UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NORTH DAKOTA

Mark Splonskowski, Plaintiff, vs. Erika White, in her capacity as State Election Director of North Dakota, Defendant.	**REPLY IN SUPPORT OF MOTION TO DISMISS** **Case No. 1:23-cv-00123**

[¶1] Defendant Erika White, in her capacity as State Election Director of North Dakota, submits this Reply in further support of her Motion to Dismiss previously filed with this Court. *See* Doc. No. 9. For the reasons set forth below, Plaintiff fails to carry his burden to show standing. But even if he did have standing, he fails to state a claim upon which relief can be granted.

I. Plaintiff's Case Must Be Dismissed for Lack of Subject Matter Jurisdiction.

[¶2] Plaintiff's attempts to establish Article III standing do not succeed. *See* Doc. No. 17, *Response*, at 9-20 (hereinafter "*Response*"). Specifically, his attempt to show an injury cites the wrong body of law, and his arguments on causation and redressability miss the mark. For parallel reasons, Ms. White's right to Eleventh Amendment immunity from this suit remains clear. If the Court were to adopt Plaintiff's proposed expansion of the standing doctrine, the Constitutional limits on federal subject matter jurisdiction would be rendered meaningless. He has failed to establish standing under controlling precedent and his Complaint should be dismissed.

A. Plaintiff Fails to Establish an Injury

[¶3] Plaintiff's Response clarifies many of the ambiguities which were present in his Complaint. No longer does he allow for the possibility that he *may* follow state law when the time comes to canvass ballots. Plaintiff now declares that "after having accepted the responsibility of being an election officer," Response, at 8, he will reject those responsibilities. *Compare* Doc. No. 1, *Complaint* at ¶ 49 (describing Plaintiff's upcoming "choice between conflicting state and federal

law") *with Response*, at 10 (asserting Plaintiff's "intent to choose federal law and disregard state law.")

[¶4] Through explaining his intent to violate his duties, Plaintiff asserts that his alleged injury is sufficient to support standing. *See generally Response*, at 9-14. Primarily, his claimed injury is the alleged risk of criminal prosecution, for which he claims entitlement to preenforcement review by this Court. His claim should be rejected.

[¶5] As Ms. White explained in her opening Memorandum, Doc. No. 10, at ¶¶ 27-29, the test for preenforcement review is inapposite here. In his Response, Plaintiff not only doubles down on the applicability of preenforcement review, but relies almost exclusively on preenforcement cases stemming from the specialized First Amendment context, despite the facial inapplicability of their holdings to his situation. When his claims of injury are examined in the full light of the actual governing law, they necessarily fail.

1. The Preenforcement Review Standard for Establishing Injury-in-Fact.

[¶6] In a long line of cases, the Supreme Court has held that in certain situations, an Article III injury-in-fact may be created by "threatened enforcement" of a law, allowing preenforcement review of the law so long as the enforcement is "sufficiently imminent." *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 603 (8th Cir. 2022), *citing Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014). Situations allowing preenforcement review are identified by application of a three-part test, as set forth in the oft-cited 2014 case of *Susan B. Anthony List v. Driehaus. See Religious Sisters of Mercy*, 55 F.4th at 603. In *Susan B. Anthony List*, the Court explained that an Article III injury is established, and preenforcement review is justified, when a plaintiff alleges: "[1] an intention to engage in a course of conduct arguably affected with a constitutional interest, but [2] proscribed by a statute, and [3] there exists a credible threat of prosecution thereunder." *Susan B. Anthony List* at 159, *quoting Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)).

[¶7] Even from this brief summary, problems arise for Plaintiff at all three factors of the test. First, he doesn't actually challenge the law under which he claims to fear prosecution (*i.e.*, N.D. Cent. Code § 16.1-01-12, which sets forth criminal violations for election law penalties). Rather,

he challenges a *different* set of statutes (*i.e.*, portions N.D. Cent. Code Chapter 16.1-07, 16.1-11.1, and 16.1-15, which, when read together, set forth the ballot receipt deadlines which Plaintiff opposes). Second, he does not even attempt to argue that his course of conduct is affected by a Constitutional interest.[1] Instead, he draws almost entirely from cases arising in the First Amendment context.[2] These facial problems with Plaintiff's analysis only grow more serious when the governing law is examined.

