IN THE SUPREME COURT
STATE OF NORTH DAKOTA

TERENCE B. BJERKE and LEVERRETT OLEY LARSEN, Petitioners, v. NORTH DAKOTA LEGISLATIVE ASSEMBLY and MICHAEL HOWE, in his official capacity as North Dakota Secretary of State, Respondents.	**Supreme Ct. No. 20260027** **District Ct. No. N/A**

SECRETARY OF STATE'S RESPONSE TO PETITION FOR DECLARATORY JUDGMENT AND WRIT OF INJUNCTION

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Dated: March 03, 2026

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

[¶1] Whether the Secretary of State has authority to refuse to put a legislatively initiated constitutional amendment on the ballot on the basis that he believes the substance of the proposed constitutional amendment would be unconstitutional.

[¶2] Whether Senate Concurrent Resolution 4008 violates either Article XV, Section 4 or Article III, Section 8, of the North Dakota Constitution.

[¶3] Whether N.D.C.C. § 32-23-08 authorizes attorney's fees when a litigant seeks a declaration that a proposed constitutional amendment violates the State Constitution.

STATEMENT OF THE CASE

[¶4] On January 20, 2026, Petitioners filed a petition asking this Court to exercise original jurisdiction and issue declaratory relief and a writ of injunction enjoining the Secretary of State from placing Senate Concurrent Resolution 4008 on the November 2026 general election ballot as Constitutional Measure 1. Petitioners named both the Secretary of State and the Legislative Assembly as Respondents.

[¶5] The Court requested any responses to the Petition by March 3, 2026, and indicated that this matter would be submitted to the Court during its April term.

[¶6] The Secretary of State and Legislative Assembly shall each be providing separate responses to the Petition.

STATEMENT OF FACTS

[¶7] In 2022, the people of North Dakota amended our State Constitution to create a set of term limits that were codified in a new Article XV of the Constitution.

[¶8] Article XV has six sections. Section 1 addresses legislative term limits; Section 2 addresses gubernatorial term limits; Section 3 applies the Article's term limits prospectively; Section 5 sets the Article's effective date; and Section 6 contains a

severability clause as well as a statement that Article XV "shall control" if it conflicts with any other provision of the Constitution. *See* N.D. Const. art. XV, §§ 1, 2, 3, 5, 6.

[¶9] Section 4 of Article XV prohibits the Legislative Assembly from proposing amendments "to alter or repeal the term limitations established in section 1." N.D. Const. art. XV, § 4. Notably, the text of Section 4 does not purport to limit the Legislative Assembly's ability to propose amendments that would alter or repeal any other provision of Article XV—including the anti-legislative-repeal provision of Section 4 itself.

[¶10] In 2025, the Legislative Assembly proposed a constitutional amendment to Article XV. *See* Senate Concurrent Res. No. 4008. If adopted by the electorate, that proposal would repeal Article XV, Section 4's prohibition on the Legislative Assembly's ability to propose amendments to Section 1, *see id.* § 2, and it would modify the legislative term limits that are currently codified at Article XV, Section 1, *see id.* § 1.

[¶11] On April 8, 2025, Senate Concurrent Resolution 4008 was filed with the Secretary of State, and the Secretary has indicated that it will be placed on the ballot in this year's November general election as Constitutional Measure 1.

SUMMARY OF ARGUMENT

[¶12] This Court has repeatedly held that the Secretary may not consider whether popularly initiated referenda are substantively unconstitutional in deciding whether to place them on the ballot. And where legislatively initiated constitutional amendments are concerned, that would appear to be even more true; the Constitution dictates such proposals "must be submitted to the electors." N.D. Const. art. IV, § 16. Thus, while the specific question does not yet appear to have been addressed by this Court, when the Legislative Assembly submits an amendment for placement on the ballot, the Secretary does not believe he has authority to refuse to place that proposed amendment on the ballot based on

his own analysis of the proposed amendment's constitutionality.

[¶13] If the Court exercises original jurisdiction to decide the constitutionality of Senate Concurrent Resolution 4008, the Secretary takes no position on that question and will leave the defense of Senate Concurrent Resolution 4008's constitutional merits to the Legislative Assembly—which is separately participating in this litigation.

[¶14] Even if Petitioners were to prevail on their claims they would not be entitled to attorney's fees in this case. North Dakota follows the American Rule, meaning that each party generally bears their own fees unless a statute or contract provides otherwise. North Dakota has no statute authorizing attorney's fees against the State if a proposed constitutional amendment is declared unconstitutional. Without any supporting argument, Petitioners gesture towards N.D.C.C. § 32-23-08 as entitling them to fees. But this Court has only ever held that statute to authorize fee-shifting in a single context: where an insured must engage in litigation to receive the coverage he contracted for and would be denied the full benefit of his bargain if he needed to subtract the expenses of litigation to obtain that coverage. That reasoning simply does not apply in this context.

