Exhibit 9

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Richard Brakebill, Deloris Baker, Dorothy Herman, Della Merrick, Elvis Norquay, Ray Norquay, and Lucille Vivier, on behalf of themselves, Plaintiffs, vs. Alvin Jaeger, in his official capacity as the North Dakota Secretary of State, Defendants.	Civil No. 1:16-cv-8

Addendum to Declaration of Daniel McCool, Ph.D.

I, Daniel McCool, Ph.D., declare as follows:

I am a professor of Political Science at the University of Utah. I have personal knowledge of the facts set forth in this addendum and could and would competently testify to those facts if asked to do so.

I. Introduction

This report is an addendum to the Declaration I filed in *Brakebill v. Jaeger* on June 20, 2016. That report focused on the impact of two voter ID laws passed by North Dakota: HB 1332 in 2013, and HB 1333 in 2015. After my report was submitted, the state of North Dakota passed another voter ID bill, HB 1369, in 2017. That law created additional changes in the requirements for identification in order to cast a ballot. Thus, this report is an update that covers the new law and

additional developments that have occurred in the state since my last report was filed.

II. The Research Question and Methodology

The essential question regarding HB 1369 is whether it has a differential and discriminatory impact on American Indian voters in North Dakota. In my previous Declaration, I relied upon three sources to guide my analysis: The "Jingles factors," the "Senate factors," and the "Arlington Heights factors" (pp. 3-4). I have broadly used them again for this analysis, but in abbreviated form. And again I will employ the standard techniques of qualitative analysis that I described in my first Declaration (4-6).

III. Six Factors that Answer the Research Question

In reviewing the available evidence from the past year, there are six factors that were obviously a significant part of the socio-political milieu that surrounded the passage of HB 1369:

1. Voting Related Discrimination/Discriminatory Voting Practices
2. The Effects of Discrimination/Racial Hostility
3. Departure from Normal Practice
4. The Tenuousness of the Policy
5. Bloc Voting/Racially Polarized Elections
6. Sequence of Events/Impact

1. Voting Related Discrimination/Discriminatory Voting Practices:

HB 1369 made several fundamental changes in the voter ID law. First, it continued the requirement that all voters have a state-recognized ID, but if the voter's ID did not have a street address, they could supplement it with five alternative documents. Second, it abandoned the requirement established by this Court for a "fail-safe" affidavit option for those who did not have an approved ID. And third, it allowed a voter who arrived at the polls without an approved ID to cast a provisional ballot which is then set aside until that individual returns with a valid ID, either to the poll or to an election administrator prior to the meeting of the canvassing board.

The previous two voter ID laws clearly had a discriminatory impact; that was established by my report and the Barreto/Sanchez report, and the holding of this Court. The sponsors of the new voter ID bill claimed they passed 1369 in response to this Court's decision and in recognition that a significant portion of American Indians did not have the requisite ID. The Deputy Secretary of State made this point in a letter: "This portion of the bill [the new ID requirements] is valuable to the Native Americans of our state since it will make all tribal ID cards valid when supplemented" (Silrum to Kasper 27 Jan. 2017). The problem with the previous law was that it required a street address on the ID for it to be valid for the purpose of voting. But, as even the state recognizes now, many tribal IDs do not have a street address; they have a PO Box or a non-residential address.

The "solution" to this problem as presented by HB 1369 was to allow five types of supplementary ID to be used to verify an ID without a street address, which thus "provide the missing or outdated information" (Sec. 2,3b, HB 1369). In other words, a street address must appear on one of the following: a current utility bill, a current bank statement, a check from a government entity, a paycheck, or a document issued by a government. The glaring problem with this "solution" is that for many tribal members all of these types of supplemental IDs may also have only a PO Box or non-residential address. The only difference between the old law and the new law is that the former law—the one that violated the Constitution—required the street address on the tribal ID, and the new voter ID law requires the street address on a supplemental ID (North Dakota Memorandum 2018: 10).

Many areas of reservations simply lack street addresses; in some areas the streets do not even have names. Russ McDonald, the President of United Tribes Technical College, explained that on his reservation (Spirit Lake), in many places there are no street addresses, no names on the roads, and the only way to navigate is to "know the land" (McDonald 5 Feb. 2018). Nancy Greene-Robertson, the former Secretary-Treasurer of the Spirit Lake Tribe, confirmed this: "It's huge that people don't have a street address; I can't even get a package here. There's no street signs, no numbers on houses unless it's a housing unit" (Greene-Robertson 5 Feb. 2018). Two members of the Turtle Mt. Band of Chippewas explained to me that, until recently, the BIA issued tribal IDs at Turtle Mountain, and virtually none of them had street addresses (C. Davis and L. Davis 2018).

