HOW DIFFICULT IS IT TO CHALLENGE LINES ON A MAP?: UNDERSTANDING THE BOUNDARIES OF GOOD FAITH IN *ABBOTT V. PEREZ*.

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"Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."[1]

I. INTRODUCTION.

Redistrict. Gerrymander. Apportion. Words that are never far removed from the minds of state legislators across the United States. Every ten years, the fifty states embark on the constitutionally mandated task of drawing new districting maps for United States House of Representative seats, as well as other state legislature districts.[2] With the power of the legislative branch at stake, the process often draws criticism, most notably of discriminatory intent.

Charges of discriminatory intent are met with the barrier of a good faith presumption when challenged in the courts. The Supreme Court's decision in *Abbott v. Perez* sets the stage for the good faith presumption in redistricting

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[*]I want to dedicate this note in honor of Professors Michael Morrison and David Guinn of Baylor Law School. They have tirelessly committed their careers to safeguarding the redistricting process in Texas. I would like to express my sincere gratitude to my wonderful parents; I would not be here without your support. I also want to thank Judge Valerie Zachary of the North Carolina Court of Appeals for inspiring me to seek greatness in legal writing. Finally, I want to thank all of the professors who have supported me and who have guided me on this journey.

[1]Reynolds v. Sims, 377 U.S. 533, 562 (1964).

[2]The Constitution provides that "Representatives . . . shall be apportioned among the several States . . . every subsequent Term of ten Years, in such Manner as they shall by Law direct." U.S. CONST. ART. I, § 2, cl. 3.

activities.[3] The Texas redistricting saga of *Perez* spans a decade and includes two trips to the Supreme Court: once in *Perry v. Perez* and again in *Abbott*.[4] The saga started with the 2010 census.[5] Due to increased population levels reported during the census, Texas gained four new seats in the United States House of Representatives.[6] Soon after, Texas developed a redistricting plan that would include the four new seats.[7] After completing its redistricting plan, Texas submitted it for preclearance to the United States Court of Appeals for the District of Columbia, as it was required to do because of its status under Section 5 of the Voting Rights Act.[8] Concurrently, the new maps were challenged in a federal court in Texas.[9] Ultimately, the Supreme Court ordered a federal district court to implement an interim districting map for the 2012 elections.[10] However, the Court required the district court "not to incorporate . . . any legal defects."[11]

After implementing the interim plans for the 2012 election, the Texas State Legislature adopted the interim plans as Texas's permanent district maps.[12] However, not long after implementing the plans, the now permanent districting maps faced new challenges in federal court.[13] Ultimately, the Supreme Court upheld the newly enacted redistricting plans, finding that the challengers to the plans had not presented sufficient evidence to prove the Texas Legislature's discriminatory intent and overcome the presumption of good faith.[14]

When an interested party challenges a state's redistricting plan, the burden lies with the challenger to prove discriminatory intent.[15] The burden requires overcoming the presumption of good faith awarded to the state

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[3] Abbott v. Perez, 138 S. Ct. 2305 (2018).

[4] *Id.* at 2313.

[5] Perry v. Perez, 565 U.S. 388, 390 (2012).

[6] *Id.*

[7] *Id.*

[8] Texas v. United States, 887 F. Supp. 2d 133, 138 (D.D.C. 2012); *see also Abbott*, 138 S. Ct. at 2315 ("The situation was further complicated by the requirement that Texas obtain preclearance of its new plans.").

[9] *Perry*, 565 U.S. at 391–92.

[10] *Abbott*, 138 S. Ct. at 2316 (quoting *Perry*, 565 U.S. at 394).

[11] *Id.* (quoting *Perry*, 565 U.S. at 394).

[12] *Id.* at 2317.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 2313.

legislature.[16] In a challenge to a state's redistricting plan on discrimination grounds, the challenger must demonstrate an intent to discriminate on the part of the state that is unrelated to the need for an expeditious conclusion to the redistricting efforts.[17] This note will first look at the historical contours of discrimination. Next, it will embark on an examination of good faith presumptions and the proof necessary to overcome them. Finally, this note will conclude by showing what a challenger must demonstrate to overcome the good faith presumption awarded to states in redistricting cases.

II. THE ROOT OF REDISTRICTING PROBLEMS: DISCRIMINATION.

Charges of discrimination are not new to the redistricting process.[18] Accordingly, any understanding of these redistricting issues must start with an understanding of discrimination.

A. The General Contours of Discrimination.

Discrimination is a concept understood by all members of society. *Webster's Dictionary* defines discrimination as a "prejudiced or prejudicial outlook, action, or treatment."[19] The legal world defines discrimination similarly as the "unequal treatment of persons, for a reason which has nothing to do with legal rights or ability."[20] Congress has addressed discrimination on a broad range of topics including race, sex, age, and disabilities.[21] Likewise, the Supreme Court has ruled in a number of cases on discrimination rooted in race, sex, and sexual orientation.[22] Further, an entire amendment of the Constitution, the Fourteenth Amendment,

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[16] *Id.* at 2325.

[17] *Id.* at 2328–39.

[18] Bush v. Vera, 517 U.S. 952, 981 (1996).

[19] *Discrimination*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/discrimination (last visited March 5, 2020).

