket prohibition against states asserting § 1983 claims on behalf of their citizens for the deprivation of constitutional rights. Instead, the Court considered the status or capacity in which the state brought the action and focused on the legislative environment in which the word “person” appears.”). Sovereign interests include “the exercise of sovereign power over individuals and entities within the relevant jurisdiction,” as well as “the demand for recognition from other sovereigns.” *State, Dep’t of Health & Soc. Servs, Div. of Family & Youth Servs. v. Native Vill. of Curyung*, 151 P.3d 388, 399 (Alaska 2006).

Spirit Lake identifies its potential injury under section 1983 as follows: “if Spirit Lake Tribe members are unable to vote, the collective political power of the Spirit Lake Tribe is reduced.” Doc. 1, at ¶ 17. Therefore, Spirit Lake believes that if its members are allegedly unable to vote, the “overall ability to advocate effectively for crucial resources for the Spirit Lake Tribe and the Reservation will be diminished.” Doc. 1, at ¶ 17. It is unclear how Spirit Lake’s political power is affected or how the votes of its members will diminish their ability to advocate on behalf of its members to local, state, and federal representatives for resources. Spirit Lake also alleges injury based on the alleged expenditure of tribal resources.

The injury alleged by Spirit Lake under section 1983 is clearly of a sovereign nature. Spirit Lake is not bringing suit as an aggrieved purchaser or in some other capacity as a private party.¹¹ See *Skokomish*, 410 F.3d at 514-15. Spirit Lake, by its own

¹¹ The Plaintiffs’ complaint details allegations that Spirit Lake has expended substantial resources for its enrolled members to ensure their ability to vote. Doc. 1, at ¶¶ 20-27. This is not included in the Secretary’s analysis as a potential injury for which Spirit Lake seeks redress, because the Plaintiffs’ claim for relief does not include a request for monetary relief or reimbursement of those resources. Even if it was included, such a request would be barred pursuant to the Eleventh Amendment. In addition to the sovereign nature of the

allegations, claims that it will not be able to leverage its political power and ability to advocate for resources to local, state, and federal representatives, if voting irregularities allegedly prevents its members from voting. Spirit Lake's alleged injury falls precisely under the definition of "sovereign interests." Political power, advocating for resources from local, state, and federal representatives, and expenditure of resources are clearly tied to Spirit Lake's exercise of its sovereign power. These injuries are not the type of injuries the court has jurisdiction to address according to *Inyo* and the progeny of cases that followed, which discuss factual scenarios where a sovereign is considered a person for purposes of stating a claim to secure private rights under section 1983. Advocacy for political power is not a private right that a private citizen or person could bring suit for under section 1983. These alleged claims are so interwoven into the fabric of Spirit Lake's sovereign status that they could not be construed as anything but Spirit Lake seeking to vindicate a sovereign right.

Because Spirit Lake asserts a sovereign right, it is not a person under 42 U.S.C. § 1983, therefore the court does not have jurisdiction over its remaining claims. Even if the court determines it has jurisdiction over Spirit Lake's claims because it is not asserting a sovereign right, the court should dismiss Spirit Lake's claims because it lacks standing.

D. Spirit Lake lacks standing.

Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. "The doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood. The doctrine limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (internal citation omitted). "To demonstrate Article III standing, a plaintiff 'must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that

claim, the resources utilized by Spirit Lake to provide IDs to their members are not constitutional claims, nor do the allegations trigger a constitutional violation.

is likely to be redressed by a favorable judicial decision.” *Heglund v. Aitkin Cty.*, 871 F.3d 572, 577 (8th Cir. 2017) (quoting *Spokeo*, 136 S. Ct. at 1547).

“The party invoking federal jurisdiction bears the burden of establishing these elements.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). “Where, as here, a case is at the pleading stage, the plaintiff must clearly allege facts demonstrating each element.” *Spokeo*, 136 S. Ct. at 1547 (internal quotation marks and citation omitted). Standing is determined as of the time a suit is commenced. *Park v. Forest Serv. of United States*, 205 F.3d 1034, 1038 (8th Cir. 2000).

