PROJECT VOTE

AUTOMATIC VOTER REGISTRATION

BEST PRACTICES

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INTRODUCTION

Automatic voter registration is generating considerable enthusiasm on the part of many voting rights advocates and policymakers. Although there is no agreed-upon definition of the concept, Project Vote understands it to mean a statutory system whereby state election officials use information about individuals' voter eligibility existing within government databases to register qualified individuals to vote without the individuals themselves needing to take action. This process has the potential to significantly increase voter registration rates in America, which is almost unique among Western democracies in putting the onus of registration on the individual.[1]

The push to develop automatic voter registration comes more than 20 years after the passage of a previous initiative to reduce the barriers to registration: the National Voter Registration Act of 1993 (NVRA).[2] The NVRA predominantly governs voter registration in America and requires, among other provisions, that certain government agencies provide voter registration services. It is law in 44 states.

Because the NVRA is federal law, automatic voter registration may co-exist alongside existing NVRA procedures, but *not* replace them. Thus, state-based automatic voter registration can merely be implemented as an *additional* method of registering voters, separate from the processes required by the NVRA. Project Vote recommends, instead, that automatic voter registration be integrated with the required NVRA processes, and used as an opportunity to modernize the processes set forth in the NVRA, making voter registration dynamic, efficient and effective.

This paper discusses, *first*, the basics of state-based automatic voter registration and the NVRA. *Second,* this paper sets forth a detailed proposal for implementing state-based automatic voter registration in conjunction with the NVRA; although these proposals are not state-specific, each proposal may be tailored to a state's practices and procedures. And, *third*, this paper reviews generally important policy considerations for any state-based automatic voter registration system.

I.   AUTOMATIC VOTER REGISTRATION AND THE NVRA

A.   State-Based Automatic Voter Registration*

State-based automatic voter registration refers to the process by which state governments register citizens to vote using relevant eligibility information already maintained by government agencies without any affirmative steps by potential registrants. By reducing the steps and actions required on the voter's part to register, automatic registration results in fewer voters facing registration barriers to voting, and allows citizens to better participate in the democratic process.

Most current proposals for state-based automatic voter registration involve using information obtained by state motor vehicles agencies to automatically register to vote eligible citizens who hold a state driver's license or identification card. The core process of these automatic voter registration proposals requires motor vehicle agencies to electronically provide election officials information, including the name, age, residence, electronic signature, and citizenship status of persons who are likely eligible to register to vote. Then the election official notifies the person of the process to decline to register or select a political party, usually through a mailing from the election official sent after the individual's transaction with the motor vehicle agency. If the individual does not respond to the notice, the election official registers him or her to vote.[3]

B.   Impact of State-Based Automatic Voter Registration on the NVRA

The NVRA requires state motor vehicle offices in Section 5, and public assistance agencies in Section 7, to affirmatively offer voter registration services.[4] Although both types of government agencies are required to affirmatively provide voter registration, the requirements of Section 5 and Section 7 of the NVRA are quite different.

There is some suggestion that state-based automatic voter registration proposals can replace the voter registration requirements of the NVRA. This is simply incorrect because the NVRA is federal election law that preempts any conflicting state law or process. The requirements of the NVRA cannot be modified or ignored regardless of what state voter registration system is established—even if the proposed state system may result in more voter registrations.**

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*This paper is limited to state-based automatic voter registration. It does not discuss federal legislations or proposals. Federal automatic voter registration legislation would, of course, be welcome, and is highly recommended.

**The NVRA offered a time-limited incentive for states to become exempt from its requirements if certain policy changes were enacted by August 1994: the only states exempted from the NVRA are states that had no voter registration requirements or that offered voters the opportunity to register to vote at the polling place in federal general elections by August 1, 1994 and have continuously maintained these processes since. *See* 52 U.S.C. § 20503. The only states that qualify for this exemption are Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming.

Indeed, the Supreme Court has made clear that the NVRA preempts state law where the state law conflicts with the NVRA. "Over the past two decades, Congress has erected a complex superstructure of federal regulation atop state voter-registration systems. [...] The [NVRA] requires each State to permit prospective voters to register to vote in elections for Federal office by any of three methods, [including] simultaneously with a driver's license application."[5] Because the NVRA was enacted pursuant to the Elections Clause of the Constitution,[6] it cannot be replaced or preempted by a state's automatic voter registration law to the extent such a law conflicts with the NVRA.[7] This does not, however, mean that automatic voter registration cannot coexist with or complement the NVRA.

C.   Combining Automatic Voter Registration and the NVRA

States adopting automatic voter registration system have two options: (1) keep intact current NVRA-compliant procedures for offering voter registration services through government agencies, and, as part of an unrelated process, use data from government agencies (such as motor vehicle departments) to separately and automatically register voters; or (2) create a framework whereby automatic voter registration is integrated with NVRA requirements.