[20] *Discrimination*, LAW.COM, https://dictionary.law.com/Default.aspx?selected=532 (last visited March 5, 2020).

[21] *See* WEST'S ENCYCLOPEDIA OF AMERICAN LAW 3 (2d ed. 2008); Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (discrimination based on race); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111–2, 125 Stat. 5 (discrimination based on sex); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34 (1967) (discrimination based on age); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (1990) (discrimination based on ability).

[22] *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (discrimination based on race); United States v. Virginia, 518 U.S. 515 (1996) (discrimination based on sex); Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (discrimination based on sexual orientation – in the marriage context).

specifically addresses discrimination.[23] As the Supreme Court notes, "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination . . . ."[24] The importance of discrimination is apparent as it has been addressed in many facets of American life.

The Supreme Court addressed discrimination in its landmark decision *Brown v. Board of Education*.[25] In *Brown*, African American children were seeking redress after being denied entry into the public schools in their community on the basis of their race.[26] Chief Justice Earl Warren highlighted the importance of guarding against the devastating effects of discrimination, concluding that discrimination "generate[s] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." [27] *Brown* exemplifies the need to alleviate discrimination from all areas of society, a need ever present to safeguard the redistricting process and by extension representative government.

Over the years, federal courts have defined the contours of discrimination. One federal district court defined discrimination in its basic terms as "in general a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored."[28] When courts define discrimination, they often do so in the context of laws created to address discrimination.[29] Based on such laws, some courts define discrimination as "the use of forbidden criterion as basis for disadvantageous difference in treatment."[30] In *Dowdell v. City of Apopka*, the Eleventh Circuit held that "discriminatory intent is not synonymous with a racially discriminatory motive . . . neither does it require proof that racial discrimination is sole purpose . . . rather, [it is] cumulative evidence of action and inaction which objectively manifests discriminatory intent."[31] Further, courts have defined discriminatory purpose in the equal protection context as an implication that the "decisionmaker selected a particular course of action

[23] U.S. CONST. amend. XIV.

[24] Loving v. Virginia, 388 U.S. 1, 10 (1967).

[25] 347 U.S. 483.

[26] *Id.* at 487.

[27] *Id.* at 494.

[28] Baker v. Cal. Land Title Co., 349 F. Supp. 235, 238 (C.D. Cal. 1972), *aff'd*, 507 F.2d 895 (9th Cir. 1974).

[29] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

[30] Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1067 (9th Cir. 2002).

[31] Dowdell v. City of Apopka, 698 F.2d 1181, 1185 (11th Cir. 1984).

at least in part because of, and not simply in spite of, the adverse impact that it would have on an identifiable group."[32] State courts applying equal protection likewise set a high bar for discrimination.[33] Accordingly, discriminatory intent by a legislature is identifiable by facts and inferences in the legislative process and acts suggesting a discriminatory purpose.

B. Balancing the XIV Amendment and Voting Rights Act.

The American redistricting process is not immune from discrimination. As in many other governmental actions, the Fourteenth Amendment protects from discrimination in redistricting. It provides that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[34] Congress further provided protections from discrimination in the redistricting process when it passed the Voting Rights Act.[35] Violations of the Act include when:

> it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[36]

Importantly, relief under the Voting Rights Act is separate but related to relief for racially discriminatory vote dilution under the Equal Protection Clause of the Fourteenth Amendment.[37]

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[32] Woods v. Edwards, 51 F.3d 577, 580 (5th Cir. 1995) (citing United States v. Galloway, 951 U.S. 64, 65 (5th Cir. 1992)); *see also* Antonelli v. New Jersey, 310 F. Supp. 2d 700, 715 (D.N.J. 2004), *aff'd*, 419 F.3d 267 (3d Cir. 2005) (citing Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)) ("Discriminatory intent 'implies that the decisionmaker . . . selected or reaffirmed particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon identifiable group."); United States v. Mesa-Roche, 288 F. Supp. 2d 1172, 1192 (D. Kan. 2003) (citing McCleskey v. Kemp, 481 U.S. 279, 298 (1987)) (same).

[33] *See, e.g.,* Nashville C. & St. L. Ry. v. Browning, 140 S.W.2d 781, 787 (Tenn. 1939), *aff'd*, 310 U.S. 362 (1940). ("In order to support a claim of discrimination under the equal protection clause of the Fourteenth Amendment there must be something that amounts to an intention or the equivalent of fraudulent purpose to disregard the fundamental principle of uniformity.").

[34] U.S. CONST. amend. XIV, § 1.

[35] Voting Rights Act 52 U.S.C. §§ 10101–10702 (2014).

[36] *Id.* at 10301.

[37] *See* Hall v. Louisiana, 108 F. Supp. 3d 419, 437–39 (M.D. La. 2015), *aff'd*, 884 F.3d 546 (5th Cir. 2018).