2. Preenforcement Review Does Not Apply When the Statute Being Enforced Is Different Than the Statute Being Challenged.

[¶8] The most obvious flaw in Plaintiff's argument is the fact that the set of laws he challenges are different than those under which he allegedly fears enforcement. However, Plaintiff does not address this threshold problem until the very end of his argument on injury.

[¶9] There, Plaintiff simply asserts "there is no requirement that [the] challenged statute exclusively prescribe the plaintiff's course of conduct." *Response,* at 14. He asserts that his "risk of injury is no less real" because his injuries may be caused by two groups of statutes operating "together." *Id.* He concludes, "Director White offers no authority to the contrary." *Id.*

[¶10] This entire paragraph misapprehends the law, but the last sentence is simply wrong. Not only Ms. White but Plaintiff himself offers "authority to the contrary." He does so six pages earlier, when he sets forth the governing standard for preenforcement review. Indeed, he cites the very test from *Susan B. Anthony List*, explaining that a plaintiff shows a preenforcement injury in fact "when he has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution ***thereunder***."

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[1] Additionally, as set forth at length in Ms. White's opening brief, his threats of prosecution are not credible. While Ms. White obviously cannot predict with certainty the actions of the Burleigh County State's Attorney's Office with regards to every criminal statute Plaintiff now threatens to violate, *see Response* at 10-13, her inability to do so only emphasizes the lack of a causal connection between Ms. White and his alleged injury.

[2] The case Plaintiff cites which does not implicate the First Amendment is *Missouri v. Yellen*, where the Eighth Circuit held that the State of Missouri failed to show an injury-in-fact under the preenforcement review standard. *See Missouri v. Yellen*, 39 F.4th 1063, 1070 (8th Cir. 2022), cert. denied, 143 S. Ct. 734, 214 L. Ed. 2d 384 (2023).

Response, at 9. The language of the test is authority enough. Thereunder means "under that." *See* Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary /thereunder. Applying this definition to the law, the word "thereunder" means that the prosecution is threatened under the statute described in the previous clause – *i.e.*, the statute proscribing the conduct. But even if there were any ambiguity on this point, it was dispelled by the Supreme Court in the very same case, when it considered whether the plaintiffs' conduct was "proscribed by [the] statute[] they wish to challenge." *Susan B. Anthony List*,, 573 U.S. at 162, citing *Babbit,* 442 U.S. at 298. In other words, preenforcement review contemplates that the statute proscribing the conduct is the *same statute* under which prosecution is threatened. Here, where Plaintiff attacks the North Dakota statutes outlining ballot receipt deadlines which supposedly prevent him from following federal law, he cannot allege any preenforcement injury because those statutes contain no criminal penalties. There is nothing to enforce.

[¶11] Cases which expand on this point are relatively few, perhaps due to the self-explanatory operation of the test. But those cases that do exist overwhelmingly support Ms. White's position. *See, e.g., Penkoski v. Bowser,* 548 F. Supp. 3d 12, 30 (D.D.C. 2021) (holding that "preenforcement challenges are limited to where the threat of enforcement *stems from the challenged law itself*.")(emphasis added); *see also Kearns v. Cuomo*, 415 F. Supp. 3d 319, 329 (W.D.N.Y. 2019), *aff'd*, 981 F.3d 200 (2d Cir. 2020) ("Plaintiff has not cited any case in which preenforcement standing to challenge a particular statute has been recognized based on the potential for prosecution under a <u>different</u> law . . . A plaintiff asserting standing on such grounds necessarily cannot satisfy the essential requirement identified by the Supreme Court in *Babbit* – that the plaintiff allege an intention to engage in a course of conduct proscribed by the challenged statute.")

[¶12] In sum, the Court should reject Plaintiff's request to expand the doctrine of preenforcement review to cover challenges to one statute and injuries from another. His claim of injury based on preenforcement review must fail.

3. Even if Plaintiff Could Allege Preenforcement Review, He Lacks a "Constitutional Interest."

[¶13] But even if this Court would expand the test to cover Plaintiff's claims, Plaintiff still fails to show an injury because he does not allege any conduct "affected with a constitutional interest." *Susan B. Anthony List*, 573 U.S. at 159. Nevertheless, in his argument, Plaintiff cites almost exclusively from cases addressing First Amendment claims – a "constitutional interest" which is entirely missing from his own case.

