ELECTION LAW — VOTING RIGHTS ACT — FIFTH CIRCUIT STRIKES DOWN VOTER ID LAW BASED ON DISPARATE IMPACT. — *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015).

Following the invalidation of the Voting Rights Act of 1965's[1] (VRA's) preclearance scheme in *Shelby County v. Holder*,[2] numerous restrictive election laws have faced challenges under section 2 of the VRA.[3] Section 2 proscribes 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 on account of race or color."[4] Congress added the statute's "results" language in 1982 to clarify that section 2 violations do not require a showing of intentional discrimination — they can "be proved by showing discriminatory effect alone."[5] Until recently, circuits have been sharply divided on the appropriate disparate impact test to apply to section 2 vote denial claims.[6]

Recently, in *Veasey v. Abbott*,[7] the Fifth Circuit addressed challenges to a Texas statute requiring that individuals present photo identification (ID) in order to vote.[8] The court upheld the district court's determination that the law violated section 2 due to its discriminatory effect on minority voters.[9] In so holding, the court employed a two-

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[1] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at scattered sections of 52 U.S.C.).

[2] 133 S. Ct. 2612 (2013). Section 5 of the VRA prevented states subject to preclearance from changing their election laws without obtaining federal approval to ensure that the change would not negatively impact minority voters. *See id.* at 2620.

[3] *See* Dale E. Ho, *Voting Rights Litigation After* Shelby County*: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 675, 676 (2014) (explaining that *Shelby County* came as "the number of voting-related controversies . . . exploded").

[4] 52 U.S.C.A. § 10301(a) (West 2015) (emphasis added).

[5] Thornburg v. Gingles, 478 U.S. 30, 35 (1986).

[6] Vote denial "refers to practices that prevent people from voting or having their votes counted," while vote dilution "refers to practices that diminish minorities' political influence in places where they are allowed to vote." Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691 (2006). The Supreme Court has yet to clarify the standard pertaining to vote denial claims, having only ever ruled on section 2 in the context of vote dilution. *See, e.g.*, Bartlett v. Strickland, 556 U.S. 1 (2009); *see also* Nicholas O. Stephanopoulos, *The South After* Shelby County, 2013 SUP. CT. REV. 55, 107–08. Some circuits have employed a test of causation between the challenged voting qualification and the discriminatory result. *See, e.g.*, Ortiz v. City of Phila. Office of the City Comm'rs Voter Registration Div., 28 F.3d 306, 312 (3d Cir. 1994). Others require intentional discrimination in certain circumstances. *See, e.g.*, Farrakhan v. Gregoire, 623 F.3d 990, 993 (9th Cir. 2010) (en banc) (applying intentional-discrimination standard for section 2 claims involving felon-disenfranchisement laws). Circuits have even differed over whether to use a multifactor test in performing *Gingles*'s "totality of the circumstances" analysis. *Compare* Miss. State Chapter, Operation Push, Inc. v. Mabus, 932 F.2d 400, 405 (5th Cir. 1991) (applying test), *with* Stewart v. Blackwell, 444 F.3d 843, 878–79 (6th Cir. 2006) (ignoring test), *vacated on granting of reh'g en banc*, No. 05-0344 (6th Cir. July 21, 2006), *and superseded*, 473 F.3d 692 (6th Cir. 2007).

[7] 796 F.3d 487 (5th Cir. 2015).

[8] *Id.* at 493.

[9] *Id.* at 512–13.

part disparate impact test that has rapidly gained in popularity among the circuits since *Shelby County*.[10] Opponents of the test may allege that it exceeds Congress's enforcement powers under the Fourteenth and Fifteenth Amendments, but, in fact, the Supreme Court should affirm the test in its current form. *Veasey*'s results test falls squarely within the Court's disparate impact jurisprudence as a congruent and proportional means of remedying America's long history of denying African Americans the right to vote.

