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Elections—Discrimination

Texas Voter ID Law: Discriminatory Effect, Violates Voting Rights Act, 5th Cir. Says

Texas's voter identification law has a discriminatory effect in violation of Section 2 of the Voting Rights Act, the U.S. Court of Appeals for the Fifth Circuit held Aug. 5 (*Veasey v. Abbott*, 5th Cir., No. 14-41127, 8/5/15).

But whether the law had a discriminatory intent—and therefore an appropriate remedy—was still up in the air, and the appeals court remanded the case for further consideration.

''I think there's a lot of room for disagreement here, on both how to prove discriminatory intent, and about what the remedy should be for a Section 2 violation based on effects only,'' Richard L. Hasen, a professor of law and political science at the University of California, Irvine School of Law, Irvine, Calif., told Bloomberg BNA in an Aug. 6 e-mail.

The court may well have recognized these potential speed bumps. ''We urge the parties to work cooperatively with the district court to provide a prompt resolution of this matter to avoid election eve uncertainties and emergencies,'' Judge Catharina Haynes wrote for the court.

Despite the split decision, WilmerHale counsel Kelly Dunbar—who represented plaintiffs in the suit—called it ''historic,'' ''a victory for voters in Texas'' and ''an affirmation of the continuing importance of the Voting Rights Act,'' in an Aug. 6 statement.

IDs for IDs. Texas passed Senate Bill 14 in 2011. After its implementation, voters had to present one of six kinds of identification at the polls, including a driver's license, passport or Election Identification Certificate issued by the Texas Department of Public Safety.

Applying for an EIC required, in turn, either one form of primary ID, such as a driver's license, or two forms of secondary ID such as a birth certificate or naturalization papers, accompanied by supporting documentation.

The plaintiffs here argued that the law had discriminatory intent and effect, that it burdened the right to vote and imposed a poll tax. The district court agreed on all counts.

Discriminatory Intent? Following U.S. Supreme Court precedent from *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), the Fifth Circuit pointed to a ''non-exhaustive list of factors'' to determine whether a law had a discriminatory intent.

The factors include a history of invidious legislation, the sequence of events leading to the specific legislation and the legislative or administrative history of the challenged law.

Although ''we respect and appreciate the district court's efforts to address this difficult inquiry,'' the Fifth Circuit concluded that the lower court's findings on these counts were ''infirm.''

In particular, the appeals court noted that in examining Texas's history of invidious legislation, the lower court examined primarily enactments predating the passage of the VRA in 1965. The ''relevant 'historical' evidence is relatively recent history, not long-past history,'' the Fifth Circuit said.

In addition, the lower court's ''heavy reliance on post-enactment speculation by opponents of SB 14'' regarding its discriminatory intent was ''misplaced,'' the appeals court said.

''Conjecture by the opponents of SB 14 as to the motivations of those legislators supporting the law is not reliable evidence,'' the court said.

Although there was some evidence of discriminatory intent, the Fifth Circuit could not determine whether the district court would reach the same conclusion after reweighing proper evidence, particularly ''in light of the extensive discovery of legislators' private materials that yielded'' no evidence of discriminatory intent.

Discriminatory Effect. In holding that the law had discriminatory effects, the court explicitly adopted the two-part test used by the Fourth and Sixth circuits to evaluate VRA Section 2 claims.

This test asks whether the challenged act imposes a discriminatory burden and whether this burden is caused by or linked to social and historical conditions that have or currently produce discrimination.

The court looked to statistics to determine the discriminatory burden, and to what it called ''Senate Factors,'' announced by Congress, to determine whether it was socially or historically based.

As to burden, the court noted that Hispanic and black voters were roughly two to three times more likely to lack SB 14 identification. It also noted that poor voters were more likely to lack SB 14 identification and were

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also more likely to lack the underlying documents required to get an EIC.

Regarding the Senate Factors, the Fifth Circuit discounted the district court's conclusion that the history of official discrimination weighed in favor of the plaintiffs here, for the same reason it discounted Texas's history of invidious legislation.

History did not end in 1965, it said, quoting *Shelby Cty., Ala. v. Holder*, 81 U.S.L.W. 4572, 2013 BL 167707 (U.S. June 25, 2013) (82 U.S.L.W. 15, 7/2/13).

The appeals court credited all of the district court's other findings regarding the Senate Factors, however. Those findings included conclusions that voting in Texas was racially polarized, and regarding the relative lack of minority public officials, the lack of responsiveness to minority needs and the tenuousness of the policies underlying the law.

''As such, we conclude that the district court did not clearly err in determining that SB 14 has a discriminatory effect on minorities' voting rights in violation of Section 2 of the Voting Rights Act,'' the court concluded.

The court, invoking the doctrine of constitutional avoidance, declined to reach whether the voter ID scheme unconstitutionally burdened voters' right to vote under the First and 14th Amendments. It also, in light of amendments to the law passed after the lower court's decision, vacated the ruling that the scheme was an unconstitutional poll tax.

What's Next? If, on remand, the district court once again finds discriminatory intent, the law would need to be invalidated, the court here said. If not, however, the district court ''should refer to the policies underlying SB 14 in fashioning a remedy,'' leaving the legislature's policy choice intact to the extent possible, the Fifth Circuit said.

Hasen said that in such a case the ''remedy might be to let the law stay in effect, but build in some exceptions or exemptions for those who cannot get'' the EIC or other valid ID.

However, given the court's ''instructions on how to'' reevaluate discriminatory intent, it is ''quite difficult and unlikely'' that it would come to the same conclusion, Hasen said.

Hasen suggested that Texas would be more likely to appeal to the Supreme Court than for rehearing in the Fifth Circuit, given the composition of the panel. Though it might ''see how things play out in the trial court,'' that would ''perhaps risk the issue bleeding into the 2016 election,'' he said.

Judges Carl E. Stewart and Nanette Jolivette Brown, sitting by designation from the Eastern District of Louisiana, joined the opinion.

Brazil & Dunn, Campaign Legal Center, attorneys from the Department of Justice, NAACP, WilmerHale, Lawyers' Committee for Civil Rights Under Law, attorneys from New York University, Dechert LLP, Texas RioGrande Legal Aid Inc. and J. Gerald Herbert represented the plaintiffs. The Texas Office of the Solicitor General represented the state.

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Full text at http://www.bloomberglaw.com/public/document/Marc_Veasey_et_al_v_Greg_Abbott_et_al_Docket_No_1441127_5th_Cir_O.

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