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A Post-*Shelby* Strategy: Exposing Discriminatory Intent in Voting Rights Litigation

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ABSTRACT. In the summer before the 2016 election, the Fourth Circuit found that North Carolina's newly implemented raft of voting restrictions "target[ed] African-Americans with almost surgical precision." This was not an isolated case. In 2016 and 2017, federal courts issued successive decisions finding that states and localities engaged in intentional discrimination in formulating their voting and election rules. These decisions partially resulted from increasingly aggressive and discriminatory tactics by state legislators, particularly after the Supreme Court's gutting of the VRA's Section 5 voting rights preclearance regime in 2013 in *Shelby County v. Holder*. But these findings are also the result of a concerted effort by voting rights lawyers in the wake of *Shelby County* to hold jurisdictions fully accountable for their actions by alleging and proving claims of intentional discrimination, rather than relying solely on Section 2 of the Voting Rights Act (VRA), which requires a demonstration of discriminatory results but not purpose. Under Section 3 of the VRA, findings of discriminatory intent open the door to preclearance—the regime under which covered jurisdictions must submit any proposed voting changes to the Department of Justice or a federal court for approval. Moreover, intent cases can strengthen Section 2 results claims, build a compelling record of ongoing racial discrimination in elections to use in future cases, and provide political and legal support for a future VRA restoration bill.

This Essay explores the importance of this strategic move in the latest generation of cases pursuing equality at the ballot box and addresses how to overcome some of the challenges litigators face in proving these claims. Intentional discrimination claims—brought where appropriate and supported by the evidence—force an appraisal of the true motives underlying laws passed behind the "cloak of ballot integrity." These claims can help spark a discussion about the continuing impact of racial discrimination in elections, and remind us how far we still have to go.

INTRODUCTION

In the summer before the 2016 election, the Fourth Circuit found that North Carolina's newly implemented raft of voting restrictions "target[ed] African-Americans with almost surgical precision," revealing the state legislature's "true

motivation" to "entrench itself . . . by targeting voters who, based on race, were unlikely to vote for the majority party."[1] As a result, the Fourth Circuit struck down in their entirety the challenged provisions of HB 589,[2] an omnibus bill of voting restrictions that included a new photo ID requirement, early voting limitations, and the elimination of same-day registration, out-of-precinct voting, and preregistration.

The Fourth Circuit's strong language — describing the law's "surgical[ly] precise" discrimination — caught the attention of courts, lawyers, and the public, shaping the discourse around strict voter photo ID laws and other recent rollbacks in access to the ballot.[3] Moreover, this was not an isolated case. In 2016 and 2017, federal courts issued decision after decision finding that states and localities engaged in intentional discrimination in formulating their voting and election rules.[4]

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1. N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 214, 233 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

2. 2013 N.C. Sess. Laws 381.

3. *See, e.g.*, Robert Barnes & Ann E. Marimow, *Appeals Court Strikes Down North Carolina's Voter ID Law*, WASH. POST (July 29, 2016), http://www.washingtonpost.com/local/public-safety/appeals-court-strikes-down-north-carolinas-voter-id-law/2016/07/29/810b5844-4f72-11e6-aa14-e0c1087f7583_story.html [http://perma.cc/NGD7-398R]; Jess Bravin, *North Carolina Voting Restrictions Violate Voters' Rights, Federal Court Finds*, WALL ST. J. (July 29, 2016), http://www.wsj.com/articles/voting-restrictions-struck-down-in-north-carolina-1469810843 [http://perma.cc/LT9K-QANP]; Michael Wines & Alan Blinder, *Federal Appeals Court Strikes Down North Carolina Voter ID Requirement*, N.Y. TIMES (July 29, 2016), http://www.nytimes.com/2016/07/30/us/federal-appeals-court-strikes-down-north-carolina-voter-id-provision.html [http://perma.cc/A7HZ-2DJZ] (noting the finding of discriminatory targeting "with almost surgical precision").

4. *See, e.g.*, Veasey v. Abbott, 830 F.3d 216, 241 (5th Cir. 2016) (remanding a discriminatory purpose finding regarding Texas' strict photo ID law, but holding that "there remains evidence to support a finding that the cloak of ballot integrity could be hiding a more invidious purpose"); Terrebonne Parish Branch NAACP v. Jindal, 2017 WL 3574878 (M.D. La. Aug. 17, 2017) (finding that the at-large voting system for election of judges was maintained for a discriminatory purpose); Patino v. Pasadena, 230 F. Supp. 3d 667 (S.D. Tex. 2017) (holding that Pasadena intentionally discriminated against Latino voters in changing its city governance structure); Perez v. Abbott, 2017 WL 1787454 (W.D. Tex. May 2, 2017) (holding that the Texas legislature intentionally discriminated against Latino voters in drawing the 2011 congressional redistricting plan); Perez v. Abbott, 2017 WL 1450121 (W.D. Tex. Apr. 20, 2017) (holding that the Texas legislature intentionally discriminated against Latino voters in drawing the 2011 Texas House redistricting plan); Veasey v. Abbott, 2017 WL 1315593 (S.D. Tex. Apr. 10, 2017) (holding that Texas' strict photo ID law was enacted with a discriminatory purpose); One Wis. Inst. v. Thomsen, 198 F. Supp. 3d 896, 925 (W.D. Wis. 2016) (finding that Wisconsin's restrictions on in-person absentee voting were motivated by discriminatory intent).

These decisions are partially a result of increasingly aggressive and discriminatory tactics by state legislatures,[5] particularly after the Supreme Court's gutting of the Voting Rights Act (VRA) Section 5 preclearance regime in 2013 in *Shelby County v. Holder*.[6] Prior to 2013, states and localities with a history of discrimination were required to submit *all* voting changes to either the Department of Justice or a federal court for approval.[7] Voting changes could only be approved if the jurisdiction could show that the changes would not harm minority voters.[8] By gutting preclearance, the *Shelby* Court nullified the VRA's ex ante protections and left minority voters to fend for themselves through affirmative litigation.[9]

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5. *See, e.g.*, *New Voting Restrictions in America*, BRENNAN CTR. FOR JUST. (Mar. 1, 2017), http://www.brennancenter.org/new-voting-restrictions-america [http://perma.cc/XCT5-4ELW] (tracking new voting restrictions since 2010).

