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Recent State Election Law Challenges: In Brief

Updated November 2, 2016

Congressional Research Service
https://crsreports.congress.gov
R44675

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

During the final months and weeks leading up to the November 8, 2016, presidential election, courts across the country have ruled in numerous challenges to state election laws. For example, there have been recent court rulings affecting the laws regulating early voting, voter photo identification (ID) requirements, registration procedures, straight-party voting, and voter rolls. Accordingly, many such laws have been recently invalidated, enjoined, or altered. Others continue to be subject to litigation.

Recent rulings in Michigan, North Carolina, Ohio, and Texas are illustrative examples. In Michigan, a court preliminarily enjoined a 2016 law that ended the ability of voters to vote for a political party's entire slate of candidates with a single notation—straight-party voting—concluding that it was likely that the challengers would succeed on the merits of their claims under Section 2 of the Voting Rights Act (VRA) and the Equal Protection Clause of the Fourteenth Amendment. In North Carolina, a court invalidated several recent changes to that state's election laws, including a voter photo ID law, holding that the laws were enacted with a racially discriminatory intent in violation of the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the VRA. In Ohio, a court held that a law setting forth the process for removing the names of inactive voters from the voter rolls violates the National Voter Registration Act, and in another case, upheld a law that eliminated a period of early voting and same-day registration, known as "Golden Week," against a challenge under the Fourteenth Amendment Equal Protection Clause and Section 2 of the VRA. Finally, in contrast to the North Carolina ruling, a court declined to invalidate a Texas voter photo ID law, but required it to be administered on November 8, 2016, with modifications, holding that the law has a discriminatory effect on minority voting rights in violation of Section 2 of the VRA.

These decisions are notable because of their impact on state election laws shortly before a presidential election and, in some cases, because they invalidated laws that were recently enacted. Furthermore, the rulings in North Carolina and Texas have drawn attention because the challenged state laws were held, in part, to violate Section 2 of the VRA, which in the past has generally been applied in the context of challenges to redistricting maps. Accordingly, the case law in this area is just beginning to develop. Likewise, questions of whether specific voter photo ID laws comply with the Fourteenth Amendment Equal Protection Clause and the VRA continue to be answered. Although the Supreme Court upheld the constitutionality of an Indiana voter photo ID law in 2008 against a facial challenge, some courts have found other state laws distinguishable or have evaluated such laws under Section 2 of the VRA. It is possible that the Supreme Court may ultimately decide to revisit this issue.

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During the final months and weeks leading up to the November 8, 2016, presidential election, courts across the country have ruled in numerous challenges to state election laws. As a result of some of these rulings, several laws have been recently invalidated, enjoined, or altered. Leading up to the issuance of such rulings, there had been uncertainty in some states as to whether, or how, to administer certain state election laws during this election cycle.[1] In some cases, litigation is still ongoing.[2]

For example, in Michigan, North Carolina, Ohio, and Texas there have been recent court rulings affecting the laws regulating early voting, voter photo identification (ID) requirements, registration procedures, straight-party voting, and voter rolls. These decisions are notable because of their impact on state election laws shortly before a presidential election, and in some cases, because they invalidated laws that were recently enacted. Furthermore, the rulings in North Carolina and Texas have drawn attention because the challenged state laws were held, in part, to violate Section 2 of the Voting Rights Act, which generally prohibits discriminatory voting laws based on race, color, or membership in a language minority and has typically been applied in the context of challenges to redistricting maps.

This report begins by setting forth key constitutional provisions relevant to recent state election law challenges. Next, it discusses federal statutory provisions contained in the Voting Rights Act and the National Voter Registration Act, which have been invoked in recent cases, and briefly examines pertinent Supreme Court precedent. Then, based on that legal framework, it provides an overview of several recent challenges to state election laws in Michigan, North Carolina, Ohio, and Texas that resulted in major decisions by the various federal courts of appeals as illustrative examples of the types of challenges that have been playing out in the courts. Finally, the report discusses some potential implications of these challenges.

Background

Although presidential and congressional elections have national impact, they are primarily administered by state laws. The Elections Clause[3] of the U.S. Constitution provides to the states the initial and principal authority to administer elections within their jurisdictions. As a result of this decentralized authority, there is significant variation among the states as to how the voting process and elections are administered. For example, states have enacted differing laws addressing whether and to what degree voters can cast ballots prior to the day of an election, known as early voting; the types of identification required to cast a ballot, including voter photo ID requirements; and voter registration procedures, such as whether to permit registration on the same day as an election.[4] In addition, Congress has enacted specific overriding federal laws,

[1] *See, e.g.,* Rebecca Beitsch, STATELINE, (October 19, 2016), *New Voter ID Rules, Other Election Changes Could Cause Confusion*, http://www.pbs.org/newshour/rundown/voter-id-election-confusion/.

[2] *See e.g.,* ELECTION LAW AT MORITZ, Major Pending Election Administration Cases, http://moritzlaw.osu.edu/election-law/major-pending-cases/ (last visited October 18, 1016). *See also,* Gary D. Robertson, *Court Battles Over Voting Still Raging*, CHICAGO DAILY LAW BULLETIN, (October 20, 2016) http://www.chicagolawbulletin.com/Articles/2016/10/20/Vote-register-extension-10-20-16.aspx.

[3] U.S. CONST. art. I, §4, cl. 1. ("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 chusing Senators.")

