

FEDERAL JURY SERVICE: NORTH DAKOTA SHOULD AMEND ITS FEDERAL JURY PLAN TO SUPPLEMENT THE SOURCE OF NAMES OF POTENTIAL JURORS

ABSTRACT

The United States District Court for the District of North Dakota should amend its Plan for Random Jury Selection. The Jury Selection and Service Act calls for jurors to be selected from a fair cross section of the community in which the court convenes. Currently, North Dakota's Plan for Random Jury Selection solely draws federal jurors from the central voter file maintained by the North Dakota Secretary of State. The voter file currently contains a list of voters from presidential elections. Other federal courts within the Eighth Circuit Court of Appeals have recognized the need to supplement their sources of prospective juror names. Those districts supplement voter records with other lists such as driver's license holders, state identification card holders, and tribal member registrants.

A fair cross section of the community is not reflected in voter turnout. In the last five presidential elections, the percentages of voter turnout in North Dakota have been within 61-65%. Notably, counties within North Dakota with high numbers of Native American populations have even lower voter turnout numbers, and voting requirements substantially burden Native Americans. State courts within North Dakota are required to draw juror names from voter records, utility customers, property taxpayers, motor vehicle registrants, tribal member registrations, and driver's license holders. The Federal District Court of North Dakota should amend its plan and include a variety of sources in order to ensure litigants access to juries comprised of a fair cross section of their community.

The first part of this note will address the development of federal jury service. Next, it will address current jury plans in the Eighth Circuit. Finally, this note will address why voting records should not be solely relied upon for jury selection and recommend amendments to the Federal District Court of North Dakota's Plan for Random Jury Selection.

I.	FEDERAL JURY SERVICE.....	607
A.	FEDERAL JURY SELECTION AND SERVICE ACT OF 1968	607
B.	EARLY CASES	609
1.	<i>Taylor v. Louisiana</i>	609
2.	<i>Duren v. Missouri</i>	610
II.	CURRENT JURY SELECTION PLANS	612
A.	DISTRICT OF NORTH DAKOTA’S PLAN FOR RANDOM JURY SELECTION.....	614
B.	OTHER PLANS WITHIN THE EIGHTH CIRCUIT	614
1.	<i>Minnesota</i>	614
2.	<i>Nebraska</i>	615
3.	<i>Iowa</i>	615
4.	<i>Missouri</i>	615
5.	<i>Western Arkansas</i>	616
III.	STATE DEMOGRAPHICS AND VOTING DATA	616
A.	NORTH DAKOTA GENERAL ELECTION VOTER TURNOUT SINCE 2000	617
B.	2016 VOTER TURNOUT AND DISPARITY WITH THE NATIVE AMERICAN POPULATION	617
C.	DEMONSTRATED RACIAL DISPARITY	619
IV.	RECOMMENDATION	622
V.	CONCLUSION	622

I. FEDERAL JURY SERVICE

Through the Federal Jury Selection and Service Act of 1968 (“Jury Selection Act”), Congress established a policy within the United States that all litigants in federal courts are entitled to juries selected from a fair cross section of the community.¹ In passing the Jury Selection Act, Congress recognized the important function juries play and constructed regulations for district courts to follow in order to implement the policy.² Recognizing the importance of the fair cross section requirement, the Supreme Court crafted a three-prong test in order for litigants to establish a violation of fair cross section requirements.³

A. FEDERAL JURY SELECTION AND SERVICE ACT OF 1968

When the Jury Selection Act was enacted, Congress recognized that juries chosen from a fair cross section of the community is fundamental to the justice system.⁴ The Jury Selection Act provides that litigants within the United States are entitled to grand and petit juries selected from a “fair cross section of the community” in the district where the court convenes.⁵ Furthermore, “all citizens shall have the opportunity to be considered for service on . . . juries in the district courts of the United States.”⁶

The Jury Selection Act sets forth a plan for random jury selection which requires each district court within the United States federal court system to devise a plan for the random selection of grand and petit juries.⁷ A district court can modify its plan at any time, and plans must be approved by a panel comprised of circuit court judicial council members.⁸

The Jury Selection Act outlines eight requirements for jury plans.⁹ First, a district court must establish a jury commission or authorize the clerk of court to manage the jury selection process.¹⁰ The clerk or jury commission acts under the supervision of the chief judge of the district court.¹¹ Second, the plan must specify whether names of prospective jurors are being selected from voter registration lists or lists of actual voters within the district.¹² The

1. *Taylor v. Louisiana*, 419 U.S. 522, 529 (1975).

2. *Id.* at 529-30.

3. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

4. *Taylor*, 419 U.S. at 529-30.

5. 28 U.S.C. § 1861(b)(3) (2019).

6. *Id.*

7. 28 U.S.C. § 1863(a) (2019).

8. *Id.*

9. 28 U.S.C. § 1863(b) (2019).

10. 28 U.S.C. § 1863(b)(1) (2019).

