VOTER SUPPRESSION OR ELECTION INTEGRITY? THE FUTURE OF VOTER IDENTIFICATION IN NORTH DAKOTA

ABSTRACT

North Dakota election law stands in a unique position among the other forty-nine states. North Dakota is the only state without voter registration provisions. The North Dakota Legislative Assembly repealed the provisions in 1951. North Dakota then moved toward the implementation of voter ID to verify voter eligibility. The voter ID process involves determining the correct balance between verifying voter eligibility and the voter's constitutional right to participate in our elections. The North Dakota Legislative Assembly created and subsequently narrowed the voter ID law. Decisions by the federal court system resulted in the North Dakota Legislative Assembly tweaking the voter ID law. North Dakota law now requires a voter to present a form of identification showing his or her residential address. This change resulted in *Brakebill v. Jaeger*, an ongoing and contentious piece of litigation, which has already reached the U.S. Supreme Court. As a result of the litigation process, the residential address provision took effect right before the 2018 General Election. Contention still exists around North Dakota's voter ID law and current litigation will likely continue to shape it into the future. This Note will explore the history of voter eligibility verification in North Dakota. It will then briefly explore *Brakebill v. Jaeger*, and argue the need to revisit voter registration in North Dakota.

I. INTRODUCTION

Most states turn voters away at the polls if the voter fails to register before the election. However, that is not the case in North Dakota. Currently, North Dakota is the only state without voter registration. This lack of voter registration allows North Dakotans greater access to the polls by allowing them to vote on election day without registering beforehand. However, a voter must still verify his or her eligibility to cast a valid ballot.

A person must meet three qualifications to vote in North Dakota according to the North Dakota Constitution.[1] First, a person must be a citizen of the United States.[2] Second, the person must be at least eighteen years of age.[3] Third, the person must be a North Dakota resident.[4] The controversy regarding voter identification ("ID") mainly arises when it comes to the complicated issue of verifying one's residency. North Dakota statutes now require a person to present an ID with a residential address when going to vote.[5] If the ID lacks the voter's residential address or the address is not current the voter must provide additional documentation in order to cast a valid ballot.[6]

Part II of this note will study the historical aspects of voter registration in North Dakota and its repeal. Part III will study the implementation of voter ID. Part IV will briefly discuss the *Brakebill v. Jaeger* litigation. Finally, part V will propose further study of voter registration and voter ID in North Dakota.

II. HISTORICAL VOTER REGISTRATION

The interplay between voter registration and voter ID laws exists at the core of this issue, as both topics focus on voter eligibility.[7] Since its implementation, voter registration has served a certain purpose–determining voter eligibility.[8] North Dakota is unique among the other forty-nine states. While some states require voters to register and show an ID, North Dakota only

1. N.D. CONST. art. II, § 1.
2. *Id*.
3. *Id*.
4. *Id*.
5. N.D. CENT. CODE § 16.1-01-04.1(2) (2019).
6. N.D. CENT. CODE § 16.1-01-04.1(3)(b) (2019).
7. Voter registration consists of a person providing a government entity with information including his or her name, address, citizenship status, political party affiliation, and other identifying information. *See* U.S. ELECTION ASSISTANCE COMMISSION, APPLICATION INSTRUCTIONS TO THE NATIONAL VOTER REGISTRATION APPLICATION FORM FOR U.S. CITIZENS (2019).
8. Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 456 (2008).

requires the latter.[9] In fact, North Dakota is the only state without voter registration requirements.[10]

Typically, voter registration is the most expensive part of the electoral process and serves the main purpose of identifying voter eligibility.[11] Voter registration did exist in North Dakota at one point. North Dakota statutes governing voter registration first appeared on the North Dakota Revised Code of 1895, a mere six years after North Dakota became a state in 1889.[12] The North Dakota Legislative Assembly repealed voter registration in 1951.[13] As a result, the North Dakota Revised Code of 1943 demonstrates North Dakota's historical voter registration and eligibility verification process.[14]

Under North Dakota's former voter registration statutes, the inspector and judges of each village, city, ward, or other election constituted a board of registration.[15] The statutes required the board to meet at "nine o'clock a.m., on Tuesday, two weeks preceding any general or city or village election and [the board] [had to] remain in session until eight o'clock p.m. of the same day, and [had to] make a list of all persons qualified to vote at the ensuing election in such election precinct."[16] The list compiled by the board became the registry of electors for the precinct.[17] The law required each meeting of the board be open to the public.[18]

The voter registration process was simple. The board would first use the poll list from the last preceding election and record the residential address of the voter.[19] If a person's name did not appear on the list he or she could become a registered voter in one of three ways.[20] If a member of the board knew the person qualified as an eligible voter, the board member could add the person to the list.[21] The person could take an oath to prove he or she was a

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9. *See* WIS. STAT. §§ 6.27, 6.79(2)(a) (2019); N.D. CENT. CODE § 16.1-01-04.1(2) (2019).

10. NORTH DAKOTA SEC'Y OF STATE, NORTH DAKOTA. . . . THE ONLY STATE WITHOUT VOTER REGISTRATION (2017), http://www.library.nd.gov/statedocs/SecretaryState/votereg-2.pdf.

11. *Voter Registration*, ACE PROJECT, http://aceproject.org/ace-en/topics/vr/onePage (last visited Aug. 20, 2019); *Elections and Technology: Purposes of Voter Registration*, ACE PROJECT, https://aceproject.org/ace-en/topics/et/ete/ete01/default (last visited Aug. 20, 2019).

12. North Dakota Revised Code of 1895 §§ 607-608 (1895) (repealed 1951).

13. Act of Feb. 28, 1951, ch. 264, § 3, 1951 N.D. Laws 373, 373.

14. *See* North Dakota Revised Code of 1943 ch. 16-02 (1943) (repealed 1951).

15. North Dakota Revised Code of 1943 § 16-0202 (1943) (repealed 1951).

16. North Dakota Revised Code of 1943 § 16-0202 (1943) (repealed 1951). North Dakota law did not require registration of voters before a primary election. North Dakota Revised Code of 1943 § 16-0426 (1943) (repealed 1981).

17. North Dakota Revised Code of 1943 § 16-0202 (1943) (repealed 1951).

18. North Dakota Revised Code of 1943 § 16-0211 (1943) (repealed 1951).

19. North Dakota Revised Code of 1943 § 16-0207 (1943) (repealed 1951).

20. *Id.*

21. *Id.*

qualified elector.[22] A third option allowed a voter already on the registry to take an oath for the person not on the registry affirming that person was qualified to vote.[23]

The law required a person taking an oath to become a qualified elector to state his or her residential address.[24] Even after stating the address, the person could become subject to a challenge by a member of the board or another registered voter regarding his or her eligibility to vote.[25] However, provided the person made an oath with his or her residential address the board had to add the person to the list of registered voters.[26]

Curiously, the board could also remove registered voters by the oath of two other registered voters.[27] If two voters provided an oath stating a person was a nonresident, the board could remove the person's name from the list of eligible voters.[28] Once the board created the list, North Dakota law required it be posted at or near the place of the last preceding election for public examination.[29] The law then required the board to meet again a week before the election to revise, correct, and complete the list.[30]

On election day, two members of the board would check the name of the elector against the list.[31] The law did not require a voter to present a form of ID.[32] Rather, a voter would present his or her name and, if needed, an affidavit and oath.[33] If the registry did not contain the voter's name, the law required the voter to present an affidavit stating he or she was currently a resident of the precinct along with his or her address and how long he or she resided there.[34] A different registered voter would also need to confirm this information by giving another oath.[35] The clerk would then record the unregistered voter's name and address on the voter roll, as well as the words "not registered."[36] The unregistered person could then vote.[37]

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22. *Id*.
23. *Id*.
24. North Dakota Revised Code of 1943 § 16-0212 (1943) (repealed 1951).
25. *Id*.
26. *Id*.
27. *Id*.
28. *Id*.
29. North Dakota Revised Code of 1943 § 16-0208 (1943) (repealed 1951). Any removal, defacing, or destroying of the list constituted a misdemeanor offense. North Dakota Revised Code of 1943 § 16-0209 (1943) (repealed 1951).
30. North Dakota Revised Code of 1943 § 16-0210 (1943) (repealed 1951).
31. North Dakota Revised Code of 1943 § 16-0213 (1943) (repealed 1951).
32. *See id*.
33. North Dakota Revised Code of 1943 § 16-0218 (1951) (repealed 1951).
34. *Id*.
35. *Id*.
36. North Dakota Revised Code of 1943 § 16-0214 (1943) (repealed 1951).
37. *See id*.