[4] *See, e.g.,* CRS Report R42806, *State Voter Identification Requirements: Analysis, Legal Issues, and Policy Considerations*, by Eric A. Fischer, R. Sam Garrett, and L. Paige Whitaker; NATIONAL CONFERENCE OF STATE LEGISLATURES, Absentee and Early Voting, http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx (last visited November 1, 2016); NATIONAL CONFERENCE OF STATE LEGISLATURES, Same Day Voter (continued...)

including the Voting Rights Act[5] and the National Voter Registration Act,[6] with which states must comply in administering the election process.

Constitutional Provisions

In recent cases, state election laws have been challenged under the Fourteenth Amendment's guarantee of equal protection and the Twenty-fourth Amendment's prohibition on poll taxes. Both provisions are set forth below:

Fourteenth Amendment Equal Protection Clause: "No State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws."[7]

Twenty-Fourth Amendment: "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."[8]

In a relatively new application of the law, recent challenges to state election laws have also invoked the Voting Rights Act of 1965, which was enacted under Congress's authority to enforce the Fifteenth Amendment,[9] set forth below:

Fifteenth Amendment: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation."[10]

Voting Rights Act

Section 2 of the Voting Rights Act (VRA), discussed below, is a primary section of the law and applies nationwide. Recently, some state voting and election administration laws have been challenged under Section 2. This is a notable development in election law because Section 2 has most frequently been invoked in the context of redistricting and has rarely been applied outside of that context.[11] In 2013, another key provision of the VRA, Section 5—known as the preclearance

(...continued)

Registration, http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx (last visited November 1, 2016).

[5] Section 2 of the Voting Rights Act is codified, as amended, at 52 U.S.C. §§10301, 10303(f).

[6] The National Voter Registration Act is codified, as amended, at 52 U.S.C. §§20501-20511.

[7] U.S. CONST. amend. XIV, §§1 & 5.

[8] U.S. CONST. amend. XXIV.

[9] The Fifteenth Amendment was ratified in 1870. However, notwithstanding its ratification, in subsequent years, the use of various election procedures in some states diluted the impact of votes cast by African Americans or prevented voting by African Americans entirely. Therefore, Congress enacted the Voting Rights Act of 1965. *See* H. REP. NO. 89-439, at 1, 11-12, 15-16, 19-20, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2439-44, 2446-47, 2451-52 (discussing discriminatory procedures such as poll taxes, literacy tests, and vouching requirements).

[10] U.S. CONST. amend. XV, §§1 & 2.

[11] In evaluating a challenge to a law eliminating straight-party voting under Section 2 of the VRA, the U.S. Court of Appeals for the Sixth Circuit observed that Section 2 is most frequently invoked "in assessing vote-dilution claims, rather than vote-denial or vote-abridgement claims." Mich. State A. Philip Randolph Inst. v. Johnson, 833 F.3d 656, at 667 (6th Cir. 2016), *stay denied by* Johnson v. Mich. State A. Philip Randolph Inst., 85 U.S.L.W. 3084 (U.S. September 9, 2016), discussed *infra*. *See, e.g.*, Bartlett v. Strickland, 556 U.S. 1, 25-26 (2009) (holding that in a vote dilution challenge to a redistricting map under Section 2 of the VRA, a minority group must constitute more than 50% of the voting population in order to satisfy the requirement of geographical compactness sufficient to constitute a majority in (continued...)

provision—was rendered inoperable by the U.S. Supreme Court in *Shelby County v. Holder*.[12] As Section 5 required prior approval of proposed changes to voting and election laws by several states and jurisdictions, and has been referenced in some of the recent court rulings, for contextual purposes, it is also discussed below.

Section 2

Section 2 of the VRA provides a right of action for private citizens or the government to challenge discriminatory voting practices or procedures, including the diminishing or weakening of minority voting power. Specifically, Section 2 prohibits any voting qualification or practice applied or imposed by any state or political subdivision that results in the denial or abridgement of the right to vote based on race, color, or membership in a language minority.[13] The statute further provides that a violation is established if, based on the totality of circumstances, electoral processes are not equally open to participation by members of a racial or language minority group in that its members have less opportunity than other members of the electorate to elect representatives of their choice.[14]

In the landmark decision *Thornburg v. Gingles*,[15] the Supreme Court held that a violation of Section 2 is established if based on the "totality of the circumstances" and "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."[16] In order to facilitate determination of the totality of the circumstances, the Court listed the following factors, which originated in the legislative history accompanying enactment of Section 2:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivisions is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;

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a district); *see also* DEP'T OF JUSTICE, *Cases Raising Claims Under Section 2 Of The Voting Rights Act*, https://www.justice.gov/crt/cases-raising-claims-under-section-2-voting-rights-act-0 (last visited October 18, 2016).

[12] 133 S. Ct. 2612 (2013).

[13] 52 U.S.C. §§10301, 10303(f).

[14] *Id.* §10301(b).

[15] 478 U.S. 30 (1986).

[16] *Id.* at 44.

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.[17]

Section 5 Preclearance Inoperable

Until 2013, when the Supreme Court issued its ruling in *Shelby County v. Holder*,[18] Section 5 of the VRA was relied on to require several states and jurisdictions covered under Section 4(b) of the act to obtain prior approval or preclearance for any proposed change to a voting law. In order to be granted preclearance, the state or jurisdiction had the burden of proving that the proposed voting change would have neither the *purpose* nor *effect* of denying or abridging the right to vote on account of race or color, or membership in a language minority group.[19] Moreover, as amended in 2006, the statute expressly provided that its purpose was "to protect the ability of such citizens to elect their preferred candidates of choice."[20] Covered jurisdictions could seek preclearance from either the U.S. Attorney General or the U.S. District Court for the District of Columbia.[21] If preclearance was not granted, the proposed change to election law could not go into effect.