11. *Id.*

12. 28 U.S.C. § 1863(b)(2) (2019).

plan must prescribe other sources of names in addition to voters where necessary to foster the Jury Selection Act's policies and protections.¹³ Third, the plan must specify detailed procedures in selecting names from the sources identified under the second requirement.¹⁴ The procedures must be designed to ensure the random selection of a fair cross section of people residing in the district.¹⁵ Further, the procedures should ensure each county within the district is proportionally represented in the master jury wheel for that district.¹⁶ Fourth, the plan must provide for a master jury wheel into which names will be placed for random selection.¹⁷ The chief judge can order additional names to be placed in the master jury wheel as necessary.¹⁸ The plan must also provide for periodic emptying and refilling of the master jury wheel, not to exceed four years.¹⁹ Fifth, the plan must specify groups of people or classes of occupations that will be excused from jury service because of undue hardship or extreme inconvenience.²⁰ The plan must also specify that volunteer safety personnel are excused from jury service upon request.²¹ Sixth, the plan must specify members in active service of the Armed Forces, members of fire or police departments, and public officers in the executive, legislative, or judicial branches of government are exempt from jury service.²² Seventh, the plan must specify the time when names drawn from the master jury wheel will be disclosed to parties and to the public.²³ If the plan allows the names to be made public, the chief judge may still keep the names confidential in certain cases.²⁴ Eighth, the plan must specify the procedures for the jury commission or clerk to follow in assigning people whose names have been drawn from the master jury wheel to grand and petit jury panels.²⁵

13. *Id.*

14. 28 U.S.C. § 1863(b)(3) (2019).

15. *Id.*

16. *Id.*

17. 28 U.S.C. § 1863(b)(4) (2019).

18. *Id.*

19. *Id.*

20. 28 U.S.C. § 1863(b)(5)(A) (2019).

21. 28 U.S.C. § 1863(b)(5)(B) (2019). "Volunteer safety personnel" are "individuals serving a public agency (as defined in section 1203(6) of title I of the Omnibus Crime Control and Safe Streets Act of 1968) in an official capacity, without compensation, as firefighters or members of a rescue squad or ambulance crew."

22. 28 U.S.C. § 1863(b)(6) (2019).

23. 28 U.S.C. § 1863(b)(7) (2019).

24. *Id.*

25. 28 U.S.C. § 1863(b)(8) (2019).

B. EARLY CASES

The Supreme Court has “unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community.”²⁶ The Court has repeatedly articulated the importance of juries being representative of the community in which they assemble.²⁷ After the enactment of the Jury Selection Act, the Supreme Court issued landmark decisions regarding federal jury trials.

1. *Taylor v. Louisiana*

The U.S. Supreme Court, in a majority opinion authored by Justice White, recognized the fair cross section requirement as fundamental to the American justice system in *Taylor v. Louisiana* (1975).²⁸ In *Taylor*, Billy Taylor was indicted in a Louisiana federal court for aggravated kidnapping.²⁹ In Taylor’s federal district, 53% of the people eligible for jury service were female, but no more than 10% of people in the master jury wheel were female.³⁰ Taylor moved the trial court to quash the petit jury venire, alleging that women were systematically excluded from the venire and he would therefore be deprived of his right to a jury representative of the community.³¹ The motion was denied, and Taylor was subsequently convicted and sentenced to death.³² In holding the Louisiana jury-selection system deprived Taylor of his right to an impartial jury trial, the Supreme Court inquired into the purpose of the Jury Selection and Service Act of 1968 and stated that the fair cross section requirement is fundamental to the American justice system.³³

The Supreme Court first noted that there was no rule mandating claims only be made by someone belonging to the group excluded from jury service.³⁴ Next, the Court mentioned the established tradition of using juries as “instruments of public justice,” and excluding racial groups from jury service frustrates the basic concepts of democracy and a representative

26. *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975).

27. *Id.*

28. *Id.* at 529-30.

29. *Id.* at 524.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 525-31.

34. Louisiana insisted that Taylor had no standing to object to the exclusion of women since he is male. However, Taylor need not be a member of the excluded class. *Id.* at 526.

government.³⁵ The Court went on to discuss the Jury Selection Act and how Congress recognized the function juries play in the administration of law.³⁶

The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool.³⁷

Further, the character of the jury should be maintained in assurance of impartiality and because “sharing in the administration of justice is an aspect of civil responsibility.”³⁸

Ultimately, the Supreme Court reversed Taylor’s conviction.³⁹ The Court clarified that it imposed no requirement that juries mirror the community and reflect distinctive groups, but that people should not be systematically excluded from jury service.⁴⁰

2. *Duren v. Missouri*

The Supreme Court established a three-prong test for a defendant to establish a fair cross section violation in *Duren v. Missouri* (1979).⁴¹ In order to establish a violation of the fair cross section requirement, a defendant must show:

- (1) that the group alleged to be excluded is a distinctive group in the community;
- (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
- (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.⁴²

In *Duren*, Billy Duren was indicted in a Missouri federal district court for first-degree murder and first-degree robbery.⁴³ Duren moved to quash his

35. *Id.* at 527.

36. *Id.* at 529.

37. *Id.* at 530 (internal citations omitted).

38. *Id.* at 530-31 (internal quotations omitted).

39. *Id.* at 538.

