State Action on Voter Identification: A National Survey

By J. Christian Adams

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Introduction

In recent years, the most politically divisive issue concerning election administration has been whether the law should require voters to provide photo identification at the polls. Many state legislatures have sought to enact these voter identification laws since the November 2010 elections. The topic is now a subject of renewed interest because of the current U.S. Supreme Court case, *Shelby County v. Holder*, which confronts the constitutionality of Section 5 of the Voting Rights Act. If the Supreme Court strikes down Section 5, those states that fall under its control will be able to enact voter identification laws without seeking clearance from the federal government.

Advocates typically argue that requiring voters to provide identification ensures robust election integrity. National groups that have supported voter identification laws include American Unity Legal Defense Fund, the Heritage Foundation, National Center for Public Policy Research, Project 21, and True the Vote. Opponents generally argue that requiring voter identification is an unjustified barrier to the polls, which, in practice, disproportionately affects racial minorities.[1] National groups that have opposed or stop enforcement of such laws include the ACLU, Advancement Project, League of Women Voters, Project Vote, Demos, and the NAACP.

By the 2012 general election, thirty-two states[2] had enacted laws requiring some form of proof for voters to establish their identity at the polls. Of these states, ten[3] have litigated the issue in court since 2009.

While advocates of these laws have enjoyed recent success in state legislatures, opponents have also had successes, stopping these measures through voter referendum, and through the Department of Justice in Section Five states. However, to date, opponents have not enjoyed much success in the courtroom: no plaintiff has ever successfully challenged the constitutionality of any state voter identification laws. Courts have uniformly upheld voter identification as constitutional—including the Supreme Court of the United States, which considered the issue in 2008.

This paper is a survey of legislative actions regarding voter identification laws and the ensuing litigation and responses since 2010 in eleven states. The paper is broken down into states that do not fall under Section Five and those that do, as Section Five states are required to meet certain federal standards prior to enactment of any law that alters how elections are conducted in those states.

Crawford v. Marion County

In *Crawford v. Marion County,*[4] plaintiffs made a facial challenge to Indiana's voter identification law under the Fourteenth Amendment of the U.S. Constitution.

Justice John Paul Stevens wrote for the six member majority that upheld Indiana's statute, which ruled that the statute did not violate the Fourteenth Amendment. The Court utilized the rational basis standard of review,[5] finding that Indiana's requirement did not present significant burdens to voters since identification was

1 In some states, advocates have mitigated the concerns of opponents by allowing multiple forms of identification to be used, providing voter identification free of charge, and allowing voters who do not possess one of the accepted forms of identifications to obtain a free, state-provided photo identification.

2 Chris Cillizza, *Voter ID laws in all 50 states—in 1 map*, Washington Post, Sept. 27, 2012, http://www.washingtonpost.com/blogs/the-fix/wp/2012/09/27/voter-id-laws-in-all-50-states-in-1-map/.

3 These states include Wisconsin, Rhode Island, Pennsylvania, Tennessee, South Carolina, Virginia, New Hampshire and Texas. Alabama and Mississippi passed voter identification laws in advance of the 2012 election but these states never sought federal approval of the laws as required under the Voting Rights Act for covered states.

4 553 U.S. 181 (2008).

5 While voting free from racial discrimination is a constitutional right, administration laws of equal application generally do not trigger heightened scrutiny. Enjoyment of other constitutional rights are predicated on the presentation of photo identification. *See generally* District of Columbia v. Heller, 554 U.S. 570 (2008) (the purchase of handguns); Loving v. Virginia, 388 U.S. 1 (1967) (obtaining a marriage license).

free and easy to obtain.[6]

One of the critical passages in *Crawford* stated that there need not be any evidence of in-person voter fraud for a state to pass prophylactic voter identification laws—protecting public confidence in the voting system was an adequate state justification for implementing such laws. Justice Stevens reasoned that "public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process."[7]

Since this case, federal circuit courts have subsequently ruled on the issue. In the 2009 case *Common Cause v. Billups*,[8] the Eleventh Circuit upheld Georgia's voter identification law.

State Actions

Kansas

In 2011, the Kansas Legislature, under the leadership of Secretary of State Kris Kobach, approved a voter identification law and it was signed into law by Governor Sam Brownback. [9] Though the measure was spearheaded by Republicans, a majority of the Democratic caucus voted in favor of the law.

