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Date: September 17, 2015

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

Fr: Jim Silrum, Deputy Secretary of State, on behalf of Secretary of State Al Jaeger

Re: Voter Registration Study

Today I will be discussing with you the subject of voter registration. This will be covered four parts:

1. A brief history of voter registration legislation in North Dakota
2. A synopsis of types of registration used in other states
3. The requirements of the National Voter Registration Act (NVRA)
4. Residency

**A Brief History of Voter Registration Legislation in North Dakota**

Until it was repealed during the 1951 Legislative Assembly, North Dakota had a form of voter registration that required local officials in cities with a population greater than 1,000 to create a list of registered voters two weeks prior to an election. That roster was available for public review for one week followed by a meeting at which eligible voters who believed they should be included on the roster or knew of people on the roster who should not be included could make a case to the board. Additionally, any eligible voter left off the roster who appeared at the polls was allowed to vote by signing an affidavit. Furthermore, this registration only applied to the General Election and not the Primary.

In 1951, SB 61, which repealed voter registration, came from the interim committee (it appears that there was only one interim committee). The committee stated that registration was "...cumbersome and of limited effect..." and according to a Legislative Council report, "Apparently, the study committee felt there was so little merit to continuing registration that no serious consideration was given the idea of including the primary elections in the registration system." The repeal passed with a unanimous vote in the Senate and only received five dissenting votes in the House.

Since the repeal of voter registration, there have been a few notable efforts to re-establish it. The first and closest successful effort was HB 1101, which was passed by the 1975 Legislative Assembly and subsequently vetoed by Governor Link. From our reading of the legislative history for HB 1101, it appears the bill resulted from concerns of fraud that were raised by the use of affidavits for voter verification following the statewide recount of the US Senate contest in the 1974 General Election.

The legislative history for SB 2522 from the 1987 Legislative Assembly shows the bill was introduced due to concerns over the use of affidavits for voter verification, frustration of urban poll workers being placed in a position of determining residency, and a situation that arose from voters in an area of Minot that

had recently been annexed by the city. The annexed area was in a different legislative district, but the city provided the poll workers with a map that indicated that that area had changed legislative districts as a result of the annexation. The bill failed to pass in the Senate on a vote of 24-27.

In 1991, SB 2413 was introduced by one of the same sponsors of SB 2522 in 1987 and surfaced out of concern for poll workers being required to challenge an individual's eligibility to vote, the signing of affidavits by voters who had been challenged, and the difficulty poll workers experienced in determining residency under the law. The bill failed to pass in the Senate on a vote of 18-30.

During the 1999 Legislative Assembly, SCR 4043 called for a comprehensive study on registration in part, "because the benefits and detriments to implementing voter registration are not easily identified." The committee did not approve the resulting bill draft out of concerns that the increased bureaucratic process, cost, and becoming subject to the NVRA were not worth implementing registration.

### **A Synopsis of Types of Registration Used in Other States**

There are two general forms of voter registration: (1) Eligible residents need to register prior to a certain number of days before an election; and (2) Same day registration, which allows for individuals to register up to and on Election Day.

There are also two subsets of voter registration that requires individuals to register a certain number of days before an election; those that require an individual to declare a party affiliation and those that do not. In states that require an individual to declare a party affiliation, the primary election is closed, meaning that voters receive a ballot that only includes the candidates for the party declared on the voter's registration. Voters that choose to register without party affiliation are not allowed to vote in the primary unless a political party allows these individuals to do so.

Same day registration requires that individuals bring proper identification to the polls in order to be added to the roster and allowed to vote. Currently 12 states and the District of Columbia offer same day registration. California will implement same day registration on January 1 of the year following the year in which its Secretary of State certifies the state's statewide voter registration system. Hawaii will implement same day voter registration in 2018.

Voter registration has been an "opt in" system in the United States. Beginning this year, Oregon passed a law to implement an "opt out" system in which all driver's license transactions automatically register the individual or updates the individual's registration record unless the individual specifically opts out.

### **The Requirements of the National Voter Registration Act (NVRA)**

While it is true that at the time of its passage, the NVRA offered exemptions from the Act for states that did not have voter registration (North Dakota) and for those states that offered same day registration (Idaho, Minnesota, New Hampshire, Wisconsin, and Wyoming) on and continuously after August 1, 1994. As such, it is our understanding that we would make ourselves subject to the following federal regulations of the NVRA if we were to enact voter registration in North Dakota.