Furthermore, the PO Box may be in a different location than the actual residence of the voter; it may even be in a different precinct. If a Native American voter does not have a street address, then all forms of the "supplemental ID" listed in the new law would also not have a street address. Given the heavy emphasis on requiring a street address (the phrase "residential address" or some variation thereof appears in the new legislation five times), tribal members who have a PO box rather than a street address would be turned away despite being eligible to vote.

Deputy Secretary of State Silrum, during the development of HB 1369, again emphasized the importance of having a street address: "Time and time again it has been pointed out to us that not all tribal IDs have a residential address on them. They have mailing addresses instead and we have always said that people don't reside in PO boxes. This means that a native [sic] American would be able to use their tribal ID and supplement it with another document" (Silrum to Montplaisir 18 Jan. 2017). Thus, the street address must appear on the "supplemental" form of ID; otherwise it would not solve the problem Mr. Silrum perceives with people using PO Boxes. He alludes to this in another email: "the bill offers legitimate options for voters to supplement their ID if it is out-of-date or to provide any missing requirements as is the case with some tribal IDs that only have a mailing address as opposed to a residential address" [emphasis mine] (Silrum to Jackson 13 Jan 2017).

His strong conviction that a street address is essential for all forms of voter ID is evident in his comments regarding other forms of ID. For a military ID, "they need something that shows their address here—the passport and military ID normally

would not." As for absentee ballot applications, a military ID should "include both their residential address and mailing address." When that ID is processed, that residential address must be matched with the one on record (Silrum to Montplaisir Jan. 18 2017). Two weeks later Mr. Silrum again expressed his strong belief that a residential address, and not a PO Box, must be a prerequisite to the right to vote: "And, in a rural state like ND, many people have mailing addresses that do not reflect their residential address. It is entirely possible for anyone to have a mailing address in a different county from the one in which they reside" (Silrum to von Spakovsky and Palmer 3 Feb. 2017). Clearly, Mr. Silrum expects each individual to have a residential address under the new law—a clear disadvantage to many Native Americans living on reservations.

This requirement in the new ID law—that a street address is required for every voter—was reiterated by the Director of the Driver's License Division in an email to Mr. Silrum: "Section 2 [of HB 1369]—requiring validation of a residential address….this appears to imply that a validation process of a residential address for all citizens through documentary evidence is required, but it is directed at the voting citizen and not the department [The ND Department of Transportation] to validate such address" [emphasis mine] (Jackson to Silrum 17 Jan. 2017).

The lack of a street address has a disproportionate impact on Native Americans because they are more likely to not have an address. The 2016 Barreto/Sanchez report found that 21.6 percent of Native Americans in their sample do not have two documents that have a street address (p. 3, 21), and they are twice as likely to lack a valid ID as Anglos (19). They estimated that 7,984 Native

Americans in North Dakota do not have a qualifying ID (i.e. an ID with a street address) (19). Obviously some of these individuals lack such an ID because they do not have a street address. Thus, the "supplemental ID" option in the new ID law does not solve the problem faced by so many Native people under the prior voter ID laws.

The second reform in HB 1369 was to allow someone who shows up at the polls without a valid ID to go home, find a valid ID, and then show it to a poll worker or an election administrator. But this option suffers from the same liability; if an individual does not have a street address, they cannot go home and produce a valid form of ID or supplemental form of ID; they still cannot meet the dictates of the law, even though they are eligible to vote. The only alternative for such individuals is to exercise the "fail-safe" affidavit option, but that was eliminated by HB 1369.

It is also evident that the state did not expect, or desire, that this option would actually be useful to a significant number of voters. The Deputy Secretary of State wrote to a county clerk and assured him that he did not expect this option would be of much use to voters: "As for the set-aside ballots, I hope the fact that many individuals who cast them will not likely come into your office later to verify their qualifications will put some of the fears to rest about long lines outside of your office in the six days after the election" (Silrum to Montplaisir 18 Jan. 2017). In another email exchange, Mr. Silrum again makes the point that he does not expect this option to be utilized by many voters: "My colleagues [other state SOSs] say that since these voters don't return to verify their registration status, the cost for a ballot and an envelope is a small price to pay to remove the conflict from the polling place" (Silrum to Montplaisir 18 Jan. 2017).