40. *Id.*

41. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

42. *Id.*

43. *Id.* at 360.

jury panel, contending his right to a jury representing a fair cross section of the community was denied by Missouri granting women an automatic exemption from jury service.⁴⁴ The motion was denied, and Duren's jury was selected from a 53-person panel consisting of five women.⁴⁵ Ultimately, all 12 jurors chosen for duty were men.⁴⁶

The U.S. Supreme Court applied the three-prong test to Duren's case.⁴⁷ Regarding the first prong, a distinctive group, the court noted its previous decision in *Taylor* established women are distinct from men and their exclusion from jury panels violates the fair cross section requirement.⁴⁸ When analyzing the second prong, whether representation of the group is not fair and reasonable, the court stated a defendant must first establish the size of the group in the community based on a percentage.⁴⁹ Duren relied upon a census measurement indicating 54% of the community was female, yet Missouri's jury panels were approximately 15% female.⁵⁰ The Supreme Court noted the "gross discrepancy" between the percentages of women included on jury panels and women in the community.⁵¹ Thus, the court found women were not fairly represented.⁵² Finally, regarding the third prong, systematic exclusion, the court held Duren's proof met the requirement.⁵³ Duren demonstrated Missouri's jury selection process allowed for larger numbers of women to claim exemption from jury service because it included a presumptive exemption for women.⁵⁴ Therefore, women were systematically underrepresented.⁵⁵

Since Duren satisfied the three-prong test and made a showing of an infringement of his right to a jury consisting of a fair cross section of his community, Missouri had the burden of justifying the infringement.⁵⁶ In this case, the court found no substantial justification for the disproportionate exclusion of women.⁵⁷ Accordingly, Duren's case was reversed and remanded.⁵⁸

44. *Id.*

45. *Id.* at 360, 363.

46. *Id.* at 363.

47. *Id.* at 364.

48. *Id.*

49. *Id.*

50. *Id.* at 364-65.

51. *Id.* at 366.

52. *Id.*

53. *Id.*

54. *Id.* at 366-67.

55. *Id.* at 367.

56. *Id.* at 368.

57. *Id.* at 369.

58. *Id.* at 671.

II. CURRENT JURY SELECTION PLANS

Although Congress has not changed its reliance on only requiring voting records as the sources of prospective juror names,⁵⁹ federal district courts have designated various lists to supplement jury wheels in order to truly capture a fair cross section of the community.⁶⁰ Voting records have long been criticized as unrepresentative of communities because of differences in the racial makeup of voters.⁶¹ Of the ten district courts within the Eighth Circuit,⁶² seven district courts supplement their sources of prospective juror names by including other lists such as driving license records, identification card holders, and tribal registration.⁶³ The Federal District Court of North Dakota is one of the three districts within the Eighth Circuit that relies solely on voting records.⁶⁴

By contrast, nearly all state courts use more than one source list for prospective juror names.⁶⁵ Specifically, North Dakota state law requires names of prospective jurors to be drawn from a pool of actual voters supplemented

59. See 28 U.S.C. § 1863(b)(2) (2019).

60. Within the Eighth Circuit, Minnesota, Nebraska, Iowa, Missouri and Western Arkansas include lists of names to supplement voter records. See *Jury Selection Plan of the United States District Court for the District of Minnesota for the Random Selection of Grand and Petit Jurors*, U.S. DIST. CT. DIST. MINN., § 6 (Nov. 2019), <https://www.mnd.uscourts.gov/sites/mnd/files/Jury-Selection-Plan.pdf> (hereinafter Minnesota's Plan); *Plan for Random Jury Selection*, U.S. DIST. CRT. FOR DIST. NEB., § 5 (Oct. 2019), <https://www.ned.uscourts.gov/internetDocs/jury/NebrJury-Plan.pdf> (hereinafter Nebraska's Plan); *Jury Selection Plan*, U.S. DIST. CRT. NORTHERN DIST. IOWA, § 5(c) (Jan. 2017), <https://www.iand.uscourts.gov/sites/iand/files/Jury%20Selection%20Plan.pdf> (hereinafter Northern Iowa's Plan); *Jury Selection Plan*, U.S. DIST. CRT. SOUTHERN DIST. IOWA, § 5(c) (Feb. 2019), https://www.iasd.uscourts.gov/jury_plan (hereinafter Southern Iowa's Plan); *Jury Selection Plan*, U.S. DIST. CRT. WESTERN DIST. MO., 2 (Apr. 2019), https://www.mow.uscourts.gov/sites/mow/files/Jury_Plan.pdf (hereinafter Western Missouri's Plan); *Plan for the United States District Court for the Eastern District of Missouri for the Random Selection of Grand and Petit Jurors*, §§ 2, 4 (May 2016), <https://www.moed.uscourts.gov/sites/moed/files/documents/JuryPlan.pdf> (hereinafter Eastern Missouri's Plan); *Plan for the Random Selection of Jurors*, U.S. DIST. CRT. WESTERN DIST. ARK., § 401 (Nov. 2015), <https://www.arwd.uscourts.gov/sites/arwd/files/general-ordes/General%20Order%2047.pdf> (hereinafter Western Arkansas' Plan).

