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## Identity Crisis: *Veasey v. Abbott* and the Unconstitutionality of Texas Voter ID Law SB 14

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# IDENTITY CRISIS: *VEASEY v. ABBOTT* AND THE UNCONSTITUTIONALITY OF TEXAS VOTER ID LAW SB 14

MARY KATE SEXTON\*

**Abstract:** In July 2016, the United States Court of Appeals for the Fifth Circuit reheard en banc its own three-judge panel decision ruling that Texas Senate Bill 14 (SB 14), a law requiring individuals to present a form of photo identification in order to vote, was unconstitutional in violation of the First and Fifteenth Amendments to the U.S. Constitution and Section 2 of the Voting Rights Act. The en banc Fifth Circuit reversed the District Court for the Southern District of Texas's decision that SB 14 violated Section 2 of the Voting Rights Act. The en banc Fifth Circuit affirmed, however, the district court's ruling that SB 14 violated the Voting Rights Act because of its discriminatory effect, and remanded that issue to the district court to determine an appropriate remedy prior to the 2016 general election. The dissenting opinion argued that the majority relied on improper evidence to support its determination that SB 14 had a discriminatory effect on certain Texas voters. This comment argues that the en banc Fifth Circuit properly determined that SB 14 could have been enacted with a discriminatory purpose, and in fact did have discriminatory effects that unconstitutionally interfered with low-income minorities' participation in the political process.

## INTRODUCTION

On November 5, 2013, Floyd James Carrier of China, Texas went to his local polling place to exercise his constitutional right to vote.<sup>1</sup> After he arrived at the polling place, Mr. Carrier, a retired, wheelchair bound, African American Army veteran, was denied the right to vote because he lacked the proper photo identification required by Texas Senate Bill 14 ("SB 14").<sup>2</sup> Specifically, Mr.

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<sup>1</sup> Plaintiff's Second Amended Complaint at 5, 7, *Veasey v. Perry (Veasey I)*, 71 F. Supp. 3d 627 (S.D. Tex. 2014) (No. 2:13-cv-00193 (NGR)) [hereinafter *Second Amended Complaint*]. The Fifteenth Amendment to the U.S. Constitution states that 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. U.S. CONST. amend. XV, § 1.

<sup>2</sup> *Second Amended Complaint*, *supra* note 1, at 5, 7. The Texas Election Code, in the section titled Documentation of Proof of Identification, states:

The following documentation is an acceptable form of photo identification under this chapter: (1) a driver's license, election identification certificate, or personal identification card issued to the person by the Department of Public Safety that has not expired or that expired no earlier than 60 days before the date of presentation; (2) a United States

Carrier was turned away at the polls because his veteran identification card did not contain a photograph, and he was thus unable to participate in the election being held that day.<sup>3</sup> To qualify for a disability exemption from the photo identification (“photo ID”) requirement under SB 14, Mr. Carrier would have needed to obtain a voter registration certificate explaining his disability.<sup>4</sup> This process would have required him to obtain written documentation of his disability from the United States Social Security Administration or the Department of Veteran’s Affairs.<sup>5</sup>

Situations like Mr. Carrier’s became common in Texas after the state legislature passed SB 14 in 2011, which dramatically changed the rules regarding the types of identification that one must present to exercise the right to vote.<sup>6</sup> Prior to the passage of SB 14, a voter could cast a ballot in person by presenting a voter registration certificate or by signing an affidavit and presenting one of several forms of identification.<sup>7</sup> Following the passage of SB 14, however, utility bills, old paychecks, expired driver’s licenses, or other “unofficial” documentation, which had previously been acceptable forms of identification at polling places, were deemed unacceptable forms of identification.<sup>8</sup> Voters now needed to adhere to much stricter rules and provide documentation which was often costly and time-consuming to acquire.<sup>9</sup>

Texas began enforcing SB 14 on June 25, 2013.<sup>10</sup> Plaintiffs filed suit against the state of Texas the next day, claiming that SB 14 was adopted with discriminatory intent and would have a discriminatory effect on African-American and Hispanic voters, who, as a group, are more likely to lack acceptable photo identification under SB 14.<sup>11</sup> The State of Texas in defense ar-

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military identification card that contains the person’s photograph that has not expired or that expired no earlier than 60 days before the date of presentation; (3) a United States citizenship certificate issued to the person that contains the person’s photograph; (4) a United States passport issued to the person that has not expired or that expired no earlier than 60 days before the date of presentation; or (5) a license to carry a handgun issued to the person by the Department of Public Safety that has not expired or that expired no earlier than 60 days before the date of presentation.

TEX. ELEC. CODE ANN. § 63.0101 (West 2016).

<sup>3</sup> *Second Amended Complaint*, *supra* note 1, at 7.

<sup>4</sup> *Veasey v. Abbott (Veasey III)*, 830 F.3d 216, 226 (5th Cir. 2016) (en banc).

<sup>5</sup> *See id.*

<sup>6</sup> *See* Plaintiff’s Original Complaint at 2–3, *Veasey I*, 71 F. Supp. 627 (S.D. Tex. 2014) (No 2:13-cv-00193) [hereinafter *Original Complaint*].