One goal of the Voting Rights Act is fair representation.[38] The concept of fair representation requires that "first, the mathematical strength of one person's vote should equal that of another person's vote as nearly as practicable; and second, assuming substantial voting equality, an apportionment scheme must not operate to minimize or cancel out the voting strength of minority elements of the populace."[39] Failure to meet the second element, even though achieving one-man-one vote, is known as dilution.[40] Under the Voting Rights Act, a plaintiff need only show the districting scheme "operates to minimize or cancel out their ability to elect their preferred candidates" to establish discrimination which violates the Act.[41]

Unlike an Equal Protection claim against a districting scheme, the Voting Rights Act does not require discriminatory intent.[42] Rather, following the 1982 amendments, the Voting Rights Act requires only a discriminatory effect.[43] To determine discriminatory effect:

> [f]irst, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district[;] . . . [s]econd, the minority group must be able to show that it is politically cohesive[;] . . . [and] [t]hird, the minority must be able to demonstrate the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate.[44]

The court must examine the totality of the circumstances to determine if the vote dilution was permissible.[45] Importantly, the burden of proof in a Voting Rights Act case is on the challenger.[46] In cases challenging a districting scheme under the Voting Rights Act, challengers may use evidence to prove discriminatory effects, including results of elections between nonminority candidates to demonstrate the success of minority-

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[38] 25 Am. Jur. 2d *Elections* § 34 (citing White v. Regester, 412 U.S. 755 (1973)).

[39] *Id.*

[40] *See* Howard v. Adams County Bd. of Sup'rs, 453 F.2d 455, 457 (5th Cir. 1972).

[41] Thornburg v. Gingles, 478 U.S. 30, 48 (1998).

[42] *Id.* at 71; Reno v. Bossier Par. Sch. Bd., 520 U.S. 471, 481–82 (1997).

[43] *See Thornburg*, 478 U.S. at 71.

[44] *Id.* at 50–51.

[45] Negron v. City of Miami Beach, 113 F.3d 1563, 1566 (11th Cir. 1997).

[46] York v. City of St. Gabriel, 89 F. Supp. 3d 843, 850 (M.D. La. 2015).

preferred candidates, statistical evidence, and the testimony of lay witnesses.[47]

The Voting Rights Act has evolved over the years and with it the contours of discrimination under the Act. In 1980, the Supreme Court held in *Mobile v. Bolden* that "[a] plaintiff must prove that the disputed plan was 'conceived or operated as [a] *purposeful* [device] to further racial . . . discrimination.'"[48] In response to this purposeful discrimination test, Congress amended the Voting Rights Act in 1982.[49] The newly amended section allows aggrieved parties to bring suit if "the court finds that a test or device has been used for the *purpose* or with the *effect* of denying or abridging the right of any citizen of the United States to vote on account of race or color."[50] Further, the Supreme Court has noted that "under the 'results test' of [section] 2, only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters."[51] The new language of section 2 broadens the actionable discrimination to include both purpose and effect.

Since the Voting Rights Act amendments, the Supreme Court has applied the amended Act, as well as the Fourteenth Amendment, in redistricting cases.[52] *Davis v. Bandemer* involved a challenge to Indiana's reapportionment plan for its state legislature's districts.[53] The Court held that under the Constitution and the Voting Rights Act, the challenger is "required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."[54] However, state legislatures must balance the Constitution's requirement that race not be a factor with the Voting Rights Act, which requires race as a consideration. Again, while Voting Rights Act cases require only discriminatory effect, a challenge under the Equal Protection Clause will need to demonstrate discriminatory intent.[55] Therefore, the definition of discrimination under the Act is instructive of the discrimination proof needed in redistricting cases.

[47] *See* Sanchez v. Bond, 875 F.2d 1488, 1491–94 (10th Cir. 1989).

[48] Mobile v. Bolden, 446 U.S. 55, 66 (1980) (emphasis added).

[49] *See* Voting Rights Act 52 U.S.C. § 10302 (2014).

[50] *Id.* (emphasis added).

[51] Thornburg v. Gingles, 478 U.S. 30, 63 (1986).

[52] *See* Davis v. Bandemer, 478 U.S. 109, 127 (1986).

[53] *Id.* at 113.

[54] *Id.* at 127.

[55] *See id.*

C. Discrimination in Legislative Acts.

Because redistricting is a legislative act, the contours of discrimination in legislative acts are instructive. Challengers can prove discriminatory intent and thereby challenge the act itself. As the Court noted in *Vieth v. Jubelirer*, "As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended."[56] Accordingly, it is possible to prove that a legislature acted with discriminatory intent in developing its redistricting plans, as supported by the discriminatory effect of the plans.

The Supreme Court has extensively discussed the characteristics and boundaries of discrimination in the legislative acts of Congress and the states. *Loving v. Virginia* was a seminal case on racial discrimination.[57] The Lovings, a biracial couple, married in the District of Columbia before moving back to their native state of Virginia, where it was a crime to be in an interracial marriage.[58] The Lovings were indicted and pled guilty in connection with their interracial marriage.[59] Soon after, the Lovings filed suit in federal court to have the statute at issue declared unconstitutional and as "repugnant to the Fourteenth Amendment."[60] The Supreme Court held that "freedom of choice to marry not be restricted by invidious racial discriminations," and accordingly ordered the convictions reversed.[61] The Court found specifically that "the racial classifications in these statutes [are] repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the 'integrity' of all races."[62] As the Court pointed out, in some cases, the lack of discriminatory intent may not be enough to salvage a discriminatory action.[63]

The Supreme Court has recognized racial discrimination beyond the contours of criminal statutes like in *Loving*. In *Washington v. Davis*, two police officers of color challenged a test used to determine promotions, which they claimed was racially discriminatory.[64] While upholding the written

[56] Vieth v. Jubelier, 541 U.S. 267, 281 (2004) (quoting *Davis*, 478 U.S. at 129).