6. 133 S. Ct. 2612 (2013). *Shelby County* struck down Section 4 of the VRA, which contained the formula for determining what jurisdictions were covered by preclearance. 52 U.S.C. § 10303 (2012).

7. 52 U.S.C. §§ 10303(b), 10304(a) (2012).

8. 52 U.S.C. § 10304(a) (2012) (requiring a determination that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" for preclearance).

9. The devastating effects of *Shelby County* cannot be overstated. In one fell swoop, the Supreme Court gutted the single most effective mechanism for eliminating the scourge of racial discrimination from our elections. By imposing a preclearance requirement on jurisdictions with a history of discrimination, the Voting Rights Act "shift[ed] the advantage of time and inertia from the perpetrators of the evil to the victims" and stopped discriminatory laws *before* they could affect elections. City of Rome v. United States, 446 U.S. 156, 182 (1980) (quoting South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966)). Section 5 preclearance is largely responsible for the uncontested progress in meaningful access to the franchise for minority voters. *See* Khalilah Brown-Dean et al., *50 Years of the Voting Rights Act: The State of Race in Politics*, JOINT CTR. FOR POL. & ECON. STUD. 4 (2015), http://jointcenter.org/sites/default/files/VRA%20report%2C%208.5.15%20%28540%20pm%29%28updated%29.pdf [http://perma.cc/6NB5-9XMK] ("Since 1965, . . . African Americans went from holding fewer than 1,000 offices nationwide to over 10,000.").

   The landslide of increasingly restrictive voting laws in previously covered jurisdictions in recent years demonstrates that Justice Ruth Bader Ginsburg was right in likening the Court's decision in *Shelby County* to "throwing away your umbrella in a rainstorm because you are not getting wet." 133 S. Ct. at 2650 (Ginsburg, J., dissenting). Traditional litigation—clunky, resource-intensive, and ex post—can never replace the Section 5 preclearance mechanism for rooting out all types of racial discrimination in voting. The loss of Section 5's information-producing function alone—which required jurisdictions to report voting changes large and small—has left an enormous gap in voting rights protections at the local level. It is nearly impossible to monitor every local voting change, but those changes can often make all the difference for voters and electoral outcomes.

   However, this Essay focuses not on *Shelby County*'s many flaws or its general fallout but rather on one strategy that has grown out of this crisis, as well as its benefits and obstacles.

But this spate of intentional discrimination findings in voting cases is also the result of a concerted strategy by voting rights attorneys in the wake of *Shelby County* to hold jurisdictions fully accountable for their actions by alleging and proving more claims of intentional discrimination, rather than relying solely on Section 2 of the VRA, which requires a demonstration of discriminatory *results*, but not purpose.

This Essay explores the importance of this strategic move in this generation of voting rights litigation and addresses some of the challenges that litigators face in proving these claims. First, intentional discrimination claims, where successful, open the door to preclearance under Section 3 of the VRA. Preclearance was vital to the VRA's prior success because it stopped discrimination in voting *before* it happened. This is important because once discriminatory voting changes are in effect for an election, the damage cannot be fully reversed.[10] Under Section 3's "bail-in" process, jurisdictions that engage in intentional discrimination or other constitutional violations can be put under a preclearance system similar to the one that operated under Sections 4 and 5.[11] Moreover, evidence of discriminatory intent can strengthen Section 2 results claims in the same case, build a compelling record of ongoing racial discrimination to use in future cases, and provide political and legal support to a future VRA restoration bill. Intentional discrimination claims—brought where appropriate and supported by the evidence—force an appraisal of the true motives underlying laws passed behind the "cloak of ballot integrity."[12] They also can help spark a discussion about the continuing impact of racial discrimination in elections, and remind us how far we still have to go.

In Part I of this Essay, we describe litigators' strategic shift toward intentional discrimination claims and the obstacles to bringing these claims. In Part II, we explain the strategic importance of these claims in the current landscape and how discriminatory intent findings can shift the debate over the state of our elections both inside and outside courtrooms. We conclude that intentional discrimination cases will be increasingly important to voting rights attorneys in the current post-*Shelby* climate.

10. *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 97 (2006) (noting that harmed voters cannot change past electoral outcomes, and the benefits of incumbency adhere to those elected under discriminatory procedures).

11. 52 U.S.C. § 10302(c) (2012).

12. Veasey v. Abbott, 830 F.3d 216, 241 (5th Cir. 2016)

I. A STRATEGIC SHIFT TO INTENTIONAL DISCRIMINATION CHALLENGES AND OBSTACLES TO PROVING INTENT

In 1982, Congress amended the VRA in part to abrogate the Supreme Court's holding in *Mobile v. Bolden*,[13] which required proof of intentional discrimination in voting rights challenges. The amendments created a discriminatory *results* test instead. In the years following the amendments, voting rights attorneys focused their efforts on Section 2 results claims rather than more labor-intensive intentional discrimination claims.[14] This strategy made good sense at the time. Shortly after the 1982 amendments, the Supreme Court laid out a clear framework for results-based vote dilution claims[15] — challenging at-large elections and other districting schemes that prevent minority voters from electing their candidates of choice — under the Section 2 results test. The Section 2 amendments thus significantly lowered the burden of proof for voting rights plaintiffs and covered a broader swath of representational harms. Moreover, because the VRA had already removed most "first-generation" direct obstacles to voting — such as literacy tests, poll taxes, or vouching requirements — and Section 5 of the VRA prevented backsliding by requiring jurisdictions with a history of discrimination to preclear all prospective voting changes, voting rights attorneys were focused on tackling vote dilution and increasing minority representation. Section 2 results claims were the ideal tool for this job.

However, litigators in the post-*Shelby County* period are now adding Fourteenth and Fifteenth Amendment intentional discrimination claims, where appropriate, to their challenges to voting rights cutbacks. Given the dramatically changed voting rights landscape of the past ten years, this shift in litigation strategy makes sense. States have rolled back minority access to voting through,

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13. 446 U.S. 55 (1980).