In *Shelby County v. Holder*[22] the Court invalidated Section 4(b)[23] of the VRA. The Court held that the application of the coverage formula to certain states and jurisdictions departed from the principle of equal sovereignty among the states without justification in light of current conditions.[24] Although the Court invalidated only the coverage formula in Section 4(b), by extension, Section 5 was rendered inoperable.

As a result of the Court's decision, nine states, and jurisdictions within six additional states, that were previously covered under the formula are no longer subject to the VRA's preclearance requirement. The covered states were Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. The six states containing covered jurisdictions were California, Florida, Michigan, New York, North Carolina, and South Dakota.[25] Shortly after *Shelby County* was decided, some states that were formerly required under Section 5 to preclear proposed voting changes, including North Carolina, whose law was the subject of a recent decision by the U.S. Court of Appeals for the Fourth Circuit, enacted new election laws.[26]

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[17] *Id.* at 36-37 (quoting S. REP. NO. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177). ("Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are: whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group [and] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.")

[18] 133 S. Ct. 2612 (2013).

[19] 52 U.S.C. §10304 (emphasis added). *See also* 28 C.F.R. §51.52(a).

[20] *Id.* §10304(d).

[21] *Id.* §10304(a).

[22] 133 S. Ct. 2612 (2013).

[23] *Id.* §10303.

[24] *See* Shelby County, 113 S. Ct. at 2623-31 (2013). The Court characterized the coverage formula as "based on 40-year old facts having no logical relation to the present day." *Id.* at 2629. *See also* CRS Report R42482, *Congressional Redistricting and the Voting Rights Act: A Legal Overview*, by L. Paige Whitaker.

[25] 28 C.F.R. pt. 51, app. (2012), "Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, As Amended." It does not appear, however, that the Court's decision affected Section 3(c) of the VRA, known as the "bail in" provision, under which jurisdictions can be ordered to obtain preclearance of voting laws if a court concludes that violations of the Fourteenth Amendment or Fifteenth Amendment justifying equitable relief have occurred. 52 U.S.C. §10302(c). *See also* CRS Legal Sidebar WSLG607, *What is the "Bail In" Provision of the Voting Rights Act?*, by L. Paige Whitaker.

[26] *See* N.C. State Conf. of the NAACP v. McCrory 831 F.3d 204 (4th Cir. 2016), *stay denied by* North Carolina v. N.C. (continued...)

However, other states not subject to preclearance, including Ohio, whose law was the subject of recent decisions by the U.S. Court of Appeals for the Sixth Circuit, also enacted changes to their voting laws over the last several years, prompting court challenges.[27]

National Voter Registration Act

Another relevant law with regard to recent election law challenges, including one regarding the laws of the state of Ohio, is the National Voter Registration Act (NVRA).[28] The NVRA was enacted in 1993 to, among other things, "establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; ... [and] to ensure that accurate and current voter registration rolls are maintained."[29] Relevant to the recent challenge in Ohio, the law forbids states from removing the names of registrants for federal elections from the official voter rolls, which list eligible voters, except under certain circumstances.[30] The law provides an exhaustive list of circumstances that can justify removal from the voter rolls, including a change in the registrant's residence.[31] Further, the statute requires that states "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" because of a change in residence by the registrant, in accordance with subsections (b), (c), and (d) of the law.[32] Subsection (b) sets forth two additional constraints on the states. All voter roll maintenance procedures must first, be uniform, nondiscriminatory, and comply with the VRA;[33] and second, such procedures cannot result in the removal of any name from the official voter rolls for federal elections because an individual failed to vote.[34]

In 2002, the second constraint was further modified by the Help America Vote Act (HAVA).[35] Specifically, HAVA construes the second constraint as not prohibiting a state from using procedures described in subsections (c) and (d), discussed below, to remove an individual from the official voter roll if the individual has failed either to notify the registrar or respond during a specified period to a notice, and then, has not voted or appeared to vote in two or more consecutive federal elections.[36] Subsections (c) and (d) provide two final constraints on the states. First, subsection (c)(2)(A) provides that any program to remove systematically the names of ineligible voters from the official voter rolls for federal elections must be completed within 90 days of a federal primary or general election.[37] Second, subsection (d)(1) prohibits the states from

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State Conf. of the NAACP, 85 U.S.L.W. 3075 (U.S. August 31, 2016), discussed *infra*.

[27] *See* A. Philip Randolph Inst. v. Husted, No.16-3746, 2016 U.S. App. LEXIS 17378 (6th Cir. September 23, 2016); Ohio Democratic Party v. Husted, 834 F.3d 620 (6th Cir. 2016), discussed *infra*.

[28] P.L. 103-31, 107 Stat. 82 (1993).

[29] 52 U.S.C. §20501(b).

[30] *Id.* §20507(a)(3).

[31] *Id.* §20507(a)(3)—(4).

[32] *Id.* §20507(a)(4)(B).

[33] *Id.* §20507(b)(1).

[34] *Id.* §20507(b)(2).

[35] P.L. 107-252, 116 Stat. 1728 (2002).

[36] 52 U.S.C. §20507(b)(2).

