

**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,

v.

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

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY
INJUNCTION**

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INTRODUCTION

“[I]t is self-evident that a legal voter is injured unless he is not only permitted to vote, but to have his vote counted as cast.” *Walker v. United States*, 93 F.2d 383, 387 (8th Cir. 1937) (citing *United States v. Mosley*, 238 U.S. 383, 386 (1915)). And yet, every election, using an inherently unreliable signature verification process, North Dakota rejects and does not count eligible voters’ validly cast mail-in ballots because of benign issues with their penmanship. Under this system, untrained officials verify ballots by comparing the signature provided on a voter’s ballot application to the one on their ballot envelope to determine if the two “correspond.” If they do not, the ballot is rejected. Affected voters are never informed their ballots are impaired or given an opportunity to fix the issue and have their ballots counted.

This system is unconstitutional. Not only does it arbitrarily disenfranchise voters based on the unreviewable, error-prone determinations of evaluators who lack meaningful training or guidance in signature examination, it disproportionately disenfranchises certain populations of voters who are both more likely to rely on absentee voting to access the ballot and less able to produce consistent signatures because of their age, disability, or underlying health conditions.

Plaintiff Maria Romo—a lifelong voter who lives with multiple sclerosis that affects her fine motor skills—had her validly cast ballot thrown away in 2018 because officials erroneously believed the signatures did not match. Plaintiff Romo is one of hundreds of voters who have been silently disenfranchised by this system, and the problem only promises to grow. Because of COVID-19, North Dakotan voters *must* rely on absentee voting in order to exercise their fundamental right to vote in upcoming elections. Their ballots *will* be reviewed under this flawed system, and eligible voters *will* be disenfranchised. At a time when the pandemic threatens not only the health of our citizens, but the health of our democracy, ensuring voters can have confidence in elections is of paramount importance.

North Dakota has, at its fingertips, the tools it needs to end these erroneous rejections by giving voters notice and an opportunity to cure ballot issues before they are disenfranchised. Unless the Court intervenes to require the State provide these constitutionally necessary safeguards in time for the June 9, 2020 all-mail elections, Plaintiffs and all North Dakota voters who cast ballots will be at significant risk of being deprived of their right to vote and right to due process under the First and Fourteenth Amendments to the United States Constitution.

FACTUAL BACKGROUND

I. North Dakota's Absentee Voting Procedures and Signature Match Law

Absentee voting is a central part of North Dakota's democratic process. In 2018, nearly thirty percent of all North Dakotans cast their ballots absentee. Ex. 1 (EAVS Data).

Any eligible North Dakota voter may request an absentee ballot. N.D.C.C. §§ 16.1-07-01, 05. Applicants provide their name, residential and mailing address, phone number, date of birth, and an ID number. *Id.* § 16.1-07-06. Applicants must then sign their applications, unless unable to do so, in which case they may place a mark on the application and have an attester sign and witness their application. *Id.* If their application is accepted, voters receive their absentee ballots, along with a return envelope, secrecy envelope, and instructions in the mail. *Id.* § 16.1-07-08.

To return their completed absentee ballots, voters must seal their marked ballots inside the secrecy envelope and then place both inside the return envelope. *Id.* Then, they must fill out a "voter affidavit" on the inner envelope with their name, precinct, residential address, and signature. *Id.* Absentee ballots must be postmarked by the day before Election Day and received before the county canvassing board meets on the sixth day after Election Day. *Id.* §§ 16.1-07-09, 16.1-15-17.

All absentee ballots undergo signature match verification before they can be counted. For ballots received before the close of polls on Election Day, the relevant precinct officials "compare the signature on the application for an absent voter's ballot with the signature on the voter's

affidavit . . . to ensure the signatures correspond.” *Id.* § 16.1-07-12. Ballots with allegedly mismatched signatures are marked as rejected and sent to the canvassing board for a “final determination.” *Id.* §§ 16.1-07-12, 16.1-15-19. Ballots timely received *after* the close of polls are sent directly to the county canvassing board to assess and determine whether “the signatures on the absentee ballot application and the voter’s affidavit were signed by the same person before allowing the ballot to be tallied.” *Id.* § 16.1-07-09.

Neither the precinct officials nor county canvassing board members are required to receive training in signature verification. *See id.* §§ 16.1-05-02, 03. Nor does state law provide any further guidance or standards to determine whether signatures “correspond” or “were signed by the same person.” Defendant Jaeger’s North Dakota Election Officials’ Manual provides this single sentence of instruction on this topic: “Compare the signature on the application for the absentee ballot with the signature on the back of the absentee ballot envelope (the voter’s affidavit) to ensure the signatures match.” Ex. 2 at 12 (2020 Election Officials’ Manual). County training materials likewise provide the same unbounded instructions. *See* Ex. 3 (Compiled county training materials).

