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TO: Interested Parties

FR: Henry T. Berger 

RE: Automatic Voter Registration – Recommended policy for New York State

Over the past several years, the pro-voter sector has been successful in advancing Automatic Voter Registration in a diverse mix of states around the country—fifteen plus the District of Columbia and growing by the year¹. In those states, AVR has been passed legislatively, approved at the ballot, and implemented administratively using existing laws.

In 2019, New York state has the opportunity to join the ranks and adopt this important reform legislatively. Doing so will help accomplish at least two crucial goals:

- Registering a significantly higher percentage of eligible voters than are presently registered, from a more representative cross-section of citizens.
- Ensuring that the voter rolls are up-to-date and accurate.

AVR was first implemented in Oregon in 2016, and since then, other states have followed with their own versions of AVR. Two approaches to AVR, described below, have emerged. Also, states are now beginning to expand AVR beyond Departments of Motor Vehicles to ensure that eligible individuals who may not interact with DMV are registered. I describe the expansion beyond DMV—the opportunities and challenges—later in this memo.

The system implemented in Oregon (and which Alaska, Massachusetts and Washington are utilizing) automatically adds eligible voters to the rolls unless they proactively take a step to decline. It doesn't require eligible voters to take any action at the agency. Individuals are later sent a post card which provides them with information about their registration and gives them the opportunity to decline registration or choose a political party. Some call this "back end" AVR, because the opting out occurs at the individual's home rather than at the agency. Others call it the Oregon Model because Oregon was the first state to adopt it.

¹ The 15 states include Alaska, California, Colorado, Connecticut, Georgia, Illinois, Maryland, Massachusetts, New Jersey, Oregon, Rhode Island, Utah, Vermont, Washington and West Virginia.

The other system—implemented in other states including California and Colorado—offers the opportunity to decline registration and make registration-related decisions at the point of service. In this case, voters are told—either by an employee or on an electronic form—that unless they decline, they will be registered to vote or have their registration updated. They are provided with the eligibility requirements as part of this transaction. This system is known among advocates as “front end.”

As a practitioner of election law in New York state for much of my career including my most recent stint as special counsel to Mayor Bill De Blasio, and as someone who has worked closely with—and on occasion brought suit against—the New York State Board of Elections, I strongly recommend that advocates and lawmakers in New York pursue the Oregon “back end” model.

I make this recommendation for several reasons:

First and foremost, experience demonstrates that a “back end” system goes much further than a “front end” system in registering more voters, and in so doing helps ensure that the population that is registered to vote is more reflective of the citizenry.

According to the Oregon Secretary of State, since the implementation of AVR in Oregon, only 6 percent of unregistered eligible voters who interact with the Department of Motor Vehicles decline to register to vote. In California, on the other hand, according to that state’s Secretary of State, after the first five months of that system’s implementation, a full 58 percent of unregistered eligible voters who interact with the Department of Motor Vehicles declined to become registered. While similar information hasn’t yet been released by the Colorado Secretary of State, a back-of-the-envelope review shows that more than half of unregistered eligible voters interacting with that state’s DMV declined to become registered.

These very significant differences in participation matter a great deal when it comes to ensuring that the voter registration rolls reflect the diversity of the citizenry. Data available from Catalist indicate that the eligible unregistered populations in certain states consist of up to 60 percent people from communities of color. If we fail to register more than one-third of these individuals when they interact with a participating agency, a critical opportunity for enfranchisement is missed.

Oregon’s AVR system has also helped add a younger, more diverse population to the state’s voting rolls. According to a study by academic experts in collaboration with CSME and the Center for American Progress, 40 percent of registrants from AVR in Oregon were 30 years old or younger. In addition, AVR registrants were more likely to come from rural or suburban areas, as opposed to metropolitan ones. The study found that AVR registrants in Oregon were more likely to come from areas with lower incomes, and were less white and more Hispanic than traditional registrants. They also lived in parts of the state where residents had completed less formal education when compared to traditional registrants².

² Center for American Progress, Who Votes With Automatic Voter Registration, June 7 2017

The Oregon “back end” model has a similarly robust effect on updating the registrations of registered voters who have moved or changed names to ensure that their information is up to date, maximizing the likelihood of engagement with candidates and political parties and minimizing potential barriers at the polls. In “front end” systems, the experience is that individuals waiting in line at DMV or another agency who are already registered are more apt to decline to participate, thinking that their addresses will be automatically updated—which is not the case—or simply wanting to get through the agency process as quickly as possible, envisioning they will update their registration at a later date.

These findings in support of a “back end” model aren’t all that surprising. A “back end” system makes the desired behavior – being registered to vote –the default setting. It simply makes sense to make the default setting the behavior that results in the most inclusive electorate. In this case, in order to get more people registered to vote, particularly those in historically disenfranchised communities, we should automatically register voters.

A “front end” system is more risky. In systems like Oregon that use “back end” opt out, officials are able to use verified proof of citizenship that is already being collected to ensure that only eligible voters are registered. A “front end” system’s reliance on individuals’ attestations at an agency, often in a stress-filled, rushed environment and sometimes using a language in which they are not proficient, leaves more opportunity for error.

Additionally, a “front end” system relies on the assumption that agency clerks will have the time and motivation to dedicate to voter registration, even though that is not their primary mandate. Based on the long history advocates have had with National Voter Registration Act requirements for agencies to assist with voter registration, we know that agency clerks are generally not incentivized to do this work and in many cases lack the knowledge, even with training, to deal with election-related issues. As a result, relying on agency personnel to be the agent for voter registration is risky.