[37] *Id.* §20507(c)(2)(A).

removing the names of registrants from the voter rolls because a registrant changed residences without first sending the registrant a confirmation.[38]

Supreme Court Precedent Upholding State Voter Photo Identification Law

In 2008, the Supreme Court issued a decision that has been invoked, and sometimes distinguished, in recent rulings evaluating the constitutionality of state voter photo ID laws. In *Crawford v. Marion County Election Board*,[39] the Supreme Court upheld an Indiana voter photo ID law against a facial challenge under the Equal Protection Clause of the Fourteenth Amendment. The Indiana law requires voters to present a photo ID card issued by the government.[40]

A majority of the Court in *Crawford* did not agree on a rationale for upholding the voter photo ID law. The lead opinion held that although the law imposes a "somewhat heavier burden" on a "limited number" of people, the severity of that burden is mitigated by the fact that eligible voters may cast provisional ballots that will ultimately be counted.[41] Moreover, the opinion reasoned, even if the burden cannot be justified as to a few voters, that fact would be insufficient to require the relief sought by the petitioners, which was to invalidate the voter photo ID law in *all* its applications.[42] In conclusion, the lead opinion determined that Indiana's voter photo ID law imposed only a "limited burden" on voting rights that is justified by the state interest in protecting election integrity.[43] The opinion also announced that if a law is nondiscriminatory, and supported by valid, neutral justifications, then such justifications are still relevant to consider even if one of the legislature's motivations in enacting the law was to pursue partisan political interests.[44] Importantly, although the lead opinion in *Crawford* rejected a facial challenge (i.e., a case seeking to invalidate the statute in all its applications) to a voter photo ID law, it appears to have left open the possibility of challenges to particular applications of such laws (or "as applied" challenges) if greater evidence of the burdens imposed on voters' rights could be shown.[45]

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[38] *Id.* §20507(d)(1).

[39] 553 U.S. 181 (2008) (plurality opinion). For further discussion, see CRS Report RS22882, *The Constitutionality of Requiring Photo Identification for Voting: An Analysis of Crawford v. Marion County Election Board*, by L. Paige Whitaker. See also, CRS Report R42806, *State Voter Identification Requirements: Analysis, Legal Issues, and Policy Considerations*, by Eric A. Fischer, R. Sam Garrett, and L. Paige Whitaker.

[40] 2005 Ind. Acts 109, codified at IND. CODE §3-11-8-25.1 (2016).

[41] *Crawford*, 553 U.S. at 199 (plurality opinion). In the concurring and dissenting opinions, the opinion written by Justice Stevens is referred to as the Court's "lead opinion." *See, e.g., id.* at 204 (Scalia, J. concurring). The lead opinion was joined by Chief Justice Roberts and Justice Kennedy; Justice Scalia wrote a concurrence, joined by Justices Thomas and Alito; Justice Souter filed a dissent, joined by Justice Ginsburg; and Justice Breyer filed a dissent.

[42] *See id.* at 199-200 (plurality opinion).

[43] *Id.* at 203 (plurality opinion).

[44] *See id.* at 204 (plurality opinion).

[45] *See id.* at 202-203 (plurality opinion). "A facial challenge must fail where the statute has a 'plainly legitimate sweep.' When we consider only the statute's broad application to all Indiana voters we conclude that it 'imposes only a limited burden on voters' rights.' The 'precise interests' advanced by the State are therefore sufficient to defeat petitioners' facial challenge to [the law]." *Id.* (internal citations omitted) (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008); Burdick v. Takushi, 504 U.S. 428, 439 (1992)).

Recent Challenges to State Election Laws

As the November 8, 2016, presidential election draws near, various court rulings have invalidated, enjoined, or required modification to several state election laws. Litigation in some states continues.[46] Recent rulings in Michigan, North Carolina, Ohio, and Texas are illustrative examples.

Michigan Straight-Party Voting

Straight-party voting, also known as straight-ticket voting, permits a voter to cast a vote for a political party's entire slate of candidates by making a single notation on the ballot. On July 21, 2016, a federal district court preliminarily enjoined a 2016 Michigan law that ended straight-party voting, holding that its elimination would reduce African American voters' opportunity to participate in Michigan's political process.[47] The court ruled it was likely that the plaintiffs would succeed on the merits under the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the VRA.[48] As a result, the option of straight-ticket voting will appear on the ballot in Michigan for the November 8 election.

Subsequently, on August 17, 2016, a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) denied the Michigan Secretary of State's motion for a stay pending appeal.[49] Similar to the lower court, the Sixth Circuit panel held that the Secretary had failed to show first, that the state had a likelihood of success on appeal as to an equal protection challenge. That is, the elimination of straight-party voting, the court held, burdened voting rights by increasing wait times and voter confusion, particularly in communities with African American voters, thereby increasing the risk of individuals not having their votes counted.[50] According to the court, the evidence presented to the lower court demonstrated that there is an "extremely high" correlation between the African American voting population and the use of straight-party voting, resulting in a disproportionate burden on African Americans.[51] Furthermore, the court determined that the justifications proffered in support of eliminating straight-party voting, including the fostering of voter knowledge and engagement, were inadequate.[52] Second, the Sixth Circuit panel held that the Secretary showed no likelihood of appellate success as to a challenge under Section 2 of the VRA because, as the lower court determined, African American voters were more likely than white voters to use straight-party voting.[53]

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[46] *See e.g.*, ELECTION LAW AT MORITZ, *Major Pending Election Administration Cases*, http://moritzlaw.osu.edu/election-law/major-pending-cases/ (last visited October 18, 1016). *See also*, Sari Horwitz, WASH. POST, (October 25, 2016), *Battleground States Still Fighting Over Voting Laws, Potential Election Day Confusion*, https://www.washingtonpost.com/world/national-security/battleground-states-still-fighting-over-voting-laws-potential-election-day-confusion/2016/10/25/32560c4e-979d-11e6-bb29-bf2701dbe0a3_story.html.