14. *See Veasey*, 830 F.3d at 336 n.15 (Costa, J., dissenting) ("The impact that making the typically easier-to-prove effects test an equally powerful avenue of relief has on purpose claims can be seen from the drop in the number of discriminatory purpose claims brought in voting cases after the 1982 amendments to the Voting Rights Act made effects a basis for section 2 liability in response to City of Mobile v. Bolden."); Perez v. Abbott, No. SA-11-CV-360, 2017 WL 1787454, at *53 (W.D. Tex. May 2, 2017) ("Because intent is not an element of results-only claims and results-only claims are usually easier to prove, few voters have asserted intentional vote dilution claims since § 2 of the VRA was amended, and thus the Supreme Court has not had occasion to establish a specific analytical framework for intentional vote dilution claims post-amendment and post-*Gingles*."); Cano v. Davis, 211 F. Supp. 2d 1208, 1249 (C.D. Cal. 2002), *aff'd*, 537 U.S. 1100 (2003) ("[S]ince the 1982 amendments to the Voting Rights Act, which eliminated the intent requirement for statutory vote dilution claims, there has been a virtual absence of intentional vote dilution litigation.").

15. Thornburg v. Gingles, 478 U.S. 30 (1986).

among other restrictions, strict photo ID laws[16] and the elimination of early voting and same-day registration — mechanisms disproportionately used by minorities.[17] Legislators have promoted a myth of widespread voter fraud, stoking mistrust in our electoral system,[18] to support these restrictions. This disconcerting trend coincided with the loss of preclearance in *Shelby County*. These events have resulted in an avalanche of voting restrictions that target minority voters to minimize their political power.

The longstanding focus on Section 2 results claims can be explained, in part, by the sheer difficulty of proving discriminatory intent. After all, "[i]n this day and age we rarely have legislators announcing an intent to discriminate based upon race."[19] Such obstacles, including the difficulty of proving the intent of a large deliberative body, claims of legislative privilege, and the complications of the correlation between race and party, can increase the costs, burdens, and risks of litigation. While significant, these obstacles to proving intent are not insurmountable, as we explain in the following Sections.

A. Proving Intent When the Actor Is a Legislative Body

In order to prevail on an intentional discrimination claim, plaintiffs must show that a discriminatory purpose was at least part of the motivation for the passage of a law. But adjudicating the intent of an entire legislative body can be

16. *See* Wendy Underhill, *Voter Identification Requirements | Voter ID Laws*, NAT'L CONF. ST. LEGISLATURES (Apr. 11, 2016), http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx [http://perma.cc/RS69-WFJC]. The Texas photo ID law is emblematic of this trend of designing photo ID laws that disparately disenfranchise minority voters. *See* Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL'Y REV. 471, 474 (2016) ("Th[e] disfranchised group is disproportionately made up of African-American and Hispanic voters because the types of IDs chosen as 'acceptable' under the law are those disproportionately held by non-minority voters. For example, concealed handgun permits and military IDs, common IDs among white or Anglo voters, are designated 'acceptable,' while student IDs and civilian government employee IDs, more common among minority voters, are excluded. The District Court found the law had a discriminatory effect on voters, and a panel of the Fifth Circuit agreed (though the Fifth Circuit later granted rehearing en banc). The effects and magnitude described above are largely uncontroverted and by all accounts appear well known to legislators engaged in crafting these laws.") (internal citations omitted).

17. *See, e.g*, N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 230 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017) (striking down North Carolina's rollback of same-day registration and early voting). *But see* Ohio Democratic Party v. Husted, 834 F.3d 620 (6th Cir. 2016) (upholding Ohio's rollback of same-day registration and early voting).

18. Brendan Nyhan, *Voter Fraud Is Rare, But Myth Is Widespread*, N.Y. TIMES (June 10, 2014), http://www.nytimes.com/2014/06/11/upshot/vote-fraud-is-rare-but-myth-is-widespread.html [http://perma.cc/G3SG-2EU3].

19. *Veasey*, 830 F.3d at 235.

a complex task. Legislative bodies are collections of individuals, each of whom may have their own motivations and reasons for voting as they do. Indeed, scholars have long questioned whether "a collective body can possess intentions or purposes."[20] The Supreme Court has noted that "[p]roving the motivation behind official action is often a problematic undertaking," especially in cases of legislative action because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."[21]

Despite these challenges, the Equal Protection Clause of the Fourteenth Amendment does, and must, protect against all forms of racial discrimination, both overt and subtle. As the Fifth Circuit recognized in the Texas voter ID case, "neutral reasons can and do mask racial intent," and circumstantial evidence can help smoke out that intent.[22] The difficulties of the intent inquiry in the voting rights context are real, but they are also common to nearly all intent inquiries and are far from insurmountable. After all, intentional discrimination only needs to be *one* motivating factor, not the *only* factor or even a *predominant* factor.[23] The Supreme Court has provided a useful framework for the inquiry. Courts need not determine the intent of each individual legislator.[24] Rather, courts should

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20. Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 537 (2016); *see* Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 11 (1992) ("If legislative purpose is the mere aggregation of the motivations of individual legislators, then there seems no escaping the conclusion that the very idea of legislative purpose is incoherent.").

21. Hunter v. Underwood, 471 U.S. 222, 228 (1985) (quoting United States v. O'Brien, 391 U.S. 367, 384 (1968)); Hunt v. Cromartie, 526 U.S. 541, 546 (1999) ("The task of assessing a jurisdiction's motivation, however, is not a simple matter; on the contrary, it is an inherently complex endeavor."); *see also* Terrebonne Parish Branch NAACP v. Jindal, 2017 WL3574878, at *39 (M.D. La. Aug. 17, 2017) ("Evaluating motive, especially the motive for many individuals over the course of many years, is an incredibly difficult task."). In a recent racial gerrymandering case, Chief Justice Roberts picked up on this issue, asking several of the attorneys the same question: "Let's say you have 10 percent of the legislators say this is because of race—that's their motive—10 percent say it's because of partisanship, and 80 percent say nothing at all. What—what is the motive of that legislature?" Transcript of Oral Argument at 6, Wittman v. Personhuballah, 136 S. Ct. 1732 (2016) (No. 14-1504); *accord. id.* at 36, 65.