[¶14] Again, the test for preenforcement review set forth in *Susan B. Anthony List* requires the proposed conduct to be "affected with a Constitutional interest." 573 U.S. at 159. *See, e.g., Religious Sisters of Mercy v. Azar,* 513 F. Supp. 3d 1113, 1138 (D.N.D. 2021) (considering whether parties' conduct implicates constitutional concerns). The problem for Plaintiff is that he fails to allege that his conduct is affected by any Constitutional interest. In his Complaint, he avers vaguely that he will suffer "serious and irreparable harm to his constitutional rights." Doc. No. 1 at ¶ 50. But nothing in the 34 pages of his Motion gives the slightest indication as to what these rights are, what amendment they fall under, or the nature of the injury that would result to them. Such a deficiency is fatal to his attempt to show an injury-in-fact based on preenforcement review. *See Bankshot Billiards, Inc. v. City of Ocala*, 634 F.3d 1340, 1350 (11th Cir. 2011) (holding operator of pool hall could not show preenforcement injury-in-fact and noting "[t]he preenforcement review paradigm hardly fits our record; even though Bankshot is "chilled" from engaging in an activity in which it once engaged, that activity is not constitutionally protected. Rather, it is normal business activity.")

[¶15] Furthermore, Plaintiff only relies upon cases which *do* implicate a constitutional interest – specifically, that of the First Amendment. When it comes to preenforcement review, "[t]he First Amendment standing inquiry is 'lenient' and 'forgiving.'" *Dakotans for Health v. Noem*, 52 F.4th 381, 386 (8th Cir. 2022). Indeed, the overwhelming majority of cases which apply the three-part test for preenforcement review arise in the First Amendment context, as did *Susan B. Anthony List* itself. *See, e.g., Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 1000 (8th Cir. 2022) (A plaintiff claiming an abridgment of free speech is permitted to seek preenforcement review "under circumstances that render the threatened enforcement sufficiently imminent.") *Peck v. McCann*,

43 F.4th 1116, 1129 (10th Cir. 2022) ("the First Amendment context creates unique interests that lead us to apply the standing requirements somewhat more leniently, facilitating preenforcement suits.") (internal quotations omitted); *see also Tingley v. Ferguson*, 47 F.4th 1055, 1067 (9th Cir. 2022) ("'[T]he Supreme Court has dispensed with rigid standing requirements' for First Amendment protected speech claims and has instead endorsed a 'hold your tongue and challenge now' approach.")

[¶16] But Plaintiff does nothing to justify application of the "lenient" First Amendment standard to his case, despite his reliance on it. Indeed, he does not allege conduct implicating *any* constitutional rights. As such, the cases he cites in support of his injury are inapplicable to his situation, and Plaintiff to establish a right to preenforcement review.

4. The Remainder of Plaintiff's Arguments Are Unavailing.

[¶17] Once the standard is clarified, there is little left of Plaintiff's arguments. For instance, he cites *St. Paul Area Chamber of Commerce v. Gaertner* for the proposition that "[w]hen a statute is challenged by a party who is a target or object of the statute's prohibitions, 'there is ordinarily little question that the [statute] has caused him injury.'" 439 F.3d 481, 485 (8th Cir. 2006). But again, this statement comes in the context of preenforcement review of a First Amendment challenge, in a case where the Court considers challenges to a criminal statute and the risk of enforcement under the same statute. It does not help Plaintiff establish threat of any injury here, where the statute "targeting" Plaintiff – the criminal penalties for election misconduct – are not the statutes he challenges. Later, Plaintiff explains that "the Supreme Court has repeatedly found that plaintiffs have standing to bring preenforcement **First Amendment** challenges to criminal statutes, even when those statutes have never been enforced." *Response*, at 13, *citing 281 Care Comm v. Arneson*, 638 F.3d 621, 628 (8th Cir. 2011) (emphasis added). That may be, but it has no relevance to Plaintiff's case.

[¶18] In an attempt to shore up his risk of prosecution, Plaintiff cites to an even wider away of criminal statutes than those mentioned in his Complaint – but this tactic backfires. For instance, Plaintiff now invokes not only the criminal penalties associated with election-related offenses, but

also N.D. Cent. Code § 12.1-11.06, which addresses public servants in general. It states: "[a]ny public servant who knowingly refuses to perform any duty imposed upon him by law is guilty of a class A misdemeanor." N.D. Cent. Code § 12.1-11-06. But this statute is extremely broad. If Plaintiff's theory is true, then *any* public servant in the state of North Dakota would be able to attack *any* law of the state in federal court, simply by alleging that they plan to ignore it, which would expose them to liability under N.D. Cent. Code § 12.1-11-06.

