Native American Voting Rights: Two Steps Forward, One Step Back

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NATIVE AMERICAN VOTING RIGHTS: TWO STEPS FORWARD, ONE STEP BACK

PATRICK J. ROCHE*

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I. INTRODUCTION

Until 2014, North Dakota resident and Native American Elvis Norquay
freely exercised his right to vote without interference.¹ Like many other
North Dakota residents, Norquay was unaware that his state had recently
enacted restrictive voting laws designed to prevent voter fraud.² In 2013,
North Dakota enacted House Bill (HB) 1332, widely categorized as one
of the strictest voting laws in the United States.³ Although voter fraud was not
a problem in North Dakota, Norquay and others faced an obtrusive obstacle
to exercising their right to vote.⁴ While the language of the legislation lacked

2. See id. (detailing Norquay’s embarrassing encounter being denied access to the ballot box).
4. See N.D. CENT. Code § 16.1-01-04.1(2)-(6) (2017) (showing the hurdles that North Dakota residents face when trying to vote); see also Appellees’ Brief at 5,
any clear reference to race, the law’s impact undoubtedly affected Native Americans more than any other group. As a result, Norquay and other tribal members faced an unwarranted burden in exercising their right to vote that violated the Equal Protection Clause and Section II of the Voting Rights Act (VRA).

Like many other states over the last decade, North Dakota passed restrictive voting measures to prevent non-existent voter fraud. In 2016, however, the United States District Court for the District of North Dakota ordered the State Assembly to rewrite HB 1332. The bill required voters to present a valid identification (ID) card but provided no fail-safe provision for those without the necessary ID cards. For example, a fail-safe provision could include the opportunity for otherwise eligible voters to sign an affidavit swearing to their eligibility to vote under penalty of perjury. In Brakebill v. Jaeger, plaintiffs contended that HB 1332 violated the VRA and the Equal Protection Clause due to the absence of a fail-safe mechanism. The District Court of North Dakota agreed. Subsequently, the North Dakota State Assembly rewrote the bill and enacted HB 1369.


5. See Plaintiffs’ Reply Memorandum in Support of Motion for Preliminary Injunction at 6-7, Brakebill v. Jaeger, No. 1:16-CV-008, 2016 WL 7118548, at *1 (D.N.D. Aug. 1, 2016) (providing data showing that tribal members face significant hurdles to vote).


10. See Brakebill, 2016 WL 7118548, at *1 (finding that “the voter could execute an affidavit swearing under penalty of perjury that he or she was a qualified elector in the precinct”).

11. See id. at *2-3 (putting forth the plaintiffs’ argument).

12. See id. at *12-13 (ordering the North Dakota State Assembly to rewrite HB 1332 to include a fail-safe mechanism).

Under House Bill 1369, North Dakota residents must have a valid state or tribal ID card that lists their current residential street address. According to Brakebill v. Jaeger, HB 1369 fundamentally hinders the voting ability of Native Americans living on reservations because it prevents citizens without a valid residential street address listed on their ID cards from exercising their right to vote. However, because many homes on reservation land do not have a registered street address, residents instead use a Post Office Box address. Furthermore, HB 1369 does not permit residents to sign an affidavit regarding their eligibility to vote, thus failing to provide a reliable fail-safe mechanism to prevent the disenfranchisement of Native American voters. Despite the Supreme Court’s reluctance to hear the case so close to the 2018 midterm elections, HB 1369 runs afoul of the Equal Protection Clause and Section II of the VRA because the law’s impact effectively denies a racial minority equal opportunities to exercise their constitutional right to vote.

This article argues that the North Dakota Legislative Assembly’s HB 1369 violates the Equal Protection Clause of the United States Constitution and Section II of the VRA. Part II provides background to HB 1369 and a concise history of Native Americans’ fight to gain their constitutional right to vote from the Civil Rights Act of 1866 to the Voting Rights Act of 1965. Part III demonstrates that North Dakota’s HB 1369 violates the Equal Protection Clause.

15. See Brakebill v. Jaeger, 905 F.3d 553, 562 (8th Cir. 2018) (explaining how residents who lack a valid ID with a proper address were prevented from casting their vote); See also Appellees’ Brief at 16-32, Brakebill v. Jaeger, 905 F.3d 553 (8th Cir. 2018) (No. 18-1725) (outlining how HB 1369 will disproportionately affect Native Americans).
16. See Brakebill, 2016 WL 7118548, at *5 (showing that many Native American voters use a Post Office box as their official address).
17. See Brakebill, 905 F.3d at 564 (showing that a reliable fail-safe option would prevent voter disenfranchisement of residents who lack the proper ID).
18. U.S. Const. amend. XIV, § 1 (providing equal protection under the law to United States citizens); 52 U.S.C. § 10301 (1965) (declaring illegal the curtailing of voting rights according to race); see also Brakebill v. Jaeger, 139 S.Ct. 10, 11 (2018) (where the Supreme Court declined to vacate the Eighth Circuit’s stay).
19. U.S. Const. amend. XIV, § 1 (providing equal protection under the law to all United States citizens); 52 U.S.C. § 10301 (prohibiting the use of race concerning voting rights).
Protection Clause and Section II of the VRA.\textsuperscript{21} House Bill 1369 intentionally violates the Equal Protection clause.\textsuperscript{22} Furthermore, the effect of HB 1369 on Native American voters violates Section II of the VRA.\textsuperscript{23} Finally, Part IV contends that states must permit the use of fail-safe mechanisms to prevent the disenfranchisement of voters who lack state-approved identification, and that courts must analyze voting rights claims under strict scrutiny.\textsuperscript{24}

II. BACKGROUND

A. The History of Native American Rights Demonstrate the Persistent Hardships They Continue to Face

The struggle to attain the right to vote for all citizens stems from the absence of any explicit mention of voting in the Constitution, prior to the Thirteenth Amendment.\textsuperscript{25} Before the Thirteenth Amendment’s ratification, class, status, and wealth represented the defining issues of voting rights.\textsuperscript{26} However, with the passage of the Thirteenth and Fifteenth Amendments, voting rights became an issue defined almost entirely by race.\textsuperscript{27} Although the Fifteenth Amendment prohibited the government from denying citizens’ right to vote according to race, many states continued to impose obstacles to voting that, in practice, disproportionately affected non-white citizens for decades following the Amendment’s ratification.\textsuperscript{28} While the VRA of 1965

\begin{itemize}
\item \textsuperscript{21} U.S. CONST. amend. XIV, § 1 (showing the Equal Protection Clause); 52 U.S.C. § 10301 (showing the VRA).
\item \textsuperscript{22} See Brakebill v. Jaeger, No. 1:16-CV-008, 2016 WL 7118548, at *10 (D.N.D. Aug. 1, 2016) (determining that North Dakota’s prior iteration, which is almost identical to its current law, violated the Equal Protection Clause).
\item \textsuperscript{23} See Appellees’ Brief at 1-4, Brakebill v. Jaeger, 905 F.3d 553 (8th Cir. 2018) (No. 18-1725) (outlining facts to demonstrate a violation of Section II of the VRA).
\item \textsuperscript{24} See Brakebill, 2016 WL 7118548, at *1 (declaring North Dakota’s HB 1332 invalid because it lacked a fail-safe mechanism).
\item \textsuperscript{25} See U.S. CONST. art. I-VII (demonstrating the lack of regard afforded to voting rights in the Constitution).
\item \textsuperscript{26} See SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 201-02 (2005) (outlining how many non-landowning citizens lacked voting rights in the early nineteenth century).
\item \textsuperscript{27} See U.S. CONST. amend. XIII, § 1 (barring slavery and forced servitude unless criminally convicted); see also U.S. CONST. amend. XV, § 1 (barring voter discrimination on account of race and color).
\item \textsuperscript{28} See U.S. CONST. amend. XV, § 1 (establishing that voting rights shall not be denied according to race); see also Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) (holding Virginia’s poll tax an illegal violation of the Fourteenth Amendment’s Equal Protection Clause); but see Breedlove v. Suttles, 302 U.S. 277, 284
\end{itemize}
certainly pushed the ball closer to the goal-line, some states still continue to impose barriers that restrict voting rights along racial lines.  

