# ABA SECTION OF STATE & LOCAL GOVERNMENT LAW

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# LITIGATE THE VOTE: WHAT IT MEANS FOR TEXAS AND AMERICA

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## Introduction

Challenges to state legislative redistricting plans and congressional plans and challenges to Voter ID laws and other restricting voting measures have been mounted in a number of recent cases. This discussion will focus on several cases arising in Texas - one decided by the Supreme Court at the end of the most recent term and one decided this past April by the *en banc* Fifth Circuit - and then turn to other cases arising in other circuits.

*Abbott v. Perez* was a multi-faceted challenge the congressional and state legislative redistricting plans for the State of Texas. Plaintiffs deployed a full array of redistricting claims, including vote dilution under § 2 of the VRA, intentional vote dilution under the Fourteenth Amendment, racial sorting under the *Shaw-Miller* line of cases, and *Larios*-style one-person, one-vote claims. The Supreme Court's decision in favor of Texas on June 25, 2018 was almost a clean sweep, with the exception of one racially gerrymandered district, H.D. 90.

*Veasey v. Abbott* was a challenge to Texas's Voter ID law, ultimately decided by the en banc Fifth Circuit Court of Appeals on April 27, 2018.

## *Abbott v. Perez: Challenges to Congressional and State Legislative Plans*

Let's first take a close look at *Abbott v. Perez*.

Individual voters in Texas, alongside organizations representing African-Americans and Latinos, argue that when the state redrew its congressional and legislative plans, it did not act in good faith to achieve population equality, and instead, intentionally diluted Latino and African-American voting strength. Some of the

plaintiffs further argued that Texas failed in both plans to create all of the majority-minority districts required by Section 2 of the VRA.

On March 10, 2017, a Fifth Circuit panel issued a ruling on challenges to the 2011 congressional map, holding that four districts in the plan were unconstitutional racial gerrymanders and that the creation of one of the districts could not be justified by a need to comply with Section 2 of the VRA. The panel also ruled that Texas had unconstitutionally and intentionally packed and cracked minority voters in the Dallas-Fort Worth area and in creating the configuration of one of the districts in the 2011 congressional plan, but the panel rejected intentional vote dilution claims related to the greater Houston area.

On April 20, the panel ruled that a number of districts in the 2011 state house plan resulted in intentional vote dilution in violation of the Constitution and the VRA, that several districts violated one-person, one-vote requirements and that one district had been drawn as a racial gerrymander. The court deferred ruling on requests that Texas be placed under preclearance coverage through Section 3 of the VRA.

Following a trial on the 2013 state house and congressional plans on July 10-15, 2017, the court held that two congressional districts created under the 2013 congressional map violated the Constitution and the VRA, and that enactment of the 2013 congressional plan was intentionally discriminatory.

On August 24, 2017, the panel held that the 2013 state house plan violated the Constitution and VRA and purposefully maintained discriminatory features from the 2011 plan.

On August 25, 2017, Texas filed an appeal to the Supreme Court asking the Court to halt the redrawing of the congressional map, and on August 28, 2017, Justice Alito temporarily stayed remedial proceedings in connection with the congressional map pending further order of the Court and directed plaintiffs to file a response to the request for a stay. On August 31, 2017, Justice Alito temporarily stayed remedial proceedings in connection with the state house map pending further order of the Court.

On September 12, 2017, the Supreme Court entered orders granting the stays requested by Texas and halting the redrawing of maps pending appeal.

In mid-January 2018, the Supreme Court agreed to hear the State of Texas' appeals of rulings on the congressional and state house plans. Oral argument in the appeals was held for April 24, 2018, and the Supreme Court handed down its decision largely in favor of Texas on June 25, 2018.
https://www.supremecourt.gov/opinions/17pdf/17-586_o7kq.pdf

There are several takeaways from this en banc decision.

First, it is important to note that the 2011 congressional districting plans and state legislative redistricting plans adopted by the Texas Legislature were never used and were repealed and not reenacted.