61. Mary R. Rose and Jeffrey B. Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism From Jury Representation Cases*, 2011 MICH. ST. L. REV. 911, 945 (2011).

62. See UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, <https://www.ca8.uscourts.gov/> (last visited Dec. 20, 2019).

63. Minnesota's Plan, *supra* note 60; Nebraska's Plan, *supra* note 60; Northern Iowa's Plan, *supra* note 60; Southern Iowa's Plan, *supra* note 60; Western Missouri's Plan, *supra* note 60; Eastern Missouri's Plan, *supra* note 60; Western Arkansas' Plan, *supra* note 60.

64. *Plan for Random Jury Selection*, U.S. DIST. CRT. DIST. N.D., § II (Jan. 2017), http://www.ndd.uscourts.gov/jury/jury_plan.pdf (hereinafter North Dakota's Plan); *Plan for the Random Selection of Grand and Petit Jurors*, U.S. DIST. CRT. DIST. S.D., § V (Oct. 2018), <https://www.sdd.uscourts.gov/sites/sdd/files/Approved%20Jury%20Plan%202018.pdf>; *Jury Plan*, U.S. DIST. CRT. E. DIST. ARK., 3 (July 2012), <https://www.are.uscourts.gov/sites/are/files/Jury-Plan.pdf>.

65. Ninth Circuit Jury Trial Improvement Committee, *First Report on Goals and Recommendations*, U.S. CTS. NINTH CIR., at 3 (May 2004), <http://cdn.ca9.uscourts.gov/datastore/uploads/jtjc/FINALFirstReport.pdf>.

with names from other lists such as utility customers, property taxpayers, motor vehicle registrants, tribal member registrants, and driver's license holders.⁶⁶ The voting record pool is supplemented in order to “foster the policy” and “protect the rights” secured by North Dakota law.⁶⁷

In 2004, the Ninth Circuit Jury Trial Improvement Committee issued a report and recommendation for federal district courts regarding increasing citizen participation in the jury process.⁶⁸ The report noted that voter lists tend to disproportionately represent people in certain categories such as age, income, employment, and education.⁶⁹ Additionally, voter lists overrepresent Caucasian populations.⁷⁰ The report also stated approximately 66% of citizens were registered to vote, yet over 90% of citizens were included on driver's license lists within the Ninth Circuit Court of Appeals.⁷¹ Thus, the committee recommended supplementing voting records with driver's license and identification card lists to increase inclusiveness and provide better representation in jury pools.⁷²

Furthermore, the American Bar Association adopted principles for juries, noting an “inclusive and representative jury pool is critical to preserving the right to a fair and impartial jury.”⁷³ Principle 10(A) addresses procedures for the source of jury pools and provides that names of prospective jurors should be drawn from two or more lists.⁷⁴ The master jury wheel should be refilled at least annually, and courts should periodically review the wheel for its representativeness and inclusiveness of eligible citizens.⁷⁵ The jury wheel should be representative of cognizable groups corresponding to percentages in the district's population.⁷⁶ As census and voting record data demonstrate in Section III of this Note, the Federal District of North Dakota's Jury Selection Plan does not accord with the American Bar Association's principles.

66. N.D. CENT. CODE § 27-09.1-05(1) (2019).

67. N.D. CENT. CODE § 27-09.1-03(4) (2019).

68. Ninth Circuit Jury Trial Improvement Committee, *First Report on Goals and Recommendations*, (May 2004), U.S. CTS. NINTH CIR. <http://cdn.ca9.uscourts.gov/datastore/uploads/jtic/FINALFirstReport.pdf>.

69. *Id.* at 4.

70. *Id.*

71. *Id.*

72. *Id.*

73. Judge William Caprathe, et al., *Assessing and Achieving Jury Pool Representativeness*, A.B.A. (May 1, 2016), https://www.americanbar.org/groups/judicial/publications/judges_journal/2016/spring/assessing_and_achieving_jury_pool_representativeness/.

74. *Id.*

75. *Id.*

76. *Id.*

A. DISTRICT OF NORTH DAKOTA'S PLAN FOR RANDOM JURY SELECTION

The United States District Court District of North Dakota's Plan for Random Jury Selection ("North Dakota's Plan") solely draws prospective grand and petit juror names from the "central voter file" maintained by the North Dakota Secretary of State.⁷⁷ The voter file contains names of actual voters from presidential elections, which happen the first Tuesday in November every four years.⁷⁸ North Dakota's Plan divides North Dakota into two divisions—Eastern and Western. Twenty-two counties are in the Eastern Division, and thirty-one counties are in the Western Division.⁷⁹ Each division maintains a master jury wheel with names of actual voters of the counties respectively designated for that division.⁸⁰ The master wheels are emptied and refilled between January 1 and September 1 of the year following the presidential election.⁸¹ North Dakota's Plan was reviewed in 2016 and placed into effect January 1, 2017.⁸²

B. OTHER PLANS WITHIN THE EIGHTH CIRCUIT

Seven of the ten districts within the Eighth Circuit Court of Appeals supplement their sources of prospective juror names.⁸³

1. *Minnesota*

The United States District Court for the District of Minnesota determined its jury selection sources represent a fair-cross section of the community in Minnesota.⁸⁴ Minnesota's Jury Selection Plan ("Minnesota's Plan") "uses voter registration lists as its primary source of names" for federal juries but supplements the master jury wheel with driver's license lists, state identification card holder lists, and other similar lists including tribal member lists.⁸⁵ Minnesota's Plan divides the District of Minnesota into six divisions, and each has its own master wheel.⁸⁶ Master wheels are emptied and refilled

77. North Dakota's Plan, *supra* note 64, § II.

78. *Id.*

79. *Id.* § IV.