[¶19] Lastly, Plaintiff also suggests that he has oath-of-office standing under *Bd. Of Educ. v. Allen*, 392 U.S. 236 (1960). Without getting into the case's questionable validity, it is enough to simply note that Plaintiff's oath-of-office standing still relies upon the injuries he cites above. In his words, "Choosing to honor his oath means rejecting his training and the Ballot Receipt Deadline, which "would be likely to bring" repercussions, such as a criminal prosecution." *Response* at 19. For the reasons set forth above, these repercussions are insufficient to support standing.[3]

5. Conclusion as to Injury-in-Fact.

[¶20] Plaintiff fails to show an injury-in-fact based on the test for preenforcement review. Accordingly, he is forced to rely on the more general, less lenient tests for injury-in-fact. *See, e.g., Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Plaintiff did not address these cases in his Response, but as set forth at length in Ms. White's opening brief, they require that injury is "certainly impending." *Id. See* Doc. No. 10, ¶¶ 13-26 (addressing general test for injury-in-fact). For all the reasons set forth in Ms. White's opening brief, Plaintiff fails to show an Article III injury, and his case must be dismissed for lack of standing.

B. Plaintiff Cannot Show Causation.

[¶21] Plaintiff's attempt to establish the second element of standing, causation, fares no better. His Response fails to meaningfully address any of the logical flaws in his theory of causal connection between his injury and Ms. White. Further, the case he cites is distinguishable.

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[3] Further, Plaintiff's discussion of this form of standing ignores the error which Ms. White previously noted in the contents of the oath. *See* Doc. No. 10 at ¶ 4.

[¶22] First, Plaintiff does not squarely address the fact that the training provided by Ms. White cannot possibly be a cause of his harm when he has *already* decided to disregard the law. On this point, Plaintiff simply avers that her training has "legal significance." *Response*, at 14. It is not clear what this proposition means. In support, Plaintiff cites N.D. Cent. Code § 16.1-01-01(2)(d), which dictates that the Secretary of State will "[c]onvene 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." But the significance of this statute to Plaintiff's argument is left unexplained. Even if Ms. White, rather than the Secretary of State, would convene this conference herself, there is no way that her facilitation of a "discussion" regarding "uniform implementation of state election policies" has any causal connection to Plaintiff's proposed course of action. The "state election conference" referenced in the statute is not a meeting of the legislature to decide the *contents* of the state election laws. It is a conference to discuss how they should be implemented. And Mr. Splonskowski has already decided to disregard them. He fails to show a causal connection between Ms. White's training and his injury.

[¶23] Plaintiff's next contention is that Ms. White will be the origin of "repercussions" which Plaintiff may face. *Response*, at 14. First of all, this is far too vague to support a claim of injury. Second of all, Ms. White works for the state, and is not in any sort of supervisory role over Plaintiff. In any event, Plaintiff fails to causally link these undefined "repercussions" to Ms. White.

[¶24] But most fatally to his causation argument, Plaintiff fails to address the fact that it is the Burleigh County State's Attorney, not Ms. White, who initiates criminal action in the state. While Plaintiff correctly recognizes that causation only requires that officials have "some connection" to the challenged law, a finding of "some connection" *here* would render the requirement of causation meaningless. Dozens of individuals across the state share in the responsibility of executing elections in compliance with laws and rules. However, none of them, except the State's Attorney's offices with the requisite jurisdiction, have authority to *bring criminal charges* which is the injury that Mr. Splonskowski supposedly faces.

[¶25] The case chiefly relied upon by Plaintiff is distinguishable. In *Worth v. Harrington*, the court found that the Minnesota Commissioner of Public Safety was one of several proper defendants in terms of plaintiff's claims for declaratory and injunctive relief against a statute placing age restrictions on permits to carry firearms in public. No. 21-CV-1348 (KMM/LIB), 2023 WL 2745673, at *20 (D. Minn. Mar. 31, 2023). The Commissioner was statutorily responsible for facilitating the age-restricted permit application process by creating and promulgating application forms, among other duties. *Id*.