[47] Mich. State A. Philip Randolph Inst. v. Johnson, No. 16-cv-11844, 2016 U.S. Dist. LEXIS 95107 (E.D. Mich. 2016).

[48] *See id.* at *25, *38.

[49] *See* Mich. State A. Philip Randolph Inst. v. Johnson, 833 F.3d 656 (6th Cir. 2016), *stay denied by* Johnson v. Mich. State A. Philip Randolph Inst., 85 U.S.L.W. 3084 (U.S. September 9, 2016).

[50] *See id*. at 663-65.

[51] *See id*. at 660, 663.

[52] *See id*. at 665-66. The court found that nothing in the record shows "that straight party voters vote blindly, that they are less informed than other voters or that they fail to complete their ballot at a lower rate." *Id*. at 666.

[53] *See id.* at 669.

On September 9, 2016, the U.S. Supreme Court, by a 6-2 vote, denied an application by the Michigan Secretary of State seeking a stay of the Sixth Circuit's ruling that required the state of Michigan to maintain the option of straight-party voting on the ballot for the November 8 election. Justices Thomas and Alito would have granted the stay.[54]

North Carolina Voter Photo ID Requirement, Early Voting, Same-Day Registration, and Preregistration

On July 29, 2016, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) invalidated and permanently enjoined North Carolina's voter photo identification (ID) requirement, along with provisions of law that reduced the days of early voting and eliminated same-day registration, out-of-precinct voting, and preregistration.[55] The partially divided court held that the laws were enacted with a racially discriminatory intent in violation of the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the VRA.[56] Reversing and remanding the lower court's ruling dismissing the challenges,[57] this decision reinstated an additional week of early voting, same-day voter registration, out-of-precinct voting, and preregistration procedures for 16 and 17 year olds.

As a threshold matter, the Fourth Circuit observed that, similar to laws that expressly discriminate on the basis of race, if a law is motivated by a racially discriminatory purpose, it is unconstitutional.[58] In determining whether racially discriminatory intent motivates a facially neutral law, the court interpreted Supreme Court precedent as requiring consideration of several factors, including first, the historical background in a case.[59] Here, the appellate court determined that the lower court clearly erred in finding minimal evidence of official discrimination in North Carolina since the 1980s and instead identified evidence of attempts by the legislature "to suppress and dilute" African American voting rights.[60]

Second, the Fourth Circuit noted that a court is required to consider the sequence of events leading to the challenge to determine whether a law was enacted because of an improper motive.[61] According to the court, the record of the case showed that immediately after the Supreme Court's 2013 ruling that rendered the preclearance requirements of the VRA inoperable,[62] the North Carolina legislature substantially expanded an earlier photo ID bill and

[54] Johnson v. Mich. State A. Philip Randolph Inst., 85 U.S.L.W. 3084 (U.S. September 9, 2016).

[55] 2013 N.C. Sess. Laws 381, codified at N.C. GEN. STAT. §163-166.13 (2016). For further discussion of the ruling, see CRS Legal Sidebar WSLG1639, *Appellate Court Invalidates North Carolina Election Law, Including Voter Photo ID Requirement*, by L. Paige Whitaker.

[56] *See* N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 219 (4th Cir. 2016), *stay denied by* North Carolina v. N.C. State Conf. of the NAACP, 85 U.S.L.W. 3075 (U.S. August 31, 2016).

[57] *See id.* at 241-42.

[58] *See id.* at 220 (citing Washington v. Davis, 426 U.S. 229, 241 (1976)).

[59] *See id.* at 220-21 (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977)).

[60] *Id.* at 223. "The record is replete with evidence of instances since the 1980s in which the North Carolina legislature has attempted to suppress and dilute the voting rights of African Americans. In some of these instances, the Department of Justice or federal courts have determined that the North Carolina General Assembly acted with discriminatory intent ... [i]n others, the Department of Justice or courts have found that the General Assembly's action produced discriminatory results. The latter evidence, of course, proves less about discriminatory intent than the former, but it is informative." *Id.* at 223-24.

[61] *See id.* at 227.

[62] *See* Shelby County v. Holder, 133 S. Ct. 2612 (2013), discussed *supra*.

"rushed through ... the most restrictive voting legislation seen in North Carolina since enactment of the Voting Rights Act of 1965."[63] The court held that the lower court erred by not drawing "the obvious inference" of discriminatory intent from this sequence of events.[64]

Third, the appellate court considered Supreme Court precedent recognizing the relevance of legislative history to determine whether a law was enacted as a result of racially discriminatory purpose.[65] In this case, the court determined it relevant that the legislature requested and utilized racial data in enacting the challenged statute, including a breakdown by race of DMV-issued ID ownership, absentee and early voting, and same-day registration, which showed that African Americans disproportionately use such procedures. When compared to the "unpersuasive non-racial explanations the State proffered for the specific choices it made," the court considered this element of the legislative history probative of the legislature's intent in enacting the law.[66]