As long as all the requirements of the NVRA are followed by the relevant state agencies, the NVRA does not prevent or preempt a state from registering voters through an automatic transfer of the relevant data from these agencies. However, this is neither a best practice nor even one that is efficient. First, using data from state agencies to automatically register voters without obtaining an attestation from the individual that he or she is eligible to register to vote may result in the registration of ineligible voters. Second, data from government agencies may be incomplete, erroneous, or outdated, resulting both in ineligible individuals registering to vote and newly eligible voters being disenfranchised.[8] Third, because adding automatic voter registration does not eliminate the requirement to proffer voter registration pursuant to the NVRA, this option merely creates additional and duplicative work for government agencies. For these reasons, Project Vote recommends integrating automatic voter registration with the requirements of the NVRA: this will ensure robust, efficient, and accurate voter registration in states.

In addition, most current proposals for state-based automatic voter registration are limited to motor vehicles agencies. New voter registration opportunities should also be incorporated at other government agencies, in particular at public assistance agencies. Project Vote's proposal provides recommendations for how the automatic transfer of government agency data for the purpose of voter registration can be integrated into NVRA compliance with each set of relevant NVRA requirements. This proposal allows for establishing a presumption (and default) of voter registration unless an individual affirmatively declines or is ineligible. This default of voter registration, requiring fewer affirmative steps by potential voters to become registered, is the most important benefit of a system of automatic voter registration. The proposals in this document explain how that benefit can be accomplished while still complying with the NVRA.

II. AUTOMATIC VOTER REGISTRATION PROCESSES WITH SECTION 5 OF THE NVRA

A.   Requirements of Section 5 of the NVRA

Specifically, Section 5 of the NVRA requires that an initial (or new), or renewal application for a driver's license must:

1. serve, *simultaneously*, as an application for voter registration, whether the transaction occurs in person at a driver's license office or online;[9]
2. not request duplicative information for voter registration purposes, other than a signature;[10]
3. request additional information necessary only to:
    i.   prevent duplicate voter registrations and enable State officials to assess the eligibility of the applicant; and
    ii. to administer the election process (this includes, for example, information such as party affiliation);[11]
4. state each eligibility requirement for voter registration (including citizenship);[12]
5. require an attestation that the applicant meets each such requirement under penalty of perjury;[13]
6. state the specific penalties for submission of a false voter registration application;[14] and
7. state that a declination to register to vote will be confidential.[15]

All changes of address are required to serve, simultaneously, as a notification of change of address for voter registration unless the client states affirmatively on the form that the change of address is not for voter registration purposes.[16] This is often accomplished through an opt-out check box on the change of address form.

Finally, completed voter registration applications must be submitted to state election officials within ten (10) days of acceptance, or within five (5) days if accepted within five (5) days prior to the voter registration deadline.[17]

Upon transfer of voter registration applications (or the portion of the driver's license application and renewals containing relevant voter registration information) to election officials by the motor vehicle department, election officials must enter voter registration data, unless it is electronically transferred. Then, state election officials must determine if the voter registration applicant is eligible to register to vote in that state. Each state sets forth its own eligibility requirements for voter registration. While all states have residency, citizenship and age requirements, many states also have requirements about an individual's felony status and mental capacity. In order to register to vote, an individual must meet the eligibility requirements of their state. Providing false information as part of a voter registration application or registering to vote when ineligible carries stiff penalties.[18] If an individual is eligible to register to vote, the person must be added to the state's voter rolls. Election officials must notify each applicant of the disposition of their voter registration application, *i.e.* whether the application has been accepted, deemed incomplete, or rejected.[19]

It is important to note that Section 5 of the NVRA does not explicitly require or provide for an opportunity to decline to register to vote on the driver's license or renewal application. However, Section 5 of the NVRA does require that the voter registration portion of the driver's license application include the voter eligibility requirements *and* have the applicant attest under penalty of perjury that he or she meets these requirements.[20] This necessarily means that an individual who does not meet the voter eligibility requirements of a particular state must have a mechanism to decline the voter registration proffer when it is made. Currently, some states provide a specific question about voter registration with "yes" or "no" check boxes, while other states require a second signature solely for the purpose of voter registration. Thus, an individual can decline to register to vote by either failing to answer the voter registration question, checking the "no" box, or merely failing to execute the second signature related to voter registration. This means that, in many cases, though the individual completes the license transaction, if the person does not take action specific to voter registration, he or she remains unregistered to vote.

In the next sections, Project Vote sets forth a detailed schematic proposal combining the best practices for implementing Section 5 of the NVRA, and adds in automatic voter registration elements so that: (1) there is a default presumption in favor of voter registration; (2) the driver's license transaction is streamlined; and (3) voter registration data is transferred electronically and automatically. These proposals incorporate all the required elements of the NVRA, but recommend significant changes to motor vehicle department procedures currently in place in most states.

B.   Initial Application and Renewal Processes

1.   Incorporate voter registration into a single continuous driver's license application or renewal transaction requiring a single signature, regardless of whether the transaction involves paper and data entry by workers or is paperless (and interactive with the client directly using electronic technology such as a keypad and stylus).