Despite its language, the Civil Rights Act of 1866 failed to bestow its rights upon Native Americans. At that point, the United States government had yet to claim absolute sovereignty over all of the Native American tribes in the western United States. Each tribe represented a sovereign entity with each tribal member considered a citizen of their own tribe. As a result, the Supreme Court determined that the Fourteenth Amendment did not apply to Native Americans. But in 1924, the same year the Apache Wars concluded, Congress enacted the Indian Citizenship Act, granting citizenship to all Native Americans born within the territorial boundary of the United States.

Even after attaining citizenship, each individual state retained the right to decide whether to grant voting rights to Native Americans. For decades, many states continued to deny voting rights to Native Americans residing on reservation land. Finally, in 1962, New Mexico accorded Navajo tribal members the right to vote, becoming the final state to grant voting rights to Native Americans.

In the United States, minorities have faced persistent hurdles to attaining legal rights equal to those of white citizens. The implementation of the

(1937) (showing a poor white male barred from voting for not paying a poll tax).

29. See Veasey v. Abbott, 830 F.3d 216, 225-27 (5th Cir. 2016) (showing the facts regarding Texas’ restrictive voter ID law).

30. See Civil Rights Act of 1866, 42 U.S.C. § 1981 (stating that “All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . as is enjoyed by white citizens”); see also Elk v. Wilkins, 112 U.S. 94, 109 (1884) (declining to bestow citizenship upon Native Americans).


32. See Elk, 112 U.S. at 99 (emphasizing that tribal members “were not part of the people of the United States”).

33. See id. at 102 (declaring Native Americans are not citizens).

34. See Indian Citizenship Act of 1924, 8 U.S.C. § 1401(b) (finally ending the practice of withholding citizenship from tribal members).

35. See U.S. Const. amend. X (reserving undelegated powers to the individual states); see also Harrison v. Laveen, 196 P.2d 456, 457-58 (Ariz. 1948) (removing Arizona’s barriers that prevented Native Americans from voting); see also Montoya v. Bolack, 372 P.2d 387, 388 (N.M. 1962) (providing voting rights to Navajo members).

36. See Harrison, 196 P.2d at 457-58 (showing plaintiffs were denied voting rights for ethnicity); see also Montoya, 372 P.2d at 388 (questioning the validity of Navajo voters).

37. See Montoya, 372 P.2d at 395 (granting Navajos voting rights).

38. See Scott v. Sanford, 60 U.S. 393, 393 (1857) (declaring African-Americans
Equal Protection Clause gradually eroded nationwide statutes that were racially discriminatory. However, the application of voter ID laws presented minorities with new challenges in securing their voting rights. Demonstrating an Equal Protection violation requires proof of discriminatory intent, which is difficult to establish because proponents of strict voter ID laws use voter fraud prevention as a justification.

B. The History of Voter Identification Laws Demonstrate a Connection with Race

In the 1950s, the South Carolina legislature implemented the first voter ID law, requiring voters to present a range of documents to prove their identity. Throughout the next few decades, many other states established their own voter ID laws. By 2006, Georgia and Indiana established strict voter ID requirements that forced voters to present valid photo ID cards to vote. The Supreme Court upheld Indiana’s photo ID requirement in Crawford v. Marion County Election Board. The majority in Crawford, determined that Indiana’s interest in preventing voter fraud and upholding the integrity of elections offset the burden placed on eligible voters. Justice Stevens, writing for the majority, rationalized the Court’s decision by stating

were not citizens under the Constitution); see also Plessy v. Ferguson, 163 U.S. 537, 551-52 (1896) (upholding separate but equal accommodations); see also Shelby Cty. v. Holder, 570 U.S. 529, 530 (2013) (holding Section Four of the VRA unconstitutional because racism of the 1960s no longer applied).


41. See Appellees’ Brief at 54-55, Brakebill v. Jaeger, 905 F.3d 553 (8th Cir. 2018) (No. 18-1725) (demonstrating HB 1369’s proponents intended to prevent voter fraud).

42. See S.C. CODE ANN. § 7-9-20 (1950) (establishing the nation’s first voter identification law that simply required voters to present documentation showing their legal name).


45. See Crawford, 553 U.S. at 204 (holding Indiana’s voter ID law constitutional).

46. See id. at 233 (emphasizing “[T]he State’s asserted interests in modernizing elections and combating fraud are decidedly modest; at best, they fail to offset the clear inference that thousands of Indiana citizens will be discouraged from voting”).
that the process of attaining the required identification did not place a significant burden on voters.47 Similarly, in Frank v. Walker, the Seventh Circuit upheld Wisconsin’s voter ID law, applying the same rationale used in Crawford.48 While the Fifth Circuit declared that Texas’ voter ID law did not have a racially discriminatory intent in Veasey v. Abbott, the court did find that the law had a discriminatory effect that violated Section II of the VRA.49 The Fifth Circuit adopted a two-part framework used in the Fourth and Sixth Circuits to determine the law’s discriminatory effect.50 The court used this framework to examine whether: (1) a law inflicts “a discriminatory burden on members of a protected class, meaning that members of a protected class have less opportunity” than others to affect the voting process, and (2) the burden is linked to historical circumstances that currently create discrimination against the protected class.51

Following the trend established in other strict voting states, North Dakota enacted HB 1332 in 2013, requiring voters at polling locations to present an ID card that included a residential street address.52 The law also lacked a fail-safe provision permitting otherwise eligible voters to cast a legitimate ballot.53 Examples of fail-safe provisions include: permitting voters without the proper ID to sign an affidavit swearing to their eligibility to vote and granting poll workers the authority to vouch for the eligibility of voters based on personal knowledge.54 Following the District Court’s order to revise HB 1332, the State Assembly enacted HB 1369, which still lacked an effective

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47. See id. at 198 (stating that “the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting”).

48. See Frank v. Walker, 768 F.3d 744, 745 (7th Cir. 2014) (staying the district court’s injunction imposed on Wisconsin’s voter ID law).

49. See Veasey v. Abbott, 830 F.3d 216, 272 (5th Cir. 2016) (demonstrating an instance where the court declared a voter ID law had a discriminatory effect in violation of Section II of the VRA).

50. See id. at 244-45 (citing League of Women Voter of N.C. v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014)) (expanding further the use of the two-part framework).

51. See id. (demonstrating the use of the two-part framework utilized in the Sixth and Fourth Circuits).

52. See N.D. CENT. CODE § 16.1-01-04.1(2-6)(2013) (showing North Dakota’s original voter ID law).


54. See id. (showing the two possible fail-safe provisions utilized in North Dakota prior to 2013).
fail-safe provision.55 Tribal members challenged each variation of the law, arguing that Native Americans living on reservations were disproportionately denied the right to vote because most residences lacked eligible street addresses.56 While the District Court twice enjoined the statute, the Eighth Circuit Court of Appeals stayed the injunction in 2018.57 The Supreme Court denied the application to vacate the stay for fear of causing voter confusion so close to the upcoming 2018 midterm elections.58

C. Requirements for Equal Protection and Voting Rights Act Violations

To show that a voting law violates the Equal Protection Clause, the injured party must present proof of the legislation’s racially discriminatory intent.59 Such discriminatory intent need not be the primary purpose of the law.60 When analyzing whether a voting law has discriminatory intent, courts give equal consideration to five factors: “(1) the historical background of the law, (2) the specific sequence of events leading up to the law, (3) departures from the normal procedural sequence, (4) substantive departures, and (5) legislative history.”61 This analysis applies specifically if legislators have made statements of a discriminatory nature.62 While courts consider the law’s historical background, such history must be “reasonably contemporaneous with the challenged law.”63 For example, in Shelby

55. See id. (enjoining North Dakota’s Secretary of State from enforcing HB 1332 for lack of a fail-safe provision); see also N.D. CENT. Code § 16.1-01-04.1(2-6) (2017) (showing that North Dakota’s new law still lacked a proper fail-safe provision).