[57] *See* Loving v. Virginia, 388 U.S. 1 (1967).

[58] *Id.* at 2.

[59] *Id.* at 3.

[60] *Id.*

[61] *Id.* at 12.

[62] *Id.* at 11 n. 11.

[63] *Id.* at 9.

[64] Washington v. Davis, 426 U.S. 229, 232 (1976).

employment test as not racially discriminatory, the Supreme Court noted that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."[65] The Court noted that one example where the outcome is different is where African Americans are excluded from serving on juries.[66]

In voting rights cases in particular, the Supreme Court has held that the challenger "may make the required showing through 'direct evidence' of legislative intent, 'circumstantial evidence of a district's shape and demographics,' or a mix of both," to prove discriminatory intent.[67] In *Cooper*, opponents of North Carolina's redistricting plans challenged the state's new boundaries for two congressional districts with substantial populations of black voters.[68] In discussing the balancing of the Fourteenth Amendment and the Voting Rights Act, the Court noted "[w]hen a State invokes the [Voting Rights Act] to justify race-based districting, it must (to meet the "narrow tailoring" requirement) show that it had 'a strong basis in evidence' for concluding that the statute required its action."[69] The Court concluded that racial consideration dominated the districting plans and North Carolina made no effort to justify the race-based considerations.[70] Therefore, the maps were unconstitutional.[71] Accordingly, the Court acknowledged the ability of racial discrimination to affect the redistricting process.

III. OVERCOMING A GOOD FAITH PRESUMPTION.

Establishing discriminatory intent is not an easy task as demonstrated in *Abbott*, which reaffirmed the good faith presumption awarded to state legislatures when adopting redistricting plans.[72]

[65] *Id.* at 242.

[66] *Id.*

[67] Cooper v. Harris, 137 S. Ct. 1455, 1464 (2017) (quoting Miller v. Johnson, 515 U.S. 900, 916 (1995)).

[68] *Id*. at 1464.

[69] *Id.* (citing Ala. Legislative Black Caucus v. Alabama, 575 U.S. 254, 278 (2015)) (parenthetical in original).

[70] *Id* at 1482.

[71] *Id.*

[72] Abbott v. Perez, 138 S. Ct. 2324 (2018).

A. Good Faith Presumption Explained.

Good faith presumptions have long existed in American jurisprudence. *Black's Law Dictionary* defines good faith as "a state of mind consisting in honesty in belief or purpose [or] faithfulness to one's duty or obligation."[73] Once established, challengers to a particular action must produce evidence to overcome the good faith presumption in order to successfully challenge a particular action.[74] Accordingly, a good faith presumption is a powerful defensive shield.[75]

In American jurisprudence, people presumptively act in good faith.[76] As the Colorado Supreme Court noted, "In the absence of proof to the contrary there is a presumption that men act in good faith and that they intend to do what they have the right to do."[77] Therefore, presumptions of good faith can be overcome by adverse evidence.[78] Accordingly, a legislature enjoys a presumption that it acts in good faith and according to its rights, unless proved otherwise.

Courts routinely apply these good faith presumptions to state actors, including public officials, prosecutors, and school officials.[79] Further, legislatures are often given the presumption of good faith in legislative acts, including the practice of redistricting.[80] In *Abbott*, the Court explained:

[73] *Good Faith*, BLACK'S LAW DICTIONARY (9th ed. 2009).

[74] Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239 (Fed. Cir. 2002).

[75] *See id.*

[76] 31A C.J.S. *Evidence* § 270; *see also* Maben v. Ranken, 358 P.2d 681, 682 (Cal. 1961) ("Good faith is presumed."); Murphy v. T. B. O'Toole, Inc., 87 A.2d 637, 638 (Del. Super. Ct. 1952) ("the legal presumption of good faith and honesty"); *In re* Carpenter's Estate, 5 N.W.2d 175, 179 (Iowa 1942) ("presumptions of law are ordinarily in favor of the honesty and good faith of the participants in a transaction").

[77] Golden Press, Inc. v. Rylands, 235 P.2d 592, 595 (Colo. 1951).

[78] Jones v. Citizens Bank of Clovis, 1954-NMSC-003, 58 N.M. 48, 265 P.2d 366, 368 (to overcome the presumption "the evidence should be clear and satisfactory"); Connelly v. McGoldrick, 133 N.Y.S.2d 327, 328 (Sup. Ct. 1954) ("a finding of good faith in them naturally follows in the absence of evidence reasonably supporting an inference of some improper motive for them"); Cowden v. Aetna Cas. & Sur. Co., 134 A.2d 223, 231 (1957) (finding a presumption of good faith "[i]n the absence of any proof to the contrary").

[79] *See Am-Pro*, 281 F.3d at 1234 (public officials); United States v. Armstrong, 517 U.S. 456, 458 (1996) (prosecutorial discretion); Wood v. Strickland, 420 U.S. 308, 309 (1975) (school board decision making).

