



STATE OF NORTH DAKOTA
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LETTER OPINION
2022-L-05

Mr. Birch Burdick
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Dear Mr. Burdick:

Thank you for your letter requesting an opinion on whether North Dakota law allows proof of citizenship as a condition for voting in North Dakota elections. Your inquiry arose in the context of individuals seeking to vote and asserting their citizenship of the United States despite their identification indicating they were not a citizen at some point in time. You asked whether, in such instances, an election official must accept the individual's word, or whether an official may require the individual to present proof of citizenship.

North Dakota law has no statutory requirement or constitutionally permissible method by which to require proof of citizenship, so it is my opinion that current law does not permit an election official to require a voter to provide documentary proof of citizenship in order to vote. There are legislative provisions that could alter this legal structure in North Dakota if enacted by a future legislative assembly, but those are not yet before me.

ANALYSIS

Article II, § 1, N.D. Const., and N.D.C.C. § 16.1-01-04 set forth the qualifications necessary to be an elector in the State of North Dakota. Under these two provisions, to qualify as an elector, an individual must be: 1) a citizen of the United States, 2) eighteen years of age or older, and 3) a resident of this State who has resided in the precinct at least thirty days immediately preceding any election.¹ Before an individual receives a ballot for voting, the individual is required to present an election official with a valid form of identification² that specifies the individual's: 1) legal name, 2) current residential street address, and 3) date of birth.³ If the identification does not include one of those three items or includes information that is not current, the individual can supplement the identification by presenting any of the documents enumerated in statute and which

¹ N.D. Const. art. II, § 1; N.D.C.C. § 16.1-01-04(1).

² A valid form of identification consists of either: 1) a driver's license or nondriver's identification card issued by the N.D. Dept. of Transp. or 2) an official form of identification issued by a tribal government to a tribal member residing in this state. N.D.C.C. § 16.1-01-04.1(3).

³ N.D.C.C. § 16.1-01-04.1(1), (2).

provide the missing or outdated information.⁴ However, as your letter makes clear, North Dakota law does not require an individual's citizenship status to be established on the form of identification presented to an election official.⁵ Absent such a proof requirement in statute, voting officials are not permitted to create one.

Although an individual does not have to be a citizen of the United States in order to obtain a driver's license or nondriver's identification card in this state, both a driver's license and nondriver's identification card issued by the North Dakota Department of Transportation include the citizenship status of the holder at the time the license or card is issued. When a license or card is issued to a noncitizen, it must be clearly distinguishable from a similar license or card issued to a United States citizen.⁶ A North Dakota driver's license or a nondriver's identification card for a noncitizen is marked with either a "temporary" or "permanent" resident label, based on the individual's legal status in this country. Notably, if an individual becomes a citizen after receiving a noncitizen license or identification, North Dakota law does not require the individual to replace the card. Persons who opt to replace these cards must pay a replacement fee.⁷ Based on these circumstances, it is reasonable to conclude some individuals with noncitizen licenses or identification cards are citizens.

The North Dakota Department of Transportation serves as one of the information sources for the North Dakota Secretary of State's electronic database of potential voters which is used for generating pollbooks.⁸ When a noncitizen becomes a citizen and shows up at a polling place to vote, it is quite possible the new citizen did not know to inform the North Dakota Department of Transportation of the change in his or her citizenship status, or did not have time to do so before they voted. In that case, both the individual's identification and the pollbook would erroneously

⁴ N.D.C.C. § 16.1-01-04.1(3)(b). The list of acceptable supplemental documentation consists of a current utility bill; a current bank statement; a check issued by a federal, state, or local government; a paycheck; a document issued by a federal, state, or local government; or a printed document issued by an institution of higher education for an enrolled student. N.D.C.C. § 16.1-01-04.1(3)(b).

⁵ Past legislative assemblies could have added citizenship status to the list of items that must be documented, however no such enactment has been made. Future legislative assemblies are similarly capable of such a course, subject to constitutional considerations.

⁶ N.D.C.C. §§ 39-06-03.1(2), 39-06-07.1(1), 39-06-14(5).

⁷ See N.D.C.C. § 39-06-03.1(2). Nothing prevents a potential voter from voluntarily presenting some other documentation as proof of citizenship.

⁸ N.D.C.C. § 16.1-02-01(central voter file), N.D.C.C. § 16.1-02-09 (Dept. of Transp. to report updates to the Sec'y of State). *See also*, N.D.C.C. § 16.1-02-06 (State Health Officer reports deaths, name changes by marriage); N.D.C.C. § 16.1-02-07(State Court Adm'r reports name changes by divorce or order of the court); N.D.C.C. § 16.1-02-08.1 (Dept. of Corr. report people convicted of a felony).

designate the individual as a noncitizen.⁹ North Dakota law does not provide a process for dealing with this scenario and none can legally be assumed.