22. *Veasey,* 830 F.3d at 236.

23. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one.").

24. Veasey v. Abbott, No. 2:13-CV-193, 2017 WL 1315593, at *1 (S.D. Tex. Apr. 10, 2017) (quoting United States v. Brown, 561 F.3d 420, 433 (5th Cir. 2009)) ("Rather than attempt to discern

look at the sum of all the evidence — both "circumstantial and direct" — regarding the legislative process, the effect of the law, and its background to determine whether race was *a* motivating factor.

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the Court laid out at least five different categories of evidence that courts can use to guide their analysis: (1) disparate impact on the protected class; (2) "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes"; (3) "[t]he specific sequence of events leading up to the challenged decision"; (4) departures from usual legislative procedure or from the usual weighing of substantive factors of decision; and (5) "legislative or administrative history."[25] While statements by members of the decision-making body can be particularly persuasive, no smoking gun is required; circumstantial evidence alone can suffice.[26] The *Arlington Heights* factors have guided courts' intent inquiries for forty years. The federal court decisions in North Carolina, Texas, Wisconsin, and elsewhere demonstrate that they are workable.

B. Legislative Privilege

While some courts have placed a premium on legislators' statements in intent cases, claims of legislative privilege can make it difficult to discover this crucial evidence. The Supreme Court has held that "state and regional legislators are entitled to absolute immunity from liability under § 1983 for their legislative activities."[27] Legislative immunity and privilege have a long history.[28] In *Bogan v. Scott-Harris*, the Supreme Court explained that the privilege was "taken as a matter of course by those who severed the Colonies from the Crown and founded our nation."[29] Respecting this "venerable tradition,"[30] courts have recognized a

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the motivations of particular legislators, the Court considers all available direct and circumstantial evidence of intent, 'including the normal inferences to be drawn from the foreseeability of defendant's actions.'").

25. *Arlington Heights*, 429 U.S. at 266-68.

26. *Veasey,* 830 F.3d at 235-36 ("In this day and age we rarely have legislators announcing an intent to discriminate based upon race, whether in public speeches or private correspondence. To require direct evidence of intent would essentially give legislatures free rein to racially discriminate so long as they do not overtly state discrimination as their purpose and so long as they proffer a seemingly neutral reason for their actions.").

27. Bogan v. Scott-Harris, 523 U.S. 44, 49 (1998).

28. *Id.* at 48 (noting that legislative immunity "has long been recognized in Anglo-American law").

29. *Id.* at 49.

30. *Id.*

legislative privilege — protecting some legislators and their staffs from some discovery requests that would pry into legislative matters — even if the legislators themselves are not parties to the suit.[31] Unfortunately, as a result, legislators are sometimes able to shield precisely the type of evidence that would be most probative of intent.[32]

But this privilege is not absolute: courts have been willing to pierce legislative privilege in some cases. The Third Circuit has held that state legislators only have a qualified privilege to ignore subpoenas and other document requests in federal cases.[33] And in 2003, the Southern District of New York developed a five-prong test for determining whether and to what extent the privilege applies, balancing the following: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable."[34] Over a dozen federal district court opinions, in various jurisdictions, have adopted this test,[35] although it has yet to be formally adopted by any circuit. In recent years, several courts have used this balancing test in voting rights cases and allowed plaintiffs to seek discovery from legislators and their aides, recognizing that the interests in favor of piercing the

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31. *See, e.g.*, Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 421-23 (D.C. Cir. 1995); Favors v. Cuomo, 285 F.R.D. 187, 209-10 (E.D.N.Y. 2012).

32. *Arlington Heights* itself recognizes this tension. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977) ("In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege.").

33. *In re* Grand Jury, 821 F.2d 946, 957-58 (3d Cir. 1987).

34. Rodriguez v. Pataki, 280 F. Supp. 2d 89, 100 (S.D.N.Y. 2003) (quoting *In re* Franklin Nat. Bank Sec. Litig., 478 F. Supp. 577, 583 (E.D.N.Y. 1979)).

35. Bethune-Hill v. Va. St. Bd. of Elections, 114 F. Supp. 3d 323, 339-43 (E.D. Va. 2015); Nashville Student Org. Comm. v. Hargett, 123 F. Supp. 3d 967, 970 (M.D. Tenn. 2015); Hall v. Louisiana, No. 12-657, 2014 U.S. Dist. LEXIS 56165, at *25-26 (M.D. La. Apr. 23, 2014); Harris v. Ariz. Indep. Redistricting Comm'n, 993 F. Supp. 2d 1042, 1070 (D. Ariz. 2014); Page v. Va. St. Bd. of Elections, 15 F. Supp. 3d 657, 666 (E.D. Va. 2014); Perez v. Perry, No. SA-11-CV-360, 2014 U.S. Dist. LEXIS 1838, at *19 (W.D. Tex. Jan. 8, 2014); Ala. Educ. Ass'n v. Bentley, No. CV-11-S-761, 2013 U.S. Dist. LEXIS 531, at *52-53 (N.D. Ala. Jan. 3, 2013); Carver v. Nassau Cty. Interim Fin. Auth., 2012 U.S. Dist. LEXIS 190981, at *17 (E.D.N.Y. May 7, 2012); *Favors*, 285 F.R.D. at 210; Comm. for a Fair & Balanced Map v. Ill. St. Bd. of Elections, No. 11-C-5065, 2011 U.S. Dist. LEXIS 117656, at *25 (N.D. Ill. Oct. 12, 2011); E. End Ventures, LLC v. Inc. Vill. of Sag Harbor, No. CV-09-3967, 2011 U.S. Dist. LEXIS 145472, at *11 (E.D.N.Y Dec. 19, 2011); Tankleff v. Cty. of Suffolk, No. CV-09-1207, 2011 U.S. Dist. LEXIS 32740, at *6 (E.D.N.Y. Mar. 29, 2011); ACORN v. Cty. of Nassau, 2009 U.S. Dist. LEXIS 82405, at *7 (E.D.N.Y. Sept. 10, 2009).

privilege are weighty in cases involving legislative intent.[36] For example, the Florida Supreme Court held that plaintiffs could pierce legislative privilege in a partisan gerrymandering case, explaining that "it is essential for the challengers to be given the opportunity to discover information that may prove any potentially unconstitutional intent."[37] But this standard is still far from established and the idea of piercing the veil of legislative privilege remains controversial,[38] often requiring hard-fought litigation to obtain necessary evidence.