Kansas' law went further than many other states that have enacted voter identification laws by requiring absentee voters (in addition to in-person voters) to provide proof of identification. Citizens must provide photo identification or a unique numeric identifier when applying for an absentee ballot.[10]

Minnesota

In 2011, the Minnesota Legislature passed a bill that would have required citizens to provide identification to vote.[11] However, Governor Mark Dayton vetoed the bill, stating that Minnesota's election system was "already exemplary" and that efforts to change the election system needed to have "broad bipartisan support" for him to sign them into the law.[12]

In response, in 2012 the legislature sought to circumvent gubernatorial approval by drafting and passing a constitutional amendment that, if ratified by voters, would have required photo identification to vote in the state.[13] The Minnesota Legislature will sometimes pass proposed constitutional amendments with both the language of the question which will appear on the ballot as well as the actual amendment.[14] Usually, the

6 In fact, the plaintiffs had particularly difficulty locating a plaintiff who had standing to bring the challenge. That is, plaintiffs were scarce who could not go into an Indiana government office and obtain the free photo identification.

7 *Crawford*, 553 U.S. at 197.

8 554 F.3d 1340 (11th Cir. 2009).

9 HB 2067, 2011 Sess. (Kan. 2011); Ch. 56, 2011 Kan. Sess. Laws 795, *available at* http://www.kssos.org/pubs/sessionlaws/2011%20Session%20Laws%20Volume%201.pdf; *see also* News Release, State of Kansas Office of the Secretary of State, Kansas Secure and Fair Elections (SAFE) Act Signed by Governor, (Apr. 18, 2011) *available at* http://www.kriskobach.org/Assets/Files/PR2011-04-18onSAFEActSigning.pdf.

10 Kan. Stat. Ann. § 25-1122(c) (2011); *see also How Will I Vote?*, Vote Kansas, http://www.voteks.org/when-you-vote/how-will-i-vote.html.

11 S.F. 509, ch. 69, 87th Leg, Reg. Sess. (Minn. 2011) *available at* https://www.revisor.mn.gov/bills/bill.php?b=House&f=SF0509&ssn= 0&y=2011.

12 Press Release, Office of Governor Mark Dayton, Governor Dayton calls for bipartisan election reform; issues Executive Order on Election Integrity and vetoes photo ID legislation (May 26, 2011) *available at* http://mn.gov/governor/newsroom/pressreleasedetail.jsp?id=102-11340.

13 The Governor of Minnesota has no role in the enactment of a constitutional amendment so this approach effectively bypassed his opposition.

14 A constitutional amendment in Minnesota must first be passed by both houses of the legislature. After passage, the amendment is put before the voters for approval or rejection in a general election. But the voters do not vote on the actual language of the constitutional amendment passed by the legislature. Instead, they vote on a constitutional question which summarizes the amendment. The constitutional question is phrased as a yes or no question and asks whether the constitution should be amended. A summary of the amendment is provided as part of the constitutional question. The summary is often written by the Minnesota Secretary of State. But because the Minnesota Secretary of State was opposed to the constitutional amendment, the legislative sponsors explicitly did not trust the Secretary of State to write a constitutional question which fairly characterized the underlying amendment. Of course the voters in Minnesota would never see the actual language of the amendment because it does not appear on the ballot, only the constitutional question does. Because of the legislative sponsor's explicit mistrust toward the Secretary of State regarding the constitutional question, the legislation not only included the constitutional amendment, but also included the constitutional question as the legislature wished to see the question posed. Despite the express language

actual amendment does not appear on the ballot, only the ballot question relating to the amendment appears. For the voter identification amendment, the legislature enacted both a proposed constitutional amendment and also the actual language to appear on the ballot. The secretary of state changed the ballot question and this change was the subject of the ensuing litigation.

An array of groups[15] sued Secretary of State Mark Ritchie, a public opponent of voter identification laws, to have the ballot question changed. Secretary Ritchie would not defend the language of the legislative enactment. In response, the Minnesota Legislature and advocacy groups[16] intervened to defend it.[17] The Minnesota Supreme Court had original jurisdiction, so the litigation bypassed all the lower courts.

In *League of Women Voters v. Ritchie*,[18] the plaintiffs argued that the enacted question was so deceptive so as to deny Minnesota voters a right to vote on the change. The central issue in the case was which branch of government in Minnesota has the power to write the ballot question for proposed constitutional amendments. The plaintiffs, opponents of voter identification laws, argued that Secretary Ritchie should draft the language of the ballot question. However, advocates of the law argued that Secretary Ritchie's proposed draft ballot question was hostile to their cause and unfairly partial to opponents of the law.