The injury-in-fact element requires an injury both particularized and concrete, and actual or imminent rather than conjectural or hypothetical. *Lujan*, 504 U.S. at 560. “For an injury to be ‘particularized,’ it ‘must affect the plaintiff in a personal and individual way.’” *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560 n.1).

The Supreme Court has “long recognized that a person’s right to vote is ‘individual and personal in nature.’” *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)). Accordingly, the “individual and personal injury of the kind required for Article III standing” requires plaintiffs who challenge an election law to show “a burden on those plaintiffs’ own votes,” that is, an “injury that they have suffered as individual voters.” *Id.* at 1931. Voters must “demonstrate a burden on their individual votes” *Id.* at 1934, because the “Court is not responsible for vindicating generalized partisan preferences” and has a “constitutionally prescribed role . . . to vindicate [only] the individual rights of the people appearing before it.” *Id.* at 1933. Moreover, “[a] plaintiff’s remedy must be tailored to redress the plaintiff’s particular injury.” *Id.* at 1934 (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006)).

In *Gill*, the Supreme Court held that voters who lived outside of districts where gerrymandering allegedly caused Democratic votes to be diluted had no standing to challenge Wisconsin’s legislative redistricting plan because the “disadvantage to the voter as an individual . . . results from the boundaries of the particular district in which he

resides. And a plaintiff's remedy must be limited to the inadequacy that produced his injury in fact." *Id.* at 1930 (internal citations and quotation marks omitted).¹²

Spirit Lake will likely argue, as it did in its Memorandum in Support of Emergency Motion for Temporary Restraining Order (Doc. 9), that it has *parens patriae* standing to bring a claim under section 1983. The Eight Circuit has recently recognized in dicta that "[t]he [court] has considered, but not yet recognized the doctrine of *parens patriae* in the context of tribes suing on behalf of tribal members." *Rosebud Sioux Tribe v. United States*, No. 3:16-CV-03038-RAL, 2017 WL 1214418, at *4 (D.S.D. Mar. 31, 2017) (citing *United States v. Santee Sioux Tribe of Neb.*, 254 F.3d 728, 734 (8th Cir. 2001); *Delorme v. United States*, 354 F.3d 810, 816 (8th Cir. 2004)). Regardless, the Secretary will address this argument in full.

Standing for purposes of Article III can be established if there is a showing that *parens patriae* standing requirements are satisfied: "the requirements of Article III will be satisfied if the Tribe demonstrates that it has *parens patriae* standing to bring claims" *Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1178 (N.D. Okla. 2009). See *Massachusetts v. EPA*, 549 U.S. 497, 498 (2007) (distinguishing requirement for a state to have standing to sue from the *Lujan* test); *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1126 (9th Cir. 2006) (noting that governmental entities have standing under Article III if they can demonstrate *parens patriae* standing); *Massachusetts v. Bull HN Information Systems, Inc.*, 16 F. Supp. 2d 90, 103 (D. Mass. 1998) ("Because the Commonwealth has *parens patriae* standing to pursue this action, Article III no longer poses an obstacle."). *Parens patriae* standing

¹² Since the court does not have jurisdiction over any claim Spirit Lake asserts in its sovereign capacity under 42 U.S.C. § 1983, it is unnecessary to address whether Spirit Lake has standing in its own right, versus *parens patriae* standing. See e.g. Plaintiffs' Memorandum in Support of *Emergency Motion For Temporary Restraining Order*, Doc. 9. To the extent the court determines it has jurisdiction over any claim Spirit Lake may bring in its sovereign capacity, or in its own right, the Secretary does not waive any argument regarding standing.

requires that a quasi-sovereign interest is asserted. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982). The interest asserted must be “apart from the interests of particular private parties . . . [the party] must be more than a nominal party.” *Id.* Quasi-sovereign interests “are not sovereign interests, proprietary interests, or private interests pursued by the State [or Tribe] as a nominal party.” *Id.* at 602. “First, a State [or Tribe] has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State [or Tribe] has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.” *Id.* at 607. Although Spirit Lake may argue it has standing to bring this claim as *parens patriae* for its members, Spirit Lake fails to assert a quasi-sovereign interest as required under *Alfred L. Snapp & Son, Inc.* and therefore, it fails the requirements for *parens patriae* standing.

