

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, :  
 :  
 Plaintiff, : Docket No. CA 12-128  
 :  
 vs. : Washington, D.C.  
 : Friday, July 13, 2012  
 ERIC H. HOLDER, JR., in his : 9:05 a.m.  
 official capacity as : (Day Five)  
 Attorney General of :  
 the United States, :  
 :  
 Defendant, and :  
 :  
 ERIC KENNIE, et al., :  
 :  
 Defendant-Intervenors. :  
 -----x

TRANSCRIPT OF BENCH TRIAL  
BEFORE THE HONORABLE DAVID S. TATEL  
UNITED STATES CIRCUIT JUDGE  
THE HONORABLE ROSEMARY M. COLLYER  
THE HONORABLE ROBERT L. WILKINS  
UNITED STATES DISTRICT JUDGES

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13 Proceedings recorded by machine shorthand, transcript produced  
14 by computer-aided transcription.

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1           THE DEPUTY CLERK: Civil action 12-128, State of  
2 Texas versus Eric H. Holder, Jr.

3           For the plaintiffs, Jonathan Mitchell, Patrick Sweeten,  
4 Matthew Frederick, Stacey Napier, Adam Mortara, Asha Spencer,  
5 and John Hughes.

6           For the defense, Meredith Bell-Platts, Jennifer  
7 Maranzano, Bryan Sells, and Matthew Colangelo.

8           For the Intervenor-Defendants, Chad Dunn, Gerald Hebert,  
9 Ezra Rosenberg, Nancy Abudu, Adam Harris and Mark Posner.

10           JUDGE COLLYER: Good morning everyone, welcome back.

11           Mr. Mitchell has joined the table. We're moving up in  
12 the world, right? We have Mr. Mitchell here himself.

13           MR. HUGHES: I thought I might need some legal  
14 assistance here at some point, Your Honor.

15           JUDGE COLLYER: Okay, I see. Well, it's a little  
16 late, but we'll hope if you need it you can turn to Mr.  
17 Mitchell.

18           All right, we have closing arguments here. Seventy-five  
19 minutes set aside for Texas and the United States and  
20 forty-five minutes for the intervenors.

21           We're hopeful that it won't take that long, but hope  
22 always springs forth in the human brain.

23           MR. HUGHES: Ms. Spencer did tell me to be both  
24 pointed and piffy.

25           JUDGE COLLYER: Ah, Ms. Spencer, thank you, Ms.

1 Spencer.

2 MR. HUGHES: I can promise to deliver on the former,  
3 but no, I can't make any promises on the latter, but I'll try.

4 JUDGE COLLYER: All right. Did you want to reserve  
5 any time?

6 MR. HUGHES: I do, Your Honor. I've got a timer up  
7 here and I'll just try to keep track of myself. I think about  
8 twenty minutes is what I would shoot to reserve depending on  
9 how things go.

10 JUDGE COLLYER: Okay. I will say for those assembled  
11 that Texas bears the burden here. The burden of proof that  
12 it's voter ID law is consistent with the requirements of the  
13 Voting Rights Act so therefore, Texas gets to argue first and  
14 last.

15 So you'll have the last word, Mr. Hughes.

16 MR. HUGHES: Nothing could please me more.

17 JUDGE COLLYER: I thought so.

18 Okay. We're ready to rock and roll. Go right ahead,  
19 sir, when you're ready.

20 CLOSING ARGUMENT BY MR. HUGHES

21 MR. HUGHES: Good morning, Your Honors, John Hughes  
22 from the law firm Bartlit Beck Herman Palenchar & Scott for the  
23 State of Texas.

24 I would like to close our case where Mr. Mortara began  
25 on Monday with how Texas satisfies its burden that Senate Bill

1 14 does not deny or abridge the right to vote on account of  
2 race or color or because of membership in a language minority  
3 group.

4           We satisfy our burden on this discriminatory effect  
5 prong of Section 5 in four ways. The first way I'd like to  
6 discuss is the social science literature that shows that photo  
7 ID laws have no effect on voting. And the substantial weight  
8 of the social science evidence establishes this and we need  
9 look no further than the Department of Justice's own expert  
10 Professor Ansolabehere.