A. 1951 VOTER REGISTRATION REPEAL AND SUBSEQUENT FALLOUT

During the 1949-50 interim, the North Dakota Legislative Research Committee studied the voter registration laws.[38] In its report the Legislative Research Committee stated, "[t]he present system is cumbersome and of limited effect since it does not apply to primary elections, usually the most important elections in the state."[39] A later report issued in 1974 expanded on this.[40] During the time of the study, North Dakota was primarily governed by Republicans and elections were effectively determined during the primaries.[41] This seems to hold true in North Dakota today.[42]

Instead of recommending primaries include voter registration, the study committee put forth a recommendation of repealing voter registration laws.[43] Senate Bill Number 61 was introduced in 1951 and passed the Senate unanimously.[44] It passed the House with a vote of 95 to 5.[45] As a result, the North Dakota Legislative Assembly voted to remove the voter registration provisions.[46]

Even with the 1951 repeal, optional voter registration still exists in North Dakota in the limited circumstance of municipal elections.[47] Cities may still require voter registration for elections held or conducted within the municipality.[48] Only one North Dakota city, Medora, uses this law to require voter registration.[49]

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38. *Voter Registration in North Dakota*, NORTH DAKOTA SEC'Y OF STATE, https://vip.sos.nd.gov/PortalListDetails.aspx?ptlhPKID=73&ptlPKID=5 (last visited Aug. 8, 2019). The North Dakota Legislative Research Committee was the predecessor of the North Dakota Legislative Council. North Dakota Legislative Branch, *Legislative Council*, https://www.legis.nd.gov/legislative-council (last visited Sept. 15, 2019).

39. *Id.*

40. *Id.*

41. *Id.*

42. As of 2019, every statewide political office is currently held by a republican. Jack Dura, *North Dakota Democrats Look Forward*, THE JAMESTOWN SUN (Nov. 11, 2018 1:00 AM), https://www.jamestownsun.com/news/government-and-politics/4527531-north-dakota-democrats-look-forward.

43. *Voter Registration in North Dakota*, NORTH DAKOTA SEC'Y OF STATE, https://vip.sos.nd.gov/PortalListDetails.aspx?ptlhPKID=73&ptlPKID=5 (last visited Aug. 8, 2019).

44. *Id.*

45. *Id.*

46. Act of Feb. 28, 1951, ch. 264, § 3, 1951 N.D. Laws 373, 373.

47. N.D. CENT. CODE § 40-21-10 (2019).

48. *Id.*

49. *Medora Voters Must Register to Vote In N.D.*, THE JAMESTOWN SUN, (Apr. 20, 2012 6:00 AM), https://www.jamestownsun.com/news/medora-voters-must-register-vote-nd; MEDORA, N.D., ORDINANCES ch. 1, art. 9 (2018).

B. ATTEMPTED REVIVAL OF VOTER REGISTRATION

The North Dakota Legislative Assembly attempted on multiple occasions between 1957 and 1975 to again require voter registration.[50] The closest attempt occurred in 1975 with House Bill 1101 when it passed the Senate by 27 to 19 and the House by 56 to 41.[51] This bill would have required voter registration during primary, general, and special elections.[52] However, Governor Arthur Link vetoed the bill claiming it would hinder election participation and was unnecessary as there was no indication of voter fraud or election irregularity.[53]

During the 1975-76 interim, the North Dakota Legislative Assembly once again reviewed the concept of voter registration.[54] A report issued in 1977 indicated the interim committee discussed and reviewed the issue at length.[55] Ideas included a government-initiated system of voter registration involving door-to-door canvassing of every household in the state to determine qualified voters.[56] Other ideas included branch office registration and registration by mail.[57] The report indicated committee members had conflicting feelings regarding the reinstitution of voter registration.[58] Some members believed voter registration might become a deterrent to voting, especially in rural areas.[59] Others believed voter identification was necessary to prevent voter fraud.[60]

The discussions from the 1975-76 interim resulted in a bill providing for statewide voter registration.[61] However, counties could be exempt if the county did not contain a city of more than 5,000 people.[62] This bill also failed to become law as the House rejected the bill with a vote of 47 to 50.[63]

The North Dakota Legislative Assembly rejected two more bills seeking to implement voter registration in 1987 and 1991.[64] In 1997, the House

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50. *Voter Registration in North Dakota*, NORTH DAKOTA SEC'Y OF STATE, https://vip.sos.nd.gov/PortalListDetails.aspx?ptlhPKID=73&ptlPKID=5 (last visited Aug. 8, 2019).
51. *Id*.
52. *Id*.
53. *Id*.
54. *Id*.
55. *Id*.
56. *Voter Registration in North Dakota*, NORTH DAKOTA SEC'Y OF STATE, https://vip.sos.nd.gov/PortalListDetails.aspx?ptlhPKID=73&ptlPKID=5 (last visited Aug. 8, 2019).
57. *Id*.
58. *Id*.
59. *Id*.
60. *Id*.
61. *Id*.
62. *Voter Registration in North Dakota*, NORTH DAKOTA SEC'Y OF STATE, https://vip.sos.nd.gov/PortalListDetails.aspx?ptlhPKID=73&ptlPKID=5 (last visited Aug. 8, 2019).
63. *Id*.
64. *Id*.

refused to adopt a resolution merely seeking to study the feasibility and desirability of implementing voter registration.[65]

As a result, voter registration laws never resurfaced again in North Dakota on a statewide level. Election workers instead needed to determine every person's eligibility to vote the day of the election. Moving forward, when someone's eligibility was in question the honor system determined whether that person could vote.

C. HONOR SYSTEM - VOTER ELIGIBILITY VERIFICATION FROM 1951 TO 2003

After the abolishment of voter registration, from 1951 to 2001, a voter could go to the polls and vote simply by presenting him or herself as an eligible voter in the precinct.[66] If the voter was challenged by a poll challenger or a member of the election board regarding his or her eligibility, the law only required the voter make an affidavit stipulating his or her name, current address, and the voter's past voting address.[67] While very similar to the oath process under the previous voter registration system, another voter was not required to vouch for this other person seeking to vote. Rather, the affidavit of the person seeking to vote alone was legally sufficient.[68]

The first version of voter ID within North Dakota appeared in 2001 with House Bill 1047.[69] The North Dakota Legislative Assembly adopted an ID provision, along with the familiar affidavit provision, for a voter who's eligibility was challenged.[70] A poll challenger or election board member now had the ability to ask a person to provide an ID to address the eligibility of the person to vote.[71] If the ID addressed the eligibility of the person adequately, the person could proceed to vote.[72] However, if the ID did not adequately address the voter's eligibility, the voter could still sign an affidavit with his

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65. *Id*.