C. The Race and Party Problem

Finally, intentional discrimination claims in the voting context almost always raise the problem of disentangling race from party. Where race and partisan affiliation align — as they so often do in modern politics, particularly in the South — a common defense is that the legislators acted for partisan reasons, not for race-based ones.[39] Indeed, the Supreme Court has held that to prevail in a racial gerrymandering case in which race and party closely correlate, the plaintiffs must be able to show that race, not party, was the predominant motive.[40]

The Fourth Circuit's decision in the North Carolina case suggests an appropriate response to those that raise partisan motives as a defense for targeting minority voters: targeting black and minority voters for exclusion from the political process is discriminatory, even when motivated by political strategy rather than racial animus. As the Fourth Circuit stated: "Using race as a proxy for party may be an effective way to win an election. But intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose."[41]

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36. *See, e.g.*, Benisek v. Lamone, 241 F. Supp. 3d 566, 574-77 (D. Md. 2017); *Bethune-Hill*, 114 F. Supp. 3d at 336-37; *Perez*, 2014 U.S. Dist. LEXIS 1838, at *17; *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *7.

37. League of Women Voters of Fla. v. Fla. House of Representatives, 132 So. 3d 135, 148 (Fla. 2013).

38. *See, e.g.*, Brief for Wisconsin State Senate and Wisconsin State Assembly as Amici Curiae Supporting Appellants at 11-14, Gill v. Whitford, No. 16-1161 (argued Oct. 3, 2017).

39. *See, e.g.*, Veasey v. Abbott, 830 F.3d 216, 303 (5th Cir. 2016) (Jones, J., dissenting) ("The law reflects party politics, not racism, and the majority of this court — in their hearts — know this.").

40. Easley v. Cromartie, 532 U.S. 234 (2001). This issue has generated significant scholarly debate that is beyond the scope of this Essay. *See, e.g.*, Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. (forthcoming 2018).

41. N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 222 (4th Cir. 2016), *cert. denied* 137 S. Ct. 1399 (2017); *see also* One Wis. Inst. v. Thomsen, 198 F. Supp. 3d 896, 925 (W.D.

II. CHANGING THE PARADIGM INSIDE AND OUTSIDE COURTS WITH DISCRIMINATORY INTENT CLAIMS

Notwithstanding the litigation challenges posed by intent cases, they represent crucial tools in the current voting rights climate, allowing advocates to effectively counter legislative efforts to impede voting by vulnerable communities. Successful intent claims can shift the dynamic in favor of voting access both inside and outside the courts. Where appropriate, they can help secure more complete remedies to intrusions on the right to vote, including the potential for preclearance of future voting changes; complement Section 2 results claims; build the record in support of a restored VRA; and expose the realities of racial discrimination to those both inside and outside the courtroom.

A. Achieving More Robust Remedies and Reestablishing Preclearance

Intentional discrimination findings have profound legal consequences in voting rights cases. In *Shelby County*, the Supreme Court struck down Section 4 on the basis that its preclearance formula relied on outdated information regarding discrimination and was not tailored to "current needs."[42] As a result, nearly all covered jurisdictions (i.e., those with long histories of discrimination) were immediately freed from the requirement to demonstrate that their voting changes would not harm minority voters.

However, another section of the VRA creates a distinct mechanism for preclearance that remains viable. Section 3 of the VRA empowers courts to place jurisdictions under preclearance — "bail-in" jurisdictions — as part of a remedy for Fourteenth and Fifteenth Amendment violations.[43] Section 3 does not implicate any of the constitutional issues raised by the Court in *Shelby County* because "bail-in" is based on findings of current intentional discrimination and can be

Wis. 2016) ("The legislature's ultimate objective was political: Republicans sought to maintain control of the state government. But the methods that the legislature chose to achieve that result involved suppressing the votes of Milwaukee's residents, who are disproportionately African American and Latino. The legislature did not act out of pure racial animus; rather, suppressing the votes of reliably Democratic minority voters in Milwaukee was a means to achieve its political objective. But that, too, constitutes race discrimination."); Miller v. Johnson, 515 U.S. 900, 920 (1995) (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993) ("[W]here the State assumes from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls,' it engages in racial stereotyping at odds with equal protection mandates.").

42. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2629 (2013).

43. 52 U.S.C. § 10302(c) (2012).

tailored to those findings.[44] While Section 3's case-by-case adjudication of intent issues cannot replace a broader preclearance formula—it requires resource-intensive and lengthy litigation prior to the issuance of any order—it can be used to shift the "advantage of time and inertia" in favor of minority voters in individual jurisdictions that have engaged in intentional discrimination.[45] A federal district court has already ordered "bail-in" of Pasadena, Texas, which immediately pounced on its freedom from Section 5 preclearance post-*Shelby* to enact a new city governance plan that intentionally harmed Latino voting power. Specifically, the city changed its districting map from an eight single-member district plan to a six single-member district plan with two-at large districts, making it more difficult for Latinos to elect their candidates of choice.[46] Going forward, because of preclearance under Section 3, Pasadena voters will not have to bear the initial burden of litigation if the city attempts to curtail Latino voting power in the future.

Even where a court does not order preclearance, key differences exist in the available remedies for intentional discrimination and results-only violations. While a remedy for a results-only violation must be tailored to maintain legitimate legislative priorities where possible,[47] laws passed with discriminatory intent have "no credential whatsoever."[48] Rather than narrowly tailoring a remedy, courts have a mandate to eliminate intentional discrimination in the law "root and branch,"[49] and the only appropriate remedy is to "place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [the discriminatory law].'"[50]

This distinction has practical import. For example, in 2016, a federal court ordered a results-only interim remedy pursuant to the VRA for Texas's strict voter photo ID law. The Fifth Circuit had affirmed the district court's holding that Texas's strict voter photo ID law had discriminatory results in violation of Section 2, but remanded the question of discriminatory intent for additional weighing of the evidence.[51] Because the 2016 election was quickly approaching,

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44. *See* Brief for Amici Curiae Campaign Legal Center, et al. in Support of Appellees at 20-28, Patino v. Pasadena, 677 F. App'x 950 (5th Cir. 2017) (No. 17-200300).