[80] Abbott v. Perez, 138 S. Ct. 2324 (2018).

> Redistricting is primarily the duty and responsibility of the State, and federal-court review of districting legislation represents a serious intrusion on the most vital of local functions. [citation omitted] [I]n assessing the sufficiency of a challenge to a districting plan, a court must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. [citation omitted] And the good faith of (the) state legislature must be presumed.[81]

Therefore, state legislatures in their redistricting activities, are given a defensive shield that challengers must overcome.

B. *The Burden of Proof to Overcome Good Faith.*

Overcoming the shield of good faith is no easy task. *Abbott* clearly places the burden on the challenger to the state legislature's actions.[82] The Court rejected the challenger's argument seeking to shift the burden to the state legislature.[83] Instead, "it was the plaintiffs' burden to overcome the presumption of legislative good faith and show that the 2013 Legislature acted with invidious intent."[84]

The placement of the burden of proof on the challenger in cases of good faith presumptions is not unique to redistricting cases.[85] The analogous cases of governmental good faith presumptions place the burden of proof similarly on the challengers.[86] Further, these cases set the level of the burden of proof at clear and convincing.[87] The clear and convincing standard requires the ultimate factfinder to have "an abiding conviction that the truth of its factual

[81] *Id.* (quoting Miller v. Johnson, 515 U. S. 900, 915–16, (1995)) (internal quotation marks omitted) (parenthetical in original).

[82] *Id.* ("Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State.") (quoting Reno v. Bossier Parish School Bd., 520 U.S. 471, 481 (1997)).

[83] *Id.* at 2325.

[84] *Id.*

[85] Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239 (Fed. Cir. 2002); *see also* United States v. Armstrong, 517 U.S. 456, 464 (1996).

[86] *Am-Pro*, 281 F.3d at 1239; *Armstrong*, 517 U.S. at 464.

[87] *Am-Pro*, 281 F.3d at 1239 ("we believe that "clear and convincing" most appropriately describes the burden of proof applicable to the presumption of the government's good faith"); *Armstrong*, 517 U.S. at 464 ("in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties") (quoting United States v. Chemical Foundation, Inc., 272 U.S. 1, 14–15 (1926)).

contentions are highly probable."[88] The Federal Circuit Court justified the clear and convincing standard in *Am-Pro v. United States* noting, "for almost 50 years this court and its predecessor have repeated that we are 'loath to find to the contrary (of good faith), and it takes, and should take, well-nigh irrefragable proof to induce us to do so.'"[89] Although *Abbott* does not define an evidentiary standard, reason follows it is the same as other cases involving the good faith presumption for state actions.[90] Therefore, the challenger to redistricting plans must overcome the burden of the good faith presumption with clear and convincing evidence.

C. Overcoming a Good Faith Presumption.

Courts have demonstrated what type of evidence can rise to the level of clear and convincing in order to overcome a good faith presumption.[91] In *Am-Pro*, a case where a government contractor was disputing a decision of the Department of State[92], the Federal Circuit Court summarized what it would take to overcome the presumption in a variety of situations.[93] The court in *Am-Pro* specifically found that Am-Pro had not established that the government was "motivated alone by malice, or [that] there was a conspiracy . . . to get rid of [Am-Pro]."[94] Therefore, proving malice on the part of state actors may prove difficult, especially in redistricting cases.[95]

A few years before *Am-Pro*, the Supreme Court in *United States v. Armstrong* noted what a criminal defendant needs to show in order to defeat the good faith presumption awarded to prosecutors.[96] The Court noted that

[88] Colorado v. New Mexico, 467 U.S. 310, 316 (1984) (citing C. McCormick, Law of Evidence § 320, p. 679 (1954)).

[89] *Am-Pro*, 281 F.3d at 1239 (quoting Schaefer v. United States, 633 F.2d 945, 948–49 (Ct. Cl. 1980)) (parenthetical in original).

[90] *See* Abbott v. Perez, 138 S. Ct. 2305 (2018); *Am-Pro*, 281 F.3d at 1234; *Armstrong*, 517 U.S. at 456.

[91] *See Am-Pro*, 281 F.3d at 1239; *Armstrong*, 517 U.S. at 464.

[92] 281 F.3d at 1236–38.

[93] *Id.* at 1241. The court found that nothing "suggests that the government 'had a specific intent to injure' Am-Pro. [citation omitted] And Am-Pro has not alleged that these threats were 'motivated alone by malice' [citation omitted]; as part of a proven "conspiracy . . . to get rid of [Am-Pro]" [citation omitted]; as part of a course of governmental conduct which was 'designedly oppressive' [citation omitted]; or as 'actuated by animus toward' Am-Pro [citation omitted]." *Id.*

[94] *Id.* (quotations omitted).

[95] *See e.g., id*, at 1242–43.

[96] *Armstrong*, 517 U.S. at 464.

the presumption of good faith could be overcome by evidence of discrimination based on "race, religion, or other arbitrary classification."[97] The Court further listed specific things the criminal defendant could show to overcome the presumption.[98] Similarly to *Am-Pro*, *Armstrong* required a subjective mindset which is difficult to prove, especially by clear and convincing evidence.