The interests asserted by Spirit Lake are its collective political power and possible economic injuries related to its expenditure of resources. Spirit Lake may claim that the desire to leverage its political power and ability to advocate for resources on behalf of its members is a quasi-sovereign interest because it relates to the health and well-being of its members and preserving their status within the federal system, but such a claim is misplaced. The desire to leverage political power is unmistakably a sovereign function.

Even if this Court determined that Spirit Lake’s desire to preserve and cultivate its political power, its suspension of charges for tribal ID’s, the extension of hours for the tribal office, and public education efforts are considered to be quasi-sovereign interests and Spirit Lake is a person with *parens patriae* standing under section 1983, these asserted interests are not violations or “depriv[ations] . . . of federally protected rights” under section 1983, and Spirit Lake cannot maintain an action against the Secretary. *Cheyenne and Arapaho Tribes v. First Bank & Trust Co.*, 560 F. App’x 699, 705 (10th Cir. 2014) (internal quotations omitted) (holding *parens patriae* standing not established because the Tribe asserted sovereign interests and “[f]urther, there is no allegation of

discriminatory treatment. Therefore, Plaintiffs cannot avail themselves of the *parens patriae* doctrine in order to maintain any § 1983 claims . . .”). The resources expended by Spirit Lake for the election also do not constitute a quasi-sovereign interest. The financial resources of Spirit Lake are functionally distinct from the resources of individual members.

Even if the court finds that Spirit Lake has asserted a quasi-sovereign interest, Spirit Lake fails to establish *parens patriae* standing because it is not representing the interests of all of its members, merely a select few. When asserting *parens patriae* standing, “[t]he governmental entity must raise claims which affect *all its members*, not just a select few.” *Navajo Nation v. Superior Court of State of Wash. for Yakima Cty.*, 47 F. Supp. 2d 1233, 1240 (E.D. Wash. 1999), *aff’d sub nom. Navajo Nation v. Confederated Tribes & Bands of the Yakama Indian Nation*, 331 F.3d 1041 (9th Cir. 2003) (emphasis added); *see also Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F. Supp. 2d 644, 652 (W.D. Tex. 1999) (Tribe asserting as *parens patriae* disinterment and autopsy order of member infringed on their members’ First Amendment right to free exercise of religion. The court held the tribe did not have standing under *parens patriae* doctrine because it is limited to those cases involving the rights of tribal members as a whole.); *Kickapoo Tribe of Oklahoma v. Lujan*, 728 F. Supp. 791, 795 (D.D.C. 1990) (Sovereign tribe could not sue under the doctrine of *parens patriae* because it was not acting on behalf of all of its members although all of its members may be affected in some way by reorganization); *Assiniboine & Sioux Tribes v. State of Mont.*, 568 F. Supp. 269, 277 (D. Mont. 1983) (Tribe did not have standing to sue under *parens patriae* doctrine because it was not acting on behalf of the collective interests of all its citizens: “Here, the proposed claim is on behalf only of those Indians seeking refunds because they have been improperly subjected to these taxes, and those Indians who might, but for this lawsuit, continue to be wrongfully subjected to them.”).