The state would be required to develop an application for registration that can be submitted by mail and we would also need to accept the National Voter Registration Application form. In addition to making the state form available for distribution through governmental entities, the form must also be made available

for distribution through private entities with “particular emphasis on making them available for organized voter registration programs.” This would include entities such as Acorn and Rock the Vote.

The North Dakota Department of Transportation (DOT) would also be required to offer voter registration to every individual applying for a driver’s license or non-driver’s identification. Additionally, address changes received by DOT are to automatically update the voter registration record unless the individual opts out. This must be done in such a manner that does not require the applicant to reenter information already provided, with the exception that a second signature may be required. Since the passage of the NVRA, state DOTs have been the single largest source of registrations. The data provided from the ND DOT is currently the primary source of the data used to populate the state’s Central Voter File from which pollbooks are generated and this would not change if we were to implement voter registration.

Other agencies and programs that must register voters under the NVRA:

1. Agencies that provide public assistance programs and state-funded programs offering services to persons with disabilities are required to not only provide the state-created registration form to the people served, but also must deliver the same level of service in filling out the form that is offered for all other forms provided by the agency.
2. The states must designate other offices that are to provide the official registration form; examples offered in the law are:
  - a. Public libraries
  - b. Public schools
  - c. Offices of city and county clerks (including marriage license bureaus)
  - d. Fishing and hunting license bureaus
  - e. Government revenue offices
  - f. Unemployment compensation offices
3. North Dakota would also be required to enter into an agreement with the Department of Defense to develop and implement procedures so that individuals may register at recruiting offices.
4. A section in a companion federal law relating to higher education also requires that in all states subject to the NVRA, all institutions of higher learning (public and private) are to make a good faith effort to provide the registration form to all students.

For all voter registration forms received, the law requires that a notice be sent by either the state or local election official to each applicant to notify the individual as to the status of the registration, whether it was accepted or rejected.

Maintenance of registration lists is also highly regulated. The NVRA mandates that lack of voting activity is not reason enough to inactivate an individual’s record. For voters who do not personally update or cancel their registration, the state will be required to develop a list maintenance program that is uniform, nondiscriminatory, and complies with the Voting Rights Act of 1965. States may utilize the United States Postal Services National Change of Address program to send confirmation requests to voters who may have moved. States could also send out uniform mailings to every individual who has not recently voted and then send a confirmation to any individual whose mailing was returned as non-deliverable. Any individual who fails to reply to a confirmation mailing may be removed only after the individual subsequently fails to vote in the next two federal General Elections.

States are also required to submit reports to the Election Assistance Commission, which then compiles all of the data and presents a nationwide report to Congress. These reports are due after every federal General Election and cover the entire previous two years (since the last federal General Election). States are responsible for collecting the following data:

1. Total number registered and eligible to vote in the General Elections
2. Total of same day registrants (if applicable)
3. Total number of forms received from all sources during the election cycle (this would include those received from political parties, candidates, special interest groups, and voter registration organizations, such as Acorn or Rock the Vote)
4. How many of each type of form was submitted
  - a. New registrations
  - b. Pre-registration of individuals younger than 18 (if allowed)
  - c. Duplicate forms of existing registrations
  - d. Rejected applications
  - e. Name/Party/or within county address change
  - f. New County Address change (transfer)
5. How the applicant applied
  - a. In person
  - b. Mail
  - c. Online (if allowed)
  - d. DOT
  - e. Public Service Office
  - f. Agency serving persons with disabilities
  - g. Recruitment offices
  - h. Third-party groups (political parties or interest groups, such as Rock the Vote or Acorn, or issue oriented groups such as initiated measure committees)
6. Number of confirmation notices sent out
  - a. How many were returned and the voter confirmed the registration
  - b. Received back confirming that the registration should be invalidated
  - c. Returned as undeliverable
  - d. Status unknown
7. Number of voters removed from the registration rolls and why
  - a. Moved out of jurisdiction
  - b. Death
  - c. Felony conviction
  - d. Failure to respond to mailed notice and failure to vote in last two general elections
  - e. Declared mentally incompetent
  - f. Voter requested to be removed

The Department of Justice has the responsibility of ensuring compliance of the NVRA. They do so by monitoring the state's registration programs, conducting investigations when it is believed that a state is not in full compliance, and filing litigation in federal court. Additionally, private right of action (an individual's right to take legal action against the state) exists as well so anyone who feels that the state's registration program did not work for them has the right to file litigation. It is interesting to note that the

majority of lawsuits that have been filed are against the programs that offer public assistance or services to persons with disabilities who are forced to take on the role of voter registration agents.

