No. _____

In the

Supreme Court of the United States

MARC VEASEY, et al.,
Applicants,
V.
GREG ABBOTT, et al.,
Respondents.

APPENDIX TO APPLICATION TO VACATE FIFTH CIRCUIT STAY OF PERMANENT INJUNCTION

Directed to the Honorable Clarence Thomas, Associate Justice of the United States Supreme Court and Circuit Justice for the Fifth Circuit

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Table of Contents

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

March 18, 2016

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 14-41127 Marc Veasey, et al v. Greg Abbott, et al
USDC No. 2:13-CV-193
USDC No. 2:13-CV-263
USDC No. 2:13-CV-291
USDC No. 2:13-CV-348

At the direction of the Court, this is to advise that the motion to vacate and all other pending motions are carried with the case for en banc consideration. The parties are directed to brief the pending motions in accordance with the current briefing schedule.

Sincerely,

LYLE W. CAYCE, Clerk

Amanda Sutton-Foy

By: _____
Amanda Sutton-Foy, Deputy Clerk
504-310-7670

Ms. Leah Camille Aden
Mr. Vishal Agraharkar
Ms. Anna Marks Baldwin
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United States Court of Appeals

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CORRECTED

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-41127

MARC VEASEY; JANE HAMILTON; SERGIO DELEON; FLOYD CARRIER; ANNA BURNS; MICHAEL MONTEZ; PENNY POPE; OSCAR ORTIZ; KOBY OZIAS; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; JOHN MELLOR-CRUMMEY, KEN GANDY; GORDON BENJAMIN, EVELYN BRICKNER

Plaintiffs – Appellees

TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS,

Intervenor Plaintiffs - Appellees

v.

GREG ABBOTT, in his Official Capacity as Governor of Texas; CARLOS CASCOS, Texas Secretary of State; STATE OF TEXAS; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety,

Defendants - Appellants

UNITED STATES OF AMERICA,

Plaintiff - Appellee

TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND; IMANI CLARK,

Intervenor Plaintiffs - Appellees

v.

STATE OF TEXAS; CARLOS CASCOS, Texas Secretary of State; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety,

Defendants - Appellants

TEXAS STATE CONFERENCE OF NAACP BRANCHES; MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES,

Plaintiffs - Appellees

v.

CARLOS CASCOS, Texas Secretary of State; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety,

Defendants - Appellants

LENARD TAYLOR; EULALIO MENDEZ, JR.; LIONEL ESTRADA; ESTELA GARCIA ESPINOSA; MARGARITO MARTINEZ LARA; MAXIMINA MARTINEZ LARA; LA UNION DEL PUEBLO ENTERO, INCORPORATED,

Plaintiffs - Appellees

v.

STATE OF TEXAS; CARLOS CASCOS, Texas Secretary of State; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety,

Defendants - Appellants

Defendant – Appellant

Appeal from the United States District Court for the Southern District of Texas, Corpus Christi

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(Opinion August 5, 2015, 5 Cir., 2015, 796 F.3d 487)

Before STEWART, Chief Judge, JOLLY, DAVIS, JONES, SMITH, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON and COSTA, Circuit Judges.

BY THE COURT:

A member of the court having requested a poll on the petition for rehearing en banc, and a majority of the circuit judges in regular active service and not disqualified having voted in favor,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-41127

MARC VEASEY; JANE HAMILTON; SERGIO DELEON; FLOYD CARRIER; ANNA BURNS; MICHAEL MONTEZ; PENNY POPE; OSCAR ORTIZ; KOBY OZIAS; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; JOHN MELLOR-CRUMMEY, KEN GANDY; GORDON BENJAMIN, EVELYN BRICKNER,

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v.

STATE OF TEXAS; CARLOS CASCOS, Texas Secretary of State; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety,

Defendants – Appellants

Appeal from the United States District Court
for the Southern District of Texas
U.S.D.C. No. 2:13-CV-193

Before STEWART, Chief Judge, HAYNES, Circuit Judge, and BROWN, District Judge.*

This court issued its judgment in this appeal on August 5, 2015. The Defendants-Appellants have filed a petition for rehearing en banc, which has the effect of staying the mandate on the court's judgment until the petition is determined. Accordingly,

IT IS ORDERED that the opposed motion of appellee USA for limited remand directing the district court to enter appropriate interim relief, consistent with this Court's August 5, 2015, opinion, pending issuance of the mandate and further proceedings below is CARRIED with the CASE, pending determination of the petition for rehearing en banc.

IT IS FURTHER ORDERED that the opposed motion of the "Veasey-LULAC" appellees to issue forthwith a limited mandate instructing the District Court to consider, in light of this Court's opinion, remedial orders necessary in order to conduct the November 3, 2015, election lawfully and in compliance with the Judgment of the Court, is CARRIED with the CASE, pending determination of the petition for rehearing en banc.

IT IS FURTHER ORDERED that appellants' opposed motion to stay issuance of the mandate pending filing of a petition for a writ of certiorari in

* District Judge for the Eastern District of Louisiana, sitting by designation.

the U.S. Supreme Court is CARRIED with the CASE, pending determination of the petition for rehearing en banc.

IT IS FURTHER ORDERED that the opposed motion of appellees Veasey-LULAC, NAACP-MALC, Taylor, Imani Clark, and Texas League of Young Voters Education Fund to expedite the issuance of the mandate is DENIED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

September 02, 2015

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

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USDC No. 2:13-CV-193
USDC No. 2:13-CV-263
USDC No. 2:13-CV-291
USDC No. 2:13-CV-348

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Jim deMontluzin

By: _____
James deMontluzin, Deputy Clerk
504-310-7679

Ms. Leah Camille Aden
Mr. Vishal Agraharkar
Ms. Anna Baldwin
Mr. J. Campbell Barker
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
August 5, 2015

Lyle W. Cayce
Clerk

No. 14-41127

MARC VEASEY; JANE HAMILTON; SERGIO DELEON; FLOYD CARRIER; ANNA BURNS; MICHAEL MONTEZ; PENNY POPE; OSCAR ORTIZ; KOBY OZIAS; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; JOHN MELLOR-CRUMMEY, KEN GANDY; GORDON BENJAMIN, EVELYN BRICKNER,

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v.

STATE OF TEXAS; CARLOS CASCOS, Texas Secretary of State; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety,

Defendants – Appellants

Appeal from the United States District Court
for the Southern District of Texas

Before STEWART, Chief Judge, HAYNES, Circuit Judge, and BROWN, District Judge.*

HAYNES, Circuit Judge:

In 2011, Texas ("the State") passed Senate Bill 14 ("SB 14"), which requires individuals to present one of several forms of photo identification in order to vote. *See* Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws 619. Plaintiffs filed suit challenging the constitutionality and legality of the law. The district court held that SB 14 was enacted with a racially discriminatory purpose, has a racially discriminatory effect, is a poll tax, and unconstitutionally burdens the right to vote. *See Veasey v. Perry*, 71 F. Supp. 3d 627, 633 (S.D. Tex. 2014).

We VACATE and REMAND the Plaintiffs' discriminatory purpose claim for further consideration in light of the discussion below. If on remand the district court finds that SB 14 was passed with a discriminatory purpose, then the law must be invalidated. However, because the finding on remand may be different, we also address other arguments raised by the Plaintiffs. We AFFIRM the district court's finding that SB 14 has a discriminatory effect in violation of Section 2 of the Voting Rights Act and remand for consideration of the proper remedy. We VACATE the district court's holding that SB 14 is a poll tax and RENDER judgment in the State's favor. Because the same relief is available to Plaintiffs under the discriminatory effect finding affirmed

* District Judge for the Eastern District of Louisiana, sitting by designation.

herein, under the doctrine of constitutional avoidance, we do not address the merits of whether SB 14 unconstitutionally burdens the right to vote under the First and Fourteenth Amendments. We therefore VACATE this portion of the district court's opinion and DISMISS Plaintiffs' First and Fourteenth Amendment claims.

I. Factual Background and Procedural History

A. Senate Bill 14

Prior to the implementation of SB 14, a Texas voter could cast a ballot in person by presenting a registration certificate—a document mailed to voters upon registration. TEX. ELEC. CODE §§ 13.142, 63.001(b) (West 2010). Voters appearing without the certificate could cast a ballot by signing an affidavit and presenting one of multiple forms of identification ("ID"), including a current or expired driver's license, a photo ID (including employee or student IDs), a utility bill, a bank statement, a paycheck, a government document showing the voter's name and address, or mail addressed to the voter from a government agency. *Id.* §§ 63.001, 63.0101 (West 2010).

With the implementation of SB 14, Texas began requiring voters to present certain specific forms of identification at the polls. These include: (1) a Texas driver's license or personal identification card issued by the Department of Public Safety ("DPS") that has not been expired for more than 60 days; (2) a U.S. military identification card with a photograph that has not been expired for more than 60 days; (3) a U.S. citizenship certificate with a photo; (4) a U.S. passport that has not been expired for more than 60 days; (5) a license to carry a concealed handgun issued by DPS that has not been expired for more than 60 days; or (6) an Election Identification Certificate ("EIC") issued by DPS that

has not been expired for more than 60 days. TEX. ELEC. CODE § 63.0101 (West Supp. 2014).[1]

SB 14 states that DPS "may not collect a fee for an [EIC] or a duplicate [EIC]," TEX. TRANSP. CODE § 521A.001(b) (West 2013), and allows DPS to promulgate rules for obtaining an EIC. *Id.* § 521A.001(f); § 521.142. To receive an EIC, DPS rules require a registered voter to present either: (A) one form of primary ID, (B) two forms of secondary ID, or (C) one form of secondary ID and two pieces of supporting information. 37 TEX. ADMIN. CODE §15.182(1). Thus, any application for an EIC requires either one Texas driver's license or personal identification card that has been expired for less than two years, or one of the following documents, accompanied by two forms of supporting identification: (1) an original or certified copy of a birth certificate from the appropriate state agency; (2) an original or certified copy of a United States Department of State Certification of Birth for a U.S. citizen born abroad; (3) U.S. citizenship or naturalization papers without a photo; or (4) an original or certified copy of a court order containing the person's name and date of birth and indicating an official change of name and/or gender. *Id.* § 15.182(3).[2]

[1] SB 14 also requires the name on the photo ID to be "substantially similar" to the voter's registered name. TEX. ELEC. CODE § 63.001(c) (West Supp. 2014). If the names are not identical but are substantially similar, the voter must sign an affidavit that the voter and the registered voter are one and the same. *Id.* If the names are not substantially similar, the voter may submit a provisional ballot and within six days must go to the county registrar with additional ID to verify his or her identity. *Id.* §§ 63.001(g), 63.011, 65.0541(a) (West Supp. 2014).

[2] Among the forms of supporting identification are: voter registration cards, school records, insurance policies that are at least two years old, identification cards or driver's licenses issued by another state that have not been expired for more than two years, Texas vehicle or boat titles or registrations, military records, Social Security cards, W-2 forms, expired driver's licenses, government agency ID cards, unexpired military dependent identification cards, Texas or federal parole or mandatory release forms, federal inmate ID

Before May 27, 2015, a statutory provision distinct from SB 14 imposed a $2 or $3 fee for a certified copy of a birth certificate.[3] TEX. HEALTH & SAFETY CODE § 191.0045 (West 2010). As discussed below, after the district court issued its judgment, the Texas Legislature passed Senate Bill 983 during the 2015 legislative session and eliminated this fee.

Persons who have a disability are exempt from SB 14's photo ID requirement once they provide the voter registrar with documentation of their disability from the U.S. Social Security Administration or Department of Veterans Affairs. TEX. ELEC. CODE § 13.002(i) (West Supp. 2014). Other persons may vote by provisional ballot without a photo ID if they file affidavits either asserting a religious objection to being photographed or that their SB 14 ID was lost or destroyed as a result of a natural disaster occurring within 45 days of casting a ballot. *Id.* § 65.054. Additionally, voters who will be 65 or older as of the date of the election may vote early by mail. *Id.* § 82.003.

If a voter is unable to provide SB 14 ID at the poll, the voter can cast a provisional ballot after executing an affidavit stating that the voter is registered and eligible to vote. *Id.* § 63.001(a), (g). The vote counts if the voter produces SB 14 ID to the county registrar within six days of the election. *Id.* § 65.0541.

SB 14 requires county registrars to inform applicants of the new voter ID requirements when issuing voter registration certificates, *id.* § 15.005, and

cards, Medicare or Medicaid cards, immunization records, tribal membership cards, and Veteran's Administration cards. TEX. ADMIN. CODE § 15.182(4).

[3] The Department of State Health Services ("DSHS") waived most of the fees for obtaining a birth certificate to get an EIC, but this provision separately required the Bureau of Vital Statistics, local registrars, and county clerks to collect a $2 fee for the issuance of a certified copy of a birth certificate, and permitted local registrars and county clerks to impose an addition $1 fee. TEX. HEALTH & SAFETY CODE § 191.0045(d), (e), (h) (West 2010).

requires both the Secretary of State and voter registrar of each county with a website to post SB 14's requirements online. *Id.* § 31.012(a). The requirements must also be placed prominently at polling places. *Id.* § 62.016. Additionally, the Secretary of State must "conduct a statewide effort to educate voters regarding the identification requirements for voting." *Id.* § 31.012(b). The district court found that SB 14 allocated a one-time expenditure of $2 million for voter education.[4] *Veasey*, 71 F. Supp. 3d at 649.

B. Procedural History

The State began enforcing SB 14 on June 25, 2013.[5] The plaintiffs and intervenors (collectively, "Plaintiffs") filed suit against Defendants to enjoin enforcement of SB 14, and their suits were consolidated before one federal district court in the Southern District of Texas. *See Veasey*, 71 F. Supp. 3d at 632. Plaintiffs claim that SB 14's photo identification requirements violate the Fourteenth and Fifteenth Amendments to the United States Constitution and Section 2 of the Voting Rights Act because SB 14 was enacted with a racially discriminatory purpose and has a racially discriminatory effect. Plaintiffs also claim that SB 14's photo ID requirement places a substantial burden on the fundamental right to vote under the First and Fourteenth Amendments, and constitutes a poll tax under the Fourteenth and Twenty-Fourth Amendments. The State defends SB 14 as a constitutional requirement imposed to prevent

[4] The district court also found that one-quarter of the $2 million was earmarked for research into what type of voter education was needed. *Veasey*, 71 F. Supp. 3d at 649.

[5] A three-judge district court declined to grant judicial preclearance to override the United States Attorney General's denial of preclearance. *See Texas v. Holder*, 888 F. Supp. 2d 113, 144–45 (D.D.C. 2012), *vacated and remanded*, 133 S. Ct. 2886 (2013). The Supreme Court vacated and remanded this decision when it issued *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), which held that the preclearance requirement in Section 5 of the Voting Rights Act was unconstitutional. Thereafter, Texas began enforcing SB 14.

in-person voter fraud and increase voter confidence and turnout.

The district court conducted a nine-day bench trial at which dozens of expert and lay witnesses testified by deposition or in person. Following that bench trial, the district court issued a lengthy and comprehensive opinion holding:

> SB 14 creates an unconstitutional burden on the right to vote [under the First and Fourteenth Amendments], has an impermissible discriminatory effect against Hispanics and African-Americans [under Section 2 of the Voting Rights Act], and was imposed with an unconstitutional discriminatory purpose [in violation of the Fourteenth and Fifteenth Amendments and Section 2]. [Furthermore,] SB 14 constitutes an unconstitutional poll tax [under the Fourteenth and Twenty-Fourth Amendments].

Veasey, 71 F. Supp. 3d at 633. Shortly before in-person early voting was scheduled to begin for the November 2014 elections, the district court "enter[ed] a permanent and final injunction against enforcement of the voter identification provisions [of SB 14], Sections 1 through 15 and 17 through 22," not enjoining sections 16, 23, and 24 in accordance with SB 14's severability clause.[6] *Id.* at 707 & n.583. Since it struck the State's voter ID law so close to the impending November 2014 election, the district court ordered the State to "return to enforcing the voter identification requirements for in-person voting in effect immediately prior to the enactment and implementation of SB 14." *Id.* The district court retained jurisdiction to review any remedial legislation and to pre-approve any administrative remedial measures. *Id.* at 707–08.

[6] Sections 16 and 23 relate to increasing the penalties and offense levels for election code violations. *See* TEX. ELEC. CODE § 64.012 note (West 2010 & Supp. 2014). Section 24 has expired, but once related to the purposes for which the voter registrars could use certain funds disbursed under the election code. *See* Act of May 16, 2011, 82d Leg., R.S., ch. 123, § 24, 2011 Tex. Gen. Laws 619.

In October 2014, the State appealed the district court's final judgment, and this court granted the State's emergency motion for stay pending appeal, grounding its decision primarily in "the importance of maintaining the status quo on the eve of an election." *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014). Plaintiffs filed emergency motions before the Supreme Court, seeking to have this court's stay vacated. The Supreme Court denied these motions to vacate the stay of the district court's judgment. *See Veasey v. Perry*, 135 S. Ct. 9 (2014). Therefore, this court's stay of the district court's injunction remained in place, and SB 14 continues to be enforced.

C. Senate Bill 983

On May 27, 2015, after oral argument was heard on this appeal, Senate Bill 983 ("SB 983") was signed into law, eliminating the fee "for searching or providing a record, including a certified copy of a birth record, if the applicant [for the record] states that the applicant is requesting the record for the purpose of obtaining an election identification certificate . . . ." Act of May 25, 2015, 84th Leg., R.S., ch. 130, 2015 Tex. Sess. Laws Serv. Ch. 130 (West) (to be codified as an amendment to TEX. HEALTH & SAFETY CODE § 191.0046(e)) (hereinafter "SB 983"). SB 983 became effective immediately. *Id.* §§ 2–3 (to be codified as Note to TEX. HEALTH & SAFETY CODE § 191.0046); *see also* S.J. of Tex., 84th Leg., R.S. 1449–50 (2015) (reporting unanimous passage out of the Texas Senate); H.J. of Tex., 84th Leg., R.S., 4478–79 (2015) (reporting passage by 142 to 0, with one member absent, in the Texas House). SB 983 provides that "a local registrar or county clerk who issues a birth record" required for an EIC that would otherwise be entitled to collect a fee for that record "is entitled to payment of the amount from the [D]epartment [of State Health Services]." Act of May 25, 2015, 84th Leg., R.S., ch. 130 (to be codified as an

amendment to TEX. HEALTH & SAFETY CODE § 191.0046(f)). SB 983 did not appropriate funds to spread public awareness about the free birth records.

The parties filed Federal Rule of Appellate Procedure 28(j) letters noting SB 983's passage.[7] The State emphasizes that SB 983 would prevent voters from being charged $2 to $3 for birth certificates necessary to obtain EICs, would eliminate fees to search for those records, and that "[t]he State will reimburse local governments any amount they would have retained had a fee been charged." Therefore, the State argues that the Legislature "does not harbor some invidious institutional purpose" and that SB 983 "eliminates the core factual premise of plaintiffs' already-unavailing claims that SB14 imposes an [unconstitutional] burden [under the First and Fourteenth Amendments], violates VRA § 2, and constitutes a poll tax." *Id.* Plaintiffs also filed Rule 28(j) letters, asserting that SB 983 does not affect the district court's discriminatory purpose or effect analyses or its unconstitutional burden analysis. Plaintiffs highlight that the Legislature passed SB 983 only after oral argument was held in this case and that the Legislature ignored many more comprehensive bills that were submitted during this legislative session.

[7] The parties also filed Rule 28(j) letters noting the passage of SB 1934, effective on September 1, 2015, which provides that state-issued identification cards issued to individuals age 60 and older expire on a date to be specified by DPS. Act of May 29, 2015, 84th Leg., R.S., S.B. 1934 (to be codified as an amendment to TEX. TRANSP. CODE § 521.101(f)). Currently, ID cards for those 60 and older do not expire. 37 TEX. ADMIN. CODE § 15.30. While Plaintiffs contend that SB 1934 will exacerbate the discriminatory effect of SB 14, the State insists SB 1934 was passed merely to comply with the federal REAL ID Act. *See* 6 C.F.R. § 37.5(a). The district court did not address this issue below and DPS has yet to issue regulations implementing this legislation. As such, this issue is not yet ripe for our review, and we do not address it. *See Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (citation and internal quotation marks omitted)).

II. Standing

Article III standing cannot be waived or assumed, *Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation, Inc.*, 32 F.3d 205, 207 (5th Cir. 1994), and we review questions of standing de novo. *See Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 190 (5th Cir. 2012). As most of the private, political, and organizational plaintiffs have standing, we have jurisdiction to consider the claims raised on appeal. *Nat'l Rifle Ass'n of Am., Inc. v. McCraw* (*McCraw*), 719 F.3d 338, 344 n.3 (5th Cir. 2013) ("Only one of the petitioners needs to have standing to permit us to consider the petition for review." (quoting *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007))). However, a court should not permit a party that it knows lacks standing to participate in the case. *See id.*

In its brief, the Texas League of Young Voters Education Fund ("Texas League") states that it has "ceased operations." "A claim becomes moot when 'the parties lack a legally cognizable interest in the outcome.'" *Id.* at 344 (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). Thus, the mootness doctrine "ensures that the litigant's interest in the outcome continues to exist throughout the life of the lawsuit . . . including the pendency of the appeal." *McCorvey v. Hill*, 385 F.3d 846, 848 (5th Cir. 2004) (citation and internal quotation marks omitted). Because the Texas League no longer suffers the injury allegedly imposed by SB 14, we conclude that its claims are moot. *See McCraw*, 719 F.3d at 344. As other Plaintiffs have standing, we nonetheless have jurisdiction over the appeal. *Id.* at 344 n.3.

III. Discussion

A. Discriminatory Purpose

The State appeals the district court's judgment that SB 14 was passed with a discriminatory purpose in violation of the Fourteenth and Fifteenth

Amendments and Section 2 of the Voting Rights Act. We review this determination for clear error; as the district court did, we apply the framework articulated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265–68 (1977), which remains the proper analytical framework for these kinds of cases. *See Price v. Austin Indep. Sch. Dist.*, 945 F.2d 1307, 1312 (5th Cir. 1991). "If the district court's findings are plausible in light of the record viewed in its entirety, we must accept them, even though we might have weighed the evidence differently if we had been sitting as a trier of fact." *Id.* (citation and internal quotation marks omitted). However, if the district court committed an error of law in making its fact findings in this case, we may set aside those fact findings and remand the case for further consideration. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291–92 (1982). In the words of the Supreme Court, when the district court's "findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue." *Id.* Although the district court properly cited the *Arlington Heights* framework, we conclude that some "findings are infirm," necessitating a remand on this point.

"Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Arlington Heights*, 429 U.S. at 265. However, "[r]acial discrimination need only be one purpose, and not even a primary purpose, of an official action for a violation to occur." *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009) (citation and internal quotation marks omitted). *Arlington Heights* enumerated a multi-factor analysis for evaluating whether a facially neutral law was passed with a discriminatory purpose, and courts must perform a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *See* 429 U.S. at 266. The

appropriate inquiry is not whether legislators were aware of SB 14's racially discriminatory effect, but whether the law was passed *because of* that disparate impact. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 278–79 (1979).[8] Importantly, although discriminatory effect is a relevant consideration, knowledge of a potential impact is not the same as intending such an impact. *See id.*; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) ("Under extant precedent purposeful discrimination requires more than 'intent as volition or intent as awareness of consequences.'" (quoting *Feeney*, 442 U.S. at 279)); *Arlington Heights*, 429 U.S. at 266 (noting that "[t]he *impact* of the official action . . . may provide an important starting point" under a discriminatory purpose analysis (emphasis added)).

The Court articulated the following non-exhaustive list of factors to guide courts in this inquiry: (1) "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes," (2) "[t]he specific sequence of events leading up to the challenged decision," (3) "[d]epartures from normal procedural sequence," (4) "substantive departures . . . particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached," and (5) "[t]he legislative or administrative history . . . especially where there are

[8] For instance, Representative Smith, a proponent of the legislation, stated that it was "common sense" the law would have a disproportionate effect on minorities. *Veasey*, 71 F. Supp. 3d at 657. Similarly, Bryan Hebert, Deputy General Counsel in the Office of the Lieutenant Governor, acknowledged that the poor were most likely to be affected by SB 14. *Id.* Without additional forms of identification, Hebert warned that SB 14 was unlikely to obtain (the now-defunct) preclearance under Section 5 of the Voting Rights Act. *Id.* at 658. However, these bare acknowledgments by two people of the law's potential impact are insufficient to demonstrate that the entire legislature *intended* this disparate effect. *See Lewis v. Ascension Parish Sch. Bd.*, 662 F.3d 343, 349 (5th Cir. 2011) ("A discriminatory purpose, however, requires more than a mere awareness of consequences." (citation and internal quotation marks omitted)).

contemporary statements by members of the decision making body, minutes of its meetings, or reports." *Arlington Heights*, 429 U.S. at 267–68. "Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). If the law's defenders are unable to carry this burden, the law is invalidated. *See id.* at 231.[9]

The State's stated purpose in passing SB 14 centered on protection of the sanctity of voting, avoiding voter fraud, and promoting public confidence in the voting process. No one questions the legitimacy of these concerns as motives; the disagreement centers on whether there were impermissible motives as well. We recognize that evaluating motive, particularly the motive of dozens of people, is a difficult enterprise. We recognize the charged nature of accusations of racism, particularly against a legislative body, but we also recognize the sad truth that racism continues to exist in our modern American society despite years of laws designed to eradicate it.

Against this backdrop, we respect and appreciate the district court's efforts to address this difficult inquiry. We now examine the evidence upon which the district court relied and find some of it "infirm." In seeking to discern the Legislature's intent under the *Arlington Heights* framework, the district court relied extensively on Texas's history of enacting racially discriminatory voting measures. *See Veasey*, 71 F. Supp. 3d at 633–39. It noted, for instance,

[9] Because SB 14 is of recent vintage and alleged to have present-day implications, we need not address the concerns raised in *Overton v. City of Austin*, 871 F.2d 529, 540 (5th Cir. 1989), regarding evaluation of older statutes. *Id.* ("[T]he *Arlington Heights* evaluation of original legislative intent only supports a Fourteenth Amendment challenge where a facially neutral state law has been shown to produce disproportionate effects along racial lines.").

Texas's use of all-white primaries from 1895–1944, literacy tests and secret ballots from 1905–1970, and poll-taxes from 1902–1966. *Id.* at 634. All of the most pernicious discriminatory measures predate 1965. *See Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2628 (2013) (noting that "history did not end in 1965"). In *McCleskey v. Kemp*, the Supreme Court held that "unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value." 481 U.S. 279, 298 n.20 (1987) (resolving that laws in force during and just after the Civil War were not probative of the legislature's intent in 1972). More recently, *Shelby County* also counseled against reliance on non-contemporary evidence of discrimination in the voting rights context. 133 S. Ct. 2612, 2618–19, 2631 (voiding Section 4 of the Voting Rights Act because "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions"). In light of these cases, the relevant "historical" evidence is relatively recent history, not long-past history.[10] We recognize that history provides context and that historical discrimination (for example, in education) can have effects for many years. But, given the case law we describe above and the specific issue in this case, we conclude that the district court's heavy reliance on long-ago history was error.

We also recognize that not all "history" was "long ago" and that there were some more contemporary examples of discrimination identified by the Plaintiffs in the district court. However, even the relatively contemporary

[10] "Relatively recent" does not mean immediately contemporaneous. *Shelby County* emphasized that "things have changed" in the 50 years since the 1965 passage of the Voting Rights Act, 133 S. Ct. at 2625, but it did not articulate a particular time limit, *see id.* at 2625–27. Nor do we. Suffice it to say the closer in time, the greater the relevance, while always recognizing that history (even "long-ago history") provides context to modern-day events.

examples of discrimination identified by the district court are very limited in their probative value in connection with discerning the Texas Legislature's intent. In a state with 254 counties, we do not find the reprehensible actions of county officials in one county (Waller County) to make voting more difficult for minorities to be probative of the intent of legislators in the Texas Legislature, which consists of representatives and senators from across a geographically vast, highly populous, and very diverse state. *See Miss. State Chapter, Operation Push, Inc. v. Mabus* (*Operation Push*), 932 F.2d 400, 409–10 (5th Cir. 1991) (stating that "evidence of disparate registration rates or similar registration rates in *individual counties* could not provide dispositive support" for the claim that plaintiffs could not participate in the political process at the *state* level (emphasis added)).

The only relatively contemporary evidence regarding statewide discrimination comes from a trio of redistricting cases that go in three directions, thus forming a thin basis for drawing any useful conclusions here. The first, *Bush v. Vera*, 517 U.S. 952 (1996), found discrimination in redistricting to create *more* minority representation. The second found voter dilution affecting Hispanics in the redrawing of one congressional district. *See League of Latin Am. Citizens v. Perry*, 548 U.S. 399, 439–40 (2006). Although citing discussions of the historic discrimination against Hispanics in Texas, the Court did not base its decision on a conclusion that the legislature intentionally discriminated based upon ethnicity. *Id.* Instead, it looked at history as a context for the disenfranchisement of voters who had grown disaffected with the Hispanic Congressman the legislature sought to protect by its redrawing of the district. *Id.* at 440. The Court did not find any voter dilution as to African-Americans in the drawing of a different district. *Id.* at 444. The third case, *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated and*

remanded on other grounds, 133 S.Ct. 2885 (2013), was a preclearance case where the burden of proof was different and which was vacated in light of *Shelby County* and remains unresolved as of this date. Thus, these cases do not support a finding of "relatively recent" discrimination.

The district court's heavy reliance on post-enactment speculation by opponents of SB 14 was also misplaced. Discerning the intent of a decisionmaking body is difficult and problematic. *Hunter*, 471 U.S. at 228. To aid in this task, courts may evaluate "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action . . . ." *Arlington Heights*, 429 U.S. at 268. Where the court is asked to identify the intent of an entire state legislature, as opposed to a smaller body, the charge becomes proportionately more challenging. *Hunter*, 471 U.S. at 228. As *United States v. O'Brien* explained:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

391 U.S. 367, 383–84 (1968).

To ascertain the Texas Legislature's purpose in passing SB 14, the district court relied to a large extent on speculation by the bill's opponents

about proponents' motives (rather than evidence of their statements and actions). For instance, it credited the following: Representative Hernandez-Luna's simple assertion that two city council seats in Pasadena, Texas were made into at-large seats "in order to dilute the Hispanic vote and representation"; Representative Veasey's testimony that his appointment as vice-chair for the Select Committee on Voter Identification and Voter Fraud was only for appearances; repeated testimony that the 2011 session was imbued with anti-immigrant sentiment;[11] testimony by the bill's opponents that they believed the law was passed with a discriminatory purpose; and testimony by Senator Uresti that he knew SB 14 was intended to impact minority voters.

"The Supreme Court has . . . repeatedly cautioned—in the analogous context of statutory construction—against placing too much emphasis on the contemporaneous views of a bill's opponents."[12] *Butts v. City of New York*, 779 F.2d 141, 147 (2d Cir. 1985) (citing, inter alia, *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 204 n.24 (1976)). We too have held that such statements are entitled to "little weight." *Mercantile Tex. Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 638 F.2d 1255, 1263 (5th Cir. Unit A Feb. 1981). The Second Circuit considered such speculation in *Butts* and held that "the speculations and accusations of . . . [a] few opponents simply do not support an inference of the kind of racial

[11] In turn, the relevance of this evidence rests upon the unsupported premise that a legislator concerned about border security or opposed to the entry into Texas of undocumented immigrants is also necessarily in favor of suppressing voting by American citizens of color.

[12] The problematic evidence is the speculation and conclusions of the opposing legislators, not any direct evidence. In other words, we are not saying bill opponents lack credibility because they are opposing legislators, as credibility is a question for the trier of fact. Instead, we are saying that the speculation and conclusory assertions of opposing legislators are not an appropriate foundation for a finding of purposeful discrimination.

animus discussed in, for example, *Arlington Heights*." 779 F.2d at 147. The Tenth Circuit has likewise concluded that "discriminatory intent cannot be ascertained by eliciting opinion testimony from witnesses, often out of context and accumulating those responses as substantive evidence of the motive of the [enactment]." *Dowell by Dowell v. Bd. of Educ. of Okla. City Pub. Schs., Indep. Dist. No. 89*, 890 F.2d 1483, 1503 (10th Cir. 1989) *rev'd sub nom. on other grounds*, *Bd. of Educ. of Okla. City Pub. Sch., Indep. Sch. Dist. No. 89 v. Dowell,* 498 U.S. 237 (1991). We agree with our sister circuits. Conjecture by the opponents of SB 14 as to the motivations of those legislators supporting the law is not reliable evidence.[13]

Moreover, the district court appeared to place inappropriate reliance upon the type of postenactment testimony which courts routinely disregard as unreliable. *See Barber v. Thomas*, 560 U.S. 474, 485–86 (2010) ("And whatever interpretive force one attaches to legislative history, the Court normally gives little weight to statements, such as those of the individual legislators, made *after* the bill in question has become law."); *see also Edwards v. Aguillard*, 482 U.S. 578, 596 n.19 (1987) ("The Court has previously found the postenactment elucidation of the meaning of a statute to be of little relevance in determining the intent of the legislature contemporaneous to the passage of the statute."). While probative in theory, even those (after-the-fact) stray statements made by a few individual legislators voting for SB 14 may not be the best indicia of the Texas Legislature's intent.[14] *See Operation Push*, 932 F.2d at 408 (finding

[13] In the different but somewhat analogous realm of employment discrimination, we have similarly rejected the plaintiff's testimony that he or she believed that the motivation of his or her employer was racial or other discrimination. *See Byers v. Dall. Morning News, Inc.*, 209 F.3d 419, 426–27 (5th Cir. 2000).

[14] For a discussion of these remarks, see footnote 8 above.

"isolated and ambiguous statements made by . . . legislators" were not compelling evidence of that law's discriminatory purpose); *Jones v. Lubbock*, 727 F.2d 364, 371 n.3 (5th Cir. 1984) (refusing to "judge intent from the statements [made by] a single member" of the legislative body).

We also have concerns about undue reliance on the procedural departures enumerated in the district court's opinion as evidence of intentional discrimination. *See Veasey*, 71 F. Supp. 3d at 645–59. While we do not reweigh evidence for the district court, we have noted that "objection[s] to typical aspects of the legislative process in developing legislation," such as increasing the number of votes a law requires for passage, may not be sufficient to demonstrate intent. *Cf. Operation Push*, 932 F.2d at 408–09 & n.6. The rejection of purportedly ameliorative amendments does not itself constitute a procedural departure; rather, the court must evaluate whether opponents of the legislation were deprived of process. *See Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 161 (5th Cir. 2007) (holding that the Texas Legislature did not deviate from procedural norms sufficient to demonstrate discriminatory intent where the Legislature held well-attended committee hearings, those opposed to the legislation were allowed to testify, and legislators met with private parties harboring concerns about the proposed law). Finally, we observe that context also matters; the procedural maneuvers employed by the Texas Legislature occurred, as the district court notes, only after repeated attempts to pass voter identification bills were blocked through countervailing procedural maneuvers. *See Veasey*, 71 F. Supp. 3d at 645–46. Given this context, the district court must carefully scrutinize whether the tactics

employed by the Texas Legislature are indeed evidence of purposeful discrimination.[15]

While the district court's comprehensive opinion included some evidence supporting its finding of discriminatory purpose, given the degree of attention paid to the evidence discussed above, we cannot gauge whether the district court would have reached the same conclusion after correct application of the legal standard weighing the remaining evidence against the contrary evidence. This is particularly true in light of the extensive discovery of legislators' private materials that yielded no discriminatory evidence.[16] We are mindful that it is not our role to reweigh the evidence for the district court. *See Pullman-Standard*, 456 U.S. at 291–92 ("When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law . . . there should be remand for further proceedings to permit the *trial court* to make the missing findings." (emphasis added)); *N. Miss. Commc'ns, Inc. v. Jones*, 951 F.2d 652, 656–57 & n.21 (5th Cir. 1992) (citing *Pullman-Standard*, 456 U.S. at 291) (remanding a case, for the fourth time, for factual findings under the proper standard). Thus, instead of ourselves evaluating any remaining evidence and drawing a conclusion as to discriminatory purpose, we conclude that the proper procedure is to vacate this

[15] Some of the procedural maneuvers employed by proponents of the legislation included: (1) designating SB 14 as an emergency, which prevented opponents of the law from using "blocker bills" to slow down the bill; (2) suspension of the two-thirds rule; (3) use of the Committee of the Whole, which eliminated the arduous committee process; and (4) inclusion of a $2 million fiscal note despite prior instructions by the Lieutenant Governor and the Speaker of the Texas House that no bills with fiscal notes could be advanced in the 2011 legislative session. *Veasey*, 71 F. Supp. 3d at 647–50.

[16] While it is true that it is unlikely for a legislator to stand in the well of the state house or senate and articulate a racial motive, it is also unlikely that such a motive would permeate a legislative body and not yield any private memos or emails.

portion of the district court's judgment (and its accompanying remedies) and remand to the district court for a reexamination of the probative evidence underlying Plaintiffs' discriminatory purpose claims weighed against the contrary evidence, in accord with the standards elucidated above.

B. Discriminatory Effect

If the district court again finds discriminatory purpose on remand, then it would not need to address effect. However, because the result could be different on remand and because the district court addressed, and the parties fully briefed, discriminatory effect, we now turn to consideration of it. Plaintiffs allege that SB 14 has a discriminatory effect in violation of Section 2 of the Voting Rights Act, which proscribes any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color." 52 U.S.C. § 10301(a). Unlike discrimination claims brought pursuant to the Fourteenth Amendment, Congress has clarified that violations of Section 2(a) can "be proved by showing discriminatory effect alone." *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986); *see also* 52 U.S.C. § 10301(b).

To satisfy this "results test," Plaintiffs must show not only that the challenged law imposes a burden on minorities, but that "a certain electoral law, practice, or structure interacts with social and historical conditions *to cause* an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47 (emphasis added).

We now adopt the two-part framework employed by the Fourth and Sixth Circuits to evaluate Section 2 "results" claims. It has two elements:

> [1] [T]he challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning

> that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice, and
>
> [2] [T]hat burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.

League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014) (citations and internal quotation marks omitted), *cert. denied*, 135 S. Ct. 1735 (2015); *see also Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated on other grounds by* No. 14-3877, 2014 U.S. App. LEXIS 24472, at *2 (6th Cir. Oct. 1, 2014) (applying the two-part framework above); *cf. Frank v. Walker*, 768 F.3d 744, 754–55 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015).[17]

While courts regularly utilize statistical analyses to discern whether a law has a discriminatory impact, *see e.g.*, *Operation Push*, 932 F.2d at 410–11, the Supreme Court has also endorsed factors ("the Senate Factors") enunciated by Congress to apprehend whether such an impact exists and whether it is a product of current or historical conditions of discrimination. *Gingles*, 478 U.S. at 44–45. These factors include:

[17] While the Fourth and Sixth Circuits both adopted this two-part framework, the Seventh Circuit in *Frank* only did so "for the sake of argument." 768 F.3d at 755. *Frank* expressed reservations about applying the second element when the district court did not specifically find that state action caused social and historical conditions begetting discrimination. *Id.* at 753. Instead, *Frank* held that a law does not violate Section 2 where a challenged law or practice does not combine with the effects of *state-sponsored* discrimination to disparately impact minorities. *Id.* We need not decide whether the Seventh Circuit's standard is the proper one to apply in this context as the district court's findings satisfied even that heightened standard. Unlike in *Frank*, the district court found both historical and contemporary examples of discrimination in both employment and education by the State of Texas, and it attributes SB 14's disparate impact, in part, to those effects. *Veasey*, 71 F. Supp. 3d at 636, 666–67.

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 36–37 (quoting S. Rep. No. 97-417, at 28–29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206–07). Two additional considerations are:

> [8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group[;]
> [9.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id.

These factors are not exclusive, and "'there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.'" *Id.* at 45 (quoting S. Rep. at 29). While the State argues

that these factors are inapposite in the "vote denial" context, we disagree.[18] *See Operation Push*, 932 F.2d at 405–06 (affirming the district court's application of the Senate Factors in a vote denial case).

Guided by these two frameworks, we evaluate the district court's discriminatory effect finding for clear error. *See id.* at 410. Of course, we review legal questions de novo. *Gingles*, 478 U.S. at 79.

1. Disparate Impact

The district court found that 608,470 registered voters, or 4.5% of all registered voters in Texas, lack SB 14 ID. *Veasey*, 71 F. Supp. 3d at 659. Of those, 534,512 voters did not qualify for a disability exemption from SB 14's requirements. *Id.* The latter figure, which was derived by comparing the Texas Election Management System with databases containing evidence of who possesses SB 14 ID, is known as the "No-Match List."[19] *Id.*

Plaintiffs' experts then relied on four distinct methods of analysis to determine the races of those on the No-Match List.[20] *Id.* at 659–61. Those

[18] Vote denial "refers to practices that prevent people from voting or having their votes counted," while vote dilution "refers to practices that diminish minorities' political influence in places where they are allowed to vote." *Farrakhan v. Gregoire*, 590 F.3d 989, 998 n.13 (9th Cir. 2010), *rev'd en banc,* 623 F.3d 990.

[19] While the State's expert criticized this calculation, the expert conceded that the methodology used to derive this figure was well accepted. Nonetheless, the State's expert attempted to challenge the No-Match List because 21,731 people on the No-Match List later voted in the spring 2014 election. We accept the well-reasoned logic relied upon by the district court, which noted that some of those 21,731 who voted may have done so by mail, which does not require SB 14 ID, while others may have obtained SB 14 ID between the calculation of the No-Match List and the spring 2014 election.

[20] We recognize that the terms used to describe different racial or ethnic groups inoffensively can themselves be the subject of dispute. Where we quote a witness or the district court, we use their terms. Where we discuss a witness's testimony, we use that witness's terms. For our part, because we are a reviewing court, while recognizing the imperfections of these terms, we use the terms used by the district court and the parties to refer to the three groups that were the subject of the evidence in this case: Anglos (used to describe non-Hispanic Caucasians), Hispanics, and African-Americans. We also recognize

included: (1) ecological regression analysis, (2) a homogenous block group analysis, (3) comparing the No-Match List to the Spanish Surname Voter Registration list, and (4) reliance upon data provided by Catalist LLC, a company that compiles election data. *Id.* at 661. The ecological regression analysis performed by Dr. Stephen Ansolabehere, an expert in American electoral politics and statistical methods in political science, which compared the No-Match List with census data, revealed that Hispanic registered voters and Black registered voters were respectively 195% and 305% more likely than their Anglo peers to lack SB 14 ID. *Id.* According to Dr. Ansolabehere, this disparity is "statistically significant and highly unlikely to have arisen by chance." The block group analysis yielded similar results, and other experts arrived at similar conclusions. *Id.* These statistical analyses of the No-Match List were corroborated by a survey of over 2,300 eligible Texas voters, which concluded that Blacks were 1.78 times more likely than Whites, and Latinos 2.42 times more likely, to lack SB 14 ID. *Id.* at 662–63. Even the study performed by the State's expert, which the district court found suffered from "severe methodological oversights," found that 4% of eligible White voters lacked SB 14 ID, compared to 5.3% of eligible Black voters and 6.9% of eligible Hispanic voters. *Id.* at 663 & n.239. The district court thus credited the testimony and analyses of Plaintiffs' three experts, each of which found that SB 14 disparately impacts African-American and Hispanic registered voters in Texas.[21] *Id.* at 663.

that many Texans identify with more than one racial or ethnic group and some Texans do not fall into any of these three groups; we address the evidence and arguments as they were presented by the parties.

[21] The State insists that the district court erred by failing to ask whether SB 14 causes a racial *voting* disparity, rather than a disparity in voter ID possession. We have never required such a showing. Section 2 asks whether a standard, practice, or procedure results

The district court likewise concluded that SB 14 disproportionately impacted the poor. *Id.* at 664–65. It credited expert testimony that 21.4% of eligible voters earning less than $20,000 per year lack SB 14 ID, compared to only 2.6% of voters earning between $100,000 and $150,000 per year. *Id.* at 664. Those earning less than $20,000 annually were also more likely to lack the underlying documents to get an EIC. *Id.* Dr. Jane Henrici, an anthropologist and professorial lecturer at George Washington University, explained that:

> [U]nreliable and irregular wage work and other income . . . affect the cost of taking the time to locate and bring the requisite papers and identity cards, travel to a processing site, wait through the assessment, and get photo identifications. This is because most job opportunities do not include paid sick or other paid leave; taking off from work means lost income. Employed low-income Texans not already in possession of such documents will struggle to afford income loss from the unpaid time needed to get photo identification.

Id.

Furthermore, the court found that the poor are less likely to avail themselves of services that require ID, such as obtaining credit and other

in "a denial *or abridgement* of the right . . . to vote." 52 U.S.C. § 10301(a). Abridgement is defined as "[t]he reduction or diminution of something," BLACK'S LAW DICTIONARY 8 (10th ed. 2014), while the Voting Rights Act defines "vote" to include "all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted." 52 U.S.C. § 10101(e). The district court's finding that SB 14 abridges the right to vote by causing a racial disparity in voter ID possession falls comfortably within this definition. Our case law dictates the same outcome. *See Operation Push*, 932 F.2d at 409, 413 (affirming the district court's finding that a voter registration law violated Section 2 when it resulted in a 25% difference in the registration rates between eligible black and white voters); *see also Chisom v. Romer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting) ("If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity 'to participate in the political process' than whites, and [Section] 2 would therefore be violated.").

financial services. *Id.* They are also less likely to own vehicles and are therefore more likely to rely on public transportation. *Id.* at 665, 672–73. As a result, the poor are less likely to have a driver's license and face greater obstacles in obtaining photo identification. *Id.* Even obtaining an EIC poses an obstacle—the district court credited evidence that hundreds of thousands of voters face round-trip travel times of 90 minutes or more to the nearest location issuing EICs.[22] *Id.* at 672. Of eligible voters without access to a vehicle, a large percentage faced trips of three hours or more to obtain an EIC. *Id.*

Although the State does not dispute the underlying factual findings, it raises several purported legal errors in the district court's decision. We conclude that the district court did not reversibly err in determining that SB 14 violates Section 2 by disparately impacting minority voters.

Foremost, the State disputes the propriety of using statistical analyses to determine the racial composition of the No-Match List. Citing *Bartlett v. Strickland*, 556 U.S. 1, 17–18 (2009), the State argues that the Supreme Court foreclosed using statistical analysis to determine the racial composition of a group of voters. That is a mischaracterization. *Strickland* cautions against adopting standards that require judges to make complicated, race-based predictions in redistricting cases, a concern that is not implicated here. *Id.* It

[22] The State attacks the entirety of the district court's findings on the grounds that the lower court did not distinguish between SB 14's statutory provisions and the Department of Public Safety's implementing regulations. Although an issue raised for the first time on appeal, like this one, is waived, this argument likewise fails on the merits. *See Fruge v. Amerisure Mut. Ins. Co.*, 663 F.3d 743, 747 (5th Cir. 2011). The State's proposed rule of law would contradict both *Gingles*'s demand that courts take a "functional view of the political process" in assessing Section 2 claims, 478 U.S. at 45, 49 n.15, 67, and Section 2's language itself, which proscribes voting practices "imposed or applied" such that they produce a discriminatory result, 52 U.S.C. § 10301(a). Moreover, we have previously affirmed a district court's finding of discriminatory purpose where the district court found the law delegated too much discretion to local officials. *See Operation Push*, 932 F.2d 400.

is well within the district court's purview to assess whether minorities are disproportionately affected by a change in the law, based on statistical analyses. *See e.g.*, *Operation Push*, 932 F.2d at 410–11. Using accepted statistical methodologies to estimate the racial composition of Texas voters does not require the type of race-based predictions that the Court referenced in *Strickland.*[23] Instead, this case is more akin to *Operation Push*, in which this court approved using surveys and "independent statistical tests" to project the impact on minorities of newly enacted voter registration procedures. *Id.*

The State also relies on *Strickland* to argue that the canon of constitutional avoidance militates against requiring the State to ensure that voters of various races possess voter ID in equal measure. *See* 556 U.S. at 18. The district court's discriminatory effect finding, if affirmed, would do no such thing; nor does Section 2 mandate the sort of remedy to which the State objects. Section 2 merely prohibits the State from imposing burdens on minority voters that would disproportionately diminish their ability to participate in the political process.[24] *Cf. Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.* ("*Inclusive Communities*"), 135 S. Ct. 2507, 2524

[23] These problematic predictions included inquiries like: "What types of candidates have white and minority voters supported together in the past and will those trends continue?" *Strickland*, 556 U.S. at 17.

[24] To the extent the State argues that the "results" test is unconstitutional, we note that this court and many others have upheld its constitutional validity. *See, e.g.*, *Vera*, 517 U.S. at 990–91 (collecting cases upholding Section 2's constitutionality); *Jones*, 727 F.2d at 373–74. "Congressional power to adopt prophylactic measures to vindicate the purposes of the fourteenth and fifteenth Amendments is unquestioned" and "[o]n those occasions when the Court has stricken enactments as exceeding congressional power under the enforcement clauses of the fourteenth or fifteenth amendments, the congressional objective has usually deviated from the central purposes of those amendments—to ensure black equality." *Jones*, 727 F.2d at 373–74. We are bound by these precedents to conclude that Section 2, as applied here, does not deviate from that purpose.

(2015) ("Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice . . . . If additional measures are adopted, courts should strive to design them to eliminate racial disparities through race-neutral means. Remedial orders that impose racial targets or quotas might raise more difficult constitutional questions." (citation omitted)).

Next, the State argues that the analyses relied upon by the district court are unreliable because one source of data—the State's voter registration database—does not list the race or ethnicity of voters. The State contends that Plaintiffs' expert should have relied instead on data provided by the Department of Public Safety ("DPS"). The district court rightly rejected this argument. The DPS database did not allow registrants to identify themselves as "Hispanic" until May 2010. As the Texas Director of Elections conceded, the number of Hispanic registered voters is "exponentially higher" than the DPS records would suggest. We cannot fault the district court for refusing to rely on inaccurate data, particularly in light of the State's failure to maintain accurate data.

Finally, the State suggests that conveying the disparity in ID possession in comparative percentages is misleading. *See Frank*, 768 F.3d at 755 n.3 (stating that purveying data as a comparative percentage is a "misuse" that "produces a number of little relevance to the problem"). Instead, the State believes a less deceptive method is to state that 2% of Anglo, 5.9% of Hispanic, and 8.1% of African-American registered voters lack SB 14 ID. Even assuming the State is correct, conveying the disparities in the way the State suggests

does not change the analysis. The district court did not err in concluding that SB 14 disproportionately impacts Hispanic and African-American voters.[25]

2. The Senate Factors

We next consider the district court's finding that SB 14 "produces a discriminatory result that is actionable because [it] . . . interact[s] with social and historical conditions in Texas to cause an inequality in the electoral opportunities enjoyed by African-Americans and Hispanic voters." *Veasey*, 71 F. Supp. 3d at 698. The district court found Senate Factors 1, 2, 5, 6, 7, 8, and 9 probative. *Id.* at 697.

(a) Senate Factor 1: History of Official Discrimination

As part of this "searching practical evaluation of the past and present reality," *Gingles*, 478 U.S. at 45 (citation and internal quotation marks omitted), the district court again found that Texas's history of discrimination in voting acted in concert with SB 14 to limit minorities' ability to participate in the political process. We repeat *Shelby County*'s admonishment that "history did not end in 1965," 133 S. Ct. at 2628, and emphasize that contemporary examples of discrimination are more probative than historical examples. Even discounting this factor and the district court's analysis of it, however, we conclude that the other factors support its finding that SB 14 has a discriminatory effect.

[25] The State argues for the first time on appeal that there is no disparate impact where, as here, the gross number of Anglos without SB 14 ID—296,156 people—almost totals the number of African-American, Hispanic, and "other" voters without SB 14 ID—312,314 people. Courts have never required the gross number of affected minority voters to exceed the gross number of affected Anglo voters. *See League of Women Voters*, 769 F.3d at 233; *see also Frank*, 768 F.3d at 753–54 (comparing the percentage of minority voters without qualifying ID under Wisconsin's voter ID to the percent of Anglos without such ID). We decline to address this argument raised for the first time on appeal. *See Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 341–42 (5th Cir. 1999).

(b) Senate Factor 2: Racially Polarized Voting

The district court relied primarily on the testimony of Dr. Barry Burden, a political science professor, and Mr. George Korbel, an expert on voting rights, in concluding that racially polarized voting exists throughout Texas. The court stated that "[r]acially polarized voting exists when the race or ethnicity of a voter correlates with the voter's candidate preference." *Veasey*, 71 F. Supp. 3d at 637 (citing *Gingles*, 478 U.S. at 53 n.21). For support, the district court noted that the gap between Anglo and Latino Republican support is between 30 and 40 percentage points, the Supreme Court has previously acknowledged the existence of racially polarized voting in Texas, and that in other litigation, Texas has conceded that racially polarized voting exists in 252 of its 254 counties. The State did not contest these findings before the district court.

For the first time in its reply brief, the State argues that the district court erred by examining whether race and voting patterns exhibited a correlated, rather than causal, link. We generally do not consider arguments raised for the first time in a reply brief. *See Baris v. Sulpicio Lines*, 932 F.2d 1540, 1546 n.9 (5th Cir. 1991).

(c) Senate Factor 5: Effects of Past Discrimination

Next, the district court appraised "[t]he extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process." *Gingles*, 478 U.S. 45. The disparity in education, employment, and health outcomes between Anglos, African-Americans, and Hispanics is manifest by fact that the 29% of African-Americans and 33% of Hispanics in Texas live below the poverty line compared to 12% of Anglos. *Veasey*, 71 F. Supp. 3d at 665. The unemployment rate for Anglos is also significantly lower. At trial, the court found that 6.1% of Anglos were

unemployed compared to 8.5% of Hispanics and 12.8% of African-Americans. *Id.* at 666. Furthermore, 91.7% of Anglo 25-year-olds in Texas have graduated from high school, compared to 85.4% of African-Americans, and only 58.6% of Hispanics. *Id.* Anglos are also significantly more likely to have completed college—33.7% of Anglos hold a bachelor's degree, compared to 19.2% of African-Americans and 11.4% of Hispanics. *Id.* Finally, the district court credited testimony that African-Americans and Hispanics are more likely than Anglos to report being in poor health, and to lack health insurance. *Id.* at 666–67.

According to the district court, "[t]hese socioeconomic disparities have hindered the ability of African–Americans and Hispanics to effectively participate in the political process. Dr. Ansolabehere testified that these minorities register and turn[ ]out for elections at rates that lag far behind Anglo voters."[26] *Id.* at 697. This is significant because the inquiry in Section 2 cases is whether the vestiges of discrimination act in concert with the challenged law to impede minority participation in the political process. *See League of United Latin American Citizens, Council No. 4434 v. Clements* (*LULAC*), 999 F.2d 831, 866–67 (5th Cir. 1993) (en banc). The district court concluded in the affirmative, and the State does not contest these underlying factual findings on appeal.