11           I would like to show you a portion of his 2009 article  
12 in Political Science which is Plaintiff's Exhibit 38 which we  
13 have not looked at before. I've got it on the screen.

14           In the beginning of this very important article he asked  
15 the question. "Do voter identification procedures effect turn  
16 out of legal voters? Do they prevent and deter people from  
17 voting?" That's the question he asks in his peer review  
18 article and that's the question we need to answer on the effect  
19 prong of Section 5.

20           And what Professor Ansolabehere says there are, these  
21 are empirical questions of the sort that political scientists  
22 are quite good at addressing. Of course, Professor  
23 Ansolabehere goes on to address that very question in his  
24 article. I don't need to show the sections of the article  
25 because you've already seen them.

1           But what he concludes is that photo ID laws prevent  
2 almost no one from voting at the polls and he also concludes  
3 that photo ID law does not deter people from coming to vote.  
4 From coming to vote.

5           JUDGE TATEL: Wasn't that a multi-state study?

6           MR. HUGHES: Yes, Your Honor.

7           JUDGE TATEL: Didn't he testify here that the  
8 situation is different in Texas?

9           MR. HUGHES: Well, what the CCES data that he's  
10 looking at in his analysis is a multi-state study which  
11 includes 2006 data from Indiana when it had its photo ID  
12 request.

13          JUDGE TATEL: But many states had different kinds of  
14 voter ID laws.

15          MR. HUGHES: That is true.

16          JUDGE TATEL: He did testify that he stuck by that,  
17 but that, but that his research shows a different situation in  
18 the State of Texas.

19          MR. HUGHES: Your Honor, I think that the conclusions  
20 Professor Ansolabehere reached here do not relate to whether or  
21 not SB 14 will have an impact on turn out in voting in Texas.

22           In fact, if you'll recall the end of Mr. Mortara's cross  
23 examination, Professor Ansolabehere repeatedly admitted he had  
24 no opinion on the ultimate impact of SB 14 on voting behavior  
25 in Texas.

1 All he was asked to do, and the only opinion he rendered  
2 in this case was that there might be or there is an ID  
3 disparity in Texas which actually is the same as in Georgia and  
4 Indiana. There is an ID disparity there and nevertheless, the  
5 CCES data that he reviewed which includes those states, shows  
6 no one is deterred from voting.

7 Then the further evidence in the case is that Professor  
8 Shaw went one step further and he reviewed the CCES data from  
9 the 2008 general election which had substantial data for both  
10 Indiana and Georgia and the data from that survey evidence  
11 showed again that photo ID laws in those states prevented  
12 almost no one from voting.

13 I've got the results there shown on the screen in  
14 Indiana and Georgia 98, basically zero percent prevented from  
15 voting and Indiana one percent prevented from voting in  
16 Georgia. No evidence that's based on race or heat (sic).

17 So Professor Shaw did take it one step further and  
18 looked at those two states and testified that voting behavior  
19 in Texas in terms of turn out and so forth is similar to  
20 Georgia and Indiana which is why Professor Shaw concluded that  
21 the weight of the social science evidence established that SB  
22 14 would not prevent anyone from voting.

23 Again, Professor Ansolabehere does not dispute that. In  
24 fact, admitted he has no opinion on the ultimate effect on  
25 voting of Senate Bill 14.

1           We submit that that is sufficient to satisfy our burden  
2 under Section 5.

3           JUDGE COLLYER: Wait, wait, wait, but that's -- his  
4 statement that he has no evidence that it would have an effect  
5 doesn't undercut his evidence that there is an undue influence  
6 or an uneven influence, let me put it that way, on the numbers  
7 of minorities in the State of Texas who are active voters who  
8 do not possess the requisite identifications.

9           And so unless they do something about it and then the  
10 question is burden, unless they do something about it, an  
11 uneven impact would be felt, wouldn't it?

12           MR. HUGHES: I think that Professor Ansolabehere's  
13 analysis which you accurately described of course only gets us  
14 halfway to the ultimate question in the case which is whether  
15 anyone would be prevented from voting on account of race or  
16 color because of SB 14.

17           The fact that there's disparate rates of ID possession  
18 doesn't ultimately answer that question particularly because  
19 those are the exact same facts that are on the ground in  
20 Indiana and Georgia.