The Minnesota Supreme Court ultimately ruled in favor of the legislature and against the groups opposed to voter identification.[19] In its decision, the court commented that the plaintiffs "seek unprecedented relief—removal from the general election ballot of a proposed constitutional amendment that the Legislature passed and proposed to the people."[20] The court held that the Minnesota Legislature has the power to write ballot questions and that the Minnesota Supreme Court would not interfere with the language selected by the Minnesota Legislature.[21] Consequently, the question, as drafted by the legislature, appeared on the ballot.

The amendment, however, was ultimately rejected by the voters in the 2012 general election after receiving only 46 percent approval of all voters, and not the required 50 percent. This surprised the advocates of the law in the state, as polling leading up to the election had shown significantly higher levels of support for the law.[22]

Pennsylvania

In 2012, Pennsylvania enacted a voter identification law.[23] Prior to implementation, however, the law was challenged in court. In *Applewhite, et. al. v Commonwealth*,[24] private plaintiffs joined with opponents of voter identification[25] to made a facial challenge to the law, alleging that they were unable to obtain voter identification.

The Pennsylvania Commonwealth Court, an intermediate appellate court, upheld the voter identification law. The court reasoned that the law had an array of failsafe mechanisms for voters to obtain free identification or cast ballots when they did not otherwise have supporting documentation or could not

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of the constitutional question proposed by the legislature, the Secretary of State nevertheless disregarded the language of the constitutional question passed by the legislature and substituted his own, less sympathetic, language for the constitutional question, thus triggering the litigation.

15 Including Common Cause and the League of Women Voters

16 Including Minnesota Majority, whose motion to intervene was rejected in favor of the 87th Legislature. Doug Belden, *Legislature can intervene in Voter ID lawsuit; Ritchie says he won't defend proposal*, St. Paul Pioneer Press, June 15, 2012, *available at* http://www.twincities.com/ci_20868772/legislature-can-intervene-voter-id-lawsuit-ritchie-says.

17 Disclosure: I served as counsel to proposed intervenor/amicus in this case.

18 819 N.W.2d 636, 651 (Minn. 2012).

19 League of Women Voters Minnesota v. Ritchie, 819 N.W.2d 636, 651 (Minn. 2012).

20 *Id.* at 646.

21 *Id.* at 651.

22 *See* Jim Ragsdale, *Voter ID drive rejected*, Minneapolis Star Tribune, Nov. 7, 2012, http://www.startribune.com/politics/statelocal/177543781.html.

23 H.B. 934, Reg. Sess. 2011-12 (Pa. 2011) (enacted), *available at* http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=201.

24 330 M.D. 2012, 2012 WL 3332376.

25 In addition to the individual plaintiffs, the League of Women Voters of Pennsylvania, the NAACP, the Pennsylvania State Conference, and the Homeless Advocacy Project were all parties to the lawsuit. Representation was provided by attorneys associated with the ACLU, The Advancement Project, and the Public Interest Law Center of Philadelphia.

take the time to obtain a free identification.[26]

Plaintiffs appealed to the Pennsylvania Supreme Court. Since the lead plaintiff, Viviette Applewhite, obtained a free voter identification the day after the lower court's ruling, her case was moot, so the case proceeded with the remaining plaintiffs.[27]

The Pennsylvania Supreme Court partially reversed and remanded the lower court decision.[28] The decision directed the lower court to carefully examine the particular effect on particular plaintiffs, especially in light of bureaucratic problems residing in the Pennsylvania Department of Transportation regarding implementation of the free voter identification program.

In its ruling, the Pennsylvania Supreme Court stated:

> Overall, we are confronted with an ambitious effort on the part of the General Assembly to bring the new identification procedure into effect within a relatively short timeframe and an implementation process which has by no means been seamless in light of the serious operational constraints faced by the executive branch. Given this state of affairs, we are not satisfied with a mere predictive judgment based primarily on the assurances of government officials, even though we have no doubt they are proceeding in good faith.[29]

On remand, the Commonwealth Court again upheld the law. However, because of the bureaucratic difficulties in implementation, the court enjoined use of the law for the 2012 presidential election.[30] A trial on the permanent injunction is set for July 25, 2013. Both parties have agreed that the voter identification law will not be enforced during the May primary election.[31]

Rhode Island

Bipartisan support prompted the passage of a voter identification law in Rhode Island in 2011.[32] The law was sponsored by Democratic Senator Harold Metts, and signed into law by Independent Governor Lincoln Chafee.