There is also significant variation in how canvassing boards that review ballots flagged for mismatched signatures by precinct officials ultimately determine whether those ballots are to be rejected. In 2018, for example, at least four counties rejected every one of the ballots that were deemed to have mismatched signatures at the polling place. Exs. 4-7 (McKenzie, McLean, Traill, and Kidder canvassing board minutes). In Dickey County in 2018, the canvassing board rejected two ballots flagged for signature mismatches outright but for another considered the voter’s “situation and history” during the evaluation, including the fact that the voter was “a long-term care resident that had signed the application in June.” Ex. 8 (Dickey canvassing board minutes). In Pembina County in 2018, the canvassing board rejected ballots signed by voters where the

application had been signed by an attester pursuant to N.D.C.C. § 16.1-07-06(2). Ex. 23 (Pembina County canvassing list).

If a county canvassing board concludes that there is any issue with a voter's signatures, the ballot is rejected and the vote is not counted. N.D.C.C. § 16.1-07-12. Their determination is final.

Voters whose ballots are ultimately rejected due to a signature mismatch are *never* notified. *See, e.g.*, Ex. 9 (Mar. 25, 2019 Email from Barnes County Auditor) (Q: “[A]re the voters whose signatures are questioned as not matching contacted about the issue before the board decides to reject their ballot?” A: “No. The canvassing board members make a determination by looking at the signatures. They do not contact the voter.”). Nor are they given an opportunity to confirm their signature and ensure their ballot is counted. Indeed, voters are never even notified about the possibility their ballot *could* be rejected because of a signature issue. Nothing in the text of voters' absentee ballot applications, voter affidavits, or the Secretary of State's instructions about absentee voting informs voters of the State's signature matching policy. *See* Ex. 10 (Absentee ballot application); Ex. 11 (Voter affidavit); Ex. 12 (Secretary of State absentee voting instructions).

II. The Error-Prone Nature of Signature Match Verification in North Dakota

Signature match verification is an inherently unreliable means of verifying absentee ballots. Countless factors can influence the appearance of any given signature, including age, physical and mental condition, disability, medication, accidents, and natural differences in a person's stance. Ex. 13 (Mohammed Decl.) ¶ 35. A person's signature may also vary based on writing conditions at the time of signing, *e.g.*, whether the person is in a moving vehicle or a stationary table, type of writing instrument, and whether the document was signed on a paper or electronic screen. *Id.* Some people also use alternative signature styles. *Id.* ¶ 43. Moreover, signature variance is more extreme and commonplace in certain populations, including young and

elderly signers, signers with disabilities, and signers with less formal education or who learned a non-Latin-based script as their first language. *Id.* ¶¶ 24, 28, 36-38.

While handwriting comparison is difficult under the best of circumstances, even certified Forensic Document Examiners (“FDEs”), who have undergone between two and three years of training and testing in handwriting analysis, would be likely to make erroneous determinations under North Dakota’s signature verification process. *Id.* ¶¶ 23, 32, 38, 42, 46-49. FDEs usually require multiple signature samples—according to one recommendation, a minimum of ten—to make signature determinations. *Id.* ¶¶ 26, 26 n.4. If the signer is elderly or has an underlying health condition, more samples may be required. *Id.* ¶ 26. North Dakota also does not give examiners the time or equipment FDEs would need to do the comparison. *Id.*

But North Dakota’s policy does not rely on trained FDEs; instead, it relies on untrained evaluators who are equipped with no standards or training to guide their analyses. Individuals without training are “highly likely” to make mistakes when comparing signatures, and the mistakes they make are more likely to be determinations that authentic signatures are inauthentic than the reverse. *Id.* ¶ 28. One study showed that lay people made this mistake in 26.1% of cases, while FDEs did so in only 7.05% of cases—in other words, lay evaluators are 3.5 times more likely than FDEs to reject a ballot based on an erroneous signature comparison. *Id.* ¶ 30.

