

Statement of the American Civil Liberties Union of North Dakota

To: Chairperson David Hogue and members of the Interim Judiciary Committee

Fr: Jennifer Cook, Policy Director, ACLU of North Dakota

Re: Voter Identification Laws

Dt: August 25, 2016

Good morning, on behalf of the ACLU of North Dakota and its members and activists statewide I want to thank Chairperson Hogue and members of the interim Judiciary Committee for the opportunity to speak with you today on the important subject of voter identification laws. I am Jennifer Cook, policy director for the American Civil Liberties Union of North Dakota. As part of our work we promote policies that encourage free, fair, and accessible elections, and those that maximize citizen enfranchisement and participation in the electoral process. Our work toward these goals has included public education, assistance and advice to state and federal policy makers on electoral legislation; and — when necessary — litigation to protect the fundamental right to vote.

The right to vote is one of America’s most sacred tenets, central to what it means to be a citizen. Expanding that franchise has run parallel to our country’s progress. Voting is a fundamental right and a cornerstone of our democracy. As the Supreme Court has said, “[n]o 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. Other rights, even the most basic, are illusory if the right to vote is undermined.”¹ But, for many, access to the polls has rarely come without a struggle.

In 2013, the Supreme Court in *Shelby County v. Holder* severely limited critical protections of the Voting Rights Act of 1965 (“VRA”). The *Shelby* decision effectively gutted the VRA by striking its Section 5, which required states with a history of discriminatory practices to seek federal permission – “preclearance” – before changing their voting laws. In fact, within hours of the *Shelby* decision, Texas announced it would implement a photo ID law that was previously challenged by the ACLU and was struck down as unconstitutional in 2012. More states would follow in Texas’ footsteps. Between 2013 and 2014, in 29 states, at least 83 restrictive voting bills were introduced. Legislation requiring voters to show photo ID at the polls was one of the most popular recent form of voting restriction considered by the states. On Election Day in 2014, there were widespread reports of voters having difficulty casting a ballot across the country due to new barriers. North Dakota was one such state and as we have heard throughout this interim committee’s study on voter registration, North Dakotans have also faced barriers at the polls due to this state’s voter ID law.

¹ *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

Voter Identification Laws

Generally, many proponents of voter ID claim that since photo IDs are required for so many common purposes, like driving a car or boarding an airplane, producing an ID for voting does not impose a great burden. Such comparisons are misplaced. Voting is not a privilege like driving or flying. Rather, it is a fundamental right guaranteed by more constitutional amendments than any other right we have as Americans. Because of the primary importance of the franchise, any law that threatens to make it more difficult to vote faces the strongest constitutional scrutiny. By contrast, actions like buying alcohol, driving, and flying are not constitutionally enshrined, and can be limited by restrictions, such as ID requirements, so long as restrictions are applied evenly and are justified by a legitimate government interest. Though the fraud that new voter ID laws supposedly redress is an illusion, massive disfranchisement of Americans through the implementation of these restrictions is a reality.

The kind of fraud that strict voter ID laws could halt—impersonation of a voter—simply does not exist to any significant degree. Voter fraud is rare and cases of voter impersonation are even more uncommon. There is no evidence of coordinated and systemic voter fraud that threatens America's elections anywhere in the country, and certainly no such evidence in North Dakota. North Dakota's strict voter ID law has not improved North Dakota's elections, but we do know that it is likely many of North Dakota's voters and eligible voters lack the kind of identification required by the law.

Studies offer confirmation that from state to state voter ID laws depress voter participation, particularly among people of color, people with disabilities, and other groups who have been historically excluded from elections. Qualified and eligible voters are prohibited from casting their ballot simply because they lack the precise ID called for under strict voter ID laws. One Brennan Center study reveals 1 in 10 eligible voters lack such an ID and would be required to navigate the administrative burdens to obtain one or forego the right to vote entirely.

Specifically in North Dakota, 23.5 percent of Native Americans and 12 percent of non-Native Americans lack a qualifying voter ID.² For a person who lacks photo ID, obtaining a new identification card can be resource-intensive. Even where there is a mechanism for the ID to be free to any and all voters who require one, as is the case in North Dakota, the cost of underlying documentation to obtain an ID is problematic and possibly prohibitive. Voters will have to travel some distance to get to an ID-issuing office in order to obtain an ID. For rural voters and North Dakota's residents who reside in households without access to a vehicle the ability to access an ID-issuing office may be difficult.

² See *Brakebill v. Jaeger*, Case No. 1:16-cv-00008 (statistical survey of North Dakota voters conducted by Matthew A. Barreto and Dr. Gabriel R. Sanchez).

In the last two years and more recently, court decisions on legal challenges to voter ID laws enacted in states like Wisconsin, Texas, North Carolina and now North Dakota have found voter ID laws violate the Constitution and the Section 2 of the Voting Rights Act of 1965.

Because of the most recent string of voting rights court decisions, I'll provide a brief overview of the relevant and ongoing voter ID law litigation in North Carolina, Wisconsin, and Texas, a comparison of the North Dakota's voter ID law to those states' with voter ID laws subject to ongoing litigation, and recommendations to this committee on the changes necessary to North Dakota's voter ID law that will alleviate the abridgement of North Dakota's voting rights.

Voting Rights: Voter ID and Relevant Federal Case Law

Wisconsin: *Frank v. Walker*, _ F.Supp. _ 2016 WL 3948068

On July 19, 2016, a federal district court ruled that Wisconsin's voter ID law violates the Constitution. The judge said voters who don't have ID must be able to vote in November by signing an affidavit declaring they're eligible.