Second, the Supreme Court in its majority opinion found that the district court erred in placing the burden of proof on Texas to show that the subsequent 2013 Legislature (the day before *Shelby County v. Holder* was decided) purged the taint attributed to the 2011 plans.

Third, a majority of the justices refused to strike down two state legislative districts and one congressional district on grounds of alleged discrimination in effect (rather than intent), and concluded that the record was insufficient to prove that the 2013 Legislature acted in bad faith and engaged in intentional discrimination.

Fourth, Plaintiffs could not establish a violation of §2 of the VRA without showing that there was a possibility of creating more than the existing number of reasonably compact opportunity districts, nor could the plaintiffs meet the ultimate *Gingles* vote dilution standard as to an alternative plan that did not enhance the ability of minority voters to elect candidates of their choice.

Fifth, the challengers did not sufficiently show that these particular modified versions of Texas's maps were "tainted" by discriminatory intent — even if earlier, largely similar versions of the maps had been tainted.

Sixth, one House District, H.D. 90, was a racial gerrymander, Texas admitted as much. The Legislature's use of race as the predominant factor in its design, however, was not permissible, since the state did not have good reasons to believe that this was necessary to satisfy §2.

Further proceedings are underway on H.D. 90. The district court on remand recently directed the parties to file advisories stating whether there was agreement on what remedy, if any, should be ordered for H.D. 90 and adjoining districts, and if not, what the nature of the disagreement is, and what other issues remain in the case. In response, the Task Force Plaintiffs who were the only parties to challenge the changes to H.D. 90 have told the court that it should defer to the H.D. 90 boundaries for Tarrant County as drawn by the Texas Legislature in 2011, a remedy they say is composed entirely of boundaries enacted by Texas and adheres to the general rule that courts should be guided by the legislative policies underlying the existing plan, to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act. The State Defendants oppose this proposed remedy and have advised the court that no remedy is necessary in H.D. 90, which is represented by an Hispanic representative and which was the subject of legislative changes at the behest of minority groups and was not changed out of a

desire to discriminate. [Order, doc. 1586; Task Force Plaintiffs' Advisory, doc. 1590; Defendants' Advisory, doc. 1591, in *Perez v. State of Texas*, Case 5:11-cv-00360 OLG-JES-XR, W.D. Texas, San Antonio Div.]

The biggest political takeaway from *Abbott v. Perez* may be that the majority on the Supreme Court wants to set a high bar before federal courts can step in and block states' district maps on racial grounds.

Let's now turn to *Veasey v. Abbott*.

## *Veasey v. Abbott*: A Challenge to the Texas Voter Photo ID Law

In 2011, the Texas legislature enacted Senate Bill 14, said to be the nation's strictest voter photo ID law that allegedly left more than half a million eligible voters who do not have the requisite types of ID from fully participating in the democratic process. SB 14 required voters to provide limited types of voter ID in order to cast an in-person ballot, including:

1. Texas driver license issued by the Texas Department of Public Safety (DPS)
2. Texas Election Identification Certificate (EIC) issued by DPS
3. Texas personal identification card issued by DPS
4. Texas concealed handgun license issued by DPS
5. United States military identification card containing the person's photograph
6. United States citizenship certificate containing the person's photograph
7. United States passport

The types of ID required, however, left out large swaths of the population. For instance, a state license to carry a handgun, which may be legally obtained by some non-U.S. citizens, is a permissible form of identification, while neither a federal or state government ID, nor a student ID, were permitted forms of voter ID.

The professed aim of the Texas Voter Photo ID law was to prevent voter fraud, even though evidence of in-person voter fraud was virtually non-existent. In fact, as the lower court noted, it was more likely for someone to get struck by lightning than for in-person voter fraud to occur.

When the Texas legislature initially enacted S.B. 14 in 2011, embodying a rigid form of voter ID, it was attacked and ultimately held to be an unconstitutional disenfranchisement of duly qualified electors, enacted with an intent to suppress minority voting.