<sup>7</sup> *Veasey III*, 830 F.3d at 226.

<sup>8</sup> *See id.*; *Second Amended Complaint*, *supra* note 1, at 13–15.

<sup>9</sup> *See Veasey III*, 830 F.3d at 226; *Second Amended Complaint*, *supra* note 1, at 13–15.

<sup>10</sup> *Veasey v. Abbott (Veasey II)*, 796 F.3d 487, 495 (5th Cir. 2015), *aff’d in part, rev’d in part, vacated in part en banc*, 830 F.3d 216 (5th Cir. 2016).

<sup>11</sup> *See Veasey I*, 71 F. Supp. 3d 627, 633 (S.D. Tex. 2014), *aff’d in part, rev’d in part, vacated in part*, 796 F.3d 487 (5th Cir. 2015), *aff’d in part, rev’d in part, vacated in part en banc*, 830 F.3d 216 (5th Cir. 2016); Brief of Amici Curiae the Am. Civil Liberties Union & the Am. Civil Liberties Union

gued that SB 14 did not deny or abridge the right to vote in any way, nor did it result in a denial or abridgement of the right to vote on account of race.<sup>12</sup> The defendants claimed that while there may be a burden associated with obtaining a valid photo ID, the choice to not bear this burden was not sufficient to establish the presence of a denial or abridgement of the right to vote.<sup>13</sup> After a nine day bench trial, the district court held that SB 14 created an unconstitutional burden on the right to vote, was passed with a discriminatory purpose, and discriminated against Hispanic and African American voters.<sup>14</sup> Subsequently, before the November 2014 general elections, the district court issued a permanent and final injunction against the enforcement of the voter identification provisions of SB 14 and ordered the state to return to enforcing the ID requirements that were in effect prior to the passage of the legislation.<sup>15</sup> The State appealed the district court's decision in October 2014, and a panel of Fifth Circuit judges granted the State's emergency motion for stay pending appeal.<sup>16</sup> Plaintiffs then filed emergency motions before the Supreme Court seeking to vacate the Fifth Circuit's stay, which the Supreme Court denied.<sup>17</sup> The Fifth Circuit panel's stay of the district court's injunction remained in effect and the photo ID requirements of SB 14 continued to be enforced.<sup>18</sup>

The Fifth Circuit's panel opinion regarding the State's appeal from the district court's judgment held that the district court committed legal errors in concluding that SB 14 was enacted with a discriminatory purpose, and vacated and remanded that portion of the district court's opinion for further proceedings.<sup>19</sup> Nonetheless, the panel affirmed the district court's determination that SB 14 had a discriminatory effect, and rendered judgment in favor of the state on that issue.<sup>20</sup> After the Fifth Circuit panel's opinion, the Supreme Court denied a motion by the parties to vacate the stay of the district court's injunction but, in an attempt to encourage the resolution of the legal issues surrounding SB 14 prior to the November 2016 presidential election, the Supreme Court instructed the full Fifth Circuit to decide the case by July 20, 2016.<sup>21</sup> Subsequently, on July 20, 2016, in *Veasey v. Abbott*, the en banc Fifth Circuit reexamined the district court's decision and concluded that SB 14 should be reex-

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of Tex. in Support of Appellees in Support of Affirmance, *Veasey II*, 796 F.3d 487 (5th Cir. 2015) (No. 14-41127).

<sup>12</sup> See Defendant's Motion to Dismiss at 18, 21, *Veasey I*, 71 F. Supp. 3d 627 (S.D. Tex. 2014) (No. 2:13-cv-00193).

<sup>13</sup> See *id.* at 21.

<sup>14</sup> *Veasey III*, 830 F.3d at 228; *Veasey I*, 71 F. Supp. 3d at 698–99.

<sup>15</sup> *Veasey I*, 71 F. Supp. 3d at 707.

<sup>16</sup> *Veasey III*, 830 F.3d at 228.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See *Veasey II*, 796 F.3d 487, 503–04 (5th Cir. 2015).

<sup>20</sup> *Id.* at 513, 520.

<sup>21</sup> *Id.* at 229.

amined for the possibility that the state legislature passed SB 14 with a discriminatory purpose, and further determined that SB 14 violated Section 2 of the Voting Rights Act because of its discriminatory effect on certain groups of Texas voters.<sup>22</sup> The court determined that beneath the seemingly legitimate motives of preventing voter fraud and protecting the political process, circumstantial evidence indicated that the legislation was racially motivated, prevented poor minority groups from exercising their right to vote, and sought to marginalize minority groups from the political process as a whole.<sup>23</sup>

Part I of this comment outlines the factual and procedural history of *Veasey III*. Part II of this comment discusses the court's determination that SB 14 was enacted with a discriminatory purpose and subsequently resulted in a discriminatory effect on minority voters. Part III advocates for the Fifth Circuit's legal interpretation and determination that SB 14 was discriminatory, and highlights the adverse impact that legislation like SB 14 has on low-income minority citizens attempting to participate in the political process. Low-income, minority citizens are statistically more likely to lack identification that complies with SB 14, and thus are more likely to be denied the right to vote than their wealthier white counterparts.