56. See Brakebill, 2016 WL 7118548 at *1 (where plaintiffs challenged the legality of HB 1332); see also Brakebill v. Jaeger, No. 1:16-CV-008, 2018 WL 1612190 at *1 (D.N.D. Apr. 3, 2018) (where plaintiffs challenged the legality of HB 1369 along the same lines as their successful challenge in 2016).

57. See Brakebill v. Jaeger, 905 F.3d 553, 561 (8th Cir. 2018) (determining that North Dakota would be irreparably harmed without staying the injunction the district court imposed).

58. See Brakebill v. Jaeger, 139 S.Ct. 10, 10 (2018) (showing the Supreme Court’s reluctance to consider the controversial voting rights issue).


60. See United States v. Brown, 561 F.3d 420, 433 (5th Cir. 2009) (explaining that the courts may even consider the predictability of the defendant’s actions).

61. See Arlington Heights, 429 U.S. at 266-68 (laying out the five factors to show a discriminatory purpose).

62. See id. at 268 (broadening the scope of analysis to include legislators’ discriminatory statements).

the Supreme Court refused to consider the United States’ extensive history of racism when it struck down aspects of the VRA. The extensive and overt history of racism in the United States may not prove the legislation’s racially discriminatory intent, unless the relevant history coincides with the legislation. This Article will assess the Arlington Heights factors to demonstrate HB 1369’s discriminatory intent in violation of the Equal Protection Clause.

Claims brought under Section II of the VRA mirror those brought under the Equal Protection Clause, except that violations of the VRA “can be proved by showing discriminatory effect alone.” To show that a law has discriminatory effect, the injured party must prove the law inflicts a burden on minorities and that existing social conditions create unequal opportunities for minority voters. The Fifth Circuit adopted a two-part test: (1) the law must inflict “a discriminatory burden on members of a protected class, meaning that members of a protected class have less opportunity” to affect the voting process, and (2) the burden must be linked to historical circumstances currently creating discrimination against the protected class. Similarly, to show a causal link between the state’s imposed burden and the social and historical conditions caused by discrimination, the Fifth Circuit considered the following factors: (1) past discrimination in the state that affected minorities’ ability to vote; (2) racial polarization of state elections; (3) whether the state increased the opportunity for discrimination; and (4) whether members of the protected class suffer discriminatory effects in areas like “education, employment and health.” Furthermore, the Fifth Circuit

64. See Shelby Cty. v. Holder, 570 U.S. 529, 530 (2013) (showing the Court’s reluctance to consider a proven history of racism due to its older nature).

65. See Veasey, 830 F.3d at 232 (quoting McCleskey v. Kemp, 481 U.S. 279, 298 (1987)) (noting that history that is asynchronous with legal challenges has little probative value for voting claims).

66. See Arlington Heights, 429 U.S. at 266-68 (providing the factors to assess discriminatory intent for Equal Protection violations).

67. See Thornburg v. Gingles, 478 U.S. 30, 35 (1986) (emphasizing the similarities between an Equal Protection and VRA analysis, but further noting that a VRA analysis entails less requirements).

68. See id. at 47 (demonstrating that the voting law must lead to inequalities between white and minority voters to prove violations of the Equal Protection Clause and Section II of VRA).

69. See Veasey, 830 F.3d at 244 (citing League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014)) (demonstrating further acceptance of the Fourth Circuit’s two-part framework to analyze discriminatory intent in a VRA analysis).

70. See id. at 245 (providing the Gingles five factor analysis to consider when evaluating the two-part test for discriminatory intent).
considered whether the elected officials demonstrated “a lack of responsiveness” to the specific needs of the protected class. This comment will further assess HB 1369’s effect to reveal a violation of Section II of the VRA.

III. ANALYSIS

A. House Bill 1369 Unfairly Affects Native American Voters

1. Native Americans Are Disproportionately Affected Because Many Native American Voters on Reservation Land Lack a Traditional Residential Street Address

The District Court’s findings in 2016 highlighting Native Americans’ lack of the necessary ID card and that attaining an appropriate ID card proved overly burdensome persisted into 2018. The primary dilemma for Native Americans is that many eligible voters technically lack a valid residential street address. In fact, many reservation roads simply lack street names entirely. Even the Secretary-Treasurer of the Spirit Lake Tribe admitted that she “[c]an’t even get a package” on the reservation because “[t]here’s no street signs, no numbers on houses unless it’s a housing unit.”

Voter fraud prevention is not an interest compelling enough to justify the strict requirement of a residential street address because it creates an unfair burden on Native American voters. The District Court noted that according

71. See id. at 245-46 (showing two further factors to consider as part of the evaluation).

72. See id. at 243 (demonstrating discriminatory effect alone is enough to show a violation of the VRA).

73. See Appellees’ Brief at 16-17, Brakebill v. Jaeger, 905 F.3d 553 (8th Cir. 2018) (No. 18-1725) (showing that the same evidence used to prove HB 1332’s disproportionate impact continued to apply in the analysis of HB 1369).

74. See id. at 20-21 (outlining that reservation residences often lack traditional addresses).

75. See id. at 18 (demonstrating the unusual circumstances involving reservation addresses).

76. See id. at 22 (outlining issues that stem from the irregular addresses on reservation land).

to North Dakota’s current voter ID law, anyone lacking a residential street address “will never be qualified to vote.”\textsuperscript{78} The District Court further noted that North Dakota is the only state that calls for a “current residential street address” to cast a ballot.\textsuperscript{79} North Dakota may overcome voting restrictions with facts “showing that threats to its interests outweigh the particular impediments,” which it failed to do.\textsuperscript{80}

2. \textit{The Lack of a Viable Fail-Safe Provision Disproportionately Affects Native American Voters}

Following the 2016 injunction by the District Court in North Dakota, 16,215 voters cast ballots using the affidavit fail-safe mechanism required in North Dakota’s prior voter ID law.\textsuperscript{81} Indeed, the three counties in North Dakota with the highest percentage of Native Americans witnessed a 750 percent increase in the use of affidavits in the 2016 election.\textsuperscript{82} Following the 2016 elections, 12.1 percent of all Native Americans in North Dakota reportedly utilized the affidavit function and a further 9.7 percent indicated that a poll worker vouched for their eligibility, another common fail-safe mechanism.\textsuperscript{83} The district court noted that “[N]ative Americans are more likely than are non-Natives to report having used a fail-safe measure to vote in the past.”\textsuperscript{84} This fact is more startling in light of “the disparities in living conditions” between white and Native American voters, which has a “disproportionately negative impact” on Native Americans.\textsuperscript{85} Native Americans in North Dakota often do not have the means to attain an ID card, either because they lack transportation or the reservation lacks public transportation.\textsuperscript{86} For many voters, the cost of getting an ID card and the

\textsuperscript{78} See Brakebill, 2018 WL 1612190 at *4 (showing that the requirement of a residential street address effectively prevents many Native Americans from voting).

\textsuperscript{79} See id. (demonstrating the irregularities of HB 1369).