[26] According to Dr. Ansolabehere's expert report, 83 to 87% of Anglos of voting age and 84 to 88% of Anglo citizens of voting age in Texas are registered to vote, compared to 65 to 77% of Blacks of voting age and 75 to 80% of Black citizens of voting age, and 50 to 55% of Hispanics of voting age and 75 to 80% of Hispanic citizens of voting age. Likewise, 41.8% of Anglos voted in 2010 compared to 31.3% of Blacks and 22% of Hispanics. In 2012, 64.3% of registered Anglos voted, compared to 45% of registered Blacks and 59.8% of registered Hispanics.

The district court credited expert testimony that tied these disparate educational, economic, and health outcomes to Texas's history of discrimination. According to Dr. Vernon Burton, a professor with an expertise in race relations, past state-sponsored employment discrimination and Texas's maintenance of a "separate but equal" education system both contributed to the unequal outcomes that presently exist. *Veasey*, 71 F. Supp. 3d at 636. Although *Brown v. Board of Education*, 347 U.S. 483 (1954), mandated desegregated schools in 1954, Dr. Burton testified that Texas maintained segregated schools until roughly 1970. *Veasey*, 71 F. Supp. 3d at 634. The district court found that the disparity in educational outcomes is also due, in part, to unequal administration of discipline. For instance, African-American students are three times more likely than Anglos to be removed from school for an otherwise comparable infraction, and African-Americans are 31% more likely to face school disciplinary procedures. *Id.* at 666. According to Dr. Burton, students that face serious disciplinary action are less likely to graduate from high school. *Id.* Again, the State does not dispute the underlying data or methodologies, and as such we cannot conclude that the district court clearly erred.

(d) Factor 6: Racial Appeals in Political Campaigns

While the existence of racial appeals in political campaigns is a factor that may be indicative of a law's disparate impact, *see Gingles*, 478 U.S. at 40, it is not highly probative here (and racial appeals seem to have been used by minorities and non-minorities). The district court found that such appeals still exist in Texas and cited anecdotal evidence to support its finding. *See Veasey*, 71 F. Supp. 3d at 638–39. While we do not overturn the underlying factual finding, it is not clear how such anecdotal evidence of racial campaign appeals combines with SB 14 to deny or abridge the right to vote.

(e) Senate Factor 7 and Factor 8: Minority Public Officials and Responsiveness to Minority Needs

The extent to which minority candidates are elected to public office also contextualizes the degree to which vestiges of discrimination continue to reduce minority participation in the political process. *See Gingles*, 478 U.S. at 45. The district court found that African-Americans comprise 13.3% of the population in Texas, but only 1.7% of all Texas elected officials are African-American. *Veasey*, 71 F. Supp. 3d at 638. Similarly, Hispanics comprise 30.3% of the population but hold only 7.1% of all elected positions. *Id.* Within the Texas Legislature, however, both groups fare better—African-Americans hold 11.1% of seats in the Legislature while Hispanics hold 21.1% of seats. *Id.* Again, the State does not contest these findings. *Id.*

The district court also found that Texas's history of discrimination, coupled with SB 14's effect on minorities in Texas, demonstrated a lack of responsiveness to minority needs by elected officials. *See Gingles*, 478 U.S. at 45. It noted that ameliorative amendments that attempted to lessen SB 14's impact on minority communities were repeatedly rejected, without explanation. *See Veasey*, 71 F. Supp. 3d at 650–51, 658, 669, 698, 702. While this does not prove improper intent on the part of those legislators, it nonetheless supports a conclusion of lack of responsiveness.[27]

(f) Factor 9: Tenuousness of Policies Underlying the Law

Finally, the district court concluded that the policies underlying SB 14's passage were tenuous. While increasing voter turnout and safeguarding voter confidence are legitimate state interests, *see Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008), the district court found that "the stated policies

[27] Something akin to the difference between negligence and intent.

behind SB 14 are only tenuously related to its provisions," *Veasey*, 71 F. Supp. 3d at 698. While in-person voting fraud is rare and mail-in fraud is comparatively much more common, SB 14's voter ID restrictions would only combat the former. *Id.* at 639–41, 653.

The district court likewise found that concerns about undocumented immigrants and non-citizens voting were misplaced. It credited testimony that undocumented immigrants are unlikely to vote as they try to avoid contact with government agents for fear of being deported. *Id.* at 654. At least one Representative voting for SB 14 conceded that he had no evidence to substantiate his fear of undocumented immigrants voting. *Id.* Additionally, the district court found that SB 14 would not prevent non-citizens from voting, since non-citizens can legally obtain a Texas driver's license or concealed handgun license, two forms of SB 14 ID. *Id.*

The district court also found "no credible evidence" to support assertions that voter turnout was low due to a lack of confidence in elections, that SB 14 would increase public confidence in elections, or that increased confidence would boost voter turnout. *Id.* at 655. Two State Senators and the Director of the Elections Division at the Texas Secretary of State's office all were unaware of anyone abstaining from voting out of concern for voter fraud, and the Director testified that implementing the provisional ballot process might undermine voter confidence. *Id.* The district court also credited testimony that SB 14 would decrease voter turnout. *Id.* at 655–56. According to a well-established formula employed by political scientists to assess individuals' likelihood of voting in an election, increasing the cost of voting decreases voter turnout—particularly among low-income individuals, as they are most cost sensitive. *Id.* at 656. Further, the district court dismissed the argument that increased turnout during the 2008 presidential election was demonstrative of

increased voter confidence in two states that had recently passed voter ID laws. *Id.* at 655. Instead, it found that the increased turnout, nationwide, was due to President Obama's candidacy. *Id.* Finally, the court also found that public opinion polls—which found high levels of support for photo ID requirements—were not demonstrative that SB 14 itself would promote voter confidence. *Id.* at 656. The district court discounted the polls because they did not evaluate whether voters supported SB 14 when weighed against its attendant effect on minority voters. *Id.*

We note that, due to timing, a full election featuring dozens of statewide offices including Governor, federal offices including United States Senator, and numerous local offices was conducted in November 2014 while SB 14 was in effect. During oral argument, we inquired whether it would be appropriate to consider evidence of effect from this election. Both sides declined any such suggestion. Thus, there is no need to remand for consideration of any such evidence.

(g) Discriminatory Effect Conclusion

Given its findings regarding SB 14's disparate impact and the Senate Factors, the district court held that SB 14 acted in concert with current and historical conditions of discrimination to diminish African-Americans' and Hispanics' ability to participate in the political process. *Id.* at 695, 698. Contrary to the State's assertion, we conclude that the district court performed the "intensely local appraisal" required by *Gingles*. 478 U.S. at 78–79. It clearly delineated each step of its analysis, finding that:

> (1) SB 14 specifically burdens Texans living in poverty, who are less likely to possess qualified photo ID, are less able to get it, and may not otherwise need it; (2) a disproportionate number of Texans living in poverty are African–Americans and Hispanics; and (3) African–Americans and Hispanics are more likely than Anglos

> to be living in poverty because they continue to bear the socioeconomic effects caused by decades of racial discrimination.

Veasey, 71 F. Supp. 3d at 664.

The district court thoroughly evaluated the "totality of the circumstances," each finding was well-supported, and the State has failed to contest many of the underlying factual findings. Furthermore, the district court's analysis comports with the Supreme Court's recent instruction that "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity." *Inclusive Communities*, 135 S. Ct. at 2523. The district court here acknowledged this principle and tethered its holding to two findings. First, the court found a stark, racial disparity between those who possess or have access to SB 14 ID, and those who do not. Second, it applied the Senate Factors to assess SB 14 worked in concert with Texas's legacy of state-sponsored discrimination to bring about this disproportionate result.

As such, we conclude that the district court did not clearly err in determining that SB 14 has a discriminatory effect on minorities' voting rights in violation of Section 2 of the Voting Rights Act. As discussed below, we remand for a consideration of the appropriate remedy in light of this finding in the event that the discriminatory purpose finding is different.

C. First and Fourteenth Amendment Burden on Right to Vote

Plaintiffs argue that SB 14 also unconstitutionally burdens their right to vote, as forbidden by the First and Fourteenth Amendments. We decline to decide this question, under the "well established principle governing the prudent exercise of this [c]ourt's jurisdiction that normally th[is c]ourt will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Escambia Cnty. v. McMillan*, 466 U.S. 48, 51 (1984). Since

we affirm the district court's determination that SB 14 has a discriminatory effect under Section 2 of the Voting Rights Act, Plaintiffs will be entitled to the same relief they could access if they prevailed on these First and Fourteenth Amendment claims. *Cf. Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009); *see also Ketchum v. Byrne*, 740 F.2d 1398, 1409–10 (7th Cir. 1984) ("There appears to be no difference in the practical result or in the available remedy regardless of how the resulting discrimination is characterized. We therefore shall not explicitly decide the issue of a fourteenth amendment violation . . . ."), *cert. denied sub nom. City Council of the City of Chi. v. Ketchum*, 471 U.S. 1135 (1985). Put another way, the rights and remedies are intertwined and, therefore, we need not decide the constitutional issue. *See Crawford*, 553 U.S. at 203 (indicating that, under the facts of that case, the petitioners did not show that the proper remedy for "an unjustified burden on some voters . . . would be to invalidate the entire statute," but not foreclosing this possibility under other circumstances); *see also Frank v. Walker*, 17 F. Supp. 3d 837, 863, 879 (E.D. Wis. 2014) (noting that *Crawford* did not prevent the district court from invalidating a photo ID requirement based on a Fourteenth Amendment claim and invalidating the entire requirement even when there existed a valid Section 2 discriminatory effect claim), *rev'd*, 768 F.3d 744 (7th Cir. 2014) (reversing on the merits, and, in dicta, casting doubt on the remedial decision of the district court, but not foreclosing the option of invalidation of an entire statute based on a Fourteenth Amendment claim), *cert. denied*, 135 S. Ct. 1551 (2015); *Boustani v. Blackwell*, 460 F. Supp. 2d 822, 827 (N.D. Ohio 2006) (in the absence of a Section 2 claim, holding that amended sections of an Ohio law requiring presentation of a certificate of naturalization unconstitutionally burdened the right to vote and permanently enjoining the statutory sections imposing this requirement);

Cotham v. Garza, 905 F. Supp. 389, 400–01 (S.D. Tex. 1995) (permanently enjoining a Texas law that banned the possession of written communications while marking a ballot as an unconstitutional burden on the plaintiffs' right to vote); *Pilcher v. Rains*, 683 F. Supp. 1130, 1130, 1135–36 (W.D. Tex. 1988) (in the absence of a Section 2 claim, permanently enjoining a Texas statute that required signatures on unrecognized political party petitions to be accompanied by the signer's voter registration number because this unconstitutionally burdened the right to vote).

Accordingly, we need not and do not decide whether SB 14 violates the First and Fourteenth Amendments by placing an unconstitutional burden on the right to vote. *See Merced v. Kasson*, 577 F.3d 578, 586–87 (5th Cir. 2009); *Jordan v. City of Greenwood*, 711 F.2d 667, 668–70 (5th Cir. 1983) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." (quoting *Spector Motor Serv., Inc. v. McLaughlin,* 323 U.S. 101, 105 (1944))). We therefore VACATE the district court's determination on this issue and DISMISS Plaintiffs' First and Fourteenth Amendment claims.

D. Poll Tax[28]

[28] We must address the poll tax claim, unlike the First and Fourteenth Amendment claims, because Plaintiffs may be entitled to a broader remedy if we found SB 14 imposed a poll tax. For example, although discriminatory effect could lead to a complete injunction of SB 14, if only discriminatory effect were found by the district court, as we discuss below, the court would be required to engage in a severability analysis, giving some deference to legislative choices. *See Crawford*, 553 U.S. at 200, 203 (noting courts must give proper deference to the intent of elected representatives and cautiously and precisely invalidate only those portions of a law necessary to alleviate the unconstitutional impact or burden), *and Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 331 (2006) (similar). Therefore, we must address Plaintiffs' poll tax claims, which, if successful, could potentially merit total invalidation of SB 14 without the same degree of deference. *Compare Harman v.*

The Veasey Plaintiffs[29] originally alleged that SB 14 imposed a poll tax under the Fourteenth and Twenty-Fourth Amendments. After the passage of SB 983, the Veasey Plaintiffs filed a Rule 28(j) Letter with this court, stating that "SB14, as amended by SB983, is no longer a poll tax." The Veasey Plaintiffs nevertheless contend that "the poll tax issue is still alive" because it operated as a poll tax for nearly two years, preventing Plaintiffs and others from voting, and because it will take a "long time" for Texas voters to "learn about and acquire free birth certificates." Additionally, even without the $2 to $3 fee, the Veasey Plaintiffs argue that the process of obtaining a free birth certificate and a free EIC constitutes the kind of "burdensome alternative process" that was struck down in *Harman v. Forssenius*, 380 U.S. 528, 531–32, 541–42 (1965).

To the extent that the Veasey Plaintiffs have not abandoned or conceded this claim,[30] we conclude that SB 14, as amended by SB 983, does not impose a poll tax. Although SB 983 was passed when this case was already on appeal, we do not need to remand this issue to the district court for two reasons: (1) we conclude that even before SB 983, SB 14 did not create a facial poll tax; and (2) the issue of SB 983's impact on the poll tax issue is a pure question of law (at

Forssenius, 380 U.S. 528, 544 (1965) (invalidating the entire offending provision of the Virginia constitution for a poll tax violation), *with Perry v. Perez*, 132 S. Ct. 934 (2012) (per curiam) (instructing that, where necessary, a court may redraw redistricting plans in remedying violations of the Voting Rights Act, but should look to the legislature's policy choices and do so as narrowly as possible).

[29] The Veasey Plaintiffs include: Marc Veasey, Jane Hamilton, Sergio Deleon, Floyd Carrier, Anna Burns, Michael Montez Penny Pope, Oscar Ortiz, Koby Ozias, League of United Latin American Citizens, John Mellor-Crummey, Ken Gandy, Gordon Benjamin, and Evelyn Brickner. No other plaintiff joined in making this allegation.

[30] *Cf. Ray v. United Parcel Serv.*, 587 F. App'x 182, 186 (5th Cir. 2014) (unpublished) (noting plaintiff "affirmatively abandoned [his Title VII] claim on appeal by conceding" that he had not established pretext for racial discrimination).

least as far as this facial challenge) that does not necessitate any reweighing of evidence or consideration of new evidence.

The Veasey Plaintiffs previously facially challenged SB 14 with respect to Texas voters born out of state (who are unaffected by SB 983's passage). Those voters could face fees in their state of birth to obtain documentation required for an EIC. We conclude that SB 14 does not facially impose a poll tax on those voters. Rather, SB 14 requires *all* Texas voters to present valid identification at the polls, exercising the State's "legitimate interest in assessing the eligibility and qualifications of voters." *Gonzalez v. Arizona*, 677 F.3d 383, 408–10 (9th Cir. 2012) (en banc), *aff'd sub nom. on other grounds*, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013); *see also Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966) ("But we must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications."). The indirect cost on voters born out of state does not constitute a poll tax.[31] *Cf. Harman*, 380 U.S. at 541 ("Thus, in order to demonstrate the invalidity of [the challenged law], it need only be shown that it imposes a material requirement *solely* upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax." (emphasis added)).

Likewise, SB 14 did not impose a poll tax on voters before the passage of SB 983. It did not "impose[] a material requirement solely on those who refuse[d]" to pay a poll tax, as proscribed by the Twenty-Fourth Amendment. *Harman*, 380 U.S. at 541–42. Rather, it drew from the State's power to set

[31] Only one plaintiff, Ken Gandy, showed that he was unable to obtain an out-of-state birth certificate due to its cost, s*ee Veasey*, 71 F. Supp. 3d at 671, but he was able to vote by mail, *id.* at 677. Accordingly, Ken Gandy has suffered no injury that we must address under the poll tax rubric, and we conclude that SB 14 is not a poll tax as applied to him.

voter qualifications by requiring all voters to present a valid form of photo identification at the polls. *See Gonzalez*, 677 F.3d at 408. Under the Fourteenth Amendment as the Supreme Court interpreted it in *Harper*, the Court has observed that a state invidiously discriminates when it imposes a cost to vote with a justification that is "irrelevant to the voter's qualifications." *Crawford*, 553 U.S. at 189. Although the questions presented to the Supreme Court in *Crawford* did not include whether Indiana's voter ID law imposed a poll tax, the Court observed that a statute would be invalid under *Harper*'s Fourteenth-Amendment poll tax analysis "if the State *required* voters to pay a tax or a fee to obtain a *new* photo identification." 553 U.S. at 198 (emphasis added). The Court implied that requiring voters to obtain photo identification and charging a fee for the required underlying documentation may not qualify as a poll tax, and we hold that SB 14's similar requirements did not operate as a poll tax. *See id.* at 198 & n.17; *see also Gonzalez*, 677 F.3d at 407–10.

As amended by SB 983, Texas law no longer imposes any direct fee for any of the documentation required to obtain a qualifying voter ID. In both of the seminal cases addressing what constitutes a poll tax, a state attempted to tax voters a specific amount for the privilege of voting. *See, e.g.*, *Harper*, 383 U.S. 663; *Harman*, 380 U.S. 528. SB 983 has removed any specific amount the State would have required of those voters who lacked both SB 14 ID and the underlying documentation to obtain it. What remain are the requirements that such voters travel to the local registrar or county clerk's office, gather and present certain forms of documentation to receive the certified record, travel to the DPS office with that record, and present the certified record, along with two forms of supporting identification, to receive an EIC. *See* 37 TEX. ADMIN. CODE § 15.182(3)–(4). The Veasey Plaintiffs appear to argue in their Rule 28(j) Letter that these obligations make SB 14 unconstitutional under *Harman*

because they "requir[e] voters to follow a burdensome alternative process to avoid paying a . . . poll tax." This is somewhat in tension with the Veasey Plaintiffs' initial briefing, which claimed SB 14 was a poll tax based on the fee involved and conceded that "incidental burdens on voters are not taxes," including "[i]ncidental costs such as paying for gas to drive to the polls."

Nevertheless, to the extent the Veasey Plaintiffs now attempt to analogize SB 14 and SB 983 to the scheme in *Harman*, we reject that analogy. In *Harman*, the state of Virginia forced those who would vote in federal elections to choose between paying a poll tax and meeting a registration requirement before each election year. 380 U.S. at 531–32. The Virginia constitution mandated that federal voters file a certificate of residence within a specific date range, beginning on October 1 of the year before the federal election at issue and ending on a date six months before the date of the federal election. *Id.* at 532. On a notarized, witnessed certificate, the federal voter had to submit a current address and attest to: (1) being a resident of Virginia, at the time of submission and since the date of voter registration, and (2) an intent not to move from the city or county of residence before the next general election. *Id.* Those voters who chose to pay federal and state poll taxes were only required to file the certificate of residence one time; those who did not pay the federal poll tax had to file a new certificate of residence in the designated time frame before each election year. *Id.*

This record reveals that Plaintiffs and those who lack both SB 14 ID and underlying documentation face more difficulty than many Texas voters in obtaining SB 14 ID. Plaintiffs and others similarly situated often struggle to gather the required documentation, make travel arrangements and obtain time off from work to travel to the county clerk or local registrar, and then to the DPS, all to receive an EIC. These greater difficulties receive consideration

in the Section 2 discriminatory effect analysis, but Supreme Court jurisprudence has not equated these difficulties, standing alone, to a poll tax. *See, e.g.*, *Harper*, 383 U.S. at 666. In *Harman*, the Court specifically noted:

> [I]t is important to emphasize that the question presented is not whether it would be within a State's power to abolish entirely the poll tax and require all voters—state and federal—to file annually a certificate of residence. Rather, the issue here is whether the State of Virginia may constitutionally confront the federal voter with a requirement that he either pay the customary poll taxes as required for state elections or file a certificate of residence.

380 U.S. at 538; *see also Crawford*, 553 U.S. at 198–99 (contrasting the unconstitutionality of a requirement that voters "pay a tax or a fee to obtain a new photo identification" with a requirement that voters without ID "travel to the circuit court clerk's office within 10 days [of the election] to execute the required affidavit").

The State does not offer Texas voters a choice between paying a fee and undergoing an onerous procedural process. *Cf. Harman*, 380 U.S. at 540–41. All voters must make a trip to the DPS, local registrar, county clerk, or other government agency at some point to receive qualifying photo identification. Undoubtedly, those who own vehicles, have flexible work schedules, and already possess the required documentation can more easily meet these procedural requirements than some of the Plaintiffs and others who lack these resources. Again, that consideration alone does not make the photo identification requirement a poll tax. *See Crawford*, 553 U.S. at 198–99; *Harman*, 380 U.S. at 538. Additionally, whether the qualifying identification is a driver's license, passport, or EIC, voters need not undergo this process every election year during a specific time frame six months prior to the election, as was the case in *Harman*. Instead, the record indicates that an EIC remains valid for six years and must only be obtained sometime before an election.

In light of the recently-enacted SB 983, SB 14 does not impose an unconstitutional poll tax under the Fourteenth or Twenty-Fourth Amendments; nor did it impose a poll tax before SB 983's enactment. Accordingly, we VACATE the district court's judgment for the Veasey Plaintiffs on their poll tax claim and RENDER judgment in the State's favor.

E. Remedy

After finding that SB 14 was enacted with a racially discriminatory purpose, the district court fully enjoined SB 14's implementation, with the exception of several sections of the law that do not relate to photo identification. *See Veasey*, 71 F. Supp. 3d at 707 & n.583. That remedy is potentially broader than the one to which Plaintiffs would be entitled if, on remand, the district court only found that SB 14 has a discriminatory effect in violation of Section 2 of the Voting Rights Act. *Compare Crawford*, 553 U.S. at 200, 203 (noting, in the Section 2 context, that "petitioners have not demonstrated that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute"), *with City of Richmond v. United States*, 422 U.S. 358, 378 (1975) (holding, in the discriminatory purpose context, that "[a]n official action . . . taken for the purpose of discriminating . . . on account of [] race has no legitimacy at all . . . ."), *and Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 465–66, 471, 487 (1982) (affirming the permanent injunction of a statewide initiative because its provisions were "effectively drawn for racial purposes" in violation of the Fourteenth Amendment).[32]

[32] We do not mean to suggest that a full injunction is never available as a remedy for a discriminatory effect finding. However, given the severability clause in this statute and the Supreme Court's cautions to give deference to legislative determinations even when some

We remand this case for further consideration of the discriminatory purpose finding, vacate the poll tax finding, and uphold at this point only the district court's discriminatory effect finding. Because of the uncertainty of findings on remand, we address the question of remedy assuming only a finding of discriminatory effect. We consider it prudent to provide guidance regarding what would constitute a properly-tailored remedy to address the discriminatory effects of the law.[33]

"When devising a remedy to a [Section] 2 violation, the district court's 'first and foremost obligation . . . is to correct the Section 2 violation.'" *Brown*, 561 F.3d at 435 (quoting *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1022 (8th Cir. 2006)). Yet, any remedy must be "sufficiently tailored to the circumstances giving rise to the [Section] 2 violation," *id.*, and to the extent possible, courts should respect a legislature's policy objectives when crafting a remedy, *see Perry v. Perez*, 132 S. Ct. 934, 940–44 (2012) (per curiam). *See also Inclusive Communities*, 135 S. Ct. at 2524 ("Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice that arbitrar[ily] . . . operate[s] invidiously to discriminate on the basis of rac[e]." (citation and internal quotation marks omitted)). In the context of redistricting,[34] the Supreme Court instructed that a legislature's policy

violation is found, the district court must examine a full range of potential remedies as we discuss herein.

[33] As part of the district court's analysis, it found that purchasing the underlying documents necessary to obtain an EIC can be cost prohibitive for many poor Texans. *See Veasey*, 71 F. Supp. 3d at 664–65. While we affirm the district court's finding that SB 14 has a discriminatory effect, in considering the proper remedy on remand, the court should assess the effect of SB 983 and its elimination of the $2 to $3 fee for obtaining a birth certificate from local governments.

[34] We have held that Section 2 redistricting cases provide an appropriate source of guidance for district courts attempting to craft remedies for Section 2 voter registration

objectives may be discerned from the challenged legislation, and those policy choices should be respected as much as possible, even when some aspect of the underlying law is unenforceable. *Perry*, 132 S. Ct. at 941.

When a statute contains a severability clause, courts must take special care to attempt to honor a legislature's policy choice to leave the statute intact. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 331 (2006) (holding that lower courts should have invalidated only the unconstitutional applications of a statute, rather than the entire statute, given its severability clause). In this case, SB 14's severability clause makes clear that the Legislature intended the photo identification system to be left intact for all valid applications.[35] Also clearly underlying SB 14 is the concern that a voter present proper identification that is not easily counterfeited or used by another.

Accordingly, if on remand the district court finds that SB 14 has only violated Section 2 through its discriminatory effects, it should refer to the

violations. *See Operation Push*, 932 F.2d at 406. Likewise, we take guidance here from precedent regarding the proper remedies for Voting Rights Act violations.

[35] The severability clause reads:

> Every provision in this Act and every application of the provisions in this Act are severable from each other. If any application of any provision in this Act to any person or group of persons or circumstances is found by a court to be invalid, the remainder of this Act and the application of the Act's provisions to all other persons and circumstances may not be affected. All constitutionally valid applications of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this Act invalid in a large or substantial fraction of relevant cases, the remaining valid applications shall be severed and allowed to remain in force.

TEX. ELEC. CODE § 64.012 note (West Supp. 2014).

policies underlying SB 14 in fashioning a remedy. Clearly, the Legislature wished to reduce the risk of in-person voter fraud by strengthening the forms of identification presented for voting. Simply reverting to the system in place before SB 14's passage would not fully respect these policy choices—it would allow voters to cast ballots after presenting less secure forms of identification like utility bills, bank statements, or paychecks. *See* TEX. ELEC. CODE § 63.001(b) (West 2010). One possibility would be to reinstate voter registration cards as documents that qualify as acceptable identification under the Texas Election Code.[36] The court could also decree that, upon execution of an affidavit that a person does not have an acceptable form of photo identification, that person must be allowed to vote with their voter registration card. *Cf.* TEX. ELEC. CODE §§ 63.008, 63.0101 (West 2010) (allowing a person to present alternate forms of identification upon submitting an affidavit certifying they did not have their voter registration card in their possession). Such a remedy would respect the Legislature's choice to do away with more problematic forms of identification, while also eliminating SB 14's invalid applications.[37] *See Ayotte*, 546 U.S. at 331 ("So long as they are faithful to

[36] While the registration card does not contain a photo, it is a more secure document than a bank statement or electric bill and, presumably, one not as easily obtained by another person. It is sent in a non-discriminatory fashion, free of charge, to each registered voter and therefore avoids any cost issues.

[37] The State argues the district court went too far in "retain[ing] jurisdiction to review [remedial] legislation to determine whether it properly remedies the violations." *Veasey*, 71 F. Supp. 3d at 707. Courts must craft remedies proportionate to Section 2 violations; therefore, if the district court is able to devise a remedy that respects the Legislature's policy choices while eliminating unconstitutional applications of the statute, it need not retain jurisdiction to review any further legislative attempts to modify the voter registration scheme. *See Brown*, 561 F.3d at 435; *cf. City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."), *superseded by statute*, 42 U.S.C. § 2000c–1–2000cc–5 ("Those enactments may be separately challenged if they prove constitutionally

legislative intent, then, in this case the lower courts can issue a declaratory judgment and an injunction prohibiting the statute's unconstitutional application."). However, we recognize that the district court must assess this potential solution in light of other solutions posited by the parties, including other forms of photo identification. We urge the parties to work cooperatively with the district court to provide a prompt resolution of this matter to avoid election eve uncertainties and emergencies.

IV. Conclusion

For the reasons stated above, we VACATE the district court's judgment that SB 14 was passed with a racially discriminatory purpose and REMAND for further consideration of Plaintiffs' discriminatory purpose claims, using the proper legal standards and evidence. We VACATE the district court's holding that SB 14 is a poll tax under the Fourteenth and Twenty-Fourth Amendments and RENDER judgment for the State on this issue. We need not and do not address whether SB 14 unconstitutionally burdens the right to vote under the First and Fourteenth Amendments; therefore, we VACATE the district court's judgment on that issue and DISMISS those claims. We AFFIRM the district court's finding that SB 14 violates Section 2 of the Voting Rights Act through its discriminatory effects and REMAND for consideration of the appropriate remedy.

Finally, on remand, the district court should: (1) give further consideration to its discriminatory purpose findings as specified herein; and (2) if the district court does not find that SB 14 was imposed with a discriminatory purpose, consider what remedy it should grant due to SB 14's discriminatory

problematic."). We do not further opine on this issue at this time, leaving it to the district court in the first instance on remand.

effect in violation of Section 2 of the Voting Rights Act, taking account of any impact of SB 983 and this opinion. We leave it to the district court in the first instance to decide whether any additional evidence may be proffered on the matters remanded.

SUPREME COURT OF THE UNITED STATES

Nos. 14A393, 14A402 and 14A404

MARC VEASEY, ET AL.
14A393 *v.*
RICK PERRY, GOVERNOR OF TEXAS, ET AL.

ON APPLICATION TO VACATE STAY

TEXAS STATE CONFERENCE OF NAACP BRANCHES, ET AL.
14A402 *v.*
NANDITA BERRY, TEXAS SECRETARY OF STATE, ET AL.

ON APPLICATION TO VACATE STAY

UNITED STATES *v.* TEXAS, ET AL.
14A404

ON APPLICATION TO VACATE STAY

[October 18, 2014]

The applications to vacate the stay entered by the United States Court of Appeals for the Fifth Circuit on October 14, 2014, presented to Justice Scalia and by him referred to the Court are denied. The motion for leave to file the response to the applications under seal with redacted copies for the public record is granted.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.

I would vacate the Fifth Circuit's stay of the District Court's final judgment enjoining the enforcement of Senate Bill 14.

This case is unlike the Ohio and North Carolina applications recently before the Court concerning those States'

election procedures. Neither application involved, as this case does, a permanent injunction following a full trial and resting on an extensive record from which the District Court found ballot-access discrimination by the State. I would not upset the District Court's reasoned, record-based judgment, which the Fifth Circuit accorded little, if any, deference. Cf. *Purcell* v. *Gonzalez*, 549 U. S. 1, 5 (2006) (*per curiam*) (Court of Appeals erred in failing to accord deference to "the ruling and findings of the District Court"). The fact-intensive nature of this case does not justify the Court of Appeals' stay order; to the contrary, the Fifth Circuit's refusal to home in on the facts found by the district court is precisely why this Court should vacate the stay.

Refusing to evaluate defendants' likelihood of success on the merits and, instead, relying exclusively on the potential disruption of Texas' electoral processes, the Fifth Circuit showed little respect for this Court's established stay standards. See *Nken* v. *Holder*, 556 U. S. 418, 434 (2009) ("most critical" factors in evaluating request for a stay are applicant's likelihood of success on the merits and whether applicant would suffer irreparable injury absent a stay). *Purcell* held only that courts must take careful account of considerations specific to election cases, 549 U. S., at 4, not that election cases are exempt from traditional stay standards.

In any event, there is little risk that the District Court's injunction will in fact disrupt Texas' electoral processes. Texas need only reinstate the voter identification procedures it employed for ten years (from 2003 to 2013) and in five federal general elections. To date, the new regime, Senate Bill 14, has been applied in only three low-participation elections—namely, two statewide primaries and one statewide constitutional referendum, in which voter turnout ranged from 1.48% to 9.98%. The November 2014 election would be the very first federal general elec-

tion conducted under Senate Bill 14's regime. In all likelihood, then, Texas' poll workers are at least as familiar with Texas' pre-Senate Bill 14 procedures as they are with the new law's requirements.

True, in *Purcell* and in recent rulings on applications involving voting procedures, this Court declined to upset a State's electoral apparatus close to an election. Since November 2013, however, when the District Court established an expedited schedule for resolution of this case, Texas knew full well that the court would issue its ruling only weeks away from the election. The State thus had time to prepare for the prospect of an order barring the enforcement of Senate Bill 14. Of greater significance, the District Court found "woefully lacking" and "grossly" underfunded the State's efforts to familiarize the public and poll workers regarding the new identification requirements. No. 13–cv–00193 (SD Tex., Oct. 9, 2014), pp. 20, 31–32, 91, n. 398 (Op.). Furthermore, after the District Court's injunction issued and despite the State's application to the Court of Appeals for a stay, Texas stopped issuing alternative "election identification certificates" and completely removed mention of Senate Bill 14's requirements from government Web sites. See Emergency Application to Vacate Fifth Circuit Stay of Permanent Injunction 11 and App. H. In short, any voter confusion or lack of public confidence in Texas' electoral processes is in this case largely attributable to the State itself.

Senate Bill 14 replaced the previously existing voter identification requirements with the strictest regime in the country. Op. 20–21. The Bill requires in-person voters to present one of a limited number of government-issued photo identification documents. *Ibid.* Texas will not accept several forms of photo ID permitted under the Wisconsin law the Court considered last week.* For ex-

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*The District Court enjoined Wisconsin from implementing the law, the Seventh Circuit stayed the District Court's injunction, and in turn,

ample, Wisconsin's law permits a photo ID from an in-state four-year college and one from a federally recognized Indian tribe. Texas, under Senate Bill 14, accepts neither. Nor will Texas accept photo ID cards issued by the U. S. Department of Veterans' Affairs. Those who lack the approved forms of identification may obtain an "election identification certificate" from the Texas Department of Public Safety (DPS), but more than 400,000 eligible voters face round-trip travel times of three hours or more to the nearest DPS office. Op. 18, 76. Moreover, applicants for an election identification certificate ordinarily must present a certified birth certificate. *Id.,* at 70. A birth certificate, however, can be obtained only at significant cost—at least $22 for a standard certificate sent by mail. *Id*., at 22. And although reduced-fee birth certificates may be obtained for $2 to $3, the State did not publicize that option on DPS's Web site or on Department of Health and Human Services forms for requesting birth certificates. *Id*., at 70.

On an extensive factual record developed in the course of a nine-day trial, the District Court found Senate Bill 14 irreconcilable with §2 of the Voting Rights Act of 1965 because it was enacted with a racially discriminatory purpose and would yield a prohibited discriminatory result. The District Court emphasized the "virtually unchallenged" evidence that Senate Bill 14 "bear[s] more heavily on" minority voters. *Id.,* at 133. In light of the "seismic demographic shift" in Texas between 2000 and 2010, making Texas a "majority-minority state," the District Court observed that the Texas Legislature and Governor had an evident incentive to "gain partisan advantage by suppressing" the "votes of African-Americans and Latinos." *Id.,* at 40, 48, 128. Cf. *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399, 438–442

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this Court vacated the Seventh Circuit's stay. See *Frank* v. *Walker*, *ante,* p. 1.

(2006) (Texas Legislature acted with a "troubling blend of politics and race" in response to "growing" minority participation). The District Court also found a tenuous connection between the harms Senate Bill 14 aimed to ward off, and the means adopted by the State to that end. Between 2002 and 2011, there were only two in-person voter fraud cases prosecuted to conviction in Texas. Op. 13–14. Despite awareness of the Bill's adverse effect on eligible-to-vote minorities, the Texas Legislature rejected a "litany of ameliorative amendments" designed to lessen the Bill's impact on minority voters—for example, amendments permitting additional forms of identification, eliminating fees, providing indigence exceptions, and increasing voter education and funding—without undermining the Bill's purported policy justifications. *Id.,* at 35–37, 132 144–147. Texas did not begin to demonstrate that the Bill's discriminatory features were necessary to prevent fraud or to increase public confidence in the electoral process. *Id.,* at 133; see also *Id.,* at 113 (proponents of Bill unable to "articulate any reason that a more expansive list of photo IDs would sabotage" their efforts at detecting and deterring voter fraud). On this plain evidence, the District Court concluded that the Bill would not have been enacted absent its racially disparate effects. *Id.,* at 133.

The District Court further found that Senate Bill 14 operates as an unconstitutional poll tax—an issue neither presented by any of the recent applications nor before the Court in *Crawford* v. *Marion County Election Bd.*, 553 U. S. 181 (2008) (upholding Indiana voter identification law against facial constitutional challenge). See *Id.,* at 186, and n. 4. Under Senate Bill 14, a cost attends every form of qualified identification available to the general public. Op. 140. Texas tells the Court that any number of incidental costs are associated with voting. But the cost at issue here is one deliberately imposed by the State. Even at $2, the toll is at odds with this Court's precedent. See

Harper v. *Virginia Bd. of Elections*, 383 U. S. 663 (1966). And for some voters, the imposition is not small. A voter whose birth certificate lists her maiden name or misstates her date of birth may be charged $37 for the amended certificate she needs to obtain a qualifying ID. Texas voters born in other States may be required to pay substantially more than that. Op. 71–74.

The potential magnitude of racially discriminatory voter disenfranchisement counseled hesitation before disturbing the District Court's findings and final judgment. Senate Bill 14 may prevent more than 600,000 registered Texas voters (about 4.5% of all registered voters) from voting in person for lack of compliant identification. *Id.,* at 50–51, 54. A sharply disproportionate percentage of those voters are African-American or Hispanic. *Ibid.*

Unsurprisingly, Senate Bill 14 did not survive federal preclearance under §5 of the Voting Rights Act. A three-judge District Court unanimously determined that the law would have a prohibited discriminatory effect on minority voters. See *Texas* v. *Holder*, 888 F. Supp. 2d 113, 115, 138 (DC 2012) (Tatel, J.). Although this Court vacated the preclearance denial in light of *Shelby County* v. *Holder*, 570 U. S. ___ (2013), racial discrimination in elections in Texas is no mere historical artifact. To the contrary, Texas has been found in violation of the Voting Rights Act in every redistricting cycle from and after 1970. Op. 7. See, *e.g., Texas* v. *United States*, 887 F. Supp. 2d 133 (DC 2012) (Griffith, J.). The District Court noted particularly plaintiffs' evidence—largely unchallenged by Texas—regarding the State's long history of official discrimination in voting, the statewide existence of racially polarized voting, the incidence of overtly racial political campaigns, the disproportionate lack of minority elected officials, and the failure of elected officials to respond to the concerns of minority voters. Op. 3–13, 122–126, 144–147.

The greatest threat to public confidence in elections in

this case is the prospect of enforcing a purposefully discriminatory law, one that likely imposes an unconstitutional poll tax and risks denying the right to vote to hundreds of thousands of eligible voters. To prevent that disenfranchisement, I would vacate the Fifth Circuit's stay of the permanent injunction ordered by the District Court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
October 14, 2014

Lyle W. Cayce
Clerk

No. 14-41127

MARC VEASEY; JANE HAMILTON; SERGIO DELEON; FLOYD CARRIER; ANNA BURNS; MICHAEL MONTEZ; PENNY POPE; OSCAR ORTIZ; KOBY OZIAS; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; JOHN MELLOR-CRUMLEY; DALLAS COUNTY, TEXAS,

Plaintiffs - Appellees

TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS,

Intervenor Plaintiffs - Appellees

v.

RICK PERRY, in his Official Capacity as Governor of Texas; NANDITA BERRY, in her Official Capacity as Texas Secretary of State; STATE OF TEXAS; STEVE MCGRAW, in his Official Capacity as Director of the Texas Department of Public Safety,

Defendants - Appellants

UNITED STATES OF AMERICA,

Plaintiff - Appellee

TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND; IMANI CLARK,

Intervenor Plaintiffs - Appellees

v.

STATE OF TEXAS; NANDITA BERRY, in her Official Capacity as Texas Secretary of State; STEVE MCGRAW, in his Official Capacity as Director of the Texas Department of Public Safety,

Defendants - Appellants

TEXAS STATE CONFERENCE OF NAACP BRANCHES; MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES,

Plaintiffs - Appellees

v.

NANDITA BERRY, in her Official Capacity as Texas Secretary of State; STEVE MCGRAW, in his Official Capacity as Director of the Texas Department of Public Safety,

Defendants - Appellants

LENARD TAYLOR; EULALIO MENDEZ, JR.; LIONEL ESTRADA; ESTELA GARCIA ESPINOSA; MARGARITO MARTINEZ LARA; MAXIMINA MARTINEZ LARA; LA UNION DEL PUEBLO ENTERO, INCORPORATED,

Plaintiffs - Appellees

v.

STATE OF TEXAS; NANDITA BERRY, in her Official Capacity as Texas Secretary of State; STATE OF TEXAS; STEVE MCGRAW, in his Official Capacity as Director of the Texas Department of Public Safety,

Defendants - Appellants

Appeal from the United States District Court
for the Southern District of Texas

Before CLEMENT, HAYNES, and COSTA, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

Early voting in Texas begins on Monday, October 20. On Saturday, October 11—just nine days before early voting begins and just 24 days before Election Day—the district court entered a final order striking down Texas's voter identification laws. By this order, the district court enjoined the implementation of Texas Senate Bill 14 ("SB 14") of the 2011 Regular Session, which requires that voters present certain photographic identification at the polls. The district court also ordered that the State of Texas ("State") instead implement the laws that were in force before SB 14's enactment in May of 2011. Based primarily on the extremely fast-approaching election date, we STAY the district court's judgment pending appeal.

I.

SB 14 was signed into law on May 27, 2011, and its voter identification requirements became effective on January 1, 2012. 2011 Tex. Sess. Law Serv. Ch. 123 (West) (S.B. 14). These requirements have been implemented in at least three prior elections.

On June 26, 2013, this lawsuit challenging SB 14 was filed. On Thursday, October 9, 2014 the district court foreshadowed its ultimate judgment, issuing an opinion saying that it intended to enjoin SB 14. The lengthy, 143-page opinion followed a nine-day bench trial. The district court opined that SB 14 is unconstitutional and violates the Voting Rights Act. But it did not issue a final judgment.

On Friday, October 10, the State filed an advisory requesting that the district court enter a final, appealable judgment. When the district court declined to do so by close of business on Friday, October 10, the State filed a petition for writ of mandamus or, in the alternative, an emergency motion for stay pending appeal. Upon the entry of the district court's final judgment on Saturday, October 11, the State also filed a notice of appeal. Accordingly, we

construed the State's motion as an emergency motion for stay pending appeal and ordered that responses be filed within 24 hours. Five responses were filed.

II.

A stay pending appeal "simply suspends judicial alteration of the status quo." *Nken v. Holder*, 556 U.S. 418, 429 (2009) (internal quotation marks and alteration omitted). We consider four factors in deciding a motion to stay pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 426. "The first two factors of the traditional standard are the most critical." *Id.* at 434.

III.

This is not a run-of-the-mill case; instead, it is a voting case decided on the eve of the election. The judgment below substantially disturbs the election process of the State of Texas just nine days before early voting begins. Thus, the value of preserving the status quo here is much higher than in most other contexts.

A.

The Supreme Court has repeatedly instructed courts to carefully consider the importance of preserving the status quo on the eve of an election. In the similar context of determining whether to issue an injunction,[1] the

[1] *See Nken,* 556 U.S. at 434 ("[T]here is substantial overlap between [the factors governing stays pending appeal] and the factors governing preliminary injunctions; not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." (internal citation omitted)).

Supreme Court held that, "[f]aced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). One of these considerations is that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* at 4-5.[2]

Further, in the apportionment context, the Supreme Court has instructed that, "[i]n awarding or withholding immediate relief, a court is entitled to and *should* consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (emphasis added). Accordingly, "under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid." *Id.*

[2] In *Purcell*, the district court declined to enjoin a voter identification law on September 11, 2006. *Id.* at 3. The plaintiffs appealed and, on October 5, the Court of Appeals issued an injunction pending the outcome of the appeal. *Id.* The Supreme Court vacated the Court of Appeals' injunction on October 20. *Id.* at 5-6. Ultimately, the Supreme Court's action preserved the status quo of the state's voting laws leading up to the election, just as our decision here does today. *See id.* ("Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules."); *id.* at 5 ("In view of the impending election, the necessity for clear guidance to the State of Arizona, and our conclusion regarding the Court of Appeals' issuance of the order we vacate the order of the Court of Appeals.")

The Supreme Court itself has declined to interfere with a fast-approaching election, even after finding that the ballots unconstitutionally excluded certain candidates. *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968). The Court found on October 15, 1968 that:

> Certainly at this late date it would be extremely difficult, if not impossible, for Ohio to provide still another set of ballots. Moreover, the confusion that would attend such a last-minute change poses a risk of interference with the rights of other Ohio citizens, for example, absentee voters.

Id. at 35.

Here, the district court's decision on October 11, 2014 presents similar logistical problems because it will "be extremely difficult, if not impossible," for the State to adequately train its 25,000 polling workers at 8,000 polling places about the injunction's new requirements in time for the start of early voting on October 20 or even election day on November 4. The State represents that it began training poll workers in mid-September, and at least some of them have already completed their training. The State also represents that it will be unable to reprint the "election manuals that poll workers use for guidance," and so the election laws "will be conveyed by word of mouth alone." This "last-minute change poses a risk of interference with the rights of other [Texas] citizens," *Williams*, 393 U.S. at 35, because we can easily infer that this late retraining by word of mouth will result in markedly inconsistent treatment of voters at different polling places throughout the State.

In their response brief, the Veasey-LULAC plaintiffs concede that, "[u]nder the district court's injunction, perhaps some poll officials in some isolated precincts might mistakenly turn a registered voter away because the voter fails to comply with SB 14." They discount this concern because "this voter would also be disenfranchised were this Court to issue a stay." But they fail to recognize that inconsistent treatment of voters, even in just "some

isolated precincts," raises a significant constitutional concern, particularly when this disparate treatment is virtually guaranteed by the late issuance of the injunction.

B.

The Supreme Court has continued to look askance at changing election laws on the eve of an election. Just this term, the Supreme Court halted three Court of Appeals decisions that would have altered the rules of this fall's general election shortly before it begins. *See Frank v. Walker*, 14A352, 2014 WL 5039671 (U.S. Oct. 9, 2014); *North Carolina v. League of Women Voters of N. Carolina*, 14A358, 2014 WL 5026111 (U.S. Oct. 8, 2014); *Husted v. Ohio State Conference of N.A.A.C.P.*, 14A336, 2014 WL 4809069 (U.S. Sept. 29, 2014).

In *League of Women Voters*, on October 1, the Court of Appeals for the Fourth Circuit reversed the district court's denial of a preliminary injunction against North Carolina's "elimination of same-day registration and prohibition on counting out-of-precinct ballots" that were contained in a law that had been on the books since August of 2013. 14-1845, 2014 WL 4852113, at *1, 4 (4th Cir. Oct. 1, 2014). The dissent argued that the injunction should not be granted, partly because of the confusion it would cause in the fast-approaching election. *Id.* at *21-23 (Motz, J., dissenting). The Supreme Court stayed the resulting October 3rd injunction. *League of Women Voters*, 2014 WL 5026111.

In *Husted*, on September 24, the Court of Appeals for the Sixth Circuit affirmed the district court's September 4th grant of a preliminary injunction ordering "the restoration of additional early in-person . . . voting hours" that had been eliminated by a statute enacted in February of 2014 and effective on June 1, 2014. 14-3877, 2014 WL 4724703, at *1, 4 (6th Cir. Sept. 24, 2014). The Supreme Court stayed this injunction. 2014 WL 4809069.

In *Frank*, on September 12, the Court of Appeals for the Seventh Circuit issued a stay of a district court injunction imposed in April of 2014 that prevented the enforcement of Wisconsin's voter identification laws. 14-2058, 2014 WL 4494153 (7th Cir. Sept. 12, 2014), *reconsideration denied*, 14-2058, 2014 WL 4827118 (7th Cir. Sept. 26, 2014). Five judges dissented from the denial of rehearing en banc, arguing that changing the rules of the election at that late date was unreasonable, whatever the merits of Wisconsin's voter identification laws. 2014 WL 4827118, at *3-6 (Williams, J., dissenting from denial of rehearing en banc). The Supreme Court vacated the Court of Appeals' stay of the injunction, pending the outcome of Supreme Court proceedings. *Frank*, 14A352, 2014 WL 5039671.

While the Supreme Court has not explained its reasons for issuing these stays, the common thread is clearly that the decision of the Court of Appeals would change the rules of the election too soon before the election date. The stayed decisions have both upheld and struck down state statutes and affirmed and reversed district court decisions, so the timing of the decisions rather than their merits seems to be the key.[3] Moreover, Justice Alito's dissent from the stay in *Walker* casts some light on the Court's rationale: "There is a colorable basis for the Court's decision due to the proximity of the upcoming general election. It is particularly troubling that absentee ballots have been sent out without any notation that proof of photo identification must be submitted." *Frank*, 2014 WL 5039671, at *1 (Alito, J., dissenting).

Here, the district court's alterations to the Texas voting laws were made on October 11, 2014, even though the challenged laws became effective on January 1, 2012 and had already been used in at least three previous elections.

[3] The Court of Appeals' decision in *Husted* was stayed even though it affirmed a district court decision. This fact undermines the plaintiffs' argument that the main concern in *Purcell* was giving proper deference to district court decisions.

We must consider this injunction in light of the Supreme Court's hesitancy to allow such eleventh-hour judicial changes to election laws.

IV.

Particularly in light of the importance of maintaining the status quo on the eve of an election, we find that the traditional factors for granting a stay favor granting one here.

A.

First, the State has made a strong showing that it is likely to succeed on the merits, at least as to its argument that the district court should not have changed the voting identification laws on the eve of the election. The court offered no reason for applying the injunction to an election that was just nine days away, even though the State repeatedly argued that an injunction this close to the election would substantially disrupt the election process. As discussed in Section III above, the Supreme Court has instructed that we should carefully guard against judicially altering the status quo on the eve of an election. And, just this term, the Court has stepped in to prevent such alterations several times. We find that the State has made a strong showing that the district court erred in applying the injunction to this fast-approaching election cycle.

The other questions on the merits are significantly harder to decide, given the voluminous record, the lengthy district court opinion, and our necessarily expedited review. But, given the special importance of preserving orderly elections, we find that this factor weighs in favor of issuing a stay.

B.

The State will be irreparably harmed if the stay is not issued. "When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419

(5th Cir. 2013); *accord Maryland v. King*, 133 S.Ct. 1, 3 (2012) (Roberts, Circuit Justice, in chambers); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, Circuit Justice, in chambers); *Voting for Am., Inc. v. Andrade*, 488 Fed. App'x 890, 904 (2012) (unpublished). If the district court judgment is ultimately reversed, the State cannot run the election over again, this time applying SB 14. Moreover, the State has a significant interest in ensuring the proper and consistent running of its election machinery, and this interest is severely hampered by the injunction, as discussed in Section III above.

C.

The individual voter plaintiffs may be harmed by the issuance of this stay.[4] But we find that this harm does not outweigh the other three factors. *See Planned Parenthood*, 734 F.3d at 419 ("While we acknowledge that Planned Parenthood has also made a strong showing that their interests would be harmed by staying the injunction, given the State's likely success on the merits, this is not enough, standing alone, to outweigh the other factors."). *Cf. Burdick v. Takushi*, 504 U.S. 428, 441 (1992) ("[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system."). Again, the first two factors are the most critical, *Nken*, 556 U.S. at 426, and we have already determined that these two factors favor granting a stay.

D.

Finally, given that the election machinery is already in motion, the public interest weighs strongly in favor of issuing the stay. As explained in Section III above, the State represents that it will have to train 25,000 polling

[4] The State contends that no individual voter plaintiffs would actually be harmed by a stay. But, at this time, we decline to decide the fact-intensive question of which individual voter plaintiffs would be harmed.

officials at 8,000 polling stations about the new requirements. Inconsistencies between the polling stations seem almost inevitable given the logistical problem of educating all of these polling officials within just one week. These inconsistencies will impair the public interest.

V.

The State's emergency motion for stay pending appeal is GRANTED, as is its motion to file a brief exceeding page limits.

The State has also moved that we maintain its emergency motion for stay pending appeal under seal. The State's motion contains very few sensitive materials; instead, it cites and quotes a limited number of materials that were filed under seal in the District Court. Rather than maintain the entire motion under seal, the references to the sealed materials should instead be redacted by the State. The State's motion is GRANTED in that the unredacted version of the motion for stay pending appeal shall be maintained under seal. The State is DIRECTED to file a redacted version of its motion by October 15, 2014.

GREGG COSTA, Circuit Judge, concurring in the judgment:

The district court issued a thorough order finding that the Texas voter ID law is discriminatory. We should be extremely reluctant to have an election take place under a law that a district court has found, and that our court may find, is discriminatory. As always, however, we must follow the dictates of the Supreme Court. In two recent decisions, it stayed injunctions issued based on findings that changes in an election law were discriminatory. *See North Carolina v. League of Women Voters of N. Carolina*, 14A358, 2014 WL 5026111 (U.S. Oct. 8, 2014); *Husted v. Ohio State Conference of N.A.A.C.P.*, 14A336, 2014 WL 4809069 (U.S. Sept. 29, 2014). It also lifted the Seventh Circuit's stay of a district court's order in place since the spring that enjoined Wisconsin's voter ID law. *See Frank v. Walker*, 14A352, 2014 WL 5039671 (U.S. Oct. 9, 2014). I agree with Judge Clement that the only constant principle that can be discerned from the Supreme Court's recent decisions in this area is that its concern about confusion resulting from court changes to election laws close in time to the election should carry the day in the stay analysis. The injunction in this case issued even closer in time to the upcoming election than did the two out of the Fourth and Sixth Circuits that the Supreme Court recently stayed. On that limited basis, I agree a stay should issue.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

October 14, 2014

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 14-41127 Marc Veasey, et al v. Rick Perry, et al
USDC No. 2:13-CV-193
USDC No. 2:13-CV-263
USDC No. 2:13-CV-291
USDC No. 2:13-CV-348

Enclosed is an opinion order entered in this case.

Sincerely,
LYLE W. CAYCE, Clerk

By: _____
Rhonda M. Flowers, Deputy Clerk

Ms. Leah Camille Aden
Mr. Vishal Agraharkar
Mr. Adam Warren Aston
Ms. Anna Baldwin
Mr. David J. Bradley
Ms. Jennifer Clark
Mr. Arthur Cleveland D'Andrea
Mr. Chad Wilson Dunn
Ms. Diana Katherine Flynn
Ms. Erin Helene Flynn
Mr. Jose Garza
Mr. J. Gerald Hebert
Mr. Preston Edward Henrichson
Mr. Robert Acheson Koch
Ms. Natasha M. Korgaonkar
Honorable Nelva Gonzales Ramos
Mr. Rolando Leo Rios I
Mr. John Barrett Scott
Mr. John Albert Smith III
Ms. Christina Swarns

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

MARC VEASEY, *et al*,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 13-CV-00193
	§	
RICK PERRY, *et al*,	§	
	§	
Defendants.	§	

FINAL JUDGMENT

Following a bench trial, the Court issued an Opinion in this case. (D.E. 628.) The Court hereby enters a permanent and final injunction, enjoining the Defendants from enforcing the voter identification provisions, Sections 1 through 15 and 17 through 22, of SB 14. The State of Texas is ORDERED to return to enforcing the voter identification requirements for in-person voting in effect immediately prior to the enactment and implementation of SB 14.

ORDERED this 11th day of October, 2014.

NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

MARC VEASEY, *et al*,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 13-CV-00193
	§	
RICK PERRY, *et al*,	§	
	§	
Defendants.	§	

OPINION

The right to vote: It defines our nation as a democracy. It is the key to what Abraham Lincoln so famously extolled as a "government of the people, by the people, [and] for the people."[1] The Supreme Court of the United States, placing the power of the right to vote in context, explained: "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[2]

In this lawsuit, the Court consolidated four actions challenging Texas Senate Bill 14 (SB 14), which was signed into law on May 27, 2011. The Plaintiffs and Intervenors (collectively "Plaintiffs")[3] claim that SB 14, which requires voters to display one of a

[1] Gettysburg Address.