## I. THE FIGHT TO THE FIFTH CIRCUIT

Prior to the passage of SB 14 on May 16, 2011, Texas voters could vote in person by presenting a registration certificate, a form of identification that was mailed to one's residence upon registering to vote.<sup>24</sup> If voters did not present the certificate at the time that they attempted to cast their vote, they could instead sign an affidavit and present one of a multitude of possible forms of identification including a driver's license, utility bill, paycheck, or another document containing their name and address.<sup>25</sup> When the state of Texas enacted SB 14 in 2011, it drastically altered the types of identification that voters could use to satisfactorily verify their identity to participate in elections.<sup>26</sup> Once enacted, SB 14 required that voters present a Texas driver's license, an identification card issued by the Department of Public Safety, a military identification card, a citizenship certificate with a photograph, a United States passport, a concealed carry permit, or an Election Identification Certificate ("EIC").<sup>27</sup> All of these forms of identification needed to be either valid or not expired by more than 60 days.<sup>28</sup>

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<sup>22</sup> See *Veasey III*, 830 F.3d at 226, 264, 272.

<sup>23</sup> See *id.* at 264.

<sup>24</sup> *Veasey v. Abbott (Veasey III)*, 830 F.3d 216, 225 (5th Cir. 2016) (en banc).

<sup>25</sup> *Id.*

<sup>26</sup> See *id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* Although the Department of Public Safety was not permitted to charge a fee for an EIC or a duplicate, the Department did require that in order to obtain an EIC a voter must present either one

To obtain these documents, some potential voters would have to travel to various government offices, sometimes out of state if the voter was not originally from Texas and the documents were still held in another state, and they would have to pay fees for certified or duplicate copies.<sup>29</sup> Thus, those without access to transportation to obtain the proper identifying documents, or those without the funds to pay for certified or duplicate copies of their IDs, would be unable to obtain appropriate identification in compliance with SB 14, and thus would be unable to vote in Texas elections.<sup>30</sup> Due to differences in average income levels, minority citizens are more likely than white citizens to lack acceptable SB 14 identification, and SB 14 thus disproportionately burdens their ability to vote.<sup>31</sup>

On June 26, 2013, almost immediately after SB 14 went into effect, opponents of SB 14 filed suit to enjoin the state of Texas from enforcing the law, and the opponents consolidated their claims into one case in the United States District Court for the Southern District of Texas.<sup>32</sup> The plaintiffs primarily claimed that the identification requirements contained within the law violated Section 2 of the Voting Rights Act because it was motivated by a racially discriminatory purpose and had a racially discriminatory effect.<sup>33</sup> Section 2 of the Voting Rights Act serves to ensure that no voter is denied participation in elec-

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form of primary ID, two forms of secondary ID, or one form of secondary ID coupled with two other forms of identification supporting their application. *See id.* at 225–26. Therefore, an application for an EIC would require voters to obtain an original or certified copy of their birth certificate, an original or certified copy of a State Department certification of birth, naturalization papers, or an original or certified copy of a court order containing the voter’s identifying information. *See id.* at 226.

<sup>29</sup> *See id.* at 225–26; *Second Amended Complaint*, *supra* note 1, at 14–15.

<sup>30</sup> *See Second Amended Complaint*, *supra* note 1, at 12–15; *Original Complaint*, *supra* note 6, at 2, 6–8.

<sup>31</sup> *Veasey III*, 830 F.3d at 250.

<sup>32</sup> *See id.* at 227.

<sup>33</sup> *See Original Complaint*, *supra* note 6, at 10. The Voting Rights Act reads:

No person acting under color of law shall—(A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote; (B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election . . . .

The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified at 52 U.S.C. § 10101(2) (2012)). Additionally, The Voting Rights Act, enacted in 1965, was born directly out of the need to protect African-Americans from facing unconstitutional burdens on their right to vote, including being subjected to literacy tests, being required to pay poll taxes, having their voting power diluted, and being subjected to threats or intimidation when attempting to cast a ballot at the polls. *See South Carolina v. Katzenbach*, 383 U.S. 301, 812 (1966); *Willing v. Lake Orion Bd. of Trustees*, 924 F. Supp. 815, 820 (E.D. Mich. 1996).

tions because of his or her race, and the plaintiffs argued that SB 14 violated Section 2 because it resulted in the denial of the right to vote for low-income minorities who were unable to obtain acceptable identification.<sup>34</sup> The plaintiffs further asserted that their First and Fourteenth Amendment rights were violated because the photo ID requirement placed a substantial burden on their right to vote.<sup>35</sup> The state of Texas defended the bill on the grounds that it passed SB 14 with the legitimate goal of preventing voter fraud, which would in turn produce more faith in the political system and higher voter turnout.<sup>36</sup>