Texas began enforcing Senate Bill 14[11] (SB 14) on June 25, 2013.[12] The bill required voters to present one of six forms of photo ID in order to cast a ballot in person,[13] with some limited exceptions.[14] Advocacy groups and the United States sought an injunction against the enforcement of SB 14 from the U.S. District Court for the Southern District of Texas.[15] The plaintiffs alleged a number of constitutional violations,[16] and argued that SB 14 violated section 2 of the VRA due to both its "discriminatory effect and purpose."[17] Texas maintained that the legislature enacted SB 14 in order to reduce voter fraud and promote public confidence in elections, and denied that the law substantially burdened the right to vote.[18]

The district court decided for the plaintiffs on every issue. In evaluating the disparate impact claim, the district court employed a two-part test, first asking "whether the law has a disparate impact on mi-

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[10] Since 2014, three circuits have held that a law disparately impacts minority voters if (1) it "impose[s] a discriminatory burden" on them, and (2) the burden is related to "social and historical conditions that . . . produce discrimination" against that minority group. *Id.* at 504 (quoting League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014)); *see also League of Women Voters*, 769 F.3d at 240; Ohio State Conference of the NAACP v. Husted, 768 F.3d 524, 554 (6th Cir. 2014). *But cf.* Frank v. Walker, 768 F.3d 744, 755 (7th Cir. 2014) (expressing skepticism about the second step of the two-step inquiry).

[11] 2011 Tex. Gen. Laws 619 (codified in scattered sections of TEX. ELEC. CODE ANN.).

[12] *Veasey*, 796 F.3d at 495.

[13] The acceptable forms of ID under SB 14 were: (1) a driver's license or state personal identification card; (2) a U.S. military ID with a photo; (3) a U.S. citizenship certificate with a photo; (4) a U.S. passport; (5) a license to carry a concealed handgun; or (6) an Election Identification Certificate, none of which could be expired for more than sixty days. *Id.* at 494. These requirements differed significantly from prior ones. Prior to SB 14, Texans could vote in person simply by presenting a registration certificate, "a document mailed to voters upon registration." *Id.* If they lacked a registration certificate, voters could cast a ballot in person by displaying one of multiple forms of ID and signing an affidavit. *Id.*

[14] *See id.* at 495.

[15] *See* Veasey v. Perry, 71 F. Supp. 3d 627, 632 & n.3, 707 (S.D. Tex. 2014).

[16] The plaintiffs argued that SB 14 contravened the Fourteenth and Fifteenth Amendments because of its discriminatory purpose, *id.* at 698, was unconstitutional under the First and Fourteenth Amendments for placing a substantial burden on the right to vote, *id.* at 684, and constituted a poll tax in violation of the Fourteenth and Twenty-Fourth Amendments, *id.* at 703.

[17] *Id.* at 632; *see id.* at 694.

[18] *Id.* at 632–33.

norities."[19] The court considered it an "understatement" to "call SB 14's disproportionate impact on minorities statistically significant."[20] After all, the court found, African Americans and Hispanics make up a disproportionate portion of the poor in Texas as compared to whites due to "socioeconomic effects caused by decades of racial discrimination," and the poor are over eight times less likely to own SB 14–qualifying ID.[21] As a result, "SB 14 specifically burdens" minorities,[22] who are less able than whites to bear the costs associated with obtaining SB 14 ID.[23]

Having decided that SB 14 satisfied the test's first prong, the court moved on to the second prong, "whether that impact is caused by or linked to social and historical conditions that currently or in the past produced discrimination against" minorities.[24] In evaluating this question, the court relied on nine "Senate factors"[25] articulated in a Senate report accompanying the 1982 amendments to the VRA.[26] The court held that the evidence supported a finding of seven of the factors,[27] indicating that SB 14 disproportionately affected minorities "by its interaction with the vestiges of past and current racial discrimination."[28] Thus, SB 14 violated section 2 on disparate impact grounds.

The Fifth Circuit affirmed the lower court's conclusion "that SB 14 violates Section 2 by disparately impacting minority voters."[29] Writing

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[19] *Id.* at 694.