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

[3] In **No. 13-cv-193 (Veasey Case)**, the **Veasey Plaintiffs** are Marc Veasey, Floyd James Carrier, Anna Burns, Michael Montez, Penny Pope, Jane Hamilton, Sergio DeLeon, Oscar Ortiz, Koby Ozias, John Mellor-Crummey, Evelyn Brickner, Gordon Benjamin, Ken Gandy, and League of United Latin American Citizens (LULAC). D.E. 109, 385. Intervenors in the Veasey Case include Texas Association of Hispanic County Judges and County Commissioners (HJ&C) (**HJ&C Intervenors**) (D.E. 153, 385) and Texas League of Young Voters Education Fund

very limited number of qualified photo identifications (IDs) to vote, creates a substantial burden on the fundamental right to vote, has a discriminatory effect and purpose, and constitutes a poll tax. Defendants[4] contend that SB 14 is an appropriate measure to combat voter fraud, and that it does not burden the right to vote, but rather improves public confidence in elections and, consequently, increases participation.

This case proceeded to a bench trial, which concluded on September 22, 2014. Pursuant to Fed. R. Civ. P. 52(a), after hearing and carefully considering all the evidence, the Court issues this Opinion as its findings of fact and conclusions of law. The Court holds that SB 14 creates an unconstitutional burden on the right to vote, has an impermissible discriminatory effect against Hispanics[5] and African-Americans, and was imposed with an unconstitutional discriminatory purpose. The Court further holds that SB 14 constitutes an unconstitutional poll tax.

(TLYV) and Imani Clark (**TLYV Intervenors**) (D.E. 73). In **No. 13-cv-263 (US Case)**, the Plaintiff is the United States of America. D.E. 1. In **No. 13-cv-291 (NAACP Case)**, the Plaintiffs are Texas State Conference of NAACP Branches (NAACP) and Mexican American Legislative Caucus of the Texas House of Representatives (MALC). D.E. 1. In **No. 13-cv-348 (Ortiz Case)**, the Plaintiffs are Eulalio Mendez Jr., Lionel Estrada, Lenard Taylor, Estela Garcia Espinoza, Margarito Martinez Lara, Maximina Martinez Lara, and La Union Del Pueblo Entero, Inc. (LUPE). D.E. 4.

[4] Defendants include the State of Texas, Rick Perry in his official capacity as Governor of the State of Texas, John Steen in his official capacity as Texas Secretary of State, and Steve McCraw in his official capacity as Director of the Texas Department of Public Safety. Mr. Steen was Texas Secretary of State when this action was filed. The current Texas Secretary of State is Nandita Berry.

[5] For purposes of this Opinion, the terms "Hispanic" and "Latino" will be used interchangeably.

I.

TEXAS'S HISTORY WITH RESPECT TO RACIAL DISPARITY IN VOTING RIGHTS

The careful and meticulous scrutiny of alleged infringement of the right to vote, which this Court is legally required to conduct, includes understanding the history of impairments that have plagued the right to vote in Texas, the racially discriminatory motivations and effects of burdensome qualifications on the right to vote, and their undeniable legacy with respect to the State's minority population. This uncontroverted and shameful history was perhaps summed up best by Reverend Peter Johnson, who has been an active force in the civil rights movement since the 1960s. "They had no civil rights towns or cities in the State of Texas because of the brutal, violent intimidation and terrorism that still exists in the State of Texas; not as overt as it was yesterday. But east Texas is Mississippi 40 years ago."[6]

State Senator Rodney Ellis testified about the horrific hate crime in the east Texas town of Jasper in the late 1990s in which James Byrd, an African-American man targeted for his race, was dragged down the street until he died.[7] A few years later, two African-American city council members spearheaded the effort to name a highly-qualified African-American as police chief in Jasper. Thereafter, those city council members were

[6] Johnson, D.E. 569, p. 10.

[7] Ellis, D.E. 573, pp. 159-62.

removed from their district council seats through "a strange quirk in the law" that allowed an at-large recall election.[8]

A. Access to the Polls

This anecdote demonstrating Texas's racially charged communities, the power of the polls, and the use of election devices to defeat the interests of the minority population is, unfortunately, no aberration. Dr. O. Vernon Burton has focused much of his career in American History on the issue of race relations.[9] Dr. Burton testified about the use in Texas of various election devices to suppress minority voting from the early days of Texas through today. Other experts, including Dr. Chandler Davidson, a professor emeritus of sociology and political science at Rice University, and George Korbel, an attorney with an expertise in voting rights, corroborated Dr. Burton's findings. This history is summed up as follows:

- 1895-1944: All-White Primary Elections
  - On the heels of Reconstruction, freed slaves and other minority men were just gaining access to the right to vote. The white primary method denied minority participation in primaries which effectively disenfranchised minority voters because Texas was dominated by a single political party (the Democratic Party) such that the primary election was the only election that mattered. The state law that mandated white primaries was found unconstitutional by the Supreme Court in 1927.[10]
  - In response, the Texas Legislature passed a facially neutral law allowing the political parties to determine who was qualified to

[8] Ellis, D.E. 573, p. 161.

[9] Dr. Burton is Creativity Professor of Humanities, History, Sociology, and Computer Science at Clemson University. D.E. 376-2, p. 5.

[10] *Nixon v. Herndon*, 273 U.S. 536 (1927).

vote in their primaries, resulting in the parties banning minority participation. This law was held unconstitutional in 1944.[11]

- 1905-1970: Literacy and "Secret Ballot" Restrictions

  - The Terrell Election Law, which also enabled white primaries, prohibited voters from taking people with them to the polls to assist them in reading and interpreting the ballot. Only white Democratic election judges were permitted to assist these voters who could not verify that their votes were cast as intended. Because minority voters had not been taught to read while enslaved or were subject to post-Civil War limited and segregated educational opportunities, and could not use their own language interpreter, these restrictions were struck down in 1970 as rendering voting an empty ritual.[12]

- 1902-1966: Poll Taxes

  - The Texas Constitution included the requirement that voters pay a $1.50 poll tax[13] as a prerequisite for voting.[14] While race-neutral on its face, this was intended to, and had the effect of, suppressing the African-American vote. In 1964, the practice was eliminated as to federal elections when the 24th Amendment to the United States Constitution was adopted.[15]

  - However, Texas retained the poll tax for elections involving only state issues and campaigns. This practice was ruled

[11] *Smith v. Allwright*, 321 U.S. 649 (1944).

[12] *Garza v. Smith*, 320 F. Supp. 131 (W.D. Tex. 1970), *vacated and remanded on procedural grounds*, 401 U.S. 1006 (1971), *on appeal after remand*, 450 F.2d 790 (5th Cir. 1971).

[13] Dr. Burton notes that $1.50 is equivalent to $15.48 in current dollars. Burton, D.E. 376-2, p. 13 (report) (citations omitted).

[14] A 1902 amendment, proposed by Acts 1901, 27th Leg., p. 322, S.J.R. No. 3 and adopted at the Nov. 4, 1902 election, added a provision requiring voters subject to poll tax to have paid the poll tax and hold a receipt therefor, or make affidavit of its loss. TEX. CONST. ART. VI, § 2 (amended 1966); *see also* TEX. CONST. ART. VIII, § 1 (historical notes, reflecting prior authorization for imposing poll tax among authorized taxes).

[15] The Texas Legislature did not vote to ratify the 24th Amendment's abolition of the poll tax until the 2009 legislative session. S.J. of Tex., 81st Leg., R.S. 2913 (2009) (HJR 39); H.J. of Tex., 81st Leg. R.S. 4569 (2009) (HJR 39); *see also* Korbel, D.E. 578, p. 189 (testimony). Even so, the process has not been completed and the measure last went to the Secretary of State. http://www.capitol.state.tx.us/BillLookup/BillStages.aspx?LegSess=81R&Bill=HJR39.

unconstitutional as disenfranchising African-Americans in 1966.[16]

- 1966-1976: Voter Re-Registration and Purging

  - Having lost the poll tax, the Texas Legislature passed a re-registration requirement by which voters had to re-register annually in order to vote. It was characterized as a "poll tax without the tax." Because of its substantial disenfranchising effect, it was ruled unconstitutional in 1971.[17]

  - In response, Texas enacted a purge law requiring re-registration of the entire electorate. Because Texas was, by then, subject to the Voting Rights Act (VRA) preclearance requirements, the United States Department of Justice (DOJ) objected to the change in the law and it was ultimately enjoined by a federal court in 1982.[18]

- 1971-2008: Waller County Students

  - In 1971, after the 26th Amendment extended the vote to those 18 years old and older, Waller County which was home to Prairie View A&M University (PVAMU), a historically Black university, became troubled with race issues. Waller County's tax assessor and voter registrar prohibited students from voting unless they or their families owned property in the county. This practice was ended by a three-judge court in 1979.[19]

  - In 1992, a county prosecutor indicted PVAMU students for illegally voting, but dropped the charges after receiving a protest from the DOJ.[20]

  - In 2003, a PVAMU student ran for the commissioner's court. The local district attorney and county attorney threatened to

[16] *United States v. Texas*, 252 F. Supp. 234 (W.D. Tex. 1966). The Supreme Court extended the ban on poll taxes to state elections in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

[17] *Beare v. Smith*, 321 F. Supp. 1100 (S.D. Tex. 1971), *aff'd sub nom. Beare v. Briscoe*, 498 F.2d 244 (5th Cir. 1974).

[18] *See Flowers v. Wiley*, 675 F.2d. 704, 705-06 (5th Cir. 1982); Dr. Burton, D.E. 376-2, p. 14 (report).

[19] *United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978) (three-judge court), *aff'd mem. sub nom. Symm v. United States*, 439 U.S. 1105 (1979).

[20] Burton, D.E. 376-2, p. 20 (report) (citations omitted).

prosecute students for voter fraud—for not meeting the old domicile test. These threatened prosecutions were enjoined, but Waller County then reduced early voting hours, which was particularly harmful to students because the election day was during their spring break. After the NAACP filed suit, Waller County reversed the changes to early voting and the student narrowly won the election.[21]

- In 2007-08, during then Senator Barack Obama's campaign for president, Waller County made a number of voting changes without seeking preclearance. The county rejected "incomplete" voter registrations and required volunteer deputy registrars (VDRs) to personally find and notify the voters of the rejection. The county also limited the number of new registrations any VDR could submit, thus limiting the success of voter registration drives. These practices were eventually prohibited by a consent decree.[22]

- 1970-2014: Redistricting

  - In every redistricting cycle since 1970, Texas has been found to have violated the VRA with racially gerrymandered districts.[23]

This history describes not only a penchant for discrimination in Texas with respect to voting, but it exhibits a recalcitrance that has persisted over generations despite the repeated intervention of the federal government and its courts on behalf of minority citizens.

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[21] *Id.*

[22] Consent Decree, *United States v. Waller Cnty.*, No. 4:08-cv-03022 (S.D. Tex. Oct. 17, 2008), *available at* http://www.justice.gov/crt/about/vot/sec_5/waller_cd.pdf.

[23] *E.g.*, *LULAC v. Perry*, 548 U.S. 399 (2006); *Bush v. Vera*, 517 U.S. 952 (1996); *Upham v. Seamon*, 456 U.S. 37 (1982); *White v. Weiser*, 412 U.S. 783 (1973); *White v. Regester*, 412 U.S. 755 (1973). While the Supreme Court eliminated the formula for the preclearance requirement in *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013), prior to that opinion, a three-judge court had found that two of Texas's 2011 redistricting plans violated the VRA. *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated and remanded on other grounds*, 133 S. Ct. 2885 (2013). The 2011 redistricting plans are still the subject of ongoing litigation. *See Perez v. Perry*, SA-11-CV-360, 2014 WL 2740352 (W.D. Tex. June 17, 2014).

In each instance, the Texas Legislature relied on the justification that its discriminatory measures were necessary to combat voter fraud.[24] In some instances, there were admissions that the legislature did not want minorities voting.[25] In other instances, the laws that the courts deemed discriminatory appeared neutral on their face. There has been a clear and disturbing pattern of discrimination in the name of combatting voter fraud in Texas. In this case, the Texas Legislature's primary justification for passing SB 14 was to combat voter fraud. The only voter fraud addressed by SB 14 is voter impersonation fraud, which the evidence demonstrates is very rare (discussed below).

This history of discrimination has permeated all aspects of life in Texas. Dr. Burton detailed the racial disparities in education, employment, housing, and transportation, which are the natural result of long and systematic racial discrimination. As a result, Hispanics and African-Americans make up a disproportionate number of people living in poverty,[26] and thus have little real choice when it comes to spending money on anything that is not a necessity.

Minorities continue to have to overcome fear and intimidation when they vote. Reverend Johnson testified that there are still Anglos at the polls who demand that minority voters identify themselves, telling them that if they have ever gone to jail, they

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[24] Burton, D.E. 582, pp. 22-23 (testimony) (Texas's stated rationale for the white primaries, secret ballot provisions, poll tax, re-registration requirements, and voter purges was to reduce voter fraud).

[25] Burton, D.E. 376-2, pp. 10-11 (report).

[26] Burden, D.E. 391-1, p. 14 (report) (citing *Poverty Rate by Race/Ethnicity*, THE HENRY J. KAISER FAMILY FOUNDATION, http://kff.org/other/stateindicator/poverty-rate-by-raceethnicity/ (last visited June 3, 2014)).

will go to prison if they vote.[27] Additionally, there are poll watchers who dress in law enforcement-style clothing for an intimidating effect. State Representative Ana Hernandez-Luna testified that a city in her district, Pasadena, recently made two city council seats into at-large seats in order to dilute the Hispanic vote and representation.[28]

And even where specific discriminatory practices end, their effects persist. It takes time for those who have suffered discrimination to slowly assert their power. Because of past discrimination and intimidation, there is a general pattern by African-Americans of not having the power to fully participate.[29] Other than to assert that today is a different time, Defendants made no effort to dispute the accuracy of the expert historians' analyses and other witnesses' accounts of racial discrimination in Texas voting laws—its length, its severity, its effects, or even its obstinacy.

B. Racially Polarized Voting

Another relevant aspect in the analysis of Texas's election history is the existence of racially polarized voting throughout the state. Racially polarized voting exists when the race or ethnicity of a voter correlates with the voter's candidate preference.[30] In other

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[27] Johnson, D.E. 569, pp. 17-18; *see also Rodriguez v. Harris Cnty.*, 964 F. Supp. 2d 686, 783 (S.D. Tex. 2013) (describing poll workers being hostile to Latinos and requiring them to show driver's licenses to vote).

[28] Hernandez-Luna, D.E. 573, pp. 373-74; *see also* Korbel D.E. 365, p. 26 (report).

[29] Rev. Johnson testified that it took five years after Rosa Parks spurred the integration of public accommodations for African-Americans to sit in the front of the bus. D.E. 596, p. 13. This delayed progress was confirmed by Sen. Ellis, who testified that, in his experience negotiating political power, African-Americans remain deferential to Anglos. D.E. 573, pp. 158, 162-63.

[30] *Thornburg v. Gingles*, 478 U.S. 30, 53 n.21 (1986) (racially polarized voting "exists where there is a consistent relationship between [the] race of the voter and the way in which the voter votes, or to put it differently, where black voters and white voters vote differently") (internal quotation marks and citations omitted).

words, and in the context of Texas's political landscape, Anglos vote for Republican candidates at a significantly higher rate relative to African-Americans and Hispanics.

Dr. Barry C. Burden, a political science professor at the University of Wisconsin-Madison, testified regarding racially polarized voting in Texas. Dr. Burden explained that the gap between Anglo and Latino Republican support is generally 30-40 percentage points. The rate of racially polarized voting between Anglo and African-American voters is even larger. These racial differences were much greater than those among other socio-demographic groups—including differences between those of low and high income, between men and women, between the least and most educated, between the young and the old, and between those living in big cities and small towns.[31] Many courts, including the United States Supreme Court, have confirmed that Texas suffers from racially polarized voting.[32] And Mr. Korbel testified without contradiction that, in the current redistricting litigation pending in the Western District of Texas, San Antonio Division, Texas admitted that there is racially polarized voting in 252 of its 254 counties.[33] Mr. Korbel opined that racially polarized voting extends to the remaining two counties as well.[34] Defendants offered no evidence to the contrary on this issue.

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[31] Burden, D.E. 391-1, p. 13 (report); Burden, D.E. 569, p. 307 (testimony).

[32] *See, e.g.*, *LULAC*, 548 U.S. at 427 ("The District Court found 'racially polarized voting' in south and west Texas, and indeed 'throughout the State.'"); *League of United Latin Am. Citizens (LULAC), Council No. 4434 v. Clements*, 986 F.2d 728, 776 *on reh'g*, 999 F.2d 831 (5th Cir. 1993); *Benavidez v. Irving Indep. Sch. Dist.*, 3:13-CV-0087-D, 2014 WL 4055366, at *12 (N.D. Tex. Aug. 15, 2014); *Fabela v. City of Farmers Branch, Tex.*, 3:10-CV-1425-D, 2012 WL 3135545, at *11, *13 (N.D. Tex. Aug. 2, 2012); *see also Bush v. Vera*, 517 U.S. 952, 981 (1996).

[33] Korbel, D.E. 578, pp. 200-01 (discussing *Perez v. Perry*, 2014 WL 2740352).

[34] *Id.*

C. Extent to Which Texans Have Elected African-Americans and Hispanics to Public Office

Texas's long history of racial discrimination may explain why African-Americans as well as Hispanics remain underrepresented within the ranks of publicly elected officials relative to their citizen population size. According to Dr. Burden's findings, as of 2013, African-Americans held 11.1% of seats in the Texas Legislature although they were 13.3% of the population in Texas as estimated by the 2012 U.S. Census.[35] Hispanics fared worse. In 2013, Hispanics held 21.1% of seats in the state legislature even though they were 30.3% of the Texas citizen population the year before.[36]

African-American and Hispanic underrepresentation did not improve when reviewing elected seats beyond the legislature. The most recent data available indicates that, as of 2000, only 1.7% of all Texas elected officials were African-American.[37] A similar analysis from 2003 found that approximately 7.1% of all Texas elected officials were Hispanic.[38] Defendants did not challenge these findings or offer any controverting evidence. Thus, this Court adopts Dr. Burden's conclusion that African-Americans and Hispanics remain woefully underrepresented among Texas's elected officials.

D. Overt or Subtle Racial Appeals

Another aspect of Texas's electoral history is the use of subtle and sometimes overt racial appeals by political campaigns. As Dr. Burton explained in his report,

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[35] Burden, D.E. 391-1, p. 16 (report).

[36] *Id.*

[37] *Id.*

[38] *Id.*

"[t]hrough the twentieth century, racial appeals—once more explicit—have become increasingly subtle."[39] He noted that, words like "welfare queen," "lazy," and "immigration" have been used by campaigns to activate racial thinking in the minds of voters.[40]

Instances of campaigns relying on racial messages persist in Texas.[41] For example, in a 2008 Texas House of Representatives race, an Anglo candidate sent a mailer featuring a manipulated picture of his Anglo opponent. The opponent's skin was darkened, a Mexican flag button was superimposed on his shirt, and an oversized Chinese flag was positioned directly behind him—all while questioning his commitment against illegal immigration.[42] Another example is a campaign mailer sent by an Austin-based political action committee against an Anglo candidate running for a Texas House of Representatives seat. The mailer, titled "Birds of a Feather Flock Together," featured black birds and the Anglo candidate surrounded by various minority elected officials—the late Texas State Senator Mario Gallegos, Congresswoman Sheila Jackson Lee, and President Barack Obama—with the caption "Bad Company Corrupts Good Character."[43] Dr. Burton offered another example of a 2008 campaign mailer aimed at dissuading African-Americans from voting. The mailer, sent to African-Americans in Dallas, Texas, warned that a group suspected of voter fraud was trying to get people to the polls and that

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[39] Burton, D.E. 376-2, p. 36 (report).

[40] *Id*. at 38.

[41] Additional examples were provided by Dr. Korbel, D.E. 365, p. 23 (report).

[42] Burton, D.E. 376-2, pp. 41, 65 (report).

[43] *Id*. at 39-40.

"[p]olice and other law enforcement agencies [would] be at the voting locations." The mailer further stated that a victim of voter fraud could serve jail time.[44]

This Court finds that racial appeals remain a tactic relied on by Texas's political campaigns. Defendants offered no controverting evidence on this issue.

II.

THE STATUS QUO BEFORE SB 14 WAS ENACTED

In-person voter impersonation in Texas is rare. Before SB 14 went into effect, the only document required for a registered voter to cast a ballot in Texas was his or her voter registration certificate.[45] Absent the certificate, the voter could use a driver's license or any number of other documents such as a utility bill that would, as a practical matter, identify the person as the registered voter. Major Forrest Mitchell works in the Texas Attorney General's law enforcement division. He testified regarding the Special Investigations Unit which handles all claims of election violations brought to the Attorney General. In the ten years preceding SB 14, only two cases of in-person voter impersonation fraud were prosecuted to a conviction—a period of time in which 20 million votes were cast.[46]

In the first case, Lorenzo Almanza, Jr., appeared at the polls with his brother Orlando's voter registration certificate and represented himself to be Orlando, who was incarcerated at the time. The poll worker knew the brothers and alerted the election

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[44] *Id*. at 40, 62-63 (the message warned that a national political group was engaging in voter fraud by taking people to the polls on election day and that their victims—the voters—would be prosecuted).

[45] TEX. ELEC. CODE § 63.001(b) (Vernon 2011).

[46] McGeehan, D.E. 578, p. 274.

judge. Because Lorenzo had Orlando's valid voter registration certificate, the elections department permitted him to vote. Lorenzo was convicted, along with his mother, who accompanied him to the polls and fraudulently vouched that Lorenzo was, in fact, Orlando.[47] In the other case, Jack Crowder, III voted as his deceased father.[48]

According to Major Mitchell, since the implementation of SB 14's photo ID requirements over three elections, there has been no apparent change in the rate of voter fraud referrals and no higher rate of convictions.[49] This is not surprising, considering the testimony of several experts who are abundantly familiar with the nature of in-person voter impersonation fraud and election history, and who testified convincingly that such fraud is difficult to perpetrate, has a high risk/low benefit ratio, and does not occur in significant numbers.

While there have always been allegations of in-person voter impersonation fraud, the reality is that the allegations are seldom substantiated. According to Randall Buck Wood, an attorney who was formerly the Director of Elections for the Texas Secretary of State (SOS) and whose specialty is election law, in over 44 years of investigating and litigating election issues, including allegations of rampant voter impersonation fraud, he has never found a single instance of successful voter impersonation in an election contest.[50]

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[47] Mitchell, D.E. 592, pp. 70-72.

[48] *Id*. at 76.

[49] Mitchell, D.E. 578, p. 174.

[50] Wood, D.E. 563, pp. 198, 204 (testimony).

Dr. Lorraine Minnite, a tenured Associate Professor of Public Policy at Rutgers University, has done extensive work since 2000 studying voter fraud in American contemporary elections. She produced a report specific to Texas, which was consistent with other states' history of very little in-person voter impersonation fraud.[51] Dr. Minnite found fewer than ten cases of in-person voter impersonation fraud in the United States between 2000 and 2010.[52] Two of those were in Texas, with one involving a woman with a falsified driver's license bearing her actual photo, so it is questionable whether SB 14 would have had any effect on that case.[53] Two occurred after SB 14 was passed.[54]

Dr. Minnite's research found that sloppy journalism regarding voter fraud and officials repeatedly suggesting that voter fraud has occurred have instilled a misconception in the public. Press releases making allegations of voter fraud were often repeated in news stories without having been verified, feeding a baseless skepticism about election integrity.[55] Looking at the pre-SB 14 procedures in place and the rarity of in-person voter impersonation fraud, she concluded: "So SB 14 doesn't add anything, in my opinion, to what we already have in place."[56]

U.S. Representative Marc Veasey previously served as a state representative in Texas. He served on the House Elections Committee over several sessions and did not

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[51] Minnite, D.E. 578, pp. 119-20 (testimony).

[52] *Id*. at 130.

[53] *Id*. at 134-37.

[54] *Id*. at 135.

[55] *Id*. at 137-38; *see also* Patrick, D.E. 588, p. 249 (testifying that the public had a widespread belief that there was fraud in elections based on news accounts).

[56] Minnite, D.E. 578, p. 142 (testimony).

see any evidence of widespread in-person voter fraud. Instead, it was always just innuendo.[57] Defendants claim that voter impersonation fraud is difficult to detect and could potentially be more widespread than the two incidents actually shown would indicate. They further claim that the voter rolls are bloated with deceased voters, which creates an opportunity to commit in-person fraud. However, they failed to present evidence that the deceased are voting, which they could have done by comparing the deceased voter list against the list of those who have voted.

As Mr. Wood and Dr. Minnite made clear, in-person voter impersonation fraud is difficult to perpetrate with success. The perpetrator would have to: (1) know of an existing registered voter; (2) gain possession of that person's voter registration certificate or some other documentation of name and residence; (3) precede that person to the polls; (4) elude recognition as either who they actually are or as not being who they pretend to be; and (5) hope that the actual voter does not appear at the polls later to cast his or her own ballot. In State Representative Todd Smith's terms, such a person would have to be a fool to take such risks, with significant criminal penalties, in order to cast a single additional ballot in that election.[58]

The cases addressing voter photo ID laws hold that the states have a legitimate interest in preventing in-person voter impersonation fraud despite minimal evidence that it exists as a real threat to any election, and Defendants here have offered very little

[57] Veasey, D.E. 561, pp. 239-40.

[58] Smith, D.E. 578, p. 343 ("My presumption is that you are a fool or you're uninformed if you're willing to commit a felony in order to add a single vote to the candidate of your choice.").

evidence that such fraud is occurring. This Court finds that instances of in-person voter impersonation fraud in Texas are negligible. In contrast, there appears to be agreement that voter fraud actually takes place in abundance in connection with absentee balloting.[59] Mr. Wood testified that some campaign assistants befriend the elderly and raid their mailboxes when mail-in ballots arrive from the county.[60] SB 14 does nothing to combat fraud in absentee ballots and, ironically, appears to relegate voters who are over 65 and do not have qualified SB 14 ID to voting by absentee ballot. Justifiably, many of the registered voters who testified in this case stated that they need to vote in person because they do not trust that their vote will be properly counted if they have to vote by absentee ballot.[61]

III.

THE TEXAS PHOTO IDENTIFICATION LAW

A. The Challenged Provisions of SB 14

Effective January 1, 2012, Texas registered voters are required to present a specified type of photo ID when voting at the polls in person. SB 14, § 26 (effective date). The law has a number of provisions placed in issue in this case, described generally as follows.

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[59] Wood, D.E. 563, p. 202 (testimony); Burden, D.E. 569, p. 320 (testimony); Lichtman, D.E. 573, p. 67 (testimony); Anchia, D.E. 573, p. 322; Minnite, D.E. 375, p. 21 (report) (most of the voter fraud referrals concern violations of the state's absentee and early voting laws, mishandling of mail ballots, unlawful assistance to the voter, coercion or intimidation of voters, and alleged ballot tampering); Mitchell, D.E. 578, p. 176.

[60] Wood, D.E. 563, pp. 224-26.

[61] See Section IV(B)(2)(a), *infra*.

The only acceptable forms of photo ID are: (1) a driver's license, personal ID card, and license to carry a concealed handgun, all issued by the Department of Public Safety (DPS); (2) a United States military ID card containing a photo; (3) a United States citizenship certificate containing a photo; and (4) a United States passport. *Id.*, § 14. All of these forms of photo ID must be current or, if expired, they must not have expired earlier than sixty days before the date of presentation at the polls. *Id*.

If a voter does not have such photo ID, that voter may obtain an election identification certificate (EIC), which is issued by DPS upon presentation of proof of identity. *Id.*, § 20. Persons with a verifiable disability may obtain an exemption from the photo ID requirement, but must provide required documentation of the disability to the voter registrar. *Id.*, § 1. The sources of that documentation are limited to the United States Social Security Administration and United States Department of Veterans Affairs. *Id*.

When the voter appears at the polling place, the law requires that the voter's registered name and name on the photo ID be exactly the same or "substantially similar." *Id.*, § 9(c). If they are exactly the same, the voter may cast a ballot without further complication. If they are not exactly alike, but are deemed by the poll workers to be "substantially similar" under the SOS's guidelines, the voter is permitted to vote, but must first sign an affidavit that the actual voter and the registered voter are one and the same. *Id.*

If the registered name and the name on the photo ID are not deemed by the poll workers to be "substantially similar," or if the voter does not have any of the necessary photo ID, the voter may cast a provisional ballot, which will be counted only if the voter, within six days of the election, goes to the voter registrar with additional documentation to verify his or her identity. *Id.*, §§ 15, 17, 18. Those who have a religious objection to being photographed or who lost their photo ID in a natural disaster may also cast a provisional ballot subject to later proof of identity within six days of any election in which that person votes. *Id.*, § 17.

The law requires each county voter registrar to provide notice of the photo ID law when issuing original or renewal registration certificates. *Id.*, § 3. The registrar must post a notice in a prominent location at the county clerk's office and include notice in any website maintained by that registrar. *Id.*, § 5. The SOS is required to include the notice of this law on the SOS website and must conduct a statewide effort to educate voters regarding the new requirements. *Id.*, § 5. The SOS must also issue training standards for poll workers regarding accepting and handling the photo IDs. *Id.*, § 6. The county clerks are directed to provide training pursuant to the SOS's standards for their respective poll workers. *Id.*, § 7.

B. The Texas Law is Comparatively the Strictest Law in the Country

States began considering voter photo ID laws in the late 1990s.[62] As of 2014, eleven states, including Texas, have enacted laws described as "Strict Photo ID" by the National Conference of State Legislatures, with two of those states delaying implementation.[63] There are several features of photo ID laws to evaluate when determining how strict they are, including soft rollouts (which Texas did not adopt), educational campaigns (which are woefully lacking in Texas), the time frame during which an expired ID will be accepted (a matter on which Texas is relatively strict), the time frame in which provisional ballots may be cured (a matter on which Texas is arguably in the middle ground), and terms on which provisional ballots may be cured (where Texas's requirements that the voter still produce a qualified photo ID make it strict). Comparing the acceptable forms of photo IDs of the strict states, it is clear that SB 14 provides the fewest opportunities to cast a regular ballot, as demonstrated in the following table.

[62] The first challenge to a photo ID requirement for voting was in Virginia in 1999. *See Democratic Party of Va. v. State Bd. of Elections*, HK-1788, 1999 WL 1318834 (Va. Cir. Ct. Oct. 19, 1999).

[63] North Carolina and New Hampshire enacted strict voter photo ID laws in 2012 and 2013, respectively, but they will not be implemented until 2015 and 2016. *See Voter Identification Requirements – Voter ID Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx.

STRICT STATE COMPARISON[64]

	Arkansas	Georgia	Indiana	Kansas	Mississippi	North Carolina	New Hampshire	Tennessee	Texas	Virginia	Wisconsin
Home state driver's license or ID	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Home state handgun/firearm license	✓			✓	✓		*	✓	✓	✓	
U.S. passport	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
U.S. citizenship or naturalization certificate with photo							*		✓		✓
Home state voter ID	✓	✓	✓		✓		*	✓	✓	✓	✓
U.S. military ID with photo	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Religious accommodation	✓		✓	✓	✓	✓		✓	✓		✓
Any state driver's license				✓	✓	✓	✓				
Any state concealed handgun license				✓			*				
Any home state photo ID	✓	✓	✓		✓		✓	✓		✓	
Any home state sub-jurisdiction ID		✓			✓		*			✓	
Any federal government ID	✓	✓	✓		✓		*	✓		✓	
Home state college or university student ID	✓	✓		✓	✓		✓			✓	✓
Home state/U.S. public employee badge or ID	✓	✓		✓	✓		*	✓		✓	
Private employee badge or ID							*			✓	
Public assistance ID	✓			✓			*				
Tribal ID		✓		✓	✓	✓	*			✓	✓
Public high school student ID				✓			✓			✓	
Nonpublic (accredited) high school student ID							✓				
Public school district employee ID				✓			*				
City library card				✓			*				
Emergency management card				✓			*				
Transit/airport authority card				✓			*				
Exemption for voting in nursing/care facility	✓		✓					✓			
Elderly permitted to use expired ID				✓		✓	✓	✓			
Indigence accommodation	✓		✓					✓			

*New Hampshire may allow these forms of photo identification if they are approved by an authorized individual.

[64] *See* ARK. CODE ANN. §§ 7-1-101, 7-5-201, 7-5-305, 7-5-321; GA. CODE ANN. § 21-2-417; IND. CODE §§ 3-5-2-40.5, 3-11-8-25.1, 3-11.7-5-2.5; KAN. STAT. ANN. §§ 25-2908, 25-1122; MISS. CODE ANN. § 23-15-563; N.C. GEN. STAT. ANN. § 163-166.13 (effective 2016); N.H. REV. STAT. ANN. § 659:13; TENN. CODE ANN. § 2-7-112; VA. CODE ANN. §§ 24.2-643, 24.2-653; WIS. STAT. ANN. §§ 5.02, 6.79(2), 6.97(3). Arkansas law held unconstitutional and stayed pending appeal. *See Ark. State Bd. of Election Comm'rs v. Pulaski Cnty. Election Comm'n*, 2014 Ark. 236, 2014 WL 2694226. Oral arguments heard Oct. 2, 2014. Wisconsin law enjoined, but reinstated upon appeal *Frank v. Walker*, No. 14-2058, 2014 WL 4966557 (7th Cir. Oct. 6, 2014), still subject to further appeal.

This table demonstrates that there are at least 16 forms of ID that some of the other strict states permit, but that Texas does not, and there are three classes of persons, including the elderly and indigent, who are excused in whole or in part from the photo ID requirement in many states, but not in Texas.

According to the evidence, the costs to obtain the respective forms of photo IDs permitted in Texas, if the voter does not already have an accurate original or certified copy of his or her birth certificate, are as follows:[65]

Texas EIC		
Issued by DPS	Application Fee	$0.00
Issued by DSHS or County Registrar	EIC-only Birth Certificate if the application is tendered in person (not by mail or online) and only if already registered and accurate	$2.00—3.00[66]
	Full-purpose Birth Certificate (the only type issued by mail, even if for EIC purposes)	$22.00—23.00
	Search Fee to find Birth Certificate plus statutory surcharge	$22.00
	Delayed Birth Certificate—Search fee plus certified copy	$47.00
	Application to Amend Birth Certificate plus certified copy	$37.00
Other State or Territory	Out-of-State Birth Certificate[67]	$5.00—34.00
	Total Fees Required To Be Paid To Obtain EIC	**$2.00—47.00**
Texas Driver's License		
Issued by DPS	Application Fee	$9.00—25.00
	Replacement Fee	$11.00
	Birth Certificate (see above)	$22.00—47.00
	Total Fees Required To Be Paid To Obtain Driver's License	**$31.00—72.00**

[65] Bazelon, D.E. 614-1, p. 19 (report); Farinelli, D.E. 582, pp. 312-98. These figures, of course, do not include travel costs, or time off of work. The cost of a birth certificate is used because it is ordinarily the most widely available and least expensive alternative of primary identification.

[66] The State did not reduce the charge of $22.00 for a birth certificate until after SB 14 passed and was signed into law. Hebert, D.E. 592, pp. 183-84; *see generally* Farinelli, D.E. 582, p. 323.

[67] Pls.' Ex. 474, pp. 5, 31 (CDC Vital Statistics Guide).

Texas Personal Identification Card		
Issued by DPS	Application Fee	$6.00—16.00
	Replacement Fee	$11.00
	Birth Certificate (see above)	$22.00—47.00
	Total Fees Required To Be Paid To Obtain Personal ID Card	**$28.00—63.00**
Texas Concealed Handgun License		
Issued by DPS	Application Fee-new	$70.00-140.00
	Application Fee-renewed	$70.00
Issued by DPS	Texas Driver's License or Personal Identification Card	$9.00—63.00
Private Vendor	Classroom Training	Varies
	Total Fees Required To Be Paid To Obtain Handgun License	**Over $79.00**
Passport		
Issued by US	Application Fee--New	$55-135
	Application Fee--Renewed	$30.00-110.00
Private Vendor	Photo	Varies
	Total Fees Required To Be Paid To Obtain Passport	**Over $30.00**
Citizenship Certificate with Photo		
Issued by US	Original Naturalization Certificate	$680.00
	Original Certificate of Citizenship	$600.00
	Copy of Naturalization Certificate[68]	$345.00
	Total Fees Required To Be Paid To Obtain Citizenship Cert.	**$345—680**
Military ID with Photo		
	Not Quantifiable	

Thus, unless the voter already has an official copy of his or her birth certificate, the minimum fee to obtain an SB 14-qualified ID to vote will be $2.00 and, according to the individual Plaintiffs' testimony, will likely be much more because of prevalent problems with the accurate registration of births of minorities.

[68] Hernandez-Luna, D.E. 573, p. 367. While naturalization certificates are not listed in SB 14, the SOS has allowed them by administrative rule. *See generally* 1 TEX. ADMIN. CODE § 81.8; 37 TEX. ADMIN. CODE § 15.182.

IV.

THE METHOD AND RESULT OF PASSING SB 14

A. The Texas Legislature's Approach to the Consideration of SB 14 Was Extraordinary

SB 14 was the Texas Legislature's fourth attempt[69] to enact a voter photo ID law. Over time, the provisions became increasingly strict[70] and the procedural mechanisms engaged to ensure passage became more aggressive.

- HB 1706 (2005)
  - In addition to the ID permitted under SB 14, the provisions included: (1) driver's licenses and personal ID cards issued by a DPS-equivalent of any state, further accepting those IDs even if they were expired for two years; (2) employer IDs issued in the ordinary course of business; (3) student photo IDs issued by a public or private institution of higher education; (4) a state agency ID card; and (5) a photo ID issued by an elections administrator or county clerk. Non-photo ID, such as utility bills, bank statements, and paychecks that were permitted under existing law continued to be acceptable. A personal identification certificate would have been available free of charge upon execution of an affidavit, with no underlying documentation specified. It further provided that it would not take effect unless it passed VRA scrutiny.[71]
  - The bill, after being reported out of the Elections Committee, passed the House but died in the Senate Committee on State Affairs.[72]

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[69] Tex. S.B. 362, 81st Leg., R.S. (2009); Tex. H.B. 218, 80th Leg., R.S. (2007); Tex. H.B. 1706, 79th Leg., R.S. (2005).

[70] Ellis, D.E. 573, p. 185; *see also* HB 1706 (2005), *supra;* HB 218 (2007), *supra;* SB 362 (2009), *supra*.

[71] http://www.capitol.state.tx.us/tlodocs/79R/billtext/pdf/HB01706E.pdf#navpanes=0.

[72] http://www.capitol.state.tx.us/BillLookup/Actions.aspx?LegSess=79R&Bill=HB1706.

- HB 218 (2007)

  - The provisions, as the bill was reported out of the Senate State Affairs Committee, included (in addition to the ID permitted under SB 14): (1) a DPS driver's license or personal ID card even if it was expired for two years (leaving out those IDs issued by other states); (2) employer IDs issued in the ordinary course of business; (3) student photo IDs issued by a public or private institution of higher education (now requiring that the school be located in Texas); (4) an ID issued by an agency or institution of the federal government (added); and (5) an ID issued by an agency, institution, or political subdivision of the State of Texas. This bill still permitted the use of non-photo ID. The free election identification certificate provision left out the requirement of an affidavit or any other proof of identity. There was no requirement that it pass VRA scrutiny.[73]

  - The bill was reported out of the House Elections Committee and several House amendments were adopted. In the Senate, it was reported out of the State Affairs Committee. While the rules were initially suspended to take it up out of order for second reading, the vote was reconsidered and the measure failed. The rules were not suspended, at which point the bill died.[74]

- SB 362 (2009)

  - As it emerged from the House Elections Committee, the provisions included (in addition to ID permitted by SB 14): (1) a driver's license or personal ID card issued by DPS, which has not been expired for more than two years; (2) an ID issued by an agency or institution of the federal government; and (3) an ID issued by an agency, institution, or political subdivision of the State of Texas. Employer and student IDs were omitted. Non-photo ID was still permitted. This bill repeated the free election identification certificate with no underlying documentation requirement.[75]

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[73] http://www.capitol.state.tx.us/tlodocs/80R/billtext/pdf/HB00218S.pdf#navpanes=0.

[74] http://www.capitol.state.tx.us/BillLookup/Actions.aspx?LegSess=80R&Bill=HB218.

[75] http://www.capitol.state.tx.us/tlodocs/81R/billtext/pdf/SB00362H.pdf#navpanes=0.

- The bill started in the Senate this time. The Senate adopted a rules change just for voter ID legislation, allowing it to be set as "special order" upon majority vote, which vote was obtained. It was referred to the Committee of the Whole Senate, from which it was reported favorably with no amendments. Upon second reading, two amendments offered by a primary author, Senator Troy Fraser, were adopted. A point of order complaining of the lack of a fiscal note, evidenced by the Finance Committee's contingency rider authorizing $2 million for voter education from the general revenue fund, was overruled. It passed the Senate and went to the House Elections Committee. It was reported out of committee, but died on the calendar, due to chubbing.[76]

Based on this experience, the proponents of voter ID legislation knew that additional procedural changes would be required to get the legislation passed. With the 2010 elections giving Republicans a majority in both the House and the Senate, they had the votes to pass a law as long as they could eliminate any two-thirds vote requirement in the Senate and keep the bill at the front of the line in both houses.

1. New Uncompromising Sponsorship

In 2011, SB 14 appeared with nineteen authors[77] and was described by some of the Texas legislators as having questionable authorship because the authors and sponsors seemed to not have full command of the text of the bill, and it was presented as "pre-packaged," already "baked," or a "done deal."[78] Sponsors exhibited an aggressive attitude and were reluctant to answer questions, appearing evasive or disinterested in any

[76] http://www.capitol.state.tx.us/BillLookup/Actions.aspx?LegSess=81R&Bill=SB362. *See also* Dewhurst, D.E. 588, pp. 26, 31-33, 45-47 (SB 362 was "chubbed to death"); Patrick, D.E. 588, pp. 279-84.

[77] http://www.capitol.state.tx.us/BillLookup/Authors.aspx?LegSess=82R&Bill=SB14.

[78] Anchia, D.E. 573, pp. 339, 355 ("I think the evasiveness of the bill authors, the failure to act to answer questions – the fact that a lot of the bills authors – or that the bill authors didn't really even know their bill that well caused me to believe that maybe somebody else was writing that bill for them."); Veasey, D.E. 561, p. 248 (pre-packaged).

consideration of opponents' substantive concerns.[79] When Senator Ellis asked primary author Senator Fraser questions about SB 14, the response was, "I am not advised."[80] This attitude, which Ellis testified was out of character for sponsors of major bills, was explained when Senator Fraser indicated that he had "drawn the straw."[81] The attitude in the 2011 session was dramatically different from that of 2009 in that SB 14 proponents were not willing to negotiate in their shared interests.[82]

2. Speed Through the Texas Senate

Special Priority and the Need for Speed. According to Senator Ellis, Texas legislation is a "game for the swift"[83] and SB 14 was "on a spaceship. I mean, it – was trying to rocket this bill out of there."[84] It was pre-filed on November 8, 2010, and had a bill number of SB 178.[85] So on January 12, 2011, the sponsors obtained the permission of Lieutenant Governor David Dewhurst to re-file the bill under one of the low numbers reserved for his priorities, thus giving it the number "SB 14."[86] That number telegraphs to the Senate a priority for the Lieutenant Governor.[87]

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[79] Anchia, D.E. 573, pp. 338-39; Martinez-Fischer, D.E. 561, p. 106 (testifying that his concerns "fell on deaf ears").

[80] Ellis, D.E. 573, pp. 184-85 ("My . . . friend Senator [Fraser] would say something to the effect, 'I'm not advised, ask the Secretary of State.'"); Fraser, D.E. 588, p. 414.

[81] Ellis, D.E. 573, p. 186.

[82] *Id*. at 186-87 (specifically disputing Sen. Fraser and Lt. Gov. Dewhurst's assertions that they were trying to work out a consensus on SB 14); Martinez-Fischer, D.E. 561, pp. 98-99.

[83] Ellis, D.E. 573, pp. 165-66.

[84] *Id*. at 176.

[85] Fraser, D.E. 588, p. 407.

[86] Fraser, D.E. 588, pp. 407-08.

[87] Dewhurst, D.E. 588, pp. 65-66.

Emergency Designation. Governor Rick Perry designated "Legislation that requires a voter to present proof of identification when voting" as an "emergency matter for immediate consideration" by both houses of the Texas Legislature.[88] According to Senator Wendy Davis, no one could explain what the emergency was.[89] The effect of this was to permit the legislature to process SB 14 during the first sixty (60) days of the legislative session.[90] Without that designation, it would have taken a four-fifths vote of the Senate to take up the legislation that early in the session.[91] With the emergency designation and the ability to proceed during the first two months of the session when the calendar was clear, other techniques for slowing down the process were eliminated. For instance, there were no "blocker bills" in the way.[92]

Two-Thirds Rule Change. At the beginning of the 2011 legislative session, the Senate adopted the governing rules of the prior session.[93] Under Senate Rule 5.11(a), a two-thirds majority vote is required to make a bill or resolution a "special order." When designated as a "special order," the bill is considered prior to other business of the Senate. The Senate of the 2009 Texas Legislature had adopted a significant rules change to Rule 5.11 providing that a bill relating to voter ID requirements that was reported

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[88] S.J. of Tex., 82nd Leg., R.S. 54 (2011); H.J. of Tex., 82nd Leg., R.S. 80 (2011).

[89] Davis, D.E. 573, pp. 9-10; *see also* McGeehan, D.E. 578, pp. 276-77 (testifying that she did not know of any election law emergency and did not know why the Governor declared one).

[90] Senate Rules 7.08, 7.13 (2011).

[91] Senate Rule 7.13 (2011).

[92] A blocker bill is a bill on a relatively mundane subject that is never passed. It sits in the way of other legislation, requiring a vote to suspend the regular order of business to move other legislation through. Patrick, D.E. 588, pp. 261-64.

[93] S.J. of Tex., 82nd Leg., R.S. 43 (2011) (Sen. Res. 36).

favorably from the Committee of the Whole Senate could be set as a special order at least 24 hours after a motion to set it was adopted by a majority of the members of the Senate.[94] That rules change, made solely for voter ID legislation, followed the 2007 session when the two-thirds rule blocked predecessor HB 218 from being taken up out of the ordinary order of business and the rule remained in place for the 2011 Texas Senate.[95]

Senators Davis, Ellis, and Carlos Uresti all testified that the suspension of the two-thirds rule was an extraordinary measure.[96] While the rule may not be enforced for insignificant matters, and has been suspended by agreement for politically sensitive votes,[97] it is unprecedented to suspend that rule for contentious legislation as important as SB 14.[98] Senator Uresti testified that the rule had been in place at least five decades and he had never seen it waived for any other major legislation,[99]and Senator Ellis considered it a 100-year honored tradition.[100] Even Lieutenant Governor Dewhurst admitted that he was not aware of any similar rule change for any other bill.[101]

Committee Bypass. Pursuant to Senate rules, no action may be taken on a bill until it has been reported on by a committee. Immediately after the emergency

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[94] S.J. of Tex., 81st Leg., R.S. 23, 28 (2009) (Sen. Res. 14). The 2009 Texas Senate had also made a special rules change regarding Senate Rule 16.07, allowing any bill regarding voter ID requirements to be set for special order by a simple majority vote. That rule was carried forward in the 2011 rules.

[95] Williams, D.E. 592, pp. 107-11; S.J. of Tex., 82nd Leg., R.S. 43 (2011) (Sen. Res. 36).

[96] Davis, D.E. 573, p. 9; Uresti, D.E. 569, pp. 221-22; Ellis, D.E. 573, p. 164.

[97] Ellis, D.E. 573, pp. 167-68 (Senate suspended the two-thirds rule during the "Segregation Forever" special session in the 1950s and during redistricting).

[98] Davis, D.E. 573, p. 9; Ellis, D.E. 573, p. 164; Uresti, D.E. 569, p. 216.

[99] Uresti, D.E. 569, pp. 221-22.

[100] Ellis, D.E. 573, p. 165.

[101] Dewhurst, D.E. 588, p. 57.

designation was made, the Texas Senate passed a resolution to convene the Committee of the Whole Senate that same day, on January 24, 2011, to consider only SB 14.[102] According to Representative Trey Martinez-Fischer, use of the Committee of the Whole is unusual, with no useful purpose in this instance other than to eliminate the natural delay attendant to the ordinary committee process.[103]

The first reading in the Senate was on January 24, 2011, at which time SB 14 was referred to the Committee of the Whole, with Senator Robert Duncan presiding.[104] The next day, January 25, 2011, at 9:20 p.m., Senator Duncan reported SB 14 out of committee and to the Senate with the recommendation that it be passed.[105] Immediately, Senator Fraser moved that it be set as a special order for 9:20 p.m. Wednesday, January 26, 2011, and the motion passed by majority vote.[106]

Questionable Fiscal Notes. Ordinarily, fiscal notes signed by the Director of the Legislative Budget Board (and kept current as legislation changed) were required to accompany any legislation.[107] This requirement was particularly important in 2011 because the legislative session was confronting a $27 billion budget shortfall.[108]

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[102] S.J. of Tex., 82nd Leg., R.S. 60 (2011) (Sen. Res. 79).

[103] Martinez-Fischer, D.E. 561, pp. 107-08; McGeehan, D.E. 578, pp. 267-68; Duncan Dep., Aug. 28, 2014, pp. 79-80 (D.E. 592, pp. 221-22 (admitting dep.)).

[104] S.J. of Tex., 82nd Leg., R.S. 54, 61-62, 99 (2011). When a Committee of the Whole Senate is formed, the President (Lieutenant Governor) leaves the chair and appoints a chair to preside in committee. The President may then participate in debate and vote on all questions. Senate Rule 13.02, 13.03 (2011).

[105] S.J. of Tex., 82nd Leg., R.S. 99 (2011).

[106] *Id*.

[107] Senate Rule 7.09(b)-(h) (2011). The House rule on that issue appears at H.J. of Tex., 82nd Leg., R.S. 116-17 (2011); Davis, D.E. 573. pp. 11-12 (requirement to keep current).

[108] Davis, D.E. 573, pp. 12-13; Anchia, D.E. 573, p. 358.

Lieutenant Governor Dewhurst, presiding over the Senate, and Speaker Straus, presiding over the House, instructed both chambers that they were not to advance any bill with a fiscal note in the 2011 session because no additional costs could be added to the state's budget.[109] However, the $2 million fiscal note that had accompanied the prior legislature's voter ID bill[110] was eventually continued with SB 14, unchanged.

Senator Davis explained that a one-time expenditure of $2 million would never be enough to accurately reflect the cost of SB 14.[111] A quarter of that amount was earmarked for research just to determine what type of voter education was needed.[112] The remainder was grossly insufficient for any media campaign.[113] The failure to fund SB 14 was clear at trial—no real educational campaign was initiated, and the individuals such a campaign needed to reach knew little, if anything, about the change in the law, including which photo IDs were allowed and the availability of EICs.[114]

Defendants failed to adduce any evidence to controvert Senator Davis' assertion that it would take far more than $2 million of publicity to reach registered voters who

[109] Davis, D.E. 573, pp. 12-13.

[110] In 2005, the 79th Legislature's fiscal note for the voter ID law was $130,000 per year, based on the estimated number of indigents (using poverty guidelines) that would require free state ID cards at $15 per card. Davis, D.E. 573, p. 14. In the 80th Legislature (2007), the fiscal note reflected $171,000 per year based on only 11,000 indigents needing free ID. *Id*. That session's fiscal note was later raised to $670,000 based on changes to the legislation that offered a free ID without necessity of showing indigence. *Id*. at 15. In the 81st Legislature (2009), when the bill originated in the Senate for the first time, the voter ID bill was originally filed without a fiscal note. *Id*. at 16. Later, there was a fiscal note attached, showing no impact on the state's budget. *Id*. at 16. When that was questioned, a $2 million note was attached. *Id*.

[111] Davis, D.E. 573, pp. 17-18.

[112] *Id*. at 18.

[113] *Id*. at 18-19.

[114] Peters, D.E. 582, pp. 146-47 (testified as the assistant director of DPS's Driver License Division that they did not conduct any targeted outreach for EICs); Cesinger Dep., May 20, 2014, pp. 50, 55, 59, 90 (D.E. 592, pp. 221-22 (admitting dep.)) (testifying that DPS did not have a budget to publicize the EIC program, did not attempt to target its outreach, and did not translate any of their communications into Spanish).

would need to be educated effectively and in a timely manner on this significant change in the ability to vote. And it is clear from the testimony of registered voters in this case that many heard about the change in the law only after they appeared at the polls to cast their vote.[115] For many, six days to cure a provisional ballot with a qualified photo ID was an unreasonable expectation because they did not understand the procedure, they needed time to save money (if they could) and obtain underlying documents (if they could), and it would take a significant effort to get to the proper office to apply for and get the necessary photo ID, which might take weeks or months to arrive.[116]

Passed from Senate Without Meaningful Debate. As set out below, the proponents allowed no real debate on SB 14's strict requirements, tabling most amendments and thus preventing discussion. There was evidence that Senator Tommy Williams requested that the DPS ID databases be compared to the SOS registered voter database to get an idea of how many voters would not have the required photo ID.[117] That database match was performed by the SOS, but the results showing 504,000 to 844,000 voters being without Texas photo ID were not released to the legislature.[118]

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[115] C. Carrier, D.E. 561, p. 27 (learned about the EIC identification only after being deposed by the State for this case); Bates, Pls.' Ex. 1090, p. 13 (did not know that her existing ID would be insufficient until she arrived at the polls); Mendez, D.E. 563, p. 104 (was not informed about his option to purchase an EIC-only birth certificate).

[116] See Section IV(B)(2)(a), *infra*.

[117] Williams, D.E. 592, pp. 128-29.

[118] Sen. Williams requested the analysis from the SOS's office in 2011. While the analysis was done, it was not turned over to the legislature. Williams, D.E. 592, pp. 128-29; McGeehan, D.E. 578, pp. 285-92. Sen. Ellis asked for discriminatory impact data from SOS and never got it. Ellis, D.E. 573, pp. 182-84. Sen. Uresti never saw any such statistical analysis. Uresti, D.E. 569, pp. 211-12. However, Lt. Gov. Dewhurst was aware of the No-Match List results showing 678,000 to 844,000 voters being potentially disenfranchised. Dewhurst, D.E. 588, pp. 71-72; *see also* McGeehan, D.E. 578, pp. 284-92.

As scheduled, on January 26, 2011, SB 14 was passed[119] having spent three days before the Senate prior to being passed on to the House of Representatives.

3. Committee Process, Evidence, and Debate in the Texas House

Special Committee. While there was slightly greater lag time in the House, compared to the three days it took to get SB 14 through the Senate, the bill did not get any more meaningful debate there. As in the Senate, House rules require that all bills be referred to a committee and be reported from that committee before consideration by the House.[120] On February 11, 2011, SB 14 was assigned to a Select Committee on Voter Identification and Voter Fraud,[121] instead of the standing committee on elections which generally considered election matters.[122] Using the Select Committee allowed the Speaker of the House to assign representatives to the committee.