2.   Streamline the state's driver's license application and renewal form by eliminating the separate voter registration question and/or the second signature, to the extent that the state's driver's license application currently includes a voter registration question or a second signature for voter registration.[21]

3.   Include a statement in both the driver's license application and renewal form that informs individuals that information provided during their transaction may be used for voter registration purposes.

4.   Modify the signature block of the driver's license application and renewal form to include: (a) the voter eligibility requirements; (b) penalties for perjury and for submitting a false voter registration application; (c) a statement that a declination to register to vote will remain confidential; and (d) attestation of meeting those eligibility requirements with a prominent and conspicuous opt-out option, such as a checkbox, to decline voter registration.

5.   Provide an opportunity to pick a political party, particularly if party membership is required to vote in any primary election of that state.

The practices stated above are illustrated below, using as an example the District of Columbia's driver's license application, which currently requires two signatures: one for the driver's license application and one for voter registration.[22]

Current Driver's License Application (has two signatures – one for each of the statements below):

Driver's License Signature:

Any person using a fictitious name or address and/or knowingly making any false statement on this application is in violation of D.C. Law and subject to a fine of not more than $1,000 or 180 days imprisonment or both. (D.C. Official Code §22-2405). I hereby certify, under penalty of perjury, that the information contained on this application is true and correct.

Applicant Signature: _____
              Date: _____

Voter Registration Signature:

Under penalty of perjury, I swear or affirm that I am a U. S. Citizen; I live in the District of Columbia at the address above; I do not claim voting residence outside of the District of Columbia; I am at least 16 years old; I am not in jail for a felony conviction; and I have not been found by a court to be legally incompetent to vote. WARNING: If you sign this statement even though you know it is untrue, you can be convicted and fined up to $10,000 and/or jailed for up to five years.

Party Registration:

To vote in a primary election in the District of Columbia, you must be registered to vote in one of the following four (4) parties (Check ONE box below):

☐ *Democratic* ☐ *Republican*
☐ *D.C. Statehood Green Party* ☐ *Libertarian*

If you register with "No Party (Independent)" or with another party not listed above, you may not vote in primary elections.

☐ *No Party (Independent)*
☐ *Other (write party name here)_____*

Sign Here: _____
     Date: _____

Proposed Modifications (only one signature for both license and voter registration):

The information you have provided in this form will be used for voter registration purposes. In order to apply to register to vote in the District of Columbia <u>you must be a U.S. Citizen;</u> be at least 16 years old; not be in jail for a felony conviction and not have been found by a court to be legally incompetent to vote. WARNING: If you sign this statement even though you know it is untrue, you can be convicted and fined up to $10,000 and/or jailed for up to five years Your signature below is an affirmation that you meet these requirements under penalty of perjury unless you refuse to register to vote.

☐ *I do not want to register to vote at this time.*
YOU <u>MUST</u> CHECK THIS BOX IF YOU DO NOT MEET THE VOTER ELIGIBILITY REQUIREMENTS STATED ABOVE.

Your decision not to register to vote will remain confidential.

Party Registration:

To vote in a primary election in the District of Columbia, you must be registered to vote in one of the following four (4) parties (Check ONE box below):

☐ *Democratic* ☐ *Republican*
☐ *D.C. Statehood Green Party* ☐ *Libertarian*

If you register with "No Party (Independent)" or with another party not listed above, you may not vote in primary elections.

☐ *No Party (Independent)*
☐ *Other (write party name here)_____*

Any person using a fictitious name or address and/or knowingly making any false statement on this application is in violation of D.C. Law and subject to a fine of not more than $1,000 or 180 days imprisonment or both. (D.C. Official Code §22-2405). I hereby certify, under penalty of perjury, that the information contained on this application is true and correct.

Applicant Signature: _____
              Date: _____

C. Change of Address Processes

Many states will not need to change their processes for change-of-address updates as part of implementing state-based automatic voter registration, because Section 5 of the NVRA already requires that address updates for driver's licenses be treated automatically as updates for voter registration purposes unless an individual opts-out in writing. Project Vote recommends the following practices:

1. Include a statement that informs individuals that information provided during the transaction may be used for voter registration purposes.

2. For individuals registered in the state, provide an opportunity to opt out of updating the address for voter registration purposes. This can be accomplished with instructions to the individual to check a box if they wish to indicate their change of address is not for voter registration purposes.

3. For individuals who are not registered in the state, provide an opportunity to register to vote. The opportunity to register to vote should include language identical to the signature block of the initial application or renewal, including the attestation and other requirements outlined above.

The requirements stated above are illustrated below, using as an example Washington's change of address application.[23]

Current Change of Address Form:

The information on this form will also update the address on your voter registration unless you decline:

☐ I do not want this information used to update my voter registration.