Following appellate reversal and remand, the Texas legislature revised the voter ID law and enacted S.B. 5. That subsequent legislative attempt to address the infirmities of S.B. 14 was again declared to be unconstitutional, and this most recent appeal followed. This most recent appeal by the state of Texas followed

remand from the *en banc* Fifth Circuit Court of Appeals concerning the state's former photo voter ID law ("SB 14").

During the remand, the Texas legislature passed a law designed to cure all the flaws cited in evidence when the case was first tried. The legislature succeeded in its goal, according to the Fifth Circuit. Yet the plaintiffs were unsatisfied and successfully pressed the district court to enjoin not only SB 14, but also the new ameliorative law ("SB 5"). Because the district court's permanent injunction and order for further relief abused its discretion, the Fifth Circuit reversed and rendered.

Following a complex and tortured path of litigation, multiple appeals and legislative enactments and revisions, the U.S. Court of Appeals for the Fifth Circuit reversed and rendered the lower court's permanent injunction and ruled in favor of the State of Texas. Its concluding remarks summed up the Fifth Circuit's final decision to uphold the revised, amended and long-litigated Voter ID law.

> That Plaintiffs' factual critique boils down to speculation demonstrates the prematurity of the court's decision to invalidate SB 5 in 2017, well before the law took effect in 2018. Nothing we conclude today disposes of any potential challenges to SB 5 in the future. See Operation PUSH, 932 F.2d at 407("We emphasize that nothing in this opinion prevents PUSH from bringing a future challenge to Mississippi's voter registration procedures. . . ."). Plaintiffs may file a new lawsuit, and bear the burden of proof, if the promise of the law to remedy disparate impact on indigent minority voters is not fulfilled. They did not challenge SB 14, for instance, for several years after its effective date. As a remedy for the deficiencies found by this court in Veasey II, however, there is no evidentiary or legal basis for rejecting SB 5, and the district court was bound not to take the drastic step of enjoining it. Further, because SB 5 constitutes an effective remedy for the only deficiencies testified to in SB 14, and it essentially mirrors an agreed interim order for the same purpose, the State has acted promptly following this court's mandate, and there is no equitable basis for subjecting Texas to ongoing federal election scrutiny under Section 3(c). See McCrory, 831 F.3d at 241 (declining to impose relief under Section 3 of the Voting Rights Act and noting "[s]uch remedies `[are] rarely used'. . . .").

*Veasey v. Abbott* (5th Cir. April 27, 2018)
https://scholar.google.com/scholar_case?case=17680069210371059318&hl=en&as_sdt=6&as_vis=1&oi=scholarr

These are the key takeaways from *Veasey v. Abbott*:

First, when the Texas Photo Voter ID Law, SB 14, was enacted in 2011, providing 5 forms of government-issued identification, the district court in 2014 enjoined enforcement of SB 14 on the ground that it had a disparate impact on African-American and Hispanic voters in violation of § 2 and was enacted for a discriminatory purpose.

Second, the Fifth Circuit reversed that discriminatory purpose determination and remanded for entry of an interim remedy before the 2016 election. The parties developed an interim remedy for the 2016 election designed to allow in-person voters who lacked an SB 14 ID to cast a regular ballot upon completing a DRI (declaration of reasonable impediment), with seven possible impediments being lack of transportation, lack of acceptable documents to obtain an ID, work schedule, lost or stolen ID, disability or illness, family responsibility or ID applied for but not yet received.

Third, during remand, the Texas legislature in its 2017 Session enacted SB 5 as a legislative remedy to cure and replace the voter ID law embodied in SB 14 and to cure all of the flaws in it.

Fourth, SB 5 was a legislative remedy that codified the DRI procedure that the parties had earlier agreed upon prior to the 2016 election and expanded the list of acceptable forms of ID.