Spirit Lake cannot satisfy *parens patriae* standing in this case because it is not seeking relief, or representing the interest of all of its members. Plaintiffs allege in their complaint that Spirit Lake has 8,001 enrolled members, 3,776 of which live on the Spirit Lake Reservation. Doc. 1, at ¶ 16. Of those members living on the Spirit Lake Reservation, 2,569 of them are eighteen years or older. *Id.* The Plaintiffs' complaint goes on to allege issues with the residential street address requirement set forth in section 16.1-01-04.1(2)(b) and (3)(b), for some—but not all—of its members living on the Reservation. Plaintiffs do not allege that every member living on the Spirit Lake Reservation has issues with the residential street address requirement, and Plaintiffs make no allegation regarding members that live off the Reservation. Of those determined to satisfy the age requirement to vote (2,569), Spirit Lake's enrollment office issued 328 new tribal IDs to tribal members. Doc. 1, at ¶ 24. The Plaintiffs' complaint generally alleges that of the 328 new tribal IDs issued to members, "many" of those members were unaware of their residential street address. *Id.* Spirit Lake additionally identified 262 members "whose tribal IDs did not have residential street addresses. Well over 100 of those members have not yet been issued an updated tribal ID with a residential street address." *Id.* at ¶ 26. The Plaintiffs' complaint does not provide any indication whether the 262 members identified as not possessing tribal IDs with residential street addresses had other forms of identification, supplemental documentation, or a State issued ID with a residential street address. Plaintiffs' own allegations clearly indicate Spirit Lake is not acting on behalf of all of its members in this lawsuit.

Even if Spirit Lake's *parens patriae* standing could be satisfied by its representation of members that lived on the Reservation only, it still fails the *parens patriae* standing requirements. Spirit Lake identifies only a small portion of those members living on its reservation as having the potential to be denied the right to vote: "Plaintiff Spirit Lake Tribe has identified over 100 members who still do not have a tribal ID with a residential

street address.”¹³ Doc. 1, at ¶ 168. The numbers provided by the Plaintiffs in this case foreclose on Spirit Lake’s *parens patriae* standing argument because even if the residential street address may in some way affect all of their members living on or off the reservation, Spirit Lake does not represent the interests of all its members, or even allege that it represents a substantial amount, and does not meet the requirements for *parens patriae* standing. *Kickapoo Tribe of Oklahoma v. Lujan*, 728 F. Supp. at 795. Based on the foregoing, Spirit Lake does not satisfy the requirements for *parens patriae* standing, and should be dismissed from this case.

E. The Plaintiffs’ claims relating to the November 6, 2018, election should be dismissed because they are moot.

Article III of the Constitution grants the Judicial Branch authority to adjudicate “Cases’ and ‘Controversies.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). Questions of mootness are matters of subject-matter jurisdiction. *Davis v. Anthony, Inc.*, 886 F.3d 674, 677 (8th Cir. 2018). “A case becomes moot – and therefore no longer a ‘Case’ or ‘Controversy’ for purposes of Article III – ‘when the issues presented are no longer “live” or the parties lack a legally cognizable interest in the outcome.” *Already*, 568 U.S. at 91 (citation omitted). “No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs’ particular legal rights.” *Id.* (internal quotations omitted). When a claim for mootness is alleged based on voluntary compliance by the defendant, “a defendant . . . bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.” *Id.* (internal quotations omitted).

In this case Election Day has passed. Plaintiffs request this court grant a preliminary and permanent injunction barring the Secretary from enforcing N.D. Cent.

¹³ The Plaintiffs do not identify whether the unnamed members have another form of identification or supplemental documentation that fits within the requirements of section 16.1-01-04.1(2)(b) and (3)(b).

Code § 16.1-01-04.1(2)(b) (current residential street address) and (3)(b) (supplemental documentation requirements) as to the individual Plaintiffs on Election Day. Doc. 1. Alternatively, Plaintiffs request a preliminary and permanent injunction barring the Secretary from enforcing N.D. Cent. Code § 16.1-01-04.1(2)(b) and (3)(b) as to the individual Plaintiffs and allow voters to identify their residences on a precinct map on Election Day. Doc. 1. Prior to Election Day, the Plaintiffs and the Secretary entered into a stipulation regarding the individual Plaintiffs' concerns regarding their ability to vote. Doc. No. 34. The individual Plaintiffs' claims are moot because there is no live case or controversy and they lack a legally cognizable interest in the outcome.