III. The Disenfranchising Impact of North Dakota’s Signature Match Law

Hundreds of ballots are rejected for signature impairments every election. According to data from the Election Administration and Voting Survey (“EAVS”)—a biennial study conducted by the Election Assistance Commission—North Dakota rejected 334 ballots for alleged signature mismatches in 2018, accounting for over sixty percent of all rejected absentee ballots. Ex. 1 (EAVS Data). The rates of rejection also vary greatly from county to county. While many counties reported no or few signature-based ballot rejections in 2018, Morton County and Nelson County

respectively rejected 1.14% and 1.74% of absentee ballots for alleged signature mismatches. *Id.* These ballot rejections could impact the outcome of elections in North Dakota, where elections can often be decided by only a handful of votes.²

Plaintiff Maria Romo cast a valid absentee ballot in 2018 that was erroneously rejected under North Dakota's signature verification regime. Ex. 14 (Romo Decl.) ¶ 6; Ex. 25 (Grand Forks District 25 rejected ballots). Ms. Romo has multiple sclerosis that impairs her handwriting and fine motor skills. *Id.* ¶ 5. Because of this chronic condition—which she has been living with for decades—Ms. Romo has strength issues in her fingers, must write with a special large width pen, and cannot produce a neat or consistent signature. *Id.* The same year, Defendants also rejected the validly cast ballot of Kourtney Culver, a former North Dakota resident who was attending school out of state at the time. Ex. 15 (Culver Decl.) ¶ 5; Ex. 25 (Grand Forks District 17 rejected ballots). Until this year, neither Ms. Romo nor Ms. Culver knew that their ballots would be subjected to a signature matching process or that their ballots had been rejected for signature issues. Ex. 14 ¶¶ 4, 6; Ex. 15 ¶ 5. After their ballots were rejected, neither were given an opportunity to cure the issue and have their votes counted. Ex. 14 ¶ 7; Ex. 15 ¶¶ 5-6.

Plaintiff Self Advocacy Solutions N.D. (SAS) is an organization by and for people with disabilities, whose members are at particular risk of disenfranchisement because of the signature match law. Ex. 16 (Marx Decl.) ¶ 7; Ex. 13 (Mohammed Decl.) ¶¶ 41-42. SAS members depend on absentee voting to participate in elections, but many members have difficulty signing their name and their signatures lack visual consistency across time. Ex. 16 ¶ 9. Plaintiff League of Women

² For example, in 2018, four North Dakota elections were determined by fewer than 50 votes. *See* ND Voices, *Official 2018 General Election Results*, Legislative District Results (Dec. 11, 2019), <https://results.sos.nd.gov/resultsSW.aspx?text=Race&type=LG&map=DIST> (showing elections in Senate District 25 being decided by 21 votes and House District 43 by 35 votes and county commissioner races in Rolette and Grand Forks being decided by 31 and 49 votes respectively).

Voters of North Dakota (LWVND) also believes that its members, including elderly individuals and individuals with physical disabilities or medical conditions that make writing difficult, are at risk of being disenfranchised by allegedly mismatched signatures. Ex. 17 (Lynch Decl.) ¶ 6.

IV. The Impact of COVID-19 on North Dakota's Elections

Before COVID-19, absentee voting was a voting option that any North Dakotans could opt to use if they desired (and many did).³ Now, it is the only means by which most voters can participate. On March 26, 2020, in an effort to keep North Dakota voters safe during the pandemic, Governor Burgum issued an executive order authorizing counties to conduct their upcoming elections solely by mail, suspending the state's ordinary requirement that counties maintain at least one in-person polling location. Ex. 18 (Exec. Order 2020-13 ("EO")). He also ordered the Secretary of State to send every voter in the state's Central Voter File a mail ballot. *Id.* All 53 counties have followed the Governor's lead and authorized mail-only elections for the June 9, 2020 statewide elections. Ex. 19 (ND Health announcement); Ex. 24 (Grand Forks announcement).

The Governor's executive order will be in effect "for the duration of the declared emergency," but there is no indication when this emergency will be over. Ex. 18 (EO). Even as North Dakota transitions back to life post-emergency, it will do so incrementally. Ex. 20 (Article on incremental opening). And recent outbreaks in Grand Forks and elsewhere serve as a reminder that the pandemic is far from over. Ex. 21 (Article on Grand Forks outbreak). Social distancing precautions will continue to be important, especially for those who are most vulnerable to COVID-19. Ex. 22 (CDC guidance). Vote by mail, then, will remain a central feature of North Dakota elections—if not the only means of voting—in 2020 and potentially beyond.

³ Even prior to COVID-19, North Dakota law authorized counties to conduct elections by mail with very limited in-person polling locations. N.D.C.C. § 16.1-11.1-01.