66. N.D. CENT. CODE § 16.1-05-06 (1997) (repealed 2013).

67. *Id*.; *Voter Registration in North Dakota*, NORTH DAKOTA SEC'Y OF STATE, https://vip.sos.nd.gov/PortalListDetails.aspx?ptlhPKID=73&ptlPKID=5 (last visited Aug. 8, 2019). The law required the county auditor to verify at least ten percent of the affidavits signed in the county following the election, and to report all violations to the state's attorney. N.D. CENT. CODE § 16.1-05-06(1) (1997) (repealed 2013).

68. N.D. CENT. CODE § 16.1-05-06 (1997) (repealed 2013).

69. Act of Mar. 20, 2001, ch. 204, 2001 N.D. Laws 22, 23.

70. *Id*.

71. *Id*. Before House Bill 1047, an election worker could not ask for a form of identification, but a challenged voter could voluntarily offer it. *Hearings on H.B. 1047 Before the H. and S. Judiciary Comms*., 57th Legis. Assemb., Reg. Sess. 25 (N.D. 2001) [hereinafter *Hearings on H B. 1047*] (testimony of Secretary of State Al Jaeger presented by Cory Fong).

72. Act of Mar. 20, 2001, ch. 204, 2001 N.D. Laws 22, 23.

or her information.[73] After signing the affidavit the voter could still cast his or her ballot and have it counted in the election.[74]

Until the passage of House Bill 1047, an election worker did not have the authority to ask for ID from a voter under any circumstance.[75] Chairman DeKrey of the 2001 House Judiciary Committee claimed the reason for this bill was because "[w]hen you ask someone to sign an affidavit, that is rather intimidating."[76] Instead, according to Chairman DeKrey, this ID addition to the law would "make [the voter] more comfortable."[77]

Under this new provision, identification was not defined and the person who challenged the voter determined what forms of identification were acceptable.[78] It appears the committee intended to leave it vague so many forms of identification could be used.[79]

III. NORTH DAKOTA IMPLEMENTS VOTER ID

In 2003, the 58th North Dakota Legislative Assembly passed the first substantive voter ID law, Senate Bill 2394.[80] This new law required every voter to show a form of identification before receiving a ballot.[81] Authorized forms of ID included a driver's license issued by the state, a photo ID with the person's date of birth listed, and other forms of ID the secretary of state deemed acceptable.[82]

If the voter did not provide a form of identification, he or she could still vote if the voter "provide[d] to the election board the individual's date of birth and if a member of the election board or a clerk [knew] the individual and [could] personally vouch that the individual [was] a qualified elector of the precinct."[83] Alternatively, a person could vote simply by signing an affidavit affirming he or she was a qualified voter.[84]

During the House Government and Veteran's Affairs Committee hearing, the Vice-Chairman of the Three Affiliated Tribes, Mervya Packineau

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73. *Id*.

74. *See id*.

75. *Hearings on H B. 1047*, *supra* note 71, at 4 (statement of Vonette Richter).

76. *Hearings on H B. 1047*, *supra* note 71, at 5 (statement of Chairman DeKrey).

77. *Hearings on H B. 1047*, *supra* note 71, at 5 (statement of Chairman DeKrey).

78. *Hearings on H B. 1047*, *supra* note 71, at 5 (statements of Representative Fairfield and Vonette Richter).

79. *See Hearings on H B. 1047*, *supra* note 71, at 5 (statements of Representative Fairfield and Vonette Richter).

80. Act of Apr. 16, 2003, ch. 172, §1, 2003 N.D. Laws 19, 19.

81. S.B. 2394 § 4, 58th Legis. Assemb., Reg. Sess. (N.D. 2003).

82. *Id*.

83. *Id*.

84. N.D. CENT. CODE § 16.1-05-06(3) (2005) (repealed 2013).

testified.[85] Packineau testified specifically against the provisions regarding voter ID.[86] Packineau stated many members of the Three Affiliated Tribes and other Indian tribes in North Dakota did not have identification cards.[87] Packineau said enrollment cards generally did not have photos on them.[88]

Another member of the Three Affiliated Tribes also testified claiming members of the tribe, especially elders, did not have a photo ID.[89] The member claimed most tribal members did not carry their enrollment card when going to vote because they knew someone at the poll would know who they were.[90] Ultimately, the Legislative Assembly passed the final version of the bill without addressing most of these concerns and it was signed into law.

A. 2005 TWEAKS TO THE VOTER ID LAW

As a result of the Legislative Assembly not taking action on the concerns of the members of the Three Affiliated Tribes in 2003, House Bill 1254 was introduced in 2005.[91]

During the House Government and Veterans Affair Committee hearing on House Bill 1254 Representative Onstad said:

> [The bill] allows for a Tribal ID to be used as identification, similar to your drivers license. Tribal IDs are issued to all Native Americans, picture, [their] name, address, they might resemble a college ID, it is an official document. A number of Native Americans did not have a drivers license, they don't have a water bill, depending on [their] age, if they had just turned 19, or if they are an elder, quite frankly it was a little bit disappointing that they could have voted, they could have been provided an affidavit, many voters just walked away. Many voters saw that [as a] deterrent not to vote, that was really [too] bad.[92]

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85. *Hearings on S B. 2394 Before the H. and S. Gov't and Veterans Aff. and Appropriations Comms.*, 58th Legis. Assemb., Reg. Sess. 110 (N.D. 2003) [hereinafter *Hearings on S B. 2394*] (testimony of Mervya Packineau).

86. *Hearings on S.B. 2394*, *supra* note 85, at 110 (testimony of Mervya Packineau).

87. *Hearings on S.B. 2394*, *supra* note 85, at 110 (testimony of Mervya Packineau).

88. *Hearings on S B. 2394*, *supra* note 85, at 110 (testimony of Mervya Packineau). The bill originally required the production of a photo ID; however, the final version excluded the photo requirement. *See* S.B. 2394 § 4, 58th Legis. Assemb., Reg. Sess. (N.D. 2003) (introduced version); S.B. 2394 § 4, 58th Legis. Assemb., Reg. Sess. (N.D. 2003) (enrolled version).

89. *Hearings on S.B. 2394*, *supra* note 85, at 108 (testimony of Phyllis Howard).

90. *Hearings on S.B. 2394*, *supra* note 85, at 108 (testimony of Phyllis Howard).

91. *See Hearings on H B. 1254 Before the H. and S. Gov't and Veterans Aff. Comms.*, 59th Legis. Assemb., Reg. Sess. 3 (N.D. 2003) [hereinafter *Hearings on H B. 1254*].

92. *Hearings on H B. 1254*, *supra* note 91, at 3.