Following a nine-day bench trial, the district court determined in *Veasey I* that SB 14 created a burden on the right to vote in violation of the Constitution, resulted in a discriminatory effect on African American and Hispanic citizens, and was passed with a discriminatory purpose.<sup>37</sup> Due to the approaching November 2014 general elections, the court issued an injunction against the enforcement of the sections of SB 14 requiring photo IDs.<sup>38</sup> The state appealed the district court's decision and a panel of the Fifth Circuit Court of Appeals granted the state's emergency motion for stay pending appeal in October 2014.<sup>39</sup> With the November 2014 elections fast approaching, the plaintiffs sought to have the court's stay vacated by the United States Supreme Court, but the court ultimately denied the motions.<sup>40</sup> Texas continued enforcing SB 14 because the Fifth Circuit granted the state's emergency motions for stay pending appeal.<sup>41</sup>

On appeal, on August 5, 2015, a Fifth Circuit panel concluded in *Veasey II* that the district court committed legal errors in analyzing whether SB 14 was passed with a discriminatory purpose, and thus vacated the district court's determination that the law was passed with discriminatory intent.<sup>42</sup> Additionally, the Fifth Circuit panel affirmed the district court's determination that SB 14 had a discriminatory effect in violation of Section 2 of the Voting Rights Act.<sup>43</sup>

<sup>34</sup> See *Second Amended Complaint*, *supra* note 1, at 27. The plaintiffs also asserted that their First and Fourteenth Amendment rights were violated because the photo ID requirement placed a substantial burden on their right to vote. *Id.*

<sup>35</sup> *Veasey III*, 830 F.3d at 227; *Original Complaint*, *supra* note 6, at 10–11.

<sup>36</sup> *Veasey v. Perry (Veasey I)*, 71 F. Supp. 3d 627, 641 (S.D. Tex. 2014), *aff'd in part, rev'd in part, vacated in part*, 796 F.3d 487 (5th Cir. 2015), *aff'd in part, rev'd in part, vacated in part en banc*, 830 F.3d 216 (5th Cir. 2016).

<sup>37</sup> *Id.* at 633.

<sup>38</sup> *Veasey III*, 830 F.3d at 228; *Veasey I*, 71 F. Supp. 3d at 707.

<sup>39</sup> *Veasey v. Abbott (Veasey II)*, 796 F.3d 487, 495, 496 (5th Cir. 2015), *aff'd in part, rev'd in part, vacated in part en banc*, 830 F.3d 216 (5th Cir. 2016).

<sup>40</sup> *Veasey III*, 830 F.3d at 228.

<sup>41</sup> See *id.*

<sup>42</sup> See *Veasey II*, 796 F.3d at 487, 503–04. The Fifth Circuit concluded that the district court relied on infirm evidence in its determination that SB 14 was passed with a discriminatory purpose, including relying too heavily on the history of past discrimination, choosing ineffective examples of current statewide discrimination, relying too heavily on post-enactment speculation by the legislature's opponents, and relying on procedural departures in passing SB 14. *Id.* at 499–502.

<sup>43</sup> See *id.* at 513.

The Fifth Circuit remanded this issue back to the district court so that the court could determine a remedy in light of the Fifth Circuit's findings.<sup>44</sup>

The Fifth Circuit subsequently granted the plaintiff's motion for rehearing en banc, and reviewed the district court's judgment.<sup>45</sup> The full Fifth Circuit in *Veasey III* examined the district court's determination that SB 14 was passed with a discriminatory purpose, the law's possible discriminatory effect, and SB 14's creation of unconstitutional burdens on the right to vote in violation of the First and Fourteenth Amendments.<sup>46</sup> The court reversed and remanded the district court's determination that SB 14 was enacted with a discriminatory purpose because the court believed that the district court relied on insufficient evidence, such as statements by the legislation's opponents and the legislative history, in concluding that SB 14 was passed with unconstitutionally discriminatory motivations.<sup>47</sup> The court also concluded that the district court did not clearly err in determining that the enactment of SB 14 had a discriminatory effect because the law specifically burdened low-income voters, and disproportionate numbers of low income Texans were members of minority groups.<sup>48</sup> The Fifth Circuit then remanded the issue to the district court for a proper remedy.<sup>49</sup>

## II. THE FIFTH CIRCUIT'S DECISION ON DISCRIMINATORY PURPOSE AND EFFECT

The Fifth Circuit Court of Appeals, sitting en banc, affirmed its three-judge panel's decision reviewing the district court's ruling on the plaintiff's discrimina-

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<sup>44</sup> *See id.*

<sup>45</sup> *Veasey III*, 830 F.3d at 225. An en banc rehearing of a case occurs "with all judges present and participating; in full court." *En banc*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>46</sup> *Veasey III*, 830 F.3d at 229, 243, 245.