LEGAL STANDARD

In determining whether to grant a preliminary injunction, the court considers four factors: “(1) the likelihood of success on the merits; (2) the presence or risk of irreparable harm; (3) the balancing of the harms of granting or denying an injunction; and (4) the public’s interest.” *CDI Energy Servs. v. W. River Pumps, Inc.*, 567 F.3d 398, 401-02 (8th Cir. 2009).

ARGUMENT

I. Plaintiffs are likely to succeed on the merits of their claims.

A. Plaintiffs are likely to succeed on their procedural due process claim.

Plaintiffs are likely to succeed on the merits of their procedural due process claim. The Due Process Clause guarantees that no state may “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. In evaluating a procedural due process claim, courts “engage in a two-part analysis . . . asking, first, whether the plaintiffs have a protected interest at stake, and if so, what process is due.” *Bliek v. Palmer*, 102 F.3d 1472, 1475 (8th Cir. 1997). To determine what process is due, courts balance three factors: (1) “the private interest that will be affected by the official action,” (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards,” and (3) “the Government’s interest, including the function involved and the fiscal and agency burdens that the additional or substitute procedural requirement would entail.” *Id.* at 1476-77 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

North Dakota’s signature verification process plainly fails this test. North Dakota uses an inherently unreliable signature match procedure to verify absentee ballots that disenfranchises eligible voters without providing *any* notice or opportunity to cure ballot impairments.

Courts have uniformly struck down signature match laws—like North Dakota’s—that fail to provide voters these constitutionally necessary safeguards. *See Martin v. Kemp*, 341 F. Supp.

3d 1326 (N.D. Ga. 2018), *appeal dismissed sub nom. Martin v. Sec'y of State of Georgia*, No. 18-14503-GG, 2018 WL 7139247 (11th Cir. Dec. 11, 2018); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 206, 222 (D.N.H. 2018); *Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 WL 6090943 (N.D. Fla. Oct. 16, 2016); *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646 (N.D. Ill. Mar. 13, 2006); *see also La Follette v. Padilla*, No. CPF-17-515931, 2018 WL 3953766, at *1 (Cal. Super. Ct. Mar. 5, 2018); *League of United Latin Am. Citizens of Iowa v. Pate*, No. CVCV056403, (Iowa Dist. Ct. July 24, 2018), *aff'd in the relevant part by League of United Latin Am. Citizens of Iowa v. Pate*, No. 18-1276, 2018 WL 3946147 (Iowa Aug. 10, 2018).

In *Saucedo*, for example, the court invalidated New Hampshire's signature match law (functionally identical to the law at issue here) because it did not require officials to provide voters with any notice or opportunity to cure before rejecting mismatched-signature ballots. 335 F. Supp. 3d at 206, 222. The court found the "fundamentally flawed" signature match process created an unacceptable risk of erroneous deprivation of the right to vote. *Id.* at 206, 217. As is the case here, New Hampshire provided local officials no training in signature verification; the state's laws and guidance offered no "functional standards" for signature comparison; and the law provided no means of reviewing election officials' assessments, leaving the decisions "irremediable." *Id.* at 206, 217-18. Finally, the court concluded that it "would not entail significant . . . burdens" for the state to provide voters with notice, by phone or otherwise, and an opportunity to cure. *Id.* at 221.

This Court should do the same. North Dakotans have a protected interest at stake, nothing less than the fundamental right to vote. And the Due Process Clause mandates that if the State uses "fundamentally flawed" signature match determinations to reject voters' absentee ballots, then it must provide voters adequate notice and a meaningful opportunity to cure.

1. Plaintiffs have a constitutionally protected interest in the right to vote.

There is no question that Plaintiffs have a protected interest in their fundamental right to vote. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”); *see also Cook v. Randolph Cty.*, 573 F.3d 1143, 1152 (11th Cir. 2009) (noting that “[t]he Constitution guarantees procedural . . . due process when” the right to vote is at stake); *Barefoot v. City of Wilmington*, 306 F.3d 113, 124 n.5 (4th Cir. 2002). This protection extends to absentee voting, both as a statutorily created right, *see Wilkinson v. Austin*, 545 U.S. 209, 221 (2005), and as a constitutional right, *O’Brien v. Skinner*, 414 U.S. 524, 530 (1974). This is especially true where vote by mail is effectively the *only* means of voting, as will be the case in the upcoming June 9 elections. Ex. 19. The State cannot deny voters this essential and often *only* available means of exercising their right to vote. *See Bush v. Gore*, 531 U.S. 98, 104 (2000); *Martin*, 341 F. Supp. 3d at 1338; *Saucedo*, 335 F. Supp. 3d at 217.