If you want to vote and have not registered or you moved to a different county, contact your county auditor's office for assistance.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Date and Place Signed: _____
Signature (Required): _____

Proposed Modifications:

The information you have provided in this form will be used for voter registration purposes unless you decline:

☐ I do not want this information used to update my voter registration.

*If you want to vote and have not registered, you may do so here. <u>I am a citizen of the United States</u>, I will have lived at this address in Washington for at least thirty days immediately before the next election at which I vote, I will be at least 18 years old when I vote, I am not disqualified from voting due to a court order, and I am not under Department of Corrections supervision for a Washington felony conviction. WARNING: If you sign this statement even though you know it is untrue, you can be convicted and fined up to $10,000 and/or jailed for up to five years. **Your signature below is an affirmation that you meet these requirements under penalty of perjury unless you refuse to register to vote.***

☐ I do not want to register to vote at this time.
YOU <u>MUST</u> CHECK THIS BOX IF YOU DO NOT MEET THE VOTER ELIGIBILITY REQUIREMENTS STATED ABOVE.

Your decision not to register to vote will remain confidential.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Date and Place Signed: _____
Signature (Required): _____

D. Automatic Voter Registration Elements

After implementing the driver's license application, renewal, and change-of-address processes as described above, an automatic, electronic transfer of all relevant voter registration data from the motor vehicle department to election officials for an eligibility determination* should be implemented as detailed below. The automatic, electronic data transfer will eliminate paper and reduce data entry errors.

1. Electronically transfer to election officials all available relevant voter registration data—including, name, address, age, citizenship status,** party preference, and attestation—of those individuals who do not affirmatively opt out during the driver's license application, renewal, or change of address transaction.

2. Upon receipt of voter registration data, election officials should determine whether an individual is eligible to vote in the state and should add all eligible individuals to the voter rolls.[24]

3. State election officials must provide a notice to individuals about the disposition of their voter registration application, *i.e.* whether it is accepted, incomplete, or rejected.[25] This notice will provide individuals whose voter registration application is incomplete an opportunity to finalize or, if needed, resubmit their voter registration application.***

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* This paper does not discuss the possibility of using existing data from motor vehicle departments for automatic voter registration purposes (also referred to as a "look back" or "retroactive automatic voter registration"). At this time, Project Vote does not recommend a look back or retroactive automatic voter registration as it raises concerns of inaccurate or outdated data. For example, an individual who was not incarcerated at the time he or she obtained a driver's license may now be incarcerated and thus potentially ineligible to register; or an individual who was not a United States citizen at the time he or she obtained a driver's license but is now a citizen will *not* be registered to vote despite being eligible. As such, in order to update or verify the old data from motor vehicle departments, a look back or retroactive automatic voter registration necessarily implicates matching old data from motor vehicle departments with databases, for example, containing felon or citizenship information. Such matching is often inaccurate and error prone; and it results in disenfranchisement. *See*, e.g., Michael P. McDonald and Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 7 Election L. J. 111 (2008); *see also* Myrna Pérez, Brennan Center for Justice, *Voter Purges 3* (2008), http://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf; Amy Sherman, "Homeland Security warned that the SAVE database is not foolproof way to verify the voter rolls, LWV says," *Politifact Florida* (Oct. 30, 2013, 1:36 PM), http://www.politifact.com/florida/statements/2013/oct/30/league-women-voters-florida/league-women-voters-says-homeland-security-warned-/.

Additionally, a look back or retroactive automatic voter registration process does not provide an individual with the ability to attest to meeting the eligibility requirements of that state. *See infra* p. 15 for a discussion on the attestation.

** It is important to note that not all state driver's license applications or renewal applications contain citizenship questions. Requiring the attestation to the voter registration eligibility requirements will allow individuals to establish their citizenship even when this information is not specifically collected by the state government. Nothing herein should be interpreted to encourage the collection of additional data or documents by motor vehicle departments. Also, even in states that do not affirmatively request citizenship status per se, the state motor vehicle agencies may already collect documentation to establish identity and residency, such as a U.S. birth certificate or passport, which also demonstrates citizenship. In this circumstance, that information should be transferred to election officials.

*** For example, in a state that collects citizenship information, the data transferred might contain information that an individual is not a citizen and an attestation that he or she eligible to register to vote. When provided with such conflicting information, state election officials should treat this voter registration application as incomplete. The notice sent pursuant to Section 8 (52 U.S.C. § 20507(a)(2)) will allow any individual whose voter registration is deemed incomplete in this (or any other) circumstance to provide the correct information, or if needed, resubmit the application if eligible.