80. *Id.* § IV (B).

81. *Id.* § IV(D).

82. *Id.* at 8-9.

83. *See supra* note 60.

84. Minnesota's Plan, *supra* note 60, § 6.

85. *Id.*

86. *Id.* §§ 2, 8.

by July 1 of each odd-numbered year.⁸⁷ Minnesota's Plan was approved in September 2018.⁸⁸

2. *Nebraska*

The United States District Court for the District of Nebraska Plan for Random Jury Selection ("Nebraska's Plan") uses voter registration lists, lists of licensed motor vehicle operators, and the list of state identification cards for sources of potential jurors.⁸⁹ Nebraska's Plan divides the state into three divisions, with different master jury wheels maintained in each.⁹⁰ The master wheels are emptied and refilled by May following the year of a general election.⁹¹ Nebraska's Plan was approved in October 2019.⁹²

3. *Iowa*

The United States District Court for the Districts of Northern and Southern Iowa Jury Selection Plans ("Iowa's Plans") draw prospective juror names from voter registration lists, lists of motor vehicle operators, and non-driver identification card holders.⁹³ Iowa's Plans divide both districts into three jury divisions, and their master jury wheels are refilled every two years.⁹⁴ Northern Iowa's Plan was approved January 26, 2017, and Southern Iowa's Plan was approved July 7, 2020.⁹⁵

4. *Missouri*

The United States District Court for the Districts of Eastern and Western Missouri Jury Selection Plans ("Missouri's Plans") also draw prospective juror names from voter lists and records of licensed drivers and non-driver identification holders.⁹⁶ Eastern Missouri is divided into three divisions, and master jury wheels are refilled every two years.⁹⁷ Eastern Missouri's Plan was approved in May 2016.⁹⁸ Western Missouri is divided into five divisions,

87. *Id.* § 8.

88. *Id.* at 12.

89. Nebraska's Plan, *supra* note 60, § 5.

90. *Id.* § 7(a).

91. *Id.* § 7(d).

92. *Id.* at 16.

93. Northern Iowa's Plan, *supra* note 60, § 5(c); Southern Iowa's Plan, *supra* note 60, § 5(c).

94. Northern Iowa's Plan, *supra* note 60, §§ 3(a), 5(b); Southern Iowa's Plan, *supra* note 60, §§ 3(a), 5(b).

95. Northern Iowa's Plan, *supra* note 60, *1; Southern Iowa's Plan, *supra* note 60, *1.

96. Eastern Missouri's Plan, *supra* note 60, § 3; Western Missouri's Plan, *supra* note 60, at 2.

97. Eastern Missouri's Plan, *supra* note 60, §§ 2, 4.

98. *Id.* at 8.

and master jury wheels are also refilled every two years.⁹⁹ Western Missouri's Plan was approved April 2019.¹⁰⁰

5. *Western Arkansas*

The United States District Court for the Western District Court of Arkansas Plan for the Random Selection of Jurors (“Western Arkansas’ Plan”) draws prospective juror names from “general election voter registration lists and lists of licensed motor vehicle operators and state identification card holders.”¹⁰¹ Western Arkansas’ Plan divides the district into five divisions, and master wheels are refilled by December 31 of each year in which there is a general election.¹⁰² Western Arkansas’ Plan was approved in August 2015.¹⁰³

The Federal District Court of North Dakota could easily emulate the aforementioned districts within the Eighth Circuit. North Dakota state courts are required to draw jury names from a pool of voters, utility customers, property taxpayers, motor vehicle registrants, tribal members, and driver’s license holders;¹⁰⁴ therefore, the supplemental lists already exist in North Dakota. It is just a matter of amending North Dakota’s plan to include the supplemental lists in order to ensure a fair cross section of the community is represented on federal juries.

III. STATE DEMOGRAPHICS AND VOTING DATA

Since 2000, the percentages of voter turnout in North Dakota presidential elections have been within 61-65%.¹⁰⁵ In the most recent presidential election, the 2016 general election, North Dakota had a 61% statewide voter turnout.¹⁰⁶ The fact that slightly over half of North Dakotans vote in presidential elections should be enough reason for the Federal District Court of North Dakota to supplement its master jury wheels with lists other than just names of voters.

99. Western Missouri’s Plan, *supra* note 60, at 1, 3.

100. *Id.* at 9-10.

101. Western Arkansas’s Plan, *supra* note 60, § 401.

102. *Id.* at §§ 101, 502.