[20] *Id.* at 695 (finding that, among registered voters, African Americans were 305% more likely, and that Hispanics were 195% more likely, to lack SB 14–eligible ID than were whites).

[21] *Id.* at 664.

[22] *Id.*

[23] *See id.* at 672.

[24] *Id.* at 695.

[25] *Id.* at 696. These factors are (1) the history of official discrimination; (2) the existence of racially polarized voting; (3) the extent to which certain voting practices are used to enhance opportunities to discriminate against minority groups; (4) whether minorities have been denied access to a candidate slating process, if one exists; (5) education, employment, and health effects on political participation; (6) racial appeals in campaigns; (7) proportional representation; (8) lack of legislative responsiveness to minority needs; and (9) whether the policy underlying the challenged act is tenuous. *Id.*

[26] S. REP. NO. 97-417, at 28–29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 206–07. The Senate factors were "enunciated by Congress to apprehend whether [a disparate] impact exists and whether it is a product of current or historical conditions of discrimination." *Veasey*, 796 F.3d at 505 (citing Thornburg v. Gingles, 478 U.S. 30, 44–45 (1986)).

[27] *Veasey*, 71 F. Supp. 3d at 697.

[28] *Id.* at 698.

[29] *Veasey*, 796 F.3d at 507. However, the Fifth Circuit vacated the district court's finding of discriminatory intent and remanded. *See id.* at 499–504 (finding that the district court had given too much weight to unreliable evidence, including "long-ago" examples of Texas's discriminatory voting practices, *id.* at 500, ambiguous procedural irregularities, *id.* at 503, and biased "[c]onjecture by the opponents of SB 14 as to the motivations of those legislators supporting the law," *id.* at 502). The Fifth Circuit also vacated the district court's holdings that SB 14 unconstitutionally burdened the right to vote, *id.* at 513–14, and that SB 14 constituted an unconstitutional poll tax, *id.* at 514–17.

for the panel, Judge Haynes[30] adopted the district court's two-part results test to evaluate the disparate impact claim.[31] The district court's findings of statistical disparities between minorities and whites in terms of access to SB 14 ID established a disparate impact, satisfying part one of the test.[32] Regarding part two, whether the disparate impact "is a product of current or historical conditions of discrimination," the Fifth Circuit affirmed the district court's use and application of the Senate factors.[33] Because the district court "point[ed] to a defendant's policy . . . causing" the disparate impact[34] — in this case, SB 14's interaction "with Texas's legacy of state-sponsored discrimination"[35] — the Fifth Circuit concluded that the district court's analysis fully complied with the Supreme Court's guidance in *Thornburg v. Gingles*.[36]

The Fifth Circuit's disparate impact analysis indicates the recent convergence among circuit courts around a section 2 disparate impact test. Supporters of stricter voter ID laws have incentives to attack the test on constitutional grounds, as the Court has "sent ominous signals about the future of" Congress's enforcement powers.[37] However, any challenge to the results test on enforcement-power grounds faces an uphill battle against direct and long-standing precedent granting Congress broad authority to remedy the effects of past, purposeful voter discrimination through disparate impact theory. Critics may question the constitutional foundation of disparate impact theory, but, ultimately, the Supreme Court should affirm *Veasey*'s results test, as it falls well within Congress's enforcement powers.

In contrast to the relative scarcity of section 2 vote denial claims before *Shelby County*, circuit courts decided a flurry of such claims in 2014. The Fourth and Sixth Circuits adopted a section 2 analysis that incorporated Supreme Court guidance pertaining to vote dilution cases and applied it to vote denial cases.[38] *Veasey*'s adoption of the Fourth

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[30] Judge Haynes was joined by Chief Judge Stewart and Judge Brown, sitting by designation from the Eastern District of Louisiana.

[31] *Veasey*, 796 F.3d at 504.

[32] *Id.* at 506–07.

[33] *Id.* at 505. The Fifth Circuit discounted only the district court's analysis of the first factor — Texas's history of official discrimination — finding the evidence too stale. *Id.* at 509.