2. The Due Process Clause requires North Dakota to provide notice and an opportunity to cure questioned absentee ballot signatures.

Under the Due Process Clause, North Dakota must provide voters whose signatures are questioned notice and an opportunity to cure. *At minimum*, due process requires adequate notice and the “opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Coleman v. Watt*, 40 F.3d 255, 260 (8th Cir. 1994) (quoting *Mathews*, 424 U.S. at 333). North Dakota’s signature verification policy—which provides *no* notice and *no* opportunity to cure—plainly fails this test.

In this context, because no procedure could possibly cure an erroneous deprivation after the election has concluded, the *only* meaningful time a voter could be given notice or an opportunity to cure is before their ballot is ultimately rejected. *See Winegar v. Des Moines Indep.*

Cnty. Sch. Dist., 20 F.3d 895, 901 (8th Cir. 1994) (“An assessment of the adequacy of predeprivation procedures depends on the availability of meaningful postdeprivation procedures.”) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) (noting “exceptions to the general rule requiring predeprivation notice and hearing” cannot be “tolerate[d]” except in “extraordinary situations”).

“Adequate notice,” then, requires the state take *affirmative steps* to contact voters whose ballots are impaired by signature issues to inform them of the impairment before the election ends. *See Saucedo*, 335 F. Supp. 3d at 218 (publishing lists of affected voters online post hoc provides insufficient notice); *see also Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354 (D. Ariz. 1990). Similarly, a “meaningful opportunity to be heard” requires the state provide voters with a means of contesting or “curing” signature mismatches in time to have their ballots count. *See also Detzner*, 2016 WL 6090943, at *2.

Far from meeting this constitutional minimum, Defendants fail to provide *any* process whatsoever. Nothing in state election law requires officials notify voters of ballot impairments, and nothing provides voters an opportunity to fix the issue before votes are finally canvassed. Voters never even receive pre-election warning that their ballots may be rejected for mismatched signatures.⁴ *See supra* Factual Background I. North Dakota’s standardless signature match process fails the notice and opportunity cure prerequisites of due process.

3. North Dakota’s signature verification policy also fails the *Mathews* test.

Where a challenged policy provides *no* notice or opportunity to respond, a violation of Due Process is established and a court need not engage in the *Mathews* test, which is designed to

⁴ This is a significant departure from the Secretary’s “Voter Bill of Rights,” which prominently states that “North Dakota residents have the right to . . . an explanation if your . . . identity is in question.” N.D. Sec’y of State, *Voter Bill of Rights*, <https://vip.sos.nd.gov/pdfs/Portals/Voter%20Bill%20of%20Rights.pdf> (last visited May 8, 2020).

ferret out whether particular challenged procedures are sufficiently robust. But an analysis of the *Mathews* factors only underscores the constitutional violation here.

i. The private interest in the fundamental right to vote, and in voting by absentee ballot to effectuate that right, is paramount.

The first *Mathews* factor weighs heavily in Plaintiffs' favor. The court first considers the "nature and weight of the private interest affected by the challenged official action." *Coleman*, 40 F.3d at 260. Plaintiffs' interest—and that of all North Dakotans—in having their validly cast ballots counted is of the utmost importance. *See supra* Part I.A.1. While absentee ballots have long served as an important means for North Dakotans to exercise their fundamental right to vote, now, because of COVID-19, mail ballots will play an essential role in North Dakota elections. As discussed *supra*, in at least the June 9 elections, all voters will *have* to cast absentee ballots. And for Ms. Romo and other North Dakotan voters with disabilities, as well as elderly voters and those with chronic health conditions who face heightened risks from COVID-19, absentee ballots will be necessary to participate safely in democracy, even beyond the June 9 election. *See supra* Factual Background IV. North Dakotans' interest in exercising their fundamental right to vote therefore depends on the proper counting of absentee ballots. This factor thus weighs heavily in favor of adequate notice and meaningful opportunity to cure. *See Saucedo*, 335 F. Supp. 3d at 217.

ii. The risk of erroneous deprivation based on inherently unreliable signature match determinations is significant, and notice and cure procedures would greatly ameliorate this risk.

The next factor—"the risk of an erroneous deprivation" and "the probable value" of additional procedures—also weighs in favor of a notice and cure process. *Mathews*, 424 U.S. at 335.