103. *Id.*

104. N.D. CENT. CODE § 27-09.1-05(1) (2019).

105. See 2000 – 2008 Election Results, N.D. SEC’Y ST., <https://vip.sos.nd.gov/PortalListDetails.aspx?ptlhPKID=67&ptlPKID=4#content-start> (last visited Dec. 22, 2019); see also 2010 – 2018 Election Results, N.D. SEC’Y ST., <https://vip.sos.nd.gov/PortalListDetails.aspx?ptlhPKID=62&ptlPKID=4#content-start> (last visited Dec. 22, 2019).

106. Official 2016 General Election Results, N.D. SEC’Y ST., <https://results.sos.nd.gov/Default.aspx?map=Cty&eid=292> (last visited Dec. 22, 2019).

There is a significant number of people within North Dakota who are not considered for federal jury service simply because they did not vote. Litigants have raised issues related to the racial make-up of federal jury panels¹⁰⁷ and obstacles Native Americans face in voting.¹⁰⁸ Yet, North Dakota has not taken action in amending its plan.

A. NORTH DAKOTA GENERAL ELECTION VOTER TURNOUT SINCE 2000

North Dakota voter turnout has remained consistent for the last five presidential elections with a little over half of eligible voters casting ballots. In the 2000 general election, North Dakota had a 62% statewide voter turnout.¹⁰⁹ In the 2004 general election, North Dakota had a 65% statewide voter turnout.¹¹⁰ In the 2008 general election, North Dakota had a 65% statewide voter turnout.¹¹¹ In the 2012 general election, North Dakota had a 61% statewide voter turnout.¹¹² And in the 2016 general election, North Dakota had a 61% statewide voter turnout.¹¹³

B. 2016 VOTER TURNOUT AND DISPARITY WITH THE NATIVE AMERICAN POPULATION

As noted, North Dakota had a 61% statewide voter turnout in the 2016 general election,¹¹⁴ which is currently the only source of names for master jury wheels in North Dakota's federal district court.¹¹⁵ From the outset, relying on just over half of North Dakota's citizens seems inadequate to capture a fair cross section of the community for jury wheels. Even greater disparity is identified when voter turnout numbers in various North Dakota counties are compared to their racial compositions. As will be illustrated, Native Americans, a distinct group within North Dakota, are underrepresented in voting records.

107. *United States v. Garcia*, 674 F. App'x 585, 587-88 (8th Cir. 2016) (unpublished).

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

109. *Official 2000 General Election Results*, N.D. SEC'Y ST., <https://results.sos.nd.gov/Default.aspx?map=Cty&eid=31> (last visited Dec. 22, 2019).

110. *Official 2004 General Election Results*, N.D. SEC'Y ST., <https://results.sos.nd.gov/Default.aspx?map=Cty&eid=26> (last visited Dec. 22, 2019).

111. *Official 2008 General Election Results*, N.D. SEC'Y ST., <https://results.sos.nd.gov/Default.aspx?map=Cty&eid=1> (last visited Dec. 22, 2019).

112. *Official 2012 General Election Results*, N.D. SEC'Y ST., <https://results.sos.nd.gov/Default.aspx?map=Cty&eid=35> (last visited Dec. 22, 2019).

113. *Official 2016 General Election Results*, *supra* note 106.

114. *Id.*

115. North Dakota's Plan, *supra* note 64, § II.

Within North Dakota's Eastern District,¹¹⁶ there is notable disparity in voter turnout and racial populations as demonstrated by the following table:

NORTH DAKOTA'S EASTERN DISTRICT¹¹⁷	RACE OF CITIZENS AGED 18+	VOTER TURNOUT IN 2016 GENERAL ELECTION
Benson County, ND	45% Native American	46%
Rolette County, ND	74% Native American	40%
Nelson County, ND	97% White	72%

Benson County's population of citizens aged 18 or older in 2016 was 45% Native American.¹¹⁸ Yet, Benson County had a low 46% voter turnout in the 2016 general election.¹¹⁹ Rolette County had the lowest voter turnout in North Dakota, with 40% of its citizens casting ballots in the 2016 general election.¹²⁰ Notably, 74% of Rolette County's population of citizens aged 18 and older in 2016 was Native American.¹²¹ In contrast, Nelson County had a 72% voter turnout in the 2016 general election,¹²² and 97% of its population of citizens aged 18 or older in 2016 was White.¹²³

The same disparity appears within North Dakota's Western District:¹²⁴

116. *Id.* § IV(A). The Eastern Division consists of the following counties in North Dakota: Barnes, Benson, Cass, Cavalier, Dickey, Eddy, Foster, Grand Forks, Griggs, LaMoure, Nelson, Pembina, Ramsey, Ransom, Richland, Rolette, Sargent, Steele, Stutsman, Traill, Towner, and Walsh. *Id.* Names of voters in the aforementioned counties are placed in the master jury wheel for the Eastern Division. *Id.*

117. Three counties within the Eastern district were selected to illustrate disparity between voter turnout and racial populations.

118. Joe Cicha, *AgeGrp18plusByCoRace_2016*, N.D. DEPT. COM. (Dec. 20, 2019) (on file with author). The percentage was calculated by dividing the total number of the "American Indian" population by the number of the "Total" population.

119. *Official 2016 General Election Results*, *supra* note 106, at Benson County.