Representative Veasey, who was on both the Elections Committee and the Select Committee, felt that the Select Committee's membership was not a fair representation of the House and his appointment as vice-chair was only for appearances.[123] Representative Martinez-Fischer commented that seniority was not honored on a select committee,

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[119] S.J. of Tex., 82nd Leg., R.S. 146 (2011).

[120] H.J. of Tex., 82nd Leg., R.S. 153 (2011) (House Res. 4; Rule 8, § 12).

[121] H.J. of Tex., 82nd Leg., R.S. 329 (2011).

[122] Martinez-Fischer, D.E. 561, p. 561; Anchia, D.E. 573, p. 317.

[123] Veasey, D.E. 561, p. 241 (not a fair representation).

and[124] Representative Anchia noted that the select committee device was highly unusual, particularly to consider a single bill.[125]

Fiscal Note, Impact Study, and Emergency. As noted, there is some question whether SB 14 was accompanied by an appropriate fiscal note. Representative Martinez-Fischer testified that there had been no impact study submitted to the legislature.[126] Under the House rules, bills are required to be accompanied by an impact statement when they create or impact a state tax or fee.[127] Furthermore, Representative Anchia's questions about racial impact went unanswered.[128]

On March 21, 2011, SB 14 was placed on the emergency calendar of the House. However, due to a point of order related to a misleading bill analysis, it was returned to the Select Committee and re-emerged on March 23, 2011, to again be placed on the emergency calendar, and the proposed amendments were immediately reviewed. The following day, SB 14 passed the House, bearing only a few amendments.[129]

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[124] Martinez-Fischer, D.E. 561, p. 108.

[125] Anchia, D.E. 573, p. 354.

[126] Martinez-Fischer, D.E. 561, pp. 112-13.

[127] H.J. of Tex., 82nd Leg., R.S. 117-18 (2011) (House Res. 4). The imposition of the requirement of photo ID was considered by many to place a fee on the right to vote. As amended in the House, the bill would have reduced the fee for a Texas personal ID card.

[128] Anchia, D.E. 573, pp. 338-39 ("And on the House floor, when I was asking . . . the House sponsor . . . what were the impacts on minority populations, or had she seen a study, or had she engaged in a study, the answers were very evasive and . . . nonresponsive.").

[129] H.J. of Tex., 82nd Leg., R.S. 1081-82 (2011).

4. The Amendments that Were Considered

While a total of 104 amendments were proposed in the two houses of the legislature, those that would have ameliorated the harsh effects of SB14 were largely tabled.[130] Representatives Veasey and Hernandez-Luna testified that there was an attitude that amendments were simply not going to be accepted.[131] The amendments proposed terms that, in some cases, were similar to those adopted by other states—even those that have passed strict photo ID laws. Some sought provisions that had been included in prior Texas photo ID bills. But the amendments in Texas, when tabled,[132] were effectively eliminated from any debate or consideration.

> A motion to lay on the table, if carried, shall have the effect of killing the bill, resolution, amendment, or other immediate proposition to which it was applied. Such a motion shall not be debatable, but the mover of the proposition to be tabled, or the member reporting it from committee, shall be allowed to close the debate after the motion to table is made and before it is put to a vote.[133]

Appended to this Opinion is a table outlining the proposals that would have accommodated the voters. They included the use of additional forms of ID, allowing the use of IDs that were not exact matches or that had expired for a longer period than SB 14

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[130] http://www.capitol.state.tx.us/BillLookup/Amendments.aspx?LegSess=82R&Bill=SB14 (listing amendments and the disposition of each, including copies for viewing and downloading).

[131] Veasey, D.E. 561, pp. 247, 253; Hernandez-Luna, D.E. 573, p. 371 ("It seemed like there was no desire to have a discussion about the issues that were being raised through amendments").

[132] S.J. of Tex., 82nd Leg., R.S. 103, 112-139 (2011) (SB 14); H.J. of Tex., 82nd Leg., R.S., 943, 958-1029 (2011) (C.S.S.B. 14).

[133] H.J. of Tex. 82nd Leg., R.S. 144 (2011) (House Res. 4; House Rule 7, § 12).

allows, making it easier to register to vote and obtain photo ID, requiring voter education, requiring SOS reporting of data relevant to the implementation of SB 14, and funding.

Senator Davis attempted to communicate to her colleagues that the terms of SB 14 created a Catch-22 for voters who did not have the necessary underlying documents to obtain photo ID. She created a detailed and informative diagram of the burden involved.[134] In essence, for the most common documentation, Senator Davis showed that a DPS ID was required in order to request a certified copy of a voter's birth certificate and a certified copy of a birth certificate was required to get a DPS ID. And obtaining both required payment of fees. So if the registered voter had neither, he or she could get neither—without going to extraordinary lengths and, in some cases, significant expense.[135] Many of the legislative amendments offered and tabled sought the loosening of the ID requirements and/or elimination of fees for a DPS personal ID card (if a registered voter had the underlying documentation to get one.)[136]

Knowing that all amendments were being tabled, Senator Davis withdrew her proposed amendment which would allow indigents to vote a provisional ballot that could be cured by affidavit, and prevailed upon Senator Duncan, the Republican who had been placed in charge of SB 14, to include the indigent-friendly terms with his amendment which included similar terms for those with religious objections to having their photo

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[134] Davis, D.E. 573, pp. 24-25; Pls.' Ex. 650.

[135] *See* Pls.' Exs. 13, 650.

[136] Victor Farinelli, Communication Manager for Texas Department of State Health Services (DSHS), testified that it was possible for DPS to set up a portal with DSHS to allow DPS to verify a birth at no charge to the voter, but this has not been pursued. Farinelli, D.E. 582, pp. 393-95; *see also* Peters, D.E. 582, pp. 147-48.

taken. Senator Duncan's amendment, containing the indigent provision, passed the Senate.[137] However, the House stripped the indigent provision and added in the natural disaster provision, which is how SB 14 emerged from the conference committee.

5. Refusal of Amendments and Going "Outside the Bounds"

A few ameliorative amendments passed the House and remained in the enrolled version of SB 14, such as a contingency plan (provisional balloting) for voters whose photo IDs were stolen or lost in a natural disaster. However, the House passed a few more, leading the Senate to refuse to concur in the House amendments. Of particular note are the following amendments: (1) including as a qualified ID an ID card that contains the person's photograph and is issued or approved by the State of Texas (H 20; Alonzo);[138] (2) including as a qualified ID a valid ID card that contains the person's photograph and is issued by a tribal organization (H 30; Gonzalez, N.); and (3) preventing DPS from collecting a fee for a duplicate personal identification certificate from a person who seeks a voter ID (H 45; Anchia).

To resolve matters regarding SB 14, the two bodies formed a conference committee.[139] Rather than accept the amendment to make duplicate DPS IDs free, the conference committee sought approval to go outside the bounds of both the Senate and House versions of the bill. Ordinarily, Senate Rule 12.03 (2011) prescribed the bounds within which the conference committee was to work: conference committees are not to

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[137] S.J. of Tex., 82nd Leg., R.S. 137-38 (2011).

[138] *See* Appendix to Opinion: TABLE OF AMENDMENTS OFFERED ON SB 14.

[139] S.J. of Tex., 82nd Leg., R.S. 918 (2011); H.J. of Tex., 82nd Leg., R.S. 1014 (2011).

"add text on any matter which is not included in either the House or Senate version of the bill or resolution."[140] A similar rule governs the jurisdiction conferred on the conference committee by the House.[141] Resolutions permitting the conference committee to go outside the bounds were passed in both houses and the resulting language of SB 14 included the invention of the election identification certificate (EIC).[142]

The EIC additions were apparently offered to resolve concerns that registered voters needed access to a photo ID without the necessity of paying a fee. However, Representative Anchia testified that it was very unusual to go outside the bounds in this manner and include an entirely new provision that had not been properly vetted by either the Senate or the House.[143] And as illustrated by the voters testifying in this case, an EIC does not resolve the substantial issues that had been identified with respect to voters obtaining the underlying documents that are needed in order to apply for an EIC (just as they are needed for Texas driver's licenses and Texas personal ID cards).

A conference committee report was passed, and SB 14 was sent to Governor Perry, who signed it into law on May 27, 2011.[144] SB 14, as signed into law, did not include photo IDs issued by Texas state agencies or departments (other than the original IDs issued by DPS) and did not include tribal IDs.

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[140] Pls.' Ex. 173, p. 92 (2011 Senate Rules).

[141] H.J. of Tex., 82nd Leg., R.S. 167-68 (2011) (House Res. 4; House Rule 13, § 9).

[142] S.J. of Tex., 82nd Leg., R.S. 2082 (2011) (Res. 935); H.J. of Tex., 82nd Leg., R.S. 4049 (2011) (Res. 2020). In creating the EIC, no one from the legislature consulted SOS. McGeehan, D.E. 578, p. 280.

[143] Rep. Anchia, D.E. 573, p. 354.

[144] S.J. of Tex., 82nd Leg., R.S. 4526 (2011).

6. Shifting Rationales

As the Texas Legislature pushed the voter photo ID laws over the years, the justifications shifted, starting with combatting voter fraud mixed with prohibiting non-citizens from voting, and then to improving election integrity and voter turnout. Although, these rationales are important legislative purposes, there is a significant factual disconnect between these goals and the new voter restrictions. As Mr. Wood put it, the 2011 Texas Legislature did not really try to determine if photo ID was necessary, nor did it try to determine whether SB 14 would have a positive effect.[145] Plaintiffs argued that it was a solution looking for a problem.

a. Preventing Voter Fraud

As demonstrated above, the Texas Legislature had little evidence of in-person voter impersonation fraud.[146] While there is general agreement that voting fraud exists with respect to mail-in ballots, the same was not demonstrated to be a real concern with in-person voting. And it was generally agreed that in-person voting fraud is the only type of voting fraud that would be addressed by a photo ID law. Even with respect to policing in-person voting, Representative Anchia testified that DPS officers had shown a collection of photo IDs to legislators and they could not tell which ones were fake,[147] leading him to conclude that poll workers would be no better at evaluating what IDs were authentic, a matter not addressed by the terms of SB 14.

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[145] Wood, D.E. 563, pp. 208-09.

[146] See Sections II, IV(B)(6)(a), *supra*.

[147] Anchia, D.E. 573, p. 327.

Over time, proponents of the photo ID bill began to conflate voter fraud with concern over illegal immigration.[148] The 2010 U.S. Census had revealed a large increase in the Hispanic population in Texas. In 2011, bill proponents were pointing to illegal immigration in relation to voter ID while the legislature also addressed redistricting, the elimination of sanctuary cities, an English-only bill, and rollbacks of the Affordable Care Act.[149] There was a lot of anti-Hispanic sentiment.[150] Representative Martinez-Fischer testified,

> From a Legislative perspective, I think it takes a census to sort of wake people's eyes up, and so in the context of 2011 that we evaluated their ID and other proposals, it came on the heels of a census release that showed that the State of Texas grew by over 4 million people in the course of a decade; 89 percent of that minority; 65 percent of that Hispanic, 23 million children 95 percent Hispanic. It marked the first time in the history of the State of Texas that our public education system became majority Hispanic. These were astronomical metrics of demographic growth.[151]

As Dr. Burton testified, voter restrictions tend to arise in a predictable pattern when the party in power perceives a threat of minority voter increases.[152]

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[148] Martinez-Fischer, D.E. 561, p. 104.

[149] Anchia, D.E. 573, p. 319. "Sanctuary cities" are cities that have refused to fund law enforcement efforts to look for immigration law violators, leaving that to the federal government. S.J. of Tex., 82nd Leg., R.S. 8 (2011) (designating the elimination of sanctuary cities as a legislative emergency).

[150] Hernandez-Luna, D.E. 573, pp. 369-70; Martinez-Fischer, D.E. 561, p. 120.

[151] Martinez-Fischer, D.E. 561, pp. 97-98.

[152] Burton, D.E. 582, p. 36 (testimony) (relating SB 14 as equivalent to the poll tax, in part, because "both come at times when the party in power in politics in Texas perceives the threat of African Americans, in particular, and minority voter increased voter ability to participate in the electoral process"); *see also* Lichtman, D.E. 374, p. 9 (report) ("Demographic changes help explain why the Republican-dominated state legislature and the Republican governor enacted the specific provisions of the photo identification law that discriminate against African-American and Latinos").

But Representative Hernandez-Luna testified convincingly that illegal immigrants are not likely to try to vote. "They are living in the shadows. They don't want any contact with the government for fear of being deported because that—I mean, my family was afraid to even go grocery shopping much less attempt to illegally vote."[153] Instead, the issue of non-citizen voting appears related to citizens who have confused the voter registration records because, when they are summoned for jury duty, they deny their citizenship in order to be exempt from service. So that "non-citizen" report filters into voter records despite the fact that it is false.[154]

Representative Todd Smith admitted that he had no facts to support his concerns about non-citizen voting, but was reacting to allegations.[155] Furthermore, non-citizens (legal permanent residents and visa holders) can legally obtain a valid Texas driver's license and a concealed handgun license,[156] making the use of those IDs to prevent non-citizen voting rather illusory. Only one instance of a non-citizen voter was revealed at trial. In that case, a Norwegian citizen, who had truthfully filled out his form to reflect that he was not a citizen, was mailed a voter registration card anyway.[157] So he thought he had the right to vote. Clearly, he was not trying to improperly influence an election.[158]

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[153] Hernandez-Luna, D.E. 573, p. 373; *see also* Anchia, D.E. 573, pp. 319, 322-25.

[154] Anchia, D.E. 573, pp. 323-24.

[155] Smith, D.E. 578, pp. 333-34.

[156] *See* TEX. TRANSP. CODE § 522.021; TEX. GOV'T CODE ANN. § 411.172; Anchia, D.E. 573, p. 325; McGeehan, D.E. 578, p. 264.

[157] Anchia, D.E. 573, pp. 322-23.

[158] *Id*. at 323.

Representatives Anchia, Hernandez-Luna, and Martinez-Fischer and Senator Uresti indicated that the repeated references to illegal-aliens and non-citizens voting generated anti-Hispanic feelings.[159] Representative Hernandez-Luna even testified that lawmakers were equating Hispanic immigration with risks of leprosy in a very tense atmosphere.[160] Senator Davis added that there was unfounded concern about non-citizen students.[161]

b. Increasing Public Confidence and Voter Turnout

Proponents of the voter ID law argued that such laws fostered public confidence in election integrity and increased voter turnout. However, there was no credible evidence to support (a) that voter turnout was low because of any lack of confidence in the elections, (b) that a photo ID law would increase confidence, or (c) that increased confidence would translate to increased turnout.[162] Senators Fraser and Dan Patrick were unaware of anyone not voting out of concern for voter fraud.[163] Ann McGeehan, who was the Director of the Elections Division at SOS, said the same.[164] She further admitted that implementing the provisional ballot process might even cause voters to lose confidence.[165]

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[159] *Id*. at 329; Hernandez-Luna, D.E. 573, p. 377; Martinez-Fischer, D.E. 561, p.104; Uresti, D.E. 569, p. 232.

[160] Hernandez-Luna, D.E. 573, pp. 369-70.

[161] Davis, D.E. 573, pp. 8-9.

[162] *See* Dewhurst, D.E. 588, p. 15.

[163] Fraser, D.E. 588, p. 419; Patrick, D.E. 588, p. 304.

[164] McGeehan, D.E. 578, p. 279.

[165] *Id*. at 280.

The public confidence argument was, for the most part, premised on the United States Supreme Court's approval of the Indiana photo ID law and implementation of similar laws in other states, along with the increase in voter turnout in the 2008 general election. Representative Anchia noted that the 2008 increase in voter turnout was nationwide (not just in photo ID law states) and was in response to Barack Obama's presidential campaign rather than any photo ID law.[166] Defendants' expert, Dr. M. V. (Trey) Hood, testified that he linked the 2008 increased voter turnout to the unprecedented Obama campaign.[167] His study of the voter turnout in Georgia in the 2012 election reflected an across-the-board suppression of turnout, which he concluded was caused by implementation of that state's photo ID law.[168] He did not do a study of Texas for this case.[169]

Dr. Burden testified that SB 14 would decrease voter turnout because it increases the cost associated with voting. Because the poor are more sensitive to cost issues,[170] he concluded that SB 14's terms raising the cost of voting would almost certainly decrease voter turnout, particularly among minorities.[171] Dr. Hood admitted that it was a firmly established political science principle that increased costs of voting are related to

[166] Anchia, D.E. 573, pp. 320-21. Likewise, increased voter turnout in the elections in Ed Couch, Texas, had more to do with the fact that all six councilmembers were up for election than that any voter had increased confidence. Guzman, D.E. 569, p. 381.

[167] Hood, D. E. 588, pp. 154-56.

[168] *Id*. at 121-22, 144.

[169] *Id*. at 131; Patrick, D.E. 588, pp. 245-47.

[170] Burden, D.E. 569, pp. 298-99.

[171] *Id*. at 295, 298-99, 315, 323, 332.

decreased turnout, which could be expected with respect to the cost of obtaining an EIC unless some other factor outweighed it for the voters.[172]

Defendants presented evidence that public opinion polls showed that voters overwhelmingly approved of a photo ID requirement.[173] Polls showed approval ratings as high as 86% for Anglos, 83% for Hispanics, and 82% for African-Americans in 2010.[174] In similar polls conducted in 2011 and 2012, those numbers dropped, but were still over 50%.[175] As Senators Davis and Ellis and Representative Anchia pointed out, Defendants have not shown that those voters were informed of (1) the low rate of in-person voter impersonation fraud, (2) the limited universe of documents that were considered to be qualified photo ID under SB 14, or (3) the plight of many qualified and registered Texas voters who did not have and could not get such ID without overcoming substantial burdens.[176] So while the Court is aware that legislators should be responsive to their constituents, the particular polls were not formulated to obtain informed opinions from constituents and, more importantly, polls cannot justify actions by the legislature which have the effect of infringing the right to vote in violation of the United States Constitution or the VRA.

Defense counsel's questioning noted that there have been few voter complaints since SB 14 was implemented in November 2013, indicating, they argue, that the

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[172] Hood, D.E. 588, pp. 125-29 (testimony).

[173] *E.g.*, Dewhurst, D.E. 588, pp. 32, 76-79; Patrick, D.E. 588, pp. 245-46.

[174] Pls.' Ex. 214.

[175] Pls.' Exs. 251, 252.

[176] Davis, D.E. 573, pp. 39-40; Ellis, D.E. 573, pp. 188-89; Anchia, D.E. 573, pp. 360-61; Patrick, D.E. 588, p. 251.

electorate is not unhappy with SB 14 as implemented.[177] However, the demographics of those likely to be burdened by SB 14—the poor, minorities, disabled, and elderly—are persons unlikely to have the wherewithal to register a complaint in any officially meaningful way. The evidence does not support the proponents' assertions that SB 14 was intended to increase public confidence or increase voter turnout. While those justifications are appropriate concerns of a state, the Court finds that the justifications do not line up with the content of SB 14.

c. Racial Discrimination

Senators Davis, Ellis, and Uresti and Representatives Anchia and Veasey testified that SB 14 had nothing to do with voter fraud, but instead had to do with racial discrimination.[178] The legislature had been working on the voter ID issue for six years and Representative Martinez-Fischer had done quite a bit of fact-checking and had found that there was no substance to the claims of in-person voter impersonation fraud, non-citizen voting, or improving election integrity related to the terms of the photo ID bills.[179] Representative Anchia had served on a number of voter ID-related committees and was Chair of the Subcommittee to Study Mail-In Ballot Fraud and Incidence of Noncitizen

[177] *See generally* Ellis, D.E. 573, p. 191; Williams, D.E. 592, p. 100; Guidry, D.E. 592, pp. 151-53, 156-60; Patrick, D.E. 588, pp. 253-54.

[178] Davis, D.E. 573, pp. 8, 31; Ellis, D.E. 573, p. 187; Uresti, D.E. 569, p. 223; Anchia, D.E. 573, pp. 354-55; Veasey, D.E. 561, pp. 254-55.

[179] Martinez-Fischer, D.E. 561, pp. 103-04.

Voting. He testified that they had done quite a bit of work in interim sessions and issued a report in 2008 showing that the incidence of non-citizen voting was very low.[180]

Other issues were also investigated in committee hearings, with testimony from state agencies, state officials, advocacy groups, and the Attorney General's office. It was clear that in-person voter impersonations were almost non-existent.[181] It was also clear that a photo ID law would hurt minorities.

> In our subcommittee, gosh, we went down to Brownsville and we took testimony on the very issue that you heard from Mr. Lara earlier, which was people -- a lot of people, especially in rural areas or along the border who were birthed by midwives or were born on farms, didn't have the requisite birth certificates and were in limbo. We took a ton of testimony at UT Brownsville on that, and that was an issue of concern.[182]

Contrasting the legislature's willingness to barrel-through a voter ID law despite the lack of need and countervailing evidence, Representative Anchia noted that critically important issues such as the $27 billion budget shortfall and transportation funding did not get a select committee or an exemption from the two-thirds rule.[183] He stated, "I have not seen a bill other than this one get that kind of procedural runway."[184]

Senator Uresti complained that he had made it clear that SB 14 would hurt minorities and the legislators knew that when they passed it.[185] He testified that he knew

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[180] Anchia, D.E. 573, pp. 320-21, 323-24.

[181] *Id*. at 321-22.

[182] *Id*. at 329-30.

[183] *Id*. at 362.

[184] *Id*. at 362.

[185] Uresti, D.E. 569, p. 223.

his district's racial and ethnic makeup (many of his constituents live in colonias), and he knew the impact that SB 14 would—and was intended to—have on those voters. From the terms of the law and the way it was passed, he firmly believes that it had a discriminatory purpose.[186]

Representative Smith expected that SB 14 might cause up to 700,000 voters to be without necessary ID.[187] After acknowledging that those affected voters would most likely be poor, he stated,

> You know, to me, again, if the question is are the people that do not have photo IDs more likely to be minority than those that are not, I think it's a matter of common sense that they would be. I don't need a study to tell me that.[188]

Bryan Hebert, Deputy General Counsel in the Office of the Lieutenant Governor, also assumed that the poor, who would be most affected by the law, would be minorities.[189] Senator Ellis testified that all of the legislators knew that SB 14, through its intentional choices of which IDs to allow, was going to affect minorities the most.[190] Despite the evidence against SB 14 being a necessary or appropriate change in the law, Representative Smith said, "I think every Republican member of the legislature would have been lynched if the bill had not passed."[191] It is clear that the legislature knew that

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[186] *Id*. at 223.

[187] Smith, D.E. 578, pp. 327-28. Lt. Gov. Dewhurst testified that he estimated 3-7% of registered voters did not have a Texas DPS-issued ID and believed the number could be as high as 844,000 based on what he had learned from the unpublished SOS no-match exercise. *See* Dewhurst, D.E. 588, pp. 70-73.

[188] Smith, D.E. 578, p. 346.

[189] Hebert, D.E. 592, pp. 195-98.

[190] Ellis, D.E. 573, pp. 178-79.

[191] Smith, D.E. 578, pp. 339-40; Patrick, D.E. 588, pp. 305-07; Pls.' Ex. 330.

minorities would be most affected by the voter ID law. However, the political lives of some legislators depended upon SB 14's success.[192]

The fact that past discrimination has become present in SB 14 is apparent from both the obvious nature of the impact and the manner in which the legislature chose options that would make it harder for African-Americans and Hispanics to meet its requirements. This was demonstrated by the analysis of Dr. Alan Lichtman, Distinguished Professor of History at American University, who is an expert in quantitative and qualitative historical analysis of voting, political, and statistical data. His report documents "intentional discrimination against minorities to achieve a partisan political advantage."[193] Dr. Davidson and Mr. Korbel echo Dr. Lichtman's opinions.

Dr. Lichtman analyzed the extraordinary procedural history of SB 14, described above. He noted that since 1981, the Senate has only made an exception to its two-thirds rule for two categories of legislation: redistricting and voter ID bills.[194] The Texas Legislature accepted amendments that would broaden Anglo voting and rejected amendments that would broaden minority voting. For instance, the provision allowing the use of concealed handgun permits favors Anglos because they are disproportionately represented among those permit holders.[195] Likewise, Anglos are a disproportionate share of Texas's military veterans of voting-age population relative to African-Americans

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[192] *See* Pls.' Exs. 707, 734, 736, 746, 749.

[193] Lichtman, D.E. 374, p. 5 (report).

[194] Davidson, D.E. 481-1, p. 29 (report).

[195] Lichtman, D.E. 374, pp. 24-25 (report).

and Hispanics.[196] Anglos are also disproportionately represented among those using mail-in ballots, which were left untouched by SB 14.[197] When the legislature rejected student IDs, state government employee IDs, and federal IDs, they rejected IDs that are disproportionately held by African-Americans and Hispanics.[198]

Dr. Lichtman also pointed out that SB 14's sponsors' justifications for the bill were disingenuous. They claimed to have modeled SB 14 after Indiana and Georgia laws but had substantially departed from those laws.[199] Bryan Hebert, with the Lieutenant Governor's office, expressly warned them that SB 14 would likely fail any preclearance standard without the additional methods of proving identity found in Georgia's law.[200] The legislature also knew that a disproportionate number of African-Americans and Hispanics had their driver's licenses suspended under various law enforcement programs that involved payment of surcharges before the license-holder could regain the license.[201] Those minority drivers, disproportionately poor, would have a more difficult time getting their licenses reinstated, and the legislature rejected measures to warn people that tendering their license in a suspension action might leave them without ID necessary to vote.[202]

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[196] Pls.' Ex. 454, p. 7.

[197] Lichtman, D.E. 374, pp. 53-54 (report)

[198] *Id*. at 24-29.

[199] *Id*. at 38-41.

[200] *Id*. at 42-44; Pls.' Exs. 205, 272; Hebert, D.E. 592, pp. 189-91, 203-05; Hebert Dep. June 20, 2014, pp. 88-93, 261-62; Davidson, D.E. 481-1, pp. 20, 30 (report).

[201] Lichtman, D.E. 374, pp. 33-35 (report) ("The DPS has also released the ten zip codes with the largest number of surcharges. [T]hese zip codes are overwhelmingly Latino and African-American in their voting age population.").

[202] *Id*. at 46-47.

Dr. Lichtman opined that in passing SB14, the legislature passed a measure that minimized minority voting while doing little to address the stated purposes of fighting in-person voter impersonation fraud and non-citizen voting.[203] Consequently, the record as a whole (including the relative scarcity of incidences of in-person voter impersonation fraud, the fact that SB 14 addresses no other type of voter fraud, the anti-immigration and anti-Hispanic sentiment permeating the 2011 legislative session,[204] and the legislators' knowledge that SB 14 would clearly impact minorities disproportionately and likely disenfranchise them) shows that SB 14 was racially motivated.

B. The Result

1. Expert Analysis Demonstrates the Magnitude of the Harm

a. The No-Match List and the Number and Race of Burdened Registered Voters.

Several experts were tasked with determining the number of registered voters who might lack SB 14 ID, along with their demographic characteristics.[205] Based on the testimony and numerous statistical analyses provided at trial, this Court finds that approximately 608,470 registered voters in Texas, representing approximately 4.5% of all registered voters, lack qualified SB 14 ID and of these, 534,512 voters do not qualify for

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[203] *Id.* at 67-71.

[204] Reps. Martinez-Fischer and Hernandez-Luna testified that the 2011 session was highly racially-charged, and anti-Hispanic, with consideration of the abolition of sanctuary cities, an English-only bill, and the rollback of the Affordable Health Care Act. Martinez-Fischer, D.E. 561, p. 98; Hernandez-Luna, D.E. 573, pp. 369-70; *see also* Davidson, D.E. 481-1, pp. 37-38 (report).

[205] Dr. Stephen Ansolabehere and Dr. Yair Ghitza on behalf of the United States; Dr. Michael C. Herron, Dr. Matthew A. Barreto, and Dr. Gabriel R. Sanchez on behalf of the Veasey Plaintiffs; Dr. Coleman Bazelon on behalf of the Texas League of Young Voters Education Fund.

a disability exemption. Moreover, a disproportionate number of African-Americans and Hispanics populate that group of potentially disenfranchised voters.

Dr. Stephen Ansolabehere, professor of Government at Harvard University, performed an extensive match of various databases to arrive at the figures set out above, which is referred to as the "No-Match List." First, he determined which of the 13.5 million voters in Texas's voter registration database, the Texas Election Administration Management System (TEAM), lacked SB 14 ID. He did this by comparing individual TEAM voter records with databases containing the records of those who possessed SB 14 ID—current DPS-issued Texas driver's licenses, Texas personal ID cards, EICs, Texas concealed handgun licenses, United States passports, citizenship certificates, and military photo IDs—to arrive at a list of voter records that did not match with any SB 14 qualified photo ID.[206]

Dr. Ansolabehere "scrubbed" the list by removing entries that appeared to be duplicates and those appearing in other databases that identified persons who were deceased and who had relocated (potentially out of state). He also removed voters identified as inactive,[207] and those who were eligible for SB 14's disability exemption to further ensure that he was counting only those who had no alternative for voting other

[206] This database comparison was performed using a matching protocol by which database fields were standardized, identifiers such as DPS and Social Security numbers were constructed, and the data went through multiple algorithmic "sweeps" to find matches. Ansolabehere, D.E. 600-1, pp. 8-9, 14, 16-31 (report). There was no disagreement among the experts as to the propriety of these methods for performing the statistical analysis. *See generally* Herron, D.E. 563, pp. 14-24 (testimony); Hood, D.E. 588, pp. 175-76 (testimony).

[207] An inactive, or "suspense," voter is one whose registration renewal notice was returned by mail to the county registrar as undeliverable, failed to respond to a confirmation notice, or was excused or disqualified from jury service because he was not a resident of the underlying county. TEX. ELEC. CODE § 15.081; Ingram, D.E. 588, p. 311-12; Ansolabehere, D.E. 600-1, p. 48 (report).

than with a qualified SB 14 ID. All of these matches were performed with algorithms designed to address different name spellings and the use of nicknames or other variations in the way individuals are identified or would be input into a database. He concluded that approximately 608,470 voters in the TEAM database lack qualified SB 14 ID.[208]

Plaintiffs also offered the testimony of Dr. Michael Herron, Professor of Government at Dartmouth College, who is an expert in database analysis and statistical methods and who also performed a series of database matches. Dr. Herron described his methodology in much the same terms as did Dr. Ansolabehere. Both experts had to write codes so that the fields of the respective databases were compared correctly, even though the databases were formatted differently. The match was programmed so that entries like "last name," "social security number," and "Texas driver's license number" were each compared to the corresponding field across databases. Dr. Herron's results were highly consistent with Dr. Ansolabehere's results, confirming that the coding and algorithms used in the matching methodology were consistent with the demands of the scientific field.[209]

Defendants challenged Dr. Ansolabehere's findings by arguing that he failed to remove felons and voters who subsequently re-registered in another state. There was evidence that the SOS purges the TEAM database on a daily basis for felons, and Dr. Ansolabehere testified that recent data from both the Pew Research Center and various secretaries of state established that the number of voters who may have re-registered in

[208] Ansolabehere, D.E. 600-1, p. 2 (report).

[209] Herron, D.E. 473, pp. 10-27 (report).

another state is extremely small—less than one percent.[210] Additionally, Dr. Ansolabehere removed the records of voters who filed a change of address form with the post office.[211]

Defendants' expert, Dr. Hood, who did not perform a match himself, criticized the Plaintiffs' No-Match List because, according to his analysis, 21,731 of the individuals on the No-Match List voted in the elections held in the Spring of 2014, several weeks or months after the data exchange offered by the parties for analysis. However, some of these votes were cast by mail, which does not require a qualified SB 14 ID, and some of these individuals may have obtained SB 14 ID in the interim.

b. The Demographic Characteristics of the No-Match List Demonstrate the Impact on Minorities.

Texas does not maintain racial or ethnic data in its voter registration list and while DPS forms requested this information, the form did not offer applicants the choice of "Hispanic" until May of 2010.[212] This rendered all self-reported ethnicity data "anomalous and highly misleading."[213] To compensate for the state's failure to collect reliable data on this issue, Dr. Ansolabehere relied on four complementary and widely

[210] Ansolabehere, D.E. 561, p. 204 (testimony).

[211] *Id*. at 181; *see also* Ghitza, D.E. 360-1, pp. 6-7 (report).

[212] Crawford, D.E. 592, pp. 38-39.

[213] "[T]he number of Hispanic ID-holders in Texas is exponentially higher than DPS's raw data indicates." Pls.' Ex. 942 (letter from Keith Ingram, Texas Director of the Elections Division at the Secretary of State's Office, to the Department of Justice).

accepted methodologies used in the social sciences for geocoding[214] the No-Match List and determining its racial makeup.

Dr. Ansolabehere (1) conducted an ecological regression analysis, (2) performed a homogenous block group analysis, (3) compared data to a Spanish Surname Voter Registration list (SSVR),[215] and (4) consulted Catalist LLC, an election data utility company. All four methods yielded equivalent results.

Dr. Ansolabehere's first method, an ecological regression analysis, measured the correlation between his No-Match List and race. Using this method, which is often used in political science studies, Dr. Ansolabehere compared individuals in his No-Match List with the racial composition of Census areas.[216] Dr. Ansolabehere concluded that Hispanic registered voters are 195% and African-American registered voters are 305% more likely than Anglo voters to lack SB 14 ID. Such racial disparities are statistically significant and "highly unlikely to have arisen by chance."[217]

Dr. Ansolabehere's homogenous block group analysis corroborated his initial finding as to racial disparities. According to this method, Dr. Ansolabehere assigned each of his No-Match voter records to its corresponding 2010 Census block group. Relying only on those block groups reported to be homogenous, he inferred the racial

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[214] The experts agreed that there is no discretion involved in geocoding this data. Ansolabehere, D.E. 561, p. 226 (testimony); Ghitza, D.E. 563, pp. 150-51 (testimony).

[215] The SSVR was developed based upon U.S. Census Bureau data in 2000. Dr. Ansolabehere testified that the Texas Legislative Council uses the Spanish Surnames list in conducting analyses (D.E. 561, p. 135), as does the SOS. McGeehan, D.E. 578, p. 259; Dewhurst, D.E. 588, pp. 64-65. It is considered a reliable way to estimate data related to Latinos.

[216] *See* Ansolabehere, D.E. 600-1, p. 38 (report).

[217] *Id*. at 40.

composition of those voters. Dr. Ansolabehere concluded that Hispanic registered voters are 177% and African-American voters are 271% more likely than Anglo voters to lack SB 14 ID. These racial disparities are statistically significant.

Assigning his data the ethnicity information used in the SSVR, Dr. Ansolabehere found that 5.8% of all SSVR voters lacked qualified SB 14 ID compared to 4.1% of non-SSVR registered voters—a pool including Anglos, African-Americans and all other races.[218] This 1.7% difference is statistically significant."[219]

Last, Dr. Ansolabehere compared his No-Match List to race estimates maintained by Catalist LLC. Catalist is a private company that maintains demographic information based on a statistical model provided by its vendor, CPM Technologies.[220] The data assigns demographic characteristics to individuals referencing the person's name in combination with their location.[221] Catalist data on ethnicity estimates are widely used in academic research and are considered highly reliable.[222] According to Dr. Yahir Ghitza, Catalist's Chief Scientist, "[f]or records with the highest race confidence scores, Catalist has found that CPM Technologies' predictions match the voter's self-reported race with 90% accuracy or greater in most cases."[223] Relying on this data, Dr. Ansolabehere

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[218] *Id*. at 105.

[219] *Id*. at 54.

[220] Ghitza, D.E. 563, pp. 154-55 (testimony); Ghitza, D.E. 360-1, pp. 4-5 (report).

[221] Ghitza, D.E. 360-1, p. 4 (report).

[222] Ansolabehere, D.E. 561, p. 227 (testimony); Ansolabehere, D.E. 600-1, p. 23 (report).

[223] Ghitza, D.E. 360-1, p. 5 (report).

concluded that Hispanic registered voters are 58% more likely and African-American registered voters are 108% more likely than Anglo voters to lack qualified SB 14 ID.[224]

Defendants challenged Dr. Ansolabehere's findings by pointing out that the Catalist analysis misclassified the race of six Plaintiffs, suggesting that the overall results were thus biased in favor of Plaintiffs. As Dr. Ansolabehere explained, the effect of misclassifications in this analysis is counter-intuitive. Both Dr. Ansolabehere and Dr. Ghitza testified that misclassification of individuals on the No-Match List would actually bias in favor of Defendants. "It's well known in statistics that if you have measurement error in a classification variable such as race it will bias toward finding no effect, bias toward finding nothing, no difference across groups."[225] Defendants did not challenge that statistical concept.

Dr. Herron also conducted various statistical analyses to determine the racial composition of registered voters lacking SB 14 ID. He based his analyses on two algorithms, one provided by the Plaintiffs and the other by the Defendants. Notwithstanding the different methods, his results were effectively the same as those of Dr. Ansolabehere[226]—the possession rate of qualified SB 14 ID among Anglo registered voters is higher than that of African-American and Hispanic voters. Dr. Herron also conducted his own ecological regression analysis and homogenous block group analysis on Dr. Ansolabehere's No-Match List and his findings were essentially the same as those

[224] Ansolabehere, D.E. 600-1, p. 41 (report).

[225] *Id*. at 153-54; *see also* Ghitza, D.E. 563, pp. 163-65 (testimony).

[226] Herron, D.E. 563, p. 66 (testimony).

of Dr. Ansolabehere.[227] A third expert, Dr. Coleman Bazelon,[228] also testified that the conclusions resulting from his own homogenous block group analysis were "highly consistent" with those of Dr. Ansolabehere.[229]

Added to this array of experts, methodologies, and consistent results are the field survey findings of Drs. Matthew Barreto and Gabriel Sanchez. Dr. Barreto, a Professor of Political Science at the University of Washington, and Dr. Sanchez, an Associate Professor of Political Science at the University of New Mexico, are experts in survey research, particularly in the field of racial and ethnic politics.[230] They conducted a four-week survey of over 2,300 eligible voters in Texas,[231] and concluded that African-American eligible voters are 1.78 times more likely to lack qualified SB 14 ID than Anglo eligible voters.[232] The observed racial disparity was magnified with Hispanic eligible voters as they are 2.42 times more likely to lack qualified SB 14 ID compared to Anglo eligible voters.[233] In addition, Drs. Barreto and Sanchez observed an even greater

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[227] *Id*. at 69.

[228] Dr. Coleman Bazelon is a principal in the Washington, D.C. office of The Brattle Group, an economic consulting firm and received a Ph.D. and M.S. in Agricultural and Resource Economics from the University of California, Berkeley, a Diploma in Economics from the London School of Economics and Political Science, and a B.A. from Wesleyan University. Bazelon, D.E. 614-1, p. 4 (report).

[229] Bazelon, D.E. 582, p. 96 (testimony).

[230] Barreto-Sanchez, D.E. 370, pp. 2-3 (report) (Dr. Barreto received a Ph.D. in Political Science, with an emphasis on racial and ethnic politics in the U.S., political behavior, and public opinion, at the University of California, Irvine. Dr. Sanchez received a Ph.D. in Political Science, with the same emphasis, at the University of Arizona.)

[231] They reported a response rate of 26.3%. Barreto, D.E. 569, pp. 47-49 (testimony). According to Drs. Barreto and Sanchez, the field survey's response rate is well within the acceptable range of 20 to 30%, making it scientifically valid. Barreto-Sanchez, D.E. 370, p. 16 (report).

[232] Barreto-Sanchez, D.E. 370, p. 18 (report).

[233] *Id*.

impact when analyzing the smaller universe of Hispanic and African-American eligible voters who were also registered to vote.[234]

Dr. Hood's evaluation of Drs. Barreto and Sanchez's field survey contained several significant methodological oversights. For example, Dr. Hood failed to properly classify certain responses, resulting in a miscount,[235] and did not properly weight his reconstruction of Drs. Barreto and Sanchez's survey data to account for disparities within the African-American and Hispanic populations as to income, education, gender, and age—a necessary step to ensure the survey's accurate reflection of the population as a whole.[236] On cross-examination, Plaintiffs pointed out a multitude of errors, omissions, and inconsistencies in Dr. Hood's methodology, report, and rebuttal testimony, which Dr. Hood failed to adequately respond to or explain.[237] The Court thus finds Dr. Hood's testimony and analysis unconvincing and gives it little weight.[238] Even with its flaws, Dr. Hood's result still confirmed Plaintiffs' experts' conclusions regarding a statistically significant disparity in the lack of qualified SB 14 ID among African-American and Hispanic registered voters as well as eligible voters relative to the Anglo population.[239]

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[234] *Id*. at 19.

[235] Hood, D.E. 588, pp. 217-22 (testimony).

[236] *Id*. at 222-36.

[237] *See id*. at 121-244 (testimony).

[238] *Frank v. Walker*, 11-CV-01128, 2014 WL 1775432, at *35, *38 (E.D. Wis. Apr. 29), *rev'd*, No. 14-2058, 2014 WL 496657 (7th Cir. Oct. 6, 2014); *Florida v. United States*, 885 F. Supp. 2d 299, 324-30, 365-68 (D.D.C. 2012); *Common Cause/Georgia v. Billups*, 4:05-CV-0201-HLM, 2007 WL 7600409, at *14 (N.D. Ga. Sept. 6, 2007).

[239] Dr. Hood's reconstructed survey results conclude that 4.0% of Anglo voting eligible population lack qualified SB 14 ID compared to 5.3% of African-Americans and 6.9% of Hispanics. Similarly, his reconstructed results indicate that 2.5% of registered Anglo voters lack qualified SB 14 ID while 4.2% of African-American and 5.1% of Hispanic registered voters lack such ID. Hood, D.E. 450, p. 30 (report) (Dr. Hood did not update this analysis in his amended report).

Accordingly, the Court credits the testimony and analyses of Dr. Ansolabehere, Dr. Herron, and Dr. Barreto, all of whom are impressively credentialed and who explained their data, methodologies, and other facts upon which they relied in clear terms according to generally accepted and reliable scientific methods for their respective fields. The Court finds that approximately 608,470 registered voters in Texas lack proper SB 14 ID. The Court also finds that SB 14 disproportionately impacts both African-Americans and Hispanics in Texas.

c. The No-Match Numbers Matter

When 4.5% of voters are potentially disenfranchised, election outcomes can easily change. According to Councilman Daniel Guzman, in 2013, four out of six councilmembers up for election in the small town of Ed Couch, Texas, won by a margin of 50 votes or less.[240] As will be explained later, Councilman Guzman took many individuals who were not allowed to vote to the local DPS office and they were unable to get SB 14 ID.[241] The Court finds that the number of voters potentially disenfranchised by SB 14 is significant in comparison to the number of registered voters in Texas.

d. The Discriminatory Effect

Evidence shows that a discriminatory effect exists because: (1) SB 14 specifically burdens Texans living in poverty, who are less likely to possess qualified photo ID, are less able to get it, and may not otherwise need it; (2) a disproportionate number of Texans

[240] Guzman, D.E. 569, p. 375.

[241] *Id*. at. 368, 372-73.

living in poverty are African-Americans and Hispanics; and (3) African-Americans and Hispanics are more likely than Anglos to be living in poverty because they continue to bear the socioeconomic effects caused by decades of racial discrimination.

SB 14 Disproportionately Burdens the Poor. The draconian voting requirements imposed by SB 14 will disproportionately impact low-income Texans because they are less likely to own or need one of the seven qualified IDs to navigate their lives. A legacy of disadvantage translates to a substantial burden when these people are confronted with the time, expense, and logistics of obtaining a photo ID that they did not otherwise need. Drs. Barreto and Sanchez's field survey found that 21.4% of eligible voters who earn less than $20,000 per year lack a qualified SB 14 ID. That number compares to just 2.6% of eligible voters who earn between $100,000 and $150,000 per year.[242] In other words, lower income Texans are over eight times more likely to lack proper SB 14 ID.

In addition, Drs. Barreto and Sanchez also found that lower income respondents were the most likely to lack underlying documents to get an EIC—a finding that is echoed by various other trial experts and witnesses. Also, 22.5% of those earning less than $20,000 annually believed that they had a qualified SB 14 ID when, in fact, they did not—making it more likely that poll workers will be forced to turn away more low-income voters than others on election day.[243]

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[242] Barreto-Sanchez, D.E. 370, p. 24 (report).

[243] *Id*.

Dr. Jane Henrici, an anthropologist and professorial lecturer at George Washington University, testified at trial and offered an expert report to contextualize why lower income Texans are less likely to have a qualified SB 14 ID. First, Dr. Henrici found that lower income Texans have difficulties obtaining, keeping, replacing, and renewing government-issued documentation. Dr. Henrici explained:

> [U]nreliable and irregular wage work and other income . . . affect the cost of taking the time to locate and bring the requisite papers and identity cards, travel to a processing site, wait through the assessment, and get photo identifications. This is because most job opportunities do not include paid sick or other paid leave; taking off from work means lost income. Employed low-income Texans not already in possession of such documents will struggle to afford income loss from the unpaid time needed to get photo identification.[244]

Second, the lack of reliable income leaves many lower income Texans without access to credit and other formal financial services.[245] This, in turn, allows poor Texans to go without the types of photo ID that SB 14 requires.[246] Dr. Henrici testified that they may not have bank accounts and their checks are likely cashed by their local grocer who knows them personally.[247] Last, Dr. Henrici concluded that many lower income Texans do not own vehicles or own vehicles that are unreliable, which illustrates why low-

[244] Henrici, D.E. 369-1, p. 17 (report).

[245] *Id.*

[246] *Id.*

[247] Henrici, D.E. 569, p. 188 (testimony).

income Texans may not have an incentive to renew their driver's license—an adequate SB 14 ID.[248]

The poor also feel the burden most acutely. The concept is simple—a $20.00 bill is worth much more to a person struggling to make ends meet than to a person living in wealth. Economists call this concept the diminishing marginal utility of wealth.[249] Mrs. Bates, an African-American retiree living on a $321.00 monthly income, described it well. She testified that it took a while to save the $42.00 she needed to pay for her Mississippi birth certificate because "when you're getting a certain amount of money, you're going to put the money where you feel the need is most urgent at the time . . . I had to put the $42.00 where it was doing the most good. It was feeding my family, because we couldn't eat the birth certificate . . . [a]nd we couldn't pay rent with the birth certificate, so, [I] just wrote it off."[250] Mrs. Bates's dire circumstances illustrate how SB 14 effectively makes some poor Texans choose between purchasing their franchise or supporting their family.

Thus, based on Drs. Barreto, Sanchez, and Henrici's findings, which confirm the demographic findings of the No-Match List, this Court finds that SB 14 will disproportionately impact lower income Texans because they are less likely to own and need proper SB 14 ID, because they are less likely to have the means to get that ID, and

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[248] Henrici, D.E. 369-1, pp. 18-19 (report).

[249] Bazelon, D.E. 614-1, p. 11 (report).

[250] Bates, Pls.' Ex. 1090, pp. 14 –17.

because the choice of how they spend their resources lacks the voluntary quality of most choices.

The Poor Are Disproportionately Minorities. As already discussed, and as confirmed by multiple methods, the persons on the No-Match List are disproportionately African-American or Hispanic. Members of those minority groups are significantly more likely to lack qualified photo ID, live in poverty (lacking the resources to get that ID), live without vehicles for their own transportation to get to ID-issuing offices, and live substantial distances from ID-issuing offices.

Minorities Live in Poverty Because of Discrimination. African-Americans and Hispanics are substantially more likely than Anglos to live in poverty throughout Texas because they continue to bear the socioeconomic effects caused by decades of discrimination. As Dr. Burton stated in his expert report:

> Since the State's admission to the Union, Texas, as well as its political subdivisions, have engaged in racial discrimination against its African-American and Latino citizens in all areas of public life . . . [t]he foreseeable result of such past and present discrimination is the substantial inequalities that exist between minority and Anglo voters in the state.[251]

Discrimination against Texas's African-Americans and Hispanics can be found in the fields of employment and income. The latest U.S. Census figures show that 29% of African-Americans and 33% of Hispanics in Texas live in poverty—in other words,

[251] Burton, D.E. 376-2, pp. 24-35 (report); *see also* Burden, D.E. 391-1, pp. 14-16 (report).

nearly one in every three. On the other hand, at 12%, just one in every ten Anglos in Texas lives in poverty.[252]

Similarly, the unemployment rate for Anglos is 6.1% compared to 8.5% for Hispanics and 12.8% for African-Americans.[253] And the median household incomes for Anglos is $63,393, while it is $38,848 for Hispanics and $37,906 for African-Americans.[254] According to Dr. Burton, these economic disparities continue to this day because employment discrimination persists in Texas. For instance, within the last twelve years, the Texas Department of Health, the Texas Department of Family and Protective Services, the City of El Paso, and the City of Houston have all entered into consent decrees or settlement agreements to redress claims of racial discrimination in employment.[255]

African-Americans and Hispanics also face the adverse effects caused by discrimination in educational institutions. The 1875 Texas constitution required that "[s]eparate schools shall be provided for the white and colored children . . . ."[256] Even after the Supreme Court's landmark 1954 decision in *Brown v. Board of Education*,[257] Texas resisted integration that extended well through the following three decades.[258]

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[252] Burden, D.E. 391-1, p. 14 (report) (citing *Poverty Rate by Race/Ethnicity*, THE HENRY J. KAISER FAMILY FOUNDATION, http://kff.org/other/stateindicator/poverty-rate-by-raceethnicity/ (last visited June 3, 2014)).

[253] Burden, D.E. 391-1, p. 15 (report).

[254] *Id*. at 14-15.

[255] Burton, D.E. 376-2, pp. 26-27 (report).

[256] *Id*. at 24.

[257] 347 U.S. 483 (1954).

[258] Burton, D.E. 376-2, pp. 23-24 (report).

Educational achievement gaps between Anglo and both African-American and Latino students continue to plague Texas. According to the U.S. Department of Education, 91.7% of Anglo 25-year-olds in Texas graduated from high school, while 85.4% of African-Americans and 58.6% of Latinos earned a diploma.[259] Likewise, Anglos are significantly more likely to have earned a college degree. The bachelor's degree completion rate for Anglos is 33.7% in comparison to 19.2% for African-Americans and 11.4% for Latinos.[260]

According to Dr. Burton, the performance gaps in Texas could partially be explained by discriminatory disciplinary procedures. In Texas, African-American students are three times more likely to be removed from school for lower-level offenses relative to Anglo students.[261] African-American students were 31% more likely to face a school discretionary action compared to otherwise identical Anglo and even Hispanic students.[262] Such disparities are of great concern because, as Dr. Burton outlined, students who were suspended or expelled have a higher drop-out rate than students who did not face disciplinary action.[263]

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[259] Burden, D.E. 391-1, p. 14 (report) (citing *Percentage of Persons Age 25 and Over with High School Completion or Higher and a Bachelor's or Higher Degree, by Race/Ethnicity and State: 2008-2010*, NATIONAL CENTER FOR EDUCATION STATISTICS, http://nces.ed.gov/programs/digest/d12/tables/dt12_015.asp (last visited June 3, 2014)).

[260] *Id*.

[261] Burton, D.E. 376-2, p. 28 (report).

[262] *Id.*

[263] *Id*. (citing Tony Fabelo, et al., *Breaking School's Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, Council of State Governments Justice Center/The Public Policy Research Institute, July 2011, *available at* http://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf (last accessed June 27, 2014), pp. 46, x-xi).

The harmful effects of discrimination can also be seen in the field of health. According to the U.S. Centers for Disease Control, African-Americans and Hispanics in Texas are much more likely to report being in poor or fair health, to lack health insurance, and to have been priced-out of visiting a doctor within the past year.[264] And compared to adult Anglos throughout the state, minorities in Texas experience higher levels of health impairment—particularly those minorities who are low-income.[265] This is a predictable effect of discrimination because health, education, and employment opportunities are all interdependent.[266]

African-Americans and Latinos are less educated because of discrimination, suffer poorer health because of discrimination, are less successful in employment because of discrimination, and are likewise impoverished in greater numbers because of discrimination. Based on this evidence, which Defendants did not contest, this Court finds that SB 14's requirements will fall significantly more heavily on the poor and that African-Americans and Latinos are substantially more likely than Anglos to live in poverty in Texas because they continue to bear the socioeconomic effects caused by more than a century of discrimination.

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[264] Burden, D.E. 391-1, p. 15 (report) (citing *Texas: Minority Health*, HENRY J. KAISER FAMILY FOUNDATION, http://kff.org/state-category/minority-health/?state=TX (last visited June 3, 2014)).

[265] Henrici, D.E. 369-1, p. 24 (report) (citing Ronald Angel, Laura Lein, and Jane Henrici. *Poor Families in America's Health Care Crisis: How the Other Half Pays*, pp. 79–100 (New York: Cambridge University Press, 2006)).

[266] *See* Bazelon, D.E. 521-1, pp.39-40 (report); Burton, D.E. 376-2, pp. 48-49 (report); Henrici, D.E. 369-1, pp. 14, 24, 30, 32 (report); Burden, D.E. 391, pp. 14-15 (report).

2. The Plaintiffs Demonstrate the Impact

Plaintiffs assert three general types of injuries associated with the implementation of SB 14: personal, political, and organizational. Those asserting personal injuries include Plaintiffs whose ability to vote has been threatened by SB 14 requirements or those who fear poll workers could keep them from voting because the name on their ID may not be "substantially similar" to that on the voter registration rolls. Those asserting political injuries include those Plaintiffs who state that SB 14 has or will cause their political campaigns to spend additional time, effort, or funding to educate their constituents about SB 14 requirements. Last, those asserting organizational injuries include Plaintiff groups who state that they were forced to divert resources from their core missions to respond to the adverse effect of SB 14 on the people they serve.

a. The Personal Injury Plaintiffs

Fourteen of the twenty-six Plaintiffs assert that SB 14 will: (1) deny them the right to vote; (2) cause them a substantial burden in exercising their right to vote; or (3) require them to vote in an unequal manner. Of those fourteen, nine lack a qualified SB 14 ID - Floyd Carrier, Gordon Benjamin, Ken Gandy, Eulalio Mendez, Jr., Lionel Estrada, Lenard Taylor, Estela Garcia Espinoza, Margarito Martinez Lara, and Imani Clark. Most of these Plaintiffs attempted to obtain, but were unsuccessful in securing, a qualified SB 14 ID because they lacked the underlying documentation required to obtain such forms of identification.