Fifth, when the district court then entered its remedial order enjoining SB 14 and SB 5, it reinstated pre-SB 14 law that lacked any photo voter ID requirement, held that Texas had failed to carry its burden to show SB 5 fully ameliorated the discriminatory purpose or result of SB 14, found that SB 5 was built on the architecture of SB 14 and enjoined enforcement of any vestige of the voter photo ID law, and ordered commencement of a VRA §3 (c) preclearance bail-in hearing.

Sixth, the en banc Fifth Circuit reversed the district court's remedial order, holding that it was an abuse of discretion, and reinstated SB 5 as affording a "generous, tailored remedy for the actual violations found." Specifically, the *en banc* Fifth Circuit stated: "SB 5 constitutes an effective remedy for the only deficiencies testified to in SB 14."

*Veasey v. Abbott*, 888 F.3d 792, 804 (5th Cir. 2018).

In a vigorous dissent, Fifth Circuit Judge James Graves wrote that

> S.B. 14 is an unconstitutional disenfranchisement of duly qualified electors. S.B. 5 is merely its adorned alter ego. The Texas Legislature enacted S.B. 14 with an intent to suppress minority voting. Because the thread of

discriminatory intent runs through both S.B. 14 and S.B. 5, the district court's judgment and remedial ordershould be affirmed.

In his dissent, Judge Graves emphasized several aspects of the lower court's remedial order that should have been given greater weight by the *en banc* majority.

First, SB 5 was merely the adorned alter ego of SB 14, which was an unconstitutional disenfranchisement of duly qualified electors that the Texas Legislature had enacted with an intent to suppress minority voting.

Second, because the thread of discriminatory intent ran through both SB 14 and SB 5, the district court's remedial order should be affirmed.

Third, Texas's rationale for undergirding the voter ID law shifted as each previous rationale was challenged or disproven by its opponents. At first, it was preventing voter fraud. Then, it was guarding against voting by undocumented immigrants. Then, it was increasing public confidence and voter turnout. This suggested that Texas's reasons may have been pretextual.

### *Parameters of Remedial Orders for VRA Violations*

*Abbott v. Perez* and *Veasey v. Abbott* provide pragmatic examples of the scope, nature, and extent of remedial orders in cases involving violations of the Voting Rights Act and the Fourteenth Amendment. Summarized, the framework of remedial orders in this context will follow these structural guidelines:

1. The remedy for violations of voting rights is governed by traditional equitable standards. *North Carolina v. Covington*, 137 S. Ct. 2211 (2017) (per curiam)("Relief in redistricting cases is `fashioned in the light of well-known principles of equity.'")
2. Even if the violation is founded on the Fourteenth Amendment, "[a]s with any equity case, the nature of the violation determines the scope of the remedy." *Swann v. Charlotte Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17, 91 S. Ct. 1267, 1276 (1971).
3. In voting rights cases, the Supreme Court has cautioned that federal courts' equitable powers are broad but not unlimited. *Whitcomb v. Chavis*, 403 U.S. 124, 161, 91 S. Ct. 1858, 1878 (1971).
4. Relief must be tailored to avoid undue interference with a legislature's judgment in order to appropriately reconcile constitutional requirements and legislative goals. *Cook v. Luckett*, 735 F.2d 912, 917 (5th Cir. 1984).
5. An equitable remedy must be fashioned to address the constitutional violation established.

6. Unless remedial legislation designed to address voting rights violations is itself infected with a discriminatory purpose, federal courts are obliged to defer to the legislative remedy. *Operation Push*, 932 F.2d at 406-07.

7. As a general rule in redistricting litigation, courts "should be guided by the legislative policies underlying the existing redistricting plan, to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act." *Perry v. Perez*, 132 S. Ct. 934, 941 (2012), quoting *Abrams v. Johnson*, 117 S. Ct. 1925, 1930 (1997).