21           When you ask not this intermediate question about ID  
22 possession, but the ultimate question which is whether there is  
23 an actual effect on people voting, whether there's an actual  
24 denial, the evidence in states even where there's an ID  
25 disparity which we dispute is the case in Texas, but the

1 evidence in states where that is the case is that no one is  
2 prevented from voting which is the ultimate question Professor  
3 Ansolabehere just asks an ancillary question which once you  
4 reach his conclusion, then you have to ask does that ID  
5 disparity translate into people being turned away from voting  
6 on account of race or color, and the overwhelming weight of the  
7 social science evidence answers that in a resounding no.

8           Just like he said, the question he asked at the  
9 beginning of his article, we're good at answering these  
10 questions, he didn't answer the question of effect by looking  
11 at ID disparity. He answered the question of effect by looking  
12 at whether people were prevented from voting and that's the  
13 issue in this case.

14           You might ask yourself --

15           JUDGE COLLYER: Wait, wait, wait, one other question.  
16 Forgive me for interrupting, it's fast.

17           The charts that you just showed were persons who went to  
18 vote and were asked for ID and then allowed to vote anyway,  
19 right?

20           MR. HUGHES: That's correct.

21           JUDGE COLLYER: Okay. So it's not those who heard  
22 that they needed ID, couldn't get ID and didn't come to vote?

23           MR. HUGHES: That is correct, Your Honor, but again  
24 Professor Ansolabehere studied that very question --

25           JUDGE COLLYER: Right, right.

1 MR. HUGHES: -- and said there's no impact there.

2 I think I would like to pivot here and address what is  
3 directly related to your question. You may ask yourself why  
4 does this survey data show that one is prevented from voting  
5 even in states where there's an ID disparity.

6 I think common sense is because people who want to vote  
7 already have an ID or can easily get one. Here it's instructed  
8 to examine the evidence in this case concerning whether there's  
9 any evidence of an actual Texas voter who does not have ID or  
10 cannot easily obtain it.

11 JUDGE WILKINS: Mr. Hughes, do you concede then that  
12 it is a relevant consideration for us as to whether it is in  
13 fact easy to get one?

14 MR. HUGHES: I think that it --

15 JUDGE WILKINS: Did you just say that?

16 MR. HUGHES: I think that that informs the ultimate  
17 conclusion of the social science literature which is that why  
18 does photo ID prevent no one from voting? It's in these states  
19 because people have one or can go get one.

20 JUDGE WILKINS: You said easy to get one?

21 MR. HUGHES: Yes, I did.

22 JUDGE WILKINS: Doesn't that mean something?

23 MR. HUGHES: I mean, I think the evidence is it is  
24 easy to get one in Texas, and that's why there won't be a turn  
25 out impact just like there's no turn out impact in Georgia and

1 Indiana.

2 JUDGE WILKINS: Well, what does abridge mean? You  
3 said that the only relevant inquiry is whether someone was  
4 prevented from voting.

5 MR. HUGHES: That's --

6 JUDGE WILKINS: The statute says deny or abridge.  
7 What does abridge mean?

8 MR. HUGHES: Deny or abridge the right to vote. I  
9 think that means in this case you go to the polls and you can't  
10 vote because you don't have an ID.

11 JUDGE WILKINS: And so abridge means the same thing  
12 as deny, is that your argument?

13 MR. HUGHES: I think that's right.

14 JUDGE TATEL: Isn't the standard actually a little  
15 broader than that?

16 The Supreme Court's decision in Beer says the standard  
17 is whether the new law leads to a quote retrogression in the  
18 position of racial minorities with respect to their effective  
19 exercise of the electoral franchise, right?

20 MR. HUGHES: Yes.

21 JUDGE TATEL: That's our standard.

22 MR. HUGHES: That is the language we hear.

23 JUDGE TATEL: Would you agree with that that's what  
24 we are looking at here?

25 MR. HUGHES: Yes.

1           JUDGE TATEL: The question here that we have to ask  
2 is does SB 14 lead to a retrogression in the ability of  
3 minorities with respect to their effective exercise of the  
4 electoral franchise.

5           So that's broader than just showing up at the polls. I  
6 assume it's getting registered, it's getting all of the  
7 information you need to be able to qualify to vote, correct?