\textsuperscript{80} See Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 209 (2008) (Souter, J. dissenting) (demonstrating that a state must present more than mere abstract interests to overcome strict impediments to voting).

\textsuperscript{81} See Appellees’ Brief at 14 (noting the effective use of the affidavit fail-safe mechanism).

\textsuperscript{82} See id. (highlighting Native American’s reliance on the affidavit fail-safe mechanism).

\textsuperscript{83} See Brakebill, 2018 WL 1612190, at *3 (noting that Native Americans were the most likely group to use a fail-safe mechanism).

\textsuperscript{84} See Brakebill, 2018 WL 1612190 at *3 (explaining that Native American voters rely more on the affidavit voting mechanism than other segments of the population).

\textsuperscript{85} See Appellees’ Brief at 12 (emphasizing that the living conditions of Native Americans makes voting a more burdensome process).

\textsuperscript{86} See id. at 12-13 (noting that Native Americans do not have means on par with
burden of travelling many miles without easily accessible transportation either prevents or hinders the ability to participate in the electoral process.\textsuperscript{87} Without a legitimate fail-safe mechanism to balance out those burdens, HB 1369 creates a significant barrier to Native American voters.\textsuperscript{88} 

North Dakota’s State Assembly enacted HB 1369 with the knowledge that it would disproportionately affect Native American voters.\textsuperscript{89} Despite that knowledge, the State Assembly refused to investigate concerns regarding the disparate impact HB 1369 was likely to impose on Native Americans.\textsuperscript{90} Furthermore, the State Assembly granted some latitude to elderly, active military, and disabled voters, yet still failed to solve the issues affecting Native Americans that the district court plainly identified in HB 1332.\textsuperscript{91} Republican Representative Johnson’s acknowledgement before her colleagues that HB 1369’s fail-safe option is “not truly a fail-safe option like an affidavit is” should have made known the foreseeable effect on Native Americans.\textsuperscript{92} 

While proponents of HB 1369 contend that the legislation contains a valid fail-safe function, that contention proves false after a deeper examination of the law.\textsuperscript{93} House Bill 1369’s fail-safe mechanism is a “set-aside” function in which voters without the proper ID can still cast a ballot that will be set aside until the voter returns to present a valid ID to an elections officer.\textsuperscript{94} The purported fail-safe mechanism that HB 1369 provides is not a viable alternative for voters who lack the necessary ID because an ID is still

\textsuperscript{87} See id. (showing that Native Americans disproportionately have a more difficult time attaining an ID).

\textsuperscript{88} See id. at 13 (explaining the need for a safety-net when states enact strict voter ID laws).

\textsuperscript{89} See Brakebill, 2018 WL 1612190, at *2 (showing that HB 1369 so closely resembled North Dakota’s prior voter ID law that the court had previously enjoined).

\textsuperscript{90} See Appellees’ Brief at 14-15 (noting the State Assembly’s failure to examine how HB 1369 would affect Native American voters, despite the impact that HB 1332 imposed).

\textsuperscript{91} See N.D. CENT. Code § 16.1-01-04.1(2) (2017) (noting the lack of deference afforded to Native Americans); see also Appellees’ Brief at 14-15 (showing the leeway granted to certain voting groups while neglecting Native Americans).

\textsuperscript{92} See Appellees’ Brief at 15 (noting Representative Johnson’s statement indicating that HB 1369 effectively imposes the same burden as HB 1332).

\textsuperscript{93} See N.D. CENT. Code § 16.1-01-04.1(2) (2017) (emphasizing HB 1369’s phantom fail-safe mechanism); see also Appellees’ Brief at 15 (noting that proponents of HB 1369 insist that the law contains a valid fail-safe function).

\textsuperscript{94} See N.D. CENT. CODE § 16.1-01-04.1(2) (2017) (outlining that HB 1369’s alleged fail-safe mechanism continues to require a valid ID card).
B. House Bill 1369 Violates the Equal Protection Clause of the Fourteenth Amendment

As it currently stands, North Dakota’s voter ID law violates the Equal Protection Clause.98 House Bill 1369 disproportionately affects Native American voters because the law requires voters at the polls to present a valid ID listing their name, date of birth, and residential street address; however, many voters living on reservation land lack a traditional street address.99 While the North Dakota State Assembly asserts the need to prevent voter fraud, such fraud is a non-issue, and thus the alleged purpose for enacting HB 1369 does not hold water.100

1. House Bill 1369’s Stated Purpose Is Invalid Because Voter Fraud Is Not a Problem in North Dakota

The North Dakota State Assembly enacted HB 1369, in part, to thwart in-person voter fraud; however, in-person voter fraud is non-existent in North Dakota.101 In Crawford, the Supreme Court held that preventing voter fraud was a legitimate reason to enforce voter ID laws, but the Court overlooked that voter fraud was not a problem in Indiana.102 Likewise, in Brakebill, the


96. See Appellees’ Brief at 16 (outlining the Deputy Secretary’s disbelief that voters were likely to fulfill the steps under the fail-safe mechanism of HB 1369).

97. See supra notes 73-96 (establishing the disproportionate effects of HB 1369 on Native American voters).

98. See Brakebill v. Jaeger, No. 1:16-CV-008, 2016 WL 7118548, at *10 (D.N.D. Aug. 1, 2016) (determining that North Dakota’s prior iteration, which is almost identical to its current law, violated the Equal Protection Clause).


100. See Appellees’ Brief at 54-55 (showing that the Secretary failed to present any evidence of voter fraud).

101. See id. (showing the alleged purpose behind HB 1369 without presenting evidence to prove the existence of in-person voter fraud).

Eighth Circuit disregarded that North Dakota’s Secretary of State failed to present a single piece of evidence to show that voter fraud was a problem.\textsuperscript{103} These decisions to accept the legislature’s non-existent voter fraud concerns present a significant risk of extending voter disenfranchisement to any voter in the United States.\textsuperscript{104}

Prior to 2013, North Dakota’s State Assembly discussed enacting more stringent voter ID measures comparable to those that would later be included in HB 1369, but ultimately declined to enact such measures upon finding no evidence of voter fraud.\textsuperscript{105} In fact, Republican State Senator Cook observed that, to the extent there was any voter fraud, he was “not sure if we have a great degree.”\textsuperscript{106} In the end, the State Assembly voted overwhelmingly to reject the legislation after it determined that the hypothetical abuse of the electoral system did not justify imposing such strict measures.\textsuperscript{107} To make the matter even clearer, the district court noted that the record lacked evidence of voter fraud.\textsuperscript{108} North Dakota’s Secretary of State hypothesized the affidavit fail-safe mechanism would lead to voter fraud, but appellants failed to put forth evidence to support the hypothesis.\textsuperscript{109} As of 2018, the Secretary’s statements regarding the dangers of voter fraud inflicted immense harm on the integrity of the electoral system and deterred voters from casting their ballots for lack of confidence in the election.\textsuperscript{110}

\(\text{(showing the Supreme Court’s acknowledgement that Indiana had no voter fraud issues and instead relied on voter fraud issues elsewhere in the United States).}\)

\textsuperscript{103} See Appellees’ Brief at 5 (demonstrating that North Dakota does not have a history of in-person voter fraud).

\textsuperscript{104} See Crawford, 553 U.S. at 226 (expressing that evidence nationwide “suggests that the type of voting fraud that may be remedied by a photo ID requirement is virtually nonexistent: the ‘problem’ of voter impersonation is not a real problem at all”).

\textsuperscript{105} See Id. at 5 (showing the North Dakota State Assembly’s explanation for declining to impose further voter ID requirements to vote).

\textsuperscript{106} See id. at 6 (emphasizing the absence of voter fraud in North Dakota’s electoral history).