[¶26] The present facts are distinguishable. While Ms. White certainly informs people of the law, she does not "facilitate" the ballot receipt deadline in the same way the Commissioner facilitated the application process. Further, while it is true that the Commissioner told the members of the public what the law said, he did so in his capacity as the head of the Department of Public Safety. Under Minnesota law, the Commissioner of Public Safety is the individual charged by statute with "supervision and control" of the Department of Public Safety. Minn. Stat. § 299A.01. *Id*. Here, Ms. White is not a department head. She is a state employee.

[¶27] And most importantly, the operation of North Dakota's election laws, even if they were under Ms. White's control, causes Plaintiff no actual injury. Unlike the plaintiffs in *Worth* who were directly harmed by the statute in question by being prevented from carrying firearms, the statutory framework at issue here causes Splonskowski no injury whatsoever. He clearly disagrees with it, but his remedy is with the state legislature.

[¶28] Lastly, Plaintiff is wrong about the application of Federal Rule 12(b)(7). Ms. White has correctly pointed out that she lacks the causal connection to the harm alleged by Plaintiff, which is a fatal jurisdictional defect requiring dismissal under Rule 12(b)(1). She is under no obligation to ask the court to join other parties in an effort to salvage Plaintiff's case.

[¶29] In sum, Plaintiff cannot show causation, and his case must be dismissed for lack of standing. For similar reasons, Plaintiff fails to prevail on the analogous inquiry as to whether Ms. White's Eleventh Amendment immunity may be overcome: here, it cannot. *See* Doc. No. 10, at 15-16.

C. Plaintiff Cannot Show Redressability.

[¶30] Plaintiff maintains that he shows redressability for both his claims for declaratory relief and his claims for injunctive relief. This claim is complicated by the fact that, since Plaintiff alleges no real injury, there is effectively nothing to redress. But even if the Court would find that Plaintiff has alleged an injury, it would not be redressed by the relief he sets forth here.

[¶31] Regarding injunctive relief, Plaintiff's response misses the mark. Again, he asserts that Ms. White ought to bring a motion under Rule 12(b)(7). But again, whether or not another better defendant exists has no bearing on whether or not Plaintiff has standing to litigate *this* case against Ms. White.

[¶32] Plaintiff correctly cites caselaw for the proposition that, to satisfy the redressability requirement, a plaintiff "need not show that a favorable decision will relieve his *every* injury." Response at 18. But here, Plaintiff has not shown that a favorable decision will relieve *any* injury. Again, an injunction against Ms. White would have no effect on the circumstances of this case; it would simply replace the individual who would ultimately be tasked with training the county auditors. And it would have no effect on the Plaintiff. He would still disagree with the law, he would still try to reject ballots, and he would still run the (speculative) risk of prosecution for failing to perform his duties. Further, his final statement – "[a]n injunction against Director White would prevent her from *forcing* Mr. Splonskowski to act contrary to federal law" – is simply unsupported. *Response*, at 18. Ms. White cannot "force" Plaintiff to do anything. Just because Ms. White, as Director of Elections, has "compliance" in her job description does not mean that Ms. White, whether by holding a conference or distributing a brochure, can *force* Plaintiff to comply with state law. Indeed, the only individuals who can force him to comply with the law are those charged with prosecuting violations of it – i.e., the Burleigh County State's Attorney. The same is true for declaratory relief. While a wholesale invalidation of North Dakota election law would presumably remove Plaintiff's temptation to violate the same, redressability in this case must concern Ms. White herself. *See Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015) ("[I]t must be the effect of the court's judgment **on the defendant** that redresses

the plaintiff's injury, whether directly or indirectly.") (emphasis added). Plaintiff's alleged injury here is his risk of prosecution, and whether or not the Burleigh County State's Attorney decides to prosecute Plaintiff does not depend on whether or not he was trained by Ms. White. He cannot establish redressability for either the declaratory or injunctive relief he seeks.

D. Conclusion as to Standing

[¶33] As the Supreme Court admonishes, "[s]tanding is not 'an ingenious academic exercise in the conceivable.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 566 (1992). Here, Plaintiff goes to great lengths to link his disapproval of North Dakota law with Ms. White, relying on a chain of disparate statutes, independent actors, and his own avowed desire to break the law unless the Court invalidates it. But for all his efforts, he fails to allege "sufficient facts to support a reasonable inference that [he] can satisfy the elements of standing." *Animal Legal Def. Fund v. Vaught*, 8 F.4th 714, 718 (8th Cir. 2021). Ms. White respectfully submits that Plaintiff has failed to carry his burden to establish the elements of this threshold requirement, and so this case must be dismissed.