LAW AND ARGUMENT

I. The Secretary Does Not Have Authority to Refuse to Put a Legislatively Proposed Constitutional Amendment on the Ballot Based on His Own Analysis of the Proposed Amendment's Constitutionality.

[¶15] Petitioners claim that the Legislative Assembly's proposed amendment to Article XV of the State Constitution would itself violate the State Constitution. But whether that contention is right or wrong—a question which the Legislative Assembly itself will address—the Secretary does not believe that he has the authority to decline to place that proposal on the ballot based on his own view of its constitutionality.

[¶16] Our State Constitution prescribes two methods for its amendment. Under the first,

set forth in Article III, the People may propose constitutional amendments by popular initiative if a petition is signed by a sufficient number of electors. N.D. Const. art. III, § 9. The Secretary of State is required to review such petitions for "proper form," *id.* § 2, and "sufficiency," *id.* § 6; *see also id.* § 9 (providing that "[a]ll other provisions relating to initiative measures" apply to initiated constitutional amendments). And if a petition is "insufficient," *id.* § 6, or not "in proper form," *id.* § 2, the Secretary shall not approve it. *See, e.g.*, *Haugen v. Jaeger*, 2020 ND 177, ¶¶10-11, 948 N.W.2d 1 (enjoining the Secretary from placing an initiative on the ballot that failed to satisfy Article III's "mandatory" form requirements because it did not contain the full text).

[¶17] Under the second method, the Legislative Assembly may propose "[a]ny amendment to th[e] constitution" by a majority vote of both houses. N.D. Const. art. IV, § 16. Unlike constitutional amendments that are initiated by the People, the Constitution does not vest the Secretary with authority to conduct a form-and-sufficiency review of legislatively initiated proposals. To the contrary, Article IV, Section 16 provides that if both houses of the Assembly vote to propose a constitutional amendment, then that proposal "*must* be submitted to the electors." *Id.* (emphasis added).

[¶18] Likewise, the Election Code does not authorize the Secretary to review the Legislative Assembly's proposed constitutional amendments for form or substance.

[¶19] The Election Code provides the Secretary with authority to regulate the form of initiative petitions. N.D.C.C. § 16.1-01-09; *see also id.* § 16.1-01-10. But with respect to legislatively proposed constitutional amendments, it simply directs the Secretary to certify them to county auditors, *id.* § 16-1-01-07, regulating only the manner in which they are advertised and published, *id.*, and the ballot form that is to be used to vote on them, *id.*

§ 16.1-06-09. While the Election Code does give the Secretary authority to prepare a "concise summary" if a proposed amendment "is too long to make it practicable to print in full," *id.* § 16.1-06-09(1), it does not authorize the Secretary to reject a legislatively proposed constitutional amendment outright for reasons of form, much less because the Secretary believes the amendment would itself be unconstitutional.

[¶20] As this Court explained over a century ago—when interpreting an early predecessor of the current Election Code—the "law declares that [the Secretary] must certify to the county auditors such question or proposition as is to be submitted to the people," and once the Legislative Assembly proposes that a joint resolution shall be submitted to the people (in that case, a legislative proposal to call a constitutional convention), "[t]he secretary of state has naught to do but obey the law, and certify such question to the proper officers, that it may be submitted to the people for their approval or disapproval." *State ex rel. Wineman v. Dahl*, 6 N.D. 81, 68 N.W. 418, 419 (1896).

[¶21] Even when it comes to reviewing the "form" and "sufficiency" of citizen-initiated petitions, this Court has repeatedly held that the Secretary's "responsibilities are 'limited' and 'ministerial in nature.'" *Haugen*, 2020 ND 177 at ¶4 (quoting *N.D. State Bd. of Higher Educ v. Jaeger*, 2012 ND 64, ¶10, 815 N.W.2d 215). Those responsibilities specifically "do not include the *authority* to review the substance or constitutionality of the measure." *State Bd. of Higher Educ.*, 2012 N.D. 64 at ¶10 (emphasis added); *see also Preckel v. Byrne*, 62 N.D. 634, 244 N.W. 781, 784 (1932) ("The secretary of state is not required nor permitted to determine whether the proposed measure is constitutional in substance."). Thus, in "reviewing a petition for form, the Secretary *must* not be concerned with the merits of the petition or the substance of its text." *Mun. Servs. Corp. v. Kusler*, 490 N.W.2d 700,

706 (N.D. 1992) (emphasis added).