The law is being phased in over two years. For the 2012 general election, voters were required to provide "proof of identity," which allowed some forms of identification that do not include a photo (such as a birth certificate, social security card, and government-issued medical card).[33] However, by 2014, only those voters with photo identification will be allowed to cast a vote.

Tennessee

In 2011, Tennessee passed a voter identification law[34] which became the subject of a court challenge.[35] For the purposes of this article, the relevant issue in the case was whether or not government created library cards could serve as acceptable photo identification. In October 2012, the Tennessee Court of Appeals upheld the constitutionality of the voter identification requirement, and expanded the list of identification which were acceptable in the case *Memphis v. Hargett*.[36]

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26 Applewhite v. Commonwealth, 330 M.D. 2012, 2012 WL 3332376, at *32 (Pa. Commw. Ct. Aug. 15, 2012) (unreported) *vacated,* 54 A.3d 1 (Pa. 2012).

27 Cherri Gregg, *PennDOT's 'Unwritten Exceptions' Lead Voter ID Plaintiff To Get ID*, CBS Philly, Aug. 20, 2012, http://philadelphia.cbslocal.com/2012/08/20/penndots-unwritten-exceptions-allow-lead-voter-id-plaintiff-to-get-id/.

28 Applewhite v. Com., 54 A.3d 1, 5 (Pa. 2012) (per curium).

29 *Id.*

30 Applewhite v. Com., 330 M.D. 2012, 2012 WL 4497211, at *8 (Pa. Commw. Ct. Oct. 2, 2012) (unreported). The state is allowed to ask voters to produce photo identification at the polling place but is not allowed to require those without photo identification to cast a provisional ballot. This is essentially an extension of the transition period included in the bill.

31 The Associated Press, *Pa. Voter ID Law Won't Be Enforced In May Primary*, CBS Philly ,Feb. 14, 2013, http://philadelphia.cbslocal.com/2013/02/14/pa-voter-id-law-wont-be-enforced-in-may-primary/.

32 S.B. 400 Sub. A, 2011 Leg., Jan. Sess. (R.I. 2011) (enacted), *available at* http://www.rilin.state.ri.us//BillText11/SenateText11/S0400A.pdf.

33 R.I. Gen. Laws § 17-19-24.2 (2011), *available at* http://webserver.rilin.state.ri.us/Statutes/TITLE17/17-19/17-19-24.2.HTM.

34 S.B. 16, 107th Gen. Assemb., 2011 Reg. Sess. (Tenn.) (enacted), *available at* http://state.tn.us/sos/acts/107/pub/pc0323.pdf.

35 *Federal lawsuit filed challenging Tennessee's voter ID law as unconstitutional*, Times News, August 9, 2012, http://www.timesnews.net/article/9050211/federal-lawsuit-filed-challenging-tennessees-voter-id-law-as-unconstitutional.

36 M2012-02141-COA-R3CV, 2012 WL 5265006, at *12 (Tenn. Ct. App. Oct. 25, 2012).

Photo library cards, for example, were deemed sufficient by the Tennessee Court of Appeals. The Tennessee Supreme Court announced in November 2012 that it would review the law. Oral arguments were heard on February 6, 2013 but no decision had been announced as of the time of this publication.[37]

Section Five States

Section Five of the Voting Rights Act of 1965 requires that certain jurisdictions must seek approval from the Department of Justice or the United States District Court for the District of Columbia before any election law change may be implemented. The law applies to nine states,[38] as well as parts of seven others.[39] The law was created in response to previous racial bias. Consequently, these states have to get the appropriate federal approval, known as "preclearance" to change their laws. Laws which have not been precleared are not effective. This has created an additional obstacle to Section Five states seeking to enact voter identification laws.

In 2006, Congress amended Section Five to make approval of election laws more rigorous. As a result, states bear the burden of establishing an absolute absence of "any" discriminatory effect as well as "any" discriminatory intent. Of significance here, if a state cannot prove to the federal government that a voter identification law does not disproportionately affect racial minorities, the law will not be precleared.[40]

Six states covered by Section Five have passed voter identification laws since 2010: Alabama, Mississippi, Texas, South Carolina, New Hampshire and Virginia. Several of these states decided to wait until after the November 2012 presidential election to seek preclearance, making the calculation that a Republican administration would have been more favorable to voter identification laws.