120. *Id.* at Rolette County.

121. Cicha, *supra* note 118.

122. *Official 2016 General Election Results*, *supra* note 106, at Nelson County.

123. Cicha, *supra* note 118.

124. North Dakota's Plan, *supra* note 64, § IV(B). The Western Division consists of the following counties in North Dakota: Adams, Billings, Bottineau, Bowman, Burke, Burleigh, Divide, Dunn, Emmons, Golden Valley, Grant, Hettinger, Kidder, Logan, McHenry, McIntosh, McKenzie, McLean, Mercer, Morton, Mountrail, Oliver, Pierce, Renville, Sheridan, Sioux, Slope, Stark, Ward,

NORTH DAKOTA'S WESTERN DISTRICT¹²⁵	RACE OF CITIZENS AGED 18+	VOTER TURNOUT IN 2016 GENERAL ELECTION
Sioux County, ND	79% Native American	46%
Mountrail County, ND	24% Native American	57%
Billings County, ND	94% White	84%

Sioux County's population of citizens aged 18 and older in 2016 was 79% Native American.¹²⁶ Sioux County had a 46% voter turnout in the 2016 general election.¹²⁷ Furthermore, Mountrail County had a 57% voter turnout in the 2016 general election,¹²⁸ and its population of citizens aged 18 and older was 24% Native American in 2016.¹²⁹ In contrast, Billings County had the highest voter turnout in the 2016 general election with 84% of eligible citizens casting ballots.¹³⁰ Notably, 94% of the population aged 18 and older in Billings County is White.¹³¹

C. DEMONSTRATED RACIAL DISPARITY

The lack of inclusion of Native Americans on federal juries was brought to the Federal District Court of North Dakota's attention in *United States v. Garcia*.¹³² In *Garcia*, Ruben Garcia was convicted of drug charges, and he appealed the conviction, arguing the jury venire did not represent a fair cross section of the community.¹³³ Garcia's jury trial took place in April 2015 in

Wells, and Williams. *Id.* Names of voters in the aforementioned counties are placed in the master jury wheel for the Western Division. *Id.*

125. Three counties within the Western district were selected to illustrate disparity between voter turnout and racial populations.

126. Cicha, *supra* note 118.

127. *Official 2016 General Election Results*, *supra* note 106, at Sioux County.

128. *Id.* at Mountrail County.

129. Cicha, *supra* note 118.

130. *Official 2016 General Election Results*, *supra* note 106, at Billings County.

131. Cicha, *supra* note 118.

132. *United States v. Garcia*, 674 F. App'x 585 (8th Cir. 2016) (unpublished). The defendant was convicted in the U.S. District Court for the District of North Dakota. *Id.* at 586.

133. *Id.*

Bismarck, North Dakota.¹³⁴ Garcia's counsel argued that the jury panel should have consisted of at least three Native Americans because of the reservations located within the district, and the lack of Native American representation raised concerns regarding a fair cross section of the community.¹³⁵ In response, the court called the jury administrator as a witness, who explained the district's jury plan.¹³⁶ The jury administrator went on to testify that few Native Americans are ever on a potential jury panel.¹³⁷

The district court determined the jury plan was "racially neutral on its face" and concluded the plan had no systematic exclusion based on race.¹³⁸ On review, the Eighth Circuit Court of Appeals noted the three-prong *Duren* test required to prevail on a fair cross section claim.¹³⁹ The Eighth Circuit had previously upheld North Dakota's jury selection plan, so Garcia was required to make a showing that Native Americans faced obstacles in voting.¹⁴⁰ Racial disparities between the general population and jury pools do not by themselves invalidate the use of voter lists in jury plans.¹⁴¹ Because Garcia did not establish Native Americans faced obstacles in voting, he failed to show they were systematically excluded from jury selection.¹⁴² Thus, Garcia's conviction was affirmed.¹⁴³

Since *Garcia*, litigants have demonstrated obstacles Native Americans face in voting. In *Brakebill v. Jaeger*, Native American plaintiffs filed a lawsuit against the North Dakota Secretary of State seeking a preliminary injunction over voter identification requirements.¹⁴⁴ In enjoining the Secretary of State from implementing the current voter identification laws, the District Court of North Dakota found the requirements to be "needlessly and substantially burdensome" particularly on Native Americans.¹⁴⁵ The court noted more severe conditions in which Native Americans live, which translates to disproportionate burdens when it comes to voting.¹⁴⁶ The Plaintiffs presented evidence that approximately 4,000 Native Americans would have been

134. Appellant's Brief at *6, *United States v. Garcia*, 674 F. App'x 585 (8th Cir. 2016) (unpublished) (No. 15-2844), 2016 WL 368623.

135. *Garcia*, 674 F. App'x at 586.

136. *Id.* at 587.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 588.

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

145. *Id.* at *1-2.