45. City of Rome v. United States, 446 U.S. 156, 182 (1980) (quoting South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966)).

46. Patino v. Pasadena, 230 F. Supp. 3d 667 (S.D. Tex. 2017).

47. *See, e.g.*, Veasey v. Abbott, 830 F.3d 216, 280 (5th Cir. 2016).

48. City of Richmond v. United States, 422 U.S. 358, 378-79 (1975).

49. *See* Green v. Cty. Sch. Bd., 391 U.S. 430, 438 (1968).

50. United States v. Virginia, 518 U.S. 515, 547 (1996) (quoting Milliken v. Bradley, 433 U.S. 267, 280 (1977)).

51. *Veasey*, 830 F.3d at 242-243.

the en banc Fifth Circuit ordered the district court to put in place for the 2016 election a results-only remedy "tailored to rectify only the discriminatory effect on those voters who do not have SB 14 ID or are unable to reasonably obtain such identification."[52] The district court's interim remedy left in place the photo ID requirements, but it created a bypass mechanism through which individuals without the required form of ID could vote after signing a "reasonable impediment" declaration. This was a significant improvement over the outright disenfranchisement of those individuals under the original law. But the result was, at best, continued confusion about the law's requirements[53] and, at worst, the use of the declaration process and the threat of prosecution for false declarations to intimidate voters who lacked an ID.[54]

Meanwhile, in North Carolina, where the Fourth Circuit found that a voter photo ID provision, among others, was intentionally discriminatory, the court of appeals rejected the reasonable impediment declaration as a sufficient remedy. It explained:

> On its face, [the reasonable impediment declaration] amendment does not fully eliminate the burden imposed by the photo ID requirement. Rather, it requires voters to take affirmative steps to justify to the state why they failed to comply with a provision that we have declared was enacted with racially discriminatory intent and is unconstitutional.[55]

Thus, the court invalidated the ID law in its entirety, requiring North Carolina to return to its prior voter identification practices.

After reweighing the discriminatory intent evidence pursuant to the Fifth Circuit's order, the district court in Texas found that the state's voter ID law was

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52. *Id.* at 271.

53. *See* Mark P. Jones et al., *The Texas Voter ID Law and the 2016 Election: A Study of Harris County and Congressional District 23*, UNIV. OF HOUS.: HOBBY SCH. PUB. AFF. 2 (Apr. 2017), http://ssl.uh.edu/class/hobby/voterid2016/voterid2016.pdf [http://perma.cc/2N8V-3QGK] (finding that most voters did not "have a good understanding of the voter photo ID rules in force for the 2016 election").

54. Meagan Flynn, *Harris County Clerk Will Vet Voters Who Claim To Lack Photo ID*, HOUS. PRESS (Aug. 26, 2016), http://www.houstonpress.com/news/harris-county-clerk-will-vet-voters-who-claim-to-lack-photo-id-8704744 [http://perma.cc/N386-XUXF] (quoting Harris County Clerk Stan Stanart's statement that he will investigate everyone who signs a reasonable impediment declaration).

55. N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 241 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

designed to discriminate against minority voters.[56] As such, it followed the reasoning of the Fourth Circuit and enjoined the discriminatory photo ID requirements in their entirety, rather than extending the interim declaration procedure described above.[57] These additional and more robust remedies for intentional discrimination are crucial in ensuring that minority voters have not just *some* access to political participation but *equal* opportunities at the ballot box.[58]

B. Strengthening Section 2 Results Claims

Gathering and putting forward strong evidence of intentional discrimination also reinforces and bolsters traditional Section 2 results-based claims. While Section 2 prohibits discriminatory results and does not *require* proof of discriminatory intent, litigating these claims together is still worthwhile.

The Section 2 results test requires courts to consider whether a voting practice "result[s] in . . . abridgement of the right . . . to vote on account of race" by considering the "totality of the circumstances," including the factors laid out in the Senate report on the 1982 amendments.[59] "The essence of a § 2 claim is that

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56. Veasey v. Abbott, No. 2:13-cv-193, 2017 WL 1315593, at *5 (S.D. Tex. April 10, 2017).

57. Veasey v. Abbott, No. 2:13-cv-193, 2017 WL 3620639, at *12 (S.D. Tex. Aug. 23, 2017) (holding that "the only appropriate remedy for SB 14's discriminatory purpose or discriminatory result is an injunction against enforcement of that law and SB 5 [the declaration procedure adopted by the Texas Legislature], which perpetuates SB 14's discriminatory features"). Private plaintiffs urged the district court to take this approach to ensure that victims of intentional discrimination suffer no additional discrimination in voting. *See* Brief of Private Plaintiffs Regarding the Proper Remedies for SB 14's Racial Discrimination, Veasey v. Abbott, No. 2:13-cv-193 (S.D. Tex. July 5, 2017). Since the change of administration, the United States has changed its position in this case, first withdrawing its intentional discrimination argument and now filing briefs in support of Texas at the remedial phase, arguing that the district court should not impose *any* additional remedies in light of the intent finding. Texas has appealed this ruling and the Fifth Circuit stayed the injunction pending appeal. Veasey v. Abbott, 870 F.3d 387, 391-92 (5th Cir. 2017).

58. *See* Richard L. Hasen, *Softening Voter ID Laws Through Litigation: Is It Enough?*, 2016 WIS. L. REV. FORWARD 100, 101 (arguing that rulings that merely "soften" voter ID laws, rather than eliminating them, "may do less to alleviate the actual burdens of voter identification laws than to make judges feel better about their Solomonic rulings" and that such half measures "still leave an uncertain number of voters disenfranchised").