The Court again discussed overcoming the presumption of good faith in *Wood v. Strickland*.[99] *Wood* involved the presumption as applied to school officials.[100] Specifically, the Court addressed Wood's section 1983 claim and the good faith presumption in relation to governmental immunity.[101] The Court noted immunity would not apply

> if [the school board member] knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.[102]

Wood, like *Am-Pro* and *Armstrong*, required a subjective state-of-mind to overcome the good faith presumption, which is difficult to prove.[103]

The burden can be overcome as challengers have defeated the good faith presumption in other contexts related to voting rights.[104] In *Drum v. Scott*, citizens of North Carolina challenged the redistricting plan of the state legislature as unconstitutional because the arithmetical deviation from perfect equality among the districts was 1.01.[105] Other redistricting proposals were available, but they required ignoring county lines, which as the court noted,

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[97] *Id.*

[98] *Id.* at 464–65 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886)) ("A defendant may demonstrate that the administration of a criminal law is "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive" that the system of prosecution amounts to "a practical denial" of equal protection of the law.").

[99] Wood v. Strickland, 420 U.S. 308, 319–22 (1975).

[100] *Id.*

[101] *Id.* at 322.

[102] *Id.*

[103] *See id.* at 321.

[104] *See* Drum v. Scott, 337 F. Supp. 588 (M.D.N.C. 1972).

[105] *Id.* at 589.

may lead to "invidious gerrymandering."[106] The court held that the state did not need to justify each variance, as long as the legislature made a good faith effort.[107] In determining what good faith meant, the court determined good faith did not mean the legislature had to choose the perfect plan.[108] However, a breach of good faith could be a "legislative failure to consider alternatives and preference for a 'makeshift bill produced by . . . an expedient political compromise.'"[109] The court found that the North Carolina Legislature had debated and considered alternate plans.[110] As long as those plans would not "markedly" reduce the issue at hand, the legislature was justified in rejecting them.[111] Accordingly, *Drum* demonstrates what is necessary to overcome good faith in a similar voting rights context.

IV. DEFEATING THE GOOD FAITH PRESUMPTION IN A REDISTRICTING CASE.

Although the burden on a challenger in overcoming the good faith presumption is high, the Supreme Court's jurisprudence indicates it is not insurmountable.[112]

A. Application of Arlington Heights.

The judicial branch has long examined the districting schemes of state and local governments for violations of the Equal Protection Clause of the Fourteenth Amendment.[113] In *Wright v. Rockefeller*, a case decided pre-*Arlington Heights*, the Court found that the New York Legislature was not "motivated by racial considerations," when creating the challenged districting schemes.[114] The Court placed the burden on the challenger to demonstrate the legislature's discriminatory intent.[115] Further, the Court required examination of the challenged districting process, as well as the

[106] *Id.*
[107] *Id.* at 590.
[108] *Id.*
[109] *Id.* (citing Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969)).
[110] *Id.* at 590–91.
[111] *Id.*
[112] *See infra* notes 113–66 and accompanying text.
[113] Wright v. Rockefeller, 376 U.S. 52, 56–57 (1964).
[114] *Id.* at 56.
[115] *Id.*

totality of the circumstances.[116] After *Wright*, the Supreme Court later outlined different factors to look at when examining the totality of the circumstances to determine discriminatory purpose or intent.

In defining the parameters of the good faith presumption, the *Abbott* court analyzed a five-factor test from *Arlington Heights v. Metro. Housing Development Corp*.[117] In *Arlington Heights*, the Metropolitan Housing Development Corporation challenged a decision by the Village of Arlington Heights not to rezone a fifteen-acre parcel for multi-family tenants.[118] The plaintiffs claimed that the decision was motivated by racial discrimination.[119] The Court noted "racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified."[120] While not discounting the discriminatory impact of the action, the Court reasoned that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[121] A determination of discriminatory intent requires " a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," with the discriminatory impact providing an important starting point.[122]

The *Arlington Heights* Court outlined a process for determining the existence of discriminatory intent.[123] The dissent in *Abbott* noted the factors of the *Arlington Heights* analysis.[124] The factors include:

> (1) the discriminatory "impact of the official action," (2) the "historical background," (3) the "specific sequence of events leading up to the challenged decision," (4) departures from procedures or substance, and (5) he "legislative or administrative history," including any "contemporary statements" of the lawmakers.[125]

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[116] *Id.* at 57.
[117] Abbott v. Perez, 138 S. Ct. 2305, 2325, 2346 (2018).
[118] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 254 (1977).
[119] *Id.* at 254, 264.
[120] *Id.* at 265–66.
[121] *Id.* at 265.
[122] *Id.* at 266.
[123] *Id.* at 266–67.
[124] Abbott v. Perez, 138 S. Ct. 2305, 2346 (2018) (Sotomayor, J., dissenting).
[125] *Id.*

As the majority in *Abbott* noted, any single factor is not dispositive.[126] The *Arlington Heights* Court placed the "burden of proving that discriminatory purpose was a motivating factor" in the decision on the challengers.[127] Because the challengers failed to produce evidence to show the discriminatory purpose, the Court held that they failed to meet their burden of proving the factors of discriminatory intent.[128]

Post-*Arlington Heights* courts have applied the five factors to establish discriminatory intent in a variety of state actions.[129] Recently, in *North Carolina State Conference of the NAACP v. McCrory*, the Fourth Circuit applied the factors to find discriminatory intent in North Carolina's voter I.D. law.[130] Finding the challengers met their burden of proof, the court stated that challengers "need not show that discriminatory purpose was the 'sole' or even a 'primary' motive for the legislation, just that it was 'a motivating factor.'"[131] On the other hand, the Fifth Circuit applied the factors declining to invalidate Texas's voter I.D. law.[132] The *Arlington Heights* analysis serves as the foundation for overcoming the good faith presumption in districting cases.