<sup>47</sup> *See id.* at 241–42. A law has a discriminatory purpose in violation of the Equal Protection Clause of the Fourteenth Amendment if, given both direct and circumstantial evidence, challengers are able to establish that discrimination was a substantial or motivating factor in the passage of the law. *Id.* at 230–31. To determine if discrimination was a substantial or motivating factor in the passage of the law, courts look to the historical background of the legislation, the specific sequence of events preceding the passage of the legislation, departures from normal procedural sequences, and legal history including contemporary statements of the decision-making body. *Id.*

<sup>48</sup> *See id.* at 252, 256. A law violates Section 2 of the Voting Rights Act if it has a discriminatory effect. *Id.* at 244. There is a two-part analysis employed in a court's determination of whether a law has a discriminatory effect. *Id.* First, "plaintiffs must show not only that the challenged law imposes a burden on minorities, but also that 'a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.'" *Id.* at 243–44 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)). In addition to pure statistical analysis, courts also employ the *Gingles* factors to determine the second prong of the two-part analysis: whether current or historical condition of discrimination impact minorities in violation of Section 2. *Veasey III*, 830 F.3d at 244.

<sup>49</sup> *Id.* at 265.



tory purpose and effect claims.<sup>50</sup> The Fifth Circuit ruled that plaintiffs did not prove that SB 14 was passed with a discriminatory purpose, but that the legislation did have a discriminatory effect.<sup>51</sup> The majority opinion, written by Judge Haynes and joined in full by six other member of the Fifth Circuit, reversed and remanded for further evaluation the issue of whether there was a discriminatory purpose behind SB 14 that was in violation of Section 2 of the Voting Rights Act.<sup>52</sup> In addition, the opinion affirmed the finding by both the district court and the Fifth Circuit panel that SB 14 violated Section 2 of the Voting Rights Act because the law had a discriminatory effect on certain Texas voters.<sup>53</sup> The dissent, in contrast, argued that the plaintiffs were unable to prove that SB 14 was passed with a discriminatory purpose because it applied to all Texas voters regardless of race, and that there was no evidence that SB 14 was the cause of the racial disparity in acceptable identification ownership.<sup>54</sup>

#### *A. SB 14 Could Have Been Enacted for a Discriminatory Purpose*

Judge Haynes, writing for the majority, first considered the plaintiffs' claim that SB 14 was passed with a discriminatory purpose.<sup>55</sup> Specifically, the plaintiffs alleged that the legislation was intended to burden only certain minority groups' right to vote in violation of Section 2 of the Voting Rights Act.<sup>56</sup> To successfully demonstrate that a particular law is in violation of Section 2 of the Voting Rights Act, plaintiffs must show that discrimination was a "substantial" or "motivating" factor behind the enactment of the law.<sup>57</sup> This does not necessarily mean that a law was passed for the sole purpose of discriminating against certain groups; it is sufficient that a law is motivated even in part by a discriminatory agenda.<sup>58</sup>

To determine if the plaintiffs sufficiently proved their Section 2 violation claims, the court applied the framework that the United States Supreme Court articulated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>59</sup> In *Arlington Heights*, the Supreme Court outlined five non-comprehensive factors to determine if a legislature passed a law with a discriminatory purpose, and articulated that courts must perform a "sensitive inquiry into such circumstantial and direct evidence of intent as may be availa-

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<sup>50</sup> *Veasey v. Abbott (Veasey III)*, 830 F.3d 216, 241–42, 265 (5th Cir. 2016) (en banc), *aff'g in part, rev'g in part, vacating in part* 796 F.3d 487 (5th Cir. 2015).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 224–25, 241–42.

<sup>53</sup> *Id.* at 272.

<sup>54</sup> *Id.* at 312, 317–18.

<sup>55</sup> *See id.* at 224–25, 229.

<sup>56</sup> *Second Amended Complaint*, *supra* note 1, at 26.

<sup>57</sup> *Veasey III*, 830 F.3d at 231.

<sup>58</sup> *See id.* at 230.

<sup>59</sup> *Id.* at 230–31.

ble.”<sup>60</sup> Under the *Arlington Heights* framework, the challengers bear the burden of demonstrating that racial discrimination was a substantial or motivating factor behind the enactment of the law.<sup>61</sup>

Applying *Arlington Heights*, a majority of the en banc Fifth Circuit determined that the district court erred in its finding that the state legislature passed SB 14 with a discriminatory purpose because it relied on insufficient evidence.<sup>62</sup> The majority concluded that the district court relied too heavily on evidence of state-sponsored discriminatory voting practices from hundreds of years ago, analyzed weak examples of more contemporary discriminatory practices, and improperly relied on post-enactment speculation by opponents of the bill.<sup>63</sup> In spite of these legal infirmities, the majority concluded that the record could support another resolution of the factual issue, and thus remanded the issue back to the district court to re-weigh the evidence.<sup>64</sup> The majority provided the district court with guidance with which to re-weigh the evidence, including emphasizing that circumstantial evidence can be used to prove a discriminatory purpose.<sup>65</sup> The court also reinforced that although the state asserted that the law was passed solely to prevent voter fraud and bolster confidence in the voting system, this seemingly legitimate purpose could not be used to mask discriminatory intent.<sup>66</sup> The majority acknowledged the time constraints of the upcoming November 2016 election, and called on the district court to provide interim relief until the legislature could provide a more permanent solution for the discriminatory aspects of SB 14.<sup>67</sup>

### B. SB 14 Had a Discriminatory Effect

The plaintiffs asserted not only that SB 14 was passed with a discriminatory purpose, but also that the legislation had a discriminatory effect on certain groups of the low-income, minority voters in Texas, particularly African Americans and Hispanics.<sup>68</sup> Section 2 of the Voting Rights Act prohibits any “voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen . . . to vote

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<sup>60</sup> Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–68 (1977). These non-exhaustive five factors to analyze include: “the historical background of the decision,” “the specific sequence of events leading up to the challenged decision,” “[d]epartures from the normal procedural sequence,” “[s]ubstantive departures,” and legislative history, “especially where there are contemporary statements by members of the decisionmaking body.” *Id.* at 267–68.