8           MR. HUGHES: I think that's why as I've explained  
9 with the social science literature we look at both the question  
10 of whether people are denied voting at the poll and whether  
11 they are deterred from coming to the polls by photo ID  
12 requirements which I think gets at what you're talking about.

13           JUDGE TATEL: Suppose you had a situation where a,  
14 unlike in Indiana, where there was no evidence, virtually  
15 everybody had the ID, required ID and as the Court said there  
16 was no evidence of any significant burden on any individual  
17 group.

18           Suppose you have a situation where under Section 5, not  
19 a constitutional case like Crawford, but suppose you had a  
20 situation where there were in fact large numbers of people  
21 without voter IDs and the evidence showed that obtaining the  
22 necessary qualifying documents to get an ID was in fact a  
23 serious economic burden.

24           MR. HUGHES: I think two things, Your Honor. I would  
25 dispute the premise that the evidence in Indiana is that

1 everybody has an ID.

2 JUDGE TATEL: That's what the Court said.

3 MR. HUGHES: There was I think the statement in  
4 Crawford is that there was no evidence in the record that  
5 anyone would be prevented from voting in that case.

6 But the social science evidence that Professor Shaw  
7 presented here and that Professor Ansolabehere agreed with is  
8 that there are some people in Indiana that don't have an ID and  
9 that there's actually a racial disparity and that nevertheless,  
10 people are still --

11 JUDGE TATEL: None of that was in the Crawford  
12 decision.

13 MR. HUGHES: You're right, none of that was  
14 necessarily in the record in Crawford, but it's in the record  
15 in our case.

16 JUDGE TATEL: But the question is what effect, how  
17 different is this case with Crawford?

18 Crawford was not a case about race.

19 MR. HUGHES: That's right.

20 JUDGE TATEL: You know, and there was no burden.

21 So I'm asking you a different, I am asking you a  
22 question about a Section 5 case where there are large numbers  
23 of people without the necessary documents to obtain a voter ID  
24 and where there's evidence to obtain that, to obtain those  
25 qualifying documents would in fact be a significant burden.

1           That would be a different case, correct?

2           MR. HUGHES: That would be a different case than what  
3 the record was in Crawford again distinguishing it from the  
4 record in this case --

5           JUDGE TATEL: Right.

6           MR. HUGHES: -- but again --

7           JUDGE TATEL: And you agree that in that case we  
8 would have a retrogression problem?

9           MR. HUGHES: No, I don't agree we would have a  
10 retrogression problem in that case particularly because there  
11 would have to be evidence tieing the burden that you're talking  
12 about to on account of race or color which I don't think  
13 there's any evidence of in this case.

14           And this gets us to I think a legal problem that  
15 Mr. Mortara discussed in his opening which is that the, all of  
16 the Section 2 cases that address instances of mere statistical  
17 disparity like felon disenfranchisement laws and voter purge  
18 laws and a property requirement for voting laws, the 9th  
19 Circuit case. All of those cases hold that a mere statistical  
20 disparity is insufficient to establish on account of race or  
21 color in Section 2 which is the same language that we'll have  
22 in Section 5.

23           If we apply, I think the standard that you are  
24 suggesting mere statistical disparity, that would leave the  
25 language interpreted in different ways between the two

1 sections.

2           So you would have an instance where a Section 2 claim  
3 against Indiana's voter ID law would fail even though there's a  
4 disparity and ID possession but an implication that a Section 5  
5 claim against Texas' law would prevail. And that inconsistency  
6 I don't think can be reconciled with the language of the  
7 statute particularly after Northwest Austin.

8           JUDGE TATEL: Excuse me. You can go in a minute, but  
9 explain what Northwest Austin. I guess I have a couple of  
10 questions about that.

11           Number one is, is there any court, do you know of any  
12 Section 5 court that's ruled that, that the retrogression has  
13 to be on account of race?

14           MR. HUGHES: I think it's implicit.

15           JUDGE TATEL: I just asked you whether any court has  
16 ruled that?

17           MR. HUGHES: I am not aware of a Section 5 case that  
18 strikes down a law on a mere statistical disparity that's not  
19 on account of race.