Alabama

In 2011, Alabama passed a voter identification law that would become effective in 2014 and submitted the statute to the Justice Department.[41] As of the release of this publication, the Justice Department has not ruled on the issue.

Mississippi

In 2011, Mississippi passed voter identification as a constitutional amendment.[42] State Attorney General Jim Hood submitted the amendment to the Department of Justice and Secretary of State Delbert Hosemann, submitted implementing procedures to the Department of Justice.[43] As the amendment was still under consideration, its provisions were not enforced during the November 2012 elections. As of this publication, the Department of Justice has not ruled on this issue.

New Hampshire

Though New Hampshire is covered by Section Five of the Voting Rights Act,[44] the Voting Section of the

37 *Id.*; Tennessee State Courts, TNCOURTS.gov (last visited Mar. 9, 2013), http://www.tncourts.gov/courts/supreme-court/arguments/2013/02/06/city-memphis-et-al-v-tre-hargett-et-al.

38 Section Five applies to parts of California, Florida, Michigan, New York, New Hampshire, North Carolina, and South Dakota.

39 Section Five applies to the entire states of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia.

40 Prior to 2006, Section Five did not contain such a *de minimis* standard. Hence, Georgia and Arizona's voter identification laws were precleared.

41 H.B. 19, 2011 Gen. Assemb., Reg. Sess., Act No. 2011-673 (Ala. 2011) (enacted), *available at* http://alisondb.legislature.state.al.us/acas/searchableinstruments/2011RS/Printfiles//HB19-enr.pdf. Note: Alabama decided to wait for the results of the Presidential election before seeking preclearance.

42 Initiative 27 passed in 2011. *Voter Identification*, Mississippi Secretary of State (Mar. 9, 2013), http://www.sos.ms.gov/elections/initiatives/InitiativeInfo.aspx?IId=27.

43 Letter from The Secretary of State of Mississippi to the DOJ Requesting Section Five Consideration (Jan. 18, 2012), *available at* http://sos.ms.gov/links/press_releases/DOJ%20Submission%20Ltr.pdf.

44 Chris Fleisher, *N.H. Awaits Voting Rights Act 'Bailout'*, Valley News, March 2, 2013, http://www.vnews.com/news/4794227-95/law-hampshire-state-voting ("Unity is among the 10 towns in the Granite State required to "pre-clear" any changes in voting laws with federal authorities under Section 5 of the law. . . . New Hampshire's towns got caught up in the law for a couple of reasons. First, the state had a literacy test as a voter qualification on the books in 1968, a key trigger date for application of the Voting Rights Act. The literacy test was enacted in 1903 and has since been repealed. Second, federal officials said records indicated that less than 50 percent of the voting age population in those 10 towns either registered or voted in the 1968 presidential election.").

Department of Justice has not enforced Section Five there as it has against other states.[45] One manifestation of this relaxed approach the Department of Justice had towards New Hampshire was that New Hampshire seeks "post clearance" (as opposed to pre-clearance) of its changes to voting protocol before the state may seek a statewide bailout.[46] The post-clearance procedure is highly irregular and is a prerequisite to receiving bailout.[47]

In June 2012 New Hampshire passed a voter identification law[48] which raised a complicated problem for the Department of Justice given the enforcement paradigm in New Hampshire: Attorney General Eric Holder has announced broad opposition to anything that makes it "harder" for someone to vote, but New Hampshire was required to seek the Department of Justice's approval for the law—forcing the Justice Department to either change its longstanding enforcement attitude toward New Hampshire or back away from its per se opposition to voter identification laws. Further complicating the problem, left-leaning organizations had embarked on a nationwide campaign to seek as many "bailouts"[49] from Section Five as possible before the Supreme Court heard a challenge to the law. A copious number of bailouts would bolster the case that the law is not burdensome, the experience of Texas and South Carolina notwithstanding.

New Hampshire's voter identification law received speedy preclearance.[50] The state was granted a bailout on March 1, 2013.

South Carolina

In 2011, South Carolina submitted a voter identification law[51] to the Department of Justice Voting Section. The Department objected to the law under the 2006 Voting Rights Act reauthorization, citing a difference of 1.6% between blacks and whites who possessed photo identification.[52] The Department of Justice made the objection, finding insufficient the precautions the South Carolina Legislature took, embodied in the reasonable impediment affidavit—provisions which allowed for voters without identification to cast ballots upon showing an inability to obtain identification embodied.