<sup>61</sup> *See id.* at 270–271.

<sup>62</sup> *Veasey III*, 830 F.3d at 230, 234.

<sup>63</sup> *Id.* at 231–34.

<sup>64</sup> *Id.* at 234–35, 241–42.

<sup>65</sup> *Id.* at 241–42.

<sup>66</sup> *See id.* at 235–36.

<sup>67</sup> *Id.* at 242–43.

<sup>68</sup> *See id.* at 243.

on account of race or color.”<sup>69</sup> Congress has clarified that plaintiffs can prove a Section 2 violation by demonstrating the discriminatory effect of the law or policy at issue.<sup>70</sup>

The court applied a two-part framework to determine whether SB 14 had a discriminatory effect on particular groups.<sup>71</sup> To prove that a law has a discriminatory effect, plaintiffs must demonstrate that: (1) the challenged law imposes a burden on minorities, and (2) that the electoral law, practice, or structure *causes* an inequality in the opportunity to participate in elections between groups of voters.<sup>72</sup> As for the first factor, the majority first assessed if the law created a burden on minorities’ right to vote.<sup>73</sup> The court analyzed statistical data to conclude that black and Hispanic voters were much more likely than white voters to lack proper SB 14 ID and that to obtain proper IDs required time, money, and extensive documentation.<sup>74</sup>

As for the second factor, the majority used the test set forth in *Thornburg v. Gingles* to analyze whether SB 14 was the *cause* of alleged discrimination.<sup>75</sup> Applying *Gingles* to determine whether SB 14 caused the burden on minority groups’ right to vote, the court considered the history of official discrimination in Texas, racially polarized voting, effects of past discrimination, racial appeals in political campaigns, the existence of minority public officials and responsiveness to minority needs, and the tenuousness of policies underlying SB 14.<sup>76</sup> The majority further analyzed state-sponsored discriminatory actions by the Texas legislature as recently as 2011, disparities in minorities’ education, employment, and housing compared to white citizens, the lack of proportional minority political representation in elected bodies, and the lack of correlation between the state’s stated purpose of SB 14 and the achievability of the result the legislature sought.<sup>77</sup> For example, the court emphasized that Texas had previously been found to have violated the Voting Rights Act in its past redistricting plans, and that, in other litigation, Texas had conceded that racially polarized voting existed in 252 of its 254 counties.<sup>78</sup> Additionally, the court indicated that minority voters in Texas were more likely than white citizens to be unemployed, live below the poverty line, and not graduate from high

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 244.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 254.

<sup>74</sup> *See id.* at 251, 254–55.

<sup>75</sup> *Thornburg v. Gingles*, 478 U.S. 30, 48–52 (1986); *Veasey III*, 830 F.3d at 243–44. While there is no precise formula, the *Gingles* factors are used to determine whether there was a sufficient causal link between SB 14 and the disparate burden placed on minorities’ voting rights. *See Gingles*, 478 U.S. at 48–52; *Veasey III*, 830 F.3d at 245–46.

<sup>76</sup> *See Veasey III*, 830 F.3d at 257–64.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 256–58.

school.<sup>79</sup> To the court, these as well as the rest of the *Gingles* factors demonstrated that minority voters in Texas bore the majority of the burden of state-sponsored discriminatory voting practices.<sup>80</sup> The court analyzed the totality of these circumstances and determined that, coupled with Texas' past and present problems with race and the political process as demonstrated by the *Gingles* factors, the law placed an unfair burden on minorities' right to vote, and that SB 14 caused this burden.<sup>81</sup> Thus, the court concluded that SB 14 had a discriminatory effect in violation of Section 2 of the Voting Rights Act, and remanded the issue to the district court to consider a proper remedy.<sup>82</sup>

### C. The Dissent's Belief in the State's Legitimate Purpose

Judge Edith H. Jones, in a dissenting opinion joined by four other members of the court, took the position that requiring Texas voters to verify their identity at the polling place by way of proper photo identification was not discriminatory in purpose or effect, and served the legitimate state interest of preventing voter fraud in elections.<sup>83</sup> Judge Jones concluded that the law was neutral and generally applicable to all Texas voters.<sup>84</sup> In regards to the plaintiffs' discriminatory purpose argument, Judge Jones stated that there was no direct evidence that the Texas legislature passed SB 14 with the intent to discriminate against minority voters.<sup>85</sup> Judge Jones emphasized that the circumstantial evidence the court relied upon to evaluate whether SB 14 was passed with a discriminatory purpose consisted of weak, unsupported inferences rather than concrete evidence that discrimination motivated the bill.<sup>86</sup>

Judge Jones then addressed the plaintiff's claims that SB 14 had a discriminatory effect on minority voters, ultimately holding that it did not.<sup>87</sup> Judge Jones stated that although a racial disparity in ID possession may very well exist, there was no indication that SB 14 "resulted in or caused a diminution of the right to vote . . ."<sup>88</sup> The dissent also made clear that, in its opinion, the majority's decision will lead to judicial supremacy by subjecting essentially every voter regulation to litigation in federal court.<sup>89</sup>

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<sup>79</sup> *Id.*

<sup>80</sup> *See id.* at 256–64.