8. When a district court is confronted with interim redistricting plans and maps, it must ensure that it "appropriately confines itself to drawing interim maps that comply with the Constitution and the Voting Rights Act, without displacing legitimate state policy judgments with the court's own preferences." *Perry*, 132 S.Ct. at 941.

9. A district court, in the context of legislative reapportionment, should follow the policies and preferences of the state, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state. *Upham v. Seamon*, 102 S. Ct. 1518, 1521 (1982).

10. A district court during the remedial phase of a Section 2 vote dilution case should not deprive the governmental defendant of an adequate opportunity to submit a remedial plan, and its failure to defer appropriately to the legislative preferences expressed by the defendant for its voting scheme may constitute reversible error. See *Cane v. Worcester County, Md.*, 35 F.3d 921 (4th Cir.1994), cert. denied, 115

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## Voter ID Challenges in Other Circuits

At the other end of the spectrum from the Fifth Circuit's *en banc* approval of the Texas Photo Voter ID law in *Veasey v. Abbott* is the Fourth Circuit's invalidation of North Carolina's voter ID law in *North Carolina State Conference of the NAACP v. McCrory*, 831 F. 3d 204 (4th Cir. 2016), followed by yet another Fourth Circuit decision going the other way in *Lee v. Virginia State Board of Elections*, 843 F. 3d 592 (4th Cir. 2016).

## *North Carolina State Conference of the NAACP v. McCrory*

The North Carolina Voter ID law represented a major overhaul of the state election code. It was challenged on the basis that it was an election reform law passed with

discriminatory intent in violation of the Fourteenth and Fifteenth Amendments and had discriminatory results in violation of Section 2 of the Voting Rights Act.

The North Carolina law limited in-person absentee voting and preregistration, and it targeted minorities with "surgical precision." In-person absentee voting and preregistration were shown to have been used frequently by African Americans in their "Souls to the Polls" programs and in youth civic engagement campaigns. The sequence of events leading to enactment of the North Carolina Voter ID law was revealing.

One day after the U.S. Supreme Court decided *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), the Chairman of the North Carolina Senate Rules Committee announced the intention of enacting a new omnibus election law and that legislation establishing North Carolina's Voter ID law would move forward. The revised H.B. 589 eliminated same-day voter registration, preregistration for sixteen-year old and seventeen-year old residents, and out-of-precinct provisional ballot voting. It also reduced the number of days for in-person absentee voting to ten days from the original seventeen.

Following one hearing on H.B. 589, and with limited debate in which less than a dozen public comments were received, the Senate and in rapid succession the House voted to pass the bill. As set forth in the Fourth Circuit's 2016 decision invalidating the North Carolina Voter ID law, the state attempted to provide partisan justifications for the law that masked racial implications. The evidence unfortunately revealed powerful racial undercurrents influencing state politics. In one rare instance of a smoking gun, the state admitted that its concerns centered on additional weekend voting hours provided in counties that were disproportionately African American. Emails were also admitted in evidence showing that legislators had specifically requested data about the use of certain voting tools by racial minorities.

On appeal from the district court's ruling upholding the North Carolina Voter ID law, the Fourth Circuit held that the appropriate legal standard for analyzing the law was not the *Anderson-Burdick* "undue burden" test that the Supreme Court itself had relied upon in *Crawford v. Marion County Election Board*, but the Supreme Court's *Arlington Heights* multifactor standard for determining whether circumstantial and direct evidence of intent proved that race was a motivating factor. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Supreme Court addressed a claim that racially discriminatory intent motivated a facially neutral governmental action. The Court recognized that a facially neutral law can be motivated by invidious racial discrimination. Id. at 264-66. If discriminatorily motivated, such laws are just as

abhorrent, and just as unconstitutional, as laws that expressly discriminate on the basis of race. Id.