[34] *Id.* at 513 (quoting Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015)).

[35] *Id.* at 513.

[36] 478 U.S. 30 (1986); *Veasey*, 796 F.3d at 512–13.

[37] Robert C. Post & Reva B. Siegel, Essay, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 441 (2000).

[38] These courts read section 2(a) as requiring a disparate impact and section 2(b) and *Gingles* as requiring a "totality of the circumstances" inquiry, guided by the Senate factors, into whether the disparate impact resulted from the challenged policy's interaction with historical and social conditions of racism. *See* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014); Ohio State Conference of the NAACP v. Husted, 768 F.3d 524, 554 (6th Cir. 2014). The same year, the Seventh Circuit eschewed adopting any formal section 2 disparate impact test,

and Sixth Circuits' results test makes its disparate impact analysis the leading circuit test for section 2 vote denial claims post–*Shelby County*.

The Supreme Court should affirm the current majority-circuit test because it adheres nearly exactly to the Court's disparate impact analysis in *Gingles*. In that case, the Court held that section 2 allowed for disparate impact liability, foreclosing statutory interpretation arguments to the contrary.[39] *Gingles*'s two-part results test required that plaintiffs show (1) that the challenged law "cause[d] an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives" and (2) that this inequality was the result of the challenged law's "interact[ion] with social and historical conditions" of racism.[40] The *Veasey* test is nearly indistinguishable, including its use of the Senate factors to guide the second step of the inquiry.[41] While it is true that *Gingles* most directly controls vote dilution cases,[42] the Court has implied that its analysis also applies to vote denial claims: "The results test mandated by the 1982 amendment is applicable to all claims arising under § 2."[43]

Despite this precedent, the future of disparate impact theory under section 2 is far from certain. In recent decades, the Court has radically altered the core twentieth-century constitutional bases of federal antidiscrimination laws. For example, the Court's restriction of the scope of the Commerce Clause[44] has eroded the constitutional authority underlying landmark civil rights legislation.[45] Even more recently, in *Shelby County*, the Supreme Court overturned the centerpiece of the Voting Rights Act.[46] Meanwhile, the Court has engaged in "stringent judicial supervision of Section 5 [of the Fourteenth Amendment] antidiscrimination legislation,"[47] in some cases without so much as a dissenting opin-

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and instead relied solely on the court's own statutory interpretation of section 2. *See* Frank v. Walker, 768 F.3d 744, 753 (7th Cir. 2014) (holding that section 2 requires that Wisconsin "make[] it *needlessly* hard to get photo ID" in order to "show a 'denial' of anything by Wisconsin").

39 *See* Thornburg v. Gingles, 478 U.S. 30, 35 (1986).

40 *Id.* at 47.

41 *See id.* at 44–46.

42 *See id.* at 46–51; *see also* Hayden v. Pataki, 449 F.3d 305, 321 (2d Cir. 2006) (en banc) ("Congress's intention in amending [section 2] was to target those electoral laws . . . that resulted in diluting the strength of the votes of members of racial and ethnic minorities but did not on their face deny any individuals the vote.").

43 Chisom v. Roemer, 501 U.S. 380, 398 (1991).

44 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2591 (2012); United States v. Morrison, 529 U.S. 598, 617–19 (2000); United States v. Lopez, 514 U.S. 549, 551 (1995).

45 *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 304–05 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964).

46 *See* Shelby County v. Holder, 133 S. Ct. 2612, 2631 (2013).