II. Even if this Court would find jurisdiction, Plaintiff fails to state a claim upon which relief can be granted.

[¶34] Even if the Court does find a proper basis to exercise jurisdiction here, Plaintiff's Complaint still warrants dismissal because he fails to state a claim upon which relief can be granted.

[¶35] Plaintiff summarizes the conflict on which his case is based as follows: "[f]ederal law fixes Election Day on one specific day," while "North Dakota law allows ballots to be cast for 13 days after Election Day." *Response*, at 20.

[¶36] The claim that North Dakotans are casting ballots for 13 days after Election Day is a surprising one. Determining whether a complaint states a plausible claim is "context specific, requiring the reviewing court to draw on its experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 663, 663-64. Ms. White respectfully submits that Plaintiff's averments, however grounded in legal analysis, are unreasonable on their face. Further, an examination of the law cited by Plaintiff

leads to the same conclusion: that he fails to state a claim upon which relief can be granted. Ms. White will address Plaintiff's arguments sequentially below.

A. Plaintiff's Complaint Fails to Plausibly Alleges Any Conflict Between State and Federal Law.

[¶37] Plaintiff starts this section of his Response by explaining the relationship between state and federal law, *Response* at 17, but he merely repeats the broad principles that Ms. White has already explained: namely, states have discretion in establishing time, place, and manner for elections of federal representatives, but such state systems may not directly conflict with federal election laws on the same subject. *See* Doc. No. 10, at ¶ 53. As the supremacy of federal law is not under attack here, Plaintiff's defense of it merits little response.

[¶38] Plaintiff next recounts the chronological histories of both the federal election statutes and the North Dakota election statutes, but the relevance of such information is not clear. He tries to cast the ballot receipt deadlines as a "new development," supposedly stemming from 2021. *Response* at 18. But even if such laws did date back to the 1800s, what would it matter? Federal law would still be supreme. Further, it appears from Plaintiff's own analysis that in 1981, just as today, ballots that arrive after election day were not counted until the County Canvassing Board meeting. Perhaps he wishes to emphasize that, in 1981, it was possible that the County Canvassing Board might meet *on* Election Day and thus any ballots arriving after Election Day would be discarded. But again, the relevance of such a hypothetical to Plaintiff's ultimate claim remains unclear.

[¶39] Plaintiff next asserts that he states a claim for preemption, because he alleges that state and federal law conflict. *Response*, at 22. Again, he refers to his own Complaint for the proposition that "North Dakota law allows the election to occur for thirteen days after Election Day." *Id*. But this does not suffice to state a claim. In analyzing a motion to dismiss pursuant to 12(b)(6), this Court must accept Plaintiff's factual allegations as true, but the Court is not required to accept his legal conclusions. *Brown v. Medtronic, Inc.*, 628 F.3d 451, 459 (8th Cir. 2010) (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). Plaintiff is not allowed to allege an erroneous "fact"

about North Dakota law and thereby shield it from legal scrutiny at the 12(b)(6) stage. Plaintiff's allegations about North Dakota's allegedly extended election period are legal conclusions, and faulty ones, at that.

B. Neither *Foster* Nor Other Federal Cases Support Plaintiff's Allegations.

[¶40] The Supreme Court case of *Foster v. Love*, 522 U.S. 67 (1997), undermines Plaintiff's position. Not only is the Louisiana statutory scheme in *Foster* illustratively distinguishable than the laws of North Dakota, but further, the Court in *Foster* cautions against exactly the sort of argument that Plaintiff makes here.

[¶41] In *Foster*, the Court was confronted with the claim that Louisiana's election framework violated federal election law. 522 U.S. at 69. In Louisiana, an "open primary" statute allowed elections for federal offices to be held in October; only if no candidate received a majority would any election at all be held the following month, on Election Day itself. *Id.* at 70. Counsel for Louisiana explained at oral argument "Louisiana's system certainly allows for the election of a candidate in October, as opposed to actually electing on Federal Election Day." *Id*. at 73. The Court observed that under Louisiana law, the election for federal office straightforwardly took place in October. *Id*. at 72-73. The Court ultimately held that the Louisiana law conflicted with 2 U.S.C. § 7 and was void, but cautioned against hyper-technical interpretation of its ruling:

> While true that there is room for argument about just what may constitute the final act of selection within the meaning of the law, our decision **does not turn on any nicety in isolating precisely what acts a State must cause to be done on federal election day** (and not before it) in order to satisfy the statute. **Without paring the term "election" in § 7 down to the definitional bone**, it is enough to resolve this case to say that a contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day, with no act in law or in fact to take place on the date chosen by Congress, clearly violates § 7.