Section 16.1-01-04.1, N.D.C.C., does provide an orderly and constitutionally sound process to follow when an individual cannot prove their legal name, current residential street address, or date of birth at the polling place.¹⁰ The law provides that the individual may mark a ballot that is then set aside in a sealed envelope. That set-aside ballot will be counted only if the individual later shows valid documentation of the missing or inaccurate information before the canvassing board meets to canvass the results of the election.¹¹ Perhaps a future legislature will craft similar provisions to constitutionally craft a process for providing proof of citizenship, but they have not done so yet, and that establishes the bounds for this Attorney General opinion.

The plain language of N.D.C.C. § 16.1-01-04.1 does not extend the set-aside ballot process to situations when an individual's citizenship status may differ from that indicated on the individual's identification. When interpreting statutes, North Dakota courts have consistently recognized the presumption that the legislature meant what it said and said all it intended to say.¹² Thus, I cannot lawfully read a proof of citizenship requirement into a statute where it does not appear.

In assessing these matters, courts are also required to consider federal law. Courts have evaluated proof of citizenship requirements under both the National Voting Rights Act (NVRA) and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Documentary proof of citizenship requirements are usually evaluated under the statutory framework of the NVRA, which does not apply to North Dakota.¹³ Recently, though, the U.S. Court of Appeals for the Tenth Circuit reviewed an Equal Protection Clause challenge to a Kansas state law requiring individuals to provide certain documents to prove citizenship when applying to register to vote. In *Fish v. Schwab*, the court evaluated the asserted injury to individuals' right to vote against the state's interests and justification for burdening that right by demanding documentary proof of citizenship.¹⁴ Although the right to vote is "fundamental" and a "preservative of all rights," it is not absolute.¹⁵

⁹ In addition to those citizens who do not update their citizenship status with the Department of Transportation, there is also the possibility that an individual's status might be mislabeled. In the June 2022 primary election there was an error that caused some United States citizens to be mislabeled as noncitizens in the pollbooks.

¹⁰ N.D.C.C. § 16.1-01-04.1(5).

¹¹ *Id.* The county canvassing board meets to canvass the election returns on the 13th day following each election. N.D.C.C. § 16.1-15-17.

¹² *Estate of + v. Gilstad*, 829 N.W.2d 453, 457 (N.D. 2013).

¹³ Six states are exempt from the NVRA (including North Dakota) because, on and after August 1, 1994, the states either had no voter-registration requirements or had election-day voter registration at polling places with respect to elections for federal office.

¹⁴ *Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020).

¹⁵ *Id.*, at 1121 (internal citations omitted).

States may regulate elections provided the regulations do not unduly burden the right to vote.¹⁶ To determine whether a statutory burden on the right to vote is constitutionally permissible, the U.S. Supreme Court developed the *Anderson-Burdick* balancing test.¹⁷ In *Fish v. Schwab*, the test balanced the state's interests in protecting the integrity of the electoral process, ensuring the accuracy of voter rolls, safeguarding voter confidence, and preventing voter fraud, against the burden on voters.¹⁸ After a lengthy, fact-specific analysis, the court there deemed the state's interests legitimate and important but ultimately insufficient to justify the burden of the statute on individuals' right to vote.¹⁹ As a result, the court found the Kansas law violated the Equal Protection Clause and upheld the lower court's injunction against enforcement of the law. I caution that any legislative action to require voters to provide documentary proof of citizenship here in North Dakota will need to be guided by an analysis of the *Fish v. Schwab* opinion and related constitutional caselaw as they may apply to the relevant facts in North Dakota.

While North Dakota law provides no basis upon which to demand proof of citizenship as a precondition to voting, there is, nonetheless, a process available to any election official who believes a person is voting illegally, including where it is suspected the person is not a citizen of the United States. If an election official has a nondiscriminatory reason to believe an individual who casts a ballot is not a citizen of the United States, the official may make a note and forward that individual's name to the appropriate state's attorney for review. After all, it is a crime for an individual to vote when he or she is not a qualified voter.²⁰ If an individual who is not a citizen votes in a North Dakota election, the individual has committed a class C felony, which is punishable by up to five years imprisonment and a fine of up to ten thousand dollars.²¹

The right to vote is a fundamental political right, and any abridgement of this right must be closely scrutinized.²² Without a clear statutory requirement to prove citizenship and a constitutionally permissible method by which to prove it, the law prohibits an election official from requiring a voter to provide documentary proof of citizenship in order to vote. If an individual states he or she is a United States citizen and otherwise qualifies as an elector in that polling place, the election official must allow that individual to vote. If the election official remains unconvinced, the election official

¹⁶ *Id.*, at 1122 (internal citations omitted).

¹⁷ *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (“A court considering a challenge to a state election law must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’”)

¹⁸ *Fish v. Schwab.*, at 1132.

¹⁹ *Id.*, at 1132, 1134.

²⁰ See e.g., N.D.C.C. § 16.1-01-12(1)(g).

²¹ N.D.C.C. § 12.1-32-01(4).

²² *Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020).

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is free to note the individual's contact information and may provide that information to the State's Attorney for appropriate review and investigation.



Drew H. Wrigley
North Dakota Attorney General

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.²³

²³ See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).