North Dakota's signature match laws create a significant risk of erroneous deprivation because signature comparison is an *inherently* error-prone means of verifying absentee ballots,

especially when undertaken by evaluators who lack any relevant expertise, guidance, training, or standards. As discussed above, an array of factors may cause a single person’s signature to vary from one signing to the next, including benign changes in the signer’s writing implement, writing surface, stance, and level of concentration. Ex. 13 (Mohammed Dec.) ¶¶ 31, 35 (identifying twenty of the most common reasons why an individual might appear to show signature variations.). And—for reasons *entirely* outside of signers’ control—certain groups, including Plaintiffs and their members, are especially prone to inconsistency in their signatures. *Id.* ¶¶ 24, 28, 37, 38 (noting people can be susceptible to signature variance because of age, health, or disability); Ex. 14 (Romo Decl.); Ex. 16 (Marx Decl.); Ex. 17 (Lynch Decl.); *Saucedo*, 335 F. Supp. 3d at 206.

Deciding whether signatures exhibit one of these benign “variations” of a single signer or a true “difference” between multiple signers is “one of the most difficult determinations in signature examinations,” even for a trained and certified Forensic Document Examiner (FDE). Ex. 13 (Mohammed Decl.) ¶¶ 24, 30, 32, 34 (citing a study finding lay persons to be *3 1/2 times* more likely than an FDE to claim that a perfectly authentic signature is inauthentic).

And yet, North Dakota leaves this work for untrained officials, who must make these determinations quickly, without proper equipment, and based only on two exemplars. Worse, the State provides no meaningful training or standards to aid them in this work beyond the unhelpful command to “[c]ompare the signatures . . . to ensure the signatures match.” Ex. 2 (2020 Election Officials’ Manual); N.D.C.C. §§ 16.1-05-02, 03. Far from adhering to any uniform guidance, some county canvassing boards make their “final determinations” based on the “situation and history” of the voter, which in practice leaves the fate of absentee voters’ ballots to the whims and personal knowledge of canvassing board officials. *Id.* § 16.1-07-12; Ex. 8 (Dickey County canvassing board

minutes). Meanwhile, in other counties the “final determination” appears to be little more than a rubber stamp. *See* Exs. 4-7 (McKenzie, McLean, Traill, and Kidder canvassing board minutes).

Hundreds of absentee ballots are rejected without voters’ knowledge under this inherently unreliable, standardless process. *See supra* Factual Background III. Thus, “the natural variations in a person’s handwriting—many of which are unintentional or uncontrollable, like mental or physical condition—when combined with the absence of functional standards, training, review, and oversight, create a tangible risk of erroneous deprivation.” *Saucedo*, 335 F. Supp. 3d at 219.

Meanwhile, the probable value of notice and cure procedures here is high. *See Martin*, 341 F. Supp. 3d at 1339. Pre-deprivation notice and opportunity to cure ensure election officials will not rely on solely their own unreliable signatures determinations, but instead can hear directly from the most authoritative sources on the question: voters themselves. *Saucedo*, 335 F. Supp. 3d at 219. Both Plaintiff Romo and Ms. Culver testified they would have taken any required steps to verify their signatures for election officials to ensure that their votes were counted. Ex. 14 (Romo Dec.) ¶ 7; Ex. 15 (Culver Dec.) ¶ 6. The value of these procedural safeguards is undoubtedly great and would “serve[] to protect the fundamental right to vote.” *Zessar*, 2006 WL 642646, at *9.

iii. Notice and cure procedures advance state interests and would require little administrative effort.

The final *Mathews* factor also weighs in favor of providing adequate notice and meaningful opportunity to cure before rejecting voters’ ballots. The State has a substantial interest in *both* counting valid ballots and excluding invalid ballots, but the current signature match system does not serve those twin interests; providing notice and an opportunity to cure would.

As the Eleventh Circuit explained in a recent case considering a signature matching requirement similar to the one at issue here, “protecting public confidence in elections is deeply important—indeed, critical—to democracy” and “public knowledge that legitimate votes were not

counted due to no fault of the voters—and with no reasonable notice to the voters that their votes would not be counted and no opportunity to correct that situation—would be harmful to the public’s perception of the election’s legitimacy.” *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019). Thus, North Dakota’s signature verification regime is, in fact, *antithetical* to its legitimate interest in “safeguarding voter confidence.” *Brakebill v. Jaeger*, 932 F.3d 671, 678 (8th Cir. 2019) (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189 (2008)); *see also Saucedo*, 335 F. Supp. 3d at 220-21 (finding notice and opportunity to cure advances state’s interest in election integrity); *Detzner*, 2016 WL 6090943, at *7; *Martin*, 341 F. Supp. 3d at 1340.