In its ruling, the Justice Department wrote that South Carolina failed to carry the burden of proving an absence of discrimination and that in fact there was a 1.6% difference in possession rates as between black and white. Furthermore, the ruling also accused South Carolina of acting with a racially discriminatory intent. Assistant Attorney General Tom Perez noted an absence of pervasive in-person voting fraud that might justify such a law, and that racism could be an alternative explanation for the legislation.

In 2012, South Carolina Attorney General Alan Wilson filed suit in the United States District Court for the District of Columbia, attacking the Department of Justice's conclusions. In *South Carolina v. U.S.*,[53]

45 *See* J. Christian Adams, *DOJ's Granite State Free Ride*, PJ Media, Apr. 5, 2012 ("It turns out that New Hampshire is subject to the obligations of Section 5, but has been allowed to ignore the law's requirements for years, and the DOJ has never done the things it does to southern states which ignore the law."). Litigants challenging Section Five have not raised this history even though this history calls into question the congruence and proportionality of Section Five. If Section Five applies in a state where the DOJ feels no need to enforce it, then the congruence and proportionality of the laws which trigger Section Five coverage are questionable.

46 Section 4 of the VRA allows jurisdictions subject to Section Five to terminate or "bailout" coverage by getting a declaratory judgment from the D.C. Circuit that they have eliminated the conditions that justifying the federal oversight. *Section 4 of the Voting Rights Act*, United States Department of Justice: Civil Rights Division, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout. New Hampshire was bailed out on March 1, 2013.

47 This applies even if to all changes that were not precleared, even if they were enforced for ten years prior to bailout.

48 S.B. 129, 2011 Gen. Ct., 2011 Reg. Sess. (N.H. 2011) (enacted), *available at* http://www.gencourt.state.nh.us/legislation/2011/SB0129.html.

49 *Supra* note 46.

50 Gary Rayno, *Feds approve voter ID law*, The New Hampshire Union Leader (Sept. 5, 2012), http://www.unionleader.com/article/20120905/NEWS06/709059870.

51 H. 3003, 119th Gen. Assemb., Reg. Sess. (S.C. 2011), *available at* http://www.scstatehouse.gov/sess119_2011-2012/prever/3003_20110511.Htm.

52 Because South Carolina keeps voter registration data on race, it was possible to match voter data with driver's license data to obtain this difference.

53 CIV.A. 12-203 BMK, 2012 WL 4814094, at *20 (D.D.C. Oct. 10, 2012).

South Carolina utilized *Crawford*'s recognition of the permissibility of prophylactic legislation, and rebutted the Department of Justice's experts on the issue of racial intent. South Carolina also pressed the point that anyone could cast a ballot under the statute after executing an affidavit of reasonable hardship in obtaining identification. Significantly, under the law at issue, the government bears the burden of establishing the affidavits as *false*, not merely *inadequate*, within forty-eight hours—a standard that, in practice, is widely considered so rigorous as to be impossible.

Groups such as the ACLU intervened on behalf of the Department of Justice.

The three-judge court ruled in favor of South Carolina and precleared the voter identification law, though not for the November 2012 election.[54] In doing so, the court did not accept that the statute was enacted with a racially discriminatory intent, a claim that the Justice Department had attempted to substantiate with expert testimony.

Most significantly, the United States District Court for the District of Columbia, relying on *Crawford*, ruled that states need not establish a record of voter fraud before enacting voter identification laws, even in the context of Section Five where the burden is against the state.[55] The decision quoted *Crawford*,[56] and reaffirmed that there need not be evidence of voter fraud to enact and enforce voter identification laws. The court also ruled that the reasonable impediment affidavit was an adequate failsafe to overcome any possible discriminatory intent. This finding was particularly important because it may permit the use of mitigating factors to overcome statistical racial disparities in submissions made by Section Five states.

<u>Texas</u>

While the South Carolina case described above was unfolding, so too was the fight between Texas and the Department of Justice. After Texas submitted its voter identification bill[57] to the Department of Justice for preclearance in 2010, the Department objected, as it had in the South Carolina case. But unlike South Carolina, Texas lost its case in federal court.