Of course, this entire discussion is based on the assumption that every Native American voter has a tribal ID—with or without a residential address, and can supplement it if necessary. None of the new options are available without a tribal ID or some other form of ID. In my last report, I detailed the difficulties Native Americans face when they attempt to obtain a state ID. But it is important to note that not all tribal members have a tribal ID. In an interview, Russ McDonald, the President of United Tribes Technical College, made that point: "There are tribal members who have no form of ID, including a tribal ID. I was one of them at one time. I just didn't have the need for one" (McDonald 5 Feb. 2018). His claim was corroborated by the former Secretary-Treasurer of the tribe: "Yes, people do not have any kind of ID, even a tribal ID. No ID at all, and it's a big number" (Greene-Robertson 5 Feb. 2018). On the Turtle Mountain Reservation, two tribal members explained to me that the tribal ID, which costs $10, expires after three years. Many members do not re-new their ID, given the expense and the need to renew so often (C. Davis and L. Davis 9 Feb. 2018).

In sum, the new voter ID law has precisely the same set of liabilities as the previous ID law. Native Americans without an ID, or without a residential street address, will be turned away at the polls, even though they are eligible to vote.

2. The Effects of Discrimination/Racial Hostility:

To say that the relationship between the Indian community and the Anglo community in North Dakota is currently strained would be a significant understatement. The voter ID bill, and the bitter conflict over the Dakota Access Pipeline (DAPL), combined with the long history of discrimination I documented in

my previous report, have created an atmosphere of tension and racial polarization—precisely the situation described in both the Senate and Jingles factors.

This hostility was expressed in the state legislature by several bills that were interpreted by some as "anti-Indian" or punitive legislation. As one legislator put it, "these bills are really coming at us really out of anger" (Representative Vetter 6 Feb. 2017: 1). Several of the bills were aimed at the DAPL protesters. Strong language was used on the floor of the House to describe them: "riots" and "ecoterrorism" (Representative Porter 6 Feb. 2017); "thugs" and "ecoterrorists" (Representative R. C. Becker 6 Feb. 2017); "If we want to protect our society and continue to have a free country, we better get these protesters taken care of" (Representative R. S. Becker 6 Feb. 2017). My point is not to agree or disagree with these characterizations, but to point out just how hostile and polarized the situation in North Dakota was in 2017—the year that HB 1369 was passed.

The following eight bills were a direct response to the DAPL protests:

- HB 1193 would make it a felony to cause economic harm while committing disorderly conduct. It did not pass.
- HB 1383 would criminalize loitering; "An individual may not loiter and prowl in a place at a time or in an unusual manner that warrants justifiable or reasonable alarm or immediate concern for the safety of other individuals or property in the vicinity." It did not pass.

- HB 1426 increased the penalties for riot offenses for riots that involve 100 or more people. This bill passed both houses by wide margins and became law.
- HB 1281 requested that the federal government return lands and mineral rights under Lake Oahe to cover "the costs borne by the state to ensure public safety in relation to protests against the placement of an oil pipeline under the Missouri River." It did not become law.
- HB 1203 was aimed at protesters who blocked traffic, and held: "Notwithstanding any other provision of law, a driver of a motor vehicle who, while exercising reasonable care, causes injury or death to an individual who is intentionally obstructing vehicular traffic on a public road, street, or highway may not be held liable for any damages." This bill did not become law.
- HB 1332 (not the same bill as the first voter ID bill) provided that anyone convicted of trespass had to pay an additional $1,000 to the county sheriff. It did not pass.
- HB 1304 made it illegal to wear a mask on public property. This bill was introduced by Representative Carlson—the same legislator who introduced HB 1369. It became law after passing both the House and Senate by wide margins.
- HB 1293 increased penalties for trespassing. It passed.

- SB 2246 made it unlawful not to vacate an area, even on public property, if ordered to do so by police; the fine was set at $5,000. This bill did not pass.

This raft of bills provoked strong reactions on both sides. The legislator who introduced the bill to waive liability for someone running over a protester in the road saw it this way: "...what we are dealing with was terrorism out there" (Wootson 17 Jan. 2017). Ladonna Brave Bull Allard, a protester and member of the Standing Rock Sioux Tribe, had a different view: "I have never seen so many people frightened in all my life. My recommendation for the legislature would be to pray harder. I think people are living on rumor and gossip more than they do the truth" (Wootson 17 Jan. 2017). Nancy Greene-Robertson described the tension this way: "It's not peaceful. There's a lot of rebuilding that needs to take place" (Greene-Robertson 5 Feb. 2018). Carol Davis at the Turtle Mountain Reservation also made reference to the high level of hostility: "The people who are in leadership don't have a good attitude toward tribal members" (C. Davis 2018).