The non-exhaustive list of factors enumerated in *Arlington Heights,* considered by the Fourth Circuit in making this sensitive inquiry in *North Carolina NAACP v. McCrory*, included the following:

- "[t]he historical background of the [challenged] decision";
- "[t]he specific sequence of events leading up to the challenged decision";
- "[d]epartures from normal procedural sequence";
- the legislative history of the decision; and of course,
- the disproportionate "impact of the official action -- whether it bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266-67

The rush legislative process combined with North Carolina's history of racially motivated legislative actions and comments by legislators was sufficient for the Fourth Circuit to hold that a racial intent existed.

Turning to the Section 2 challenge mounted against the North Carolina Voter ID law, the Fourth Circuit applied the two prongs of the Section 2 test for liability to determine whether North Carolina's voter ID and certain other provisions of its election reform measures violated Section 2. Applying the *Gingles* preconditions and the analytical standard for proving that a discriminatory impact existed and that collective official policies were the cause, the Fourth Circuit found that Section 2 was violated.

Finally, the Fourth Circuit found that the North Carolina legislation was a response to unprecedented African American voter participation in a state with a troubled racial history and racial polarization. It enjoined the challenged provisions of the North Carolina law including the changes to the Voter ID law and invalidated those provisions.

## *Lee v. Virginia State Board of Elections*

Another panel of the Fourth Circuit took a different approach to voter ID laws in *Lee v. Virginia State Board of Elections*, 843 F. 3d 592 (4th Cir. 2016). There the Fourth Circuit, in a panel decision by Circuit Judge Niemeyer, affirmed the district court's ruling that plaintiffs challenging Virginia's Voter Identification law had failed to present evidence sufficient to support their claims under Section 2, the

First Amendment, the Fourteenth Amendment, the Fifteenth Amendment and the Twenty-Sixth Amendment. Specifically, the district court and Fourth Circuit on appeal agreed that the Virginia photo identification requirement did not unduly burden the right to vote, did not impose discriminatory burdens on African Americans and Latinos, and was not enacted with the intent to discriminate against minorities, young voters, and Democrats. Following the approach of the United Supreme Court in the facial challenge to Indiana's voter ID law upheld in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the district court in *Lee v. Virginia State Board of Elections*, 188 F. Supp. 3d 577, 610 (E.D. Va. 2016) concluded:

> From in-person voting, to an absentee option, to provisional ballots with the ability to cure, and the provision of free voter IDs, Virginia has provided all of its citizens with an equal opportunity to participate in the electoral process.

On appeal, the Fourth Circuit in *Lee* found itself in a similar position as the Supreme Court in *Crawford v. Marion County Election Board*, in that it was called upon to judge slim evidence based largely on the experiences of a handful of voters against the state's broad justification to protect election integrity. The Fourth Circuit apparently accepted Virginia's argument that its voter ID law differed in adoption, implementation and operation from the North Carolina Voter ID law challenged in *McCrory.* Moreover, the Fourth Circuit evidently sided with Virginia in its claim that the Virginia Voter ID law was more lenient that Indiana's and imposed lighter burdens on Virginia voters.

The Fourth Circuit concluded that the plaintiffs in *Lee* had simply failed to provide evidence that members of the protected class has less of an opportunity than others to participate in the political process, reasoning that

1. Every registered voter who shows up to his or her local polling place on the day of election has the ability to cast a ballot and to have the vote counted, even if the voter has no identification.
2. When a voter shows up without identification, he or she is able to cast a provisional ballot, which can be cured by later presenting a photo ID.
3. If the voter lacks an acceptable form of identification, the voter can obtain a free voter ID with which to cure the provisional ballot.
4. Because under Virginia's election laws every registered voter in Virginia has the full ability to vote when election day arrives, the state voter ID law does not diminish the right of any member of the protected class to have an equal opportunity to participate in the political process and thus does not violate Section 2.
5. It is not enough, the Fourth Circuit concluded, to assert that the voter ID law results in disparate inconveniences that voters face when voting, where such

inconveniences do not rise to the level of a denial or abridgement of the right to vote.