On the other hand, limiting agencies to electronically transmit information to the Board of Elections and leaving it to the Board of Elections to contact eligible voters is more likely to be successful and accurate. That’s not to say that there aren’t real challenges with the New York Board of Elections; however, I believe it’s much more prudent to leave the bulk of the interactions around voter registration with eligible voters to the Board of Elections and work closely with them to ensure they’re performing their job.

There are two concerns that some advocates raise about the “back-end” or Oregon system: 1) compared to other forms of AVR, some argue it puts individuals who aren’t eligible to vote, including immigrants, at greater risk; and 2) compared to “front end” AVR, some argue that victims of domestic violence who seek to keep their identities confidential are at greater risk. These concerns are very important and must be addressed; however, “back end” systems can—and have—addressed these challenges. In the case of protecting ineligible individuals from being registered, as noted above, “back end” provides more of a failsafe than “front end” systems.

Protecting ineligible people from being registered

Oregon's "back-end" model uses a simple process to ensure that only eligible citizens are registered. At the Department of Motor Vehicles (the agency in Oregon that uses AVR), this has become especially simple with the federally mandated implementation of REAL ID, since applicants must provide documentation of either citizenship or lawful presence. If a person provides documentation demonstrating citizenship, the state registers them to vote unless they decline later. If they do not provide such documentation, they are not registered.

Relying on documentation and automation significantly reduces the risk of human error that is present in "front end" systems, where individuals are registered based on their responses to questions. This can be especially problematic if an individual has limited English understanding. While some argue it's safer to get an attestation of citizenship on the front end, I believe it's safer for individuals and agencies as a legal matter not to force someone to sign what can be a complicated attestation in what is usually a stressful environment at the DMV if a mechanism to determine eligibility is already part of the agency infrastructure.

Legislation should absolutely include language that protects individuals who are ineligible to vote. This is a special concern for immigrant communities who are under assault by the present administration in Washington, DC. However, this is not a failsafe, and the "back end" method of using already required documentation of citizenship is a safer way to protect immigrant communities and others who are not eligible to vote. Moreover, if there is an instance of someone ineligible getting on the registration roll, through a "back end" system there can be no argument that the individual knowingly and willingly claimed they were a citizen – they took no affirmative action of their own. That's not the case for a "front end" system.

The Oregon system has now been in effect for two years, and to date according to the Oregon Secretary of State, **there have been only four potential errors with one million AVR interactions, all in the early days of the program.** And while the error data isn't yet available for "front end" systems, common sense tells us that the automated nature of the Oregon system makes it more reliable than "front end" systems that rely on individuals' attestations. "Front end" systems also require significantly more testing of interfaces for frontline state workers and customers to ensure that design or data transfer issues do not register ineligible individuals.

Protecting Victims of Domestic Violence

Oregon has dealt carefully and effectively with the important need to protect the confidentiality of survivors of domestic violence and others whose safety needs require address confidentiality. New York can replicate those protections. First, persons already registered in a state's confidentiality program (in New York, the New York Address Confidentiality Program) would not be put through the AVR system and their addresses would not be made public (https://www.dos.ny.gov/acp/faq_participant.html#17). Oregon has also established a second route for persons who have safety concerns but are not in the confidentiality program – they may apply to the county clerk to have their address excluded from the list of active registered

voters. If desired, the “opt out” postcard may include information about these options, in addition to providing the options to decline.

Agencies Beyond Motor Vehicles

In order to maximize registrations and ensure that populations less likely to interact with DMV are able to benefit from AVR, policy makers and advocates are wisely looking to expand agencies beyond the DMV. DMV remains a priority agency for voter registration given the percentage of the populace that interacts with the agency and the detailed data it collects.

In assessing the viability of additional agencies, particularly for a “back end,” Oregon-style approach, it’s important to prioritize agencies that already, by law, verify citizenship information to ensure that non-citizens aren’t inadvertently registered. Thankfully, one of the most robust such agencies—the state Medicaid agency—by federal law requires verification of citizenship. Two of the states that approved AVR in 2018, Massachusetts and Washington, have included their Medicaid agency (MassHealth and Apple Health respectively) along with their DMV as required agencies for implementing AVR.

The New York Department of Health operates the second largest Medicaid program in the country, with 6.5 million enrolled as of July 2018, and presumably serves a portion of New Yorkers who would be less likely to interact with the Department of Motor Vehicles. So a combination of DMV and Department of Health, using a “back end” opt out, would make for a strong AVR system with deep reach into lower income communities and communities of color.

Additionally, other states including Washington state and New Jersey have included legislative language that requires the state to evaluate the readiness of additional agencies to automatically register voters. Washington requires the state to produce a report by the end of 2018, while New Jersey directs the state to bring additional agencies onboard as soon as they are ready without additional authorization. A provision such as this could be included in New York’s legislation so that other agencies could be evaluated expeditiously for readiness to participate and then brought onboard once they’re ready.

As someone who has practiced election law in New York for decades, I know well the real challenges we have in New York to get our voter registration system right. And yet we have a powerful and unique opportunity to do just that, to register – and update the registration – of nearly everyone who comes into contact with key government agencies while fully protecting immigrants and victims of domestic violence. I have no doubt that advocates, legislators and government officials, working together, can craft a powerful system of automatic voter registration that meets the unique needs of New York state. I look forward to supporting the efforts to do just that.