Last, the Fourth Circuit considered whether the law impacts one race more than another to determine racially discriminatory intent.[67] The court found error in the lower court's conclusion that the voting procedures eliminated by the law, including early voting and same-day registration, were simply "more convenient" and "preferred" by African Americans.[68] African-American voters disproportionately use the voting procedures eliminated or reduced by the challenged law as a result of socioeconomic disparities, the court held, and such use is not borne from a simple "preference."[69] The court concluded: "Registration and voting tools may be a simple 'preference' for many white North Carolinians, but for many African Americans, they are a necessity."[70]

The court also noted that its holding was not meant to suggest that any member of the North Carolina legislature "harbored racial hatred or animosity toward any minority group."[71] The court concluded that the totality of the circumstances evidenced that the law was enacted to "entrench" the majority party's control of the legislature, and even if enacted for such "partisan ends," the court held, "targeting voters who, based on race, were unlikely to vote for the majority party ... constituted racial discrimination."[72]

Finally, the court held that the challenged provisions of the North Carolina law, including the voter photo ID requirement, were not tailored to achieve its stated justifications and in several ways, were, in the court's views, "solutions in search of a problem."[73] The court concluded that the legislature's reliance on *Crawford*, upholding an Indiana voter photo ID law, was misplaced.[74] Distinguishing *Crawford*, the court observed that the challengers in that case did not allege intentional race discrimination, but instead challenged the law facially, as unduly burdensome on

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[63] *N.C. State Conf. of the NAACP*, 831 F.3d at 227.

[64] *Id.*

[65] *See id.* at 229.

[66] *Id.* at 230.

[67] *See id.*

[68] *Id.* at 232-33 (quoting N.C. State Conf. of the NAACP v. McCrory, 2016 U.S. Dist. LEXIS 55712, at *170 (M.D.N.C. 2016)).

[69] *Id.* at 233.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* at 238.

[74] *See id.* at 235

the right to vote generally.[75] Moreover, the court found that the evidence established, at least partially, that the North Carolina law was motivated by racial considerations. These distinctions, among others, contributed to the court determining that the deference afforded to the legislature in *Crawford* was inapplicable in this case.[76]

On August 31, 2016, the U.S. Supreme Court denied North Carolina's request for a stay of the Fourth Circuit ruling.[77] The vote by the Court was 4-4, except as to the preregistration provision, which was denied by a 7-1 vote. As a result, the changes enacted in 2013 to North Carolina election law will not be in effect for the November 8 election.[78]

On October 13, 2016, a federal district court denied an emergency request by the plaintiffs to expand early voting in five North Carolina counties, determining that the state of North Carolina had complied with the injunction, and that granting the request would create logistical difficulties and potential voter confusion.[79]

Ohio Voter Rolls, Early Voting, and Same-Day Registration

On September 23, 2016, a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) held that an Ohio law setting forth the process for purging the names of inactive voters from the official voter rolls violates the National Voter Registration Act (NVRA).[80] By a 2-1 vote, the appellate court reversed and remanded a lower court ruling.[81]

Among other things, the Sixth Circuit held that an Ohio voter roll procedure, known as the "Supplemental Process," violates subsection 8(b)(2) of the NVRA, which prohibits roll maintenance processes that result in the removal of the name of any person from the official voter rolls for federal elections "by reason of the person's failure to vote."[82] Ohio law sets forth two processes for purging the voter rolls of those who are no longer eligible to vote because they have moved outside their county of registration.[83] The first is the National Change of Address (NCOA) Process, whereby the names and addresses in a statewide voter registration database are compared with those in the NCOA database, which contains names and addresses of individuals who filed changes of address with the U.S. Postal Service.[84] Thereafter, based on the comparison of the two databases, the Secretary of State sends to each county board of elections a list of voters who appear to have moved, and in turn, the county boards send confirmation notices to those individuals.[85] Recipients of the confirmation notices are removed from the voter rolls if they (1) do not respond to the confirmation notice or update their registration; and (2) do not

[75] *See id.*

[76] *See id.*

[77] *See* North Carolina v. N.C. State Conf. of the NAACP, 85 U.S.L.W. 3075 (U.S. August 31, 2016).

[78] On October 10, 2016, the Chief Justice of the United States extended the deadline for filing a petition for a writ of certiorari in this case from October 27 to November 28, 2016. (No. 16A362), https://www.supremecourt.gov/search.aspx?filename=/docketfiles/16a362.htm.

[79] *See* N.C. State Conf. of the NAACP v. McCrory, No. 1:13CV658, 2016 U.S. Dist. LEXIS 141890, at *54 (M.D.N.C. October 13, 2016).

[80] *See* A. Philip Randolph Inst. v. Husted, No.16-3746, 2016 U.S. App. LEXIS 17378, at *17-34 (6th Cir. September 23, 2016).

[81] *See id.* at *38.

[82] *Id.* at *28 (citing 52 U.S.C. §20507(d)(2)).

[83] OHIO REV. CODE §3503.21.1

[84] *Id.* §3503.21.1(D).