Free EIC is Obscure. Defendants assert that no one is denied the right to vote because SB 14 allows individuals without a qualified photo ID to get a free EIC. The problem is that the implementation of the EIC program has been insufficient. A voter without qualified SB 14 ID must first know that they need such identification to vote. And if they do not have the generally available ID, they must know that an EIC exists before they are able to apply for it. The word is not out. A number of Plaintiffs had not heard of an EIC until they were deposed—even those who had shown up at the polls and were turned away for not having the necessary photo ID[267] and those who made multiple attempts to obtain DPS-issued photo IDs.[268] And some of those turned away at the polls were not offered a provisional ballot so that they could attempt to resolve the identification issue after election day.[269] For instance, Floyd Carrier was well-known to the election workers at his polling place, but was not offered a provisional ballot and was not permitted to cast a vote.[270] His son went to great efforts to get him an SB 14-qualified photo ID, never learning that an EIC was an option.[271]

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[267] *See* Bates, Pls.' Ex. 1090, p. 13 (did not know that her existing ID would be insufficient until she arrived at the polls); Washington, Pls.' Ex. 1093, pp. 17-24; *see also* Barreto, D.E. 569, p. 66 (testimony) (testifying that 87% of survey respondents without a high school diploma had never heard of an EIC). Sen. Uresti testified that his constituents were not aware of EICs. Uresti, D. E. 569, p. 249. City Councilman Guzman testified that, while helping registered voters turned away at the polls during the November 2013 election to obtain appropriate identification, he was not aware of EICs. Guzman, D.E. 569, pp. 359-62, 364, 367-68, 372-74.

[268] Calvin Carrier testified that throughout his efforts to obtain the underlying documentation and qualifying ID for his father, no one mentioned the EIC. C. Carrier, D.E.561, pp. 14-28; *see also* Barber, Pls.' Ex. 1108, pp. 26-30; Espinoza, D.E. 582, p. 177.

[269] Bingham, Pls.' Ex. 1091, pp. 33-34 (was not offered a provisional ballot until she specifically asked if there was some other way she could vote). Councilman Guzman testified that his constituents who were turned away from the polls did not know about provisional ballots. Guzman, D.E. 569, pp. 367-68, 375.

[270] C. Carrier, D.E.561, pp. 26-27.

[271] *Id*. at 27-28.

No real effort has been made by Texas to educate the public about the availability of an EIC to vote, where to get it, or what is required to obtain it.[272] In order to obtain an EIC, an applicant must provide: (1) documentation of identity, (2) documentation of U.S. citizenship, and (3) a valid Texas voter registration card.[273] An applicant may satisfy the documentation of identity requirement in three ways by: (1) providing one primary form of identification, (2) providing two secondary forms of identification, or (3) providing one secondary form of identification and two supporting identification documents.[274] To prove citizenship, an applicant must provide: (1) a U.S. passport book or card, (2) a birth certificate issued by a U.S. state or the U.S. Department of State, (3) a U.S. Certificate of Citizenship or Certificate of Naturalization, or (4) an Immigration and Naturalization Service U.S. Citizen ID card.[275] Thus, for the vast majority of applicants who lack a primary form of identification, the only way to prove identity for EIC purposes is through

[272] *See* Jewell, D.E. 578, pp. 35-36, 38-39 (testimony); Uresti, D.E. 569, pp. 214-15; Cornish, D.E. 569, pp. 259-66, 287; Peters, D.E. 582, pp. 156-57.

[273] 37 TEX. ADMIN. CODE §§ 15.181-.183.

[274] A primary form of identification is a Texas driver license that has been expired for at least 60 days but no more than two years. *Id*. at § 15.182. A secondary form of identification can be: (1) an original or certified copy of a birth certificate issued by the appropriate State Bureau of Vital Statistics or equivalent agency; (2) an original or certified copy of United States Department of State Certification of Birth (issued to United States citizens born abroad); (3) an original or certified copy of a court order with name and date of birth indicating an official change of name or gender; or (4) a U.S. Citizenship or Naturalization Certificate (regardless of whether it contains an identifiable photo). *Id*. An EIC-only birth certificate issued by the Texas Department of State Health Services is also an accepted form of a secondary identification. Peters, D.E. 582, p. 156. Supporting documentation includes twenty-eight different documents—including a Social Security card, a Texas driver license or identification card that has been expired for more than two years, a voter registration card, a Texas vehicle title or registration, as well as certain school records. 37 TEX. ADMIN. CODE § 15.182.

[275] *Election Identification Certificates (EIC) – Documentation Requirements*, TEXAS DEPT. OF PUBLIC SAFETY, http://www.txdps.state.tx.us/DriverLicense/eicDocReqmnts.htm (last visited October 7, 2014).

a birth certificate. As of the trial, however, DPS's website failed to identify EIC-only birth certificates as one of the secondary forms of identification.[276]

Underlying Documents are Not Free. Even if the EIC, itself, is issued at no charge, the problem for the registered voters who do not have one of the approved photo IDs is getting the documents that they need to obtain an EIC—the same documents DPS requires for a Texas driver's license.[277] Ordinarily, the easiest and cheapest underlying document is a birth certificate. SB 14 was passed with no provision reducing or eliminating the $22.00-$23.00 fee charged in Texas for a birth certificate despite Senator Davis' warning to the legislature that this would cripple the ability of those without SB 14 ID in their effort to obtain it.[278] The State has since reduced the fee for obtaining a birth certificate (if sought exclusively for an EIC), but that reduced fee of $2.00-$3.00 has not been publicized and the Texas Department of State Health Services (DSHS) forms for requesting birth certificates do not address an EIC-only version.[279]

Mr. Mendez paid $22.00 for his birth certificate because he did not know and was not informed about an EIC birth certificate.[280] Also, as Plaintiffs' individual stories substantiate, the reduced-fee EIC-only birth certificate is not readily available to anyone

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[276] Peters, D.E. 582, p. 156.

[277] Mr. Peters testified that the application requirements for an EIC were simply adopted from those required for a driver's license or personal ID card in order to provide continuity and simplicity for the customer service representatives. Peters, D.E. 582, pp. 138-39. Mr. Rodriguez confirmed this. Rodriguez, D.E. 582, pp. 253-54.

[278] Davis, D.E. 572, pp. 24-27; Pls.' Ex. 650.

[279] *See* Farinelli, D.E. 582, pp. 340-41, 384-85, 389-92.

[280] Mendez, D.E. 563, pp. 103-04.

whose birth has not been registered or if there are inaccuracies on the birth certificate requiring amendment.

Delayed Birth Certificates for Unregistered Births. Plaintiffs testified as to the varied bureaucratic and economic burdens associated with purchasing a proper birth certificate when their births were not registered. Mr. Lara, a 77-year-old Hispanic retiree from Sebastian, Texas, has attempted to locate his birth certificate for more than twenty years.[281] He was born in what he described as a "farm ranch" in Cameron County, Texas.[282] With the help of his daughter, he visited three offices in two counties but was unsuccessful in locating his birth certificate.[283] Mr. Lara later paid a $22.00 search fee to DSHS to confirm what he already suspected—his birth was never registered.[284] Thus, Mr. Lara must now apply for a delayed birth certificate (using a 14-page packet of instructions and forms) at a cost of $25.00. Additionally, he will have to pay $22.00 for a certified copy of the birth certificate.[285] He testified that he has twice attempted to apply for the delayed birth certificate to no avail.[286]

Like her brother, Maximina Lara's birth was not registered.[287] Although she currently has a driver's license, it will expire in October 2015, and because of a change in Texas law, she will need to show proof of citizenship to renew her license. Therefore,

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[281] Mar. Lara, D.E. 573, pp. 219-20.

[282] *Id.*

[283] *Id.* at 222.

[284] *Id.* at 222-23.

[285] *Id.*; Pls.' Ex. 989.

[286] Mar. Lara, D.E. 573, p. 231.

[287] Max. Lara, D.E. 573, p. 235.

Ms. Lara will need to obtain a delayed birth certificate at a cost of $47.00, which she cannot afford. And she does not have the underlying documents to get the delayed birth certificate. Similarly, Mr. Carrier was forced to endure an exhaustive course that is further documented below to purchase a delayed birth certificate because he was born at home.[288] This problem is far from unusual.

Amended Birth Certificates to Correct Errors. It is important that birth certificates be accurate in order for individuals to use them to obtain identification. Mistakes tend to crop up on birth certificates of those born at home with the help of midwives and many of those born at home are minorities.[289] Mistakes occur in the names of parents and child, gender of child, date of birth of parents and child, and place of birth. Ms. Gholar, who intends to vote in person as long as she can walk, will be required to hire a lawyer in Louisiana, where she was born, to amend her birth certificate there.[290]

Mr. Carrier, an 84-year-old retiree from China, Texas, was born at home and, with the help of his son, contacted three different counties trying to locate his birth certificate to no avail.[291] He then paid DSHS $24.00 for them to conduct a search for his birth certificate.[292] After twelve weeks, DSHS sent him a birth certificate, but it was riddled

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[288] C. Carrier, D.E. 561, p. 14.

[289] Gholar, Pls.' Ex. 1092, p. 64 (testifying that it was common when she was born in the 1930s for midwives to not read and write very well, adding that church birth records were better kept because "they didn't hold Black people very valuable"); Bazelon, D.E. 603-1, p. 24 (report) ("Evidence provided at trial in the recent Wisconsin voter ID case of *Frank v. Walker* found that '[m]issing birth certificates are also a common problem for older African American voters who were born at home in the South because midwives did not issue birth certificates.'" (citation omitted)).

[290] Gholar, Pls.' Ex. 1092, pp. 61, 79.

[291] C. Carrier, D.E. 561, pp. 14-16.

[292] *Id*. at 16-17.

with mistakes (his first name was listed as "Florida," his last name was misspelled, and his date of birth was wrong).[293] Mr. Carrier, again with the help of his son, submitted an application to amend his birth certificate which included a $12.00 notary fee.[294] After some months, DSHS contacted him and requested additional documentation to execute the amendment, one of which included the same document he was attempting to obtain in the first place—a birth certificate.[295] Eventually his son received a call from the Texas deputy registrar, who assured him that the matter would be resolved.[296] A week before he was to testify in this case, Mr. Carrier received his amended birth certificate. Unfortunately, the birth certificate still contains the incorrect birth date.[297]

Mrs. Espinoza testified that she did not have a birth certificate until January of 2014 when Texas Rio Grande Legal Aid paid for the document.[298] The birth certificate contains her maiden name and misstates her date of birth.[299] She must now obtain an amended birth certificate, as well as a copy of her marriage license, to obtain an EIC.

Out-of-State Birth Certificates. Many people living in Texas were born in other states. If they do not have their birth certificate, it can be difficult and costly to obtain one. Mr. Benjamin, a 65-year-old African-American, was unable to afford a certified copy of his birth certificate because Louisiana charged $81.32 to process his online

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[293] *Id*. at 56-57.

[294] *Id*. at 16-17, 20.

[295] *Id.* at 23.

[296] *Id*. at 32.

[297] *Id.* at 33.

[298] Espinoza, D.E. 582, p. 167.

[299] *Id*. at 166; Pls.' Ex. 996 (birth certificate).

application.[300] He later discovered that Louisiana allowed a relative to request a birth certificate in person at no cost.[301] Fortunately, his sister was able to request his birth certificate on her way to a family reunion in Atlanta, Georgia—a trip he could not make himself.[302]

Mr. Gandy does not have a certified copy of his New Jersey birth certificate.[303] He conducted Internet research to determine what he had to do to get it, but did not order it because the $30.00 fee is "quite a bit of money" for him.[304] This Court heard testimony from other witnesses regarding the difficulty in obtaining identification for individuals born in states outside of Texas.[305]

Suspension of, and Surcharges on, DPS-Issued ID. Mr. Estrada, a 41-year-old Hispanic part-time construction worker from Kenedy, Texas, testified that he has been unable to renew his commercial driver's license (CDL) because he cannot afford the surcharges imposed for failure to comply with financial responsibility laws.[306] He testified that he would have to pay $260.00 a year for the next three years to renew his CDL.[307] To obtain an EIC, he would have to forfeit his CDL, which would threaten his

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[300] Benjamin, D.E. 563, pp. 291-93.

[301] *Id*. at 292-93.

[302] Benjamin, D.E. 563, pp. 293-94.

[303] Gandy, D.E. 573, pp. 208-09.

[304] *Id*. at 215; Gandy Dep., June 11, 2014, p. 41 (D.E. 592, pp. 221-22 (admitting dep.)).

[305] Bates, Pls.' Ex. 1090, p. 7 (Mississippi); Barber, Pls.' Ex. 1108, p. 6 (Tennessee); Gholar, Pls.' Ex. 1092, p. 62 (Louisiana).

[306] Estrada, D.E. 569, pp. 129, 135, 140.

[307] *Id*. at 135.

future ability to earn a living as a truck-driver.[308] Mrs. Ramona Bingham went without a Texas driver license for about four years because she could not afford to pay the traffic-related fines.[309]

Dr. Lichtman noted that the suspension of more than a million driver's licenses because of substantial surcharges related to traffic violations disparately burdened African-Americans and Latinos.[310] The legislature rejected amendments that would require the issuance of substitute photo ID if a driver's license was suspended or at least provide notice to the individual that the right to vote was in jeopardy.[311]

Inability to Pay the Costs. Some Plaintiffs testified that they were either unable to pay or that they would suffer a substantial burden in paying the cost associated with getting a qualified SB 14 ID or the necessary underlying documents. Mr. Mendez testified about his family's "very sad" financial state, explaining that "[e]ach month by the last week there's no food in the house and nothing with which to buy any, especially milk for the children. Then my wife has to go to a place to ask for food at a place where they give food to poor people."[312] Mr. Mendez was embarrassed to admit at trial that having to pay for a new birth certificate was a burden on him and his family.[313] Mr. Lara described his financial situation by stating that "we got each our little . . . small amount of

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[308] *Id*. at 141.

[309] Bingham Dep., July 29, 2014, pp. 16-18.

[310] Lichtman, D.E. 374, pp. 33-35 (report).

[311] *See* Appendix: Table of Amendments Offered on SB 14.

[312] Mendez, D.E. 563, p. 107.

[313] *Id.*

cash . . . and we try to . . . stretch it out as possible by the end of the month, and sometimes we'll make it and sometimes we won't."[314] Ms. Lara described her financial state as both difficult and very stressful.[315]

Travel Required for ID or Underlying Documents. The cost of traveling to a DPS office to obtain SB 14 ID is a particular burden in Texas because of its expansive terrain. Of the 254 counties in Texas, 78 do not have a permanent DPS office.[316] For some communities along the Mexican border, the nearest permanent DPS office is between 100 and 125 miles away.[317] Dr. Daniel G. Chatman, Associate Professor of City and Regional Planning at the University of California, Berkeley, concluded that over 737,000 citizens of voting age face a round-trip travel time of 90 minutes or more when visiting their nearest DPS office, mobile EIC unit, or nearest county office that agreed to issue EICs.[318]

While that number represents only 4.7% of citizens of voting age, for those who do not have access to a household vehicle, 87.6% have that long commute to obtain an SB 14-qualified ID, reflecting an extraordinary burden on the poor.[319] Dr. Chatman's study also concluded that over 596,000 citizens of voting age faced a travel time of at least two hours and over 418,000 faced a commute of three hours or more, which is 54%

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[314] Mar. Lara, D.E. 573, p. 225.

[315] Max. Lara, D.E. 573, p. 245.

[316] Peters, D.E. 582, pp. 148-49.

[317] Burton, D.E. 376-2, p. 46 (report) (citing *Texas v. Holder*, 888 F. Supp. 2d 113, 140 (D.D.C. 2012), *vacated and remanded on other grounds*, 133 S. Ct. 2886 (U.S. 2013).

[318] Chatman, D.E. 426-1, pp. 2, 9, 27 (report).

[319] *Id*. at 29.

of those without access to a vehicle.[320] He further testified that the travel burden fell most heavily on poor African-Americans and Hispanics at differential rates that were statistically significant at the very highest level.[321] The travel times would be both burdensome and unreasonable to most Texans—regardless of wealth or income.[322]

Some of the Plaintiffs without SB 14 ID do not have the ability or the means to drive.[323] Four of them—Ms. Clark, Mr. Gandy, Mr. Benjamin, and Mr. Taylor—rely almost exclusively on public transportation.[324] The lack of personal transportation adds to both the time and the cost of collecting the underlying documents. Mr. Taylor, who was recently homeless, declared that he sometimes cannot afford a bus pass.[325] And for those who can afford the fare, like Mr. Gandy, it can take an hour to reach the nearest DPS office.[326] Others, like Mr. Estrada and Mrs. Espinoza are forced to rely on the kindness of family and friends to move about town, much less for a 60-mile roundtrip ride to the nearest DPS station.[327] Mr. Lara, who is nearing his eightieth birthday,

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[320] Chatman, D.E. 426-1, p. 27 (report).

[321] The 90-minute burden was expressed as falling on Whites at the rate of 3.3%, on Hispanics at the rate of 5%, and on Blacks at the rate of 10.9%. Chatman, D.E. 578, pp. 97-98 (testimony); Chatman, D.E. 426-1, p. 29 (report).

[322] Using generally accepted quantitative data principles, Dr. Bazelon quantified the general travel burdens associated with obtaining an EIC for those registered voters on the No-Match List. Dr. Bazelon considered both monetary costs, like bus or taxi fares, and non-monetary costs such as travel time. Dr. Bazelon estimated that the average travel cost to obtain an EIC for all affected registered voters was $36.23—a conservative estimate because it did not attempt to quantify the totality of costs associated with acquiring underlying documentation like day care or time off work.

[323] Mendez, D.E. 563, p. 101 (does not have a driver's license).

[324] Clark Dep., May 2, 2014, p. 89 (D.E. 592, pp. 221-22 (admitting dep.)); Gandy, D.E. 573, p. 208; Benjamin, D.E. 563, pp. 291, 295; Taylor, D.E. 569, p. 147; Taylor Decl., Pls.' Ex. 1000.

[325] Taylor Decl., Pls.' Ex. 1000.

[326] Gandy Dep., June 11, 2014, p. 12 (D.E. 592, pp. 221-22 (admitting dep.)).

[327] Estrada, D.E. 569, p. 134; Espinoza, D.E. 582, p. 173.

testified that he has to ride his bicycle when he is unable to find a car ride.[328] And Mr. Carrier, who is in a wheelchair, must rely on others to drive him even to his own mailbox because it is, as is the case with everyone's mailbox in China, Texas, located at the local post office.[329]

DPS, Using Discretion, Can Apply the Burdens Inconsistently. The evidence demonstrated that there are inconsistencies in the enforcement of SB 14 by DPS and other Texas officials. Plaintiffs' likelihood of acquiring qualified photo ID may be determined not by the underlying documents they possess but by the luck of the customer service representative (CSR) they draw during their DPS visit.

Mr. Tony Rodriguez, a DPS senior manager in charge of the EIC program, testified at trial that CSRs and other DPS officials are granted discretion to circumvent the underlying document requirements when granting EICs.[330] He was unable to articulate a protocol as to how and when DPS staff could exercise their discretion.[331] He admitted that there were no written instructions or training materials on the matter.[332] Thus, DPS may grant or reject an EIC application based not on the underlying documentation but rather on the office's location,[333] with little to no consistency.

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328 Mar. Lara, D.E. 573, pp. 219, 223-24.

329 C. Carrier, D.E. 561, pp. 13-14, 29, 42.

330 Rodriguez, D.E. 582, pp. 251-52.

331 *Id*. at 276-79.

332 *Id*. at 251-52.

333 *Id*. at 278.

This may explain Ruby Barber's trip through the system. Mrs. Barber, a 92-year-old woman from Bellmead, Texas, went to DPS to get an EIC but was unsuccessful because she did not have a birth certificate or other required documents.[334] She or her son called the press, and the Waco Tribune ran a story on her difficulties obtaining an EIC.[335] Within a matter of days, without any additional documentation submitted by Mrs. Barber, DPS gave her an EIC, explaining that DPS had found a U.S. Census entry from the 1940s that supported her claim to her identity.[336]

Name Changes and Variations. Five Plaintiffs possess SB 14 ID, but fear that poll workers could keep them from voting in the future because the name on their ID may not be deemed "substantially similar" to that on the voter registration rolls. These Plaintiffs include: Anna Burns, Koby Ozias, John Mellor-Crummey, Evelyn Brickner, and Maximina Martinez Lara. After marriage, Anna Burns, whose maiden name is Anna Maria Bargas, changed her name to Anna Maria Bargas Burns and that is the name on her driver's license.[337] However, she registered to vote as Anna Maria Burns.[338]

Ms. Lara's only form of SB 14 ID is her driver's license, which states her name as Maxine Martinez Lara.[339] However, Ms. Lara is registered to vote as Maximina M. Lara.[340]

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334 Barber, Pls.' Ex. 1108, pp. 6, 27-30.

335 Barber, D.E. 578, p. 320; *see also* Defs.' Exs. 270, 271, 272.

336 Rodriguez, D.E. 582, pp. 207-08; Barber Dep., Pls.' Ex. 1108, pp. 36, 37- 38.

337 Burns Dep., July 21, 2014, pp. 12-13 (D.E. 592, pp. 221-22 (admitting dep.)).

338 *Id*. at 22.

339 Max. Lara, D.E. 573, pp. 236-37; Pls.' Ex. 987.

Mr. Mellor-Crummey was concerned that a poll worker would turn him away because he was registered to vote as John M. Mellor-Crummey but the name on his driver license is J M Mellor-Crummey.[341] Mr. Ozias, who is in the process of changing his name, is registered to vote as Stephanie Lynn Dees.[342] Mr. Ozias fears he will be turned away from the polls because, in his words, "I don't really match my photograph and you always get people who just don't like transgender people . . . ."[343]

Commissioner Oscar Ortiz, who asserts a political injury, testified that he had a bit of a problem voting because the name on his driver license and voter registration card do not match—one has Oscar O. Ortiz and the other has Oscar Ochoa Ortiz.[344] In order to vote, he had to sign a substantially similar name affidavit.[345]

The Disability Exemption is Strict. At least four Plaintiffs may qualify for SB 14's disability exemption. Mr. Carrier, Ms. Espinoza, Mr. Mendez, and Mr. Taylor testified that they suffer from a disability. SB 14 provides for a disability exemption which can be obtained with written documentation from (a) the United States Social Security Administration evidencing the individual's disability or (b) the United States Department of Veterans Affairs evidencing a disability rating of at least 50%.[346] These

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[340] Max. Lara, D.E. 573, p. 237.

[341] Mr. Mellor-Crummey has since obtained the necessary alignment of names between his voter registration and driver's license. Defs.' Ex. 2520.

[342] Ozias Dep., July 22, 2014, pp. 5, 17-18 (D.E. 592, pp. 221-22 (admitting dep.)).

[343] *Id*. at 51.

[344] Ortiz, D.E. 578, pp. 13-14.

[345] *Id*. at 28-29.

[346] TEX. ELEC. CODE ANN. § 13.002(i).

Plaintiffs were not made aware of this exemption when they went to DPS or other relevant offices.[347] As of January 15, 2014, only 18 voters were granted a disability exemption in Texas.[348]

A Widespread, Practical Problem. The experiences of these Plaintiffs are not unusual. Other than for voting, many of the Plaintiffs in this case do not need a photo ID to navigate their lives. They do not drive (many do not own a car), they do not travel (much less by plane), they do not enter federal buildings,[349] and checks they cash are cashed by businesspeople who know them in their communities.[350]

At trial, the Court heard from witnesses who painted a compelling picture of the more universal photo ID plight. Kristina Mora worked for a non-profit organization in Dallas, Texas, The Stew Pot, which assists the homeless who are trying to get a photo ID to obtain jobs or housing. She testified that her indigent clients regularly number 50 to 70 per day.[351] Dawn White is the Executive Director of Christian Assistance Ministry (CAM), a church-funded organization in San Antonio, Texas, providing crisis management and ID recovery services.[352] Her clients are the homeless or working poor,

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[347] *See* C. Carrier, D.E. 561, pp. 72-73; Taylor, D.E. 569, p. 150. In helping his constituents vote in light of SB 14's ID requirements, Councilman Guzman testified that he was not aware of any disability exemption from the photo ID requirement. Guzman, D.E. 569, p. 375.

[348] Ansolabehere, D.E. 600-1, p. 8 (report).

[349] A federal employee ID will not permit a person to vote under SB 14.

[350] Henrici, D.E. 569, p. 188 (testimony); Henrici, D.E. 369-1, pp. 18-19 (report).

[351] Mora, D.E. 563, pp. 114-15.

[352] White, D.E. 563, pp. 268-69.

80% of which are African-American and Hispanic.[353] Of approximately 10,000 people eligible for and seeking CAM services regarding obtaining an ID, CAM can only accept 5,000 and is successful in obtaining ID for about 2,500.[354]

According to Ms. Mora, these clients confront four general barriers to getting necessary ID: (1) understanding and navigating the process; (2) financial hardship; (3) investment of time; and (4) facing DPS or any type of law enforcement.[355] The Stew Pot and CAM, exist in part, to help with the first barrier and to an extent, the second barrier. These two witnesses testified that it costs on average, $45.00 to $100.00 per person in document and transportation costs to get a photo ID.[356] It generally takes an individual two trips to obtain the necessary documents to get an ID.[357] Many homeless individuals do not have a birth certificate or other underlying documents because they have nowhere to secure them and they get lost, stolen, or confiscated by police.[358] Furthermore, most are not in communication with their families and cannot get assistance with any part of this process. Ms. Mora testified that it generally takes about one hour to get to DPS or the necessary office, one hour to stand in line and be served, and one hour to return to the shelter.[359] This generally has to be done in the morning because homeless shelters have

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353 *Id*. at 271-72. CAM has two offices. The one on the north side of town services a population that is largely Anglo. Requests for ID recovery in that office are so rare that they do not know how to do it and have to phone the downtown office. *Id.* at 285-86.

354 White, D.E. 563, p. 277.

355 Mora, D.E. 563, p. 177.

356 *Id*. at 118; White, D.E. 563, pp. 279-80.

357 Mora, D.E. 563, p. 118.

358 *Id*. at 130.

359 *Id*. at 119.

early afternoon curfews.[360] The $45.00 cost to obtain a Texas ID card is equivalent to what these clients would pay for a two-week stay in a shelter.[361]

The clients served by CAM who work have difficulties obtaining IDs because they cannot get time off of work, they do not have transportation, and a two-hour bus ride to the DPS office is not uncommon.[362] For those who are able to obtain an ID, the process usually takes four to six weeks, but can take much longer. Fear of law enforcement by this population is widespread and justified.[363] Many homeless people have outstanding tickets that they cannot pay and DPS is a law enforcement office where their names can be checked for outstanding tickets and arrest warrants.[364] Testimony at trial confirmed that DPS took fingerprints for EICs until the SOS asked them to stop.[365] DPS has done nothing to allay public perception that DPS can fingerprint, conduct a warrant check, and arrest EIC applicants.[366]

Despite both Mora and White's expertise in obtaining photo ID for many people every day, they were not aware of the existence of an EIC until they were contacted for

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[360] *Id*. at 119-20.

[361] *Id*. at 118-19.

[362] White, D.E. 563, p. 282.

[363] Sen. Uresti and Councilman Guzman both testified that many of their constituents are afraid to be near DPS officers or the Sheriff because they owe tickets that they cannot pay or because they are simply intimidated. Uresti, D.E. 569. p. 246; Guzman, D.E. 569, p. 372.

[364] Mora, D.E. 563, p. 120; Peters, D.E. 582, pp. 144-45 (confirming that law enforcement is present at DPS offices where driver's licenses and EICs are issued, and that a public perception exists that interactions with DPS will trigger a check for warrants).

[365] Peters, D.E. 582, pp. 144-45 (confirming that existing regulations give DPS discretion to take fingerprints); McGeehan, D.E. 578, p. 282; *see* 37 TEX. ADMIN. CODE 15.183(a)(3) (DPS has may re-implement this requirement at any time).

[366] Pls.' Ex. 345; Peters, D.E. 582, p. 144.

this case.[367] Despite Mora's familiarity with the DPS website, she had trouble finding any instructive materials for obtaining an EIC.[368] And the information said nothing about any reduction in the fee for birth certificates.[369] The EIC, because it requires the same underlying documents, is not easier for the clients to obtain and, because its only use is for voting, it is likely that neither organization will assist their clients in obtaining one.[370]

Alternatives and Choices. Defendants argue that none of the individual Plaintiffs are disenfranchised or substantially burdened because (1) those over 65 or disabled can vote by mail; and (2) any remaining Plaintiffs can get qualified SB 14 ID, but choose not to. Defendants fail to appreciate that those living in poverty may be unable to pay costs associated with obtaining SB 14 ID. The poor should not be denied the right to vote because they have "chosen" to spend their money to feed their family, instead of spending it to obtain SB 14 ID.

Insufficiency of Mail-In Ballots. The evidence also indicates that the choice of using the absentee ballot system is not truly an appropriate choice. At trial, there was universal agreement that a much greater risk of fraud occurs in absentee balloting, where some campaign workers are known to harvest mail-in ballots through several different methods, including raiding mailboxes.[371] Mail-in ballots are not secure and require an

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[367] Mora, D.E. 563, p. 131; White, D.E. 563, p. 283.

[368] Mora, D.E. 563, pp. 131-32.

[369] *Id*. at 133-34.

[370] *Id*. at 133; White, D.E. 563, p. 284.

[371] Wood, D.E. 563, p. 202 (testimony); Burden, D.E. 569, p. 320 (testimony); Lichtman, D.E. 573, p. 67 (testimony); Anchia, D.E. 573, p. 322; Minnite, D.E. 375, p. 21 (report).

application in advance of the election and mailing or returning the ballot before election day.[372]

There was substantial testimony that people want to vote in person at the polls, not even in early voting, but on election day, and they were highly distrustful of the mail-in ballot system.[373] For some African-Americans, it is a strong tradition—a celebration—related to overcoming obstacles to the right to vote.[374] Reverend Johnson considers appearing at the polls part of his freedom of expression, freedom of association, and freedom of speech.[375]

Nine of the fourteen Plaintiffs are eligible to vote by mail because they are over the age of 65 and/or are disabled,[376] and all but two of the nine expressed a reservation about casting their vote by mail.[377] Even Mr. Gandy, who voted by mail rather than not vote at all, stated that he felt as though he was being treated like "a second-class citizen."[378] He is on the Nueces County Ballot Board, but cannot vote in person. Mr.

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[372] Ingram, D.E. 588, pp. 338, 341.

[373] Bates, Pls.' Ex. 1090, p. 21; Eagleton, Pls.' Ex. 1095, pp. 10, 12; Benjamin, D.E. 563, p. 292; Gholar, Pls.' Ex. 1092, pp. 60-61; Johnson, D.E. 569, p. 19 ("But if you understand Black American in the terms of Blacks in the south . . . going to vote and standing in line to vote is a big deal. It's much more important for an 80-year-old Black woman to go to the voting poll, stand in line, because she remembers when she couldn't do this."); Hamilton, Dep., June 5, 2014, pp. 66-67 (D.E. 592, pp. 221-22 (admitting dep.)) ("[F]or some people who literally fought for the right to vote, there are a lot of seniors . . . who do not, women especially, who do not want to vote by mail. They want to go to the polls . . . like they've always gone.").

[374] Ellis, D.E. 573, p. 157; Washington, Pls.' Ex. 1093, pp. 12, 76.

[375] *See* Johnson, D.E. 569, p. 21.

[376] F. Carrier, D.E. 561, p. 75; Benjamin, Pls.' Ex. 815; Gandy, Pls.' Ex. 850; Mendez, D.E. 563, p. 98; Taylor, D.E. 569, p. 146; Espinoza, D.E. 582, p. 166; Mar. Lara, D.E. 573, p. 219; Brickner Dep., July 23, 2014, p. 8; Max. Lara, Pls.' Ex. 987.

[377] C. Carrier, D.E. 561, pp. 29-31; Benjamin; D.E. 563, p. 292; Gandy Dep., June 11, 2014, pp. 62-63; Mendez, D.E. 563, pp. 100-01; Taylor, D.E. 569, p. 150; Mar. Lara, D.E. 573, p. 220; Max. Lara, D.E. 573, p. 236.

[378] Gandy Dep., June 11, 2014, pp. 62-63.

Benjamin expressed his distrust of voting by mail when he stated that "mail ballots have a tendency to disappear."[379] Calvin Carrier testified that his father's mail often gets lost and his father does not want to rely on a mail-in ballot to exercise his franchise.[380]

In a case in which Defendants claim that voter fraud and public confidence motivated and justified the change in the law, it is ironic that they want the voters adversely affected by that law to vote by a method that has an increased incidence of fraud and a lower level of public confidence.

b. The Political Injury Plaintiffs

Six of the twenty-six Plaintiffs assert a political injury: Congressman Marc Veasey, Constable Michael Montez, Justice of the Peace Penny Pope, Justice of the Peace Sergio de Leon, Commissioner Oscar Ortiz, and Jane Hamilton. Congressman Veasey, who testified that he represents a majority-minority district, believes that SB 14 is a hardship on his constituents and that it requires additional resources, manpower, and time to educate his constituents about the new requirements.[381] Any election campaign must address voter registration, but with the enactment of SB 14, campaigns must now ensure that those who are registered to vote also possess the necessary photo ID to cast their ballots, or they must persuade them to give up the privilege of voting in person and vote by mail—if they are eligible to do so and can timely register for the mail-in ballot.[382] Ms.

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[379] Benjamin, D.E. 563, p. 292.

[380] C. Carrier, D.E. 561, pp. 29-31.

[381] Veasey Dep., June 20, 2014, pp. 84-85 (D.E. 592, pp. 221-22 (admitting dep.)).

[382] Veasey Dep., June 20, 2014, pp. 84-85; Hamilton Dep., June 5, 2014, pp. 64-67; *see also* D.E. 592, pp. 221-22 (admitting deps.)

Hamilton, Congressman Veasey's chief of staff and campaign manager, declared that SB 14 has made her job significantly more difficult as she has screened numerous calls from voters who did not know how to obtain proper ID and who were overwhelmed by the process.[383] Constable Montez, Justice of the Peace Pope, Justice of the Peace de Leon, and Commissioner Ortiz all asserted an injury because they anticipated having to spend additional time, effort, and funds to campaign in their upcoming elections.

c. The Organizational Injury Plaintiffs

The last six of the twenty-six Plaintiffs assert an organizational injury. Those Plaintiffs include the League of United Latin American Citizens (LULAC), the Texas Association of Hispanic County Judges and County Commissioners (HJ&C), the Texas League of Young Voters Education Fund (TLYV), the Texas State Conference of NAACP Branches (Texas NAACP), La Union Del Pueblo Entero, Inc. (LUPE), and the Mexican American Legislative Caucus of the Texas House of Representatives (MALC). Like the political injury Plaintiffs, the organizational Plaintiffs assert that they must now expend additional time, effort, and funding in order to educate their constituents about SB 14.

A Texas NAACP representative testified that the organization had to make the most extensive changes ever to its printed voter education materials because of SB 14.[384] In addition, the Texas NAACP had to shift the responsibilities of one of its employees

[383] Hamilton Dep., *supra* at 64-65, 77.

[384] Lydia, D.E. 561, pp. 269-70.

from mostly administrative work to 80% legislative work as a result of SB 14.[385] Similarly, a representative from the TLYV testified that the organization was forced to pivot from its core mission of encouraging young people—and, in particular, young people of color—to engage in civic participation through voting by redirecting resources to print additional marketing materials and by launching the "Got ID Texas Coalition."[386] Almost the entire "get out the vote" mission has changed from focusing on why to vote to how to vote.[387]

LULAC asserts that it is and will be required to expend time, effort, and funds to educate its members about the requirements of SB 14. To that end, LULAC representatives testified in the Texas Legislature, held press conferences, conducted trainings, and sent out various communications to its members regarding SB 14.[388] LUPE asserts that SB 14 caused it to divert resources to educate its constituents on voting requirements.[389] In doing so, LUPE—a non-partisan organization whose mission is to improve the community by encouraging civic engagement—created and distributed flyers and booklets to educate its members and the greater community about SB 14. Thus, according to LUPE's executive director, the organization has been unable to completely fulfill its mission because of SB 14.[390]

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385 Lydia, D.E. 561, p. 270.

386 Green, D.E. 563, pp. 255-58, 261; TLYV, Pls.' Ex. 857 (mission statement).

387 *See* Green, D.E. 563, p. 257.

388 Ortiz Dep., Aug. 14, 2014, pp. 36-45, 49-50 (D.E. 592, pp. 221-22 (admitting dep.)); Pls.' Ex. 006 (Tr. Senate Floor Debate, Jan. 25, 2011).

389 Cox, D.E. 569, pp. 160-61.

390 Cox, D.E. 569, pp. 172-73.

Before SB 14, MALC allocated few of its resources to voter education. But since SB 14's adoption, MALC has experienced a radical uptick in the amount of time, effort, and funding to address SB 14's requirements. MALC's executive director stated that the organization now spends approximately 80% of its resources on voter education, and voting rights issues.[391] As a result, it has been hindered in pursuing its policy goals and initiatives.[392] MALC was also forced to let go of a staff member because of the additional costs.[393] HJ&C also asserts that SB 14 has diverted the organization from its core mission of Hispanic voter turnout because it must now educate its constituents on how to satisfy SB 14 requirements.[394]

d. Plaintiffs' Standing

The Court finds that Plaintiff Jane Hamilton's claimed injury is not the kind of injury that the VRA or the United States Constitution was intended to redress. Her claims are DISMISSED. The Court finds that each of the remaining Plaintiffs has standing to sue and has stated a legal injury sufficient to support his or her respective claims regarding SB 14 requirements.

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391 *Id*. at 284.

392 Golando, D.E. 561, pp. 281-82.

393 *Id*. at 287-88.

394 Garcia Dep., July 14, 2014, p. 158 (D.E. 592, pp. 221-22 (admitting dep.)).

V.

CHALLENGES TO PHOTO ID LAWS.

This Court does not write on a clean slate, as there are several cases that have addressed challenges to voter photo ID laws on United States constitutional and VRA grounds. Understandably, Defendants rely heavily on the Supreme Court of the United States' *Crawford v. Marion County Election* Board[395] opinion. That case involved a facial challenge to the Indiana voter photo ID law, with the argument that it imposed an unconstitutional burden on the right to vote. The Supreme Court upheld the Indiana law, but it did not hold that all voter photo ID laws are valid. This case is different because the Indiana law is materially different from SB 14, this is an as-applied rather than a facial challenge, there are substantial differences in the evidentiary record developed in this case, and this case includes claims of discriminatory effect, discriminatory purpose, and a poll tax, which were not present in *Crawford*.

Notably, while Defendants claim that SB 14 was modeled after the Indiana law, the Indiana law is more generous to voters. Unlike SB 14, it permits the use of any Indiana state-issued or federal ID and contains a nursing home resident exemption. Furthermore, Indiana is more generous in its acceptance of certain expired ID.[396] Of particular relevance here, Indiana's accommodation of indigents, while requiring an additional trip to the county election office to claim an exemption, does not require an

[395] 553 U.S. 181 (2008).

[396] *See* IND. CODE ANN. § 3-5-2-40.5(a)(3) (West 2014).

indigent to actually obtain, or pay any fees associated with, a qualified photo ID.[397] This is significant, as demonstrated in this case. There was also a reference in *Crawford* to a "greater public awareness" of the law, which would prompt voters to secure qualified ID, as opposed to a relative dearth of publicity and instruction in Texas.[398]

Even more compelling, however, is the difference in the record developed by the parties. In *Crawford*, the Court was confronted with sparse evidence. An expert report was deemed unreliable and the number of voters potentially disenfranchised in that case was estimated at 43,000 or 1% of eligible voters.[399] Here, Plaintiffs' experts were abundantly qualified, produced meticulously prepared figures regarding voters who lack SB 14 ID, and that number is estimated at 608,470, or 4.5% of registered (not just eligible) voters.[400] Unlike the record in *Crawford*,[401] the experts here provided a clear

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[397] *Id*. at § 3-11.7-5-2.5 (West 2011).

[398] *Crawford*, 553 U.S. at 187-88 & n.6. Here lack of information was demonstrated by evidence that, *inter alia*: (1) the Department of Public Service's website was difficult to navigate regarding EICs and places to get EICs in both English and Spanish; (2) registered voters were confused about the requirement and believed that a metro card would be sufficient; (3) mobile EIC locations were determined at the last minute and were poorly advertised; (4) many county offices offering EICs had not posted on their websites any information regarding the ID requirements or the availability of EICs; (5) the availability of birth certificates at a reduced charge was not disclosed at offices capable of issuing those birth certificates; and (6) the form used to request an EIC birth certificate is not available in Spanish. *See* Mora, D.E. 563, pp. 131-32; Rodriguez, D.E. 582, pp. 303-09; Eagleton, Pls.' Ex. 1095, pp. 30-31; Guidry, D.E. 592, pp. 154-65; Peters, D.E. 586, p. 146; Ingram Dep., Apr. 23, 2014, p. 338 (D.E. 592, pp. 221-22 (admitting dep.)); Pls.' Exs. 455-61; Farinelli, D.E. 582, pp. 383-84. Mr. Farinelli testified that there was no public education effort with respect to EIC birth certificates—no posted notices, no press releases, no media campaign, no direct mail to voters, no materials developed for DPS to publicize. Farinelli, D.E. 582, pp. 389-92. Neither were there adequate procedures to make sure EIC rates for birth certificates were ever offered. Farinelli, D.E. 582, pp. 388-89. The DSHS webpage addressing EICs first went live the day before Mr. Farinelli testified in this trial. Farinelli, D.E. 582, p. 392.

[399] *Crawford*, 553 U.S. at 187-88.

[400] Ansolabehere, D.E. 600-1, p. 4 (report); *see also* Herron, D.E. 473 (report); Ghitza, D.E. 360-1 (report); Barreto-Sanchez, D.E. 370, 483 (report).

[401] *Crawford*, 553 U.S. at 202 n.20.

and reliable demographic picture of those voters based on the best scientific methodology available.

And while the *Crawford* case apparently had no evidence of a single actual voter who was disenfranchised or unduly burdened,[402] this record contains the accounts of several individuals who were turned away at the polls, who could not get a birth certificate to get the required ID, or for whom the costs of getting the documents necessary to get qualified photo ID exceeded their financial and/or logistical resources.

Crawford applied the *Anderson/Burdick* balancing test by which the law's burden on the right to vote is weighed against the state's justifications for the law to see if the law is constitutional. The differences in the particular voter ID law and the evidence between this case and *Crawford* affect the weight of the burden side of the *Anderson/Burdick* calculus. On the justification side, Texas relies on two of the four justifications discussed in *Crawford*: (1) detecting and deterring voter fraud; and (2) increasing public confidence in elections. There is no question these are legitimate legislative interests. It is this Court's task to make the "hard judgment,"[403] based on the record provided, of how to navigate the intersection of the individual's fundamental right to vote and the state's obligation to ensure the integrity of elections.

The Eleventh Circuit's decision in *Common Cause/Georgia v. Billups* (*Common Cause III*),[404] which addressed the Georgia voter photo ID law, is similarly

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[402] *Id*. at 187.

[403] *Id*. at 190.

[404] 554 F.3d 1340 (11th Cir. 2009).

distinguishable. Like Indiana's law, the Georgia law is substantially more liberal than SB 14. It permits the use of IDs issued by the federal government (and its branches or departments) as well as those issued by the State of Georgia (and any of its political subdivisions, such as counties, municipalities, boards, and authorities). It also includes certain employee badges and tribal IDs.[405]

Like the Supreme Court in *Crawford*, the Eleventh Circuit applied the *Anderson/Burdick* balancing test. And, as in *Crawford*, the *Common Cause III* court found the evidence regarding the burden on voters to be fatally insufficient. Instead of determining how many registered voters had no qualifying ID, the plaintiffs produced a list of registered voters who had no qualifying ID *issued by the Department of Driver Safety*. Because the Georgia law includes a number of other qualifying IDs, databases for which had not been tested against the registered voter list, the resulting number was not probative of the number of registered voters who might not have ID.[406] Furthermore, there was no evidence of any particular voters who were unable to obtain, or were substantially burdened in getting, a qualifying ID.[407]

The Texas law here is far more restrictive and the evidence is far more robust—both with respect to the integrity of the No-Match List and with respect to individual voters who face substantial, and perhaps insurmountable, burdens in obtaining the necessary documents to vote in person.

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[405] *Id.*

[406] *Id.*

[407] *Id.*

The Tennessee voter photo ID law was challenged in *Green Party of Tennessee v. Hargett*[408] under only the First and Fourteenth Amendments. This recent decision addressed whether a preliminary injunction should issue. The Court recognized that the plaintiffs had raised substantial issues, but it denied the preliminary injunction because the plaintiffs chose not to submit any evidence in support of the issues they had raised.[409]

Frank v. Walker[410] involves the Wisconsin voter photo ID law. Wisconsin's voter photo ID law is the most similar to SB 14, including the requirement of presenting to the Department of Motor Vehicles certain underlying documents in order to obtain a free state photo ID card. However, it includes two categories of photo ID that Texas does not: an ID issued by a federally recognized Indian tribe in Wisconsin and an ID issued by an accredited Wisconsin university or college. The trial court struck down this slightly more liberal law, but the Seventh Circuit reversed.[411]

The trial court found that the claimed purpose of preventing in-person voter impersonation fraud was very weak. The trial court found no evidence that such fraud was much of a problem, perhaps because the risk/benefit of the crime prevents it from being a rational goal and because it is not easy to commit.[412] Existing measures, including significant criminal penalties, were held to provide any necessary deterrence,

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[408] No. 3:14cv1274, 2014 WL 3672127 (M.D. Tenn. July 23, 2014).

[409] *Id*. at *4.

[410] No. 11-CV-01128, 2014 WL 1775432 (E.D. Wisc. April 29, 2014), *rev'd*, No. 14-2058, 2014 WL 496657 (7th Cir. Oct. 6, 2014).

[411] *Id*.

[412] *Id.* at *6-8.

particularly given that a successful perpetration of the fraud would net only a single additional vote, unlikely to sway an election.[413]

There was no empirical evidence to support the claim that a voter photo ID law would increase public confidence in elections.[414] The trial court stated that the public may perceive the state's conduct—of choosing to combat voter fraud by raising substantial obstacles to voting—as projecting a much larger problem than there is, thereby undermining confidence.[415] Further, the law did nothing to boost confidence among those individuals the law would disenfranchise or put to unnecessary trouble. The trial judge found unpersuasive the state's goals of detecting and deterring other voter fraud and promoting orderly election administration and accurate recordkeeping.[416]

The trial judge weighed those weak justifications against the same types of burdens evidenced here: (a) the challenge of navigating the process so as to understand the requirements; (b) the cost and difficulty of obtaining underlying documents that are required to support an application for a free election ID; (c) the distance between voter residences and the offices that can issue the election ID and the special trip needed, often without ready access to transportation, for the exclusive purposes of proving up the right to vote; and (d) the fact that the number of voters potentially disenfranchised were

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413 *Id*. at *8.

414 *Id*.

415 *Id*. at *8-9 (citing testimony of Professor Lorraine Minnite, who testified in this case as well).

416 *Id*. at *10.

certainly sufficient to sway elections.[417] The trial judge in *Frank* found that the Wisconsin voter photo ID law was an unconstitutional burden on the right to vote.

The *Frank* trial court also found that the Wisconsin voter photo ID law violated Section 2 of the VRA because the burdens of the law disproportionately impacted Black and Latino voters and the law suppressed those minority voters in part because they are disproportionately impoverished due to a historical legacy of past, combined with present, discrimination.[418] The evidence and arguments in the *Frank* case are similar to those presented here.

The trial court permanently enjoined the implementation of the Wisconsin photo ID law, but on appeal, the Seventh Circuit, citing *Crawford*, reversed. This Court notes several distinguishing factors between this case and the Seventh Circuit's view of the facts in *Frank*, including: evidence before this Court regarding the attempt by Plaintiffs to overcome the multiple obstacles to obtaining ID, such as the State's determination of location and hours of ID-issuing offices, the strict requirements regarding underlying documentation necessary to apply for IDs, and the cost involved with obtaining those underlying documents (rather than Plaintiffs appearing "unwilling to invest the necessary time"); and uncontroverted record evidence regarding the extensive history of official discrimination in Texas and the extraordinary legislative history of SB 14. In addition, the Supreme Court's determination that another state's law is constitutional in response to a facial challenge does not govern this as-applied challenge to SB 14. In sum, this record

[417] *Id.* *11-18.

[418] *Id.* at *32.

is compelling in detailing how SB 14's particular terms are functionally preventing motivated and historically faithful voters from casting their ballots in person at the polls.

In Pennsylvania, the focus of *Applewhite v. Commonwealth (Applewhite I)*[419] was on the initial implementation of the voter photo ID law. In particular, the question was whether the voters had adequate access to the free ID that the law provided to those who did not have any other qualifying ID. The Pennsylvania Department of Transportation was requiring an original or certified copy of a birth certificate or its equivalent, along with a social security card and two forms of documentation showing current residency.[420] It was clear that some qualified voters would be unable to meet these requirements because they either did not have an adequate opportunity to become educated about the requirements and navigate the process or, because of age, disability, and/or poverty, they would be unable to meet the requirements in time for the upcoming election.[421]

The Supreme Court of Pennsylvania, over two dissenting opinions that called for an immediate imposition of injunctive relief against the photo ID law's implementation, remanded to the trial court for a determination of whether the flaws in implementation could be cured prior to the election.[422] Finding that they could not, the trial court entered a limited preliminary injunction against enforcement of the law until such time as all qualified voters could have a reasonable opportunity to obtain a free identification without application requirements that would have the effect of disenfranchising those

[419] 617 Pa. 563 (2012) (per curiam).

[420] *Id*. at 567.

[421] *Id*. at 567-68.

[422] *Id*. at 570-71.

voters.[423] While that court did not enjoin poll workers from requesting to see photo ID, they were enjoined from prohibiting a voter from casting a ballot without that ID.[424]

That decision was made on a partial record addressing the implementation of the voter photo ID law prior to the November 2012 election. Subsequently, the trial court permanently enjoined the law on state grounds not present here, which require that a registered voter have liberal access to his or her right to vote.[425] Among other reasons, the court held that there was no substance to Pennsylvania's claim that photo ID was necessary to combat in-person voter impersonation fraud because there was no evidence that such fraud was a real problem.[426] The court also found that the voter ID law would not increase voter confidence in election integrity because of the numbers of qualified, but disenfranchised, voters who would be turned away at the polls.[427] The free voter ID cards were not being issued at expected levels, and thus they were insufficient to offset the vast numbers of registered voters who were disenfranchised by the law and may not know about the free IDs or be able to get them.[428]

The Tenth Circuit, in *ACLU of New Mexico v. Santillanes*,[429] considered a federal equal protection challenge to a city charter's photo ID law, which required "one current

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[423] *Applewhite v. Commonwealth* (*Applewhite II*), No. 330 M.D. 2012, 2012 WL 4497211, at *3-7 (Pa. Commw. Ct. Oct. 2, 2012).

[424] *Id*. at *4.

[425] *See Applewhite v. Commonwealth* (*Applewhite III*), No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014) (unreported).

[426] *Id*. at *56-57.

[427] *Id*. at *57.

[428] *Id*. at *50-54.

[429] 546 F.3d 1313 (10th Cir. 2008).

valid identification card containing the voter's name and photograph."[430] There, the list of acceptable IDs was non-exclusive, and included any government-issued ID, student ID, credit or debit cards, insurance cards, union cards, and professional association cards. No address or expiration date was required. In the absence of sufficient identification, the voter could cast a provisional ballot, supported by affidavit, with ten days to cure. Moreover, a free ID was available from the city clerk's office (even on the day of the election and each of the following ten days) with no evidence of the need for costly or difficult-to-obtain underlying documentation.[431]

In relevant part, the court determined that the law was not unconstitutionally vague and survived the *Anderson/Burdick* balancing test. While the court gave significant weight to the city's desire to prevent in-person voter impersonation fraud, it noted that there was insufficient evidence to support the challengers' assertion that there was voter confusion because of lack of education. In the final analysis, the court appeared to rely heavily on the liberality of the requirements and the measures in place to ensure that all voters could obtain a truly free voter certificate at a conveniently located office.

Finally, SB 14 itself was previously considered by a three judge court in the District of Columbia pursuant to Texas's prior preclearance requirement.[432] While the Court is fully cognizant that the resulting opinion was vacated when the Supreme Court

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[430] *Id*. at 1324 (quoting Albuquerque, N.M., City Charter, art. XIII, § 14 (as amended Oct. 4, 2005)).

[431] *Id*. at 1316, 1324.

[432] *Texas v. Holder* (*Texas v. Holder I*), 888 F. Supp. 2d 113 (D.D.C. 2012).

"invalidated the Section 4(b) preclearance coverage formula of the VRA",[433] and while the burden of proof in that case was on the State and retrogression was the standard, it is instructive that the court found that SB 14 weighs more heavily on the poor, who are more likely to be minorities.[434] "A law that forces poorer citizens to choose between their wages and their franchise unquestionably denies or abridges their right to vote."[435]

VI.

DISCUSSION

A. SB 14 Places an Unconstitutional Burden on the Right to Vote—1st and 14th Amendment Claims[436]

The individual's right to vote is firmly implied in the 1st Amendment of the United States Constitution[437] and is protected as a fundamental right by both the Due Process and Equal Protection Clauses of the 14th Amendment.[438] An equal protection

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[433] *Texas v. Holder* (*Texas v. Holder II*), 133 S. Ct. 2886 (2013); *see also Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013).

[434] *Texas v. Holder I*, at 127. While the Court acknowledges the previous Section 5 proceeding, the decision in this case rests solely on the record developed at the trial of this case from September 2 to September 22, 2014.

[435] *Texas v. Holder I*, at 140.

[436] This claim is brought by all of the private Plaintiffs and Intervenors: (Veasey) Gordon Benjamin, Kenneth Gandy, Anna Burns, Penny Pope, Michael Montez, Congressman Marc Veasey, Sergio DeLeon, Evelyn Brickner, John Mellor-Crummey, Floyd Carrier, Koby Ozias, Oscar Ortiz, and LULAC; (TLYV) Imani Clark and Texas League of Young Voters Education Fund; (HJ&C) Texas Association of Hispanic County Judges and County Commissioners; (NAACP) Texas State Conference of NAACP Branches and Mexican American Legislative Caucus of the Texas House of Representatives; and (Ortiz) Lenard Taylor, Lionel Estrada, Estela Garcia Espinoza, Eulalio Mendez, Margarito Lara, Maximina Lara, and La Union del Pueblo Entero.

[437] *See Kusper v. Pontikes*, 414 U.S. 51 (1973); *Briscoe v. Kusper*, 435 F.2d 1046, 1053 (7th Cir. 1970); *Paul v. State of Ind., Election Bd.*, 743 F. Supp. 616, 623 (S.D. Ind. 1990); *Wright v. Mahan*, 478 F. Supp. 468, 473 (E.D. Va. 1979), *aff'd*, 620 F.2d 296 (4th Cir. 1980); *see also John Doe No. 1 v. Reed*, 561 U.S. 186, 224 (2010) (Scalia, J. concurring) ("We have acknowledged the existence of a First Amendment interest in voting."); *Storer v. Brown*, 415 U.S. 724, 756 (1974) (Brennan, J. dissenting) ("The right to vote derives from the right of association that is at the core of the First Amendment."); *Harper v. Va. State Bd. Of Elections*, 383 U.S. 663, 665 (1966).

[438] *See Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 786 n.7, 787 (1983); *see also Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964); *Yick Wo. v. Hopkins*, 118 U.S. 356, 370 (1886).

challenge applies either when a state "classifies voters in disparate ways, or places restrictions on the right to vote."[439] It is the restriction on the right to vote that applies here. And while the right to vote is not absolute,[440] the state may not burden it unduly.