47 Post & Siegel, *supra* note 37, at 444. Section 5 of the Fourteenth Amendment and section 2 of the Fifteenth Amendment grant Congress the power to enforce the amendments through "appropriate legislation." U.S. CONST. amend. XIV, § 5; *id.* amend. XV, § 2. The VRA derives its constitutional authority from the enforcement sections of the Fourteenth and Fifteenth Amend-

ion protesting the diminution of section 5 powers.[48] While many of these cases are distinguishable from *Veasey*, they indicate that the Court may be receptive to more restrictive readings of section 5 powers than its past cases require.[49] This posture of the Court may thus embolden supporters of stricter voter ID laws to challenge the *Veasey* test as an ultra vires application of Congress's enforcement powers.[50]

An enforcement power challenge begins from the premise that the Fourteenth and Fifteenth Amendments protect the right to be free from intentional discrimination, but not from disparate impact.[51] However, the Court has also long held that in order to "prevent and deter unconstitutional conduct,"[52] Congress has broader powers under those amendments' enforcement sections than under their specific substantive provisions.[53] To enforce those substantive rights, Congress may "enact prophylactic legislation proscribing practices that are discriminatory in effect [even] if not in intent."[54] Such enforcement statutes face an important limitation, though, to ensure that Congress does not create new substantive constitutional rights[55]: "There must be a

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ments "for the remedial purpose of eliminating racially discriminatory voting practices." Johnson v. Governor of Fla., 405 F.3d 1214, 1227 (11th Cir. 2005) (citing South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).

48 Post & Siegel, *supra* note 37, at 442 (referring to the section 5 holdings of Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), and *Morrison*, 529 U.S. 598).

49 *See* Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 605 (2013) (noting that since 1982, "the Supreme Court's receptivity toward evidence of disparate impact" has experienced "a precipitous decline").

50 *See* Roger Clegg & Hans A. von Spakovsky, *"Disparate Impact" and Section 2 of the Voting Rights Act*, HERITAGE FOUND. 4 (Mar. 17, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/LM119.pdf [http://perma.cc/7GYY-2WJK] (suggesting that "Congress . . . arguably exceeded its enforcement authority" in establishing disparate impact liability for section 2); *see also* Chisom v. Roemer, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting) (implying that there may be a constitutional problem with section 2). At least one district court has agreed. *See* Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 596 (9th Cir. 1997) ("The district court asserted that applying § 2 to invalidate the District's land ownership voting requirement would exceed Congress's authority to enforce the Fifteenth Amendment."). Some scholars argue that, short of proving intentional discrimination, disparate impact tests must at least require plaintiffs to prove "*a significant likelihood* that the electoral inequality is traceable to race-biased decisionmaking." Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 384 (2012).

51 *See, e.g.*, Washington v. Davis, 426 U.S. 229, 240 (1976) ("[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.").

52 Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003).

53 *Kimel*, 528 U.S. at 81.

54 Tennessee v. Lane, 541 U.S. 509, 520 (2004).

55 For a criticism of separation of powers–based judicial hostility to powers exercised under section 5 of the Fourteenth Amendment, see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1947 (2003) (arguing that "for purposes of Section 5 power the Constitution should be regarded as having multiple interpreters," including Congress).

congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[56]

Veasey's results test applies section 2 so that it remains congruent and proportional to preventing intentional discrimination against minority voters in two ways. First, the results test requires that conditions of racial discrimination interact with the challenged policy to cause the disparate impact.[57] This requirement serves to connect disparate impact theory with indicators of discriminatory purpose.[58] At the same time, it "protects defendants from being held liable for racial disparities they did not create,"[59] an outcome that would be incongruent with enforcing the right to be free from purposeful discrimination.

Second, in order to proportionally enforce the Fourteenth and Fifteenth Amendments, disparate impact tests may prevent only "artificial, arbitrary, and unnecessary barriers"[60] to voting. Courts determine the arbitrariness and necessity of a challenged policy by balancing its burden against the state's legitimate interests in the law.[61] Many disparate impact tests do so through the use of burden-shifting frameworks.[62] For example, the Court recently affirmed such a framework in upholding a disparate impact claim under the Fair Housing Act (FHA).[63] While the Court's holding in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*[64] is arguably limited to the FHA, the majority went so far as to declare that "disparate-impact suits [must] incorporate at least the safeguards discussed here,"

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56 City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

57 *Veasey*, 796 F.3d at 513 (explaining that the district court appropriately used the Senate factors to determine that "SB 14 worked in concert with Texas's legacy of state-sponsored discrimination to bring about this disproportionate result").