[85] *Id.*

subsequently vote during a period of four consecutive years that includes two federal elections.[86] The second process, known as the Supplemental Process, is similar to the NCOA Process, except that instead of identifying voters who may have moved as indicated by the NCOA database, each county board of elections compiles a list of registered voters who have not engaged in any "voter activity" for two years.[87] For the purposes of the Supplemental Process, "voter activity" includes filing a change of address; filing a voter registration card; casting an absentee ballot; casting a provisional ballot; or voting on election day.[88] After compiling a list of inactive voters, each county board of elections sends a confirmation notice to those on its list. Those on the list are removed from the rolls if they subsequently fail to vote for four years and fail to either respond to the notice or re-register.[89]

In sum, the Sixth Circuit panel interpreted the Ohio Supplemental Process as purging from the official voter rolls anyone who failed to vote for four years, who also either failed to respond to a confirmation notice mailed to the voter seeking to confirm their address or failed to re-register.[90] This process, the court held, results in the removal of names from the voter rolls "solely by reason of a failure to vote" in violation of the NVRA.[91] The NVRA "would have no teeth at all," the court warned, if states would be in compliance simply by including the act of voting in a disjunctive list of activities that a registrant must fail to do in order to trigger the confirmation notice procedure.[92] In other words, the court explained, a state cannot avoid the determination that its voter roll maintenance process is tantamount to removing names because of failure to vote simply "by providing that the confirmation process is triggered by a registrant's failure either to vote *or* to climb Mt. Everest *or* to hit a hole-in-one."[93]

On October 19, 2016, the lower court ordered the state of Ohio to allow voters who were illegally removed from the official voter rolls under the Supplemental Process to cast a provisional ballot during the November 8, 2016, election, in accordance with procedures set forth by the court.[94]

In contrast to its ruling on voter rolls, on August 23, 2016, the Sixth Circuit upheld a 2014 Ohio law that eliminated a period of early voting and the availability of same-day registration, known as "Golden Week," against a challenge under the Fourteenth Amendment Equal Protection Clause and Section 2 of the VRA.[95] The court held that the state of Ohio's justifications for the law outweighed and justified the minimal burden that it would place on some voters, and that the challengers failed to show that the law had a disparate impact on minority voters.[96] Accordingly, finding no cognizable injury, by a 2-1 vote, the appellate court reversed and vacated a lower court ruling.[97]

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[86] OHIO REV. CODE §3503.21(A)(7), (B).

[87] *See A. Philip Randolph Inst.*, 2016 U.S. App. LEXIS at *4-5.

[88] *See id.*

[89] *See id.*

[90] *See id.* at *37-38.

[91] *Id.* at *27.

[92] *See id.*

[93] *Id.* (emphasis included).

[94] *See* Ohio A. Phillip Randolph Inst. v. Husted, 2016 U.S. Dist. LEXIS 144799, at *7-8.

[95] *See* Ohio Democratic Party v. Husted, No. 16-3561, 2016 U.S. App. LEXIS 15433 (6th Cir. August 23, 2016), *stay denied by* Ohio Democratic Party v. Husted, 85 U.S.L.W. 3084 (U.S. September 13, 2016).

[96] *See id.* at *14-15.

[97] *See id.* at *51.

In evaluating the equal protection claim, the court invoked Supreme Court precedent, determining that it must first consider the degree to which the law burdens the right to vote.[98] Taking into account the multitude of voting options available in Ohio, especially in comparison to other states, the court determined that the law did not impose a "true" burden on voting.[99] At most, according to the court, eliminating a period of early voting constituted a mere withdrawal of just one of many convenient voting methods.[100] Criticizing the lower court for placing an "inordinate weight" on its finding that some African American voters may prefer the option of early voting, the court concluded that the law imposed only a "minimal" burden on some African American voters.[101] In conclusion, the court held that the law was minimally burdensome and nondiscriminatory.[102]

Accordingly, the court determined that a deferential standard of review was appropriate, under which the state only needed to advance "important regulatory interests."[103] In this case, the state of Ohio argued that its law serves four legitimate interests: (1) preventing voter fraud; (2) reducing costs; (3) reducing administrative burdens; and (4) increasing voter confidence and preventing voter confusion.[104] In comparison to the state interests proffered in *Crawford*, the court determined that the interests put forth by the state of Ohio were "even better substantiated" than those accepted by the Supreme Court in that case, including concrete, albeit inconclusive, evidence of voter fraud during Golden Week's same-day registration period.[105] In sum, the court held the state justifications for the law "easily outweigh and sufficiently justify the minimal burden that some voters may experience," and therefore rejected the challengers' equal protection claim.[106] Similarly, the court held that the Ohio law did not violate Section 2 of the VRA because it does not result in less opportunity for African American voters, in comparison to other members of the electorate, to participate in the political process.[107] In fact, the court determined, when compared to the rest of the electorate, statistical evidence indicated that the political processes in Ohio are equally open to African Americans.[108]

On September 13, 2016, the U.S. Supreme Court denied an application by the appellants seeking a stay of the Sixth Circuit's ruling.[109]

Texas Voter Photo ID Requirement

On July 20, 2016, issuing a plurality opinion, a divided *en banc* panel of the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) ruled that a Texas voter photo ID law[110] must be administered in such a manner to rectify a discriminatory effect on voters who do not have the

[98] *See id.* at *13 (citing Anderson v. Celebrezze, 460 U.S. 780 (1983); Burdick v. Takushi, 504 U.S. 428 (1992)).

[99] *Id.* at *18.

[100] *See id.*

[101] *Id.* at 23.

[102] *See id.* at *28.

[103] *Id.* at *27.

[104] *See id.* at *30.

[105] *Id.* at *29, *31.

[106] *Id.* at *39.

[107] *See id.* at *48 (citing 52 U.S.C. §10301(b)).

[108] *See id.*

[109] Ohio Democratic Party v. Husted, 85 U.S.L.W. 3084 (U.S. September 13, 2016).