As a result of the 2003 law, many tribal voters believed they could not vote during the 2004 election.[93] Secretary of State Alvin "Al" Jaeger did indicate his office ran full page advertisements in every newspaper across the state before the election.[94] These advertisements indicated tribal IDs and affidavits were acceptable forms of identification.[95] The secretary of state's office also issued pamphlets with the same information.[96] However, confusion over the law still resulted in tribal members not exercising their right to vote.[97]

During the committee hearing, the committee discussed with the chairman of the Three Affiliated Tribes how some tribal members found it difficult to put their residential address on their ID.[98] House Bill 1254 would require listing the residential address on the ID.[99] Discussion between Secretary of State Al Jaeger and the committee clarified a descriptive residential address would be sufficient under the law and a street address was not required.[100] The main concern was establishing a person's residence and not using a PO box for voting.[101]

As a result of House Bill 1254, authorized forms of ID included those issued by the state or tribal governments, IDs prescribed by the secretary of state, or a combination of any of the three.[102] The ID needed to show the voter's residential address and date of birth.[103]

B. 2011 FAILED ATTEMPT TO REMOVE THE AFFIDAVIT SYSTEM

In 2011, the Legislative Assembly discussed voter fraud, the affidavit system, and voter ID through House Bill 1447.[104] The bill originally made ballots cast using the affidavit system provisional until a voter showed his or her ID.[105] Later, the bill changed to remove the affidavit system and left only

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93. *See Hearings on H B. 1254*, *supra* note 91, at 3.

94. *Hearings on H B. 1254*, *supra* note 91, at 25 (statements of Secretary of State Al Jaeger).

95. *Hearings on H B. 1254*, *supra* note 91, at 25 (statements of Secretary of State Al Jaeger).

96. *Hearings on H B. 1254*, *supra* note 91, at 36.

97. *See Hearings on H B. 1254*, *supra* note 91, at 24-25 (statements of Richard Mayer and Senator Krebsbach).

98. *Hearings on H B. 1254*, *supra* note 91, at 4-5 (statements of Chairman Tex Hall).

99. *Hearings on H B. 1254*, *supra* note 91, at 6 (statement of Chairman Tex Hall).

100. *Hearings on H B. 1254*, *supra* note 91, at 6-8 (statements of Secretary of State Al Jaeger).

101. *Hearings on H B. 1254*, *supra* note 91, at 8 (statement of Secretary of State Al Jaeger).

102. Act of Mar. 23, 2005, ch. 183, § 1 2005 N.D. Laws 864, 864-65.

103. *Id.*

104. *Hearings on H B. 1447 Before the H. and S. Political Subdivisions Comms.*, 62nd Legis. Assemb., Reg. Sess. 1 (N.D. 2011) [hereinafter *Hearings on H B. 1447*].

105. *Hearings on H B. 1447*, *supra* note 104, at 1 (statements of Representative Koppelman).

a voucher system for a voter without an ID.[106] Ultimately, the Legislative Assembly rejected the bill.[107]

During a House Political Subdivisions committee discussion Deputy Secretary of State Jim Silrum said, "We don't have voter registration in this state so the only way to really prove who you are is [to] present an ID."[108] While discussing voter registration Representative Klemin said, "In no other state is a person allowed to cast a ballot unless they have first established that they are a qualified elector. Only in ND is a person allowed to cast a ballot without first establishing that he is a qualified elector."[109]

C. 2013 REMOVAL OF THE AFFIDAVIT SYSTEM

In 2013, the 63rd Legislative Assembly removed the affidavit provision in effect since 1951.[110] Under House Bill 1332, a voter could no longer sign an affidavit and have his or her vote counted.[111] A poll worker could also no longer vouch for a voter.[112] Rather, the law required the voter to present a valid ID.[113] If the voter did not present an ID, he or she could not vote.[114]

House Bill 1332 began as a bill to change the deadline for determining residency in one's precinct.[115] However, during the House Government and Veterans Affairs Committee, a sponsor of the bill appeared before the committee, Representative Randy Boehning.[116] During his testimony Representative Boehning said, "I am going to bring a hoghouse amendment in. It basically is going to require a voter ID at the polls."[117] When Chairman Jim Kasper asked Representative Boehning whether the hoghoused bill would do

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106. *See Hearings on H B. 1447*, *supra* note 104, at 59, 63; H.B. 1447 § 3, 62nd Legis. Assemb., Reg. Sess. (N.D. 2011) (first engrossment with conference committee amendments).

107. N.D. SENATE, S. JOURNAL, 62nd Legis. Assemb., Reg. Sess. 1660 (2011).

108. *Hearings on H.B. 1447*, *supra* note 104, at 9 (statement of Deputy Secretary of State Jim Silrum).

109. *Hearings on H B. 1447*, *supra* note 104, at 9 (statements of Representative Klemin).

110. *See* Act of Apr. 18, 2013, ch. 167, § 8 2013 N.D. Laws 10, 15 (repealing N.D. CENT. CODE § 16.1-05-06).

111. *See id.*

112. Brakebill v. Jaeger, No. 1:16–cv–008, 2016 WL 7118548, at *2 (D.N.D. Aug. 1, 2016).

113. *See* § 8, 2013 N.D. Laws at 15 (repealing N.D. CENT. CODE § 16.1-05-06).

114. *See id.*

115. H.B. 1332, 63rd Legis. Assemb., Reg. Sess. (N.D. 2013) (introduced version).

116. *Hearings on H B. 1332 Before the H. and S. Government and Veterans Affairs Comms.*, 63rd Legis. Assemb., Reg. Sess. 2 (N.D. 2013) [hereinafter *Hearings on H B. 1332*].

117. *Hearings on H.B. 1332*, *supra* note 116, at 2 (statements of Representative Boehning). A hoghouse amendment is when the substance of the bill is entirely removed and replaced with something else but the same bill number is used. Duxbury v. Harding, 490 N.W.2d 740, 743 n.5 (S.D. 1992).

away with the voter affidavit system entirely Representative Boehning confirmed it would.[118]

Later, when appearing before the Senate Government and Veterans Affairs Committee, Representative Boehning stated work was being done with tribal governments and higher education to accept more forms of identification.[119] The secretary of state's office stood in support of requiring an ID before a voter received a ballot.[120]

House Bill 1332 allowed four forms of acceptable ID for voting: (1) a North Dakota driver's license; (2) a North Dakota non-driver's ID card; (3) a tribal government-issued ID card; or (4) an alternative form of ID prescribed by the secretary of state for cases where a voter did not possess any other acceptable ID.[121] Secretary of State Jaeger later did prescribe two other acceptable forms of ID: student ID certificates and long-term care ID certificates.[122]

Ultimately, the Legislative Assembly voted in favor of the bill and the affidavit and voucher provisions were repealed.[123] North Dakota law now required voters to have a valid ID or they could not vote.

D. 2015 AMENDMENT TO NORTH DAKOTA VOTER ID

In 2015, the Legislative Assembly again made changes to the voter ID law.[124] House Bill 1333 repealed the provision allowing the secretary of state to prescribe new acceptable forms of ID.[125] Further, the bill reversed the secretary of state's decision allowing students to use college ID certificates for voting.[126] As a result, a voter needed to provide either a North Dakota driver's license, a North Dakota non-driver's ID card, a tribal government issued ID card, or a long-term care certificate in order to vote.[127]

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118. *Hearings on H B. 1332*, *supra* note 116, at 4 (statements of Representative Boehning and Chairman Jim Kasper).

119. *Hearings on H B. 1332*, *supra* note 116, at 47 (statements of Representative Boehning).

120. *See Hearings on H B. 1332*, *supra* note 116, at 9 (statements of Deputy Secretary of State Jim Silrum).

121. Brakebill v. Jaeger, No. 1:16–cv–008, 2016 WL 7118548, at *2 (D.N.D. Aug. 1, 2016).

122. *Id.*

123. Act of Apr. 18, 2013, ch. 167, § 8 2013 N.D. Laws 10, 15 (repealing N.D. CENT. CODE § 16.1-05-06).

124. *Brakebill*, 2016 WL 7118548, at *2.