These bills were a direct response to the DAPL protests, which were clearly polarizing and confrontational. But another bill appeared to be aimed squarely at Native American tribes in the state. HB 3033 proposed to build six state-regulated private casinos; this was a transparent bid to run Indian casinos out of business (MacPherson 2 Mar. 2017). This bill was introduced by Representative Carlson—the same legislator who sponsored the voter ID bill. Tribal leaders considered it "retaliatory" (McDonald 5 Feb. 2018). One of the legislators who considered this bill in committee noted "...there were concerns among the committee members that the

introduction of the resolution has the appearance of being a response to the recent issues being faced by the state with regard to the protest" (Roer Jones, Representative 23 Mar. 2017). One of the few Native American legislators, Senator Richard Marcellais, had a much more adamant response to Representative Carlson's casino bill: "It's racist. I feel like going over there and knocking him through the window" (MacPherson 2 Mar. 2017).

The intensity and depth of the racial polarization that is evident in this legislative activity was summarized by Senator Dever: "I think that... there have been damages done to the relationships between our general population and the population south of here through recent events. But it needs to be made clear that that is a two-sided thing. That we're going to have to work together to repair some of those things that have come together over the last 30, 40, 50 years to the positive and now have been challenged" (Dever 14 Feb. 2017).

It was within this atmosphere of heightened racial tensions that HB 1369 was introduced. The bill that was largely written by Mr. Silrum was assigned to the House Government and Veterans Affairs Committee. The chair of that committee, Representative Jim Kasper, sent out an email to select colleagues informing them of the hearing date and then wrote in all capitals: "I WANT A HUGE CROWD OF ELECTION OFFICIALS AND DISTRICT CHAIRS THERE TO TESTIFY" (Kasper to legislators 16 Jan. 2017). Knowing that this bill would be of enormous interest to tribes, and was a response to the lawsuit filed by tribal members, I cannot determine if he also invited them to be a part of the "huge crowd."

3. Departure from Normal Practice:

HB 1369 was essentially "ghost" written by the Deputy Secretary of State: "HB 1369 ... is a bill I wrote" (Silrum to von Spakovsky and Palmer 3 Feb. 2017). He then wrote to certain legislators and asked them to introduce it as though it originated with them. He alludes to this unusual departure from normal practice: "We think it is best that election officials would not be the ones to request this amendment because it should be a good change for all reasons and not just for voting purposes. If election officials were to propose this amendment, it would be in the legislative history and would be another reason the SOS [Secretary of State] could have another lawsuit brought against us" (Silrum to Montplaisir 18 Jan. 2017). In an email to a select group of legislators, the Deputy Secretary of State suggested which legislators he would like to introduce the legislation and then urged all the recipient legislators to sign on to the bill. Interestingly, the subject line of the email is: "Potential Legislative Response to the Voter ID Lawsuit—Attempt to Avoid a Trial" (Silrum to legislators 4 Jan. 2017). In that email, he suggested that the bill be introduced by "Rep. Al Carlson or Senator Rich Warder [sic]," both of whom were among the recipients. He got his wish; both men became prime sponsors.

In another example of departure from normal practice, the Deputy Secretary of State, in an email to legislators, noted that "I know that I have never worked on a bill that has gotten to version 5 before its introduction" (Silrum to Kasper and Louser 13 Jan. 2017).

A final departure from normal practice is the passage of three different voter ID laws in the space of just four years. This makes it difficult for anyone to

understand the latest requirements to vote in North Dakota. A county auditor lamented how the constant changes have taken a toll on election workers: "Every election they [election workers] have new things to learn. The hardest part of elections today is finding, training, and retaining election workers. And this [HB 1369] will add to the duties, responsibilities and will make it more difficult to find election workers" (quoted in Hageman 27 Jan. 2017).

4. The Tenuousness of the Policy

HB 1369 eliminated the affidavit option because of alleged voter fraud during the 2016 elections. A record number of people—16,215--chose to rely on affidavits in that election (Silrum Affidavit 2018: 8). That was up from 10,519 in 2012 (no one used it in 2014 because it had been eliminated) (SOS000700). The increase in affidavits may be explained by the implementation of the strict ID laws, although that cannot be confirmed without a thorough analysis. Of the 16,215 voters who filed affidavits in 2016, there were some that resulted in claims that voter fraud occurred—hence the name of the new voter ID law as the "Voter Integrity Act." But a close analysis of the affidavits indicates that North Dakota, which has long been known as a state free of voter fraud, continues to be virtually fraud-free.