\textsuperscript{107} See id. at 7 (showing the North Dakota State Assembly’s reasonable determination to reject a more stringent voter ID law).

\textsuperscript{108} See id. at 54 (emphasizing the lack of evidence in the district court’s record regarding voter fraud).

\textsuperscript{109} See id. at 54-55 (noting the lack of evidence to prove the Secretary of State’s hypothetical scenario).

\textsuperscript{110} See id. at 56-57 (discussing the negative effects of the Secretary’s unsubstantiated assertions).

To determine whether a voting law violates the Equal Protection Clause, courts apply the *Arlington Heights* five-factor analysis.111 Considered together, these factors can determine whether a law was enacted with discriminatory intent in violation of the Equal Protection Clause.112 The first factor requires an analysis of the historical background of HB 1369 and the second factor entails an analysis of the events that preceded enactment of the legislation.113

House Bill 1369 stems from earlier attempts to impose obstacles to voting.114 Because HB 1369’s provisions bear a striking resemblance to prior legislation that was rejected on the grounds that there was no voter fraud problem, it is worth asking what supposedly changed to make North Dakota legislators enact more stringent voter ID laws.115 It is likely that former Democratic Senator Heidi Heitkamp’s slim margin of victory in the 2012 election influenced the Republican-led campaign to enact HB 1332 and later HB 1369.116 North Dakota’s HB 1332, nullified by the district court in 2016, was the state’s response to preventing non-existent voter fraud.117 The law was enacted along partisan lines, thus supporting the argument that the legislature enacted HB 1369 in response to North Dakota’s altered political landscape and not to prevent voter fraud, only the latter of which the Supreme Court accepts as a compelling interest.118

The third factor requires an analysis of the legislation to determine whether there were irregularities to the lawmaking process within the State

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112. *See id.* at 268 (outlining the five-factor analysis while emphasizing its non-exhaustive nature).

113. *See id.* at 267 (showing the first and second factors applied to Equal Protection challenges).

114. *See* Appellees’ Brief at 5 (outlining HB 1447 of 2011 that would have imposed measures similar to HB 1369).

115. *See id.* at 7 (showing the most obvious difference being the election of former United States Senator Heidi Heitkamp).

116. *See id.* (showing that Senator Heitkamp’s election victory of fewer than 3,000 votes were credited in large part to Native American voters).


Assembly. 119 Similarly, the fourth factor must analyze whether any of those irregularities represented a substantive departure from the usual lawmaking process. 120 In 2016, the district court noted that North Dakota appeared to be the only state that lacked a fail-safe mechanism in their voting laws. 121 As previously mentioned, this incongruity was the result of HB 1332, which erased North Dakota’s fail-safe mechanism that is standard in all other states with strict voter ID laws. 122 The State Assembly’s abolition of the fail-safe mechanism represented a substantive departure from the lawmaking process for voter fraud prevention. 123 Coupling this departure with the State Assembly’s reluctance to adequately resolve HB 1332’s fail-safe issue ordered by the district court further accentuates the irregularities in the lawmaking process. 124 Adding to the irregularities, to enact HB 1332, the North Dakota State Assembly utilized what is locally known as a “hoghouse” amendment, which effectively erases the proposed bill only to replace it with an entirely new text. 125

The fifth factor requires an examination of the legislative history of HB 1369, specifically where state legislators have made statements regarding the legislation. 126 While debating the value of HB 1369, Representative Mary C. Johnson noted that the proposed legislation failed to adequately put forth a legitimate fail-safe mechanism that the district court had previously ordered. 127 Representative Johnson contended that HB 1369’s provisional

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120. See id. at 267-68 (showing the fourth factor of an Equal Protection challenge).
121. See Brakebill, 2016 WL 7118548, at *10 (recognizing North Dakota as the only state with a strict voter ID law that lacked a fail-safe mechanism).
122. See id. (showing that North Dakota is the sole state without a fail-safe mechanism); see also N.D. CENT. CODE § 16.1-01-04.1(2-6) (2013) (demonstrating the absence of a fail-safe mechanism).
124. See Brakebill, 2016 WL 7118548, at *1 (ordering North Dakota’s State Assembly to rework HB 1332 to provide a legitimate fail-safe function); see also N.D. CENT. CODE § 16.1-01-04.1(2)-6 (2017) (showing HB 1369’s misleading attempt to include a fail-safe function).
125. See Appellees’ Brief at 6, Brakebill v. Jaeger, 905 F.3d 553 (8th Cir. 2018) (No. 18-1725) (highlighting the peculiarity of the “hoghouse” amendment).
127. See Appellees’ Brief at 15 (emphasizing the acknowledgement within the State
ballot addition still required voters to possess a valid ID, and thus represented a phantom fail-safe provision.\footnote{128} During debate on HB 1332, Representative Corey Mock argued that the legislation would “completely change the way we handle voters in our state.”\footnote{129} Even Deputy Secretary of State Jim Silrum, HB 1369’s drafter, doubted the effectiveness of HB 1369’s fail-safe function.\footnote{130}

Although the discriminatory intent is not obvious on its face, the disproportionate burden HB 1369 places on Native American voters provides “[a]n important starting point.”\footnote{131} An analysis of the Arlington Heights factors interwoven with the facts regarding HB 1369 demonstrates that HB 1369 violates the Equal Protection Clause.\footnote{132}

C. House Bill 1369 Violates Section II of the Voting Rights Act of 1965

North Dakota’s voter ID law violates Section II of the VRA.\footnote{133} As previously noted, the Fifth Circuit in Veasey held that discriminatory effect alone is enough to prove a Section II violation of the VRA.\footnote{134}

1. The Two-Part Framework to Examine Discrimination Under Section II Voting Rights Claims Demonstrates That HB 1369 Violates the VRA

The two-part framework that the Fifth Circuit adopted in Veasey provides a reasonable structure to analyze the discriminatory effect of voting laws.\footnote{135}

Assembly that HB 1369 did not provide a legitimate fail-safe mechanism).


\footnote{130} See Appellees’ Brief at 16 (emphasizing the Deputy Secretary of State’s negligence in securing the voting rights of all North Dakota residents).

\footnote{131} See Arlington Heights, 429 U.S. at 266 (emphasizing the deference given to overly burdened groups).

\footnote{132} See id. at 266 (emphasizing that the five-factor analysis can demonstrate an Equal Protection violation).

\footnote{133} See Appellees’ Brief at 1-4 (outlining the facts that satisfy the requirements to demonstrate a violation of Section II of the VRA).

\footnote{134} See Veasey v. Abbott, 830 F.3d 216, 243 (5th Cir. 2016) (quoting Thornburg v. Gingles, 478 U.S. 30, 35 (1986)) (demonstrating the lower bar to show a VRA violation as opposed to showing an Equal Protection violation).

\footnote{135} See id. at 244 expanding the use of the two-part framework previously used in
Part one of the framework requires an analysis of whether the disputed law places a discriminatory burden on a protected class so that those members lack the same opportunities as non-members.\textsuperscript{136} It is plainly wrong to assume Native Americans have the same access to resources as all other rural North Dakota residents.\textsuperscript{137} There is overwhelming evidence that HB 1369’s requirement that voters present a valid ID card listing the individual’s residential street address disproportionately affects Native American voters.\textsuperscript{138} In 2016, 23.5 percent of Native Americans lacked any of the valid forms of voter ID.\textsuperscript{139} By 2018, a new survey found that this percentage had only dropped to 19 percent.\textsuperscript{140} Also in 2016, 21.8 percent of Native American voters in North Dakota did not possess a driver’s license, as opposed to 5.6 percent of non-Native American voters.\textsuperscript{141} Additionally, 47.7 percent of Native Americans in 2016 who lacked the necessary ID card to vote also lacked the obligatory paperwork to obtain an appropriate ID card.\textsuperscript{142} As of 2018, 48.7 percent of Native Americans who could not vote due to the address requirements did not have at least one of the address documents required under the law.\textsuperscript{143} Also as of 2018, 32.9 percent of Native Americans without a qualifying ID also lacked a birth certificate.\textsuperscript{144} This data demonstrate that HB 1369 is likely to have a

the Fourth and Sixth Circuits).