[¶22] To the Secretary's knowledge, the Court has not yet specifically addressed whether he has an inherent or express authority to refuse to place a legislatively proposed constitutional amendment on the ballot based on his own analysis of the proposed amendment's constitutionality.[1]

[¶23] But the Secretary does not understand his office to have greater authority to review the substance of legislatively proposed constitutional amendments than it does to review the substance of citizen-initiated referenda. Instead, the text of our Constitution would appear to suggest the opposite, expressly requiring the Secretary to submit legislatively proposed constitutional amendments to the People. *See* N.D. Const. art. IV, § 16 (providing that "[a]ny amendment to this constitution" that is agreed to by the majorities of both houses "must be submitted to the electors").

[¶24] It could perhaps be contended that the 2022 ratification of Article XV implicitly amended not only the Legislative Assembly's authority to propose amendments that repeal or revise aspects of Article XV, but also the Secretary's authority to review the substance of legislatively proposed amendments. However, this Court's decisions suggest that the Secretary lacks authority to substantively police constitutional limits on repeal. For

[1] However, in the context of a legislative proposal to place a constitutional convention on the ballot, the Court rebuked the then-Secretary for refusing to place a joint resolution on the ballot because it was "not written in constitutional form," *State ex rel. Wineman*, 68 N.W. at 418, stating that when the Legislative Assembly submitted a proposal for popular election, the Secretary had "naught to do but … certify" it, *id.* at 419.

example, in *Preckel*, challengers to a proposed measure claimed that the Secretary should not have placed it on the ballot because it amended or repealed prior laws without naming those laws, thereby (allegedly) violating a constitutional limitation. 244 N.W. at 784. This Court responded that when deciding whether to place a proposed measure on the ballot, the Secretary "does not consider whether there are other laws upon similar subjects, and therefore does not determine whether the proposed measure revises or amends existing statutes." *Id.* at 784-85. Applying that logic to this case, the Secretary would similarly lack authority to reject the Legislative Assembly's proposal based on Petitioners' contentions. Petitioners claim Senate Concurrent Resolution 4008 would impermissibly modify Article XV, Section 1's term limits, but, to decide whether that is correct, the Secretary would have to assess Article XV, Section 1's term limits against those in the proposed amendment. The Secretary believes that inquiry would exceed his designated role, which cases like *Preckel* instruct is limited to reviewing the proposed measure, not its potential interaction with other laws or provisions.[2]

II. The Secretary Takes No Position on Whether Senate Concurrent Resolution 4008 Violates the North Dakota Constitution.

[¶25] The Legislative Assembly was named as an additional Respondent in this litigation and will be filing its own brief to address the constitutionality of having Senate Concurrent Resolution 4008 on the 2026 ballot as Constitutional Measure 1.

[2] If the Court disagrees and is of the opinion that in this case the Secretary possesses independent authority to reject a legislatively proposed amendment based on its substance, the Secretary would welcome the Court's direction on when and how such authority should be exercised, if the Court deems this case a proper vehicle to address the question.

[¶26] Accordingly, the Secretary of State takes no position on the constitutional merits of Petitioners' claims that Senate Concurrent Resolution 4008 violates Article XV or Article III, and he will leave arguments regarding the Legislative Assembly's authority to propose that amendment to the Legislative Assembly itself.

[¶27] If the Court exercises original jurisdiction and decides the constitutionality of placing Senate Concurrent Resolution 4008 on the 2026 ballot, the Secretary simply asks for a final decision no later than June 30, 2026. The Secretary respectfully submits that a decision issued after that date would create administrative burdens that may impede the fair and efficient operation of the 2026 general election.

III. Petitioners Are Not Entitled to Attorney's Fees If They Prevail.

[¶28] Citing no authority but N.D.C.C. § 32-23-08, Petitioners request attorney's fees if they prevail in this litigation. Pet. ¶9. But, even if they are found to prevail, Petitioners have no basis under North Dakota law for claiming attorney's fees in this case.

[¶29] "North Dakota generally applies the 'American Rule' for attorney's fees and assumes each party to the lawsuit will bear its own attorney's fees." *Rocky Mtn. Steel Found., Inc. v. Brockett Co., LLC*, 2019 ND 252, ¶9, 934 N.W.2d 531. As such, "[s]uccessful litigants are not allowed to recover attorney fees unless authorized by contract or by statute." *Id.* (citation omitted).

[¶30] North Dakota does not have—and Petitioners do not point to any—statute that expressly provides for fee-shifting against the State whenever a proposed constitutional amendment (or a State action taken in relation thereto) is declared to violate the State Constitution. Petitioners merely gesture to N.D.C.C. § 32-23-08, without offering any argument to explain their putative basis for a fee claim under that provision.