A total of 349,945 people voted in the 2016 election in North Dakota. Of those, the Assistant Attorney General initially indicated that they might have four (she was not actually sure) potential cases of voter fraud (Fischer to Jaeger 26 Jan. 2017). However, nearly three months after the election she admitted that no one had even been referred for prosecution, much less convicted (Fischer to Jaeger 26

Jan. 2017). The state was acutely aware that claims of voter fraud had important implications for this lawsuit. The Deputy Secretary of State noted that "the answer we give to this letter could ultimately be used by the attorneys for the plaintiffs in our pending lawsuit" (Silrum to Jaeger, Arnold, Fischer 25 Jan. 2017). "The letter" to which he refers is the state's claim that voting fraud might have occurred. Thus, he carefully crafted language that stressed that "No cases of voter fraud have been prosecuted to this point because the counties are still conducting their investigations" (Id.). Then, in an artfully balanced sentence, he tried to keep alive the idea that voter fraud may be a problem "We are therefore unwilling to say that voter fraud did occur to the same degree we would say that it did not occur" (Id.). That was over a year ago. By last summer, the state had apparently identified two possible cases of double-voting; one was due to some confusion by a man with both medical and legal problems, and the other by a man who possibly voted in two states (Schramm 11 Sept. 2017; Hageman). Also, a case from 2014 involved a father who had helped his 18-year old daughter, who was a college student, cast an absentee ballot, but then she also voted where she attended college (Schramm 11 Sept. 2017).

The most recent statement by the Secretary of State's office on alleged voter fraud was made by Mr. Silrum in his 2018 affidavit: "Prior to 2016, the SOS is not aware of any convictions for voter fraud being obtained in North Dakota" (Silrum 2018: 5). For the 2016 election, Mr. Silrum found three possible cases of double-voting (Silrum Affidavit 2018: 16). These are the cases alluded to earlier; two possible cases involved men who voted in two states, a man who voted in two

counties but was given neuropsychological testing rather than a prison sentence (Silrum Affidavit 2018: 16). It does not appear to me that any of these three cases involved the fraudulent use of affidavits.

Rather than admit that voter fraud simply isn't occurring, Mr. Silrum instead claimed that state attorneys don't pursue vote fraud cases because they have "cases of greater consequences upon which to focus" (Silrum 2018: 4). Thus, "voter fraud" is not sufficiently important to pursue convictions, but is sufficiently important that the state has passed three voter ID bills in the last four years. Also it does not appear that any of the three possible cases of fraud involved affidavits. Thus, the rationale for passing HB 1369 is based on a slight possibility that some people who used the affidavit process were not legally entitled to vote in North Dakota, but there is no evidence to substantiate that claim.

The highly speculative nature of the state's voter fraud claims is evident in the language of Mr. Silrum's 2018 Affidavit in this case: "There were concerns about the validity" (p. 4); "The SOS cannot confirm" (p. 4); "it is still unknown" (p. 4); "nine suspected cases" (p. 5); "Questions remain" (p. 14): "Questions also remain" (p. 14); "investigations are still ongoing" (p. 15); "one probable case" (p. 16); "This raises suspicion" (p. 17); "raises questions" (p. 18). Similar conditional and unsubstantiated language is also found in the State's 2018 Memorandum in this case:

- "In response to concerns that the validity of an extremely close 2012 United States Senate race could not be verified… [the state passed its first voter ID law]" (p. 7).
- "A special interest group … could cast fraudulent votes…" (p. 7).

- "The practice of using self-authenticating Voter's Affidavits has been a potential problem…" (p. 12).
- "…purposeful fraud was likely required…" (p. 13).
- "[Goldwater's] belief that voter fraud…" (p. 14).
- "…an election some believe was impacted by voter fraud…" (p. 14).
- "…leaving open the possibility that some of them…" (p. 15).
- "…the continued use of this 'fail-safe' raises the possibility…" (p. 16).
- "North Dakota's small population, coupled with the use of self-authenticating Voter's Affidavits, make it a potential target…" (p. 16).
- "Because of the unanswered questions raised about the qualifications of the voters…" (p. 17).
- "…fraud could be happening…" (p. 18).
- "…the State identified at least nine suspected cases of fraudulent votes…" (p. 19)

[all italic emphases are mine]

This is not the language of evidentiary documentation, but rather an expression of suspicion of what might have occurred if a whole series of assumptions turn out to be true if they are ever verified. The focus in these documents is on raising questions, not answering them.

