



**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

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**IN THE MATTER OF A PETITION TO TERMINATE THE SPECIAL  
PROVISION OF LEGAL SERVICES BY**

**QUALIFIED ATTORNEYS FROM OUTSIDE NORTH DAKOTA**

To:

Penny Miller  
Clerk of the North Dakota Supreme Court  
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**COMMENTS OF THE AMERICAN CIVIL LIBERTIES UNION**

The American Civil Liberties Union Foundation (“ACLU”) submits the following comments in Opposition to the Petition to Terminate the Special Provision of Legal Services by Qualified Attorneys from Outside North Dakota (“Petition”).



**I. The Need for Effective Assistance of Counsel Continues for  
Approximately 150 Defendants with Pending Cases.**

In January of this year, the Court in this matter recognized “the potential for delay or inconvenience for litigants due to the relatively large number of arrests and finite resources to handle the judicial proceedings related to those [pipeline protest] arrests” and “that the South Central Judicial District had a significantly increased caseload as a result of the arrests related to the pipeline protests” made it necessary to permit the temporary streamlining of procedures for temporary admission. *Matter of Petition to Permit Temp. Provision of Legal Servs.*, 2017 ND 255, ¶¶ 10-12, 889 N.W.2d 399, 401–02 (N.D. 2017).

AMERICAN CIVIL  
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The need for out-of-state attorneys to represent individuals arrested during the protests continues. The Bismarck Tribune recently quoted the Water Protectors Legal Collective and reported: “[a]s of September 11, there were 159 cases without representation or any appointed counsel.”<sup>1</sup> As a result, it continues to be in the best interest of both the defendants and the State to ensure that those individual defendants have effective assistance of counsel. Without this limited special process for temporary admission, defendants may be able to raise ineffective assistance of counsel claims if their lawyers are overwhelmed and commit errors that are prejudicial or

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<sup>1</sup>Found at [http://bismarcktribune.com/news/local/crime-and-courts/judges-request-ending-provisions-for-outside-attorneys-in-dapl-cases/article\\_4e44715e-19e5-5423-bef6-664d524d4d19.html](http://bismarcktribune.com/news/local/crime-and-courts/judges-request-ending-provisions-for-outside-attorneys-in-dapl-cases/article_4e44715e-19e5-5423-bef6-664d524d4d19.html).

deprive the defendants of a fair trial.

The Sixth Amendment's guarantee of counsel in the defense of criminal charges that jeopardize a citizen's liberty is well established. *See, e.g., Strickland v. Washington*, 466 U.S. 668 (1984). The Sixth Amendment "right to counsel is the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759 (1970). Ensuring that each of the remaining protest defendants receives effective assistance of counsel is the paramount issue in this matter. The Petition urges the termination of both the temporary streamlining process and the admission of certain lawyers who used the process because, among other things, some of the lawyers admitted through this streamlined process purportedly are not actively representing defendants and approximately half are associated with lawyers admitted in North Dakota, but who do not have an office in North Dakota. Petition, p. 1. Neither of these facts are relevant to determining whether a need still exists for the 150 individuals who have pending cases related to the protests.

The relevant issue is whether a significant burden on the criminal justice system continues to exist. Given the number of remaining cases, it does. Petitioners do not deny that the system has been very effective and worthwhile. Even if some of the lawyers who have been admitted are not yet representing individuals, this only indicates that some of the remaining cases could be resolved more quickly, not that the rule is no longer needed. Logic

would indicate that the waiver should be revoked only when all or the vast majority of the cases related to the protests have been resolved. Therefore, the Court's order permitting the streamlined process should remain in place for now.

## **II. The Revocation of the Rule is Unnecessary.**

This Court's January Order is very specific; it applies only to protest-related arrests, and thus there is no need to terminate it early. The language of the Order allows for relaxed provisions for temporary admission to practice only in "criminal cases pending in the South Central Judicial District arising from arrests made during the protests of the Dakota Access Pipeline. . .". *Id.* (Emphasis Added). There is no practical reason to justify termination of the process at this point. An out-of-state attorney seeking to represent an individual defendant in the South Central Judicial District on an unrelated criminal case (i.e., DWI, domestic violence, robbery, etc.) would not be able to use the temporarily streamlined process outlined in this Order. Soon, after the cases related to pipeline protest are resolved, the Order will be moot. It is premature to terminate it at this point and would serve no purpose. The State saves on the cost of providing indigent defense to the individuals with protest-related cases and can protect itself from potential costs associated with an overburdened system.

For the above-stated reasons, the ACLU urges the North Dakota Supreme Court to reject the Petition calling for termination of the January Order and urges the Court to keep the special, temporary provisions in place until the vast majority of the protest-related cases are resolved.

Dated this 2<sup>nd</sup> day of October, 2017.

By:

AMERICAN CIVIL  
LIBERTIES UNION OF  
NORTH DAKOTA

A handwritten signature in black ink that reads "Jennifer J. Cook". The signature is written in a cursive, flowing style.

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