1. Dion Jackson and Kara Longie.

The basis for Jackson's claim is the rejection of his absentee ballot application by the Benson County Auditor. Doc. 1, at ¶¶ 29-32. Longie's claim is based upon her fear that she would not be able to vote because she was aware that Jackson's absentee ballot application was rejected by the Benson County Auditor. *Id.* at ¶¶ 50-51. The Parties entered into a stipulation that permitted Jackson and Longie to vote on Election Day. Doc. 34. The stipulation provides that the Benson County Auditor issued a supplemental document to them listing their current address. See Doc. 34, Exhibits A and B. The letters were issued pursuant to N.D. Cent. Code § 16.1-01-04.1(3)(b)(5). The stipulation also provides that the law permits Jackson and Longie to cast a ballot with this supplemental document and their state-issued IDs at Benson County Precinct 4 – Warwick Fire Hall, Warwick, North Dakota. Doc. 34.

To the extent their claim for relief relates to their ability to vote on or before Election Day, it is the Secretary's position that both Jackson and Longie could have voted on Election Day without the Parties' stipulation. Regardless, upon learning there was an issue with his residential address, Jackson could have engaged in self-help methods such as contacting the county auditor or the 9-1-1 coordinator to cure this irregularity. After curing the address irregularity, Jackson could have submitted another absentee ballot

application with the correct address. Similarly, upon learning of the irregularity with the residential address, Longie could have utilized the same self-help methods and contacted the county auditor or 9-1-1 coordinator to cure the irregularity and consequently update her information with the DOT or county auditor. With her non-driver ID and after curing the address irregularity, Longie would have been able to vote. Regardless, Jackson and Longie's claim relating to Election Day is moot and subject to dismissal based upon the stipulation, because there is no longer embedded in the case any actual controversy about their particular legal rights.

It is also the Secretary's position that Jackson and Longie's alleged election irregularity is not reasonably expected to recur based upon the steps taken to address the lack of alignment between their address and the address maintained in the CVF. Jackson and Longie both possess a non-drivers ID and supplemental documentation recognized under N.D. Cent. Code § 16.1-01-04.1(3)(b)(5). Additionally, both Longie and Jackson could update their information on their non-drivers IDs with the DOT and would not require the supplemental documentation. Going forward, both Jackson and Longie are qualified electors who meet the state voting requirements, and are in a position to vote in future elections, if they choose to do so. Any claim regarding an injury in the future is purely hypothetical and cannot satisfy the standing requirements for this claim.

Even if Longie claims that she continues to fear not being able to vote (because Jackson's absentee ballot was rejected) Longie's fear should not be construed as an injury for purposes of standing. An injury must be more than mere conjecture or hypothetical in the future. *Gill*, 138 S.Ct. 1916.

2. Leslie and Clark Peltier.

Although the Peltiers had previously voted in St. John, North Dakota (Doc. 1, at ¶ 59), they alleged a fear that they would not be permitted to vote on Election Day because the town listed on their IDs allegedly did not match the town listed on the "My Voting Information" online search tool. Doc. 1, at ¶ 60. The Parties entered into a stipulation

that the Peltier's address, 10296 40th Ave. NE, St. John, ND, 58369, was currently listed in the State's CVF, and that they would be permitted to cast ballots at St. John Senior Center, St. John, North Dakota. Doc. 34.

The Peltier's claim is moot and subject to dismissal because there is no longer embedded in the case any actual controversy about the Peltiers' particular legal rights. Going forward, the Peltiers possess IDs and supplemental documentation in compliance with N.D. Cent. Code § 16.1-01-04.1(3)(b)(5) and are in a position to vote in future elections, if they choose to do so. The Peltiers may also update the information on their IDs with the DOT and could forego the supplemental documentation to vote in future elections. If an issue arose regarding the city designated on the Peltiers' IDs, the Peltiers could update their IDs with the DOT or contact their county auditor to update their address and fix any irregularity.

It is also the Secretary's position that the Peltiers' alleged fear of being permitted to vote is not an injury for purposes of standing. An injury must be more than mere conjecture or hypothetical in the future. *Gill*, 138 S.Ct. 1916. The Peltiers' "fear" is mere conjecture and hypothetical since the Peltiers had voted in St. John in prior elections when the residential address requirement was in place. Any claim regarding an injury in the future is purely hypothetical and cannot satisfy the standing requirements for this claim.