### **Residency**

The question of residency has been an ongoing issue in North Dakota's elections. As noted previously, one of the recurring issues when the legislature has previously considered restoring voter registration was concern of voter fraud during a time when ID was not required to be shown at the polls and an affidavit (that was not subsequently able to be verified) was sufficient to prove residency. Starting in 2004, all North Dakotans were required to show ID at the polls; however, an affidavit was still available as a form of ID and questions regarding the validity of those affidavits persisted. During the 2013 Legislative Assembly, the voter's affidavit was removed as a valid form of identification and all voters are now required to present one of the valid forms of identification.

This advancement, as yet, has not lessened the question of residency. As was seen during the 2014 Primary and General Elections, there exists a minority of voters who do not maintain the current residence on identification used to prove residency, whether due to a move and not updating the driver's license within 10 days as is required by law or for some other reason. The issue is further compounded by the ambiguity in the rules for determining residency found in NDCC § 54-01-26, which states that "the residence can be changed only by the union of act and intent." If a voter fails to update his or her identification, it is difficult for election officials to determine that there has been, in fact, a union of act and intent. But likewise, with voter registration, if a voter fails to update his or her registration (most likely at the DOT) after a change of residence, that individual is likely to still appear at the polling location of the voter's new address and would not be eligible to vote for failure to update the voter registration record. The end result is essentially the status quo, but with the added bureaucracy and cost of implementing a voter registration process.

North Dakota has made numerous improvements to the voter ID laws in the past few years. 2014 was the first General Election in which the unverified affidavit was not available and voter turnout was 46%, which was comparable to other non-presidential election years (2010 was 47% and 2006 was 45%).

Whether the state moves forward to enact voter registration or we stay as we are today, the most helpful improvement that could come from this study would be to seek to remove the ambiguity that exists in the law regarding how residency is determined for voting purposes.

### **Verification of Citizenship Status for Voting**

The current plan by the Secretary of State for the verification of citizenship status will be conducted at polling locations all across the state. Clerks will be instructed that along with requesting the individual's ID, a question is to be asked of the individual appearing to vote, "Are you a citizen of the United States and have you lived within your precinct for the last 30 days?" The individual will be allowed to vote when responding in the affirmative and the individual meets the other eligibility requirements. This process has been utilized in Cass County for a number of elections. It has been received well by both the voters and the poll workers.

On the administrative side of the process, our office has had discussions with the North Dakota Department of Transportation (DOT) to receive additional data detailing whether an individual used a form of identification that would only be available to non-citizens when obtaining a driver's license. When we receive this data from DOT, we will be taking those records and adding, or editing as the case may be, the record in the Central Voter File. The individual's record will be given a status of "Not Eligible-Not a US Citizen." Records with this status will not appear in the paper pollbook, but it does allow for the record to be found after the election if that individual responds in the affirmative to the poll worker's question and he or she is manually entered into the pollbook. With that status and the identification that the poll worker gathers, this gives the respective County's States Attorney a place to begin an investigation and possible prosecution. Without maintaining the information of non-citizens in the database, election officials would not have any reason to suspect that someone who was written into the pollbook was not eligible to vote in the first place.

At such time in the future when we implement electronic pollbooks in every polling location in the state, poll workers will be able to find the record for nearly every individual residing in the state to determine if a "not eligible status" had been placed on the record. This information will clue the poll workers in that additional questions should be asked of the voter, such as, "I see that you obtained your driver's license by using your Green Card as proof of residence. Have you become a citizen of the U.S. since you obtained your driver's license?" This will provide another opportunity to inform individuals that non-citizens are not eligible to vote until US citizenship has been obtained.

It is worth noting that the states of Arizona and Kansas have both attempted to require individuals to prove US citizenship when registering to vote, but the courts, all the way to the US Supreme Court, have denied those states the right to do this for federal elections since this requirement is not specified in the National Voter Registration Act.