59. Thornburg v. Gingles, 478 U.S. 30, 30 (1986). The Senate factors, intended to guide a court's analysis under Section 2 of the VRA, include: "1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; 2. the extent to which voting in the elections of the state or political subdivision is racially polarized; 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; 4. if there is a candidate slating process, whether the members of the minority group have

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 participate in the political process.[60] Therefore, Section 2 of the VRA was designed to prohibit voting rules and restrictions that not only have a disparate impact on minorities but also interact with current and past patterns of discrimination and continuing inequalities to cause that disparate impact. In other words, voting restrictions that reinforce inequality in the democratic process rather than opening it up to citizens on an equal basis run afoul of Section 2, even if legislators did not intentionally act to harm minority voters.

Evidence of intentional discrimination, including evidence related to the *Arlington Heights* factors,[61] bolsters a Section 2 results claim. Evidence of disparate impact,[62] a history of discrimination in voting,[63] racially polarized voting,[64] racially-charged statements by legislators,[65] unresponsiveness to the minority

been denied access to that process; 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; 6. whether political campaigns have been characterized by overt or subtle racial appeals; 7. the extent to which members of the minority group have been elected to public office in the jurisdiction. Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are: whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." *Id.* at 36-37 (quoting S. REP. NO. 97-417, at 28-29 (1982)).

60. *Id.* at 47.

61. *See supra* text accompanying note 25.

62. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (finding that disparate impact is part of an intent analysis); Veasey v. Abbott, 830 F.3d 216, 245 (5th Cir. 2016) (holding that plaintiffs must prove a discriminatory burden on minority voters to prove a Section 2 results claim).

63. *Gingles*, 478 U.S. at 36-37 (finding that history of official discrimination is one of the Senate factors); *Arlington Heights*, 429 U.S. at 267 (finding that history of discrimination is relevant to intent analysis).

64. *Veasey*, 830 F.3d at 241 (quoting Veasey v. Perry, 71 F. Supp. 3d 627, 700 (S.D. Tex. 2014)) ("Further supporting the district court's finding [of intent] is the fact that the extraordinary measures accompanying the passage of SB 14 occurred in the wake of a 'seismic demographic shift,' as minority populations rapidly increased in Texas, such that the district court found that the party currently in power is 'facing a declining voter base and can gain partisan advantage' through a strict voter ID law."); *see also Gingles*, 478 U.S. at 37 (racially polarized voting is one of the Senate factors).

65. *Gingles*, 478 U.S. at 37 (finding that the use of racial appeals in elections is one of the Senate factors); *Arlington Heights,* 429 U.S. at 268 (finding that statements by legislators are relevant to intent).

community,[66] and the lack of a strong policy rationale for the challenged law[67] can all be relevant to *both* intent and results claims. At the same time, putting forward all this evidence in results cases also strengthens the constitutional case for Section 2's results standard. While the Supreme Court as recently as 2013 in *Shelby County* reaffirmed Section 2 as a "permanent, nationwide ban on racial discrimination,"[68] it has never directly adjudicated Section 2's constitutionality. Texas has already begun to lay the groundwork for a potential challenge to the results test's constitutionality by asserting that it may be disproportionate or incongruent with the Fourteenth and Fifteenth Amendment prohibitions on discrimination.[69] The Fifth Circuit summarily rejected this argument,[70] noting that the introduction of intent evidence reinforces the connection between the results standard and Fourteenth and Fifteenth Amendment harms. Therefore, continuing to introduce intent evidence alongside Section 2 results claims will reinforce the connection between Section 2 and the enforcement provisions of the Fourteenth and Fifteenth Amendments.

C. Building a Record of Continued Discrimination

By litigating intentional discrimination claims, voting rights attorneys and plaintiffs are also building a record of continued discrimination in our electoral system. This record is important in several key respects. First, documentation of cumulative discrimination in particular jurisdictions is pivotal to the success of

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66. *Veasey,* 830 F.3d at 236 (noting that "drafters and proponents of SB 14 were aware of the likely disproportionate effect of the law on minorities, and that they nonetheless passed the bill without adopting a number of proposed ameliorative measures that might have lessened this impact" as evidence of intent); *see also Gingles*, 478 U.S. at 37 (finding that a lack of responsiveness to minority community members is one of the Senate factors).

67. *Veasey*, 830 F.3d at 238 (noting, in its intent analysis: "Yet, one might expect that when the Legislature places a bill on an expedited schedule and subjects it to such an extraordinary degree of procedural irregularities, as was the case with SB 14, such a bill would address a problem of great magnitude. Ballot integrity is undoubtedly a worthy goal. But the evidence before the Legislature was that in-person voting, the only concern addressed by SB 14, yielded only two convictions for in-person voter impersonation fraud out of 20 million votes cast in the decade leading up to SB 14's passage."); *see also Gingles*, 478 U.S. at 37 (finding that the tenuousness of underlying policy is one of the Senate factors).

68. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2631 (2013).

69. *See* Supplemental En Banc Brief for Appellants at 37-38, *Veasey*, 830 F.3d 216 (No. 14-41127), 2016 WL 1558273, at *47 ("As interpreted by the district court, therefore, § 2 would exceed Congress's authority because it lacks congruence and proportionality to the constitutional prohibition."); *see also* Appellant Brief at 26-40, Alabama v. Ala. State Conference of the NAACP, No. 17-14443 (11th Cir. 2017) (questioning the constitutionality of Section 2 under the congruence and proportionality standard).

70. *Veasey*, 830 F.3d at 253.

future VRA claims in those jurisdictions. Both the *Arlington Heights* (purpose) and *Gingles* (results) factors consider past intentional discrimination as a factor in determining liability. Therefore, every successful claim not only provides relief to voters with respect to the specific voting restriction at issue, but also builds a record and historical context for the next case, should a jurisdiction enact another discriminatory restriction.

Second, these claims together build a legislative record that can provide a basis for Congress to restore the protections of the VRA. When the Supreme Court struck down Section 4's coverage formula, it explicitly left the door open for Congress to craft a new preclearance formula based on "current needs."[71] Two bills to restore the Voting Rights Act with new preclearance formulas—the Voting Rights Amendment Act,[72] which has bipartisan sponsorship, and the Voting Rights Advancement Act[73]—have been repeatedly introduced in Congress but to date have not moved forward. Disappointingly, despite the mounting evidence of post-*Shelby* intentional discrimination, House Judiciary Chairman Bob Goodlatte has refused to hold a hearing on a new VRA formula, asserting that he has not seen "any new evidence of discrimination."[74] With every additional judicial finding of intentional discrimination across the country, however, that assertion becomes less credible and the need for restoration of the VRA's preclearance mechanism becomes more apparent.