And implementing a notice and cure procedure for absentee voters would not impose any significant fiscal or administrative burden on the state. North Dakota and local election officials already maintain records, including in the Central Voter File, on voters’ ballot applications, and elsewhere, that contain voters’ contact information. *See, e.g.*, N.D.C.C. § 16.1-02-12; Ex. 10 (Absentee ballot application). Also, county canvassing boards do not meet until six days after the election, which provides sufficient time for election officials to give voters notice and an opportunity to cure. N.D.C.C. § 16.1-15-17.

Further, providing notice and opportunity to cure would not be entirely out of the ordinary. *Id.* § 16.1-07-17 (explaining notice procedures for military and overseas voters); *id.* § 16.1-15-08 (providing opportunity to cure for voters who vote “set-aside ballots” at the polls because they were unable to verify their identity with a state-required ID). Thus, North Dakota election officials have shown they can provide some voters an opportunity to fix issues with their ballots before the meeting of the canvassing board. Given the availability of existing systems as models, the fiscal

and administrative burden is slight, especially when stacked up against the harm done by the erroneous disenfranchisement of hundreds of North Dakotans.

In sum, insofar as Defendants require election officials to make unreliable signature match determinations, the Due Process Clause demands that they provide voters notice of a potential signature match issue and an opportunity to resolve it to avoid erroneous deprivation of their right to vote. Plaintiffs are thus likely to succeed on the merits of their procedural due process claim.

B. Plaintiffs are likely to succeed on their claim that North Dakota’s signature match law unduly burdens the fundamental right to vote.

Plaintiffs are likely to succeed on their undue burden claim as well. When determining whether a challenged election law unconstitutionally burdens the right to vote, courts apply the *Anderson-Burdick* standard, weighing “‘the character and magnitude of the asserted injury . . .’ against ‘the precise interests put forward by the State as justifications for the burden . . .’ 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 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983)). Under this standard, the rigorousness of a court’s review depends on the severity of the burden the challenged law imposes. When a law “imposes only ‘reasonable, nondiscriminatory restrictions’ . . . ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions,” but laws that impose severe burdens on voters’ First and Fourteenth Amendment rights are subject to strict scrutiny. *Id.*; see also *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616 (8th Cir. 2001).

1. North Dakota’s use of an error-prone signature match system severely burdens Plaintiffs’ right to vote.

North Dakota’s signature matching procedures severely burden Plaintiffs’ right to vote. Every election, North Dakota’s error-prone signature match law summarily discounts eligible voters’ validly cast ballots and completely deprives these voters of their right to vote. This system

bears “[t]he hallmark of a severe burden”—“exclusion or virtual exclusion from the ballot.” *Libertarian Party of Kentucky v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016).

Every voter is at risk of having their ballot arbitrarily rejected based on a benign signature issue under North Dakota’s unreliable system. *United States v. State of S.D.*, 636 F.2d 241, 243 (8th Cir. 1980) (holding the “right to vote may not be burdened by arbitrary restrictions”). Worse, there is nothing voters can do to safeguard their ballot from such erroneous rejections. The magnitude of this already severe burden multiplies with respect to Plaintiffs and other voters like them whose age and underlying health conditions make it impossible for them to produce a consistent signature. Ex. 14 (Romo Decl.); Ex. 16 (Marx Decl.); Ex. 17 (Lynch Decl.). These voters not only are disproportionately likely to have their ballots rejected for signature issues, they are also more likely to require absentee voting to access the franchise. Ex. 16 (Marx Decl.) ¶ 8 (noting that in-person voting can often be inaccessible to voters whose disabilities make appearing at a polling place, waiting in line, and voting on a voting machine difficult). Indeed, Plaintiff Romo did not just have her right to vote in the 2018 election severely *burdened*, but rather outright *denied*.

To determine the burden on voters, the Court may also consider the availability of alternative means of accessing the ballot. *See Republican Party of Arkansas v. Faulkner Cty., Ark.*, 49 F.3d 1289, 1294 (8th Cir. 1995) (“[A]n alternative means of [ballot] access must be provided absent a sufficiently strong state interest”). Elderly voters and voters with disabilities depend on absentee voting to access the franchise. Through the duration of the COVID-19 emergency, all North Dakota voters will as well.

Plaintiff Romo and the members of Plaintiffs SAS and LWVND are eligible voters who follow the rules. They overcome any obstacles posed by age, health conditions, or public health emergencies to cast valid, signed ballots and exercise their fundamental rights to vote. The State’s

continued use of an unreliable signature match procedure—one that provides voters with no notice or opportunity to cure—risks that their votes will not be counted. Such a system is unconstitutional.