B. *Insufficient to Overcome the Good Faith Presumption.*

The Court in *Abbott* highlighted the deficiencies in a challengers' attempt to overcome the good faith presumption, clearly showing what is not enough. The majority in *Abbott* focused on how the motivation to expeditiously reach a conclusion is not enough to overcome the presumption of good faith.[133] The Court went into detail of why this is a legitimate goal for a legislature and why it is not suggestive of discriminatory intent.[134] As the Court explained,

[126] *See id.* at 2327.

[127] *Arlington Heights*, 429 U.S. at 270.

[128] *Id.* at 270–71.

[129] N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 233 (4th Cir. 2016); Veasey v. Abbott, 830 F.3d 216, 230–41 (5th Cir. 2016) (en banc).

[130] *McCrory*, 831 F.3d at 220–33. In applying the factors, the court noted that "North Carolina's history of voting discrimination; the surge in African American voting; the legislature's knowledge that African Americans voting translated into support for one party; and the swift elimination of the tools African Americans had used to vote and imposition of a new barrier at the first opportunity to do so" established a discriminatory intent. *Id.* at 233.

[131] *Id.* at 220 (citing *Arlington Heights*, 429 U.S. 266).

[132] *Veasey*, 830 F.3d at 230–413 (5th Cir. 2016) (en banc).

[133] Abbott v. Perez, 138 S. Ct. 2305, 2327 (2018).

[134] *Id.*

"[l]itigating districting cases is expensive and time consuming, and until the districts to be used in the next election are firmly established, a degree of uncertainty clouds the electoral process. Wishing to minimize these effects is understandable and proper."[135]

The majority also recognized the historical background of the case, as well as that of its predecessor, *Perry*, but decided it was not determinative of discriminatory intent.[136] Specifically, the Court noted that "[t]he 'historical background' of a legislative enactment is 'one evidentiary source' relevant to the question of intent. But we have never suggested that past discrimination flips the evidentiary burden on its head."[137] *Abbott*'s view on historical background is demonstrative of the principle that no single *Arlington Heights* factor is determinable.

In other situations, the Supreme Court has noted other factors that standing alone are insufficient to overcome the presumption of good faith.[138] The fact the legislature used race as a factor in its decision making is not enough to overcome the good faith presumption.[139] The Court explained this principle in *Ricci v. DeStefano*.[140] While *Ricci* is not a redistricting case, it serves as an example of the good faith presumption in state action. *Ricci* involved minority firefighters who felt they were prevented from passing a test required for promotion.[141] Justice Kennedy, writing for the majority, noted that "certain government actions to remedy past racial discrimination--actions that are themselves based on race--are constitutional."[142] The actions in which decision-making based on race are not discriminatory are very limited.[143] *Ricci* and *Abbott* highlight the level of evidence that is insufficient

[135] *Id.*

[136] *Id.* at 2325.

[137] *Id.* (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977).

[138] Ricci v. DeStefano, 557 U.S. 557, 563 (2009) (holding that race-based action is excusable under Title VII if an employer can present a "strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.").

[139] *Id.* at 582. This is also evidenced in the requirements of the Voting Rights Act to consider race in creating minority districts. 52 U.S.C. § 10301.

[140] *Ricci*, 557 U.S. at 581–82.

[141] *Id.* at 562–63.

[142] *Id.* at 582.

[143] *Id.* (Justice Kennedy noted the actions are constitutional "only where there is a 'strong basis in evidence' that the remedial actions were necessary.").

to demonstrate discriminatory intent and overcome the good faith presumption.[144]

Absent direct evidence, isolated information regarding the legislature and its members is insufficient to overcome the burden of the good faith presumption.[145] The court in *NAACP* noted that "statements from only a few legislators, or those made by legislators after the fact are of limited value."[146] Further, evidence that the legislature considered better plans but ultimately chose a different plan for legitimate reasons is insufficient to overcome the burden.[147] Unless clear evidence of the legislative intent is demonstrable, the challenger may find it difficult to prove discriminatory intent.[148]

The requirements of Voting Rights Act challenges also demonstrate what is insufficient to overcome the good faith presumption. In Voting Rights Act challenges, "evidence of a simple disproportionality between the voting potential and the legislative seats won by a racial or political group is insufficient."[149] As the Supreme Court stated in *Chapman v. Meier*, "the mere assertion of such possible weaknesses in a legislature's multimember districting plan was insufficient to establish a denial of equal protection."[150] Similarly, it is likely insufficient to assert merely the racially discriminatory effect of the redistricting plans in order to overcome the presumption of good faith. Further, while it may support a challenge under the Voting Rights Act, evidence of the results of elections between nonminority candidates to demonstrate the success of minority-preferred candidates, statistical evidence, and the testimony of lay witnesses is insufficient to overcome the good faith presumption for Equal Protection Clause claims.[151]

Even if the challengers are able to infer discriminatory intent from the legislature's actions, the inference alone may not be enough.[152] In *Wright,* the

[144] *Id.* (explaining that there must be a 'strong basis' in evidence for the government to show no racial discrimination); Abbott v. Perez, 138 S. Ct. 2305, 2325 (2018) (opining that evidence a legislature enacted redistricting plans with 'legal defects' was not determinative of intent).