58 *Id.* at 512 ("SB 14 acted in concert with current and historical conditions of discrimination to diminish African-Americans' and Hispanics' ability to [vote]."); *see also* Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 WM. & MARY L. REV. 725 (1998) (explaining an "internal," "external," and "prospective" connection between section 2 disparate impact theory and purposeful discrimination).

59 Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015).

60 *Id.* at 2524 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

61 *See* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983); Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 n.3 (1966) (invalidating a poll tax despite not finding discriminatory intent).

62 *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 94 (1986) ("Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion."); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71 n.21 (1977).

63 The Court affirmed the following burden-shifting framework promulgated by an implementing regulation: (1) the plaintiff must make a prima facie case of disparate impact, *Inclusive Cmtys.*, 135 S. Ct. at 2514; (2) if she does, the burden then shifts to the defendant to establish that the policy "is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests," *id.* at 2515 (quoting 24 C.F.R. § 100.50(c)(2) (2014)); (3) if the defendant does, then the burden shifts back to the plaintiff to prove that those interests "could be served by another practice that has a less discriminatory effect," *id.* (quoting 24 C.F.R. § 100.50(c)(3)).

64 135 S. Ct. 2507.

which included a causal requirement and a burden-shifting framework, so as to avoid "displac[ing] valid governmental . . . priorities."[65]

Despite the fact that the *Veasey* results test did not employ a burden-shifting analysis, it should still withstand an enforcement power challenge. The ninth Senate factor — which inquires into the "tenuous[ness]" of the government's interests in the policy[66] — ensures that the government's legitimate interests receive due consideration even without being directly balanced against the discriminatory burden. After all, the district court's analysis of the ninth factor (left undisturbed by the Fifth Circuit) consisted of evaluating the strength of the government's justification for SB 14.[67] For example, the Fifth Circuit noted that the government's interests in preventing voter fraud and increasing confidence in elections were legitimate,[68] but agreed with the district court that SB 14 did not advance those interests.[69] In dismissing each of the stated justifications for SB 14, the court considered the government's interests alongside the act's burden on minorities, resembling the weighing of the burden against challenged interests that the Court requires of vote denial claims made under the Equal Protection Clause.[70]

Given the trend since *Shelby County*, statutory disparate impact claims will only increase in importance, as courts decide more vote denial challenges that preclearance would have otherwise prevented.[71] To resolve the circuit split over section 2 results tests, the Supreme Court may soon address whether *Veasey*'s disparate impact test exceeds Congress's enforcement powers. The outcome should not be a close call — the test congruently and proportionally enforces the Fourteenth and Fifteenth Amendments. But given the current Court's receptivity to overturning precedent in this area to police Congress, supporters of federal antidiscrimination laws have reason for mild anxiety. In conjunction with the Court's gradual erosion of Congress's Commerce Clause powers, any ruling limiting section 5 enforcement authority of the VRA will have profound consequences for federal antidiscrimination laws.

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[65] *Id.* at 2524; *see also* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 441 (2015) (arguing that section 2's results test should employ a burden-shifting analysis).

[66] S. REP. NO. 97-417, *supra* note 26, at 29.

[67] Veasey v. Perry, 71 F. Supp. 3d 627, 698 (S.D. Tex. 2014); *see also Veasey*, 796 F.3d at 511–12.

[68] *Veasey*, 796 F.3d at 511 (citing Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 191 (2008) (plurality opinion)).

[69] The trial court had found that in-person voter fraud is practically nonexistent, and that SB 14 would, if anything, only increase fraud by encouraging absentee voting, a demonstrably less safe form of voting. *Id.* at 511–12.

[70] *See Crawford*, 553 U.S. at 190–91 (plurality opinion).

[71] *See* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 239 (4th Cir. 2014) (noting that the "paucity" of section 2 vote denial case law prior to 2014 "likely stems from the effectiveness of the now-defunct Section 5 preclearance requirements that stopped would-be vote denial from occurring in covered jurisdictions").