146. *Id.* at *4.

denied the right to vote in the 2016 presidential election without injunctive relief.¹⁴⁷

In 2017, the North Dakota Legislature amended the election law involved in the 2016 *Brakebill* decision.¹⁴⁸ The Secretary of State moved to set aside the injunction issued in 2016, and the Plaintiffs sought a second injunction.¹⁴⁹ The court noted evidence that “Native American eligible voters in North Dakota are less likely to possess a qualifying voter ID under current North Dakota law, as compared to non-Native Americans.”¹⁵⁰ Furthermore, “at least 4,998 otherwise eligible Native Americans currently do not possess a qualifying voter ID under the new law.”¹⁵¹ The Plaintiffs’ motion for a second preliminary injunction was granted by the district court.¹⁵² However, the Eighth Circuit Court of Appeals issued a stay of the preliminary injunction pending appeal.¹⁵³ The U.S. Supreme Court subsequently denied the application to vacate the stay entered by the Eighth Circuit in October 2018.¹⁵⁴ The Eighth Circuit officially vacated the district court’s order enjoining the Secretary of State from enforcing certain voter laws.¹⁵⁵ The Eighth Circuit remanded the case and concluded the statewide injunction was not warranted, but it left open a possibility for the court to enter a narrower injunction for certain voters who have been burdened.¹⁵⁶

The parties in *Brakebill* agreed to settle the case in February 2020, which included terms to relieve certain burdens on Native Americans and ensure ongoing collaboration to address concerns and issues in the future.¹⁵⁷ Regardless, the developments in *Brakebill* certainly warrant further discussion on voter eligibility laws in North Dakota,¹⁵⁸ and voter eligibility laws currently have a direct impact on federal juries in North Dakota. It remains to be seen how the settlement in *Brakebill* will resolve all the issues related to Native Americans being able to exercise their rights to vote.

147. *Id.* at *11.

148. *Brakebill v. Jaeger*, No. 1:16-cv-008, 2018 WL 1612190, at *1 (D.N.D. Apr. 3, 2018).

149. *Id.*

150. *Id.* at *2.

151. *Id.* at *4.

152. *Id.* at *7.

153. *See Brakebill v. Jaeger*, 905 F.3d 553, 561 (8th Cir. 2018).

154. *Brakebill v. Jaeger*, 139 S. Ct. 10 (2018) (mem.).

155. *See Brakebill v. Jaeger*, 932 F.3d 671, 673-74 (8th Cir. 2019).

156. *Id.* at 680-81.

157. Press Release, Alvin Jaeger, Sec’y, N.D. Sec’y of State, Agreement in Principle Related to Tribal IDs for Voting (Feb. 13, 2020), http://sos.nd.gov/files/uploaded_documents/tribal-ids-for-voting-joint-press-release-20200213.pdf.

158. Logan Carpenter, *Voter Suppression of Election Integrity? The Future of Voter Identification in North Dakota*, 94 N.D.L.REV. 569, 595 (2019).

IV. RECOMMENDATION

Between the trend in other districts to supplement voting records with other lists in master jury wheels, consistent low voter turnout in North Dakota, and the demonstrated racial disparity related to voting, it is time to update North Dakota's Plan for Random Jury Selection. The Federal District Court of North Dakota should not wait for future fair cross section challenges to warrant change. The integrity of the justice system calls for a fair cross section of the community, and that simply is not achieved by solely relying on voting records.

Supplementing the jury pool will not create a heavy burden on the Federal District Court of North Dakota. Since juries within state district courts in North Dakota are drawn from a pool of actual voters supplemented with names from other lists such as utility customers, property taxpayers, motor vehicle registrations, tribal registries, and driver's licenses,¹⁵⁹ the Federal District Court of North Dakota could access the same lists for its master jury wheels. In order to stay uniform with federal plans, the Federal District Court of North Dakota should mirror the District of Minnesota's plan, which provides for drawing prospective juror names from voter lists, driver's license lists, state identification card holder lists, and tribal enrollment lists.¹⁶⁰

The Federal District Court of North Dakota should take a step forward and join the seven other district courts within the Eighth Circuit in order to uphold the integrity of the justice system. In supplementing its master jury wheel with names from other lists, the Federal District Court of North Dakota will demonstrate its commitment to representation of the entire community.

V. CONCLUSION

It is time for the Federal District Court of North Dakota to join its seven sister courts within the Eighth Circuit Court of Appeals that supplement voting records with other lists in their master jury wheels. The fundamental fair cross section requirement is not achieved by limiting potential jurors to general election voters, especially when voter turnout in North Dakota is essentially half of eligible citizens. The burdens Native Americans face in voting further demonstrate the need for supplementation of names in North Dakota's

159. N.D. CENT. CODE § 27-09.1-05(1) (2019).

160. Minnesota's Plan, *supra* note 60, § 6.

master wheel. By supplementing the master jury wheel with names from other lists, North Dakota can include more citizens in federal jury service and uphold the integrity of the American justice system.

*Katie Winbauer**

*†2021 J.D. Candidate at the University of North Dakota School of Law. I first and foremost need to thank Paul Myerchin, of Bormann, Myerchin, Espeseth & Edison, LLP, for opening my eyes to this issue. Paul, I appreciate your guidance and feedback in writing this Note. I would also like to thank Erica Woehl for helping me navigate law school and the legal profession. Erica, you are the best mentor I could ask for. Finally, thank you to my family and friends – your unending support and encouragement keeps me going.