Similar to South Carolina, Texas sought administrative preclearance with the Department of Justice. After receiving indications that the administrative preclearance would not proceed favorably, Texas decided to initiate parallel tracks for approval—both the administrative submission to the Department of Justice, but also a challenge in the United States District Court for the District of Columbia. The initial complaint filed by Texas did not include a constitutional challenge to Section Five of the Voting Rights Act, but upon encountering additional friction from the Department of Justice, Texas amended its complaint to add a count challenging the constitutionality of Section Five.

The Department of Justice finally interposed an objection along the same lines as the objection in South Carolina—citing a *de minimis* difference between black and white possession of voter identification, and alluding to a nefarious racial motive in enacting the statute.[58]

In *Texas v. Holder*,[59] each side presented dueling statistical experts, and Department of Justice brought forward witnesses who testified they had obstacles to obtaining an identification to vote.[60] The Department of Justice and interveners argued that the court should consider poverty to be a proxy for race: because indigent voters had greater difficulty obtaining identification due to lack of transportation and similar reasons, then there was likely a racially discriminatory effect. [61]

Ultimately the court ruled against Texas, stating that under the 2006 reauthorization of the Voting Rights Act, Texas had failed to carry its burden of proof.

54 *Id.*

55 *Id.* at *13.

56 *Id* at *12 (quoting *Crawford)* ("deemed interests valid despite the fact that the 'record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history.'").

57 S.B 14, 82d Leg., Reg. Sess. (Tex. 2011), *available at* http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/SB00014F.pdf#navpanes=0.

58 Letter from the Office of the Assistant Attorney General to the Texas Director of Elections, (Mar. 12, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_031212.php.

59 888 F. Supp. 2d 113, at *33 (D.D.C. 2012).

60 *Texas v. Holder*, 888 F. Supp. 2d 113, at *33 (D.D.C. 2012).

61 *Id.* at *28.

In doing so, the court essentially refused to adopt the position of either side regarding the statistical disparity.

Favorable to advocates of voter identification laws, the court rejected the argument offered by the Justice Department that the absence of widespread voter fraud was an indication that voter identification laws were passed with a racially discriminatory intent. The court, referencing *Crawford*, stated:

> [W]e reject the argument, urged by the United States at trial, that the absence of documented voter fraud in Texas somehow suggests that Texas's interests in protecting its ballot box and safeguarding voter confidence were 'pretext.' A state interest that is unquestionably legitimate for Indiana - without any concrete evidence of a problem - is unquestionably legitimate for Texas as well.[62]

Finally, the court adopted the arguments of the Department of Justice and the interveners and considered poverty as a proxy for race, reasoning that indigent voters had greater difficulty obtaining photo identification because of disparities in transportation and other reasons—thus, there was likely a racially discriminatory effect.[63]

As of this publication, the constitutional portions of the case have not been heard as the parties agreed to essentially bifurcate the proceedings to obtain a ruling in advance of the 2012 election, a ruling which ultimately stopped Texas from using photo identification in the November 2012 election.

<u>Virginia</u>

In 2012, Virginia passed a voter identification law that required voters to furnish proof of identity to vote, but did not require photo identification.[64] Despite opposition, the Department of Justice precleared the law, specifically citing the fact that the law did not require an actual photo identification.[65] A variety of documents could be used to establish identity, including, for example, a utility bill. In 2013, Virginia passed another voter identification law which requires a government-issued photo identification to vote. The law has not yet been precleared under Section Five.

Conclusion

Battles in the states over voter identification requirements will probably continue. Section Five states such as Texas, Alaska, and North Carolina are expected to introduce legislation. Meanwhile, Alabama and Mississippi will fight for approval of their voter identification statutes in 2013 under the preclearance provisions of the Voting Rights Act.

However, the fight over election administration will likely shift to new topics that have been introduced by scholars and advocacy groups. On the horizon, the national debate will be over mandatory voter registration, early voting in all states, mandatory no-excuse absentee ballots, and federal mandates to eliminate advance voter registration.

62 *Id.* at *12.

63 *Id.* at *28.

64 2012 Va. Laws Ch. 839 (S.B. 1).

65 Letter from the Office of the United States Assistant Attorney General to the Virginia Senior Assistant Attorney General, (Mar. 12, 2012), *available at* http://www.ag.virginia.gov/Media%20and%20News%20Releases/News_Releases/Cuccinelli/USDOJ_82012_Ltr_Preclearing_VA_Voter_ID_Law.pdf.

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