1. The Test For Evaluating the State's Interest Against the Individual's Right

The determination of what is an undue burden is made by applying one of three tests formulated to calibrate the respective interests of individual voters against the state in a constitutional dispute.[441] If the burden is severe, such that the individual loses the ability to vote, for instance, the standard of review is one of strict scrutiny.[442] Strict scrutiny requires courts to review the restriction to assure that it is "narrowly drawn to advance a state interest of compelling importance."[443] Plaintiffs concede, and the Court finds, that the burden SB 14 imposes on Texas voters is not severe as that term is used in this constitutional analysis.

On the opposite end of the spectrum are those regulations that do not treat individuals differently and do not impose much of a burden at all. In those cases, the courts apply a rational basis test.[444] That test does not apply here because a burden on the

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439 *See Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012) (internal citations omitted).

440 *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (citations omitted).

441 *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189-90 (2008).

442 *Burdick*, 504 U.S. at 434.

443 *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

444 *Obama for Am.*, 697 F.3d at 429.

right to vote, which is preservative of other rights,[445] implicates heavier burdens than the rational basis test will accommodate.[446]

Here, Plaintiffs assert a substantial, albeit not severe, burden on their right to vote. To evaluate claims in this middle ground, the Court applies the *Anderson/Burdick* balancing test as the standard of review.[447] The balancing test is articulated in *Burdick* as follows:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," ***taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights***."[448]

In other words, the Court must "determine the legitimacy and strength of each of [the State's] interests"[449] and the extent to which those particular interests cannot be achieved without imposing the particular resulting burden on Plaintiffs' right to vote.[450]

2. How to Apply the Balancing Test

The question is whether the State's interests, including detecting and preventing voter fraud, preventing non-citizen voting, and fostering public confidence in election

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[445] *Wesberry v. Saunders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined.").

[446] *Crawford*, 553 U.S. at 189.

[447] *See id*. at 190; *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 789.

[448] *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789; emphasis added).

[449] *Anderson*, 460 U.S. at 789.

[450] *Id*.

integrity, justify the specific burdens that are imposed on voters who are required to produce one of the limited SB 14-qualified photo IDs in order to vote in person at the polls. There is some question whether, when assessing this balance, a court is to consider the magnitude of the law's burden on the electorate generally or on a specific subgroup.[451] In other words: Does the burden imposed by having to produce an SB 14-qualified ID have to unduly burden all of the registered voters in Texas or just those who do not already have the ID?

In *Crawford's* lead opinion, Justice Stevens concluded that the Supreme Court was not supplied with the evidence necessary to assess the burden on a subgroup and therefore evaluated Indiana's law as it applied generally.[452] Justice Stevens' reasoning in dismissing the subgroup-particularized balancing test does not apply here because the type of evidence that Justice Stevens needed in order to consider the burden on the subgroup has been supplied as to Texas voters in this case.

On the other hand, Justice Scalia's concurring opinion dismisses any need to evaluate subgroups because he treats them not as having a particularized burden, but rather as having individual impacts from a single burden—and he considered the law to be unconcerned with individual impacts. He treated the Indiana voter ID law as one slight burden applied universally.[453] This Court reads *Anderson* and *Burdick*, as well as

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[451] *See Ohio State Conference of the NAACP v. Husted (Ohio NAACP II)*, No. 14-3877, 2014 WL 4724703, at *14-15 (6th Cir. Sept. 24), *stayed*, 573 U.S. ___ (Sept. 29, 2014); *Frank v. Walker*, 11-CV-01128, 2014 WL 1775432, at *4-5 (E.D. Wis. Apr. 29), *rev'd*, No. 14-2058, 2014 WL 496657 (7th Cir. Oct. 6, 2014).

[452] *Crawford*, 553 U.S. at 201-03 (Stevens, J., lead opinion).

[453] *Crawford*, 553 U.S. at 205, 209 (Scalia, J. concurring).

the lead opinion in *Crawford*, to require balancing the state's interest against the burdens imposed upon the subgroup—here, those who do not possess an SB14-qualified photo ID.[454]

3. The Balancing Test, Applied

Unlike in *Crawford*, this Court is confronted with an as-applied challenge to the voter photo ID law. This decision comes after full trial on the merits in which the Court heard abundant evidence of specific Plaintiffs' individual burdens as well as evidence of more categorical burdens that apply to the population represented by the No-Match List. The Court must determine the nature of SB 14's burden, the nature of the state's justifications, and whether the state's interests make it necessary to burden the Plaintiffs' rights. While Plaintiffs have not demonstrated that any particular voter absolutely cannot get the necessary ID or vote by absentee ballot under SB 14, such an extreme burden is not necessary in an as-applied challenge.

a. The Burden

i. The Extent of the Burdened Voters

As set out above, sophisticated statistical methods employed by highly qualified experts have revealed that approximately 608,470 registered voters in Texas lack SB 14-qualified ID.[455] Even if that number is discounted by the numbers Dr. Hood challenges,

[454] *See Ohio NAACP II*, 2014 WL 4724703, at *15-16; *Frank*, 2014 WL 1995432, at *5.

[455] Ansolabehere, D.E. 600-1, p. 4 (report); *see also* Herron, D.E. 473 (report); Ghitza, D.E. 360-1 (report); Barreto-Sanchez, D.E. 370, 483 (reports).

over half a million registered voters are expected to lack the ID necessary to cast their votes in person at the polls.[456]

To vote in person at the polls, all but the disabled (who fall into a limited class of officially acknowledged disability) and those who have a religious objection to being photographed must have one of the prescribed forms of photo ID. The evidence is clear that there is significant time, expense, and travel involved in obtaining SB 14-qualified ID, even if a person has the necessary documents, time, and transportation available to do so. The evidence in this case is extensive and has been detailed above.

ii. The EIC is Not a Safe Harbor

Knowing that a substantial number of registered voters lack SB 14-qualified ID, and knowing that voting must be accessible to the poor, the legislature created the EIC as a safe harbor. But the terms on which an EIC is available do little to make it a bona fide safe harbor for those having difficulty obtaining other SB 14-qualified ID. Applicants still need the same underlying documents required to obtain a driver's license or personal ID card. Those underlying documents will cost at least $2.00. Voters must go to a DPS office, or in some cases the county clerk's office, which may be substantially further than their polling place and is sometimes a prohibitive distance.[457]

[456] Hood, D.E. 604-1, p. 4 (report).

[457] Sen. Patrick testified that he supported an exemption from ID requirements for the disabled because he knew that the travel distance could be prohibitive. D. E. 588, p. 299; Pls.' Ex. 331.

DPS officers are present at driver's license offices that issue EICs, the law still permits fingerprinting,[458] and there is still the impression that EIC applicants will be screened for outstanding tickets and warrants, instilling a fear of arrest. While mobile EIC units have been created, the evidence at trial indicated that there are too few and their schedules are too erratic to make a real difference. The fact that only 279 EICs had been issued as of the time of trial, compared to the rate of issuance of free IDs offered in other states, indicates that the EIC safe harbor program has failed to mitigate the burdens on Texas voters who do not have SB 14-qualified ID.

iii. Provisional Balloting is Not A Safe Harbor

A registered voter who appears at the polls without the required SB 14 ID is supposed to be given the opportunity to cast a provisional ballot, which must be cured within six days of the election. Some Plaintiffs testified that they were turned away without being given the provisional ballot opportunity. More important, however, is the fact that the only way to cure a provisional ballot and have it count is to later produce SB 14-qualified ID. If a voter does not have that ID on election day, the evidence indicates that it will be very difficult for the voter to get it within six days.

Thus the provisional ballot procedure may work for voters who know to ask for a provisional ballot, who need one simply because they forgot the SB 14-qualified ID they already have, and who will suffer no substantial impediment to returning to the designated location to later cure the ballot. On the other hand, the provisional ballot

[458] The fingerprinting of EIC applicants was stopped at the request of the SOS, but the law still permits it.

procedure does nothing for voters who are not informed of the procedure, who do not have SB 14-qualified ID already available and do not have an original or certified copy of their birth certificate or other necessary proof of identity at the ready, or who do not have necessary transportation. Plaintiffs, who fall squarely within the demographic expectations of the individuals on the No-Match List, are largely unable to cast a provisional ballot that can be cured in a timely manner and thus be counted.

iv. The Mail-In Alternative Does Not Relieve the Burden

In reviewing the extent of the burden imposed by SB 14 on individual Plaintiffs, the Court has considered the alternative of voting by mail. Defendants argue that many of the individual Plaintiffs—those who are 65 years of age or older, or disabled—are not burdened by SB 14 because they are eligible to vote by mail-in ballot, for which SB 14 ID is not required.[459] However, absentee balloting carries other burdens.

Voters May Not Be Aware. Some individuals who are eligible to vote by mail may be unaware that it is permitted or that SB 14-qualified ID is not required with that method. This problem was evidenced by the testimony of witnesses at trial.

The Procedure is Complicated. The mechanics of voting by mail create a different set of procedural hurdles that may prevent an individual from successfully casting a ballot and having that ballot counted.[460] In order to vote by mail in Texas, an

[459] *See* TEX. ELEC. CODE ANN. §§ 82.002-.003, 86.001.

[460] *See Ohio State Conference of NAACP v. Husted (Ohio NAACP I)*, 2:14-CV-404, 2014 WL 4377869, at *33 (S.D. Ohio Sept. 4) ("The associated costs and more complex mechanics of voting by mail" along with other factors,

eligible voter must complete an application and mail it to the early voting clerk.[461] Eligible voters who reside in Texas[462] and wish to vote by mail must apply for a mail-in ballot within a specific window of time: no earlier than 60 days and no later than 9 days before election day.[463]

If an application that was received 12 or more days before the election is rejected, the applicant will be notified of the reasons for the rejection and will be able to submit a second application.[464] If an application that was received fewer than 12 days before the election is rejected, the voter will be notified of the reasons for the rejection but will be unable to submit a second application.[465] If the application is accepted, the clerk mails the voter a ballot, which the voter must fill out and return so as to be received before polls close (generally 7:00 p.m.) on election day.[466]

Requiring elderly or disabled voters—the population that is most likely to need assistance—to vote by mail can deny them the opportunity to receive assistance with their ballots.[467] In contrast, when voting in person, if the voter needs help with the

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including demographics, "indicate to the Court that voting by mail may not be a suitable alternative for many voters"), *aff'd*, 14-3877, 2014 WL 4724703 (6th Cir. Sept. 24), *stayed*, 573 U.S. ___ (Sept. 29, 2014).

461 TEX. ELEC. CODE ANN. § 86.001.

462 Slightly different timelines apply to out-of-state military and overseas voters voting by mail. *See* Military & Overseas Voters, http://votetexas.gov/military-overseas-voters.

463 *See* http://www.votetexas.gov/voting/when.

464 TEX. ELEC. CODE ANN. § 86.008.

465 *Id*. There are at least 13 reasons for which an application for mail-in ballot may be rejected by the early voting clerk. *See Notice of Defective Application for Ballot by Mail*, *available at* http://www.sos.state.tx.us/elections/forms/pol-sub/5-16f.pdf.

466 The ballot must be received, not merely post-marked, by the deadline. TEX. ELEC. CODE ANN. § 86.007.

467 *See Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004) ("Absentee voters also are more prone to cast invalid ballots than voters who, being present at the polling place, may be able to get assistance from the election judges if they have a problem with the ballot.").

logistics of casting a ballot, poll workers are there to assist, as testified to by Ms. Eagleton.[468] Other factors outside of a voter's control may also affect the reliability of an absentee ballot.[469]

Materials Go Missing. Voting by mail also carries a risk of the application or the ballot itself being delayed or lost in the mail, which would prevent the voter from actually casting a ballot. No such risk exists for those voting in person. Several Plaintiffs testified that they do not trust the process of voting by mail-in ballot and prefer to vote in-person, for reasons that include seeing their vote actually being cast.[470] Plaintiff Benjamin testified that he was suspicious of voting by mail, stating that "mail ballots have a tendency to disappear."[471] Calvin Carrier testified that his father's mail often gets lost and that his father does not want to rely on a mail-in ballot to exercise his franchise.[472]

Timing Requires Pre-Planning and Deprives a Voter of Considering Last-Minute Campaign Developments. Voting by mail also requires significantly more advance planning than voting in person does. Any individual wishing to vote by mail-in ballot must plan far enough in advance to make a timely application and then must also mail the ballot early enough to ensure that the ballot is received no later than 7:00 p.m.

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[468] Eagleton, Pls.' Ex. 1095, p. 10.

[469] *See, e.g., Thompson v. Willis*, 881 S.W.2d 221, 222 (Tex. App.—Beaumont 1994, no writ) (invalidating a local election where the Early Voting Ballot Board improperly marked 120 early/absentee ballots).

[470] *See* Veasey, D.E. 561, pp. 251-52; Mendez, D.E. 563, pp. 100-01; Taylor, D.E. 569, p. 150; Bates, Pls.' Ex. 1090, p. 21.

[471] Benjamin, D.E. 563, p. 292.

[472] C. Carrier, D.E. 561 pp. 29-31.

the day of the election.[473] Because of that timing issue, individuals voting by mail are deprived of using relevant information that becomes available immediately prior to the election to possibly change how they want to vote in a particular contest.[474]

Different is Not Equal. Otherwise eligible voters should not be abridged in the manner in which they choose to exercise their franchise. The Supreme Court has repeatedly found that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."[475] "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise."[476]

Some Plaintiffs desire the ability to fully carry out their civic duty and exercise a right that some Plaintiffs remember being effectively abridged or denied within their lifetimes.[477] Plaintiff Gholar does not consider voting by mail equivalent to voting in person, and describes voting in person on election day as a "celebration" that she has

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[473] In reviewing the availability of mail-in (or absentee) voting in Georgia, which has significantly less strict timelines for requesting a mail-in ballot than Texas, the court found that "[t]he majority of voters—particularly those voters who lack Photo ID—would not plan sufficiently enough ahead to vote via absentee ballot successfully. In fact, most voters likely would not be giving serious consideration to the election or to the candidates until shortly before the election itself." *Common Cause I*, 406 F. Supp. 2d at 1364-65.

[474] *See Griffin*, 385 F.3d at 1131 ("[B]ecause absentee voters vote before election day, often weeks before, they are deprived of any information pertinent to their vote that surfaces in the late stages of the election campaign.") (internal citations omitted); *Selph v. Council of City of Los Angeles*, 390 F. Supp. 58, 60 (C.D. Cal. 1975) ("Plaintiffs present a strong argument to support their contention that many voters either change their minds as to the manner in which they will vote on candidates and issues in the two or three days preceding Election Day or wait until that period to seriously concentrate on the ballot decisions they must make.").

[475] *Dunn*, 405 U.S. at 336 (citations omitted); *accord Obama for Am.*, 697 F.3d at 428.

[476] *League of Women Voters v. Brunner*, 548 F.3d 463, 477 (6th Cir. 2008) (internal quotations marks omitted) (quoting *Bush v. Gore*, 531 U.S. 98, 104 (2000)); *accord Obama for Am.*, 697 F.3d at 428; *see also Baker v. Carr*, 369 U.S. 186 (1962) ("Our form of representative democracy is premised on the concept that every individual is entitled to vote on equal terms.").

[477] *See* Washington, Pls.' Ex. 1093, pp. 12, 16-17, 75-76; Gholar, D.E. 1092, pp. 60-61; Mendez, D.E. 563, p. 100; Johnson, D.E. 569, p. 19; Mar. Lara, D.E. 573, p. 220; Ellis, D.E. 573, p. 157.

"earned."[478] Plaintiff Gandy testified that he regards being forced to vote by mail as akin to being treated like a "second-class citizen."[479] Plaintiff Hamilton testified that the senior citizens that she works with resent being told to vote by mail and that many want to personally go to the polls, especially those who "literally fought for the right to vote."[480]

Mail-In Balloting is Not a Cure for SB 14 Burdens. There is extensive evidence in the record that "voting by mail is not actually a viable 'alternative means of access to the ballot'" for many of the Plaintiffs.[481] This record confirms what other courts have found: that voting by mail is fundamentally different from voting in person and, itself, constitutes a burden on the right to vote.[482] Elderly and disabled voters especially should not be required to vote by mail, while most others continue to vote in person, merely to avoid the obstacles created by the State. The Court thus finds that voting by mail is not a satisfactory alternative for elderly and disabled voters who lack SB 14 ID and thus does not excuse the significant burdens placed on those voters by the State.

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[478] Gholar Dep., July 16, 2014, pp. 21, 83 (D.E. 592, pp. 221-22 (admitting dep.)).

[479] Gandy Dep., June 11, 2014, pp. 62-63 (D.E. 592, pp. 221-22 (admitting dep.)).

[480] Hamilton Dep., June 5, 2014, pp. 66-67 (D.E. 592, pp. 221-22 (admitting dep.)).

[481] *See Ohio NAACP II*, 2014 WL 4724703, at *13; *see also Common Cause I*, 406 F. Supp. 2d at 1365 ("[A]bsentee voting simply is not a realistic alternative to voting in person that is reasonably available for most voters who lack Photo ID.").

[482] *See ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1320 (10th Cir. 2008) (citing *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 830–31 (S.D. Ind. 2006)); *see also United States v. Texas.*, 445 F. Supp. 1245, 1254 (S.D. Tex. 1978) (implicitly recognizing that requiring young voters to obtain absentee ballots may constitute a special burden), *aff'd mem. sub nom. Symm v. United States*, 439 U.S. 1105 (1979); *Walgren v. Howes*, 482 F.2d 95, 100, 102 (1st Cir. 1973) (implicitly recognizing that absentee voting has inherent burdens, additional procedural requirements, and disadvantages, as compared to in-person voting).

b. The State's Interests

"A State indisputably has a compelling interest in preserving the integrity of its election process."[483] States must be able to regulate elections if they are to be fair, honest, and orderly.[484] Likewise, the restrictions they use must, in fact, be "generally applicable, even-handed, politically neutral, and . . . protect the reliability and integrity of the election process."[485] Proper administration of elections further works to the individual's benefit in assuring the individual's right to vote and to associate with others for political ends.[486] Yet even a slight burden on voters "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'"[487]

In the time period during which voter photo ID laws were debated in the Texas Legislature, the asserted rationales shifted. At one time or another, Defendants argued five justifications for the photo ID law: (1) detecting and preventing voter fraud;[488] (2) preventing non-citizen voting;[489] (3) improving the electorate's confidence in the integrity of elections;[490] (4) increasing voter turnout;[491] and (5) addressing bloated voter

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[483] *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (citation omitted).

[484] *Storer*, 415 U.S. at 730.

[485] *Gonzalez v. Arizona (Gonzalez I)*, 485 F.3d 1041, 1049 (9th Cir. 2007) (internal quotation marks and citations omitted).

[486] *See Anderson*, 460 U.S. at 788.

[487] *Crawford*, 553 U.S. at 191 (quoting *Norman*, 502 U.S. at 288-89).

[488] This was the first concern, expressed in 2005 using terms like "a voter fraud epidemic." Anchia, D.E. 573, p. 318.

[489] The non-citizen narrative started in 2007. Anchia, D.E. 573, p. 322. Between 2007 and 2009, legislators began conflating the issue of non-citizen voting with illegal immigration, while a 2008 report debunked the prevalence of non-citizen voting. Anchia, D.E. 573, p. 319.

[490] *Id*. at 320.

[491] *Id*. at 326.

registration rolls.[492] There is no question that the State has a legitimate interest in each of those issues.[493] The question for this Court is whether those interests justify the particular burdens imposed.

Detecting and Deterring Fraud. SB 14, if effective, would operate only against in-person voter impersonation fraud. That type of fraud is very rare. Yet, the State is not required to prove specific instances of voter fraud in order to have some interest in protecting against it.[494] Because the record contains proof of four instances of in-person voter impersonation fraud in Texas, only two of which predated the passage of SB 14 with any proximity, there is some question whether a change in the law was required. The existing pre-SB 14 framework, outlined in Section II, of requiring the voter registration card and, in the absence of that, other forms of identification that included non-photo ID, was demonstrated to be sufficient to assure that those showing up to vote were the registered voters that they claimed to be. Defendants failed to rebut this evidence, and witnesses for the state were unable to articulate a reason that additional measures were required to combat this type of voter fraud.

SB 14's proponents were unable to articulate any reason that a more expansive list of photo IDs would sabotage the effort other than speculation that the limited universe of SB 14 IDs would be easier for poll workers to process. While the state has an interest in detecting and deterring voter fraud, SB 14 was clearly overkill in that its extreme

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[492] Ingram, D.E. 588, p. 375.

[493] *Crawford*, 553 U.S. at 196-97 (voter fraud and confidence in elections); *Texas v. Holder I*, 888 F. Supp. 2d at 125 (confidence in elections).

[494] *ACLU of N.M.*, 546 F.3d at 1323.

limitation on the type of photo IDs that would qualify does not justify the burden that it engenders.

Non-Citizen Voting. There is very limited evidence that non-citizen voting is a problem. Only one instance was described. It involved a Norwegian, who was legally in the country and who filled out paperwork admitting that he was not a citizen. When he nonetheless received a voter registration card, he thought he was legally permitted to vote and did so.[495] Representative Hernandez-Luna indicated that most illegal immigrants would be afraid to vote. The problem, if there is one, is rare.

Importantly, it is undisputed that SB 14-qualified ID can be legally obtained by non-citizens. Those who are legal permanent residents or who hold unexpired visas are entitled to obtain a Texas driver's license[496] even though they are not entitled to vote. Non-citizen members of the military will have military IDs. Thus requiring those persons to produce an SB 14-qualified photo ID at the polls would not stop them from voting. Again, the nature of the concern and the method for addressing it do not line up well and this is not a compelling justification for the specific terms of SB 14.

Improving Confidence in Elections. Lieutenant Governor Dewhurst reported general hearsay that people lack confidence in elections and Defendants relied on opinion polls in which people reported that they favored some sort of photo ID requirement to vote. However, nothing in the evidence linked the particular terms of SB 14 with voter confidence. In fact, the provisional ballot requirement for those without SB 14 ID would

[495] Anchia, D.E. 573, p. 323.

[496] TEX. TRANSP. CODE § 522.021 (driver's license requirements).

likely decrease voter confidence. There is a substantial risk of the loss of confidence when fully qualified, registered voters cannot vote in person and are relegated to the less reliable mail-in ballot or cannot vote at all. Because there is always some state interest in running elections in a manner that instills confidence, the Court gives this justification some weight, but finds that the justification is not served by the overly strict terms of SB 14.

Increasing Voter Turnout. This was often stated in conjunction with improving voter confidence. There was some evidence that photo ID laws suppress voter turnout and no competent evidence that any photo ID law has improved voter turnout. SB 14 has been enforced since November 2013, and there is no credible evidence that election turnout since then has been any better than before. The Court finds that this justification has weight only in its abstract form and does not justify the burdens accompanying the restrictive terms of SB 14.

Bloated Voter Registration Rolls. This justification came up during the trial and in the Defendants' proposed findings of fact and conclusions of law. While stated as a separate justification, it is part of the concern over voter impersonation fraud. With registration rolls including the names of persons who do not belong on them, it is easier (although not necessarily more likely) for voter impersonation to take place. The Court combines this interest with the first interest in detecting and deterring voter fraud.

The Court is mindful of the various burdens placed on the Plaintiffs and the right to vote discussed above.[497] They face obstacles far in excess of the usual burdens of voting in that they have to go through complicated and expensive lengths to obtain an accurate birth certificate, they have to prove up name discrepancies, and one would even have to forfeit a commercial driver's license or pay surcharges that he cannot now afford. The State's legitimate interests are so rarely implicated, that it is difficult to conceive how any restriction that places a substantial burden on voters without SB 14-qualified ID could be justified.

c. Under *Anderson/Burdick*, SB 14 Places an Unconstitutional Burden on Voters

The record in this case does not support the legislature's specific choices in passing the strictest law in the country—allowing the fewest types of ID and providing no safe harbor for indigents.[498] SB 14's restrictions go too far and do not line up with the proffered State interests. Thus Plaintiffs have sustained their legal burden to show a violation of the 1st and 14th Amendments because SB 14 imposes a substantial burden on the right to vote, which is not offset by the state's interests.

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[497] The burden created by SB 14 may not be rebutted under Section 2 by positing that this unequal opportunity may be overcome if individuals devote sufficient resources to the task or by positing that the unequal opportunity is somehow a product of individual "choice." *See Teague v. Attala County*, 92 F.3d 283, 293-95 (5th Cir. 1996); *Kirksey v. Bd. Of Supervisors*, 54 F.2d 139, 145, 150 (5th Cir. 1977) (en banc), *cert. denied*, 434 U.S. 968 (1977); *United States v. Marengo County*, 731 F.2d 1546, 1568-69 (11th Cir. 1984); *Major v. Treen*, 574 F. Supp. 325, 351 n.31 (E.D. La. 1983) (three-judge court).

[498] The opportunity for in-person voters without SB 14 ID to cast a provisional ballot does not serve as a safe harbor because they still must present that ID within six days after the election. That means that the documentary requirements and any associated fees are obstacles that must still be overcome and few individuals will be able to complete the process and have ID in hand within the short window of time allowed after casting a provisional ballot. Neither is the availability of a mail-in ballot a safe harbor. Absentee ballots are only available to a subset of voters, most of whom are Anglo. TEX. ELEC. CODE §§ 82.001-.004. Because of the requirements for obtaining a mail-in ballot and the risks associated with such ballots, they are not equivalent to voting in person.

The unconstitutionality of SB 14 lies not just in the fees the State charges for birth certificates, although that is part of it. It is not just about causing people to make extra trips—in many cases covering significant distance—to county and state offices to get their photo IDs, although that is part of it. It is not just about making people figure out the requirements on their own and choose whether to go to work or go get a photo ID, although that is part of it. It is not just about creating a second class of voters who can only vote by mail, although that is part of it. And it is not just about placing the administration of voting rights in the hands of a law enforcement agency, although that, too, is part of it.

The unconstitutionality of SB 14 lies also in the Texas Legislature's willingness and ability to place unnecessary obstacles in the way of a minority that is least able to overcome them. It is too easy to think that everyone ought to have a photo ID when so many do, but the right to vote of good citizens of the State of Texas should not be substantially burdened simply because the hurdles might appear to be low. For these Plaintiffs and so many more like them, they are not.

B. The Voting Rights Act is Constitutional and SB 14 Violates the Act

Defendants contend that Plaintiffs' Section 2 claims are unconstitutional as exceeding the scope of the 14th and 15th Amendments and being unduly vague in applying a "totality of the circumstances" test. This Court has previously rejected these arguments[499] and continues to hold that, under *LULAC v. Clements*[500] and *Jones v. City of*

[499] D.E. 385, pp. 32-34.

Lubbock,[501] Plaintiffs have stated viable claims to relief pursuant to Section 2 of the Voting Rights Act. The Court rejects Defendants' challenges to the constitutionality or viability of the Section 2 claims.

1. SB 14 Produces a Discriminatory Result—Voting Rights Act, Section 2[502]

Section 2 of the Voting Rights Act prohibits a state from imposing a voting qualification, prerequisite to voting, or standard, practice, or procedure that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race[,] color[, or language minority status]."[503] This is referred to as the "results test." When analyzing a violation under the results test, proof of intentional discrimination is not required.[504]

A results violation "is established if, based on the totality of the circumstances, 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 [protected

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[500] 986 F.2d 728, 759-60 (5th Cir. 1993).

[501] 727 F.2d 364, 373 (5th Cir. 1984).

[502] This claim is brought by the United States of America and all of the private Plaintiffs and Intervenors: (Veasey) Gordon Benjamin, Kenneth Gandy, Anna Burns, Penny Pope, Michael Montez, Congressman Marc Veasey, Sergio DeLeon, Evelyn Brickner, John Mellor-Crummey, Floyd Carrier, Koby Ozias, Oscar Ortiz, LULAC, (TLYV) Imani Clark, Texas League of Young Voters Education Fund, (TAHCJ) Texas Association of Hispanic County Judges and County Commissioners, (NAACP) Texas State Conference of NAACP Branches, Mexican American Legislative Caucus of the Texas House of Representatives, (Ortiz) Lenard Taylor, Lionel Estrada, Estela Garcia Espinoza, Eulalio Mendez, Margarito Lara, Maximina Lara, La Union del Pueblo Entero.

[503] 52 U.S.C. § 10301(a), transferred from 42 U.S.C. § 1973(a).

[504] S. Rep. No. 97-417, 97th Cong., 2d Sess., at 2 (1982); *Chisom v. Roemer*, 501 U.S. 380, 394 & n.21. The legislative history and case opinions issued since the 1982 amendments to Section 2 make it clear that Plaintiffs may bring a claim based on discriminatory voting practices using either the results test or an intentional discrimination test. *See* 52 U.S.C. § 10301(a), transferred from 42 U.S.C. § 1973(a); S. Rep. No. 97-417; *League of United Latin Am. Citizens (LULAC), Council No. 4434 v. Clements*, 986 F.2d 728, 741-42, *on reh'g*, 999 F.2d 831 (5th Cir. 1993); *Velasquez v. City of Abilene, Tex.*, 725 F.2d 1017, 1021 (5th Cir. 1984).

class] 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."[505] In vote denial cases, a two-part analysis is conducted under the "totality of the circumstances" test.[506] First, a court determines whether the law has a disparate impact on minorities.[507] Second, if a disparate impact is established, the court assesses whether that impact is caused by or linked to social and historical conditions that currently or in the past produced discrimination against members of the protected class.[508] The Court finds both that SB 14 imposes a disparate impact on African-Americans and Latinos and that its voter ID requirements interact with social and historical conditions to cause an inequality in voting opportunity.[509]

a. SB 14 Has a Disparate Impact on African-Americans and Latinos

It is clear from the evidence—whether treated as a matter of statistical methods, quantitative analysis, anthropology, political geography, regional planning, field study, common sense, or educated observation—that SB 14 disproportionately impacts African-

[505] 52 U.S.C. § 10301(b), transferred from 42 U.S.C. § 1973(b).

[506] *See Ohio NAACP II*, 2014 WL 4724703, at *24; *League of Women Voters of N.C. v. North Carolina*, 14-1845, 2014 WL 4852113, at *12 (4th Cir. Oct. 1), *stayed*, 574 U.S. ___ (Oct. 8, 2014).

[507] *See Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) ("the 'right' question . . . is whether 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice. . . . In order to answer this question, a court must assess the impact of the contested structure or practice on minority electoral opportunities 'on the basis of objective factors.'") (internal citations omitted); *Gonzalez v. Arizona (Gonzalez II)*, 624 F.3d 1162, 1193 (9th Cir. 2010).

[508] *See Gingles*, 478 U.S. at 46 ("Plaintiffs must demonstrate that, under the totality of the circumstances, the [practices] result in unequal access to the electoral process."); *Gonzalez II*, 624 F.3d at 1193 ("Rather, pursuant to a totality of the circumstances analysis, the plaintiff may prove causation by pointing to the interaction between the challenged practice and external factors such as surrounding racial discrimination, and by showing how that interaction results in the discriminatory impact.").

[509] *See Gingles*, 478 U.S. 47.

American and Hispanic registered voters relative to Anglos in Texas. The various studies of highly credentialed experts compel this conclusion.[510] And while Defendants criticized Plaintiffs' experts' methods on cross-examination and with proffered experts of their own, they failed to raise a substantial question regarding this fact.

To call SB 14's disproportionate impact on minorities statistically significant would be an understatement. Dr. Ansolabehere's ecological regression analysis found that African-American registered voters were 305% more likely and Hispanic registered voters 195% more likely than Anglo registered voters to lack SB 14-qualified ID. Drs. Barreto and Sanchez's weighted field survey, a different but complementary statistical method, found that Hispanic voting age citizens were 242% more likely and African-American voting age citizens were 179% more likely than Anglos to lack adequate SB 14 ID. This evidence was essentially unrebutted and the Court found the experts' methodology and testing reliable.

Thus, regardless of the method, the experts[511] and this Court conclude that SB 14 will have a disparate impact on both Hispanics and African-Americans throughout the State of Texas. However, a bare statistical showing of a disproportionate impact is not enough.[512] It is only the first part of the Section 2 results standard.

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[510] Even Dr. Hood, Defendants' expert witness, admitted that his findings demonstrated a disproportionate impact with respect to the rate of qualified SB 14 ID possession for African-Americans and Hispanics compared to those of Anglos. Hood, D.E. 588, pp. 179, 194, 230-37 (testimony).

[511] Discussed in Section IV(B)(1), *supra*.

[512] *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997).

b. SB 14's Terms Combine With the Effects of Past Discrimination to Interfere with the Voting Power of African-Americans and Latinos

The Section 2 results standard also requires "a searching practical evaluation of the 'past and present reality'" and "a 'functional' view of the political process"[513] to determine whether the voting regulation diminishes voting opportunities for African-Americans and Latinos. Generally, factors to review in assessing whether a law violates the Section 2 results standard include, but are not limited to:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. The extent to which voting in the elections of the state or political subdivision is racially polarized;

3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process;

6. Whether political campaigns have been characterized by overt or subtle racial appeals;

7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

[513] *Gingles*, 478 U.S. at 45 (quoting from S. Rep. 97-417, p. 30).

> Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:
>
> [8.] Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; [and]
>
> [9.] Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.[514]

"[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other."[515]

These Senate factors were designed with redistricting and vote-dilution in mind.[516] In contrast, "Vote denial occurs when a state employs a 'standard, practice, or procedure' that results in the denial of the right to vote on account of race."[517] Vote denial is at issue here.[518] At least one court declined to apply the Senate factors to a vote denial case."[519] Although the courts most commonly apply the Senate factors in vote dilution cases, multiple courts have expressly found these factors to be relevant to vote denial cases as

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[514] *Id*. 36-37 (quoting from S. Rep. No. 97-417's non-exhaustive list, at pp. 28-29).

[515] *Id*. at 45.

[516] *Frank*, 2014 WL 1775432, at *23; *Mississippi State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1263 (N.D. Miss. 1987), *aff'd sub nom*. *Mississippi State Chapter, Operation Push v. Mabus*, 932 F.2d 400 (5th Cir. 1991).

[517] *Johnson v. Governor of Florida*, 405 F.3d 1214, 1227 n.26 (11th Cir. 2005) (en banc) (citations omitted).

[518] "Vote denial" includes not only practices that categorically deny minority citizens the right to vote but, also, those that impose obstacles to voting that disproportionately affect minority voters and deny minority voters an equal electoral opportunity in the totality of the circumstances. *See, e.g*., *Chisom*, 501 U.S. at 397-98.

[519] *Frank*, 2014 WL 1775432, at *31 (citing *Gingles*, 478 U.S. at 47); s*ee also N.C. State Conference of NAACP v. McCrory*, 997 F. Supp. 2d 322, 348 (M.D.N.C.), *aff'd in part, rev'd in part and remanded on other grounds sub nom. League of Women Voters of N.C. v. North Carolina*, 14-1845, 2014 WL 4852113 (4th Cir. Oct. 1), *stayed*, 574 U.S. ___ (Oct. 8, 2014).

well.[520] The Court finds that Senate factors 1, 2, 5, 6, 7, 8, and 9 are relevant and have been demonstrated by the evidence.

Factor One: History of Official Discrimination. The Court has set out above in Section I(A) the long history of official discrimination practiced in Texas that impacted the right to vote of minorities. It will not be repeated here. This factor weighs strongly in favor of finding that SB 14 produces a discriminatory result.

Factor Two: Racially Polarized Voting. Included in the historical discussion above is evidence that racially polarized voting has been prevalent, including in recent years, with the State of Texas admitting as much in redistricting litigation currently pending. This finding is particularly relevant because, as Dr. Burden explained, "SB 14 imposes additional costs on Blacks and Latinos in a way it does not on Anglos, and is more likely to deter minority participation than Anglo participation. Because those minority groups have different preferences, it's likely that SB 14 could affect the outcome of elections."[521] This factor weighs in favor of finding that SB 14 produces a discriminatory result.

Factor Five: Education, Employment, and Health Effects on Political Participation. As outlined in Section IV(B)(1)(d) above, African-Americans and Hispanics bear the effects of discrimination in education, employment, and health. African-Americans are 2.4 times more likely and Hispanics are 2.75 times more likely

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[520] *Ohio NAACP II*, 2014 WL 4724703, *25 (listing cases); *see League of Women Voters of N.C.*, 2014 WL 4852113, at *11-13.

[521] Burden, D.E. 569, p. 309 (testimony).

than Anglo Texans to live in poverty. The median household income for Anglos is more than 50% higher compared to Hispanics and African-Americans. Hispanics and African-Americans suffer considerably lower high school graduation and college completion rates than Anglos. And in the field of health, African-Americans and Hispanics are more likely to report they are in "poor" health and lack health insurance—a matter often related to employment and income status. The evidence at trial clearly related the current socioeconomic status of these minorities to the effects of discrimination.[522] These socioeconomic disparities have hindered the ability of African-Americans and Hispanics to effectively participate in the political process. Dr. Ansolabehere testified that these minorities register and turnout for elections at rates that lag far behind Anglo voters. This factor weighs strongly in favor of finding that SB 14 produces a discriminatory result.

Factor Six: Racial Appeals in Campaigns. Overt or subtle racial appeals by political campaigns were identified and discussed in Section I(D). This factor weighs in favor of finding that SB 14 produces a discriminatory result.

Factor Seven: Proportional Representation. Hispanics and African-Americans remain underrepresented within the ranks of publicly elected officials relative to their population size, as discussed in Section I(C) above. This factor weighs in favor of finding that SB 14 produces a discriminatory result.

Factor Eight: Lack of Legislative Responsiveness to Minority Needs. Texas's long history of state-mandated discrimination, along with the process and outcome

[522] See Section IV(B)(2)(d), *supra*.

relating to SB 14 itself, are strong indicators of a significant lack of responsiveness to the needs of Texas's minority voters. Significant amendments proposed for SB 14, which would have expanded the type of IDs accepted, allowed the use of expired IDs, and provided exemptions for indigents, were summarily rejected despite the fact that bill sponsors knew that the harsh effects of SB 14 would fall on minority voters. This factor weighs in favor of finding that SB 14 produces discriminatory results.

Factor Nine: Policy Underlying SB 14 is Tenuous. As discussed in Section IV(A)(5) and (6) regarding the unjustified burden placed on the right to vote by SB 14's photo ID requirement, the rarity of in-person voter impersonation fraud and non-citizen voting, coupled with the fact that SB 14's photo ID requirements are unduly restrictive yet still would not prevent non-citizens from voting or have any effect on potential mail-in voter fraud, lead to the conclusion that the stated policies behind SB 14 are only tenuously related to its provisions. Given that the severity of its provisions falls disproportionately on minorities, this factor weighs heavily in favor of finding that SB 14 produces a discriminatory result.

SB 14 Creates a Discriminatory Result. This Court finds that Plaintiffs have met their burden of proving that SB 14 produces a discriminatory result that is actionable because SB 14's voter ID requirements interact with social and historical conditions in Texas to cause an inequality in the electoral opportunities enjoyed by African-Americans and Hispanic voters as compared to Anglo voters. In other words, SB 14 does not disproportionately impact African-Americans and Hispanics by mere chance. Rather, it

does so by its interaction with the vestiges of past and current racial discrimination.[523] SB 14 results in the denial or abridgement of the right of African-Americans and Latinos to vote on account of their race, color, or membership in a language minority group in violation of Section 2 of the Voting Rights Act.

2. SB 14 Has a Discriminatory Purpose-- Voting Rights Act, Section 2 and 14th and 15th Amendments[524]

Plaintiffs challenge SB 14 on the basis that it was enacted with a discriminatory purpose under the VRA and the 14th and 15th Amendments. While the United States proceeds under VRA Section 2 and the remaining Plaintiffs proceed under both Section 2 and the constitutional provisions, the rubric for making a determination of a discriminatory purpose is the same.[525] Discriminatory intent is shown when racial discrimination was a motivating factor in the governing body's decision.[526] Discriminatory purpose "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular

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[523] This holding applies to the specific photo ID law in this case—SB 14—and does not speak generally to the legality of any other law regarding voter identification requirements that any state, including Texas, may enact.

[524] The statutory claim is brought by the United States of America. The statutory claim as well as the constitutional claims are brought by all of the private Plaintiffs and Intervenors: (Veasey) Gordon Benjamin, Kenneth Gandy, Anna Burns, Penny Pope, Michael Montez, Congressman Marc Veasey, Sergio DeLeon, Evelyn Brickner, John Mellor-Crummey, Floyd Carrier, Koby Ozias, Oscar Ortiz, and LULAC; (TLYV) Imani Clark and Texas League of Young Voters Education Fund; (HJ&C) Texas Association of Hispanic County Judges and County Commissioners; (NAACP) Texas State Conference of NAACP Branches and Mexican American Legislative Caucus of the Texas House of Representatives; (Ortiz) Lenard Taylor, Lionel Estrada, Estela Garcia Espinoza, Eulalio Mendez, Margarito Lara, Maximina Lara, and La Union del Pueblo Entero.

[525] *See generally Village of Arlington Heights v. Metropolitan Hous. Dev. Corp*., 429 U.S. 252, 265-68 (1977) (constitutional test); *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009) (Section 2 test; quoting *Arlington Heights*).

[526] *Arlington Heights*, 429 U.S. at 265-66; *Brown*, 561 F.3d at 433.

course of action at least in part 'because of,'. . . its adverse effects upon an identifiable group."[527] In the final analysis, discriminatory purpose need not be the primary purpose of the official act for a violation to occur as long as it is one purpose.[528]

The Court does not attempt to discern the motivations of particular legislators and attribute that motivation to the legislature as a whole.[529] Instead, to determine intent the Court considers direct and circumstantial evidence, "including the normal inferences to be drawn from the foreseeability of defendant's actions."[530]

The Supreme Court in *Arlington Heights* and the Fifth Circuit in *Brown* noted the relevance of some of the Senate factors, discussed above, as circumstantial evidence of discriminatory purpose.[531] The foregoing discussion of the Senate factors is thus incorporated by reference into this analysis of purposeful discrimination. Pursuant to *Arlington Heights* and *Brown*, the Court further considers the following nonexclusive and nonexhaustive list of factors in determining whether discriminatory intent was a motivating factor in enacting SB 14: [532]

- The historical background of the decision;

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[527] *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (internal citations and footnotes omitted).

[528] *Brown*, 561 F.3d at 433 (citing *Velasquez v. City of Abilene*, 725 F.2d 1017, 1022 (5th Cir. 1984)).

[529] See *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968); *Florida v. United States*, 885 F. Supp. 2d 299, 354 (D.D.C. 2012); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996); *but cf. Busbee v. Smith*, 549 F. Supp. 494, 500-03, 508-09, 516-18 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983) (finding discriminatory intent based in part on overt racial statements made by the chairman of the Georgia redistricting committee who "used the full power of his position and personality to insure passage of his desired Congressional plan").

[530] *Brown*, 561 F.3d at 433 (internal quotation marks and citations omitted).

[531] *Arlington Heights*, 429 U.S. at 266 (referring to disparate impact); *Brown*, 561 F.3d at 433 (referring to the Senate factors as *Zimmer* factors); *see also Terrazas v. Clements*, 581 F. Supp. 1329, 1343, 1347 (N.D. Tex. 1984).

[532] Some courts additionally consider the comparative nature and weight of the state interest claimed to justify the decision. *See N.C. State Conference of NAACP*, 997 F. Supp. 2d at 361; *Florida*, 885 F. Supp. 2d at 348, 355.

- The sequence of events leading up to the decision;
- Whether the decision departs from normal practices;
- Contemporaneous statements by the decisionmakers;[533] and
- Whether the impact of the decision bears more heavily on one racial group than another.[534]

Historical Background. As amply demonstrated, the Texas Legislature has a long history of discriminatory voting practices.[535] To put the current events into perspective, Texas was going through a seismic demographic shift at the time the legislature began considering voter ID laws. Hispanics and African-Americans accounted for 78.7% of Texas's total population growth between 2000 and 2010.[536] In addition, it was during this time that Texas first became a majority-minority state, with Anglos no longer comprising a majority of the state's population.[537] As previously discussed, this Court gives great weight to the findings of Dr. Lichtman that "[t]he combination of these demographic trends and polarized voting patterns . . . demonstrate that Republicans in Texas are inevitably facing a declining voter base and can gain partisan advantage by suppressing the overwhelmingly Democratic votes of African-Americans and Latinos."[538]

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[533] This includes the legislative drafting history, which can offer interpretive insight when the legislative body rejected language or provisions that would have achieved the results sought in Plaintiffs' interest. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006).

[534] *Arlington Heights*, 429 U.S. at 266 (citations omitted).

[535] See Section I(A), *supra*.

[536] Lichtman, D.E. 374, p. 8 (report).

[537] *Id*.

[538] *Id*. at 9.

Sequence of Preceding Events. The more specific background of SB 14 shows that the voting rights of minorities were increasingly threatened, despite the failure of three prior efforts to pass a voter photo ID bill. Rather than soften its provisions that would accomplish the bill's stated purpose while not affecting a disproportionate number of African-Americans and Hispanics, the bill sponsors made each bill increasingly harsh, turning to procedural mechanisms to pass the bill rather than negotiation and compromise. Throughout the prior six years of debating this issue, and despite opposing legislators' very vocal concerns, no impact study or analysis was done to demonstrate whether the bill would unduly impair minority voting rights. This same legislature also enacted at least two redistricting plans that were held by a three-judge federal court to have been passed with a discriminatory purpose.[539]

Departures from Normal Practices. The passage of SB 14 involved extraordinary departures from the normal procedural sequences. As set forth in Section IV(A) of this opinion, the proponents of SB 14 engaged in a number of procedural devices intended to force SB 14 through the legislature without regard for its substantive merit. Calling it an emergency, they disposed of the usual order of business, and ensured that—with unnatural speed—it would reach the end of the legislative journey relatively unscathed. It was, procedurally, unorthodox.

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[539] *Texas v. United States*, 887 F. Supp. 2d 133, 225 (D.D.C. 2012), *vacated and remanded on other grounds*, 133 S. Ct. 2885 (2013); *see Perez v. Texas*, No. 5:11-cv-360, slip. op. at 6 (W.D. Tex. Mar. 19, 2012) (finding that Texas "may have focused on race to an impermissible degree by targeting low-turnout Latino precincts"), explaining interim plan issued by *Perez v. Texas*, 891 F. Supp. 2d 808, 810 (W.D. Tex. 2012), *stay denied sub nom. LULAC v. Perry*, 133 S. Ct. 96 (2012).

The passage of SB 14 was also a substantive departure because "the factors usually considered important by the decisionmakers strongly favor a decision contrary to the one reached."[540]

- SB 14 proponents offered the bill as a way to address voter fraud and to assure the integrity of the ballot box. Yet, by all accounts, a real effort to reduce voter fraud would have focused on the rather prevalent mail-ballot fraud rather than the extremely rare in-person voter impersonation fraud. Oddly, in supposedly fighting voter fraud, the Legislature would relegate a large number of voters from the relatively secure in-person polls to the mail-in system that is openly acknowledged to suffer a higher incidence of fraud.[541]

- In ostensibly fighting non-citizen voting, the legislature approved of the use of a very small number of photo IDs, including some which are legally issued to non-citizens, while the legislature rejected many others that would be needed to permit citizens who are registered to vote to cast their ballots in person.

- Whereas the proponents of SB 14 claim to want to foster the public's perception of election integrity and improve voter turnout, it chose legislation that will cause many qualified, registered voters to be turned away at the polls and, at best, require many to use the fraud-riddled mail-in ballot system.

As outlined in Section IV(A) above, there is a tenuous nexus between SB 14's purported goals and the legislation's design.

Legislative Drafting History. Proponents of SB 14 claimed that it was modeled after voter ID laws in Georgia and Indiana which had passed constitutional and VRA muster. However, SB 14 was a material departure from those other state laws, was

[540] *Arlington Heights*, 429 U.S. at 267.

[541] *E.g.*, Wood, D.E. 363, pp. 4-5.

openly understood to be "the strictest photo ID law in the country,"[542] and it lacked any accommodations for indigents, who the legislature knew were disproportionately African-American and Latino.

As addressed in Section III(B) of this opinion, Georgia allows citizens to vote with a valid out-of-state photo ID while SB 14 does not, Georgia and Indiana allow any federal government-issued photo ID to vote while SB 14 does not, Georgia allows in-state college and university photo ID to vote while SB 14 does not, and Indiana allows for an indigence accommodation at the polls while SB 14 does not. Both Georgia and Indiana permit the use of expired IDs for a much longer period of time than does SB 14. The expiration factor, alone, would permit a number of Plaintiffs to continue to vote in person because they simply allowed their otherwise-qualified SB 14 photo ID to expire because they did not need it anymore.

SB 14's legislative proponents knew at the time that they would face VRA Section 5's preclearance requirement, which precluded passing a bill that would have retrogressive effects on ethnic minorities. As set forth in Section IV(A) above, SB 14 proponents' decision to bar the use of government employee and college and university photo IDs to vote while allowing concealed handgun permits made the voting requirements much more restrictive for African-Americans and Hispanics while making it less so for Anglos.[543]

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[542] Hebert Dep., June 17, 2014, pp. 260-61 (D.E. 592, pp. 221-22 (admitting dep.)).

[543] Lichtman, D.E. 374, pp. 25-34 (report) (based on information publicly available when the 82nd Legislature passed SB 14).

Even Mr. Hebert, who assisted Lieutenant Governor Dewhurst in shepherding SB 14 through the legislature and who drafted the EIC provision, expressed concern to various legislative staffers about preclearance, recommending that, at a minimum, the list of acceptable photo IDs should be expanded to include federal, state, and municipal government-issued IDs.[544] His warning was not heeded. As outlined in Section IV(A)(4)[545] above, proponents of SB 14 rejected a litany of ameliorative amendments that would have redressed some of the bill's discriminatory effects on African-Americans and Hispanic voters—amendments that would not have detracted from the legislation's stated purpose.

Contemporaneous Statements. There are no "smoking guns" in the form of an SB 14 sponsor making an anti-African-American or anti-Hispanic statement with respect to the incentive behind the bill. However, the 2011 legislative session was a racially charged environment. With the 2010 U.S. Census results showing substantial gains by minority populations, there were a number of measures proposed that exhibited an anti-Hispanic sentiment—anti-immigration laws, an effort to abolish sanctuary cities—and there were even concerns about leprosy being raised.[546] Add to this environment that Representative Smith admitted that it was "common sense"—he did not need a study to tell him—that minorities were going to be adversely affected by SB 14. Yet SB 14 was pushed through in the name of goals that were not being served by its provisions.

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[544] Hebert, D.E. 592, pp. 195-96, 213; Pls.' Ex. 272.

[545] See Appendix: Table of Amendments Offered on SB 14.

[546] See Section IV(A), *supra*.

Disparate Impact. As set out above, this Court has concluded that SB 14's effects bear more heavily on Hispanics and African-Americans than on Anglos in Texas. This impact evidence was virtually unchallenged.

Conclusion. The evidence establishes that discriminatory purpose was at least one of the motivating factors for the passage of SB 14. "Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the [challenged] law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor."[547] The record demonstrates that SB 14 was discriminatory, among other reasons, because: (a) its list of acceptable IDs was the most restrictive of any state and more restrictive than necessary to provide reasonable proof of identity; (2) IDs that had expired more than 60 days before an election were still capable of identifying the ID-holder, yet were not permitted; and (3) there is no cost-free way for an indigent to prove up his or her identity in order to vote.

Defendants did not provide evidence that the discriminatory features of SB 14 were necessary to accomplish any fraud-prevention effort. They did not provide evidence that the discriminatory features were necessary to prevent non-citizens from voting. They did not provide any evidence that would link these discriminatory provisions to any increased voter confidence or voter turnout. As the proponents who appeared (only by deposition) testified, they did not know or could not remember why they rejected so many ameliorative amendments, some of which had appeared in prior

[547] *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

bills or in the laws of other states. There is an absence of proof that SB 14's discriminatory features were necessary components to a voter ID law.

Defendants rely on the proposition that SB 14 is a facially-neutral law imposing burdens that do not exceed the normal burdens associated with a normal life, including voting. Given the demographic statistics of the No-Match List, and the Plaintiffs' testimony, it is clear that possessing a photo ID, possessing a birth certificate, having a nearby DPS or other ID-issuing office, having transportation, and having the funds to purchase an ID are all things that are not within normal, tolerable burdens.

This Court concludes that the evidence in the record demonstrates that proponents of SB 14 within the 82nd Texas Legislature were motivated, at the very least in part, *because of* and not merely *in spite of* the voter ID law's detrimental effects on the African-American and Hispanic electorate. As such, SB 14 violates the VRA as well as the 14th and 15th Amendments to the Unites States Constitution.

C. SB 14 Constitutes an Unconstitutional Poll Tax—24th and 14th Amendments[548]

The 24th Amendment provides that a citizen's right to vote in a federal election may not be "denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."[549] The 24th Amendment "nullifies sophisticated as well as simple-minded modes of impairing the right guaranteed."[550] A statute also violates the

[548] This claim is brought by the Veasey Plaintiffs: Gordon Benjamin, Kenneth Gandy, Anna Burns, Penny Pope, Michael Montez, Congressman Marc Veasey, Jane Hamilton, Sergio DeLeon, Evelyn Brickner, John Mellor-Crummey, Floyd Carrier, Koby Ozias, Oscar Ortiz, and LULAC.

[549] U.S. Const. amend. XXIV, § 1.

[550] *Harman v. Forssenius*, 380 U.S. 528, 540-41 (1965) (internal quotations omitted).

24th Amendment if "it imposes a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax."[551]

In *Harper v. Virginia State Board of Elections*,[552] the Supreme Court extended the ban on poll taxes to state elections, using the Equal Protection Clause of the 14th Amendment. Specifically, the Court held that a State may not use "the affluence of the voter or payment of any fee [as] an electoral standard" because "wealth or fee paying has . . . no relation to voting qualifications."[553] In finding that a $1.50 poll tax for state elections violated the Equal Protection Clause, the *Harper* Court held that "[t]he degree of the discrimination is irrelevant."[554]

The Veasey Plaintiffs argue that SB 14 is a poll tax, in violation of the 14th and 24th Amendments. They do not claim that the requirement to show photo identification prior to voting itself is a tax, but that the underlying costs (including the payment of fees as well as travel and time costs), which must be incurred by individuals without acceptable identification, effectively function as a poll tax. Defendants respond that SB 14 is not like the poll taxes struck down by the Supreme Court and, furthermore, Texas provides, free of charge, an EIC to individuals who need qualifying ID to vote. Defendants also claim that the incidental economic costs of obtaining appropriate

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551 *Id.* at 541.

552 383 U.S. 663 (1966).

553 *Id.* at 666, 670.

554 *Id.* at 668.

identification cannot constitute a poll tax prohibited by the Constitution since in-person voting itself often entails unavoidable travel costs.