To be sure, there are legitimate questions about a small percentage of the affidavits. According to Mr. Silrum, 3,719 of them could not be verified (Silrum Affidavit 2018: 12), but he presents no evidence that any of them were actually cast by people who were not eligible to vote. Lack of verification means that a lot of people didn't bother to return the post card sent to them after the election—postcards that had a virtually impossible deadline of six days after the election (Silrum Affidavit 2018: 9).

There were also claims that 86 affidavits had a Minnesota address (Hageman 3 Feb. 2017). The state simply assumed these were all cases of voter fraud with a pernicious design to throw the election. But there are several explanations for the "Minnesota ballots." They could have been filed by students who kept their

residence in North Dakota but temporarily live on a college campus in Minnesota (a lot of North Dakotans attend school in Minnesota). As long as these students don't vote in Minnesota and their permanent residence remains in North Dakota, then it appears to me that they would not be violating the law. Also, some times people make honest mistakes, such as the case alluded to above when the father helped his 18-year old college-student daughter vote for the first time, unaware that she also voted in-person (Schramm 11 Sept. 2017). That hardly sounds like a conscious criminal act with a view to destroying the integrity of the electoral process. And some times the state makes mistakes. Amid claims that seven "non-citizens" committed fraud by voting, the state discovered that six of the seven were actually naturalized citizens and entitled to vote, and the seventh person could not be found (Schramm 11 Sept. 2017; Silrum Affidavit 2018: 17).

The rationale for passing HB 1369 rests on the assumption that the 86 ballots with Minnesota addresses were a result of individuals consciously breaking the law and committing a serious crime (now a felony) in the hope that somehow their vote might swing a race to their favored candidate. That begs the question; if an individual was intent on committing the crime of voter fraud, it would be foolish to use an out-of-state address—a dead giveaway that something is askew. That is a bit like casing a neighborhood with the word "Burglar" painted on your back.

However, let us assume that all 86 affidavits were indeed illegal votes from out-of-staters who were not just making a clerical error but were consciously violating the law; that would mean that 0.02 percent of the votes cast in the 2016 election in North Dakota were fraudulent. Whether that is a sufficient rationale to

throw out a voting option—the affidavit—that allowed 16,215 to exercise the fundamental right to vote is a question that goes directly to the issue of vote denial.

5. Bloc Voting/Racially Polarized Elections:

Another potential driver of the new voter ID law may be partisan advantage. The effort to implement one of the strictest voter ID laws in the country began after Heidi Heitkamp narrowly defeated Rick Berg for the U. S. Senate in 2012 (the first ID bill was enacted the following year). There is considerable evidence that such laws have a partisan rationale and are part of an effort by legislators of one party to suppress voters of another party (See pp. 23-28 of my first report). The margin of Heitkamp's victory was exceedingly slim, and could be attributed to her strong showing in predominantly Native precincts (Barreto/Sanchez Report: 25; Lone Chief 2012; Raven 2012; Blades 2012; Trahant 2012). Thus, there was a clear partisan motivation—and advantage—for the legislature to enact a voter ID law that would prevent some Native Americans from voting.

There is also evidence of partisan bias that drove the effort to pass HB 1369. Todd Fuchs, District 13 Republican co-chair, emailed certain legislators and demanded that something be done to eliminate the affidavit process that was so popular in the 2016 election: "Just a quick note to find out where we are in the process of fixing the train wreck that was the last election in regards to the over 8,000 affidavits. We work too hard and spend far too much money to have our votes stolen by people who are not eligible to vote in ND nor the District. Are we going to lose our District 45/27/13 Republicans as well the next time? (Fuchs to legislators 16 Jan. 2016).

6. Sequence of Events/Impact:

In 2016, a record number of people relied upon the affidavit process to exercise their right to vote. A lot of those people were Native American. In three counties with large Native American population, the affidavit was used extensively:

Benson County (55% Native) filed 47 affidavits; Rolette County (77% Native) filed 209; and Sioux County (84% Native) filed 134 affidavits. Mountrail County also has a sizeable population of Native Americans; 342 people in that county relied on affidavits to vote. These are counties with fairly small populations, so those numbers indicate a significant percentage of the voters. We do not know how many total Native Americans used the affidavit in 2016. However, Mr. Silrum indicated that 37 percent of the affiants had no record of an ID with state Department of Transportation (Affidavit 2018: 12). The reports filed in this case earlier by myself and Professors Barrett and Sanchez established that Native Americans are more likely not to possess a state ID. So, the large number of people filing affidavits without a state ID could be an indicator that it was used by a significant number of Native Americans who have a tribal ID or no ID of any form.