Then, on July 29, another federal district court called the state's voting system a "wretched failure" for Black and Latino voters. Judge James Peterson found that the state had eliminated early-voting hours on nights and weekends to "suppress the reliably Democratic vote of Milwaukee's African Americans." He added, "The Wisconsin experience demonstrates that a preoccupation with mostly phantom election fraud leads to real incidents of disenfranchisement, which undermine rather than enhance confidence in elections, particularly in minority communities."

Wisconsin Voter ID law: IDs permitted for voting are driver's licenses, Wisconsin state ID cards, passports, U.S. military ID of active duty members, naturalizations papers, tribal ID, and college or university ID.

Wisconsin offers a failsafe for voters without ID. Voters may cast provisional ballots (state will count the ballot if the voter produces photo ID by the next Friday).

Texas: *Veasey v. Abbot*, _ F.3d _ 2016 WL 392868

On July 20, 2016, the Fifth Circuit Court of Appeals, perhaps the most conservative federal appeals court in the country, ruled 9-6 that the state's requirements for photo ID had a discriminatory effect on African-American and Latino voters. Voters had been required to show one of seven forms of photo ID before entering the voting booth. A gun license was acceptable, but an out of state drivers' license was not, nor was a college ID — even from the University of Texas, a state institution.

The state has now agreed to permit voters who lack ID to vote in November by signing an affidavit at the polls.

TX Voter ID law: Seven acceptable forms of ID include a Texas driver's license or personal identification card, passport, military ID, election identification certificate, a concealed handgun license, or citizenship certificate.

Texas voter ID law does not provide a failsafe for voters without ID.

North Carolina: *League of Women Voters v. State of North Carolina*, _ F.3d _ 2016 WL 4053033

In 2013, North Carolina's voter ID law was challenged in federal court. The state passed the country's most sweeping voting restrictions a month after the Supreme Court's decision in *Shelby*. On July 29, 2016, the Fourth Circuit Court of Appeals invalidated these restrictions, which it said "target African Americans with almost surgical precision."

NC Voter ID law: Acceptable forms of ID are North Carolina driver's license, a North Carolina non-operator card, a U.S. passport, U.S. military ID, veterans ID card, tribal enrollment card, a driver's license or non-driver's operator card issued by another state (only if voter's registration completed 90 days prior to the election).

North Carolina's voter ID law provides a failsafe option for voters. Voters without ID may cast a provisional ballot if the voter completes a reasonable impediment declaration.

North Dakota: *Brakebill v. Jaeger*, Case No. 1:16-cv-00008

On August 1, 2016 the federal district court for the District of North Dakota determined that North Dakota's voter ID law disproportionately impacted Native American voters and likely violated the Fourteenth Amendment of the United States Constitution.

Judge Daniel Hovland granted the plaintiffs' motion for preliminary injunction and effectively blocked North Dakota from enforcing its voter ID law "without any adequate failsafe provisions as had been previously provided to voters prior to 2013."

ND Voter ID law: ID accepted for voting are a North Dakota driver's license, a North Dakota non-driver identification card, tribal ID, or long term care certificate.

North Dakota's voter ID law does not provide a failsafe option for voters without ID.

NC, TX, WI Voter ID Laws v. ND Voter ID Law

Compared to North Dakota's voter ID law, North Carolina, Texas, and Wisconsin voter ID laws all offer more permissible ID options for voters. Where Wisconsin, Texas, and North Carolina voter ID laws provide far more acceptable ID options and even fail safe options for voters without ID (provisional ballots), North Dakota's voter ID law is substantially stricter. As you are aware, North Dakota voters may present only a North Dakota driver's license, non-driver's license, tribal ID, or long term care certificate. Unlike voters in Wisconsin or North Carolina,

voters in North Dakota without a qualifying ID are not offered a failsafe option. In fact, up until the court's recent decision in *Brakebill v. Jaeger*, an eligible ND voter without photo ID could not vote. North Dakota's voter ID law is the most strict voter ID law in the country.

Four courts have reviewed the acceptability of the burden voter ID laws place on individual voters and their legal inquiries involved fact-specific determinations, including what exceptions to the ID requirement may be available, whether the ID requirement is extended to absentee voters and how flexible or restrictive the documentary requirements are for voters. The courts have also considered how expansive the lists of acceptable documentation beyond ID are, whether there is a reasonable opportunity for voters without ID to confirm their identity with a signature match or by executing a declaration of identity under the penalty of perjury. In light of the courts' decisions, this committee should consider recommending to the legislature the following changes to North Dakota's voter ID law.

Recommendations

This legislature should:

- Pass legislation that expands the type of IDs that are permitted for voting. IDs that should be added are:
 - For proof of address and date of birth:
 - North Dakota game and fish license
 - Concealed weapons license
 - For proof of address:
 - Utility bill
 - Bank or credit card statement
 - Change of address verification from US. Postal Service
 - Paycheck
 - Lease
 - Government document that shows name and address of the voter, such as Social Security benefits award letter or a letter from a state or local government office
 - For proof of date of birth:
 - U.S. military ID
 - Birth certificate
 - U.S. passport
 - Medicaid card
- Pass legislation that provides fail safe options for voters without photo ID. Our recommendation for a voter failsafe option follows the recommendation made by North Dakota's federal district court in *Brakebill v. Jaeger*. The court in *Brakebill* recommended the state reinstate the voter affidavit system as used in North Dakota

elections prior to the enactment of North Dakota's stringent voter ID law. In addition, poll workers' ability to vouch for voters should be reinstated as a failsafe option.

I thank you again for your time this morning and urge this committee and the 65th Legislature to amend North Dakota's voter ID law to provide greater access to the ballot box for thousands of North Dakotans. The bottom line is voting is a fundamental right that is at the heart of our democratic process, not a privilege that only some should have. Any law that creates the potential for thousands of voters to be turned away from the polls on Election Day should be rejected, no matter what small perceived benefit it may have.