125. *Id.*

126. *Id.*

127. *Id.*

IV. *BRAKEBILL V. JAEGER*

A. 2016 DISTRICT COURT PRELIMINARY INJUNCTION

On January 20, 2016, seven Native American plaintiffs, Richard Brakebill, Deloris Baker, Dorothy Herman, Della Merrick, Elvis Norquay, Ray Norquay, and Lucille Vivier, filed a federal lawsuit against North Dakota Secretary of State Al Jaeger in his official capacity.[128] The plaintiffs requested the United States District Court for the District of North Dakota issue a preliminary injunction for the 2016 General Election preventing North Dakota from implementing the voter ID provisions.[129]

The plaintiffs challenged North Dakota's voter ID requirements under the Voting Rights Act, the U.S. Constitution, and the North Dakota Constitution.[130] Under the constitutional claims, the plaintiffs argued the voter ID requirements violated the Equal Protection Clauses of both the U.S. Constitution and the North Dakota Constitution.[131]

In order for the court to award a preliminary injunction, the movant needs to demonstrate the necessity for one.[132] The district court evaluated whether the plaintiffs met this necessary requirement for a preliminary injunction using four factors known as the *Dataphase* factors.[133] The four factors are: "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest."[134]

1. Likelihood of Success on the Merits

First, the district court evaluated whether the plaintiffs would succeed on the merits of the case.[135] Under *Crawford v. Marion County Election Board*,[136] "[a] court evaluating a constitutional challenge to an election regulation must weigh the asserted injury to the right to vote against the precise

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128. *See generally* Complaint, Brakebill v. Jaeger, No. 1:16–cv–008, 2016 WL 7118548 (D.N.D. Aug. 1, 2016).

129. *Brakebill*, 2016 WL 7118548, at *1.

130. *Id.* at *2.

131. *Id.* at *3.

132. *Id.* (citing Watkins Inc. v. Lewis, 346 F.3d 841, 844 (8th Cir. 2003); Baker Elec. Coop., Inc. v. Chaske, 28 F.3d 1466, 1472 (8th Cir. 1994); Modern Computer Sys., Inc. v. Modern Banking Sys., Inc., 871 F.2d 734, 737 (8th Cir. 1989)).

133. *Id.* at *3-13.

134. *Id.* at *3 (citing Dataphase Systems, Inc., v. C L Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981)).

135. *Brakebill*, 2016 WL 7118548, at *3.

136. 553 U.S. 181 (2008).

interests put forward by the State as justifications for the burden imposed by its rule."[137] Any burden imposed by the state for elections "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'"[138] The state has a legitimate and important interest in counting only the votes of eligible voters.[139] In *Crawford*, plaintiffs challenged an Indiana law requiring individuals voting in person to present a photo ID.[140] However, in that case the U.S. Supreme Court found the ability to cast a provisional ballot and later sign an affidavit to verify it mitigated the ID issue.[141]

Here, the court first addressed the burdens alleged by the plaintiffs.[142] The court found it was "undisputed that the more severe conditions in which Native Americans live translates to disproportionate burdens when it comes to complying with the new voter ID laws."[143] The court emphasized the State of North Dakota did not challenge or refute any of the affidavits, declarations, surveys, studies, or data submitted by the plaintiffs in the motion for a preliminary injunction.[144]

As a result, the court looked to the plaintiffs' statistical survey of North Dakota voters.[145] The plaintiffs' survey found Native Americans disproportionately lacked valid IDs for voting compared to non-Native Americans.[146] According to the survey, 23.5% of Native Americans lacked a valid voter ID, while only 12% of non-Native Americans did.[147] The survey also showed Native Americans disproportionately lacked the means to obtain valid IDs for voting.[148] The court gave the plaintiffs' survey evidence and data considerable weight since the State did not present any evidence contrary to it.[149]

Next, the court moved to the interests asserted by the State of North Dakota.[150] The court recognized North Dakota relied on the U.S. Supreme Court's *Crawford* decision to support its interests.[151] The court also recognized the *Crawford* holding, finding the state has a legitimate and important

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137. *Brakebill*, 2016 WL 7118548, at *3 (quoting Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190 (2008)).
138. *Id*. (quoting Norman v. Reed, 502 U.S. 279, 288-89 (1992)).
139. *Crawford*, 553 U.S. at 196.
140. *Id*. at 185.
141. *Id*. at 199.
142. *Brakebill*, 2016 WL 7118548, at *4.
143. *Id*.
144. *Id*.
145. *Id*.
146. *Id*.
147. *Id*.
148. *See Brakebill*, 2016 WL 7118548, at *4.
149. *Id*.
150. *Id*. at *9.
151. *Id*.

interest in counting only the votes of eligible voters.[152] The court agreed with the State and the U.S. Supreme Court that "the electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."[153]

However, due to the plaintiffs' statistics, the court found "a somewhat heavier burden" was placed on a limited number of persons, specifically Native Americans.[154] Unlike *Crawford*, those lacking a valid ID could not cast a provisional ballot.[155] The court found North Dakota eliminated all "fail-safe" mechanisms for voters without valid ID by removing the affidavit and voucher mechanisms.[156] The court noted North Dakota was the only state without any "fail-safe" provisions in the nation.[157]

The court noted the main reason the Indiana law was upheld in *Crawford* was due to a poorly developed record.[158] The court found the plaintiffs' in *Brakebill* preserved a very thorough record.[159] The court further found the record here contained concrete evidence of significant burdens placed on Native Americans.[160] The court held the record revealed North Dakota's voter ID law imposed "excessively burdensome requirements" on Native American voters.[161]

Further, the court found the lack of any "fail-safe" provisions in North Dakota violated the Equal Protection Clause of the 14th Amendment.[162] The court held, "a safety net is needed for those voters who simply cannot obtain a qualifying voter ID with reasonable effort."[163] The record did not contain any evidence voter fraud had ever been a problem in North Dakota.[164] As a result, the court found no state interest relevant or legitimate enough to justify the removal of the "fail-safe" affidavit and voucher provisions previously in effect.[165]

The court ultimately determined the plaintiffs would likely succeed on their claim under the Equal Protection Clause of the Fourteenth Amendment

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152. *Id*.
153. *Id*. (citing Crawford, 553 U.S. at 194).
154. *Brakebill*, 2016 WL 7118548, at *9.
155. *Id*.
156. *Id*.
157. *Id*. at *2.
158. *Id*. at *10.
159. *Id*.
160. *Brakebill*, 2016 WL 7118548, at *10.
161. *Id*.
162. *Id*.
163. *Id*.
164. *See id*.
165. *See id*.

to the U.S. Constitution.[166] As a result, the court did not address the Voting Rights Act or North Dakota Constitution claims.[167]

2. Irreparable Harm

Second, the court evaluated whether the plaintiffs would suffer irreparable harm if the law was implemented during the 2016 General Election.[168] The court stated, "The Eighth Circuit has explained that a district court can presume irreparable harm if the movant is likely to succeed on the merits.[169] The court quoted *Wesberry v. Sanders*[170] which says:

> No 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. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.[171]

As a result of *Wesberry*, the court found the plaintiffs could suffer irreparable harm if no "fail-safe" provisions accompanied the voter ID law.[172] Further, the court found over 3,800 Native Americans could be denied the right to vote in the 2016 general election without injunctive relief.[173]

3. Balance of the Harms and the Public Interest

The balance of the harms and the public interest factors "merge when the government is the opposing party."[174] The court held the interests of the state in preventing voter fraud and promoting voter confidence would not be undermined by allowing voters who cannot obtain an ID, including Native Americans, to present an affidavit or declaration.[175] The court noted many states allow voters lacking IDs to vote by signing an affidavit or similar declaration or statement.[176] The state also indicated it had time to implement any