\textsuperscript{136} See id. (emphasizing part 1 of the analysis to determine discrimination regarding voting rights).

\textsuperscript{137} See Plaintiffs’ Reply Memorandum in Support of Motion for Preliminary Injunction at 6, Brakebill v. Jaeger, No. 1:16-CV-008, 2016 WL 7118548 (D.N.D. Aug. 1, 2016)(showing the discrepancy between Native Americans and non-Native Americans).

\textsuperscript{138} See id. at 7-8 (outlining the inequities between Native Americans and all others regarding access to ID cards in 2016).


\textsuperscript{141} See Plaintiffs’ Reply Memorandum in Support of Motion for Preliminary Injunction at 7 (noting that non-Native Americans generally have more access to a driver’s license).

\textsuperscript{142} See id. (emphasizing the burdensome process Native Americans face regarding access to voter ID cards).

\textsuperscript{143} See Brakebill, 2018 WL 1612190, at *3 (further emphasizing additional burdens Native Americans face due to North Dakota’s residential address requirement).

\textsuperscript{144} See Appellees’ Brief at 23, Brakebill v. Jaeger, 905 F.3d 553 (8th Cir. 2018) (No. 18-1725) (noting how difficult it can be for some Native Americans to prove their
disparate effect on Native American voters.\textsuperscript{145}

The district court noted that Native Americans tended to have less understanding of the voting laws than non-Native Americans.\textsuperscript{146} According to a 2018 survey, just 24.7 percent of Native Americans possessing an ID without a residential street address were aware that they needed an ID with a residential street address to vote.\textsuperscript{147}

Further emphasizing the discriminatory burden, many Native Americans also have difficulty travelling to a location where they can obtain an ID.\textsuperscript{148} Data from 2016 specifies that 10.5 percent of Native Americans state-wide do not have access to a motor vehicle, compared to 4.8 percent of non-Native Americans.\textsuperscript{149} Adding to that issue, Native Americans living on reservation land typically must travel greater distances to obtain a valid voter ID than their non-Native American counterparts.\textsuperscript{150}

Additionally, Native Americans have traditionally relied upon using a fail-safe mechanism to vote in past elections.\textsuperscript{151} In fact, of all possible voters in 2016, 12.1 percent of Native Americans reportedly used a signed affidavit to vote and a further 9.7 percent had a poll worker vouch for their eligibility.\textsuperscript{152}

While HB 1369 does not discriminate against Native Americans on its face, it fails to consider the living circumstances of Native Americans and

\textsuperscript{145} Compare N.D. CENT. Code § 16.1-01-04.1(2)-(6) (2017) (showing the voting requirements of HB 1369), with supra notes 138-144 (providing data that indicates Native American’s will face greater obstacles to voting than non-Native American voters).

\textsuperscript{146} See Brakebill, 2018 WL 1612190 at *3 (emphasizing that a large percentage of Native Americans who possessed an ID were unaware that an ID must list a residential street address).

\textsuperscript{147} See id. (emphasizing that many Native Americans largely misunderstood HB 1369).


\textsuperscript{149} See id. (showing that many Native Americans lack easily accessible transportation).

\textsuperscript{150} See id. (noting that reservation residents must travel greater distances to attain voter ID cards).

\textsuperscript{151} See Brakebill, 2018 WL 1612190 at *3 (emphasizing that a significant percentage of Native American voters have utilized the fail-safe mechanisms in past elections).

\textsuperscript{152} See id. (emphasizing Native Americans’ reliance on a viable fail-safe mechanism).
thus violates Section II of the VRA. Considered in its totality, the statistics portray a great discrepancy between Native Americans and non-Native Americans. Under part one of the Fourth and Sixth Circuits’ VRA analysis, it is evident that HB 1369 places a discriminatory burden on Native Americans that affects their ability to equally impact the electoral process.

Part two of the Veasey framework requires an analysis of whether the discriminatory burden represents a product of social and historical conditions that created discrimination against members of the protected class. Native Americans in North Dakota experienced sustained violence and deceit at the hands of the United States government throughout the latter half of the nineteenth century. More recently, Native Americans have continued to face discriminatory and violent tactics at both the state and federal levels.

In 2016, several tribes lost a battle in federal court to prevent the construction of gas and oil pipelines across environmentally necessary water sites and sacred burial grounds. While this case is separate from voting rights issues, it exemplifies the recent level of discrimination Native Americans have faced in North Dakota.

153. See Plaintiffs’ Reply Memorandum in Support of Motion for Preliminary Injunction at 7-9, Brakebill v. Jaeger, No. 1:16-CV-008, 2016 WL 7118548 (D.N.D. Aug. 1, 2016); see also Brakebill, 2016 WL 7118548 at *8 (showing statistics regarding Native Americans’ living conditions compared with HB 1369’s demands portray discrimination in violation of the VRA).

154. See Brakebill, 2016 WL 7118548 at *3-4, and 6-9 (comparing statistics for Native Americans and non-Native Americans, and providing 2016 voting statistics); see also Brakebill, 2018 WL 1612190 at *2-3 (showing 2018 voting statistics).

155. Compare Veasey v. Abbott, 830 F.3d 216, 244 (5th Cir. 2016) (showing part 1 of the VRA analysis), with Brakebill, 2016 WL 7118548 at *3-4 (providing voting statistics from 2016), and Brakebill, 2018 WL 1612190 at *2-3 (showing voting statistics from 2018).

156. See Veasey, 830 F.3d at 244 (emphasizing part 2 of the analysis to determine discrimination regarding voting rights).


160. See Medina, supra note 158 (showing discrimination that tribes faced for construction of the Dakota Access Pipeline).
Along with voting rights, Native Americans are traditionally disadvantaged in areas of education, employment, and self-government.\textsuperscript{161} The history of discrimination is directly linked to prevailing issues of poverty, educational inequality, and unemployment experienced on reservations nationwide.\textsuperscript{162} Such prolonged hardships discourage and dispel voter participation.\textsuperscript{163} Coupling this adversity with the existing hardships average voters face on Election Day exacerbates the discrimination Native Americans face in the voting process.\textsuperscript{164}

2. The Gingles Factors to Guide the Veasey Two-Part Framework

Support that HB 1369 Violates the VRA

In evaluating violations of Section II of the VRA, the Fifth Circuit has considered the following factors: (1) the state’s history of discrimination and its effect on minorities’ ability to take part in the electoral process; (2) whether the state’s elections have been polarized; (3) whether the state has previously implemented measures to increase the chance of discrimination; and (4) the status of minorities in areas like “education, employment and health,” and its effect on their participation in the electoral process.\textsuperscript{165} In \textit{Veasey}, Judge Higginson outlined five additional factors to consider.\textsuperscript{166} However, “there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.”\textsuperscript{167} Judge


\textsuperscript{164} Compare id. (showing the obstacles poor voters face), \textit{with} \textsc{N.D. Cent. Code} § 16.1-01-04.1(2-6) (2017) (demonstrating the requirements for all voters in North Dakota).

\textsuperscript{165} \textit{See} Veasey v. Abbott, 830 F.3d 216, 245 (5th Cir. 2016) (showing the Gingles factors utilized in the Fourth and Sixth Circuits).

\textsuperscript{166} \textit{See} id. at 245–46 (outlining the five additional factors that are unnecessary in this case to analyze a violation of Section II of the VRA).