Without the affidavit option, these people would have been denied the right to vote. For Native Americans without a street address, their only hope to continue voting is to exercise the one option that the state of North Dakota has taken away from them. In North Dakota, this "most fundamental right," the right from which all other rights are derivative, is dependent on the kind of street you live on and whether there is a four-digit number tacked to the front of your house.

Another impact of the new voter ID law is directly tied to who wins elections. Mr. Silrum notes in his affidavit that several elections in North Dakota have been won by narrow margins (Affidavit 2018: 13-14). He used the 2012 election of Senator Heitkamp as an example; she won by only 2,936 votes (2018: 4). He then asserts that 97 percent of the voters in that election had a verified state ID. That means that 3 percent did not, which was 9,775 voters. In other words, people without state IDs were sufficiently numerous to change the results of elections. Thus, excluding those people from elections also changes the results of elections.

Another consideration regarding the impact of the new ID law is that it is least needed on an Indian reservation where nearly everyone knows everyone else. Voter ID laws only prevent one kind of fraud, usually referred to as voter impersonation or in-person voter fraud. That particular type of voter fraud is exceedingly rare regardless of the jurisdiction; a 2014 study by the Government Accountability Office reviewed the existing literature on alleged voter impersonation and concluded: "The studies we reviewed identified few instances of in-person voter fraud" (GAO 2014: 64).

It would be exceedingly difficult to pretend to be someone you are not when the poll officials are people you have known all your life. Carol Davis, of Turtle Mountain, explained that on her reservation, "everybody knows everybody. We have two precincts, and we have about 8 or 9 local people who work the polls; they know everybody. If someone was trying to vote illegally, they would not get to vote" (C. Davis 9 Feb. 2018). I note that Mrs. Davis tried to vote in the 2015 school board election. She arrived at the poll just before it closed, and realized she had forgotten

her purse. The poll worker was her niece; they both grew up on the reservation and knew each other since childhood. But her niece informed Mrs. Davis that she could not vote because she did not have an ID, and there was insufficient time for her to drive back to her house and retrieve her ID. She did not vote, even though she was eligible. The new voter ID law would not have helped her; she lacked an ID and the "supplemental forms" of ID.

And finally, the impact of the voter ID law directly relates to the social and economic status of Native Americans. In 2016, the punishment for illegally filing an affidavit was a maximum of one year in prison and a fine of $3,000 (Silrum Affidavit 2018: 8). It is likely that the poorest people in the state—and the most over-represented in the prison population—would be very reluctant to risk such a punishment. With the new voter ID law, fraud is now a felony—even more reason for Native Americans to studiously avoid voter fraud.

IV. Conclusion

The foundational rationale for HB 1369 is that the elimination of the affidavit option was necessary to prevent voter fraud—fraud that allegedly "tainted" the 2016 elections (North Dakota Memorandum 2018: 9). But, there is no evidence that voter fraud is a problem beyond a very few isolated cases, and no direct evidence that any of the affidavits filed in 2016 were cast by people who were ineligible to vote. There is simply a presumption that affidavits lead to fraud. For example, Mr. Silrum, in his 2018 affidavit, claims that the low rate of voter fraud (a single case) in 2014 "was partly due to the removal of the Voter's Affidavit as a form of voter ID" (2018: 6). But a near-total absence of voter fraud in North Dakota has

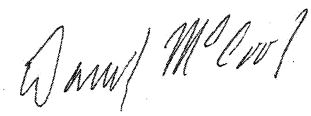
been the norm since statehood; there was no decrease in 2014--a trend line with virtually zero variation. So it is impossible to attribute the absence of voter fraud in 2014 to abolishing affidavits. Also, none of the handful of fraud cases that occurred in recent years involved affidavits. In short, HB 1369 is a law based on a highly presumptuous conditional possibility, suspected to be true by a group of legislators with a vested interest in making assumptions in the absence of data.

Under the previous voter ID bill, there was a catch; the tribal ID was useless if it did not have a street address. Under the new law, the catch is still there, it was just moved to a new location in the voting law. Without an affidavit, the catch is absolute; there is no way for an eligible voter to meet the dictates of the new law if they do not have a street address or some form of ID. That simple fact denies the right to vote to a significant number of Native Americans. Mr. Silrum, in his Affidavit, concluded that "each vote is important" (2018: 18). That is true, even for tribal members who do not have an ID, or who have a tribal ID but no street address.