166. *Brakebill*, 2016 WL 7118548, at *10.
167. *Id.*
168. *Id.*
169. *Id.* (citing Calvin Klein Cosmetics Corp. v. Lenox Labs. Inc., 815 F.2d 500, 505 (8th Cir. 1987)).
170. 376 U.S. 1 (1964).
171. *Brakebill*, 2016 WL 7118548, at *11.
172. *See id.*
173. *Id.*
174. *Id.* (quoting Nken v. Holder, 556 U.S. 418, 435 (2009)).
175. *Id.*
176. *Id.* at *12.

injunction before the 2016 General Election if the court issued the injunction before early September 2016.[177]

4. Preliminary Injunction

Ultimately, after considering the *Dataphase* factors, the court issued the preliminary injunction stating the plaintiffs met their burden of showing a likelihood of success on the merits.[178] As a result, the District Court for the District of North Dakota enjoined the North Dakota secretary of state from enforcing the voter identification laws without any "fail-safe" provisions.[179] The court even went so far as to state the repeal of "fail-safe" provisions was "ill-advised" as it resulted in an undue burden on Native Americans.[180] Following the preliminary injunction, over 16,000 voters during the 2016 General Election signed an affidavit instead of showing a valid ID to vote.[181]

B. 2017 AMENDMENT

As a result of the August 2016 preliminary injunction, the 65th North Dakota Legislative Assembly amended the voter ID law in 2017.[182] House Bill 1369 changed the statute and now allows a voter to supplement his or her ID.[183] The bill moved the ID requirements from section 16.1-05-07 to section 16.1-01-04.1, a new section of the North Dakota Century Code.[184]

Section 16.1-01-04.1 made a few modifications to the ID requirements.[185] The law still requires a person to show a North Dakota driver's license, a North Dakota nondriver's ID card, a tribal government ID, or a long-term care certificate.[186] However, a voter can now supplement his or her ID if it is not current or does not contain all the required information.[187] A voter can supplement his or her ID with a current utility bill, bank statement, a paycheck, or a check or document issued by a federal, state, or local

177. *Brakebill*, 2016 WL 7118548, at *12.

178. *See id.* at *13.

179. *Id.*

180. *Id.*

181. John Hageman, *More Than 16,000 Vote Affidavits Filed in North Dakota Election*, THE BISMARCK TRIB. (Dec. 14, 2016), https://bismarcktribune.com/news/state-and-regional/more-than-voter-affidavits-filed-in-north-dakota-election/article_2ffbc642-642e-553d-997e-3262f94a5451.html.

182. Brakebill v. Jaeger, No. 1:16-cv-008, 2018 WL 1612190, at *1 (D.N.D. Apr. 3, 2018), *vacated and remanded*, 932 F.3d 671 (8th Cir. 2019).

183. *See generally* H.B. 1369, 65th Legis. Assemb., Reg. Sess. (N.D. 2017) (enrolled version).

184. *Id.* at §§ 2, 6.

185. *Id.* at § 2.

186. N.D. CENT. CODE § 16.1-01-04.1(3)-(4) (2019).

187. N.D. CENT. CODE § 16.1-01-04.1(3)(b) (2019).

government.[188] The new law also allows certain voters to use a military identification card or passport in limited circumstances when they are away from their residences.[189]

The law also includes a provisional ballot provision for voters lacking the necessary documentation when they show up at the polls.[190] If the voter does not show valid documentation but asserts the right to vote in the precinct he or she can have the ballot set aside in a sealed envelope.[191] The voter must then return before the polls close with valid identification to have the ballot counted.[192] Alternatively, the voter can show the identification to the proper election officials before the meeting of the canvassing board six days after the election.[193]

C. *BRAKEBILL V. JAEGER* FOLLOWING THE 2017 AMENDMENTS

Brakebill v. Jaeger is still an ongoing case following the 2016 General Election and the 2017 changes to North Dakota's voter ID law. Following the 2017 amendment to North Dakota's voter ID law, the state moved to dissolve the preliminary injunction issued before the 2016 General Election.[194]

The district court again compared the issue to the U.S. Supreme Court's *Crawford* decision.[195] The court also analyzed *Lee v. Virginia State Board of Elections*[196] where a Virginia law was challenged that required voters to present a photo ID.[197] However, in *Lee* the Fourth Circuit Court of Appeals upheld the law because Virginia offered provisional ballots and free IDs to voters if they needed one.[198]

Here, the court found 4,998 Native Americans lacked a qualifying ID to vote.[199] The court also determined for a provisional ballot, "[n]o reasonable person who reads [the] statute would have a clue as to where and to whom they need to report to present a valid ID."[200] The court stated the statute is, "vague and unclear at best."[201]

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188. *Id*.
189. N.D. CENT. CODE § 16.1-01-04.1(4)(b) (2019).
190. N.D. CENT. CODE § 16.1-01-04.1(5) (2019).
191. *Id*.
192. *Id*.
193. *Id*.
194. Brakebill v. Jaeger, No. 1:16-cv-008, 2018 WL 1612190, at *2 (D.N.D. Apr. 3, 2018), *vacated and remanded*, 932 F.3d 671 (8th Cir. 2019).
195. *Id*. at *3.
196. 843 F.3d 592 (4th Cir. 2016).
197. *Brakebill*, 2018 WL 1612190, at *4.
198. *Id*.
199. *Id*.
200. *Id*. at *5.
201. *Id*.

Further, the court addressed whether a tribal ID included a letter from tribal authorities, as the State of North Dakota asserted it did.[202] However, the court determined the more likely interpretation was "that the plain language of the statute requires a tribal ID card and not simply a letter from tribal authorities."[203] The court found no official state policy or public pronouncement included the interpretation that tribal authority letters would be accepted as a form of ID.[204] The court said, "[I]t is dangerous for an elector to trust that poll workers would consistently accept such a letter from a tribe as a valid form of identification to comply with the new law."[205]

The court also rejected the State of North Dakota's assertion that IDs issued by the Bureau of Indian Affairs ("BIA") would be accepted.[206] The statute did not contain language allowing these IDs as it only encompassed IDs issued by tribal governments and not the BIA.[207]

The court found North Dakota could implement three possible remedies: (1) revisions to the existing law; (2) launching a statewide pre-election campaign informing all voters of the ID requirements; or (3) "a system of voter registration like that used in the other 49 states which allows for verification before the election rather than afterward . . ."[208]

The court also found the law disenfranchised anyone lacking a "current residential street address," including homeless persons and Native Americans on reservations.[209] Additionally, the court also determined the North Dakota Constitution does not require a current residential address in order to vote.[210]

As a result, the court found the record and the *Dataphase* factors weighed in favor of issuing "a very limited preliminary injunction."[211] The court enjoined the State of North Dakota from enforcing the residential street address law, allowing a voter to receive a ballot if he or she presented an ID with a residential or mailing address, including a PO box.[212] The court also required the State of North Dakota to accept any documentation issued by any tribal authority, including the BIA, that contained a residential street address or a mailing address.[213] The court further required the secretary of state

202. *Id*.
203. *Brakebill*, 2018 WL 1612190, at *5.
204. *Id*.
205. *Id*.
206. *Id*. at *6.
207. *Id*.
208. *Id*. (emphasis in original).
209. *Brakebill*, 2018 WL 1612190, at *6.
210. *Id*.
211. *Id*. at *7.
212. *Id*.
213. *Id*.