III. AUTOMATIC VOTER REGISTRATION PROCESSES WITH SECTION 7 OF THE NVRA

A.   Background and Requirements[26]

In addition to Section 5 of the NVRA, there is an equally important but less well-known provision of the NVRA requiring states to affirmatively offer voter registration opportunities to clients of public assistance programs. Section 7 of the NVRA governs voter registration by public assistance offices.[27] Programs covered by the NVRA include, but are not limited to, Food Stamps (now known as the Supplemental Nutrition Assistance Program or SNAP), Temporary Assistance for Needy Families (TANF), Medicaid, and the Children's Health Insurance Program (CHIP).[28]

Section 7 requires public assistance agencies to offer voter registration services each time a client applies for benefits, renews/recertifies benefits, or submits a change of address (collectively, "covered transactions")[29] by:

1. distributing a voter registration application to individuals who do not decline voter registration in writing;[30]

2. distributing a voter information form with appropriate disclosures and the question, "If you are not registered to vote where you live now, would you like to apply to register to vote here today?" (this is often called the "voter preference question");[31]

3. providing the same degree of assistance in completing voter registration applications as is provided in completing the agency's own forms;[32] and

4. accepting completed voter registration applications for timely transmittal to the appropriate state election officials.[33]

Voter registration services must be provided whether covered transactions occur in-person at the public assistance office or remotely (via mail, telephone, or the internet).[34]

Voter registration by public assistance agencies is not required to be as streamlined as the process set forth in Section 5 of the NVRA. Rather than incorporating voter registration into the public agency systems and transactions in a non-duplicative fashion, public assistance agencies leave the completion of voter registration applications to individual clients. In fact, in addition to the agencies' own forms (whether on paper or online), many states provide a separate voter information form, and almost all states provide a separate voter registration application form to individuals who do not decline to register to vote in writing. Thus, individuals must go through several different documents, or hop through different online portals, in order to register to vote. Consequently, many public assistance clients never complete and submit a voter registration application. As described below, state-based automatic voter registration by public assistance agencies can shift the burden of registering voters to the government in a manner that is efficient for both the public assistance agency and the individual.

In the next sections, Project Vote sets forth a detailed schematic, combining the best practices for implementing Section 7 of the NVRA with elements of automatic voter registration so that (1) there is a default presumption in favor of voter registration; (2) the

covered transaction is streamlined, efficient, and non-duplicative; (3) extraneous paperwork is eliminated; and (4) voter registration data is transferred electronically and automatically. Like the proposals for motor vehicle offices, these proposals incorporate all the required elements of the NVRA, but recommend significant changes to public assistance agencies procedures currently in place in most states.

B.   Covered Transactions

1. Eliminate a separate voter information form, and instead incorporate it into the initial paperwork or online system for all covered transactions such that it is a single document or online transaction.

2. Eliminate a separate voter registration application (which requires duplicative informa-tion), and instead state the voter eligibility requirements along with the voter information form disclosures. Unless an individual specifically declines voter registration by opting out, the person's signature will automatically submit a voter registration application for an eligibility assessment by election officials.

3. Require individuals to answer the voter preference question as part of their covered transaction. For example, this can be accomplished during an online process by mak-ing the voter preference question a "hard stop," which requires a response prior to continuing. During paper transactions, individuals can be required to answer the voter preference question just like they must provide other required information, e.g. income information.

4. Provide a clear and prominent notice informing individuals that the information provided on the form will be used for voter registration purposes unless they opt out.

5. Provide a clear statement that the signature (electronic or on paper) required as part of the transaction will be an attestation under penalty of perjury that they meet the voter eligibility requirements unless they decline to register to vote or opt out.

6. Accomplish the declination or opt-out either by incorporating an attestation into the check boxes that are already part of the voter preference question, or by incorporating the voter registration attestation into the signature block at the end of the form.

7. Provide individuals an opportunity to select a party preference; in states with closed pri-maries, include a notice that party selection in required to vote in primary elections.

8. Public assistance agencies often provide benefits to entire households through a single covered transaction. As such, as a best practice, make available blank voter registration applications for additional individuals in the household who are eligible to vote and for individuals who prefer to register to vote later and/or in private.

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* Public assistance agencies cannot incorportate automatic voter registration during covered transactions that take place entirely on the telephone as there is no opportunity to provide an attestation. *See infra* p. 15 discussion on the impor-tance of attestation. Rather, during telephone covered transactions, as a best practice, all individuals should be mailed a voter registration application.

The requirements stated above are illustrated below, using as an example Virginia's public assistance benefits application.[35]

Current Voter Preference Form Component of Benefits Application:

If you are not registered to vote where you live now, would you like to apply to register to vote here today? (Please check only one)

☐ I am already registered to vote at my current address, or I am not eligible to register to vote and do not need an application to register to vote.

☐ Yes, I would like to apply to register to vote. (please fill out the voter registration application form)

☐ No, I do not want to register to vote. If you do not check any box, you will be considered to have decided not to register to vote at this time.

Applying to register to vote or declining to register to vote will not affect the assistance or services that you will be provided by this agency.

If you decline to register to vote, this fact will remain confidential. If you do register to vote, the office where your application was submitted will be kept confidential, and it will be used only for voter registration purposes.

If you would like help filling out the voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private if you desire.

If you believe that someone has interfered with your right to register or to decline to register to vote, your right to privacy in deciding whether to register or in applying to register to vote, you may file a complaint with: Secretary of the Virginia State Board of Elections, Washington Building, 1100 Bank Street, Richmond, VA 23219-3497, Telephone (804) 864-8901.