3. Kim Twinn.

Twinn alleges that although she wished to vote on Election Day, she "[had] not identified any way to obtain an identification or supplemental documentation of her residential address that would allow her to vote on Election Day." Doc. 1, at ¶¶ 70-71. Twinn did not allege a deficiency in the address system for voting. The Parties entered into a stipulation that permitted Twinn to vote on Election Day by presenting her Northern Cheyenne Tribe enrollment certificate. Doc. 34.

To the extent Twinn's claim for relief relates to her ability to vote on Election Day, it is the Secretary's position that she could have voted on Election Day without the stipulation entered into by the Parties because Twinn had the same self-help options of obtaining a free, non-drivers ID with the DOT. Regardless, Twinn's claim is moot as it relates to this election because she was permitted to vote on Election Day.

Even though Twinn may need to obtain a non-drivers ID at the DOT in order to comply with the applicable voting requirements, this requirement is not an unconstitutional burden. The United States Supreme Court held, in a challenge to Indiana's requirement for voters to present an ID, that:

Just as other States provide free voter registration cards, the photo identification cards issued by Indiana's BMV [Bureau of Motor Vehicles] are also free. For most voters who need them, the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.

Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 198 (2008). The Court's rationale applies here. In order to vote, Twinn may have needed to obtain an ID at the DOT. Because North Dakota's non-driver ID is free, the inconvenience of going to the DOT, gathering required documents, and posing for a photograph, does not qualify as a substantial burden on Twinn's right to vote nor does it represent a significant increase over the usual burdens of voting.

4. Terry Yellow Fat.

Yellow Fat alleges his residential street address is 1343 92nd Street. Doc. 1, at ¶ 74. He alleges that when this address is input into the North Dakota GIS Hub Explorer online search tool, Yellow Fat's address is listed as 93rd St. *Id.* at ¶ 78. The Parties entered into a stipulation whereby the Sioux County Auditor issued supplemental documentation to Yellow Fat, listing his current residential address for voting purposes as 1392 92nd St., Fort Yates, ND 58538. Doc. 34, Exhibit C. The letter was issued pursuant

to N.D. Cent. Code § 16.1-01-04.1(3)(b)(5). Doc. 34. And, the stipulation provides that the law permits Yellow Fat to cast a ballot with this supplemental document and his tribal ID at Sioux County Courthouse (FY West), Fort Yates, North Dakota. Doc. 34.

To the extent his claim for relief relates to his ability to vote on Election Day, it is the Secretary's position that Yellow Fat could have voted without the Parties' stipulation. Yellow Fat had available to him self-help methods of contacting the county auditor or his 9-1-1 coordinator to work out any irregularity in his residential address prior to the election. If Yellow Fat had voted on Election Day with an irregularity in his residential address, he could have marked a set-aside ballot and used the self-help tools to provide supplemental information after Election Day to have his ballot counted. Regardless, Yellow Fat's claim relating to the Election Day is moot and subject to dismissal because there is no longer any actual controversy about Yellow Fat's particular legal rights.

In addition, the alleged wrongful behavior or injury is not reasonably expected to recur because Yellow Fat is currently a qualified elector who possesses an ID and supplemental documentation in accordance with N.D. Cent. Code § 16.1-01-04.1(3)(b)(5) which meets the State voting requirements, and at this time is in a position to vote in future elections without impediment. Yellow Fat lacks a legally cognizable interest in the outcome of this litigation because Yellow Fat was permitted to vote on Election Day and may continue to vote in future elections because he meets the voting requirements. Any claim regarding an injury in the future is purely hypothetical and cannot satisfy the standing requirements for this claim.

5. Self-help mechanisms available.

It is the Secretary's position that even if the Parties had not entered into a stipulation, the individual Plaintiffs had several self-help remedies available to them to assist them with North Dakota voting laws. If the Plaintiffs were concerned about their address, they could have contacted their appropriate county auditor to determine their address, or they could have contacted their 9-1-1 coordinator. *See supra*; *see also* N.D.

