

GOVERNMENT AND ELECTION LAW

Expert Analysis

Proving Who You Are: The Legal Battle Over Voter ID Laws

In recent months, federal and state courts throughout the country have been weighing in on the validity of voter ID laws.¹ In the seminal voter ID case, *Crawford v. Marion County Election Board*, a 2008 decision, the U.S. Supreme Court refused to enjoin Indiana's voter ID law.² Recent cases, however, have differed in their outcomes. Indeed, the more recent decisions seem to be trending against harsh voter ID laws—but, as they say, the jury is still out.

The Landscape

In recent years, state legislatures have been very busy addressing voter ID laws. In 2013 at least 25 state legislatures introduced photo ID bills and five states passed them.³ As of Jan. 21, 2014, at least 11 state legislatures introduced photo ID bills.⁴ Not all states have laws requiring the presentation of identification at the polls before voting. Among those states that do have voter identification laws,



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however, requirements vary. For example, some state photo ID laws are categorized as “strict” and generally require presentation of a government-issued ID from a specified list before being allowed to cast a valid ballot. Some states require presentation of an identity document, but do not demand that it either include a photo and/or be issued by the government. Other laws request photo identification, but permit an alternative for voters who do not have an ID, such as, for example, an affidavit attesting to one's identity.

Here in New York, except for first-time voters who registered by mail and did not provide accepted identifying information, no additional ID is required at the polling place.⁵

Reviewing the Dockets

Subsequent to the Supreme Court's decision in *Shelby County v. Hold-*

*er*⁶—which rendered inoperative the Voting Rights Act's preclearance requirement for changes to voting procedure—a number of states immediately took steps to implement more stringent procedures to register and vote.⁷ Challenges, of course, ensued.

Let's review how the courts are responding to various voter ID laws. Starting in the East, a Pennsylvania state court judge, relying on the state's constitution, permanently blocked the state's 2012 photo ID law in *Applewhite v. Commonwealth*.⁸ The court pointed out that hundreds of thousands of voters may not have the required ID, noting “[T]he evidence showed the photo ID provisions at issue deprive numerous electors of their fundamental right to vote, so vital to our democracy.” The governor decided to forgo appeal of the law, leaving Pennsylvania's photo ID law a dead letter for now.⁹

Voter ID law is far from settled due south in North Carolina, however. The photo ID provision of an omnibus bill, enacted on the heels of the Supreme Court's evisceration of the preclearance requirements of the Voting Rights Act's Section 5, is being challenged in state and

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federal court under Section 2 of the act and the federal Constitution.¹⁰

Unlike the targeted reach of Section 5, Section 2 of the Voting Rights Act is nationwide in its scope and prohibits all voting practices or procedures that discriminate on the basis of race, color, or language minority group membership. The Department of Justice and others have requested that the federal court issue a preliminary injunction to block the law before the November elections.¹¹ A full trial in the federal case is scheduled for next year, and the state challenge has seen no docket activity since the fall of 2013.

Moving further west, challenges to Tennessee's photo ID law have thus far failed. The law was upheld in February 2014 by a federal court, sometime after a state court also upheld the law.¹² The court, on a motion to dismiss, rejected the plaintiff Green Party's constitutional claims and assertions of standing. The plaintiff filed a motion for reconsideration which was rejected, and, just last month, an amended complaint was also rejected.

In Arkansas, the state's photo ID law has undergone a number of litigation twists and turns—leaving the outcome in doubt. A state circuit judge declared the law “void and unenforceable,” and unconstitutional.¹³ The Arkansas Supreme Court at first temporarily stayed the decision, and then later vacated the circuit judge's ruling on the photo ID law.¹⁴ The same state circuit judge, however, issued another injunction against the law in another case. But opponents of the law could not declare victory yet, as the judge

stayed his own injunction and invited the parties to submit proposals for a final order.¹⁵ Meanwhile, the state has moved to have the state Supreme Court hear the case.¹⁶

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Immediately to the west in Texas, the consolidated cases challenging its photo ID law are in the throes of discovery, but scheduled for trial in early fall. This is “Round 2” for the law, which had been enjoined by a three-judge court under Section 5 of the Voting Rights Act.¹⁷ Moments after the Shelby County ruling, Texas announced the law would go into effect, and the court's injunction was later vacated. Like the North Carolina federal case, this law is being challenged under Section 2 of the Voting Rights Act as well as the federal Constitution.¹⁸ Co-author Myrna Pérez is one of the litigators representing the challengers.