[¶31] Enacted in 1923, Section 32-23-08 provides that "[f]urther relief based on a

declaratory judgment" may be granted when "necessary or proper." N.D.C.C. § 32-23-08. To the Secretary's knowledge, this Court has *never* awarded attorney's fees under that section based solely on a State action being declared unconstitutional.

[¶32] Instead, this Court has only held that provision to authorize fee shifting in the "unique situation" of "[l]itigation between an insurance company and its insured to determine coverage." *State Farm Fire & Cas. Co. v. Sigman*, 508 N.W.2d 323, 326 (N.D. 1993). As the Court explained, "[w]hen the insured gets th[e] policy protection" that he contracted for "only by court order after litigating coverage, it is both 'necessary' and 'proper' to award attorney fees and costs to give the insured the full benefit of his insurance contract." *Id.* at 326-27; *see also W. Nat'l Mut. Ins. Co. v. Univ. of N.D.*, 2002 ND 63, ¶¶50-51, 643 N.W.2d 4 (re-affirming and applying the reasoning of *Sigman* to another insurance dispute). In that situation, "[i]f an insured is not awarded attorney fees … he is effectively denied the benefit he bargained for," as "bear[ing] the expense of … litigation" to obtain his insurance coverage may cause him to be "no better off financially than if he never had" coverage at all. *Sigman*, 508 N.W.3d at 327.

[¶33] Conversely, this Court has "declined to apply *Sigman* where there is no coverage under an insurance policy." *W. Nat'l Mut. Ins. Co.*, 2002 ND 63, at ¶51. "The Legislature has not amended N.D.C.C. § 32-23-08 since this Court's 1993 decision in *Sigman*, and the Legislature's acquiescence … is evidence the *Sigman* interpretation of that statute is in accordance with legislative intent." *Id.*

[¶34] The *Sigman* line of cases justify fee-shifting under N.D.C.C. § 32-23-08 based on the idea that it's "necessary" to award fees when an insured is forced to litigate to enforce his contractual insurance rights in order receive the full benefit of his bargain. Petitioners

have no analogous contractual right against the State that would be less than fully satisfied if they receive declaratory judgment without a fee-shifting award here.[3]

[¶35] Accordingly, even if Petitioners were to prevail on the claims that they've asserted in this case, a fee-shifting award under Section 32-23-08 is not necessary for them to achieve their desired relief, and the ordinary American Rule applies. *See Sorum v. State*, 2020 ND 175, ¶58, 947 N.W.2d 382 (noting, in declaratory-judgment action against the State, that "North Dakota courts generally apply the 'American Rule' for attorney's fees and assume each party to a lawsuit will bear its own attorney's fees …).

CONCLUSION

[¶36] For the foregoing reasons, the Secretary submits that he does not have authority to refuse to place Senate Concurrent Resolution 4008 on the ballot based on his own analysis of its constitutionality, and he takes no position on whether Senate Concurrent Resolution 4008 violates the State Constitution—a contention that will be addressed in these proceedings by the Legislative Assembly itself.

[¶37] To administer a fair and efficient election, the Secretary respectfully asks for final resolution of this matter as soon as feasible, and no later than June 30, 2026.

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[3] In one unpublished decision, the federal court for the District of North Dakota opined that fee shifting under N.D.C.C. § 32-23-08 may be available outside the insurance context if the case involves "special or unique circumstances." *Morse v. City of Velva*, 2020 WL 8991687, at *5 (D.N.D. Oct. 26, 2020) (Hochhalter, M.J.). But such circumstances did not exist in that case, and that court offered no elaboration on what types of circumstances it believed this Court might award fees for outside of the insurance context.

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CERTIFICATE OF COMPLIANCE

[¶1] In compliance with Rule 32(d) of the North Dakota Rules of Appellate Procedure, the undersigned hereby certifies that the following document

SECRETARY OF STATE'S RESPONSE TO
PETITION FOR DECLARATORY JUDGMENT AND WRIT OF INJUNCTION

contains 15 pages (including cover page, table of contents, table of authorities, and signature block), and was prepared with a plain, roman style typeface in a 12-point font.

Dated: March 03, 2026

/s/ *Philip Axt*
Solicitor General
Counsel for Michael Howe, in his official capacity as North Dakota Secretary of State

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CERTIFICATE OF SERVICE

[¶1] The undersigned hereby certifies that on March 03, 2026, the following document:

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were filed electronically with the Clerk of Supreme Court through the North Dakota Supreme Court E-Filing Portal and was served upon counsel for the parties to the action electronically through the North Dakota Supreme Court E-Filing Portal as follows:

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