_____ _____ _____
Applicant Name   Signature   Date

Proposed Modifications

Information provided on this application will be used to register you to vote unless you check the "No" box below.

To be eligible to register to vote in Virginia, <u>you must be a United States citizen</u>, a resident of Virginia, 18 years old by the next general election, have had your voting rights restored if you have ever been convicted of a felony, and have your capacity restored if you have ever been declared mentally incapacitated in a Circuit Court.

If you are not registered to vote where you live now, would you like to apply to register to vote here today? (If you do not check any box, you will be considered to have decided not to register to vote at this time.)

☐ YES, I would like to apply to register to vote. By checking this box and signing this application for benefits, I swear or affirm under penalty of perjury and under felony penalty for making willfully false material statements or entries that I am eligible to register to voter per the requirements provided above.

☐ NO, I do not want to register to vote at this time. YOU <u>MUST</u> CHECK THIS BOX IF YOU DO NOT MEET THE VOTER ELIGIBILITY REQUIREMENTS STATED ABOVE.

Applying to register to vote or declining to register to vote will not affect the assistance or services that you will be provided by this agency.

If you decline to register to vote, this fact will remain confidential. If you do register to vote, the office where your application was submitted will be kept confidential, and it will be used only for voter registration purposes.

If you would like help filling out the voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private if you desire. (If you wish to register to vote in private, a blank voter registration form will be provided to you.)

If you believe that someone has interfered with your right to register or to decline to register to vote, your right to privacy in deciding whether to register or in applying to register to vote, you may file a complaint with: Secretary of the Virginia State Board of Elections, Washington Building, 1100 Bank Street, Richmond, VA 23219-3497, Telephone (804) 864-8901.

Party Preference (OPTIONAL):
☐ Democratic   ☐ Republican ☐ Independent

C. Automatic Voter Registration Elements

After implementing the covered transaction processes as described above, an automatic, electronic transfer of data from public assistance agencies to election officials should be implemented as follows:

1. Electronically transfer to election officials relevant voter registration data—including name, address, age, citizenship status,* party preference, and attestation—of those individuals who do not opt out of voter registration by checking the "No" box in response to the voter preference question.

2. Upon receipt of voter registration data, election officials should determine whether an individual is eligible to vote in the state and add all eligible individuals to the voter rolls.

3. State election officials must provide a notice to individuals about the disposition of their voter registration application, *i.e.* whether it is accepted, incomplete, or rejected.[36] This notice will provide individuals whose voter registration applications are incomplete an opportunity to finalize or resubmit their voter registration application as necessary.**

4. Public assistance agencies often conduct a single covered transaction for an entire household. As such, for automatic voter registration purposes, only the voter registration information of the attesting individual (and not of all potential beneficiaries) should be electronically transferred to election officials.

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* Again, nothing herein should be interpreted to collect additional demographic data by public assistance agencies other than that which is collected in the normal course of business.

** In a state that collects citizenship information as part of its public assistance transaction, the data transferred might contain information that an individual is not a citizen *and* an attestation that he or she eligible to register to vote. When provided with such conflicting information, state election officials should treat this voter registration application as incomplete. The notice sent pursuant to Section 8 (52 U.S.C. § 20507(a)(2)) will allow any individual whose voter registration is deemed incomplete in this (or any other) circumstance to provide the correct information and complete their voter registration application if eligible.

IV. POLICY CONSIDERATIONS

There are numerous considerations for any state-based automatic voter registration proposal. This document does not address in detail all policy concerns that may be implicated by state-based automatic voter registration. The focus in this paper is on ensuring that state-based automatic voter registration programs comply with the NVRA. However, the most important potential policy concerns to consider beyond NVRA compliance are identified and explained below. Although these issues are not discussed at length, Project Vote recommends that any state-based automatic voter registration proposal consider and address these issues. It is Project Vote's belief that in many instances NVRA compliance will mitigate other policy concerns created by state-based automatic voter registration programs.

A.   Benefits of the Attestation

Providing a statement of eligibility requirements and requiring an attestation to meeting those eligibility requirements as described above creates a meaningful line of protection for ineligible individuals, including parolees and non-citizens, who potentially face stiff penalties for voting or registering to vote.* Under the NVRA-compliant processes set forth in this paper, if an individual does not meet the eligibility requirements, the person is able to decline voter registration without disclosing the reason. This provides ineligible individuals an opportunity at the front end to remove themselves from the automatic voter registration system and prevent becoming mistakenly registered to vote through no fault of their own.

Some other proposals for state-based automatic voter registration, particularly through motor vehicle offices, instead provide ineligible voters an opportunity to decline voter registration only through a subsequent mailing that they must sign and return. However, direct mail campaigns have a notoriously low rate of return, and as such, many ineligible voters who do not return this so-called "back-end" opt-out mailing will be added to the voter rolls, potentially facing stiff penalties simply because of their inadvertent inaction.