Finally, going north to the mid-West, a federal trial court judge held that Wisconsin's photo ID law unconstitutionally burdened the right to vote, and found that it violated Section 2 of the Voting Rights Act.¹⁹ The ruling in *Frank v. Walker* is noteworthy because it is the first court that has invalidated a photo ID law on the basis of either the framework articulated in the Supreme Court's Crawford decision or Section 2. Opining that upwards of 300,000 Wisconsin vot-

ers could be disenfranchised by the law, *Frank* has implications for the pending cases in Texas and North Carolina. In any event, the matter is yet to be finally settled in that the Wisconsin Attorney General has already appealed.²⁰

The resolution of these cases, depending upon when future decisions are rendered, could very well have an impact upon voting in these key states' midterm elections this year.

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1. Courts are also in the thick of rendering decisions about a “proof of citizenship” requirement for voter registration and “early voting” cutbacks. See Associated Press, “Court Extends, in 2 States, Its Halt of Proof-of-Citizenship Voting Rules,” N.Y. TIMES, May 20, 2014; see also Jim Siegel, “ACLU Sues to Reverse Ohio's Early-Voting Changes,” COLUMBUS DISPATCH, May 2, 2014.

2. 553 U.S. 181 (2008).

3. Voting Laws Roundup 2013, BRENNAN CENTER FOR JUSTICE (Dec. 19, 2013), <http://www.brennancenter.org/analysis/election-2013-voting-laws-roundup>.

4. Voting Laws Roundup 2014, BRENNAN CENTER FOR JUSTICE (Feb. 6, 2014), <http://www.brennancenter.org/analysis/voting-laws-roundup-2014>.

5. N.Y. Election Law §§5-210(5)(k)(vii) and 8-302.

6. 133 S. Ct. 2612 (2013).

7. See Jerry H. Goldfeder and Myrna Pérez, “After ‘Shelby County’ Ruling, Are Voting Rights Endangered?” NYLJ, Sept. 23, 2013.

8. 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014).

9. See Amy Worden, Corbett Abandons Appeal of Voter ID Ruling, PHILLY.COM, May 10, 2014.

10. Complaint, *League of Women Voters of N.C. v. McCrory*, No. 1:13-CV-660 (M.D.N.C. Aug. 12, 2013); Complaint, N.C. State Conference of the NAACP v. McCrory, No. 1:13-CV-658 (M.D.N.C. Aug. 12, 2013); Complaint, *United States v. N.C.*, No. 1:13-CV-861, 2014 WL 494911 (M.D.N.C. Feb. 6, 2014).

11. United States' Motion for a Preliminary Injunction and for the Appointment of Federal Observers, *United States v. N.C.*, No. 1:13-CV-861 (M.D.N.C. May 19, 2014).

12. *Green Party of Tennessee v. Hargett*, — F.Supp.2d —, 2014 WL 1007291 (M.D. Tenn. March 14, 2014).

13. *Pulaski Cnty. Election Comm'n, et al. v. Arkansas State Board of Election Comm'rs*, No. 60CV-14-1019 (Pulaski County, Ark. Cir. Ct. April 24, 2014).

14. John Lyon, Court: Judge erred in striking down voter ID law, ARK. NEWS, May 14, 2014.

15. Max Brantley, “Judge Tim Fox issues injunction against Voter ID law; stayed for now but that could change, with votes in the balance,” ARK. TIMES BLOG, May 23, 2014.

16. *Id.*

17. *State of Texas v. Holder*, 888 F.Supp.2d 113 (D.D.C. 2013).

18. Complaint, *Tex. State Conference of the NAACP v. Steen*, No. 2:13-cv-291 (S.D. Tex. Sept. 17, 2013).

19. *Frank v. Walker*, — F. Supp. 2d —, 2014 WL 1775432 (E.D. Wis. April 29, 2014).

20. Defendants' Notice of Appeal, *Frank v. Walker*, No. 11-cv-1128 (E.D. Wis. May 12, 2014).