The Supreme Court has not considered whether a voter photo ID law constitutes a poll tax. However, several other courts have recently done so regarding laws that were different in important respects from SB 14. Various versions of the Georgia voter photo ID law were challenged as constituting an impermissible poll tax.[555] In *Common Cause I*, voters without an approved form of government-issued ID were required to pay a $20.00 fee to obtain a five-year photo ID card (or a $35 fee to obtain a ten-year photo ID card) in order to vote in person.[556] The Court found that "as a practical matter, most voters who do not possess other forms of Photo ID must obtain a Photo ID card to exercise their right to vote, even though those voters have no other need for a Photo ID card" and thus "requiring those voters to purchase a Photo ID card effectively places a cost on the right to vote" in violation of the 24th and 14th Amendments.[557] The court further held that the possibility of the fee being waived for voters who complete an affidavit of indigency did not save the law from being a poll tax because it constituted a material requirement in lieu of a poll tax, as rejected in *Harman*.[558]

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[555] *Common Cause/Georgia v. Billups (Common Cause I)*, 406 F. Supp. 2d 1326, 1369 (N.D. Ga. 2005); *Common Cause/Georgia League of Women Voters of Georgia, Inc. v. Billups (Common Cause II)*, 439 F. Supp. 2d 1294, 1354 (N.D. Ga. 2006).

[556] 406 F. Supp. 2d at 1369.

[557] *Id.*

[558] *See Common Cause I*, at 1370.

Indiana's voter ID law was also challenged as a poll tax and prevailed because it only potentially imposed incidental costs on certain voters.[559] The court found that "the imposition of tangential burdens does not transform a regulation into a poll tax" and "the cost of time and transportation cannot plausibly qualify as a prohibited poll tax because these same 'costs' also result from voter registration and in-person voting requirements, which one would not reasonably construe as a poll tax."[560]

The Indiana court did recognize that, although the state-issued voter photo ID card was free, the fee required to obtain a birth certificate (which would then be used to obtain the photo ID card) might plausibly be considered a poll tax.[561] Nonetheless, the court decided that it was not, because it found that the need to pay that fee was "purely speculative and theoretical" due to the plaintiffs not providing evidence that anyone would actually be required to incur this cost in order to vote."[562]

When the Georgia law was challenged again, the state provided photo ID free of charge and eliminated the previous requirement of an indigency affidavit.[563] The plaintiffs nonetheless argued that the law still constituted a poll tax because voters without approved photo ID were required to arrange for transportation to a registrar's

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[559] *See Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 827-28 (S.D. Ind. 2006), *aff'd sub nom. Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007). When the Supreme Court later reviewed the Indiana law and affirmed the district's court's decision, the Court did not review the issue whether the photo ID law constituted an impermissible poll tax. *See Crawford v. Marion Cnty.*, 553 U.S. 181 (2008).

[560] *Rokita*, 458 F. Supp. 2d at 827.

[561] *Id.*

[562] *Id.*

[563] *See Common Cause II*, at 1354.

office and to successfully navigate the process of receiving the state photo ID.[564] Additionally, the plaintiffs contended that some voters "might be required to pay a fee to obtain a birth certificate in order to obtain a Voter ID card."[565] The court rejected these arguments, finding that the cost of time and transportation did not qualify as a prohibited poll tax.[566] The court further found entirely speculative the contention that any voter would be required to pay a fee to obtain a birth certificate to vote, because the registrar could accept a number of other documents to issue a voter ID card and there was no evidence that any particular voter would actually be required to incur the cost for a birth certificate.[567] The court thus found that the plaintiffs had not demonstrated that the cost of obtaining a birth certificate [was] sufficiently tied to the requirements of voting so as to constitute a poll tax."[568]

Pursuant to SB 14, any individual wishing to vote in person must procure one of seven forms of approved photo ID if he or she currently lacks such identification. Individuals must pay an application fee in order to obtain any of the required forms of ID, except for the EIC. The EIC itself, issued by DPS, must be issued free of charge. But in order to receive an EIC, an applicant must provide one of several supporting documents,

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564 *Id.*

565 *Id*. at 1355.

566 *Id*. at 1354 (citing *Rokita*, 458 F. Supp. 2d at 827).

567 *Id*. at 1355. In addition to a birth certificate, a multitude of other documents could be presented by an individual in order to receive a Georgia voter ID card, including: a student ID card, a transit card, an employee ID card, a state or federal government benefits card, a copy of the applicant's state or federal tax return, an original Medicare or Medicaid statement, etc. *Id*. at 1310.

568 *Id*.

the cheapest of which is a birth certificate. If the applicant does not have a birth certificate, it must be purchased at a minimum fee of $2.00 in Texas.[569]

In addition to the fee, individuals also must expend time and resources, which are significant in some instances, in order to travel to the vital statistics office, a local registrar, or a county clerk to obtain a birth certificate (even more so if more than one visit is required).[570] Nonetheless, the Court cannot reasonably conclude at this time that the incidental time, travel, and information search costs constitute either a poll tax or "other tax" prohibited by the 24th Amendment, or a "material requirement" imposed "solely upon those who refuse to . . . pay[] a poll tax."[571]

But the fact that a voter without an approved form of SB 14 ID and without a birth certificate, in order to vote, must pay a fee to receive a certified copy of his or her birth certificate, which is functionally essential for an EIC, violates the 24th Amendment as an impermissible poll tax or "other tax."[572] It also violates the 14th Amendment by making the "payment of any fee . . . an electoral standard."[573]

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[569] As demonstrated above, an EIC-only birth certificate may be purchased for $2.00-$3.00 if the person applies in person. That fee can be as much as $47.00 if the birth was not previously registered and a delayed birth certificate is required from the DSHS. It may also cost more than the minimum fee if an inaccuracy needs to be corrected and an amended birth certificate is issued.

[570] The incidental time and travel costs associated with obtaining an EIC, especially for individuals lacking a birth certificate, can be quite onerous. According to the uncontroverted expert report of Mr. Jewell, the cost of securing an EIC, including the costs of obtaining the underlying documents, the transportation costs, the opportunity/time costs, and the information search costs, approached $100 for some of the named Plaintiffs. D.E. 367, p. 3. In a vacuum, these costs are considerable; for five of the seven Plaintiffs Mr. Jewell studied, who have no household income in excess of poverty guidelines, these costs are extraordinary. *See id.*, pp. 4-5. Dr. Bazelon noted that a poll tax of $1.75 in 1966 was 69% of the average hourly wage. Dr. Bazelon estimated that the average travel cost alone to get an EIC in Texas is $36.23, which is 149% of today's average hourly wage. Bazelon, D.E. 603-1, p. 4. (report).

[571] *Harman*, 380 U.S. at 542.

[572] *See Common Cause I*, 406 F. Supp. 2d at 1369. Although voters are not required to obtain an EIC in order to vote, and may instead wish to obtain a different form of SB 14 ID, none of the other acceptable forms of ID may be

Unlike in *Common Cause II* and *Rokita* (and by extension *Crawford*), there is ample evidence in the record of several Plaintiffs having to pay a substantial fee in order to obtain a birth certificate (in some cases a delayed or amended birth certificate) for the purpose of receiving an EIC.[574] Victor Farinelli, who testified with comprehensive knowledge of how the State of Texas issues birth certificates, demonstrated that they are never free. Even at birth, a newborn's birth certificate must be ordered and paid for.[575]

Although as of October 21, 2013, the fee to receive a certified copy of a birth certificate specifically for the purpose of receiving an EIC is only $2.00, the amount of the fee is irrelevant.[576] Plaintiffs have thus demonstrated that every form of SB 14-qualified ID available to the general public is issued at a cost. And for voters without appropriate SB 14 ID, they can only obtain a free EIC with a birth certificate that they

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obtained without paying a fee to a government agency (except perhaps for the United States military ID card, which is not available to all individuals).

[573] *See Harper*, 383 U.S. at 666; *Common Cause I*, 406 F. Supp. 2d at 1368; *see also Boustani v. Blackwell*, 460 F. Supp. 2d 822, 826 (N.D. Ohio 2006) (finding unconstitutional the requirement that some naturalized citizens would be required to pay $220 to the United States Citizenship and Immigration Service for a replacement certificate of naturalization in order to vote); *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, 851 N.W.2d 262, 277 (July 31, 2014) (interpreting as unconstitutional the portion of the Wisconsin voter ID law that required payment to a government agency to obtain the underlying documents necessary to receive a Department of Transportation ID for voting because "the State of Wisconsin may not enact a law that requires any elector, rich or poor, to pay a fee of any amount to a government agency as a precondition to the elector's exercising his or her constitutional right to vote").

[574] Although the *Crawford* Court discussed the cost of obtaining photo ID, the Court noted that the evidence in the record was insufficient to determine the actual costs borne by individuals, including individual plaintiffs, of obtaining an appropriate form of photo ID. *See* 553 U.S. at 200-02.

[575] Farinelli, D.E. 582, pp. 317-18.

[576] *See Harper*, 383 U.S. at 668. Additionally, the availability of a fee waiver (which may only be requested in person) to reduce the fee for a birth certificate for the purpose of voting to $2.00 is not well publicized and the evidence does not indicate that the State has made an effort to advertise it.

have already purchased or one for which they now must pay at least $2.00.[577] The cost of obtaining a birth certificate is thus sufficiently tied to the requirements of voting as to constitute an unconstitutional poll tax or other tax.

The fact that those Plaintiffs who were either disabled or over the age of 65 could have opted to vote by mail-in ballot, thus avoiding the cost of obtaining an EIC, does not change the result. First, being forced to vote by mail-in ballot in lieu of paying for a birth certificate constitutes "a material requirement" imposed "solely upon those who refuse to surrender their constitutional right to vote . . . without paying a poll tax."[578] Voting by mail requires properly filling out and mailing a form in order to request a mail-in ballot, well before, but no more than 60 days before, the election, for every single election in which the voter wishes to participate.[579] That process is analogous to the yearly re-registration requirement that was struck down in *Harman*.[580] Second, mail-in voting, for the many reasons discussed in Sections IV(B)(2)(a) and VI(A)(3)(a)(iv), *supra*, is "not a realistic alternative to voting in person."[581]

Therefore, the Court finds that SB 14 imposes a poll tax in violation of the 24th and 14th Amendments.

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[577] Furthermore, nothing in SB 14 eliminates the cost of obtaining a birth certificate issued by other jurisdictions for those who reside in Texas but were not born in Texas. And while Texas clearly cannot control the costs imposed by other jurisdictions, it is no doubt aware that such fees exist.

[578] *See Harman*, 380 U.S. at 541.

[579] *See Early Voting*, http://www.votetexas.gov/voting/when#early-voting; TEX. ELEC. CODE ANN. § 86.001 et seq.

[580] *See* 380 U.S. at 541.

[581] *See Common Cause I*, 406 F. Supp. 2d at 1365; *see also Ohio NAACP II*, 2014 WL 4724703, at *13.

VII.

THE REMEDY

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined"[582] To preserve that right, the Court, pursuant to its equitable powers and to redress the VRA claims of discriminatory result and discriminatory purpose, will enter a permanent and final injunction against enforcement of the voter identification provisions, Sections 1 through 15 and 17 through 22, of SB 14.[583]

To avoid piecemeal decisionmaking, including piecemeal appellate review, and also because the claims rely on many of the same underlying facts, the Court has ruled on each of the legal theories presented. In addition, the requests for a preclearance order under Section 3(c) of the Voting Rights Act, and for authorization of election observers under Section 3(a) of the Act, depend on a finding that SB 14 was enacted with a discriminatory purpose, and therefore the Court was obligated to rule on the purpose issue. The injunction described above is sufficient to remedy the Plaintiffs' as-applied challenge to the unconstitutional burden that SB 14 places on the right to vote, along with

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[582] *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

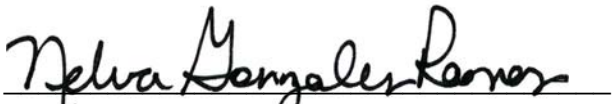
[583] SB 14 includes a severability clause, to which this Court defers, *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam), and therefore the injunction shall not apply to these provisions of SB 14 that do not relate to voter identification for in-person voting. Accordingly, the injunction to be issued shall not apply to sections 16, 23, and 24 of SB 14.

the challenge to SB 14 as a poll tax. No further delineation of relief as to those claims is required at this time.

Under the injunction to be entered barring enforcement of SB 14's voter identification provisions, Texas shall return to enforcing the voter identification requirements for in-person voting in effect immediately prior to the enactment and implementation of SB 14. Should the Texas Legislature enact a different remedy for the statutory and constitutional violations, this Court retains jurisdiction to review the legislation to determine whether it properly remedies the violations. Any remedial enactment by the Texas Legislature, as well as any remedial changes by Texas's administrative agencies, must come to the Court for approval, both as to the substance of the proposed remedy and the timing of implementation of the proposed remedy.

By subsequent order, the Court will set a status conference to address the procedures to be followed for considering Plaintiffs' request for relief under Section 3(c) of the Voting Rights Act.

ORDERED this 9th day of October, 2014.



NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE

APPENDIX
TABLE OF AMENDMENTS OFFERED ON SB 14

NUMBER[584]	SUBSTANCE OF PROPOSED AMENDMENT	SPONSOR
Allowing the Use of Additional Forms of ID		
S F10	Allowing proof of identity by affidavit	Zaffirini
S F16	Two forms of non-photo ID Voter registration certificate accompanied by reliable documents United States Military ID with photo ID issued by Federal government agency or institution ID issued by Texas agency, institution, or political subdivision	Van de Putte
S F17	Temporary driving permit	Gallegos
S F19	Student photo IDs issued by accredited public university in Texas[585]	Ellis
S F20	Medicare ID cards issued by Social Security Administration accompanied by voter registration certificate	West
S F21	Employee photo IDs issued by Federal government agency or institution Texas agency, institution, or political subdivision Institution of higher education located in Texas	Davis
S F24	Voter registration certificates with photo issued by county election administrator or county clerk	Hinojosa
H 11	Allowing proof of identity by affidavit	Veasey
H 12	Allowing proof of identity by personal knowledge of election judge	Dutton
H 17	Temporary driving permit	Dukes
H 21	Employee photo IDs issued by any employer in ordinary course of business	Veasey
H 23	Student photo IDs issued by public or private high school or institution of higher education	Dutton
H 24	Any photo IDs issued by the State of Texas[586]	Martinez-Fischer
H 25	IDs issued by Texas agency, institution, or political subdivision or Federal agency or institution	Hernandez-Luna
H 38	Temporary driving permit issued after license revocation (defeated by vote)	Burnam
H 39	Provisional ballot accepted when voter signs affidavit at polls and signature on affidavit is substantially similar to voter registration application or other public document	Anchia, Strama

[584] The Senate voted SB 14 out of committee without amendments. References of "S F#" were amendments offered on the floor of the Senate and were disposed of by being tabled immediately. Those beginning with "H #" were disposed of after SB 14 emerged from committee and prior to the full House of Representatives vote and were disposed of by being tabled unless otherwise noted.

[585] While those advocating the use of student IDs faulted SB 14 proponents for failing to show that such IDs were ever used fraudulently, Rep. Martinez-Fischer could not state how frequently student IDs were needed as voting ID.

[586] According to the State, DPS issues three types of IDs not included in SB 14 and over 90 state agencies use DPS resources to issue secure access cards, including Libraries, the Veterans Commission, university systems, and many other state employers.

NUMBER[584]	SUBSTANCE OF PROPOSED AMENDMENT	SPONSOR
H 42	Allowing county voter registrars to issue voter registration certificates with photos and providing for cooperation with DPS and other Texas state agencies for access to voter photos	Walle
H 30	Tribal IDs allowed (adopted, but omitted from the Conference Committee Report and is not in SB 14 as enacted)[587]	Naomi Gonzalez
Allowing the Use of IDs With Irregularities		
S F13	Allowing the use of any expired IDs[588]	Davis
S F15	Expanding use of expired IDs by including those that expired after the last general election	Davis
S F16	Expanding the use of expired IDs by including those that expired within two years of the current election	Van de Putte
S F22	Allowing the use of IDs expired within 60 days of election; For those over 65 years of age, allowing the use of any expired driver's license or personal identification cards issued by Texas or any other state	Lucio
S F11	Allowing nonconforming names of women upon a showing of a marriage certificate, divorce decree, or upon execution of an affidavit affirming identity	Davis
H 37	Allowing nonconforming names upon voter's execution of affidavit stating voter's name was changed as a result of marriage or divorce (defeated by vote)	Hernandez-Luna
Making Qualified Photo IDs or Voting More Accessible		
S F1	Providing criminal penalties for intimidating voters	Watson
S F2	Ensuring that those seeking a new or renewed personal identification card that it is free if needed for voting (upon presentation of voter registration certificate).	Davis
S F12	Eliminating the fees for underlying documents (needed to obtain photo ID) ordinarily charged by Texas agencies, institutions, and political jurisdictions	Davis
S F25	Requiring DPS to have one driver's license office for every 50 voting precincts, centrally located by voting age population	Gallegos
S F26	Requiring DPS to open any new driver's license facility no more than 5 miles from public transportation, if county has public transportation	Gallegos
S F28	Allowing for same-day voter registration	Ellis
S F29	Enlarging the hours of DPS offices to at least 7:00 p.m. one weeknight per week and for four hours on two Saturdays per month	Gallegos
S F36	Giving the disabled the option of voting by mail without having to renew the disability exemption; providing reasonable notice of the availability of the disability exemption to those likely to need it	Davis
S F39	Exempting the indigent by allowing cure of provisional ballot upon execution of affidavit of indigency	Davis
H 15	Eliminating the fee for underlying documents (needed to obtain photo ID) ordinarily charged by Texas agencies, institutions, and political subdivisions	Martinez

[587] http://www.lrl.state.tx.us/scanned/82ccrs/sb0014.pdf#navpanes=0, p. 22.

[588] Ann McGeehan, overseeing the Elections Division of the Secretary of State's office testified that an expired ID is still capable of establishing identity. D.E. 578, p. 276.

NUMBER[584]	SUBSTANCE OF PROPOSED AMENDMENT	SPONSOR
H 16	Allowing exemption upon proof of an employee paycheck and affirmation that the employer does not permit taking off work to get photo ID and the DPS office is not open for at least two consecutive hours when employee is off work	Raymond
H 36	Expanding the time to cure a provisional ballot, using only "business days"	Dutton
H 43	Allowing for same-day voter registration	Rodriguez
H 44	Prohibiting application of changes to counties that do not have a DPS full-service driver's license office	Gallego
H 49	Allowing for same-day voter registration	Alonzo
H 50	Providing for reimbursement of travel expenses incurred by indigent voters to secure photo ID	Raymond
H 52	Allowing only a poll worker to request to see photo ID; any other person requesting ID is harassing a voter and commits a felony	Castro
H 61	Exempting application of the requirement to lineal descendants of those prevented from voting by white primary laws or other laws targeting a citizen's right to vote based on race, nationality, or color	Martinez
H 63	Exempting voters over age 65 from photo ID requirement Allowing for same-day voter registration Authorizing the Secretary of State to establish additional documents to prove residency	Eiland
Educating the Public About Photo ID Requirements		
S F2	Providing for notice to those renewing an ID by mail that an ID is free for voting purposes	Davis
S F27	Providing for notice to applicants for marriage license that any name change requires updating of voter registration	Lucio
S F37	Requiring the Secretary of State to develop uniform statewide voter registration outreach program and ombudsmen to address allegations of voter suppression, discrimination, or other abuse	Davis
S F38	Expanding the triggers for providing a voter with notice of the cancellation of voter registration	Davis
H 46	Requiring DPS to give notice to applicants for new or renewed driver's license or personal identification card that ID for voting is available at no charge	Martinez
Requiring Analysis and Reporting by Secretary of State		
S F30	Requiring the SOS to produce an annual report disclosing: the comparative number of eligible voters who have and do not have the necessary ID to vote; the number and percentage of voters who are disqualified by name changes, address changes, or expired IDs; the average amount of time a voter must wait for qualified ID from DPS; the number of provisional ballots cast; and an analysis of photo ID requirements on women, elderly, disabled, students, and racial or ethnic minorities.	Ellis
H 54	Requiring the SOS to keep detailed records by county and precinct, including demographic information regarding the number of voters who were prohibited from voting because of photo ID requirements and the number of provisional ballots that were not counted	Alvarado

NUMBER[584]	SUBSTANCE OF PROPOSED AMENDMENT	SPONSOR
H 55	Requiring the SOS to determine whether the majority of provisional ballots cast for lack of photo ID were cast by members of a racial or ethnic minority; if so, subsequent election qualification would be by voter registration certificate	Veasey
H 58	SB 14 not to take effect until SOS completes (a) a study of the impact of the law on state residents, including the availability of offices to issue qualified photo ID and (b) an analysis of the law's impact on voter turnout	Anchia
H 62	Requiring the SOS to conduct election integrity training to enhance detection, investigation, and prosecution of in-person voter impersonation fraud and establishing election integrity task forces to prosecute such crimes; requiring county clerks to conduct an election integrity audit and publish the results after each general election, along with requiring any evidence of voter fraud to be referred for prosecution	Strama
Requiring Funding		
S F31	SB 14 not to take effect until implementation is fully funded and SOS has certified that it and all counties are in compliance or have developed training and information required to implement.	Van de Putte
S F32	SB 14 not to take effect until funded	Watson
H 57	SB 14 not to take effect unless there is a specific appropriation to fund implementation	Anchia

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 14-41127

MARC VEASEY, *et al.*,

Plaintiffs-Appellees,

v.

GREG ABBOTT, in his Official Capacity as Governor of Texas, *et al.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

EMERGENCY MOTION OF VEASEY-LULAC APPELLEES TO VACATE STAY

I. INTRODUCTION

On October 9, 2014, the District Court held that Texas's photo ID bill, Senate Bill 14 ("SB 14"), was adopted with an impermissible discriminatory purpose in violation of the United States Constitution, and results in racial discrimination in violation of Section 2 of the Voting Rights Act. Furthermore, the District Court held that SB 14 imposes an unconstitutional burden on the

fundamental right to vote.[1] Accordingly, on October 11, 2014, the District Court entered an injunction against the enforcement of SB 14. This Court issued a stay of that injunction "[b]ased primarily on the extremely fast-approaching" 2014 elections. *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014). The Supreme Court declined to vacate that stay, with three Justices dissenting. *Veasey v. Perry*, 135 S. Ct. 9 (2014).

Since then, a panel of this Court, on August 5, 2015, after ordering expedited briefing and oral argument, unanimously affirmed that SB 14 results in racial discrimination in violation of Section 2 of the Voting Rights Act. On March 9, this Court issued an order to rehear this case en banc, vacating the panel opinion. 5th Cir. R. 41.3. Therefore, the standing opinion on review in this Court is the District Court's opinion, finding, among other things, that SB 14 has both a racially discriminatory purpose and result.

Thus far, three federal courts, and seven federal judges, have reviewed SB 14 and they have unanimously held that SB 14 has an unlawful discriminatory effect on minority voters in Texas. The District Court's injunction was stayed on the basis of the "extremely fast-approaching" 2014 elections. *Veasey*, 769 F.3d at 892. That justification no longer applies. Therefore, to protect the right to vote for

[1] The District Court also found that the statutory scheme, amended since that time, amounted to an unconstitutional poll tax.

all Texas citizens, the stay should be vacated and jurisdiction should be restored to the District Court to reinstate its injunction or enter another appropriate injunction.

If relief is further deferred, there is a significant risk that there may be insufficient time for the District Court to fashion appropriate relief for the upcoming November 8, 2016 general election and SB 14 will again be enforced, despite the District Court's findings that SB 14 discriminates against minority voters and violates both the Voting Rights Act and the United States Constitution. Over 600,000 registered Texans lack the photo ID needed to vote. *Veasey v. Perry*, 71 F.Supp.3d 627, 659 (S.D. Tex. 2014). The law is scheduled to be enforced again in the upcoming runoff elections in May,[2] as well as the General Election in November, likely to be the highest-interest election since the implementation of SB 14.

This ever-increasing risk presents a growing emergency for the hundreds of thousands of eligible Texas voters who lack SB 14 ID and may, once again, be deprived of the fundamental right to vote this November. Therefore, Plaintiffs file this emergency motion asking this Court to vacate the stay and restore the District Court's jurisdiction to reinstate its injunction or enter another appropriate injunction.

[2] Movants here accept that it is likely too late to ensure proper relief for the May 2016 runoff elections. The relief sought here is for all forthcoming elections after the May 2016 runoffs.

II. TEXAS VOTERS FACE FURTHER DISENFRANCHISEMENT ABSENT EMERGENCY ACTION BY THIS COURT

As the Supreme Court stated in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), courts must "carefully consider the importance of preserving the status quo on the eve of an election." *Veasey*, 769 F.3d at 893. The Supreme Court has not elucidated any rule for when and under what circumstances a court order may be too close to an election. But it has made clear that "[a]s an election draws closer, [the] risk [of voter confusion] will increase." *Purcell*, 549 U.S. at 7. Given the proximity to a November election, the Supreme Court has, on some occasions, stayed election-related injunctions issued as early as September 4. *Husted v. Ohio State Conf. of NAACP*, 135 S. Ct. 42 (2014). Therefore, Plaintiffs must secure a remedy before the gears of election administration begin to turn in order to safeguard effective relief and avoid a scenario when another election is held under SB 14 simply because Texas claims that it does not have enough time to conduct elections lawfully.

As noted above, on August 5, 2015, a panel of this Court held that SB 14 violates Section 2 of the Voting Rights Act. Shortly thereafter, on August 20, 2015, the undersigned and other appellees moved for an expedited limited mandate for interim relief pending further proceedings. This Court ordered that the motions be "carried with this case, pending determination of the petition for rehearing en

banc." In the following six months, this Court took no action and SB 14 was enforced in Texas's fall 2015 election and spring 2016 primary election, blocking eligible Texas voters' access to the ballot. In December 2015, the undersigned and other appellees filed Rule 28(j) letters advising this Court of the upcoming March primary and the urgent need for interim relief; but again no action was taken.

On March 9, this Court granted rehearing en banc in this matter. Oral argument is scheduled for the week of May 23, 2016. Therefore, the earliest possible opinion from this Court will likely not be issued until at least June or July 2016. Texas has already alleged that considerable work prior to an election would be required to reverse course and stop enforcing SB 14, including training approximately 25,000 poll workers. *Veasey*, 769 F.3d at 893; *see also* Texas Petition for Writ of Mandamus (filed Oct. 11, 2014), at 6. Indeed, Texas has taken the position that the wheels of election administration for the general election in November, including the enforcement of SB 14, go into motion as soon as early June. *See* Exh. A, Affidavit of Keith Ingram, Doc. 40-1, *Texas v. Holder*, No. 1:12-CV-00128 (D.D.C.). As the November election approaches, the State will no doubt argue that *Purcell* protects against any injunctive action once the process begins. Moreover, if the State does not prevail in this proceeding, it will undoubtedly pursue a stay of the mandate pending a petition for a writ of certiorari. Thus, the schedule for this recently granted en banc rehearing likely forecloses effective

relief for the November 2016 election if the stay remains in effect pending the en banc proceedings.

The foregoing adds up to an emergency for the voters of Texas. Absent emergency action by this Court, the risk that voters will be irreparably harmed by the unlawful denial of their fundamental constitutional right to vote in the 2016 general election may eventually become insurmountable. *See Save Our Aquifer v. City of San Antonio*, 237 F. Supp.2d 721 (W.D. Tex. 2002) ("[T]he loss of that sacred right [to vote] clearly would be irreparable."); *see also Reynolds v. Sims*, 84 S. Ct. 1362 (1964) ("[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights."); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). The loss of the right to vote in an election is quintessentially irreparable because, once an election passes, there can ordinarily be no effective remedy. Texas voters cannot and should not be forced to forfeit their right to vote in yet another election.

III. THE STAY IS NO LONGER JUSTIFIED.

To issue a stay pending appeal, courts must consider "(1) whether the stay applicant has made a showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issues of a stay will substantially injure the other parties interested in the proceeding; and

(4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). "The first two factors . . . are the most critical," and the "party requesting a stay bears the burden of showing that the circumstances justify" a stay. *Id.* at 434.

The circumstances no longer justify a stay. The prior stay was granted *because of* the District Court order's proximity to the 2014 elections. *Veasey*, 769 F.3d at 892. Indeed, the proximity of the 2014 elections affected this Court's analysis of practically every factor. *Id.* at 895 ("We must consider this injunction in light of the Supreme Court's hesitancy to allow such eleventh-hour judicial changes to election laws."). This was true as to the likelihood of success on the merits: "First, the State has made a strong showing that it is likely to succeed on the merits, at least as to its argument that the district court should not have changed the voting identification laws on the eve of the election." *Id.* It was also true as to irreparable harm: "Moreover, the State has a significant interest in ensuring the proper and consistent running of its election machinery, and this interest is severely hampered by the injunction." *Id*. at 896. And it was true again as to the public interest: "Finally, given that the election machinery is already in motion, the public interest weighs strongly in favor of issuing the stay." *Id*. Clearly, this time-sensitive logic no longer supports a continued stay. By vacating the stay now, this Court can avoid creating another situation where election administration overrides fundamental access to the right to vote.

Texas has the burden of establishing a likelihood of success on the merits, and nothing in the stay order indicates it has met that burden. The District Court rendered a detailed 147-page opinion finding that the law violates the Voting Rights Act and the United States Constitution. The District Court's decision, rendered after a two-week trial, rested on settled Supreme Court precedent and well-supported findings of fact. A three-judge panel of this Court already unanimously agreed that SB 14 violates the Voting Rights Act. This Court's prior stay opinion recognized that Texas only established a likelihood of success on the merits with respect to *when* the District Court issued its injunction, not the underlying merits of its opinion. *Veasey*, 769 F.3d at 895 ("The other questions on the merits are significantly harder to decide, given the voluminous record, the lengthy district court opinion, and our necessarily expedited review.").

Absent harm to orderly election administration, which can be avoided by timely action on the part of this Court, Texas has not and cannot prove any irreparable harm. *See* Texas Petition for Writ of Mandamus (filed Oct. 11, 2014), at 37-39 (arguing irreparable harm on the basis of the imminent election). Texas has no cognizable interest in enforcing a discriminatory and unconstitutional law. *See City of Richmond v. United States*, 422 U.S. 358, 378 (1975) (holding that racially discriminatory laws "have no credentials whatsoever"). Indeed, the District Court's finding that the law was intentionally racially discriminatory counsels

strongly against further enforcement of the law pending further proceedings. *See Veasey*, 769 F.3d at 896 (Costa, J., concurring) ("We should be extremely reluctant to have an election take place under a law that a district court has found, and that our court may find, is discriminatory.").

Meanwhile, the ongoing injury to the plaintiffs, the Texas voters, and the public weighs heavily against the stay. The District Court held, based on Texas's own data, that over 600,000 registered Texan voters lack SB 14 ID, and face substantial burdens to obtaining such ID. *Veasey v. Perry*, 71 F. Supp. 3d 627, 659 (S.D. Tex. 2014); *see also Veasey*, 769 F.3d at 896 ("The individual voter plaintiffs may be harmed by the issuance of this stay."). The "right to vote freely for the candidate of one's choice is of the essence of a democratic society and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Therefore, the District Court's finding that SB 14 imposes an unconstitutional burden on the right to vote, and does so in a racially discriminatory manner, weighs heavily in favor of vacating the stay.

In sum, this Court previously granted the stay only on the basis of the specific circumstances immediately prior to the 2014 election. Absent the pressing

concerns of an eleventh hour election change, the stay of the District Court's well-supported injunction simply cannot be justified.

IV. CONCLUSION

Therefore, the undersigned ask the Court to vacate the stay and order the District Court to reinstate relief for the upcoming elections subsequent to the May runoff elections. As the Supreme Court has recognized, in voting cases, the en banc review procedure "can consume further valuable time." *Purcell*, 549 U.S. at 7. In this case—wherein the process has already consumed over six months over the course of two statewide elections, with another approaching—this is certainly true.

Careful consideration of this case by the en banc panel need not, and should not, hinder effective relief for voters in the upcoming general election. The Court should vacate the stay and proceed with en banc proceedings under the normal course of business. Such an order will not affect the proper consideration of the en banc rehearing or any further consideration of this case.

We request that Texas be directed to respond within 7 days after the filing of this motion and the Court act on the motion within 14 days after the filing of the motion. The facts supporting emergency consideration of this motion are true and complete. We have notified the appellants of the filing of this motion by phone and email.

The stay should be vacated in its entirety or to the extent necessary to allow entry of another appropriate district court injunction. In the alternative, if the Fifth Circuit believes that more limited interim relief such as that suggested by the panel in this case is appropriate, the Fifth Circuit should modify the stay accordingly.

Respectfully submitted on March 18, 2016,

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CERTIFICATE OF CONFERENCE

Pursuant to Fifth Circuit Rule 27.4, counsel for Plaintiffs-Appellees has conferred with counsel for Defendants-Appellants regarding this motion. Defendants-Appellants oppose the relief that Plaintiffs-Appellees seek.

Respectfully submitted on March 18, 2016,

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CERTIFICATE OF SERVICE

I certify that on March 18, 2016, I electronically filed the foregoing EMERGENCY MOTION TO VACATE STAY with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 14-41127

MARC VEASEY; *et al*.,

Plaintiffs-Appellees,

v.

GREG ABBOTT, in his Official Capacity as Governor of Texas; *et al*.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

THE VEASEY-LULAC, NAACP-MALC, TAYLOR, IMANI CLARK AND TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND APPELLEES' MOTION TO EXPEDITE THE ISSUANCE OF THE MANDATE

This Court's opinion recognized that SB 14, as adopted by Texas, results in discrimination against Black and Latino voters in violation of Section 2 of the Voting Rights Act. In its opinion, the Court proposed potential remedies the District Court could consider to address the Voting Rights Act violation, and the United States' motion has proposed a limited remand to consider a form of interim relief. The Court's opinion requested that the parties work cooperatively with the

District Court to fashion a remedy that would "avoid election eve uncertainties and emergencies." The Court also remanded other issues for additional consideration.

The next regularly held election in Texas is on November 3, 2015; early voting for this election begins on October 19, 2015. This Court's mandate is not scheduled to issue until September 29, 2015. In order to give the parties and the District Court ample time to consider an appropriate remedy in advance of the upcoming November election, the undersigned movants respectfully move this Court to issue forthwith a limited mandate instructing the District Court to consider, in light of this Court's opinion, remedial orders necessary in order to conduct the November 3, 2015 election lawfully and in compliance with the Judgment of the Court. [1]

[1] The undersigned Movants will attempt to work with the State on a remedy for the upcoming November 3, 2015 election, as this Court's decision suggested. Today the private Appellees conferred with attorneys for Texas by telephone. The state's position on this Motion is that Texas opposes issuance of an expedited remand. Texas has indicated, as it did to the Department of Justice, that it will respond to this motion on or before August 28, 2015.

Respectfully submitted on August 20, 2015,

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CERTIFICATE OF SERVICE

I certify that on August 20, 2015, I electronically filed the foregoing MOTION TO EXPEDITE THE ISSUANCE OF THE MANDATE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that on August 20, 2015, I served a copy of the foregoing Motion on the following counsel by certified U.S. mail, postage prepaid:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-41127

MARC VEASEY, *et al.*,

Plaintiffs-Appellees

v.

GREG ABBOTT, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

OPPOSED MOTION FOR A LIMITED REMAND DIRECTING THE DISTRICT COURT TO ENTER INTERIM RELIEF CONSISTENT WITH THIS COURT'S AUGUST 5, 2015, OPINION

The United States respectfully requests a limited remand directing the district court to enter interim relief consistent with this Court's August 5, 2015, opinion. See 28 U.S.C. 2106. Such an order is necessary to ensure that, pending completion of the appellate process and further proceedings below, voters in upcoming elections are not subject to a law that both this Court and the district court have determined violates Section 2 of the Voting Rights Act (VRA), 52 U.S.C. 10301. It also would ensure that the State has adequate time to implement

the requested relief prior to the upcoming elections on November 3, 2015. This Court would retain jurisdiction of the appeal pending the district court's compliance with the limited remand, see, *e.g.*, *Wheeler* v. *City of Columbus*, 686 F.2d 1144, 1154 (5th Cir. 1982), thereby avoiding any prejudice to the State's ability to petition for further review.[1]

The State opposes this motion, and has indicated that it will respond by August 28, 2015. We have consulted with the private plaintiffs, but have not received their position as of this filing.

In support of this motion, the United States provides as follows:

1. On October 9, 2014, the district court issued an opinion holding that Texas Senate Bill 14 (SB14) – Texas's photo-identification requirements for in-person voting – violates Section 2 of the VRA, 52 U.S.C. 10301, and the United States Constitution. Two days later, the district court entered a judgment enjoining Texas from enforcing SB14's photo-ID provisions and requiring the State to reinstate its preexisting voter-ID law.

2. On October 14, 2014, based "primarily on the extremely fast-approaching election date," this Court granted Texas's emergency motion for a stay of the

[1] Given the exigencies created by the upcoming November elections, the relief requested in this motion is directed solely at providing necessary interim relief pending further proceedings below. This motion does not address the question of the appropriate scope of permanent relief.

district court's judgment pending appeal. ROA.27377. Plaintiffs filed emergency applications with the Supreme Court to vacate the stay order, which the Supreme Court denied. See Nos. 14A393, 14A402, 14A404 (S. Ct. Oct. 18, 2014). Accordingly, Texas has continued to enforce SB14 pending appeal.

3. On December 10, 2014, this Court granted in part the Veasey-LULAC appellees' motion to expedite this appeal. In support of the motion, appellees cited this Court's stay order, upcoming elections in November 2015 and March 2016, and the need to provide election administrators with sufficient time to implement lawful identification procedures without creating significant voter confusion. This Court ordered that, upon the completion of briefing, this case be placed on the first available oral argument calendar.

4. Oral argument was held on April 28, 2015.

5. On August 5, 2015, this Court issued an opinion that, *inter alia*, affirmed the district court's finding that SB14 violates Section 2 of the VRA because the law interacts with social and historical conditions in Texas to produce a discriminatory result. Slip Op. 35-36. In reaching that conclusion, this Court accepted the district court's undisputed findings that over 600,000 registered voters in Texas lack SB14 ID, that a disproportionate number of these affected voters are African American or Hispanic, and that poor individuals face greater obstacles to obtaining SB14 ID. Slip Op. 23-26. Having found that SB14 violated the results

test of Section 2, this Court went on to vacate the district court's finding that SB14 has a discriminatory purpose. Slip Op. 19-20. It also vacated the remedy ordered by the district court, and remanded the case to the district court for further consideration of discriminatory purpose and the appropriate relief in accordance with this Court's opinion. Slip Op. 20, 36, 48-49.

6. In so doing, this Court recognized that the nature and scope of any permanent relief will depend upon the district court's findings on remand. Slip Op. 44-45. This Court also provided "guidance regarding what would constitute a properly-tailored remedy to address [SB14's] discriminatory effects." Slip Op. 45. This Court recognized the longstanding requirement that, when remedying a Section 2 violation, the district court's "first and foremost obligation" is to correct the Section 2 violation. Slip Op. 45. It also stated that courts "should respect a legislature's policy objectives" to the extent possible. Slip Op. 45. To that end, this Court observed that "[o]ne possibility" to remedy SB14's discriminatory result "would be to reinstate voter registration cards as documents that qualify as acceptable identification under the Texas Election Code." Slip Op. 47. But this Court recognized that "the district court must assess this potential solution in light of other solutions posited by the parties, including other forms of photo identification." Slip Op. 48. Regardless of the remedies that the parties might ultimately propose, this Court urged them "to work cooperatively with the district

court to provide a prompt resolution of this matter to avoid election eve uncertainties and emergencies." Slip Op. 48.

7. On August 5, 2015, this Court also issued a judgment stating that "the judgment of the District Court is affirmed in part, vacated in part, rendered in part, and dismissed in part. This cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court."

8. Consistent with this Court's rules and internal operating procedures, the Clerk's August 5, 2015, docket entries list the mandate pull date as September 28, 2015. Thus, until at least September 29, 2015, the district court is divested of jurisdiction to conduct further proceedings consistent with this Court's opinion.

9. The Secretary of State already has posted general information and important election dates for statewide, municipal, and local elections scheduled for November 3, 2015, and March 1, 2016. See Texas Sec'y of State, *Election Outlook*, available at http://tinyurl.com/ouvjp. Some dates are fast-approaching. Indeed, early voting for this November's election begins on October 19, 2015.

10. In order to ensure that voters in upcoming elections are not subject to a law that this Court and the district court have now both determined violates Section 2 of the VRA, the United States respectfully requests that this Court issue a limited remand, consistent with this Court's opinion, directing the district court to enter interim relief pending issuance of the mandate and further proceedings below.

11. One such appropriate order would put in place the guidance this Court provided in its opinion: namely, that voter registration certificates (*i.e.*, Texas's equivalent of voter registration cards) be added to the list of forms of identification provided in SB14 as sufficient for all voting-related purposes. Accordingly, voters would be able to cast a *regular ballot* by presenting a valid registration certificate at the time they appeared at an early voting center or at the polls. A voter who lacked sufficient identification (including a voter registration certificate) at the time he or she appeared at an early voting center or polling place could cast a *provisional ballot* that would be cured by presenting either one of the forms of identification listed in SB 14 *or* a voter registration certificate to the county registrar within six days of the election. The order could also direct that, consistent with current practice, county registrars should make replacement registration certificates freely and readily available to registered voters who seek them and whose registration certificates are lost or destroyed. See Tex. Elec. Code § 15.004 (2013).[2]

12. The timely entry of interim relief mitigates SB14's discriminatory result while also minimizing any voter confusion or disruption to upcoming election-day

[2] Under Section 15.004, a voter whose registration certificate is lost or destroyed may request a replacement certificate from his or her county registrar in writing or by telephone. The registrar must fulfill the request within 30 days. See Tex. Elec. Code § 15.004 (2013).

preparations, including poll-worker training and the issuance of election-related information, materials, and notices. Moreover, since SB14's enactment, county registrars throughout Texas have continued to issue initial and renewal registration certificates in accordance with state law. See, *e.g.*, Tex. Elec. Code §§ 13.142, 14.001 (2013). In addition, the Texas Secretary of State has advised in-person voters to bring such certificates to the polls in addition to their SB14 ID. See VoteTexas.Gov, *FAQ*, available at http://tinyurl.com/nnx9fay ("Do I still need to bring my voter certificate/card?"). This decreases any possibility that numerous replacement registration certificates will have to be issued in advance of the upcoming election.[3]

WHEREFORE, the United States respectfully requests a limited remand directing the district court to enter appropriate interim relief, consistent with this Court's August 5, 2015, opinion, pending issuance of the mandate and further proceedings below. To the extent this Court must modify its October 14, 2014, stay order in order to grant the relief sought, we respectfully request that it do so.

[3] By law, Texas is scheduled to issue renewal registration certificates to registered voters between November 15, 2015, and December 6, 2015. See Tex. Elec. Code § 14.001 (2013). In addition to the above-mentioned relief and any other ancillary relief the district court deems proper to effectuate the terms of the interim order (*e.g.*, requiring Texas to take such steps as are necessary to educate the public as to the terms of the interim relief), we anticipate requesting that the district court order Texas to remove from such renewal registration certificates any language that is inconsistent with the interim relief ordered (*e.g.*, that in-person voters may cast a regular ballot only upon presenting a form of SB14 ID).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 20, 2015, I electronically filed the foregoing MOTION with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that on August 20, 2015, I served a copy of the foregoing MOTION on the following counsel by certified U.S. mail, postage prepaid:

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s/ Erin H. Flynn
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Attorney

General Information

Court	US Court of Appeals for the Fifth Circuit; US Court of Appeals for the Fifth Circuit
Federal Nature of Suit	Civil Rights - Voting[1441]
Docket Number	14-41127
Status	Closed

December 21, 2015

Re: *Veasey, et al. v. Abbott, et al.*, Case No. 14-41127 (petition for rehearing en banc pending)

By ECF

Lyle W. Cayce, Clerk
U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, Louisiana 70130-3408

Dear Mr. Cayce:

Private Appellees submit this letter to advise the Court of rapidly approaching election dates in Texas and to emphasize the pressing need for interim relief. *See* Fed. R. App. P. 28(j); 5th Cir. R. 28.4. A panel of this Circuit affirmed the District Court's October 2014 ruling that Senate Bill 14 (SB 14) violates Section 2 of the Voting Rights Act because of its discriminatory effect on Black and Latino voters. Yet Texas's enforcement of SB 14 continues unabated today.

As the panel observed, over half a million Texas voters lack all of the limited forms of photo identification required by SB 14. These voters' rights are jeopardized in every election held with SB 14 enforced. In the near term, Texas will hold primaries in March 2016; early voting for these elections begins on February 16, 2016. Run-off elections are in May. Texas's continued enforcement of SB 14 will result in an irreversible denial of voting rights.

Private Appellees and the Department of Justice (DOJ) opposed Texas's motion for stay pending appeal after the District Court's ruling. Tex. Mot. (Oct. 10, 2014). The stay was granted. Order (Oct. 14, 2014). After the panel affirmed in August 2015 that SB 14 violates Section 2 because of its discriminatory effect, Private Appellees (and, separately, DOJ) again petitioned this Court for relief from SB 14. Private Appellees' Mot. (Aug. 20, 2015). That motion is still pending today, as Texas prepares for upcoming elections. As DOJ notes in its December 18 letter to the Court, Texas continues to advise voters that SB 14 is enforceable, and continues to insist that SB 14 is enforceable by issuing voter registration certificates maintaining the same.

In light of the upcoming election dates, Private Appellees respectfully urge this Court to remand this case to the District Court, with instructions to enter interim relief consistent with this Court's finding that SB 14 violates Section 2's ban on discrimination against Black and Latino

voters. Texas's continued enforcement of this discriminatory photo ID law cannot be countenanced by the very courts that have affirmed its unlawfulness.

Respectfully Submitted,

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December 18, 2015

VIA CM/ECF

Lyle W. Cayce
Clerk of the Court
United States Court of Appeals
for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Re: *Veasey* v. *Abbott*, No. 14-41127 (5th Cir.) (petition for rehearing en banc pending)

Dear Mr. Cayce:

This letter is to notify the Court of the closure of candidate qualifying for upcoming elections in Texas and the continued need for interim relief pending issuance of the mandate in the above-referenced case. See Fed. R. App. P. 28(j); 5th Cir. R. 28.4.

On August 5, 2015, the panel issued an opinion affirming the district court's finding that Senate Bill 14 (SB14), Texas's photo-identification requirements for in-person voters, violates Section 2 of the Voting Rights Act because it has a discriminatory result. *Veasey* v. *Abbott*, 796 F.3d 487, 504-513 (5th Cir. 2015), pet. for reh'g (filed Aug. 28, 2015). The panel vacated the district court's discriminatory purpose finding and remanded for further proceedings on that issue and consideration of the proper remedy. *Id.* at 503-504, 519-520.

Following the panel's decision, the United States filed a motion for a limited remand, pending issuance of the mandate, directing the district court to enter interim relief consistent with the panel's opinion. See U.S. Mot. (filed Aug. 20, 2015); U.S. Reply Mot. (filed Sept. 2, 2015). We argued that interim relief was necessary to ensure that voters in upcoming elections, including elections in November 2015, would not be subject to SB14's discriminatory provisions. The panel ordered that the motion be held in abeyance pending a determination of Texas's petition for rehearing en banc. See Order at 1 (Sept. 2, 2015).

Texas will conduct its primary election on March 1, 2016; early voting will take place from February 16 to February 26. See Texas Sec'y of State, *Election Outlook*, available at www.sos.state.tx.us/elections; Tex. Elec. Code §§ 41.007, 85.001 (2013). Absent a court order, Texas will impose SB14 as enacted. See FAQs, VoteTexas.Gov. Local registrars have recently issued renewal registration certificates to all registered voters, see Tex. Elec. Code §§ 14.001 and 14.002 (2013), and Texas continues to advise voters to bring such certificates to the polls, see FAQs, VoteTexas.Gov. Accordingly, allowing voters who lack SB14-qualifying ID to cast a

regular ballot upon presentation of a valid registration certificate remains a workable and appropriate interim remedy.

Sincerely,

Diana K. Flynn
Section Chief

s/ Erin H. Flynn
Erin H. Flynn
Christine A. Monta
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(202) 514-5361

cc: Counsel of Record via CM/ECF

No. _____

In the United States Court of Appeals for the Fifth Circuit

IN RE: STATE OF TEXAS,
Petitioner,

On Petition for Writ of Mandamus to the United States District Court
for the Southern District of Texas, Corpus Christi Division
Cases No. 2:13-CV-193 (lead case), 2:13-CV-263 and 2:13-CV-291 (consolidated)

PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, EMERGENCY MOTION TO STAY FINAL JUDGMENT PENDING APPEAL AND MOTION FOR EXPEDITED CONSIDERATION

FILED UNDER SEAL

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Counsel for Petitioners

Certificate of Interested Persons

Counsel of record certifies that the following persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Respondents	Respondents' Counsel
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• United States of America	Anna Baldwin Bradley E. Heard Elizabeth S. Westfall Richard Dellheim Robert S. Berman Avner Michael Shapiro Daniel J. Freeman Meredith Bell-Platts Jennifer L. Maranzano Bruce I. Gear U.S. Department of Justice John Alert Smith, III Office of the U.S. Attorney

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Third Party Movants	**Third Party Movants' Counsel**

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Interested Third Party	Pro Se
• Robert M. Allensworth • C. Richard Quade	Robert M. Allensworth, Pro Se C. Richard Quade, Pro Se

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Petitioners

Relief Sought

In *Purcell v. Gonzalez*, the Supreme Court unanimously reversed a Ninth Circuit decision that had enjoined a voter-ID law only a few weeks before an election, and cautioned that court-ordered changes to state election procedures may cause "voter confusion and consequent incentive to remain away from the polls" when issued weeks before an election begins. 549 U.S. 1, 4-5 (2006) (per curiam). The district court in *Veasey v. Perry*, No. 2:13-cv-193, and the consolidated cases issued an "opinion" only eleven days before the start of early voting stating that Texas's voter-identification law, Senate Bill 14 (SB 14), is invalid. The State of Texas respectfully asks this Court to issue a writ of mandamus instructing the district court to declare that Texas's voter-identification law will remain in effect for the November 2014 election cycle.

Issue Presented

On Thursday, October 9, 2014, the district court issued an "opinion" stating that SB 14 was invalid on multiple independent grounds, and announced the court's intention to issue an injunction. But the district court declined to actually issue an injunction or final judgment that the State could appeal. On Friday, October 10, 2014, the State asked the district court to issue an appealable injunction or judgment, but the district court refused to do so and gave no indication on when an injunction or judgment might issue. It appears that the earliest possible date on which an injunction or judgment might reasonably be expected is Tuesday, October 14, 2014 (Monday is a federal holiday). But early voting is scheduled to start on October 20, 2014, and the State must seek relief from this Court (or the Supreme

Court) to ensure that it can enforce its law for that election. The issue is whether the district court was correct to disapprove SB 14 as illegal and unconstitutional—and to do so in an "opinion" that sows confusion and uncertainty on the eve of an election.

Factual Background

In 2011, the Texas Legislature enacted Senate Bill 14 (SB 14), which requires voters to present government-issued photo identification when voting at the polls. The law took effect on June 25, 2013, and Texas has since held three statewide elections, five special elections, and countless local elections under this law. There were no reports of disenfranchisement. And Republican and Democratic state and county officials testified that the number of complaints and incidents of voters turned away from the polls were "vanishingly small." Ingram Dep. 53:25-54:2.

On Thursday, October 9, 2014, at 7:16 P.M.—only 11 days before early voting starts on October 20, 2014—the district court issued an "opinion" stating that SB14 violates the Fourteenth Amendment, violates section 2 of the Voting Rights Act, was enacted with an racially discriminatory purpose, and constitutes a "poll tax" in violation of the Twenty-Fourth Amendment. Appendix Tab A (opinion). But the district court did not enter an injunction or final judgment, stating only that they were "to be entered" in the future. *Id.* (opinion at 143). This led to understandable confusion with the parties, the public, and the press. *See, e.g.*, Greg Abbott seeks guidance on Texas voter ID ruling, available at http://www.statesman.com/news/news/greg-abbott-seeks-guidance-on-texas-

voter-id-rulin/nhgPD/ (noting that "[t]he judge concluded her opinion by saying that an injunction will be issued barring enforcement of the law, but she didn't specify when the injunction would be issued"). And it left some to speculate that an injunction might not be entered until after the November election.

Confusion over when the district court's promised injunction against SB 14 will issue is not acceptable on the eve of early voting. Thus, shortly before noon on Friday, October 10, 2014, Texas filed an advisory with the district court explaining the confusion caused by her decision to issue an "opinion" without an injunction or judgment, and requesting that the district court enter a judgment by the end of the day. Appendix Tab F (Defendants' Advisory). The plaintiffs, however, were content to allow the confusion to linger through the upcoming holiday weekend, and they responded that the district court need not issue a judgment or an injunction until "an appropriate time." Appendix Tab G (Plaintiffs' Response). Remarkably, the district court informed the parties that no judgment would be entered on Friday—and did not indicate when an injunction or judgment will issue. *See* Appendix Tab H (e-mail from the court). That means the earliest possible date on which the State could expect an injunction or judgment from the district court is Tuesday, October 14, 2014, (Monday, October 13, 2014 is a federal holiday)—even though the "opinion" came out on Thursday, October 9, 2014.

The State cannot file a notice of appeal (or seek a stay of the district court's ruling pending appeal) until an injunction or judgment has issued. Moreover, state officials remain obligated to obey SB 14 in the absence of an injunction or final judgment. Mere district-court "opinions" that have not been memorialized in an in-

junction or final judgment have no legal effect. And it is a criminal offense under state law for an election official to allow a voter to cast a ballot in violation of SB 14. Yet the newspapers are all reporting that SB 14 has been struck down, leading election officials to believe that they cannot enforce SB 14 (even though they must), and leading voters to believe that they need not bring photo identification when early voting starts on Monday, October 20, 2014. The district court's refusal to issue an injunction or judgment is indefensible, and it appears calculated to thwart the State's ability to obtain timely appellate relief before the start of early voting.

Because the State is not yet able to appeal what the district court has done, we are not (yet) able to ask for an emergency stay pending appeal. But because the situation created by the district court will lead to ever-expanding confusion as long as it is unremedied, and because the district court's opinion is so riddled with errors that it would warrant a stay if it were accompanied by an injunction or final judgment, we have filed this document as a petition for writ of mandamus. We respectfully ask this Court to order the district court to declare that SB 14 remains in effect, and that the State will be allowed to enforce SB 14 for the November general elections. That will serve as the functional equivalent of a stay pending appeal, and it will prevent the district court from depriving the State of its appellate remedies after announcing in an "opinion" that its voter-identification law is invalid.

If the district court issues an injunction or judgment over the weekend, or before the Court rules on the mandamus request, then we respectfully ask the Court to convert this filing into an emergency motion for stay of that injunction or judgment pending appeal—and to stay that injunction or judgment. If the injunction or

judgment presents new issues for the State to address, then we will file a supplemental brief with the Court. Finally, if the district court ever issues an injunction or judgment for the State to appeal from, the State respectfully asks the Court to set an expedited briefing schedule that will allow the Court to decide the merits of this appeal at the earliest possible sitting. As for timing, we respectfully ask the Court to issue mandamus (or a stay) as soon as possible, but no later than 5:00 P.M. on Monday, October 13.