<sup>81</sup> *See id.* at 264–65.

<sup>82</sup> *Id.* at 265.

<sup>83</sup> *See id.* at 280–81, 286, 312 (Jones, J., dissenting).

<sup>84</sup> *Id.* at 283.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 303.

<sup>87</sup> *Id.* at 312–13.

<sup>88</sup> *Id.* at 312.

<sup>89</sup> *Id.* at 317–18.

### III. ENSURING THAT LOW INCOME MINORITY VOTERS ARE NOT BURDENED BY VOTER ID LEGISLATION

According to the United States Supreme Court, “[v]oting is of the most fundamental significance under our constitutional structure.”<sup>90</sup> Although the right to vote has long been considered of the utmost importance for its citizens, the United States has a long history of both state and private action that has denied or abridged the voting rights of certain minority groups.<sup>91</sup> The Voting Rights Act attempts to ensure that those citizens who have historically faced challenges in exercising integral, fundamental rights are protected from unjust laws and practices that serve to diminish their voting capacity.<sup>92</sup>

It is unacceptable that more than fifty years after the Voting Rights Act was enacted, legislatures are still attempting to create laws that not only restrict citizens’ fundamental right to vote, but also have a disparate impact on historically marginalized minority groups.<sup>93</sup> In *Veasey III*, the en banc Fifth Circuit correctly held that SB 14 was potentially enacted for a discriminatory purpose, and indeed had a discriminatory effect on poor voters, who in turn are more likely to be members of minority groups.<sup>94</sup> The state of Texas argued that the number of people who were actually impacted by the law in such a way that they would be unable to exercise their right to vote was so small that this could not be used as evidence of a discriminatory effect.<sup>95</sup>

In an analysis of Texas voters as a whole, statistics demonstrate that African American and Latino voters were respectively 1.78 and 2.42 times more likely than white voters in Texas to lack acceptable identification under SB 14.<sup>96</sup> To counter this disparity, the state presented statistics demonstrating that only 4.5% of all registered voters in Texas lacked the IDs that SB 14 required in the first place.<sup>97</sup> However, in a state as large as Texas, 4.5% of registered

<sup>90</sup> Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979).

<sup>91</sup> See generally *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (determining that requiring state and local governments to receive federal preclearance before changing their voting practices to ensure the changes complied with the Voting Rights Act of 1965 was unconstitutional); *Reynolds v. Sims*, 377 U.S. 533 (1964) (addressing practice of gerrymandering districts in order to dilute certain voters’ political influence); *Smith v. Allwright*, 321 U.S. 649 (1944) (addressing the use of all-white Democratic primaries in Texas); *Voting Rights Act: Major Dates in History*, ACLU, <https://www.aclu.org/voting-rights-act-major-dates-history> [<https://perma.cc/U8KU-EQJ9>] (last visited Oct. 24, 2016).

<sup>92</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301, 812 (1966); *Willing v. Lake Orion Bd. of Trs.*, 924 F. Supp. 815, 820 (E.D. Mich. 1996); *City of Port Arthur v. United States*, 517 F. Supp. 987, 1010 (D.D.C. 1981).

<sup>93</sup> See *Voting Rights Act: Major Dates in History*, *supra* note 91.

<sup>94</sup> See *Veasey v. Abbott (Veasey III)*, 830 F.3d 216, 241–42, 264–65 (5th Cir. 2016) (en banc), *aff’g in part, rev’g in part, vacating in part* 796 F.3d 487 (5th Cir. 2015).

<sup>95</sup> *Reply Brief for Appellants* at 11–14, *Veasey v. Abbott (Veasey II)*, 796 F.3d 487 (5th Cir. 2015) (No. 14-41127).

<sup>96</sup> *Veasey III*, 830 F.3d at 251.