[145] *See* N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 229 (4th Cir. 2016).

[146] Id.

[147] Drum v. Scott, 337 F. Supp. 588, 590–91 (M.D.N.C. 1972).

[148] *See* Cooper v. Harris, 137 S. Ct. 1455, 1481–822 (2017).

[149] 25 AM. JUR. 2d *Elections* § 50.

[150] Chapman v. Meier, 420 U.S. 1, 17 (1975).

[151] *Compare id.* (". . . there must be more evidence than a simple proportionality between the voting potential and the legislative seats won by a racial or political group."), *with* Sanchez v. Bond, 875 F.2d 1488, 1491–94 (10th Cir. 1989).

[152] Wright v. Rockefeller, 376 U.S. 52, 55–57 (1964).

Court noted that "[e]vidence which could have supported inferences that racial considerations might have moved the state legislature, but, even if so, we agree that there also was evidence to support his finding that the contrary inference was 'equally, or more, persuasive.'"[153] Accordingly, any challenger will likely need to demonstrate that discriminatory intent is the only possible inference from the legislature's action, if not some other facts demonstrating the actual discriminatory intent in order to overcome the good faith presumption.

C. Sufficient to Overcome the Good Faith Presumption.

Unfortunately, the *Abbott* Court did not explicitly outline a bright-line test for what is enough to overcome the presumption of good faith.[154] However, the Court did hint at what might overcome the presumption.[155] The majority suggested that it may be enough to overcome the presumption of good faith if the motivation of the legislature to solidify the redistricting plans expeditiously was rooted in getting "acceptance of plans that it knew were unlawful."[156] In *Abbott*, the district court had justified its finding against the legislature on the grounds that the legislature enacted the plans "regardless of [the plans'] legal infirmities."[157] The Supreme Court suggested that if the challengers had shown the legislature knew of the legal infirmities, they could overcome the presumption.[158] The Court even suggested that relying on plans that were invalid could overcome the presumption.[159] The challengers in *Abbott* did not prove the subjective state of the legislature in regards to the invalidity or illegality of the plans.[160] However, if a challenger were to prove the legislature knew the court-adopted plans were unlawful, illegitimate, or otherwise invalid, evidence of such could overcome the presumption of good faith.[161]

Further, *Abbott* suggests that not engaging in a proper process could weigh against the legislature and aid in overcoming the presumption of good

[153] *Id.* at 56–57.
[154] Abbott v. Perez, 138 S. Ct. 2305, 2327 (2018).
[155] *Id.*
[156] *Id.*
[157] *Id.* (quoting 274 F. Supp. 3d 624, 650 (W.D. Tex. 2017)).
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.* at 2325.

faith.[162] The dissent in *Abbott* argued that "the Legislature did not engage in a deliberative process," which was a point weighing against the presumption of good faith.[163] The majority disagreed believing the legislature did engage in a deliberative process.[164] The majority's holding suggests that if the legislature had not, that fact may be enough to overcome the presumption of good faith.[165] Accordingly, if a challenger can prove by clear and convincing evidence that the legislature did not engage in a deliberative process, the presumption of good faith may be overcome.[166]

V. CONCLUSION.

As the challengers to Texas's redistricting plan discovered in *Abbott*, overcoming the presumption of good faith awarded to state legislatures is a difficult feat. Future challengers learned it is not an impossible feat. The Court firmly placed the burden of proof on the challenger.[167] Further, as is the case with other presumptions of good faith, the challenger will have to produce evidence that meets a clear and convincing standard.[168] While expeditious process, historical background, and decision-making based in race are not enough to overcome the presumption, they can factor into the complete picture.[169] A challenger, however, may prove more, including a failure to have a deliberative process or subjective knowledge of the plan's illegality or invalidity.[170] If the challenger is able to prove such things, the challenger may be able to prove discriminatory intent and overcome the presumption of good faith.[171] Absent such evidence, the presumption of good faith will remain a barrier for challengers to state redistricting plans.

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[162] *See id*. at 2325, 2353.

[163] *Id.* at 2353.

[164] *See id.* at 2327.

[165] *See id.*

[166] *See supra* text accompanying notes 85–90.

[167] Abbott v. Perez, 138 S. Ct. 2305, 2325–27 (2018).

[168] *See supra* text accompanying notes 85–90.

[169] *See supra* text accompanying notes113–32, 133–53.

[170] *See* Abbott, 138 S. Ct. at 2325, 2327 (referencing deliberative process in this case and the subjective knowledge of illegality in Hunter v. Underwood, 471 U.S. 222 (1985)).

[171] *See supra* text accompanying notes 154–166.