\textsuperscript{167} \textit{See} id. at 246 (quoting Thornburg v. Gingles, 478 U.S. 30, 45 (1986) (emphasizing that the Gingles factors are meant to provide guidance to determine discriminatory effect).
Higginson further noted that every factor need not be applicable to every case; rather, these factors are intended to guide an analysis “on how to examine the current effects of past and current discrimination and how those effects interact with a challenged law.”

Here, a *Gingles* analysis reveals that HB 1369 was enacted in a discriminatory manner in violation of Section II of the VRA.

Part one of the *Gingles* factors requires an analysis of North Dakota’s history of discrimination and its impact on minority voters. North Dakota’s history is rampant with claims of discrimination; however, more recent patterns of discrimination are given more weight because courts only consider history that is reasonably contemporary. In 1983, the North Dakota State Assembly passed the North Dakota Human Rights Act that permitted the Department of Labor to investigate claims of labor discrimination. However, this law lacked any means of enforcement. In 1995, the North Dakota State Assembly failed to create a human rights commission, instead choosing to remain one of four states in the United States that lacked such an investigatory committee. After years of backlash for this failure, the State Assembly put forth its compromise to give “the North Dakota Department of Labor’s Division of Human Rights the authority to investigate allegations of discrimination and ensure that justice and fair compensation was provided to victims of illegal discrimination in North Dakota.”

North Dakota’s halfhearted approach to root out discrimination negatively impacts Native Americans’ ability to meaningful

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168. See id. (demonstrating the proper use of the *Gingles* factors).
169. See id. (showing the *Gingles* factors to determine discriminatory effect).
170. See id. at 245 (demonstrating the deference given to a state’s history of discrimination).
171. See id. at 232 (quoting McCleskey v. Kemp, 481 U.S. 279, 298 (1987)) (emphasizing that courts cannot consider all of history’s effects when evaluating discrimination).
173. See id. (showing that the law lacked teeth).
175. See NORTH DAKOTA HUMAN RIGHTS COALITION, https://www.ndhrc.org/about/history/ (last visited Mar. 8, 2019) (outlining the delegation of authority granted to the North Dakota Department of Labor).
participate in the electoral process.\textsuperscript{176}

Next to voting discrimination, workplace discrimination has plagued North Dakota in recent years.\textsuperscript{177} Claims of racial and gender discrimination account for two of the more significant complaints; however, fears of workplace retaliation likely conceal many possible accusations.\textsuperscript{178} But the most relevant example of previous discrimination to directly affect the electoral process in North Dakota is reflected in the District Court’s order to reconfigure HB 1332 because of its disproportionate effect on Native American voters.\textsuperscript{179} Continual setbacks in human rights limit the ability for Native Americans to participate in the electoral process, and may dissuade Native Americans from voting, thus satisfying the first \textit{Gingles} factor.\textsuperscript{180}

North Dakota elections have been more polarized since the election of former Democratic United States Senator Heidi Heitkamp in 2012, thereby satisfying the second \textit{Gingles} factor.\textsuperscript{181} The conservative State Assembly responded with HB 1332 that disproportionately affected voters more likely to vote for a democratic candidate.\textsuperscript{182} This fact blends into the third factor of the \textit{Gingles} analysis because HB 1332 and HB 1369 each increased the chance of discrimination against Native American voters.\textsuperscript{183} Additionally,

\begin{quote}
176. Compare Veasey, 830 F.3d at 245 (considering a state’s history of discrimination and its effect on voters), \textit{with supra} notes 172-175 (demonstrating North Dakota’s lackluster human rights record).


178. See id. (showing that fears of workplace retaliation persist despite racial and gender discrimination).


180. See id. (enjoining HB 1332 for its discriminatory effects); \textit{see also supra} notes 172-179 (discussing discrimination Native Americans face); \textit{but see} Katie Reilly, \textit{A New North Dakota Law Threated Native American Votes. They Responded by Turning Out in Historic Numbers}, \textit{Time}, (Nov. 7, 2018 12:16 PM), http://time.com/5446971/north-dakota-native-american-turnout/ (noting voter turnout among Native Americans surged in 2018).


\end{quote}
Deputy Secretary of State Jim Silrum’s statement regarding HB 1369’s fail-safe function demonstrates careless disregard for securing the voting rights of all North Dakota citizens. North Dakota’s polarized political climate and recent history of discrimination satisfy parts two and three of the Gingles factors.

Finally, and perhaps most importantly, deficiencies in education, employment, and health negatively impact Native Americans’ role in the electoral process, thus satisfying part four of the Gingles analysis. In the 2015-2016 school year, the high school graduation rate for Native Americans in North Dakota was 65 percent compared to 87 percent for non-Native American students. By 2017, the rate for Native Americans had increased to 67 percent, but there still existed a 23 percent gap between Native American and non-Native American graduation rates. One former student remarked that “[s]chool was the last thing on my mind.” These statistics demonstrate that Native Americans encounter more hurdles to participate in the electoral process.

Unemployment rates for Native Americans on reservations portray a similar disparity when compared to non-Native Americans. In 2015, the

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184. See Appellees’ Brief at 16, Brakebill v. Jaeger, 905 F.3d 553 (8th Cir. 2018) (No. 18-1725) (emphasizing Silrum’s email stating his hope that voters who use HB 1369’s fail-safe “will not likely come into [the] office later to verify their qualifications”).

185. See supra notes 181-184 (emphasizing North Dakota’s political polarization and recent history of voter discrimination).


187. NDDPI Dropout Prevention & Reengagement, supra note 186 (providing a power-point that outlines the graduation rates of Native Americans in 2016).


189. See id. (showing remarks of former student Paden Streitz).


overall jobless rate was 3.3 percent in North Dakota, while the rate among Native Americans ranged from 4.4 percent at Turtle Mountain Reservation to 24.4 percent at Standing Rock Reservation. The lower socioeconomic status of Native Americans tends to demonstrate that Native American voters face burdens that other voters do not encounter.

Perhaps the most impactful disparities for part four of the Gingles analysis exist in the health statistics for Native Americans in North Dakota. During an interview conducted in 2013, Dr. Donald Warne, a member of the Oglala Lakota Tribe noted the existence of a “public health crisis” based on statistics that showed the life expectancy of White North Dakotans was 75.7 years, while that of Native Americans was 54.7 years. North Dakota’s government health studies conducted every decade show that in 2010 Native Americans between the ages of 18-64 were twice as likely to have a disability as their white counterparts. The same report noted that 26 percent of Native Americans identified as binge drinkers, while 49 percent reportedly were users of tobacco. Additionally, 41.2 percent of Native Americans were categorized as obese compared to just 25.4 percent of white North Dakotans. Overall, about 16 percent of Native Americans reported they had poor physical or mental health, compared to 10 percent for that of white North Dakotans. These statistics place many of North Dakota’s Native Americans in a low socioeconomic standing that impedes their ability to

192. See id. (comparing the unemployment rates between Native Americans and non-Native Americans).
193. See Thornburg, 478 U.S at 39 (stressing that a group’s lower socioeconomic status encumbers their ability to vote).
196. NORTH DAKOTA AMERICAN INDIAN HEALTH PROFILE, supra note 194 (demonstrating the prevalence of disabilities amongst the North Dakota Native American population for the purpose of the Gingles analysis).
197. See id. (showing the percentage of binge drinkers and tobacco users amongst the Native American population).
198. See id. (further noting that Native Americans suffer more than white Americans regarding health statistics).
199. See id. (showing the general health statistics of Native Americans compared to white Americans).
participate in the electoral process.\textsuperscript{200} The integration of these statistics into the Gingles factors demonstrate that Native Americans face more burdens to affect the electoral process.\textsuperscript{201} Furthermore, the data support that HB 1369 violates Section II of the VRA.\textsuperscript{202}

IV. POLICY RECOMMENDATION

While it is imperative to prevent abuses to the electoral system like voter fraud, it must be fairly balanced with providing each citizen the ability to exercise their right to vote.\textsuperscript{203} House Bill 1369 unfairly abridges the fundamental right to vote without providing a state interest compelling enough to overcome the burden.\textsuperscript{204}

Like other minority groups throughout American history, Native Americans have been forced to jump through hoops to gain the protections that United States law should afford to all its citizens.\textsuperscript{205} Where the similarities diverge is that Native Americans are a forgotten people.\textsuperscript{206} Even the term “Native American” refers to a continent of people comprised of thousands of different cultures, languages, and ideologies lumped together under a single moniker.\textsuperscript{207} With their original cultures virtually destroyed and re-formed under the auspices of the United States government, tribal members have consistently faced barriers to citizenship and attaining the

\textsuperscript{200} See Thornburg v. Gingles, 478 U.S. 30, 39 (1986) (showing health as an indicator of socioeconomic status that can affect a group’s ability to vote).