<sup>97</sup> *Id.* at 250; *Reply Brief for Appellants*, *supra* note 95, at 11.

voters amounts to 608,470 people.<sup>98</sup> Of these 608,470 people who lack proper SB 14 ID, Hispanic registered voters and Black registered voters were respectively 195% and 305% more likely than their white peers to lack SB 14 ID.<sup>99</sup> Further, statistics show that voters earning less than \$20,000 per year, who are disproportionately minorities, were ten times as likely to lack acceptable SB 14 ID as compared to voters making between \$100,000 and \$150,000.<sup>100</sup> These statistics make it difficult to claim that the law does not place a burden on low-income minority voters.<sup>101</sup>

Fortunately, the en banc Fifth Circuit saw through the state's attempt to portray SB 14 as a legitimate effort to protect against voter fraud and encourage voter turnout.<sup>102</sup> A significant portion of the state's argument rested on the claim that the plaintiffs were unable to point to a specific person who was adversely impacted by SB 14, yet the plaintiffs in *Veasey III* were a collection of people who were not able to exercise their right to vote on election day.<sup>103</sup> Mr. Floyd James Carrier, who had put his life on the line for his country, was denied the right to vote in the very country that he fought to protect.<sup>104</sup> Mr. Carrier's lack of resources and physical disability made obtaining a form of photo ID that would be acceptable under SB 14 particularly burdensome.<sup>105</sup> Unavoidably, those who suffer from these laws the most are those who cannot afford to take the time—or can't afford to pay the money—and thus cannot obtain the proper documentation needed to participate in elections.<sup>106</sup> As the statistics show, those without the ability to obtain acceptable photo IDs are disproportionately members of historically marginalized minority groups who have already spent decades attempting to ensure that their right to vote is not abridged.<sup>107</sup>

The state argued that the photo identification requirement of SB 14 was not unduly burdensome on poor or minority voters because it was under the impression that most people already have an acceptable form of ID.<sup>108</sup> In *Veasey III*, the state asserted that people already have photo IDs to purchase alcohol, buy cold medicine, open a bank account, drive, travel, enter certain buildings, and engage

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<sup>98</sup> *Veasey III*, 830 F.3d at 250.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 251.

<sup>101</sup> *See id.*

<sup>102</sup> *See id.* at 254.

<sup>103</sup> *See id.* at 254–55.

<sup>104</sup> *See id.*

<sup>105</sup> *See id.*

<sup>106</sup> *See id.* at 254–55, 264–65.

<sup>107</sup> *See id.* at 251. *See generally* *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Smith v. Allwright*, 321 U.S. 649 (1944).

<sup>108</sup> Brief of Amici Curiae the Am. Civil Liberties Union & the Am. Civil Liberties Union of Tex. in Support of Appellees in Support of Affirmance, *supra* note 11, at 6–7.

in many other everyday activities.<sup>109</sup> However, many of these assertions are false, given that in some of these instances there is either no need to provide identification at all or there exists an alternative way of confirming one's identity that does not involve the cost or time burden of obtaining the SB 14 identification.<sup>110</sup> Additionally, the state's incorrect assumptions about photo ID possession demonstrate a lack of understanding of the lives of low-income people, as many of these citizens do not drive, travel on planes, or participate in other activities that would require the presentation of identification.<sup>111</sup> This failure to appreciate that possessing photo IDs is in fact a burden on the disproportionately high number of low-income minorities demonstrates how devastating laws like SB 14 can be.<sup>112</sup> It is not a certainty that every citizen possesses an acceptable ID under SB 14, but it should be self-evident that every citizen be guaranteed the right to vote.<sup>113</sup> The Fifth Circuit in *Veasey III* correctly thwarted a legislative attempt to deny certain citizens this fundamental right.<sup>114</sup>

#### CONCLUSION

The right to vote for the laws that govern and choose democratic leaders is one of the most fundamental rights that a citizen of the United States can exercise. The state of Texas attempted to pass SB 14 under the guise that it was simply a piece of legislation which would protect the integrity of the election system and bolster the public's belief that individual votes matter. The Fifth Circuit Court of Appeals, sitting en banc, correctly determined that underneath this legitimate state interest, the law could have been enacted with a discriminatory purpose and the law had a discriminatory effect by placing an unconstitutional burden on the right to vote upon poor minority voters.

In *Veasey III*, the Fifth Circuit identified circumstantial evidence leading to the conclusion that the Texas legislature was intending to prevent poor minorities from voting in elections, as well as statistical evidence that those most affected by SB 14 were low-income minorities. The dissent failed to delve deeper into the legislation itself, and accepted at face value the state's explanation that it was simply trying to protect voters. The ramifications of legislation like SB 14 are catastrophic for minority voters, especially poor minority vot-

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<sup>109</sup> *Id.* at 7–8.

<sup>110</sup> *See id.*

<sup>111</sup> *See id.* at 9–10. In their brief, the American Civil Liberties Union established that Texas state law does not require a person over the age of 21 to present an ID to purchase alcohol (nor is a proper form of ID required to purchase alcohol specified), patients do not need an ID to pick up medicine in 35 states including Texas, and according to the Treasury Department individuals are not required to show a photo ID to open a bank account. *Id.* at 8–10.

<sup>112</sup> *See id.*

<sup>113</sup> *See id.*

<sup>114</sup> *See Veasey III*, 830 F.3d 216, 241–42, 264–65 (5th Cir. 2016) (en banc).

ers, as this legislation requires voters to expend a burdensome amount of time or money to exercise their right to vote. The thought process that everyone already needs and possesses an acceptable form of photo identification that would comply with SB 14 represents a privileged mindset that refuses to acknowledge the additional monetary and time burden that a citizen without such identification would have to bear to exercise a right that inherently belongs to them.