Cent. Code § 16.1-01-04.1(5) (Provision for set aside ballots if an individual is unable to show a valid form of identification. After a ballot is set aside, the individual may show a valid form of identification to a polling place election board member if the individual returns to the polling place before the polls close, or to an employee of the office of the election official responsible for the administration of the election before the meeting of the canvassing board which occurs six days after the election.). In addition, if the Plaintiffs decide to change their address in the future, they have numerous self-help remedies available to them, including: 1) updating their non-drivers ID addresses through the DOT, which will automatically populate the CVF; 2) contacting the county auditor where they reside to update their address; 3) or, contacting the 9-1-1 coordinator in the county where they reside to assist with identifying their appropriate address.

F. The Plaintiffs' claims against the Secretary should be dismissed with prejudice because their allegations fail to state a claim.

Although it is clear the individual Plaintiffs had concerns about their ability to vote on Election Day, and Spirit Lake had concerns about its members living on the Reservation, the Eighth Circuit has held that it is well settled not every election irregularity gives rise to a constitutional action under section 1983. *Minn. Voters All. v. Ritchie*, 720 F.3d 1029, 1031-1032 (8th Cir. 2013); *see also Shannon v. Jacobowitz*, 394 F.3d 90, 96 (2d Cir. 2005); *Curry v. Baker*, 802 F.2d 1302, 1315 (11th Cir. 1986); *Bodine v. Elkhart Cty. Election Bd.*, 788 F.2d 1270, 1272 (7th Cir. 1986); *Griffin v. Burns*, 570 F.2d 1065, 1076 (1st Cir. 1978); *Lecky v. Va. State Bd. of Elections*, 285 F. Supp. 3d 908 (E.D. Virginia 2018). “[S]ection 1983 is implicated only when there is ‘willful conduct which undermines the organic processes by which candidates are elected.’” *Minn. Voters All.*, 720 F.3d at 1032 (quoting *Bodine v. Elkhart Cty. Election Bd.*, 788 F.2d 1270, 1271 (7th Cir. 1986)) (alternation in original); *citing Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975) (explaining that “irregularities caused by mechanical or human error and lacking in invidious or fraudulent intent” do not warrant relief under § 1983); *see also Daniels v.*

Williams, 474 U.S. 327, 328 (1986) (“the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property.”). The court in *Minnesota Voters Alliance* also recognized that in *Pettengill v. Putname County R-1 School Dist., Unionville, Mo.*, 472 F.2d 121, 122 (8th Cir. 1973), the Eighth Circuit adopted the following rationale:

In the plaintiffs’ view, [these] federal statutes comprehensively protect their ballots against dilution by illegal voting, whether or not the dilution was willful or knowing. It is appropriate to note at the outset that the plaintiffs do not claim any discrimination because of race. Thus, they face a considerable burden of persuasion in asserting so sweeping and novel a conception, one apparently never before asserted, so far as reported cases reveal. Were we to embrace plaintiffs’ theory, this court would henceforth be thrust into the details of virtually every election, tinkering with the state’s election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law.

Id. (quoting *Powell v. Power*, 436 F.2d 84, 86 (2d Cir. 1970)).¹⁴

The Plaintiffs have not alleged willful conduct in this case nor is there any basis for such an allegation. The Secretary’s conduct has not undermined the election process, nor was it discriminatory, or unlawful. The election process in North Dakota is not patently and fundamentally unfair, consequently any remaining claims for prospective relief should be dismissed for failure to state a claim.

¹⁴ The Secretary does not dispute that the individual Plaintiffs and Spirit Lake claim North Dakota law places a burden on Native Americans, but none of the Plaintiffs make specific claims of racial discrimination directed towards the specific plaintiffs or individual Native Americans.

IV. Conclusion

The Secretary respectfully requests that the Plaintiffs' Complaint be in all things dismissed.

Dated this 7th day of January, 2019.

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