REASONS THE WRIT SHOULD ISSUE

I. THE DISTRICT COURT'S "OPINION" VIOLATES THE SUPREME COURT'S INSTRUCTIONS BY INTRODUCING CONFUSION AND CHAOS ONLY 11 DAYS BEFORE THE START OF EARLY VOTING IN TEXAS

Emergency relief from this Court is warranted for many reasons. To begin, the district court's efforts to alter state election procedures only 11 days before the start of early voting cannot stand. See, *e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (instructing that courts are to refrain from making last-minute changes that may cause "voter confusion and consequent incentive to remain away from the polls"); *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968); *see also* Appendix Tab C (*Frank*, slip. op. at 7 (Williams J., dissenting from the denial of rehearing en banc) (admonishing her colleagues that they "should not have altered the status quo in Wisconsin so soon before its elections. And that is true whatever one's view on the merits of the case.")). Worse, the district court's opinion injects doubt where for fifteen months, and three statewide elections, there had been certainty: Texas vot-

ers have understood that they are required to show up to the polls with photo IDs, and Texas poll workers have understood the requirement to check for them.

The district court's flagrant disregard for the Supreme Court's admonition that courts are not to disturb the status quo during an election compels emergency relief. In *Purcell v. Gonzalez*, for example, the Supreme Court unanimously reversed a last-minute Ninth Circuit decision that had enjoined a voter-ID law, and cautioned that court-ordered changes to state election procedures may cause "voter confusion and consequent incentive to remain away from the polls" when issued a few weeks before an election begins. 549 U.S. 1, 4-5 (2006) (per curiam); *see also, e.g.*, *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968) (denying immediate relief, even after finding that a state statute violated the Constitution, because "the confusion that would attend such a last-minute change poses a risk of interference with the rights of other Ohio citizens" and "relief cannot be granted without serious disruption of [the] election process").

SB 14 *is* the status quo in Texas; it has been the status quo for 15 months and has governed numerous statewide and local elections. Worse, the district court's order upends the status quo for an election *that is already well underway*. The Secretary of State has already published and distributed training manuals for the upcoming election, and county officials have already trained approximately 25,000 poll workers how to check for certain types of ID, how to ask the voter to submit a "substantially similar name" affidavit, and how to accept a provisional ballot. Trial Tr. 322:2-6 (Sept. 10, 2014) (Ingram); *see also* DEF 0456 at 279–342 (Qualifying Voters on Election Day, Handbook for Election Judges and Clerks, 2014). These

activities, and more, have already taken place to prepare the State for the first day of early voting on October 20, 2014. "[W]here an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

The district court's eleventh-hour "opinion" is aggravated by the fact that the United States never asked the district court to enjoin SB 14 before the November 2014 election. The United States, along with every private plaintiff group except one, asked the district court for a trial date in March 2015. The district court preferred an earlier trial date and denied the request, but the United States was so unconcerned about the November 2014 election that it filed a motion for reconsideration, again urging the trial court to delay the trial until 2015.

Moreover, nearly one year ago, the State advised the district court that a trial held during September 2014—after Texas's election machinery had already begun to operate—was sure to cause confusion among voters and poll workers, and the State offered the district court options for reviewing the plaintiffs' claims in a manner that would not disrupt the 2014 election calendar. Texas explained that that the district court could conduct a PI hearing in July 2014, well in advance of the election. Texas's Advisory, ECF # 76 (Nov. 19, 2013); Tran. Civil Initial Conference, 29:22–30:13 (Nov. 15, 2013). Plaintiffs rejected the option of seeking a PI. Tran. Civil Initial Conference, 31:19–33:10 (Nov. 15, 2013). Texas then suggested that the Court hold trial in July 2014, rather than on the eve of early voting, Tran. Status Hearing, 4:24–5:15 (Nov. 22, 2013). Plaintiffs rejected that option, *id.* 6:21–7:23;

9:5–17, and the district court chose the September trial date. Thus, the present electoral chaos was both avoidable (as Texas demonstrated to the district court nearly a year ago) and seems to be exactly what the plaintiffs' lawyers intended to cause.

Once the trial date was set, and it was clear that the trial would end only a few weeks before early voting began, none of the plaintiffs ever asked for a preliminary injunction, which would have provided the appropriate mechanism for plaintiffs to seek relief in advance of the November 2014 elections. *See*, *e.g.*, United States Response Regarding the September 2014 Trial Date at 2–3 (Nov. 21, 2013) (ECF #85) (recognizing that private plaintiffs seeking an adjudication prior to the November 2014 election "could file a motion for preliminary relief").

The district court's "opinion" creates additional confusion because state officials will be bound by the eventual injunction while county officials (who were not parties to this lawsuit and cannot be subject to the injunction) remain bound by state law. A district court judgment has no precedential effect and binds only the parties to the judgment. *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case. . . . Otherwise said, district court decisions—unlike those from the courts of appeals—do not necessarily settle constitutional standards") (internal quotation marks omitted). The plaintiffs sued state officials, but neglected to sue any county officials. Whether this was intentional or an oversight, the result will be a disorderly election, with county officials legally bound to check for photo ID (and

subject to criminal penalties if they do not) and state officials legally bound not to enforce SB 14.

II. The District Court's Opinion Is Legally Indefensible, And Its Eventual Injunction Or Judgment Will Likely Be Reversed On Appeal.

Emergency relief is also warranted because the district court's legal analysis is indefensible—and the State is likely to succeed on its appeal of the eventual injunction or judgment. The district court disapproved SB 14 despite the Supreme Court's ruling in *Crawford* that voter-ID laws do not violate the Fourteenth Amendment; despite the fact that *SB 14 will not prevent a single one of the 17 voters who testified at trial* from voting; and despite the district court's recognition that "Plaintiffs have not demonstrated that any particular voter absolutely cannot get the necessary ID or vote by absentee ballot under SB 14," Appendix Tab A (opinion at 104).

The district court's errors are numerous and manifest. They include:

(1) overruling *Crawford* by holding that "the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph," *does* "qualify as a substantial burden on the right to vote [and] represent[s] a significant increase over the usual burdens of voting,"—even though *Crawford* specifically holds that it *doesn't*. *Compare* Appendix Tab A (district court opinion at 100-17) with *Crawford*, at 198.

(2) overruling *Crawford* by holding that there was insufficient evidence of voter impersonation in Texas to justify a voter-ID law—even though *Crawford* specifical-

ly holds that voter-ID requirements serve as legitimate fraud-prevention devices even in States with *zero* episodes of voter impersonation. *Compare* Appendix Tab A (opinion at 13-16, 39), *with Crawford*, at 194-95.

(3) declaring that SB 14 was enacted with a racially discriminatory purpose without *any* evidence that *anyone* who voted for or supported SB14 acted out of racist or racially discriminatory motives. Instead, the court relied on self-serving conjecture from legislators who voted against SB 14, *see, e.g.*, Appendix Tab A (opinion at 39–45), and offered a review of long-past history of the sort that the Supreme Court recently explained fails to take into account that "things have changed dramatically" in the south. *Compare Shelby County v. Holder*, 133 S. Ct. 2612, 2622, 2624-26, 2629 (2013) *with* Appendix Tab A (opinion at 3-8, 121-23).

(4) asserting that SB 14 will "result" in a "denial or abridgement" of the right to vote "on account of race or color"—even though the district court recognized that "Plaintiffs have not demonstrated that any particular voter absolutely cannot get the necessary ID or vote by absentee ballot under SB 14." Appendix Tab A (opinion at 104). In the absence of any evidence that anyone is unable to vote on account of SB 14, the district court tried to establish that blacks and Hispanics are less likely than whites to possess photo identification by relying on a "database matching" process that is so riddled with problems that it cannot generate reliable data.

(5) declaring that any voting law with a disparate impact on the poor—or on any group disproportionately composed of racial minorities—has a racially dispar-

ate impact under section 2 of the Voting Rights Act. *See* Appendix Tab A (opinion at 60–66).

(6) holding that SB 14 is an unconstitutional "poll tax" because Texas charges a $2 fee to obtain a birth certificate and voters who lack *both* photo ID *and* a birth certificate will pay this fee to obtain the necessary ID. Appendix Tab A (opinion at 134-141).

(7) relying upon the judgment and findings of an unconstitutional "preclearance" proceeding held in the district court for the District of Columbia—even though these findings and judgment were vacated in their entirety by the Supreme Court. *Compare* Appendix Tab A (opinion at 99–100), *with United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013) (noting that when a district-court decision is vacated on appeal, "its ruling and guidance" are erased."). The district court misleadingly asserts that its ruling was based "solely on the record developed at the trial of this case," Appendix Tab A (opinion at 100 n.434), when the district court erroneously admitted into evidence—at the pretrial conference (a mere six days before trial) and after the close of discovery—trial testimony and depositions from the section 5 proceeding, Pretrial Conference Tran. 16:8–27:12 (August 27, 2014).

(8) promising to enjoin SB 14's application to every voter in the State despite a severability clause declaring that "every provision in this Act and *every application of the provisions in this Act* are severable from each other." SB 14, § 25. Even in plaintiffs' worst-case-scenario view, more than 95.5% of registered voters in Texas already have an acceptable photo ID, and there is no conceivable basis for enjoining SB 14's application against the more than 95.5% of registered voters who have pho-

to identification. *See Leavitt v. Jane L.*, 518 U.S. 137, 138 (1996); *Voting for America, Inc. v. Steen*, 732 F.3d 382, 398 (5th Cir. 2013).

(9) promising to enjoin SB 14 wholesale even though the court insisted that this was an "as-applied challenge," *see, e.g.*, Appendix Tab A (opinion at 90, 96, 142–43), brought, not as a class action, but by fewer than two dozen Texas voters, even though Fifth Circuit precedent makes clear that relief in an as-applied challenge may not extend beyond the named parties to the lawsuit. *See, e.g.*, *Jackson Women's Health Organization v. Currier*, 760 F.3d 448, 458 (5th Cir. 2014).

(10) purporting to re-enact Texas laws that have been replaced and re-instituting a preclearance regime (at least on a limited basis) similar to the one Texas operated under prior to *Shelby County*: "Texas shall return to enforcing the voter identification requirements for in-person voting in effect immediately prior to the enactment and implementation of SB 14. Should the Texas Legislature enact a different remedy for the statutory and constitutional violations, this Court retains jurisdiction to review the legislation to determine whether it properly remedies the violations. Any remedial enactment by the Texas Legislature, as well as any remedial changes by Texas's administrative agencies, must come to the Court for approval, both as to the substance of the proposed remedy and the timing of implementation of the proposed remedy." Appendix Tab A (opinion at 143).

A. The District Court's Decision Defies The Supreme Court's Decision In *Crawford*.

Crawford holds that any inconvenience associated with obtaining photo identification is no more significant than "the usual burdens of voting." *See Crawford v.*

Marion Cty. Election Bd., 553 U.S. 181, 198 (2008) (opinion of Stevens, J.) ("[T]he 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."); *id.* at 209 (Scalia, J. concurring in the judgment) ("The universally applicable requirements of Indiana's voter-identification law are eminently reasonable. The burden of acquiring, possessing, and showing a free photo identification is simply not severe, because it does not even represent a significant increase over the usual burdens of voting.") (internal citations omitted). The trial court acknowledges *Crawford* but sought to limit its holding to the specific law—and the specific appellate record—in that case. The district court's efforts to escape *Crawford* are unavailing.

As the Seventh Circuit recently observed, *Crawford*'s specific holding that the process of obtaining photo identification "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" is a ruling that "hold[s] for Wisconsin as well as for Indiana"—and it holds for Texas as well. *See* Appendix Tab E (*Frank v. Walker* slip op. at 3). The district court thought it could ignore *Crawford* because Indiana accepted more forms of photo identification that Texas, and because Indiana accepts an "indigency affidavit" in lieu of photo identification. *See* Appendix Tab A (Opinion at 90-91). None of these observations, however, changes the fact that the process of obtaining a photo identification is not a "a significant increase over the usual burdens of voting"—and the district court said *nothing* to show that the process of obtaining

identification is more burdensome in Texas than it is in Indiana. If anything, the process is *less* burdensome in Texas because Texas charges only $2 for birth certificates, while Indiana charged between $3 and $12. See *Crawford*, 553 U.S. at 198 n.7.

The process of casting a ballot always imposes *some* small costs on voters—that is one reason why many people choose not to vote in elections. Traveling to the polls requires voters to spend money on gasoline or public transportation, and incur the opportunity costs of time away from work. Yet the Fourteenth Amendment does not require States to abolish in-person voting and allow everyone to vote by mail (as Oregon has done), nor does it require States to abolish Tuesday voting and allow everyone to vote on weekends or holidays. Registering to vote also involves inconveniences that might be described as "costs"; that is one reason why many do not register. But none of these laws "den[y]" or "abridg[e]" the right to vote of persons who *choose* not to incur these costs. Appendix Tab C (*Frank v. Walker*, Nos. 14-2058 & 14-2059, slip. op. at 6 (7th Cir. Sept. 30, 2014) ("We do not apply the label 'disfranchised' to someone who has elected not to register, even though that step also requires an investment of time.")). These minor inconveniences are constitutionally permissible—and *Crawford* holds that the minor inconveniences associated with obtaining photo identification are constitutionally permissible as well. A district court cannot hold a factual trial and declare that the Supreme Court was wrong to equate the burdens of obtaining photo identification with the usual inconveniences associated with voting.

Worse, the district court held that the State's interest in deterring and detecting voter fraud was insufficient to justify SB14 because "voter impersonation fraud" is "very rare." Appendix Tab A (Opinion at 113). Yet *Crawford* specifically holds that voter-identification laws are legitimate fraud-prevention devices *even in States with zero recorded incidents of voter impersonation*. *See Crawford*, 553 U.S. at 194-95. Texas has had multiple recorded incidents of voter impersonation—which is more than Indiana had—and even the plaintiffs' own experts opined that there is always fraud that goes undetected. Indeed, other types of fraud prevalent in Texas—such as voter-registration fraud and voter harvesting—present opportunities for in-person voter fraud. PL054 at 281 (identifying voter-registration fraud as a problem); Trial Tr. 220:17-221:19 (September 3, 2014) (observing that vote harvesting is prevalent in Texas and hard to catch). It is therefore reasonable to believe (as the Texas legislature did) that SB 14 would also deter these other types of fraud even if it would not prevent it directly. Trial Tr. 159:4-9 (September 8, 2014) (plaintiffs' expert recalls that concerns that voter-registration fraud can lead to fraudulent ballots was raised before the legislature during the debate over Voter ID). What's more, Texas's voter-identification law deters other types of fraud, because undocumented immigrants who register to vote cannot obtain driver's licenses, and persons under 18 who fraudulently register must present identification that shows they are too young to vote. The district court defied *Crawford* by holding that the State's interests in preventing voter fraud were insufficient to justify a photo-identification requirement.

The district court's actions are even more egregious in light of the plaintiffs' failure to identify even a single voter who will be unable to vote on account of SB 14. Since *Crawford* was decided six years ago, opponents of voter-ID laws have been preparing their case, searching for individuals disenfranchised by such laws, and they have come up short. The present dispute over Texas's voter-ID law, for example, is nearly three years old. *See* Complaint, *Texas v. Holder*, No. 12-cv-128 (D.D.C. Jan. 24, 2012). The United States has spared no expense in mounting an attack on SB 14. Lawyers from the Department of Justice have crisscrossed Texas, traveling to homeless shelters with a microphone in hand, searching in vain for voters "disenfranchised" by SB 14. Trial Tr. 143:24–145:9 (Sept. 3, 2014) (Mora) (testifying that a lawyer from the Voting Section of the Civil Rights Division searched for disenfranchised voters with a microphone at her homeless shelter). The United States also spared no expense with experts, hiring six testifying experts in this case alone. *See generally, e.g.*, Davidson Depo. (Dr. Chandler Davidson, a Sociology professor at Rice University, charged the United States over $250,000 to opine on the history of racial discrimination in Texas, and he never even testified at trial.). LULAC, MALC, NAACP, TLYVEF, and LUPE also searched the State for disenfranchised voters, but they could not identify by name any such voters. *Compare* Trial Tr. 249:20-250:4 (Sept. 3, 2014) (TLYVEF describing its efforts to register voters all over the state), *with id.* at 267:7-17 (TLYVEF not being able to identify a single person who is unable to vote because of SB 14); *see also* ECF # 550 (Stipulation of Facts Regarding La Union Del Pueblo Entero, providing that LUPE was not relying on any alleged injury to their members for standing purposes); ECF # 545

(Stipulation of Facts Regarding TLYVEF); ECF # 547 (Stipulation of Facts Regarding LULAC); Lydia Depo. at 129:9–14 (Plaintiff NAACP was not aware of the identity of any member of the organization who has been or would be injured by SB 14.).

And while the plaintiffs brought over a dozen voters to testify at trial—including a voter who refused to get an ID "out of principle," and voters who preferred to vote in-person rather than by mail—they failed to produce a single individual unable to vote on account of SB 14. *See* Appendix Tab B (demonstrating the ability of all 17 testifying witnesses to vote). And the plaintiffs' well-paid experts could not identify *any* evidence that *any* Texan will be prevented from voting.

And this is hardly surprising in light of the extensive steps Texas took to mitigate the already minor inconveniences associated with securing photo identicication. Texas mitigated these inconveniences by offering election identification certificates free of charge, *see* Tex. Transp. Code § 521A.001; allowing voters to cast provisional ballots if they appear at the polls without photo identification, *see* Tex. Elec. Code § 63.001(g); allowing voters who are 65 or older to vote by mail without a photo ID, Tex. Elec. Code § 82.003; allowing disabled voters to vote by mail without a photo ID simply by checking a box indicating that they are disabled, Tex. Elec. Code § 82.002; and allowing voters determined to have a disability by the United States Social Security Administration or determined to have a disability rating of at least 50 percent by the U.S. Department of Veterans Affairs to vote in-person without a photo ID, Tex. Elec. Code § 13.002(i).

Texas also took steps to make the free EICs easy to obtain. The Texas Department of Public Safety currently has 225 driver's license offices. Trial Tr. 149:23-150:7 (Sept. 9, 2014) (Peters); PX352. Approximately 98.7% of the Texas population live within 25 miles of a DPS office, and approximately 99.95% live within 50 miles of a DPS office. DEF1170; Trial Tr. 214:4-215:10 (Sept. 9, 2014) (Rodriguez); Trial Tr. 335:5-25 (Sept. 4, 2014) (Burden). Free election identification certificates are available at every DPS driver's license office. *Id.* And DPS has a "homebound program" to issue IDs to people with disabilities. Trial Tr. 162:18-163:22 (Sept. 9, 2014) (Peters). The Secretary of State's office, the Department of Public Safety, and the Counties themselves have implemented a program to issue EICs on a full-time basis in counties that do not have a DPS office, and "mobile EIC units" are being made available in targeted areas in the weeks leading up to the 2014 election. Trial Tr. 146:4-146:8 (Sept. 9, 2014) (Peters); Trial Tr. 220:8-222:12 (Sept. 9, 2014) (Rodriguez); Ingram Depo. 47:1-48:13; Cesinger Depo. 15:13-19; DEF2738 (County Locations Issuing EICs). Because of these efforts, every county in the State has had a physical location where a voter could obtain an EIC free of charge. *Id.*; DEF2739 (EIC State and County Participation Map); Trial Tr. 263:6-21 (Sept. 9, 2014) (Rodriguez). And as a result, the percentage of Texans living within 25 miles on an EIC-issuing office is greater than 98.7%. By contrast to all of this, Wisconsin's DMV offices are generally open only two days per week. Appendix Tab C (*Frank*, slip. op. at 8 (Williams, J., dissenting from the denial of rehearing en banc)).

The district court complains that Texas has issued only a few hundred EICs. Appendix Tab A (opinion at 106). But it is unclear what to make of that fact. It is possible that very few registered voters lacked ID to begin with, so the demand for EICs is low.[1] It is likely that many people without IDs chose to obtain a Texas Driver's License or ID card, instead of a free EIC, because those cards can be used for other purposes in addition to voting.[2] And it is certain that the Texas Democratic Party has been urging Democratic legislators to undermine the Secretary of State's efforts to educate the voters about EICs. *See* Email from S. Haltom, Texas Democratic Party to Chiefs of Staff (Nov. 3, 2011) ("And for God's sake, tell your respective members to stop 'educating' the voters about the new requirements …") (Lodged with the district court under seal through an offer of proof.); *see also, e.g.*, Holmes Depo. 60:15–19 (explaining that the Harris County Democratic Party "didn't tell me" about the availability of EICs and that "I wish I'd known that now").

[1] Support for this possibility can be found in the fact that since the implementation of SB 14, approximately 22,000 of the registered voters that plaintiffs claim do not have a photo ID have voted in at least one election. Amended Second Supplemental Rebuttal Decl. of M.V. Hood III at 7 (DEF2758).

[2] Indeed, many of plaintiffs' witnesses testified that they were taking steps to obtain photo IDs other than an EIC in order to use the ID for additional things. Trial Tr. 88:17-24 (Sept. 2, 2014) (F.Carrier); Trial Tr. 7:12-18 (Sept. 2, 2014) (Bates Video Deposition) (Bates Depo. 31:9-16); Trial Tr. 112:5-10 (Sept. 3, 2014) (Bingham Video Deposition) (Bingham Depo. 67:13-68:5) (testimony implies she wants her driver's license to be able to drive); Trial Tr. 299:10-13 (Sept. 3, 2014) (Washington Video Deposition) (Washington Depo. 48:13-16); Trial Tr. 141:21-22 (Sept. 4, 2014) (Estrada); Trial Tr. 238:22-23 (Sept. 5, 2014) (Maximina Lara) (plans to renew her driver's license implying she uses it for purposes of driving); Trial Tr. 357:14-15 (Sept. 8, 2014) (Trotter Video Deposition) (Trotter Depo. 79:11-20 & 87:10-88:5); Gholar Depo. 26:18-23; Benavidez Depo. 37:25–38:14.

As if *Crawford* were not enough to show that the district court is wrong, empirical studies demonstrate that voter-identification laws prevent no one from voting and do not reduce minority turnout. Two of the United States' own experts — lead expert Dr. Ansolabehere as well as Dr. Minnite—have published academic papers reporting no connection between voter ID laws and reduced minority turnout. Dr. Ansolabehere concluded that "the actual denials of the vote in these two surveys suggest that photo-ID laws may prevent almost no one from voting." *See* Rebuttal Declaration of M.V. Hood at 11 (DEF 0007) (citing Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, 42 PS: Pol. Sci. & Pol. 127, 129 (2009) (DEF 0034)). Dr. Ansolabehere concludes:

> Voter ID does not appear to present a significant barrier to voting . . . . Although the debate over this issue is often draped in the language of civil and voting rights movements, voter ID appears to present no real barrier to access.

Id. at 129. Dr. Lorraine Minnite published an academic study concluding that even though her "sympathies lie with the plaintiffs in voter ID cases," "[w]e should be wary of claims—from all sides of the controversy—regarding turnout effects from voter ID laws . . . . [T]he data are not up to the task of making a compelling statistical argument." Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification—Voter Turnout Debate*, 8 Elec. L. J. 85, 98 (2009) (DEF 2480).

These critical concessions from the United States' own experts were made when their academic reputations were on the line, not when they were being paid to testify. These concessions are confirmed by voter turnout statistics in both Indiana

and Georgia, showing that turnout did not decrease—and instead happened to increase—after those States' photo ID laws were implemented. *See* Rebuttal Declaration of M.V. Hood at 10 (citing Jason D. Mycoff, et al., *The Empirical Effects of Voter-ID Laws: Present or Absent?*, 42 PS: Pol. Sci. & Pol. 121 (2009) (DEF 0025)); Rebuttal Declaration of Milyo 32-35 (DEF 0009); Rebuttal Declaration of Jeffrey Milyo at 32 (DEF 0009) (citing The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis, Institute of Public Policy, University of Missouri (Nov. 2007) (DEF 0024)).

The Texas Legislators relied on these empirical studies and others in passing SB 14. *See, e.g.*, Trial Tr. 24:1-10 (Sept. 10, 2014) (Lt. Gov. Dewhurst) ("All the empirical data that I have seen has shown that there is no — no example that I am aware of where any jurisdiction with a photo voter ID requirement that individuals have not been able to obtain access to acceptable documents."); McCoy Depo. 76:12-17.

Texas's experience in the three statewide elections and numerous local and special elections under SB 14 coincides with the concessions by the United States' experts and the empirical studies from Georgia and Indiana. A representative from the Secretary of State testified that reports of voters being unable to present ID or experiencing other problems have been "vanishingly small." Ingram Depo. 53:25-54:2; Trial Tr. 309:17-18 (Sept. 10, 2014) (Ingram). As Keith Ingram explained:

> We have realtime feedback from the public, and we get thousands of phone calls every month, and there have been absolutely almost no phone calls, emails, problems related to lack of an ID. The few we have had primarily related to elderly folks who have been using an ex-

> pired driver license but don't drive anymore. That has been — we've had maybe three or four of those who have been unable to have an ID, and obviously they can vote by mail. But as far as a pattern of people who said, 'I don't have an ID, I don't know what to do, how can I get one,' doesn't exist. *Thousands of phone calls every month. We've got a public hotline that is on the back of every voter registration card, and we get all kinds of calls. We get calls because my name doesn't match. We get calls for lots of reasons. But not that I don't have an ID.*

Ingram Depo. 55:8-24 (emphasis added). Texas Legislators reported a similar lack of complaints over the rollout of SB 14:

> When voters aren't happy, you hear from them. They call your office. They find a reporter. They show up on a news station. And, again, there may have been a report somewhere, or a news story — or, you know, somewhere, but I'm just not aware of any. And, again, we're talking about millions of people.

Trial Tr. 255:11-21 (Sept. 10, 2014) (Patrick); *see also id.* at 253:19-254:22; 256:10-259:23; Patrick Depo. 253:3-254:5; Trial Tr. 335:10-336:1 (Sept. 10, 2014) (Ingram).

County election officials also testified to almost no complaints whatsoever. *See, e.g.*, Newman Depo. 33:14-15 (Jasper County) ("Q. Have you ever had complaints from constituents about the photo ID law? A. No."); Guidry Depo. 127:10-131:10 (Jefferson County); Stanart Depo. 109:19-24 (Harris County). Jefferson County, Texas, for example, is a diverse county whose seat is in Beaumont. Its population is over 10 percent Latino and over 30 percent African American. The county clerk was elected to office as "a Democrat," Trial Tr. 139:4 (Sept. 11, 2014) (Guidry), and testified that she was formerly "a union official" who was "very, very involved" in politics and political campaigns from "a very, very young age." *Id.*

139:5-13. Her office is responsible for administering elections, and if something goes wrong, she is often the first to know. *Id.* 139:17-141:25. Yet Guidry reported that she received only one complaint about the implementation of SB 14, and it concerned an election worker's *failure* to check someone's photo ID:

> Q. Alright, now did you hear any complaints from anyone that they were not allowed to vote in the March 2014 primary because of a similar name issue?
>
> A. No, sir.
>
> Q. And I guess it would be more a dissimilar name.
>
> A. Right.
>
> Q. Did anyone complain to you, "Hey, I was not allowed to vote because my name did not match my ID"?
>
> A. No, no.
>
> Q. Okay. Did anyone complain to anyone in your office that they were not allowed to vote in the March 21, 2014 primary because the name on the voter roll did not match exactly the name on their -- the ID that they presented?
>
> A. No.
>
> Q. Okay. Did anyone complain to you after the 2014 March primary that for any reason S.B. 14 prevented them from being able to vote?
>
> A. No, sir.
>
> * * *
>
> Q. Okay. So that letter is the only complaint you're aware of in March for the 2014 primary related to S.B. 14, correct?

A. Yes.

Q. And the gentleman who made that complaint was not complaining that he was not allowed to vote because of the photographic requirement, correct?

A. No, he was allowed to vote. He was complaining why was he not asked for his photo ID.

Trial Tr. 156:18-158:19 (Guidry); *see also id*. Guidry Depo. at 72:6-16; 73:4-11. Guidry also testified that she attends the county commissioners meetings every Monday, Guidry Depo. at 11:22-25, where no citizen has ever complained about SB 14's requirements, *id.* at 112:3-12.

B. The District Court's Conclusion That SB 14 Violates The "Results" Prong Of Section 2 Is Likely To Be Reversed.

SB 14 does not violate section 2 of the VRA, which prohibits "denial or abridgement of the right . . . to vote on account of race or color":

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .
>
> (b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that . . . . members [of protected racial minorities] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301 (emphasis added). To begin, SB 14 does not even "deny" or "abridge" the right to vote, given *Crawford*'s holding that the inconveniences as-

sociated with obtaining photo identification are "no more significant than the usual burdens of voting." And the plaintiffs were unable to locate *anyone* who is unable to vote on account of SB14. So the plaintiffs attempted to establish, via statistical guesses, that a disproportionate number of registered voters who lack photo ID are black or Hispanic—even though registered voters who lack photo ID can easily obtain that identification.

The plaintiffs' experts compared the list of registered voters with the names listed in databases of persons with SB14-acceptable ID. Registered voters who could not be found in those databases were placed on a "no-match" list. But there is no way to know the race or ethnicity of these voters because Texas does not record the race of registered voters. So the plaintiffs' experts tried to guess the voter's race by deploying an algorithm from Catalist LLC, which attempts to discern race from a person's name and address. The plaintiffs' experts estimated that at least 2.0% of registered non-Hispanic white voters, 8.1% of black registered voters, and 5.9% of Hispanic registered voters appeared on their "no-match" list.[3] See Notice of Filing of Corrected Supplemental Expert Report of Stephen Ansolabehere, ECF 600, 600.1.

The district court's "ID-disparity" theory is woefully insufficient to establish a violation of section 2. First, any registered voter on the "no match" list who lacks

[3] The actual ID disparity is but a few percentage points, yet the district court manipulates these statistics to claim that "African-American registered voters were 305% more likely and Hispanic registered voters 195% more likely than Anglo registered voters to lack SB 14-qualified ID." *E.g.*, Appendix Tab A (opinion at 120). But of course, that is "a misuse of data" designed to inflate the purported impact of SB 14 and that "produces a number of little relevance to the problem. . . . That's why we don't divide percentages." Appendix Tab E (*Frank*, slip. op. at 16 n. 3).

identification can obtain one. Many voting-age citizens of Texas, for example, are not registered to vote—and they must register before they can cast a ballot. Texas would not be violating section 2 if it were revealed that the voting-age citizens who are not registered are disproportionately black and Hispanic, because anyone in that situation can register. In like manner, anyone who lacks photo identification can obtain one—and the State offers election identification certificates free of charge. Persons who are *capable* of obtaining photo identification—but who *choose* not to do so—have not had their right to vote "denied" or "abridged," any more than an unregistered voting-age citizen who *chooses* not to register. *See Crawford*, 553 U.S. at 188. The plaintiffs' experts made no effort to determine the voters on their "no-match" list who have *chosen* not to obtain identification, or who have decided that they no longer want to vote. The racial makeup of the plaintiffs' "no-match" list is simply irrelevant.

Second, the database-matching process is not reliable. It is nearly impossible to know the race of a registered voter because the Secretary of State does not inquire about voters' race when they register. Trial Tr. 146:4-9 (Sept. 2, 2014). And it is difficult to determine whether a registered voter possesses a valid photo ID because neither the voter rolls nor the drivers' license database contains full social security numbers. *Id.* at. 141:10-142:25. On top of that, voter-registration lists have become inflated with deceased voters and persons who have moved, and the National Voter Registration Act imposes strict limits on state and local officials' ability to remove persons from their voter registration lists. As a result, many individuals will appear on the "no-match" list even though they have died or no longer live in Texas, and

the plaintiffs' experts had no way of knowing whether a registered voter on the "no-match" list is currently eligible to vote in Texas—even if they were eligible to vote in the past. It is not credible to suggest that 608,470 registered *and eligible* voters in Texas lack government-issued photo identification—as the district court found—a finding that would mean that 608,470 Texans who have registered to vote cannot drive a car, board an airplane, cash a check, open a bank account, or enter a courthouse to serve as a juror.

Finally, section 2 will exceed Congress's authority to enforce the Fifteenth Amendment if it means that Texas cannot enact a voter-identification law unless whites, blacks, and Hispanics possess photo identification in equal numbers. At the very least, the district court's construction of the Voting Rights Act's "results" prong presents grave constitutional questions that courts must avoid under the canon of constitutional doubt. The Fourteenth and Fifteenth Amendments prohibit only *purposeful* racial discrimination. *See City of Mobile v. Bolden*, 446 U.S. 55 (1980). They do not prohibit States from enacting laws with a mere disparate impact on racial groups. *See id.*; *Washington v. Davis*, 426 U.S. 229, 242 (1976). The district court's construction of section 2 sweeps far beyond what is needed to "enforce" the Fourteenth and Fifteenth Amendments. *See Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting) (suggesting that section 2 of the VRA is unconstitutional if it reaches too far beyond intentional discrimination). Moreover, the States hold a constitutionally protected prerogative to establish the qualifications for voting in state and federal elections. *See* U.S. Const. art. I, § 2, cl. 1; *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253-54 (2013). That in-

cludes the right to require voters to obtain and present photo identification when appearing to vote at the polls. The district court's construction of section 2 pushes constitutional boundaries by depriving the States of their entitlement to determine the qualifications of their voters, and it must be rejected under the canon of constitutional avoidance.

C. There Is No Evidence Whatsoever That SB 14 Was Enacted With A Racially Discriminatory Purpose

SB 14 was not enacted with a racially discriminatory purpose, and the plaintiffs have the documents to prove it. The district court improvidently gave Plaintiffs unprecedented access to the privileged and confidential papers and communications of dozens of Republican legislators who voted for SB 14.[4] The district court ordered discovery of the legislators' office files, bill books, and personal correspondence concerning SB 14. The district court also ordered electronic discovery of these Republican legislators' work e-mail accounts, private e-mail accounts, home e-mail accounts, and the e-mail accounts maintained by the businesses that employ the legislators when they are not in session. The district court even ordered discovery of confidential e-mail communications between legislators and their lawyers at the Texas Legislative Council. These discovery orders included legislative staff's files and e-mail accounts, and the files and e-mail accounts of Lieutenant Governor Dewhurst. As a result, these Republican legislators, their staff, and the Lieutenant Governor produced to the plaintiffs thousands of documents containing

[4] The Court denied the State's analogous request for discovery of Democratic legislators' files.

their confidential communications and impressions concerning SB 14. The plaintiffs who received these once-privileged documents included not only the United States, but numerous Democratic legislators who had opposed SB 14, along with counsel for the Texas Democratic Party. For the price of a filing fee, the district court allowed these partisan opponents of the Republican legislators to rummage through every one of their political opponents' office files and e-mail accounts.

The discovery did not end there. Many Republican legislators and their staffs, including Senator Dan Patrick and Lieutenant Governor Dewhurst, were forced to testify under oath in seven-hour depositions, where the United States and private plaintiffs asked about their conversations with other legislators, their mental impressions, and their motives for passing SB 14. All of this should have been foreclosed by the Supreme Court's admonition that legislative privilege will, in except the most extraordinary instances, block testimony from legislative members. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977) (holding that "extraordinary" circumstances must exist for a district court to sweep aside the state legislative privilege and that plaintiffs instead should prove illicit purpose with circumstantial evidence only).

This discovery turned up nothing whatsoever. After producing thousands of privileged documents and weeks of intrusive depositions, the plaintiffs did not offer into evidence *a single document or statement* from a legislator or staffer even suggesting that SB 14 was enacted for the purpose of suppressing the minority vote or yielding a partisan advantage. Moreover, when the Republican legislators fought the district court's discovery orders in an effort to preserve the legislative privilege,

the plaintiffs' lawyers repeatedly insisted that their entire case on illicit purpose turned on gaining access into these privileged matters and that such discovery would be dispositive. *See, e.g.*, Hr'g of February 12, 2014, at 29:19-22) (ECF # 168) (Ms. Baldwin: "… and also the legislative documents, which are documents that are at the heart of the United States' claim that this law was passed in part based on a discriminatory intent"); Hr'g of May 1, 2014, at 28:4-10 (ECF #263) ("Mr. Rosenberg: [T]hat evidence is going to be very, very important in this case dealing with the intent behind S.B. 14 itself."); U.S. Opp'n to Mtn to Quash, at 1 (ECF # 254) (demanding this "vital discovery from current and former legislators"). Perhaps most telling is that plaintiffs never even provided, nor asked their so-called purpose experts to review, these documents. And DOJ didn't even call its purpose expert to the stand to testify.

Circumstantial evidence also indicates that the Texas Legislature did not pass SB 14 with the intent to discriminate against racial minorities. *Arlington Heights*, 429 U.S. at 268. At the time of SB 14 passage, the Supreme Court had endorsed voter ID laws as lawful means for preventing fraud and boosting public confidence in the election process. *See Crawford*, 553 U.S. at 195-96 (discussing the United States' extensive history of voter fraud). Congress too had agreed "that photo identification is one effective method of establishing a voter's qualification to vote and that the integrity of elections is enhanced through improved technology." *Id.* at 193. And prominent veterans of the Executive Branch had publically endorsed photo ID laws. The Commission on Federal Election Reform chaired by

former President Jimmy Carter and former Secretary of State James A. Baker III, concludes as follows:

> A good registration list will ensure that citizens are only registered in one place, but election officials still need to make sure that the person arriving at a polling site is the same one that is named on the registration list. In the old days and in small towns where everyone knows each other, voters did not need to identify themselves. But in the United States, where 40 million people move each year, and in urban areas where some people do not even know the people living in their own apartment building let alone their precinct, some form of identification is needed.
>
> There is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election. *The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo identification cards currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.*

Building Confidence in U.S. Elections § 2.5 (Sept. 2005) (Carter–Baker Report) (DEF 0003) (emphasis added). And, perhaps more importantly, an overwhelming majority of Texas voters support a voter ID law. A few months before SB 14's passage, a poll conducted by the University of Texas and the Texas Tribune revealed that an overwhelming 75 percent of Texas voters (including 63 percent of black respondents and 68 percent of Hispanic respondents) agreed that voters should be required to present a government-issued photo ID to vote. *See* University of Texas / Texas Tribune, Texas Statewide Survey (Feb. 11-17, 2011) (DEF 0723). Legislators often cited these polls as a reason they voted for SB 14. *See, e.g.*, Trial Tr. 276:4-8 (Sept. 10, 2014) (Patrick) ("[I]t seems to me I remember a number where 96 percent of the Republicans and 74 percent of Democrats supported photo voter

ID."); McCoy Depo. 37:14-39:18; Dewhurst Depo. 55:11-22; Trial Tr. 245:10-246:5; Trial Tr. 399:21-402:24 (Sept. 10, 2014) (Fraser).

The legislature's stated purpose in enacting SB14 was to detect and deter voter fraud and enhance public confidence in elections. Courts are not permitted to second-guess a legislature's stated purposes absent clear and compelling evidence to the contrary. *See Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) ("[W]e ordinarily defer to the legislature's stated intent."); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) ("[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground of [improper legislative motive]."); *Whole Woman's Health v. Lakey*, 2014 WL 4930907, *6 (5th Cir.) ("Courts are not permitted to second-guess a legislature's stated purposes absent clear and compelling evidence to the contrary."). The district court's opinion contains *nothing*—let alone "clear and compelling evidence"—to show an improper motive on the part of the Texas legislature. The legislature enacted SB 14 because voter identification laws are popular: that explains the "departures from normal practice" and the rejection of amendments designed to water down the bill—which the district court somehow thought could be deemed evidence of racism. Opinion at 129-32. And *Shelby County* precludes courts from relying on decades-old incidents of official racism to impugn current officeholders in southern States. See Shelby County, 133 S. Ct. at 2612, 2622, 2624-26. The district court's insistence on finding racism where no evidence of racism exists can only reflect a determination to return Texas to the preclearance that *Shelby County* had invalidated.

D. The District Court's "Poll Tax" Holding Is Likely To Be Reversed.

The district court ruled that SB 14 violates the Twenty-Fourth and Fourteenth Amendments by imposing a "poll tax," because some voters will lack *both* photo identification *and* a birth certificate—and those voters will have to pay $2.00 to obtain the birth certificate needed to obtain photo identification. Op. at 134-41. The Ninth Circuit's opinion in *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012), *aff'd on other grounds*, 133 S. Ct. 2247 (2013), cogently explains why the district court erred.

The plaintiffs in *Gonzalez* challenged an Arizona law requiring voters to present proof of citizenship when they register to vote, and they made the argument that the district court made here: "[B]ecause some voters do not possess the identification required under Proposition 200, those voters will be required to spend money to obtain the requisite documentation, and that this payment is indirectly equivalent to a tax on the right to vote." *Gonzalez*, 677 F.3d at 407. The Ninth Circuit rejected this argument out of hand: "Although obtaining the identification required under § 16–579 may have a cost, it is neither a poll tax itself (that is, it is not a fee imposed on voters as a prerequisite for voting), nor is it a burden imposed on voters who refuse to pay a poll tax." The Ninth Circuit's subsequent discussion of the Twenty-Fourth and Fourteenth Amendments is instructive and equally applicable here.

Even apart from *Gonzalez*, the district court's analysis is untenable. A tax or fee that is charged for something that a small subset of the voting population needs to

vote is simply not a "poll tax" under any reasonable understanding of that term. A tax on gasoline is not a "poll tax"—even though nearly every voter must spend money on gasoline (or pay for transportation from someone who must buy gasoline) to travel to the polls.

And even if the district court's "poll tax" analysis were correct (and it isn't), it cannot support a blanket, permanent injunction against the enforcement of SB 14. It would still be constitutional for the State to enforce SB 14 if it repeals the $2.00 fee charged for birth certificates, or at least repeals that fee as applied to those who need a birth certificate to vote. Any judicial remedy on this "poll tax" claim must be limited to an injunction against the $2 fee for birth certificates. At the very least, the remedy it must allow for the State to resume enforcement of SB 14 if the $2.00 fee were ever to be waived or repealed.

E. The Remedy Promised In The District Court's Opinion Is Unlawful.

Remarkably, the district court has refused to issue an injunction or judgment. But its opinion tells us what that eventual injunction or judgment will look like. The district court intends to "enter a permanent and final injunction against enforcement" of the challenged provisions of SB 14. It will also order Texas to "return to enforcing the voter identification requirements for in-person voting in effect immediately prior to the enactment and implementation of SB 14," and *require Texas to seek prior approval from the district court* if the legislature or any state agency alters these pre-SB 14 procedures in any respect. This remedy is patently unlawful.

First, the district court repeatedly claimed that it was resolving only an "as-applied challenge" to SB 14—and not a "facial" challenge. Appendix Tab A (opinion at 90, 96, 142-43). Yet the law is clear that in an as-applied challenge, a district court may not extend relief beyond the named plaintiffs to the lawsuit. As this Court explained in *Jackson Women's Health Organization v. Currier*:

> [T]his case is an as-applied challenge to H.B. 1390. The district court's judgment granting the preliminary injunction enjoined "any and all forms of enforcement of the Admitting Privileges Requirement of the Act during the pendency of this litigation." To the extent that this language extends the preliminary injunction to actions by the State against parties other than JWHO and the other plaintiffs, it was an overly broad remedy in an as-applied challenge.

760 F.3d 448, 458 (5th Cir. 2014). *See also Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) ("[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs …"). Yet the district court's opinion promises to enjoin the State from enforcing SB 14 against *anyone*, regardless of whether they are named parties to this lawsuit. But this lawsuit was not brought as a class action, and a statewide remedy of that sort is impermissible in an as-applied challenge.

Second, SB 14 contains a severability clause that requires courts to sever not only the discrete statutory provisions of SB 14, but also the statute's *applications to individual voters*:

> Every provision in this Act and every application of the provisions in this Act are severable from each other. If any application of any provision in this Act to any person or group of persons or circumstances is found by a court to be invalid, the remainder of this Act and the application of the Act's provisions to all other persons and circumstances

> may not be affected. All constitutionally valid applications of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this Act invalid in a large or substantial fraction or relevant cases, the remaining valid applications shall be severed and allowed to remain in force.

SB 14, § 25. Under this severability clause, any relief must be limited to the individual voters or groups of voters whose legal rights have been or will be violated. And the Supreme Court and this Court have held many times that state severability clauses are conclusive and binding on federal district courts. *See Leavitt v. Jane L.*, 518 U.S. 137, 138 (1996) (per curiam) ("Severability is of course a matter of state law."); *Wyoming v. Oklahoma*, 502 U.S. 437, 460–61 (1992) ("Severability clauses may easily be written to provide that if application of a statute to some classes is found unconstitutional, severance of those clauses permits application to the acceptable classes."); *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924) (holding that a state court's "decision as to the severability of a provision is conclusive upon this Court."); *Voting for America, Inc. v. Steen*, 732 F.3d 382, 398 (5th Cir. 2013) ("Texas's strong severability statute, which preserves statutes even if in some "applications" they are unconstitutional, clearly applies to the hypothetical situations Appellees invoked. Tex. Gov't Code Ann. § 311.032(c). Severability is a state law issue that binds federal courts. *See Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996).").

The *only* legal violation found by the district court that could possibly justify a blanket, permanent injunction against SB14 is its "racially discriminatory purpose" finding—which is so transparently meritless that one must wonder whether the dis-

trict court included it only to ensure total invalidation of the law. Every other supposed violation found by the district court requires a remedy that is limited to the individual voters (or groups of voters) who will suffer a violation of their legal rights. They cannot support an injunction that prevents the State from enforcing SB 14 against the more than 95.5% of registered Texas voters who possess photo identification and will not encounter any inconveniences whatsoever on account of this law.

Finally, the district court has no authority to require Texas to "preclear" its voter-identification laws with an unelected federal district court sitting in Corpus Christi. A district court's remedial authority is limited to ending illegal conduct; it has no authority to arrogate to itself a veto power over *future* state laws that have yet to be been enacted. If Texas ever were to enact a new policy on voter identification, it can be challenged in a new lawsuit brought by injured plaintiffs. That mechanism is more than sufficient to ensure that Texas will comply with federal requirements. There is no justification for a district court to *sua sponte* establish a preclearance regime absent findings and evidence that ordinary litigation will be insufficient to remedy federal-law violations committed by state officials.

III. Texas Will Suffer Irreparable Injury Absent Mandamus Relief

The invalidation of a duly enacted statute will always impose irreparable injury on the State. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form

of irreparable injury."). The irreparable injury imposed in this case is greater than usual, because it changes the rules of a statewide election that already is underway, and does so only 11 days before the start of early voting. Training for approximately 25,000 poll workers and election judges is already in progress or completed. Before every election, the Secretary of State trains county officials on the requirements of state and federal election law, including SB 14, and those county officials train the approximately 25,000 poll workers who will enforce the law at 8,000 polling places around the State. Trial Tr. 322:2-6 (Sept. 10, 2014) (Ingram). In June of 2013, the Secretary of State began training county officials on the requirements of SB 14. *Id.* 322:6-25. During the weeks of September 8, 2014, and September 15, 2014, the Counties began training the 25,000 poll workers who will work the November election. *Id.* In addition to this training, the Secretary of State and Counties have been running radio ads, TV commercials, and web-based ads notifying voters on the requirements of SB 14.

The district court's last-minute opinion throws an unexpected wrench in the election. Absent a stay, state and county officials will have to retrain thousands of poll workers and election judges on the fly. Because it is too late to re-print the election manuals that poll workers use for guidance, the election laws governing the November 2014 election will be conveyed by word of mouth alone. And the voting public, who are now used to bringing photo ID to the polls, will be hopelessly confused when they are told by a poll worker that SB 14 is no longer the law — even though the poll worker has nothing in writing to prove it. The district court's order is all the more troubling because Texas made the district court aware of the adverse

consequences of its scheduling decision long ago. *See, e.g.*, Defendants' Advisory Regarding September 2014 Trial Date at 2–6 (ECF # 76); Decl. of B. Keith Ingram (ECF # 76.1).

The district court has aggravated the situation by refusing to issue an injunction or judgment to implement her opinion of Thursday, October 9, 2014. It is now past the close of business on Friday, October 10, 2014—and state and county officials can only wonder when or if the district court will enter an injunction against SB 14 before early voting starts on Monday, October 20. State and local officials *must* obey SB 14 absent an injunction, yet newspaper reports are telling everyone that the SB 14 has been struck down. It is indefensible for the district court to issue that opinion and then leave everyone guessing on whether and when an injunction against the law will ever issue.

IV. The Plaintiffs Will Not Be Substantially Injured By Mandamus Relief

The plaintiffs cannot possibly argue that they will be substantially injured if Texas holds a fourth statewide election under SB 14. The plaintiffs' lawyers have had three years to find someone whose right to vote was "denied" or "abridged" by SB 14, and they have failed to identify a single Texan. The plaintiffs produced 17 witnesses at trial, and SB 14 will not prevent a single one of them from voting. *See* Appendix Tab B.

And even if the plaintiffs could make a plausible claim of substantial injury, they should be estopped from making it. If the plaintiffs really believed that enforcing SB 14 for the 2014 general elections would impose a substantial injury on them,

then they should have sought a preliminary injunction against the law months ago—indeed, they should have sought this relief immediately after filing their lawsuit. That would have provided for the orderly adjudication of their claims in advance of the November election.

On top of that, nearly all of the plaintiffs, including the Department of Justice were content to allow the November election go forward without disruption. Most of the plaintiffs never even asked the district court for a ruling before the November general elections. Nearly all the plaintiffs, including the Department of Justice, sought a trial in March of 2015, and none of the plaintiffs sought preliminary relief. They cannot now claim to be irreparably injured by an election with which they were previously unconcerned. Nor can the organizational plaintiffs claim that they would be suffer an irreparable injury if the State obtains a stay: they have been unable to identify any members who will be disenfranchised, and the only injury the organizations assert on their own behalf is a monetary one arising from a different allocation of their resources under SB 14.

V. The Public Interest Favors Preserving The Status Quo During An Election

We already have explained how the district court's order will confuse the public, create chaos at the polls, undermine the public's confidence in the results of the November election, and undermine the public's confidence in the ability of their elected officials and appointed judges to govern. The Supreme Court has instructed that the district court should have avoided imposing these consequences, especially after the "election machinery is already in progress." *Reynolds*, 377 U.S.

at 585; *see also Purcell*, 549 U.S. at 4-5; *Williams*, 393 U.S. at 34-35. Indeed, even the five Judges on the Seventh Circuit who dissented from the denial of en banc reconsideration in *Frank* agree that the district court here erred: "Our court should not have altered the status quo in Wisconsin so soon before its elections. *And that is true whatever one's view on the merits of the case.*" Appendix Tab C (*Frank*, slip. op. at 7 (Williams, J., dissenting from the denial of rehearing en banc) (emphasis added)).

A stay of the district court's order pending appeal would allow for the orderly resolution of this dispute and allow the Secretary of State and Counties to carry out the statutory policy of the Legislature, which "is in itself a declaration of public interest and policy which should be persuasive." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937); *Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.*, 157 F.3d 500, 503 (7th Cir. 1998) ("[T]he court must consider that all judicial interference with a public program has the cost of diminishing the scope of democratic governance."). This is especially true for voter-identification laws, which States across the country will be permitted to use in the November 2014 election, and which Texas has used successfully in its elections since June 2013.

Conclusion

The petition for writ of mandamus should be granted. If the district court enters an injunction or judgment before this Court rules on the mandamus petition, then the Court should convert this filing into an emergency-stay application and grant the State's motion to stay the judgment pending appeal. The motion for expedited consideration should also be granted.

Respectfully submitted.

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Certificate of Service

I certify that this document has been filed with the clerk of the court and served by ECF or e-mail on October 10, 2014, upon counsel of record in this case.

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell
Counsel for Petitioner

Certificate of Electronic Compliance

Counsel also certifies that on October 10, 2014, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov/.

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell
Counsel for Petitioner

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS c/o Attorney General Greg Abbott *Plaintiff,* vs. ERIC H. HOLDER, JR., Attorney General of the United States, *Defendant.*	Case No. 1:12-CV-00128 (RMC, DST, RLW) Three-Judge Court

AFFIDAVIT OF KEITH INGRAM

STATE OF TEXAS §
§
COUNTY OF TRAVIS _____§

BEFORE ME, the undersigned authority, on this day personally appeared Keith Ingram, who, being by me duly sworn, deposed and stated as follows:

"I, the undersigned, am over 21 years of age, of sound mind, capable of making this affidavit, and have personal knowledge of the facts herein stated as being true and correct:

1. My name is Keith Ingram. I currently serve as the Director of Elections for the Texas Secretary of State, and I have been a licensed attorney since 1993. The Secretary of State, as the chief election officer for the State of Texas, has authority to obtain information and

maintain uniformity in the application, operation, and interpretation of the Election Code and of the election laws outside the Election Code. TEX. ELEC. CODE ANN. § 31.003 (Vernon 2010).

2. Federal approval of Senate Bill 14, enacted by the 82nd Legislature, is pending before the court in the above-styled cause.

3. In order for Texas to implement Senate Bill 14 for the November General Election, there are three factors to consider:

- Production and distribution of supplies for all of the November 2012 General and local elections currently scheduled;
- Re-production of Election Judge's and Clerk's 2012-2013 Training Materials; and
- Voter Education regarding new photo identification laws throughout the state of Texas.

4. In our communications with vendors in the election supply business, they would like to have the forms approved by the Secretary of State's office by early June, with a mass production of the forms in late June and during the month of July. The vendor who supplies the majority of the forms to the State of Texas entities told us that this timeline would be necessary in order to have the current forms to the counties and other local entities in time to conduct their local training classes and be ready to conduct early voting and election day voting for the November 6, 2012 elections. There are a handful of forms that would need to change in order to comply with SB-14 requirements. For example, the provisional ballot is a form that would need to be modified depending upon the outcome of this case. Those modified forms can be printed and supplied to the entities holding elections in a supplemental election worker kit if there is a decision as late as August 15, 2012. The vendor prefers a decision by August 1, but the absolute drop dead date is August 15.

5. With respect to the new training materials, the Secretary of State's office plans to proceed with drafting the materials and distributing to the counties and local entities. In order to

get the materials to the counties and local entities for the November early voting period, we would need to have everything distributed by August of 2012.

6. With respect to voter education, the Secretary of State, along with its advertising vendors, Burson-Marsteller and TKO, will have different ads, commercials and radio spots to educate the general public about the November 2012 Elections, which we will alter if Senate Bill 14 is pre-cleared. We have a road tour scheduled to begin in August of 2012 for the November 6, 2012 elections. We anticipate that paid advertising for the general election education program would start running in the August/September timeframe. The Secretary of State and its advertising vendors have already begun preparations for its voter education efforts in both the primary and general elections. While logistics of the program would likely not change significantly, the content of the efforts would change focus to educate voters on how they can comply with the requirements of Senate Bill 14.

7. In order to have a basic education program in place to have a successful November 2012 election season, the Secretary of State's office would need to have a final decision by August 15, 2012; however, to have a complete program that would mirror what our Texas voters, counties and local entities have become accustomed to, we would need to have a final decision no later than July 6.

Further Affiant Sayeth Not.

SIGNATURE

Keith Ingram
PRINTED NAME

SWORN TO AND SUBSCRIBED before me on the 22nd day of March, 2012.

[Check one:]

- ☑ personally known to me;
- ☐ proved to me on the oath of who is a credible witness personally known to me; or
- ☐ proved to me through the following current identification card or other document issued by the federal government or any state government containing the photograph and signature of the ~~acknowledging~~ person: _____.

LOURIA HARRIGAN
Notary Public
STATE OF TEXAS
Commission Exp. 12-03-2014
Notary without Bond

Notary Public, State of Texas

My Commission expires: _____

Notary Seal: _____