Id. at 72 (emphasis added).

[¶42] In other words, *Foster* explicitly *declines* to "isolat[e] precisely what acts a State must cause to be done on federal election day." *Id.* Plaintiff reads this language to the contrary, but even his attempt to pare "the term election . . . down to the definitional bone" fail to cast aspersions on North Dakota's statutory scheme.

[¶43] Indeed, the commentary offered by *Foster* on the federal definition of "election" only helps Ms. White. "When the federal statutes speak of 'the election' of a Senator or Representative, they plainly refer to the **combined actions of voters and officials meant to make a final selection of an officeholder.**" *Id.* at 71. In North Dakota, the "combined actions of voters and officials" does not continue beyond Election Day for even a single hour, let alone for 13 days as Plaintiff contends.[4] Simply put, voters cannot take any action after Election Day in furtherance of the "final selection of an officeholder." While the ballots themselves can move through the postal system after Election Day, the voters cannot revise, change, or undo their choice in the "final selection" because their ballots are required to be postmarked *before* Election Day. N.D. Cent. Code § 16.1-07-09. They have exercised their right to vote by marking their ballot, sealing the envelope, and sending it through the mail to be canvassed. Nothing about North Dakota's procedure for returning ballots offends *Foster* or any definition of the word "election."

[¶44] Plaintiff's reading of *Foster* – indeed, his entire case – depends upon his deliberate misunderstanding of the finality of a voter's actions in the context of a ballot returned by mail. Specifically, he insists that a vote is not "cast" until it is received by an election official. But his only support for this idea *Maddox v. Board of State Canvassers*, in which the Montana Supreme Court interpreted its' own state laws as they existed in 1944. 149 P.2d 112, 115 (1944). *Maddox* is not binding on this court, nor has its rationale been adopted by any of the federal courts since to consider this subject.[5]

[4] For unclear reasons, Plaintiff does not appear to object to the canvassing of votes by the County Canvassing Board, asserting that canvassing is excluded from the phrase "final selection" as he construes it. This puzzling omission only detracts from the plausibility of his narrow definition of "final selection."

[5] Plaintiff's unsupported statements on "the status of a ballot," do not help his case. *See* Response at 17 ("The ballot sitting in a voter's kitchen waiting to be completed is not a vote." … "A ballot that is lost, stolen, or destroyed is not a vote.") This focus on the metaphysical characteristics of a ballot raises more questions than answers. What if a ballot is received by an election official, who then promptly loses it? (Indeed, what if a ballot is received by an election official who disregards it because he disagrees with state law?) While an extended discussion on this subject would be of little value, Ms. White simply notes that no case besides *Maddox* subscribes to Plaintiff's theory on the ballot-vote distinction, which was not addressed in *Foster*; it is of no relevance in deciding the instant case.

[¶45] Rather, cases following *Foster* have not interpreted it as Plaintiff has. One of *Foster's* progeny, *Millsaps v. Thompson*, discusses the case at length and explicitly acknowledges the need for post-Election Day official actions to confirm and verify results. *Millsaps v. Thompson*, 259 F.3d 535, 546 n.5 (6th Cir. 2001).

[¶46] Looking at Plaintiff's legal discussion more broadly, his inability to cite a single case which squarely supports him is telling. Indeed, all the cases directly considering this matter oppose his position, and his attempts to minimize them are unavailing. For instance, Plaintiff criticizes the recent case of *Bost v. Ill. State Bd. of Elections,* No. 22-CV-02754, 2023 WL 4817073 (N.D. Ill. July 26, 2023) for not discussing *Foster*. *Response,* at 32. But he omits the fact the *Bost* court carefully considered *Voting Integrity Project, Inc. v. Bomer,* 199 F.3d 773, 776 (5th Cir. 2000), a case reliant on *Foster* and cited by Plaintiff himself earlier in his brief.