6. The evidence of racially discriminatory intent presented in *McCrory* was lacking in *Lee*. The Virginia legislature went out of its way to make the impact of the Virginia Voter ID law as burden-free as possible, allowing a broad scope of IDs to qualify, providing free IDs to those who did not have a qualifying ID, issuing free IDs without any requirement of presenting documentation, and providing numerous locations throughout the state where free IDs could be obtained.
7. The legislative process was normal, with full debate and no evidence of untoward external pressures or influences affecting the debate.
8. Unlike North Carolina's process that targeted black voters with almost "surgical precision," the legislative process in Virginia leading to enactment of the Virginia Voter ID law contained no events that would "spark suspicion", nor did the Virginia legislature call for or have racial data such as that used in the North Carolina process as described in *McCrory*.

Finally, *One Wisconsin Inst., Inc. v Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016), provided both sides of the Voter ID debate with ammunition. There the district court upheld Wisconsin's Voter ID law, acknowledging that the Seventh Circuit's decision in *Frank v. Walker*, 768 F. 3d 744 (7th Cir. 2014) (upholding Wisconsin's photo ID law requiring voters to cast provisional ballots and whose list of acceptable identification documents was less inclusive that S.B. 5's in *Veasey v. Abbott*) was controlling precedent, but struck down the state's identification petition process by which voters were allowed to obtain a free ID for purposes of voting but within the framework of a bureaucratic process that placed a severe burden on poor voters and racial minorities. For the challenged provisions relating to in-person absentee voting, the state statutes establishing a one-location rule were found violative of the First and Fourteenth Amendments and § 2 of the Voting Rights Act. Statutory provisions limiting the days and times for in-person absentee voting were found violative of the Fifteenth Amendment, and, along with statutory limitations on the hours for in-person absentee voting, violative of § 2 of the Voting Rights Act and the First and Fourteenth Amendments. Further, provisions relating to registering to vote and requiring dorm lists to include proof of a student's citizenship were found violative of the First and Fourteenth Amendments, and provisions increasing the durational residency requirement from 10 days to 28 days were found violative of the First and Fourteenth Amendments.

## CONCLUSION

Voter ID legislation has a long history in this nation. That history does not provide resounding evidence that such laws are inherently motivated by racial animus. In 2005, the Commission on Federal Election Reform, co-chaired by Jimmy Carter and James Baker III, identified a voter ID system with photo ID as one of five pillars of a reformed U.S. election system. Commission on Federal Election Reform, *Building Confidence in U.S. Elections* (September 2005), http://www.eac.gov/assets/1/AssetManager/Exhibit&Muml;.PDF

At least 34 states have adopted some form of Voter ID requirement, and a circuit split is now evident with the latest decisions coming from the Fifth Circuit and the Fourth Circuit.

The common thread in lawsuits challenging Voter ID laws and other restrictions on voting rights is that the majority party has imposed restrictions on voting rights that may appear facially innocuous but in reality are targeted at the minority party or its traditional constituencies. In many of these challenges, moreover, the courts are being asked to assign discriminatory intent to a state legislature based on the comments of individual legislators, many of whom unfortunately do not heed the admonition "loose lips sink ships."

Furthermore, many of the Voter ID laws that have been enacted or revised since 2011 are predicated on fraud prevention among other stated justifications. The incidence of fraudulent voter impersonation – the kind of fraud that a voter ID card purports to prevent - is virtually nil. The lack of a verified voter fraud problem justifying imposition of a Voter ID requirement suggests a legislative solution in search of a bona fide problem.

As another justification for Voter ID, however, concern for election integrity appears to provide a valid, non-discriminatory reason for supporting a voter ID law, notwithstanding legitimate countervailing concern that voter ID requirements impede access to the polls and impose burdens on voters, particularly minority, disabled, and young voters.

To the extent that a Voter ID law can be justified on the basis of a robust, non-discriminatory rationale, challengers will have an increasingly hard time proving that legislative support for voter ID has been racially motivated, absent a smoking gun like the one present in *McCrory*.

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