\textsuperscript{201} Compare Veasey v. Abbott, 830 F.3d 216, 245 (5th Cir. 2016) (showing the Gingles factors to consider for VRA violations), with supra notes 187-199 (outlining the education, employment, and health statistics of Native Americans in North Dakota).

\textsuperscript{202} See supra notes 165-200 (providing an analysis of the Gingles factors in relation to the discriminatory intent of HB 1369).

\textsuperscript{203} See Brakebill v. Jaeger, No. 1:16-CV-008, 2016 WL 7118548, at *11 (D.N.D. Aug. 1, 2016) (noting states have an interest in preventing voter fraud, but eligible voters should be permitted to sign an affidavit in lieu of lacking a valid ID).


\textsuperscript{205} See Elk v. Wilkins, 112 U.S. 94, 95 (1884) (declaring Native Americans born within the territorial boundary of the United States were not automatically granted citizenship).

\textsuperscript{206} See Tony Magliano, The Forgotten Plight of Native Americans, NATIONAL CATHOLIC REPORTER (Feb. 2, 2015), https://www.ncronline.org/blogs/making-difference/forgotten-plight-native-americans (showing that Native Americans are largely overlooked as a group).

The North Dakota State Assembly’s intentions to secure the purity of its elections does not justify why it failed to adequately provide a mechanism that allows equal access to the voting booth. To maintain impartiality in elections, voter ID laws must include adequate fail-safe mechanisms that allow otherwise eligible voters to continue to exercise their right to vote. The fail-safe mechanism may include voters’ ability to sign an affidavit swearing to their eligibility, having poll workers vouch for their eligibility, or any novel idea that still provides sufficient access to the voting booth.

Judicial review of such severe voting issues should be analyzed under strict scrutiny. To pass strict scrutiny, the State Assembly must have enacted the law to further a compelling government interest and must be narrowly tailored to achieve that interest. To apply strict scrutiny, the State Assembly must have either enacted a law that infringes upon a fundamental right or involves a suspect clarification. House Bill 1369 severely restricts the voting rights of Native Americans, thus courts should analyze its constitutional validity under strict scrutiny. Voting alone represents a fundamental right, thus it is reasonable that all restrictions to voting be assessed under strict scrutiny.

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208. See Elk, 112 U.S. at 94 (denying automatic citizenship to all Native Americans born within the territorial United States); see also Montoya v. Bolack, 372 P.2d 387, 395 (N.M. 1962) (finally granting Navajo members in New Mexico the right to vote).


211. See id. (demonstrating two possible fail-safe mechanisms).

212. See Norman v. Reed, 502 U.S. 279, 280 (1992) (emphasizing that a severe restriction “must be narrowly drawn to advance a state interest of compelling importance”).


215. See supra part III (establishing that HB 1369 violates the Equal Protection Clause and Section II of the VRA).

216. See Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) (emphasizing that “we have often reiterated that voting is of the most fundamental significance under our constitutional structure”).
V. CONCLUSION

Considering the status for many of North Dakota’s Native Americans, HB 1369 violates the Equal Protection Clause of the Fourteenth Amendment.217 While voter fraud has not posed an issue in North Dakota’s long history, the facts of Brakebill v. Jaeger support the Arlington Heights five-part discrimination test to assess an Equal Protection violation.218 Furthermore, because many Native Americans’ homes lack a traditional residential street address and HB 1369 lacks an adequate fail-safe mechanism, HB 1369 violates the Equal Protection Clause.219

House Bill 1369 also violates Section II of the VRA.220 When infused with the two-part framework to assess Section II violations adopted in the Fourth, Fifth, and Sixth Circuits, the facts of Brakebill v. Jaeger demonstrate a violation of the VRA.221 Additional proof to demonstrate a Section II violation is evident when the facts are coupled with the Gingles factors.222 Taken altogether, it is evident that HB 1369 violates Section II of the VRA.223

Despite this, in July of 2019, the Eighth Circuit again ruled against appellees’ claim that HB 1369 violated the Equal Protection Clause and the VRA.224 Despite the thousands of voters at risk, the court reasoned that this “fact does not justify a statewide injunction that prevents the Secretary from requiring a form of identification with a residential street address from the vast majority of residents who have them.”225 Again, the Eighth Circuit failed to properly consider the evidence; instead, relying on the fact that “88% of North Dakota voters do have a qualifying identification.”226 The court failed to recognize or consider the benefits of North Dakota’s prior and

217. See supra Part III.B (discussing how HB 1369 violates the Equal Protection Clause).
218. See supra Part III.B (outlining the lack of voter fraud in North Dakota and assessing the five-part test to analyze violations of the Equal Protection Clause).
219. See supra Part III.B.1-2 (showing that many Native Americans lack traditional residential street addresses and that HB 1369 lacks an adequate fail-safe mechanism).
220. See supra Part III.C (detailing how HB 1369 violates Section II of the VRA).
221. See supra Part III.C.1 (outlining the use of a two-part framework to analyze violations of Section II of the VRA).
222. See supra Part III.C.2 (using the Gingles factors to show a violation of Section II of the VRA).
223. See supra Part III.C (laying out how HB 1369 violates Section II of the VRA).
224. See Brakebill v. Jaeger, 932 F.3d 671, 674 (8th Cir. 2019).
225. See id. at 678.
226. See id. at 690 (Kelly, J. dissenting)
legitimate fail-safe option.\footnote{227}

The Legislature should repeal and replace North Dakota’s HB 1369 with legislation that does not unduly disenfranchise United States citizens like Elvis Norquay.\footnote{228} While it is imperative that North Dakota prevent voter fraud, the replacement legislation should include fail-safe options for voters who financially, or otherwise, cannot abide by the specific requirements of the law.\footnote{229} Allowing voters to use an affidavit to vote will substantially reduce disenfranchisement. State legislatures must stop using non-existent voter fraud as an excuse to disenfranchise their citizens, but rather encourage and assist their citizens to exercise their fundamental right to vote.

\begin{footnotesize}
\footnote{227. See id. at 674 (where the court only ruled on the merits of plaintiffs’ challenge).}
\footnote{228. See Brakebill v. Jaeger, No. 1:16-CV-008, 2016 WL 7118548, at *1 (D.N.D. Aug. 1, 2016) (where the district court enjoined enforcement of North Dakota’s prior voter ID law that mirrored HB 1369).}
\footnote{229. See Appellees’ Brief at 14-16, Brakebill v. Jaeger, 905 F.3d 553 (8th Cir. 2018) (No. 18-1725) (outlining how Native Americans have previously relied on a fail-safe mechanism to vote).}
\end{footnotesize}
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