[¶47] Further, Plaintiff misapprehends the significance of *Republican Nat'l Comm. v. Democratic Nat'l Comm.,* 140 S. Ct. 1205 (2020). True, this case concerns a primary election, and the question facing the Court is not so close to the instant facts as are the other cases Ms. White relies upon. But the Court's rationale in *Republican Nat'l* casts doubt in Plaintiff's theory of what it means to cast a vote. In *Republican Nat'l*, the Court was faced with a district court who extended the deadline for mailing and postmarking ballots to an unspecified number of days *after* Election Day, so long as the ballots were received within six days of Election Day itself. *Id.* at 1206-07. In describing this decision, the Court stated that the district court's plan to allow *mailing* of votes after Election Day would be "*allowing voting* for six additional days after the election." *Id*. at 1208. In other words: mailing a ballot is the functional equivalent of casting it. In North Dakota, by contrast, no voting *or* mailing is allowed after Election Day. Ballots must be postmarked by the day before Election Day. N.D. Cent. Code § 16.1-07-09.

[¶48] Further, Plaintiff's claim that the court in *Donald J. Trump for President, Inc. v. Way,* 492 F. Supp. 3d 354 (D.N.J. 2020) conducted "little to no analysis" of *Foster* is wrong. *Response*, at 32. The court in *Way* analyzed *Foster* both on the question of early voting and the question present

here – i.e., whether counting votes postmarked by Election Day but arriving after it violates federal law. The Court in *Way* simply reads *Foster* in a way that does not help Plaintiff's case:

> New Jersey law prohibits canvassing ballots cast after Election Day, in accordance with the Federal Election Day Statutes. Plaintiffs direct the Court to no federal law regulating methods of determining the timeliness of mail-in ballots or requiring that mail-in ballots be postmarked. Where Congress "declines to preempt state legislative choices," the Elections Clause vests the states with responsibility for the "mechanics of congressional elections." Foster, 522 U.S. at 69, 118 S.Ct. 464.

Way, 492 F. Supp. 3d at 372.

[¶49] Faced with this federal court decision which directly contradicts his reading of *Foster*, Plaintiff attempts to minimize it as a "rushed" decision. *Response,* at 32. This Court should disregard this criticism and read *Way* on its merits.

[¶50] Lastly, Plaintiff's extensive historical discussion does not help his argument. *Response,* at 26-31.[6] While a comprehensive review of all historical literature is outside the scope of the instant Reply, some small examples serve to show Plaintiff's error. For instance, he cites a 1918 article for the proposition that practices at that time "adhered with the original public meaning that Election Day meant receipt day." *See* Response at 30 (discussing P. Orman Ray article). Yet the article itself reveals that these practices could not have been unanimous. For instance, according to this same source, absentee ballots in Washington State were sent through the mail and counted so long as they were "received by the county auditor within six days from the date of the election." Id. at 253-254. At least as of 1918, then, a post-Election Day ballot receipt deadline was not unheard of. Presumably, Plaintiff's historical recitation is meant to support his flawed analysis of the finality of an absentee vote postmarked and sent through the mail. He writes, "[i]n North Dakota, the "whole question" cannot be decided until thirteen days after Election Day," but again, this is false. *Id*. at 31.The whole question *is* decided by Election Day on North Dakota. The vote of a North Dakotan is immutable once his or her ballot is in the mail, where it is required to be placed by the day before Election Day. *See* N.D. Cent. Code § 16.1-07-09. Even if, on Election

[6] The undersigned was unable to access some of the academic articles cited by Plaintiff despite using the "available at" links supplied in the Response, but for purposes of this response Ms. White simply relies upon the excerpts provided by Plaintiff in his briefing.

Day, a ballot is still *en route* to the election officer through the mail, that ballot is already cast – signed, sealed, if not delivered – in full compliance with federal law. In other words, the "whole question" is answered by Election Day, even though the "answer" – the results of the election – will not be published until the votes are carefully tallied and the other post-election day certifications and canvasses take place.

[¶51] Plaintiff cannot escape the fact that federal courts have unanimously rejected his arguments. Ms. White respectfully requests that this Court should do the same and find that he has failed to plausibly allege any conflict between state and federal law.

CONCLUSION

[¶52] For all the reasons set forth above, the Court lacks subject-matter jurisdiction over this case. But even if the Court does find the existence of subject matter jurisdiction, it should dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted. Ms. White respectfully requests that Plaintiff's Complaint be dismissed in its entirety.

Dated this 22nd day of September, 2023.

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