B.   Data Collection

Automatic registration systems should consider what data is and is not currently collected by the government entity that is the information source for state-based automatic voter registration. For example, public assistance agencies administering SNAP benefits do not always obtain citizenship data from all of their clients: it is possible for children born in the United States to receive SNAP benefits even if their non-citizen parents (who are the persons applying for the benefits at the public assistance agency) are not eligible for such benefits. Therefore, it is possible for parents to apply for SNAP benefits for their children without providing any information about their own citizenship status. Automatic voter registration should not be used as a basis to seek additional documentation from benefits applicants; an attestation

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* Non-citizens who vote or register to vote may violate federal law. State laws cannot mitigate consequences of these violations. See infra p. 16 for a discussion of immigration concerns.

to meeting the eligibility requirements has, and will continue to, obviate the need for additional documentation. If the government entity does not collect relevant voter registration data during its normal course of business, the attestation and other disclosure requirements of the NVRA allow individuals an opportunity to self-select out of the data being transferred and used for automatic voter registration.

C.   Domestic Violence Victims

State-based automatic voter registration proposals should include identity protections for victims of domestic violence, which can frequently be found in state statutes or regulations. This is typically accomplished by providing individuals a chance, when they register to vote, to request that their voter registration is not made public.

D.   Felons

Many states have complicated eligibility requirements for persons with felony convictions, including parolees or other non-imprisoned persons. Even with an attestation, some individuals may not understand the nuances of their particular situation where the laws for rights restoration are complex. As such, any persons who are registered to vote through automatic voter registration should be protected by state law or policy from the consequences of voter registration when their felony status makes them ineligible to register and vote.

E.   Mental Incapacity

Similarly, there should be protection in any automatic voter registration legislation for persons who are ineligible under state law due to mental incapacity who are registered to vote through automatic voter registration.

F.   Legal Intent for Non-Citizens

There are potentially serious consequences under federal immigration laws and regulations for non-citizens who inadvertently become registered to vote and then subsequently vote upon governmental notice that they are registered to vote. Moreover, these consequences may not be dependent on the non-citizen's intent to violate the law. Although state law cannot preempt or override federal immigration laws, non-citizens who are inadvertently registered to vote through automatic voter registration should at least be given protections by state law so that persons who inadvertently become registered cannot be deemed to have intentionally committed a state crime. Furthermore, state laws should be modified to include that voter registration through automatic voter registration may not be used as evidence of criminal conduct or unfitness of character to the extent it occurs as a mistake or inaction on the part of the individual.

NOTES

1. In fact, voter registration rates in the United States remain particularly dismal for young, minority, and low-income voters. *See, e.g.,* Vanessa Perez, *Representational Bias in the 2012 Electorate* (2015), http://www.projectvote.org/images/publications/Representational-Bias-2012/Representational-Bias-in-the-2012-Electorate.pdf; *accord Youth Engagement Falls; Registration Also Declines,* Pew Research Center (Sept. 28, 2012), http://www.people-press.org/2012/09/28/youth-engagement-falls-registration-also-declines/; Daniel Weeks, "Why Are the Poor and Minorities Less Likely to Vote?", *The Atlantic* (Jan. 10, 2014), http://www.theatlantic.com/politics/archive/2014/01/why-are-the-poor-and-minorities-less-likely-to-vote/282896/.

2. 52 U.S.C. § 20501 *et seq.*

3. E.g., HB 2177 (Or. 2015); AB 1461 (Cal. 2015); A4613 § 31 (N.J. 2015).

4. The specific requirements of the NVRA by motor vehicle offices and public assistance agencies is discussed *infra* p. 5 and p. 11, respectively.

5. *Arizona v. Inter Tribal Council of Arizona,* 133 S. Ct. 2247, 2251 (2013) (internal citations omitted).

6. The Elections Clause of the Constitution, art. I, § 4, cl. 1, provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of [choosing] [*sic*] Senators."

7. *See Arizona v. Inter Tribal Council of Arizona,* 133 S. Ct. 2247, 2257 (2013) (holding that the presumption against preemption of state law by federal law doesn't apply in the NVRA context "[b]ecause the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent."). *See also, Ex parte Siebold,* 100 U.S. 371, 392 (1880) ("The power of Congress . . . is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.")

8. *See infra* footnote 18 for further discussion.

9. *See* 52 U.S.C. § 20504(a)(1).

10. *See* 52 U.S.C. § 20504(c)(2)(A).

11. *See* 52 U.S.C. § 20504(c)(2)(B).

12. *See* 52 U.S.C. § 20504(c)(2)(C)(i).

13. *See* 52 U.S.C. § 20504(c)(2)(C)(ii) & (iii).

14. *See* 52 U.S.C. § 20504(c)(2)(D)(i).

15. *See* 52 U.S.C. § 20504(c)(2)(D)(ii).

16. *See* 52 U.S.C. § 20504(d).