to provide clarification regarding where, when, and to whom a voter filling out a provisional ballot needed to provide additional documentation.[214] The court closed saying North Dakota needed to launch a statewide pre-election campaign to inform voters of the ID requirements.[215]

1. Stay Pending Appeal

Following the second preliminary injunction, the State of North Dakota, through Secretary of State Jaeger, moved for stay pending appeal on the residential address issue.[216] In the order, the district court refuted the state's claim that the second preliminary injunction required the secretary of state to launch a statewide pre-election campaign.[217] The court clarified its holding was merely saying the state needed to educate the voting public of the ID requirements.[218]

While the court noted the State raised "some legitimate concerns as to the Plaintiffs' lack of standing," the court denied the State's motion for stay pending appeal.[219] The court cited the burden the plaintiffs have to maintain a current residential street address and the burden to maintain an ID to prove they have a street address.[220] The court said a requirement to have a residential street address is a requirement to have an interest in real property.[221] The court held this was enough to confer standing.[222] The State argued non-residents could take advantage of the injunction and vote with a PO box as an address.[223] However, the court dismissed this notion stating the State showed no evidence of voter fraud.[224]

The court left the parties to address the *Dataphase* factors with the Eighth Circuit Court of Appeals.[225] Once again the court made suggestions on how to fix the issue without proceeding with the litigation.[226] The suggestions included making it easier to obtain IDs by setting up locations on the reservations.[227] Other suggestions by the court included a mail-in application

214. *Id*.
215. *Brakebill*, 2018 WL 1612190, at *8.
216. Brakebill v. Jaeger, No. 1:16-cv-008, 2018 WL 4714914, at *1 (D.N.D. Apr. 30, 2018).
217. *Id*.
218. *Id*.
219. *Id*. at *1-2.
220. *Id*. at *1.
221. *Id*.
222. *Brakebill*, 2018 WL 4714914, at *1.
223. *Id*. at *2.
224. *Id*.
225. *Id*.
226. *Id*.
227. *Id*.

for an acceptable ID or computers being set up on reservations for people to apply online for IDs.[228]

2. The Eighth Circuit Court of Appeals Grants Stay

Following the district court's orders, the Eighth Circuit Court of Appeals addressed the residential address issue and released its order on September 24, 2018.[229] In its appeal, the State moved to stay the district court's order.[230]

The State of North Dakota argued it would succeed on appeal because none of the plaintiffs had standing under Article III of the U.S. Constitution to challenge the statute's requirement for a residential address.[231] However, the court found even though all the plaintiffs currently had a residential street address, at least one plaintiff had standing.[232] Plaintiff Elvis Norquay had an outdated address on his ID and in order to vote in his new precinct he needed a new ID or supplemental documentation.[233]

The Eighth Circuit Court of Appeals considered four factors to determine whether to grant a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."[234]

Next, the court turned to the merits of the case. The court noted in *Crawford* the U.S. Supreme Court held, "A plaintiff seeking relief that would invalidate an election provision in all of its applications bears 'a heavy burden of persuasion,' as facial challenges are disfavored."[235] The court held, "Even assuming that a plaintiff can show that an election statute imposes 'excessively burdensome requirements' on *some* voters, that showing does not justify broad relief that invalidates the requirements on a statewide basis as applied to *all* voters."[236] The court noted *Crawford* left open the possibility that

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228. *Brakebill*, 2018 WL 4714914, at *2.

229. *See generally* Brakebill v. Jaeger, 905 F.3d 553 (8th Cir. 2018).

230. *Id.* at 557.

231. *Id.* To satisfy Article III standing a plaintiff must show an injury in fact that is concrete and particularized and actual or imminent, the injury is fairly traceable to the challenged action of the defendant, and it is likely the injury will be redressed by a favorable decision. Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc., 528 U.S. 167, 180-81 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992)).

232. *Brakebill*, 905 F.3d at 557.

233. *Id.*

234. *Id.* (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).

235. *Id.* at 558 (citing Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 200 (2008); Wash. State Grange & Wash. State Republican Party, 552 U.S. 442, 449-51 (2008)).

236. *Id.* (citing Crawford, 553 U.S. at 202) (emphasis in original).

a subset of voters might challenge the law as-applied to them, and it need not be struck down on its face.[237]

Because the district court did not limit the injunction to the plaintiffs the possible *Crawford* as-applied theory did not support the injunction.[238] The court stated, "[E]ven assuming that some communities lack residential street addresses, that fact does not justify a statewide injunction that prevents the Secretary from requiring a form of identification with a residential street address from the vast majority of residents who have residential street addresses."[239]

The court dismissed the argument that the requirement of showing a residential street address required an interest in property.[240] Rather, a voter must only show where he or she resides.[241] Residing at an address does not mean the person needs to have an interest in the property where he or she resides.[242]

The court found the State would be irreparably harmed without a stay of the district court's injunction.[243] A voter presenting only a mailing address could possibly vote in the wrong precinct and dilute the votes of people actually residing in the precinct.[244] Out-of-state voters without a North Dakota residence could also potentially vote if they present a North Dakota ID with a North Dakota mailing address.[245]

The court went even further addressing the timing of the stay.[246] The court noted any voter relying on the district court's order would have more than a month before the 2018 General Election to present a valid ID or supplemental document with a valid residential address.[247] The court dismissed the plaintiffs' request to reinstate the affidavit option from the first preliminary injunction.[248] The court noted under the 2017 statute the district court did not even suggest the affidavit option was an appropriate remedy.[249] Further, the likelihood of success by the State did not justify a statewide injunction in any form for the residential address requirement.[250]

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237. *Id*. at 559.
238. *Brakebill*, 905 F.3d at 559.
239. *Id*. at 558.
240. *Id*. at 559.
241. *Id*.
242. *Id*.
243. *Id*. at 559.
244. *Brakebill*, 905 F.3d at 559-60.
245. *Id*. at 560.
246. *Id*.
247. *Id*.
248. *Id*. at 561.
249. *Id*.
250. *Brakebill*, 905 F.3d at 561.

Concluding, the Eighth Circuit Court of Appeals granted the motion for stay pending appeal.[251] In its closing, the court addressed the district court's suggestion that a resident without a current residential address would never be qualified to vote.[252] The court found no plaintiff in the current litigation fell in that category.[253] However, the court alluded to a possible claim if that plaintiff exists. The court stated, "If any resident of North Dakota lacks a current residential street address and is denied an opportunity to vote on that basis, the courthouse doors remain open."[254]

3. U.S. Supreme Court Denies to Vacate Stay

On October 9, 2018, less than a month before the 2018 Midterm Election, the U.S. Supreme Court denied the application to vacate the stay entered by the Eighth Circuit Court of Appeals.[255] The application to vacate was presented to Justice Gorsuch and referred to the Court.[256] Justice Kavanaugh did not take part in the consideration or decision of the application.[257]

Citing the potential for voter confusion and the finding of the district court that many North Dakotans lacked qualifying IDs or supplemental documentation, Justices Ginsburg and Kagan dissented from the denial of the application to vacate stay.[258] The dissent stated the Eighth Circuit's order "may lead to voters finding out at the polling place that they cannot vote because their formerly valid ID is now insufficient."[259]

D. 2018 ELECTION

On October 31, 2018, in *Spirit Lake Tribe v. Jaeger*,[260] the Spirit Lake Tribe and some of its members filed a motion for a temporary restraining order.[261] The motion requested a temporary restraining order to prevent the residential street address provision from going into effect.[262]

The court denied the motion citing the federal courts' unanimous approach "that it is highly important to preserve the status quo when elections