2. North Dakota’s interest in maintaining its signature match procedures does not outweigh the severe burden it places on Plaintiffs’ right to vote.

North Dakota’s flawed signature verification process does not serve any plausible state interest in election integrity, nor does it justify the burden placed on Plaintiffs and their members. Rather, by arbitrarily rejecting eligible voters’ validly cast ballots, it threatens to undermine the legitimacy of elections and public confidence in North Dakota’s democratic process. *See Lee*, 915 F.3d at 1327. As discussed previously, providing voters with notice and an opportunity to cure not only furthers the State’s interests in promoting public confidence and protecting the integrity of its elections, these procedural safeguards could be implemented at no significant cost to the State. *See supra* Part I.A.3.iii. To the extent the State has any legitimate interest in maintaining its error-prone signature verification process without any due process procedures, that interest is outweighed by the significant burden Plaintiffs face of being silently, arbitrarily, and without recourse deprived of their basic, fundamental right to vote.

II. Absent a preliminary injunction, Plaintiffs are at imminent risk of irreparable harm.

North Dakota’s signature matching process has caused and will continue to cause irreparable harm absent a preliminary injunction. These claims concern nothing less than the fundamental right to vote. Once the election has passed, the right to vote is lost permanently and the harm cannot be fully redressed. *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016); *see also Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

If this Court does not grant preliminary injunctive relief, Plaintiffs will suffer imminent, irreparable harm. Plaintiff and Plaintiff members intend to vote in North Dakota’s June 9, 2020

statewide and local elections. Because of COVID-19, these voters have no choice but to cast their ballots by mail, meaning their ballots *will* be subjected to North Dakota’s unreliable signature verification process. There is no doubt, too, that validly cast ballots *will be rejected* by this system. Plaintiff Romo has already been erroneously deprived of her right to vote by this flawed process once, in 2018. She should not be forced to take the same risk yet again.

Plaintiff Romo and members of Plaintiffs SAS and L WVND are at particular risk of being further disenfranchised by North Dakota’s error-prone signature match procedure. Because Plaintiff Romo suffers from a chronic health condition that impairs her handwriting, she is in no better position to produce a “matching” signature today than she was in 2018. Plaintiffs SAS and L WVND similarly have members whose age and underlying health conditions make producing a consistent signature impossible. If the State erroneously finds these voters’ signatures do not “correspond” under current law they face certain disenfranchisement unless this Court intervenes.

In sum, the fact that Plaintiffs face immanent, irreparable harm weighs in favor of granting preliminary injunctive relief. *Kirkeby v. Furness*, 52 F.3d 772, 775 (8th Cir. 1995).

III. The balance of harms and public interest weigh heavily in Plaintiffs’ favor.

The balance of harms and public interest weigh in favor of granting a preliminary injunction. While the usual inquiry on a motion for preliminary injunction “calls for assessing the harm to the opposing party and weighing the public interest,” “[t]hese factors merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Issuing relief will ensure that when eligible North Dakota voters cast valid ballots on June 9 and beyond, either their ballots will be counted as cast or the State will notify them of a ballot impairment and give them an opportunity to fix the issue so their votes can count. This relief supports the public interest in protecting the fundamental right to vote. And, as this Circuit has affirmed, “it is always in the public interest to protect constitutional rights.” *Phelps-Roper v.*

Nixon, 509 F.3d 480, 485 (8th Cir. 2007), *modified on reh'g*, 545 F.3d 685 (8th Cir. 2008); *see also Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999) (“[T]he public interest favors protecting core First Amendment freedoms.”). Indeed, Defendant Jaeger has stated publicly that voters have a right to be informed if their identity is questioned. *See supra* n.4. The public interest is served by Defendants following their own “Voter Bill of Rights.”

Defendants will suffer no harm if relief is granted here. As discussed above, the State has an affirmative interest in protecting voters’ confidence in the integrity of elections. *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). Further, any administrative harms incurred by Defendants pale in comparison to the injury suffered by Plaintiffs. Defendants have the information they need to provide voters with notice when there is a signature issue impairing a voter’s ballot. Implementing a system for notice and opportunity to cure would require few additional resources from the State, a cost well worth the value of protecting the integrity of North Dakota’s elections and safeguarding Plaintiffs’ most precious fundamental right.

CONCLUSION

For these reasons, Plaintiffs’ Motion for a Preliminary Injunction should be granted.

Dated: May 11, 2020

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