In my previous expert witness report in this case I came to the conclusion that "voter ID requirements have placed an especially difficult burden on American Indian people living in North Dakota" (p. 54). HB 1369 did not solve that problem. The same set of limitations I described in the previous report—the poverty, lack of computer access, unfamiliarity with administrative processes, distance from government offices, poor transportation, etc.—all still operate to disadvantage Native Americans in the political process. Establishing a state voter ID requirement dependent on having a street address and an ID, without the option of an affidavit, deprives some tribal members of an opportunity to vote.

Executed at Ogden, Utah, on Feb. 10, 2018.

I declare under penalty of perjury that the foregoing is true and correct.



Dr. Daniel McCool

SOURCES

Becker, R. C. 6 Feb. 2017. House Floor Session, HB 1193.

Becker, R. S. 6 Feb. 2017. House Floor Session, HB 1193.

Blades, Meteor. 8 Nov. 2012. "American Indian Voters and Indian Organizers Gave N.D. Senate Edge to Democrat Heidi Heitkamp." Dailykos.com.

Davis, Carol. 9 Feb. 2018. Telephone interview.

Davis, Lynn. 9 Feb. 2018. Telephone interview.

Fischer, Elizabeth, Assistant Attorney General, to Al Jaeger, Secretary of State. 26 Jan. 2017.

Fuchs, Todd, to legislators. 16 Jan. 2016.

Government Accountability Office. 2014. "Elections: Issues Related to State Voter Identification Laws." GAO 14-634. Sept.

Greene-Robertson, Nancy. 5 Feb. 2018. Telephone interview.

Hageman, John. 27 Jan. 2017. "Voter ID Again Comes Before North Dakota State Legislature." *Grand Forks Herald*.

_____. 3 Feb. 2017. "Voter ID Bill Easily Passes in North Dakota House." *Grand Forks Herald*.

_____. 7. Sept. 2017. "North Dakota Unable to Provide Voter Info to Election Commission." *Bismarck Tribune*.

Jackson, Glenn, Director, Driver's License Division, to Jim Silrum, Deputy Secretary of State. 17 Jan. 2017.

Jones, Roers, Representative. 6 Feb. 2017. House Floor Session, HB 1383.
_____. 23 Mar. 2017. House Floor Session, HB 1203.

Kasper, Jim, to legislators. 16 Jan. 2017.

Lone Chief, Vonnie. 2012. "How the Indian Vote Boosted Heidi Heitkamp." Indianz.com.

MacPherson, James. "North Dakota Casino Proposal Risks Angering Tribes." AP.

McDonald, Russ. 5 Feb. 2018. Telephone interview.

North Dakota Department of Transportation, A. "Real ID Information." https://www.dot.nd.gov/divisions/driverslicense/real-id-information.htm

North Dakota Department of Transportation, B. "Required Documentation Information." https://www.dot.nd.gov/divisions/driverslicense/real-

idinformation.htm#requireddocinfo

North Dakota Memorandum. 16 Jan. 2018. "Memorandum in Support of Motion to Dissolve Preliminary Injunction."

Porter, Representative. 6 Feb. 2017. House Floor Session, HB 1193.

Raven, Scarlet. 7 Nov. 2012. "Senator Elect Heitkamp Owes Debt of Gratitude to Native American Voters in North Dakota." Dailykos.com.

Silrum, Jim, Deputy Secretary of State, to legislators. 4 Jan. 2017.

Silrum to Jim Kasper and Scott Louser. 13 Jan. 2017.

Silrum to Glenn Jackson, Director, Driver's License Divsion. 13 Jan. 2017.

Silrum to Michael Montplaisir, Cass County Auditor. 18 Jan. 2017.

Silrum to Jaeger, Arnold, Fischer. 25 Jan. 2017.

Silrum to Hans von Spakovsky and Don Palmer. 3 Feb. 2017.

Silrum, Irwin James. 11 Jan. 2018. "Affidavit of Irwin James Narum (Jim) Silrum." Case No. 1:16-cv-00008.

Trahant, Mark. 9 Nov. 2012. "Elections 2012: Look at the Numbers and Indian Country Outperformed." *Indian Country Today*.

Vetter, Representative. 6 Feb. 2017. House Floor Session, HB 1193.

Wootson, Cleve. 17 Jan. 2017. "How a Mother-in-Law Inspired a Bill to Protect Drivers who Accidently Run Over Protesters." *The Washington Post*.