Finally, assuming Congress eventually responds by reinstating the full protections of the VRA, this record of current discrimination will provide a robust constitutional basis for a new VRA preclearance formula covering those discriminating states and localities.

D. Exposing Discrimination and Fighting Myths in Courtrooms

In addition to the strategic litigation reasons to pursue intentional discrimination claims, these claims can also help shift the broader national dialogue surrounding the recent wave of voting restrictions. In order to justify rollbacks in access to the vote—from documentary proof of citizenship requirements to strict

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71. *Shelby Cty.*, 133 S. Ct. at 2631 ("Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.").

72. Voting Rights Amendment Act of 2017, H.R. 3239, 115th Cong. (2017).

73. Voting Rights Advancement Act of 2017, H.R. 2978, 115th Cong. (2017).

74. Alicia Petska & Tiffany Holland, *Goodlatte: Voting Rights Act Remains Strong Without Amendment*, ROANOKE TIMES (June 22, 2015), http://www.roanoke.com/news/local/goodlatte-voting-rights-act-remains-strong-without-amendment/article_5bbff2ca-dae2-58ed-9930-f652b9317913.html [http://perma.cc/4JW5-VQNH].

photo ID laws to elimination of same-day registration—legislators have repeatedly alleged widespread voter fraud. While actual voter fraud is exceedingly rare,[75] these repeated claims—now echoed by President Trump and given the imprimatur of a presidential commission[76]—have convinced many Americans of widespread voter fraud[77] and undermined faith in our democracy. Voting rights advocates argue that these claims are false, overblown, and dangerous, but these arguments are often discounted as mere partisan bickering.

Public trials and judicial findings may play a valuable role here. Intentional discrimination claims give advocates an opportunity to expose the voter fraud myth as pretext, not through talking points and messaging but rather with facts, witnesses, records, and expert testimony. For example, in the Texas strict voter photo ID trial, plaintiffs' expert Dr. Lorraine Minnite, a tenured professor at Rutgers University and a leading expert on evidence of voter fraud, testified that she had "found fewer than ten cases of in-person voter impersonation fraud in the United States between 2002 and 2010."[78] Texas failed to contradict that evidence and the en banc Fifth Circuit found this to be compelling evidence of pretext: "We cannot say that the district court had to simply accept that legislators were really so concerned with this almost nonexistent problem."[79] Meanwhile, plaintiffs also presented other evidence that Texas had repeatedly used the pretext of preventing voter fraud and promoting ballot integrity to defend other discriminatory voting provisions such as the white primaries, the poll tax, and reregistration requirements.[80]

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75. *See, e.g.*, Philip Bumb, *Here's How Rare In-Person Voter Fraud Is*, WASH. POST (Aug. 3, 2016), http://www.washingtonpost.com/news/the-fix/wp/2016/08/03/heres-how-rare-in-person-voter-fraud-is [http://perma.cc/6J26-HQTS].

76. *Presidential Advisory Commission on Election Integrity*, WHITE HOUSE, http://www.whitehouse.gov/blog/2017/07/13/presidential-advisory-commission-election-integrity [http://perma.cc/BRQ5-X7X3]. The White House announced its decision to disband this commission on January 3, 2018. *See Executive Order on the Termination of Presidential Advisory Commission on Election Integrity*, THE WHITE HOUSE (Jan. 3, 2018), http://www.whitehouse.gov/presidential-actions/executive-order-termination-presidential-advisory-commission-election-integrity [http://perma.cc/67UK-AA39]

77. Nyhan, *supra* note 18.

78. Veasey v. Perry, 71 F. Supp. 3d 627 (S.D. Tex. 2014).

79. Veasey v. Abbott, 830 F.3d 216, 239 (5th Cir. 2016).

80. "Dr. Vernon Burton, an expert in race relations, testified about the 'history of official discrimination in Texas voting.' He identified some devices Texas has used to deny minorities the vote, including 'the all[-]White primary, the secret ballot and the use of illiteracy[,] . . . poll tax, re-registration and purging.' He testified as follows regarding 'the stated rationale' for each of these devices:

> Q What, in your opinion, was the stated rationale for the enactment of all[-]White primaries in Texas?
> A The stated rationale was voter fraud.

Trials provide both sides an opportunity to put forward evidence regarding the true motives behind voting restrictions in a forum where the evidence can be tested, weighed, and evaluated. Thus far, states—when put to their evidence—have been unable to demonstrate any meaningful voter fraud threat, while voting rights plaintiffs have been able to show racially discriminatory motives for the design and selection of voting restrictions.

CONCLUSION

For decades, intentional discrimination claims were relatively rare in voting rights cases. Both scholarly and judicial attention, therefore, was focused on developing the results test jurisprudence under Section 2 of the Voting Rights Act. But the influx of new barriers to voting and the loss of preclearance since *Shelby County* has changed the legal landscape and ushered in a new strategic embrace of intentional discrimination claims. While intentional discrimination claims impose a higher evidentiary burden, recent success with these claims demonstrates their legal and strategic benefits. By holding jurisdictions accountable for not only the results of their actions but also their motives, voting rights plaintiffs can secure more complete remedies, win back preclearance, build a public record of continuing racial discrimination, and expose the voter fraud myth as pretext in neutral fora. In so doing, our democracy will be strengthened and the most precious right we have as Americans, the right to vote, will be safeguarded for future generations.

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> Q What was the stated rationale, in your opinion, for the use of secret ballot provisions in Texas?
> A The stated rationale was to prevent voter fraud.
> Q And what was the stated rationale, in your opinion, for the use of the poll tax in Texas?
> A The stated rationale by the State was to prevent voter fraud.
> Q And how about the stated rationale for the use in Texas of re-registration requirements and voter purges?
> A The stated rationale was voter fraud.
> Q Dr. Burton, in your expert opinion, did these devices actually respond to sincere concerns or incidents—incidences of voter fraud?
> A No."

Id. at 237.

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