251. *Id*.
252. *Id*.
253. *Id*.
254. *Id*.
255. Brakebill v. Jaeger, 139 S.Ct. 10, 10 (2018).
256. *Id*.
257. *Id*.
258. *Id*. (Ginsburg, J. and Kagan, J., dissenting).
259. *Id*. at 11.
260. No. 1:18-cv-222, 2018 WL 5722665 (D.N.D. Nov. 1, 2018).
261. *Spirit Lake Tribe*, 2018 WL 5722665, at *1.
262. *Id*.

are fast approaching."[263] Without an injunction from the courts, the voter ID law went into full effect during the 2018 election. However, even with the law taking effect Native American voter turnout achieved some of its highest levels.[264] In the two most populous Native American counties, the voter turnout reached its highest levels since 2010.[265] Other Native American precincts had the highest Native American turnout in history.[266]

However, this record number came after many Native Americans acquired new IDs. On the Turtle Mountain Indian Reservation, Chairman Azure signed an executive order to provide free tribal IDs before the election.[267] The demand resulted in the ID machine overheating and melting IDs.[268] Further, some reports indicated confusion about the law still existed as voters went to the polls to cast their ballots.[269]

E. EIGHTH CIRCUIT COURT OF APPEALS ISSUES ITS OPINION

On July 31, 2019, the Eighth Circuit Court of Appeals issued its full opinion on the motion to vacate stay mirroring the September 24, 2018 opinion.[270] Again, the court addressed standing and the *Dataphase* factors.[271] The court reiterated at least one of the plaintiffs, Elvis Norquay, had standing as he would need a new ID or supplemental documentation with his new address.[272]

Next, the court again addressed the issue of the facial challenge to the statute.[273] Stating that facial challenges are disfavored, the court dismissed the plaintiffs' facial challenges.[274] The plaintiffs' argued on its face, the law required an interest in property.[275] However, the court found the voter ID law

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263. *Id*.

264. Roey Hadar, *North Dakota Reservations See Record Voter Turnout Amid Fears of Suppression*, ABC NEWS (Nov. 7, 2018, 5:19 PM) https://abcnews.go.com/Politics/north-dakota-reservations-record-voter-turnout-amid-fears/story?id=59038845.

265. *Id*.

266. *Id*.

267. John Hageman, *ND Tribal Leaders Hope to Overcome Voter ID 'Barriers' After Supreme Court Decision*, DULUTH NEWS TRIB. (Oct. 15, 2018 2:00 PM) https://www.duluthnewstribune.com/news/government-and-politics/4514040-nd-tribal-leaders-hope-overcome-voter-id-barriers-after-supreme.

268. *Id*.

269. Katie Reilly, *A New North Dakota Law Threatened Native American Votes. They Responded By Turning Out in Historic Numbers*, TIME (Nov. 7, 2018 12:16 PM) https://time.com/5446971/north-dakota-native-american-turnout/.

270. Brakebill v. Jaeger, 932 F.3d 671, 671 (8th Cir. 2019).

271. *Id*. at 676.

272. *Id*. at 677.

273. *Id*.

274. *Id*. (citing Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449-51 (2008)).

275. *Id*.

did not require an interest in property.[276] The law only required a voter to show where he or she lived, not that he or she has an interest in the property where he or she lives.[277]

The court also disregarded the facial challenge that the law placed burdensome requirements on Native Americans.[278] The court again stated, "But even assuming that a plaintiff can show that an election statute imposes 'excessively burdensome requirements' on *some* voters . . . that showing does not justify broad relief that invalidates the requirements on a statewide basis as applied to *all* voters."[279] Finding the residential address requirement did not impose a substantial burden on most North Dakota voters, the Eighth Circuit Court of Appeals held it did not justify a statewide injunction against the voter ID provision.[280] Similarly, the court found a facial challenge to the supplemental documentation provision was unwarranted for the same reasons.[281]

Finally, the court addressed the portion of the district court order requiring the secretary of state to provide clarification for provisional ballots.[282] The court indicated the plaintiffs did not seek this relief.[283] Finding the district court did not cite any evidence of voter confusion over this provision, the court found no sufficient basis to enjoin the secretary of state to clarify the statute.[284]

The Eighth Circuit Court of Appeals indicated a successful challenge to the voter ID statute may be possible in the future.[285] The court concluded that a statewide facial challenge to the statute was not warranted.[286] However, an as-applied challenge for an individual plaintiff or plaintiffs may be a successful option going forward. The court indicated if the plaintiffs proceeded with an as-applied challenge before the election that option may have been justified.[287] The court left that option open for the plaintiffs stating, "That option remains available going forward."[288]

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276. *Brakebill*, 932 F.3d at 677.
277. *Id*.
278. *Id*. at 678.
279. *Id*. (emphasis in original).
280. *Id*.
281. *Id*. at 679-80.
282. *Brakebill*, 932 F.3d at 680.
283. *Id*.
284. *Id*.
285. *Id*.
286. *Id*.
287. *Id*. at 681.
288. *Brakebill*, 932 F.3d at 681.

V. MOVING FORWARD

Brakebill will continue to move forward, as the Eighth Circuit Court of Appeals remanded the case to the district court.[289] While it is difficult to predict the future of pending litigation, the issue of voter ID in North Dakota warrants further discussion and review. North Dakota's voter ID law resulted in litigation and consternation as many people tried to comply with the law. Instead of the residential address provision of voter ID, perhaps another solution exists to ensure election security–voter registration. Voter registration laws would allow election officials to determine the eligibility of voters before the election begins rather than at the polls.

In 2015-2016, the interim Judiciary Committee studied the issue of voter registration briefly.[290] The study reviewed former legislation and studies done on voter registration in North Dakota.[291] However, it appears no clear result or legislation resulted from the study.

Perhaps the 67th North Dakota Legislative Assembly should consider studying the issue of voter eligibility, voter ID, and voter registration during the interim more in depth. The developments with North Dakota's voter ID law and *Brakebill v. Jaegar* warrant further discussion on this issue. The study could serve as a public forum to discuss the developments in litigation, barriers to voting in North Dakota, election security, and voter eligibility verification. A comprehensive legislative study would allow exploration of other states' voter ID and registration provisions. After studying the issue, North Dakota could identify whether changes to the voter ID provisions are warranted, and if warranted what those changes should look like. Perhaps the best solution is to follow the other forty-nine states' lead and adopt voter registration.

VI. CONCLUSION

For almost seventy years, North Dakotans have debated the best way to verify voter eligibility. This process began with the repeal of voter registration provisions in 1951. Since that time, North Dakota has undergone drastic changes in the process of verifying voter eligibility. In the twenty-first century, that debate has reached the U.S. Supreme Court.

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289. *Id.*

290. *See generally* N.D. LEGIS. COUNCIL, VOTER IDENTIFICATION AND VERIFICATION OF CITIZENSHIP – BACKGROUND MEMORANDUM, 17.9083.01000, 64th Legis. Assemb., Interim (2015) [hereinafter *Voter Identification and Verification of Citizenship*]. This study was done as a result of House Bill 1302 from the 2015 session. *Id.*

291. *Voter Identification and Verification of Citizenship*, *supra* note 290, at 1.

Brakebill v. Jaeger emphasizes the complex balance between ensuring a person has the right to vote and a state's interest in election integrity. Litigation will likely continue to shape North Dakota's voter ID laws without legislative action. However, the North Dakota Legislative Assembly should use this as an opportunity to study the issue and possibly propose changes to the current law. A thoughtful solution by the legislative branch will ensure the federal court system does not need to intervene in North Dakota elections in the future.

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