17. *See* 52 U.S.C. § 20504(e).

18. *See, e.g.,* 52 U.S.C. § 20511 (making it a federal crime to knowingly procure or submit false, fictitious, or fraudulent voter registration applications, punishable by fine or imprisonment up to five years, or both); *see also* 18 U.S.C. § 1015(f); 25 PA. CONS. STAT. § 1703 (2002) (making it a misdemeanor for an ineligible individual to apply for registration, punishable by a fine of up to $10,000 or imprisonment up to 5 years, or both, and a loss of suffrage); N.J. STAT. ANN. § 19:34-1 (West 2005) (making it a crime of the third degree for an ineligible person to register to vote, or to violate any other election law provisions); ALA. CODE § 17-17-46 (making it a Class A misdemeanor to provide false information to register to vote).

19. *See* 52 U.S.C. § 20507(a)(2) (". . . each State shall [ ] require the appropriate State election official to send notice to each applicant of the disposition of the [registration] application.")

20. 52 U.S.C. § 20504(c)(2)(C).

21. A second signature for voter registration purposes is an option, not a requirement. *See* 52 U.S.C. § 20504(c)(2)

(A). For example, Arizona's driver's license application only requires one signature. *Driver License / Identification Card Application,* ADOT Motor Vehicle Division, http://azdot.gov/docs/default-source/mvd-forms-pubs/40-5122.pdf?sfvrsn=11.

22. DC Driver License or Identification Card Application, Government of the District of Columbia: Department of Motor Vehicles, http://dmv.dc.gov/sites/default/files/dc/sites/dmv/publication/attachments/New%20DLVR%20Application%20Sept%202014.pdf.

23. See *Driver License Change of Address,* Washington State Department of Licensing, http://www.dol.wa.gov/forms/500039.pdf. Note, because Washington does not have any closed primaries, party preference is not added to the change of address transaction illustration.

24. On receipt of change-of-address data for any voter who is already registered and did not opt out of updating their voter registration, election officials shall update the person's change of address. No additional eligibility determination, which was already made at the time the person registered, should be necessary at this time.

25. See 52 U.S.C. § 20507(a)(2) ("... each State shall [ ] require the appropriate State election official to send notice to each applicant of the disposition of the [registration] application.")

26. Similar to Section 5, Section 7 of the NVRA also preempts any conflicting state law, and therefore, any program or plan to automate voter registration using data from public assistance agencies must incorporate all the requirements of Section 7.

27. 52 U.S.C. § 20506. For additional information on complying with Section 7 of the NVRA, please see Project Vote's "Section 7 of the National Voter Registration Act: A Toolkit for Public Agencies," which is available at http://www.projectvote.org/images/publications/Public%20Agency%20Registration/SECTION%207%20TOOLKIT%20September%202014.pdf.

28. *The National Voter Registration Act of 1993 (NVRA): Questions and Answers,* Civil Rights Division of the U.S. Department of Justice, Q&A 13 (June 2010), http://www.justice.gov/crt/national-voter-registration-act-1993-nvra.

29. 52 U.S.C. § 20506(a)(6)(A).

30. *Id. See also, Valdez v. Squier,* 676 F.3d 935 (10th Cir. 2012).

31. 52 U.S.C. § 20506(a)(6)(B). The following disclosures must be provided:

(1) "Applying to register or declining to register to vote will not affect the amount of assistance that you will be provided by this agency."

(2) "If you would like help filling out the voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private."

(3) "If you believe that someone has interfered with your right to register or to decline to register to vote, your right to privacy in deciding whether to register or in applying to register to vote, or your right to choose your own political party or other political preference, you may file a complaint with [name, address, and telephone number of appropriate official to whom a complaint should be addressed]."

See *id.*

32. 52 U.S.C. § 20506(a)(6)(C).

33. 52 U.S.C. § 20506(a)(4)(A)(iii).

34. See *Ga. State Conf. of the NAACP v. Kemp,* 841 F. Supp. 2d 1320 (N.D. Ga. 2012) (holding that voter registrations must be provided during remote transactions); *see also The National Voter Registration Act of 1993 (NVRA): Questions and Answers,* Civil Rights Division of the U.S. Department of Justice, Q&A 24 (June 2010), http://www.justice.gov/crt/national-voter-registration-act-1993-nvra ("Many Section 7 designated agencies/offices routinely provide services/assistance such as application for, or renewal of, services or change-of-address notification through the internet, by telephone, or by mail. States should ensure the availability of voter-registration opportunities to individuals using such remote service/assistance opportunities from designated agencies.").

35. See *Application for Benefits,* CCommonwealth of Virginia Department of Social Services, http://www.dss.virginia.gov/files/division/bp/fs/intro_page/forms/032-03-0824-30-eng.pdf.

36. See 52 U.S.C. § 20507(a)(2) ("... each State shall [ ] require the appropriate State election official to send notice to each applicant of the disposition of the [registration] application.").

PROJECT VOTE

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