[110] 2011 Tex. Gen. Laws 619, codified at TEX. ELEC. CODE ANN. §63.0101 (2016).

required ID or are unable to obtain such ID reasonably.[111] Affirming a lower court, a plurality of the court concluded that the voter photo ID law has a discriminatory effect on minorities' voting rights and therefore violates Section 2 of the VRA.[112] While the court did not invalidate the law, it remanded for consideration by the district court of an appropriate remedy.[113] The court also held that the indirect cost on voters who were born outside of Texas to obtain an ID was not the equivalent of an unconstitutional poll tax because the law applies equally to all Texas voters, not just to those who are born out of state.[114] On the issue of whether the law was enacted with a discriminatory *intent*, however, in contrast to the Fourth Circuit ruling discussed above, the court reversed the lower court's judgment and remanded for the district court to consider in light of guidance that the appellate court provided.[115]

Regarding the finding that the voter photo ID law has a discriminatory effect in violation of Section 2 of the VRA, the plurality opinion invoked Supreme Court precedent.[116] As required under such precedent, the opinion determined that the challengers showed not only that the law imposes a burden on minorities, but also that it interacts with social and historical conditions to cause an inequality in the opportunities of minority voters to elect preferred representatives.[117] The opinion approved of the lower court's analysis and resulting determination that (1) the law burdens Texans living in poverty, who are less likely to have, or to be able to procure, the requisite ID; (2) a disproportionate number of Texans living in poverty are African Americans and Hispanics; and (3) such minority voters are more likely to be living in poverty because they bear the socioeconomic effects of historical racial discrimination.[118] Further, the opinion determined that the district court thoroughly evaluated the totality of the circumstances, with each finding well supported, and that the state of Texas had failed to contest many of the factual findings.[119]

In August, the district court entered an order approving a plan that, among other things, for the November 8 election, allows certain Texas voters without the required voter photo ID, and who cannot obtain such ID due to a reasonable impediment, to cast a ballot after completing a "reasonable impediment declaration."[120] Furthermore, in September, the district court ordered the

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[111] *See* Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016). *See also* Frank v. Walker, No. 16-3003, 2016 U.S. App. LEXIS 14917 (7th Cir. August 10, 2016) (staying a federal district court order requiring the state of Wisconsin to permit voters who do not possess a statutorily required voter photo ID, and who cannot obtain one with "reasonable effort," to cast a ballot on November 8, 2016 by executing an affidavit to that effect). On August 29, 2016, the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit) declined to reconsider this decision in an initial review en banc. The Seventh Circuit held that there was insufficient urgency to justify such review, relying on the state of Wisconsin's representation that it has instituted an ID Petition Process (IDPP), whereby those who commence the IDPP will promptly receive a credential for voting, unless it is clear that they are not qualified to vote. *See* Frank v. Walker, No. 16-3003, 2016 U.S. App. LEXIS 16337, *7 (7th Cir. August 29, 2016).

[112] *See id.* at 265.

[113] *See id.* at 230-43.

[114] *See id.* at 265-69.

[115] *See id*. at 242-43. The Fifth Circuit encouraged the district court to determine the issue of discriminatory intent after the November 8, 2016 election and, notwithstanding when the determination is made, ordered the district court not to implement any remedy arising from the discriminatory intent claim until after the election. *See id.*

[116] *See id.* at 243 (citing Thornburg v. Gingles, 478 U.S. 30, 47 (1986)).

[117] *See id.* at 243-44.

[118] *See id.* at 264 (citing Veasey v. Perry, 71 F. Supp. 3d 627, 664 (S.D. Tex. 2014)).

[119] *See id*.

[120] Order Regarding Agreed Interim Plan for Elections, Veasey v. Abbott, No. 2:13-cv-00193, (S.D. Tex. August 10, 2016). "Voters who appear on the official list of registered voters and present a valid voter registration certificate, a certified birth certificate, a current utility bill, a bank statement, a government check, a paycheck, or any other government document that displays the voter's name and address and complete and sign a reasonable impediment (continued...)

state of Texas to ensure that voter education materials accurately reflect the court's August order setting forth how the voter photo ID law is to be administered for the November 8 election.[121]

On September 23, the state of Texas filed a petition for writ of certiorari in the U.S. Supreme Court, arguing for a reversal of the Fifth Circuit's holding that the law has a discriminatory effect.[122] If the Court agrees to hear this case, a decision would be expected after November 8, and therefore would not affect the administration of voting in Texas for the 2016 election.

Implications

Although the 2016 presidential election is drawing near, state election laws have been subject to recent changes by the courts. Decisions such as those evaluating laws in North Carolina and Texas, while still in the nascent stages, signal a willingness by the courts to hold that state election laws violate Section 2 of the VRA. As Section 2 has generally been invoked in the context of redistricting, this is a relatively new application of the law. Therefore, the attendant case law is just beginning to develop. Likewise, questions of whether specific voter photo ID laws comply with the Fourteenth Amendment Equal Protection Clause and the VRA continue to be answered. Although the Supreme Court upheld the constitutionality of an Indiana voter photo ID law in 2008 against a facial challenge, some courts have concluded that other state laws are distinguishable from the Indiana law or have evaluated such laws under Section 2 of the VRA. It is possible that the Supreme Court may ultimately decide to revisit this issue.

Author Information

L. Paige Whitaker
Legislative Attorney

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declaration shall be permitted to vote using a regular ballot." *Id.* at 1-2.

[121] Order, Veasey v. Abbott, No. 2:13-cv-00193 (S.D. Tex. September 20, 2016).

[122] Pet. for Writ of Cert., Veasey v. Abbott, No. 16-393 (U.S. September 20, 2016).

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