20           JUDGE TATEL: Well, there are many Section 5 cases  
21 for example, moving polling places, things like that have  
22 desperate impacts, they're considered violations of Section 5.

23           MR. HUGHES: I think that the moving polling place  
24 decided by the Department of Justice holds that that is just a  
25 case that holds that's subject to a Section 5 preclearance, not

1 that it's necessarily impermissible under Section 5.

2 JUDGE TATEL: So what's the difference then in your  
3 mind between the two parts of Section 5?

4 MR. HUGHES: Between purpose and effect?

5 JUDGE TATEL: Yeah, what's the difference?

6 MR. HUGHES: I think on effect you have to show the  
7 denial or abridgment of the right to vote on account of race or  
8 color by connecting those two things.

9 And the purpose you have to show the statute was enacted  
10 with a racially discriminatory purpose. I think they are  
11 distinct inquiries.

12 JUDGE WILKINS: So if the Texas legislature passed a  
13 law that said in order to vote, you have to satisfactorily  
14 recite the Pledge of Allegiance in English at the polling place  
15 in order to be able to cast your ballot, that would be okay  
16 under Section 5?

17 The reason being that you want people to be patriotic  
18 and understand what they're voting for and why they're voting?

19 MR. HUGHES: I guess you would have to look and see,  
20 you would have to perform an analysis to see whether that would  
21 deny or abridge the right to vote on the account of race or  
22 color and you would have to look at the purpose, the  
23 legislative purpose of, of the enactment and it would just  
24 depend on the evidence just like this case.

25 JUDGE WILKINS: I just told you the legislative

1 purpose.

2 MR. HUGHES: Was to --

3 JUDGE WILKINS: Let's put purpose aside.

4 MR. HUGHES: Okay.

5 JUDGE WILKINS: I just told you the purpose was  
6 patriotic.

7 MR. HUGHES: Okay. And we're only considering then  
8 whether there's an effect on the ability to vote? If there  
9 wasn't, then I don't think there would be a Section 5 problem,  
10 there might be other problems.

11 JUDGE WILKINS: So what about on account of race with  
12 respect to that?

13 MR. HUGHES: Well, that's why I say you would have to  
14 look at and see if there was, if that would result in the  
15 denial of people's ability to vote on account of race, if  
16 that's what the evidence established, then there would be a  
17 Section 5 problem.

18 JUDGE WILKINS: Well, the evidence established that  
19 it would disproportionately effect Latino vote.

20 MR. HUGHES: Would prevent Latinos from coming to the  
21 polls and would mean that they wouldn't exercise their right to  
22 vote? If that was the effect of that, if that was tied to  
23 racial considerations, then that would be evidence of a  
24 discriminatory effect on account of race or color.

25 I think if that was the evidence, then that could

1 potentially sustain a Section 5 violation. It depends on the  
2 evidence.

3 JUDGE WILKINS: Well, the evidence shows that it  
4 would be a disproportionate number of Spanish surname voters  
5 that or could not to a poll worker's satisfaction recite from  
6 memory the Pledge of Allegiance in English?

7 MR. HUGHES: Again, I think if that evidence  
8 establishes that people are denied to vote because I think  
9 maybe in this instance it would be membership in a language  
10 minority group, if that is what the evidence established, that  
11 they were denied the right to vote, then that would establish a  
12 Section 5 violation.

13 I think that, of course, is very different than the  
14 facts that are in evidence in this case but to answer your  
15 hypothetical, that's my answer.

16 JUDGE COLLYER: But you think that abridge and deny  
17 in this context are the same thing?

18 MR. HUGHES: I think you have got to look at the  
19 statutory language in the context of the policy which is under  
20 consideration and think about how a photo ID requirement might  
21 prevent people from exercising their electoral --

22 JUDGE COLLYER: I'm sorry, my question is back to the  
23 statutory text and let's not apply the text at the moment. I  
24 know you can't help it, but try.

25 So in the context of the Voting Rights Act statutory

1 language Section 5 do abridge and deny mean the same thing when  
2 it says that you can't, a state that's covered can't adopt a  
3 law that has the effect to deny or abridge the right to vote?

4 I mean, deny means stop and abridge means curtail  
5 doesn't it?

6 MR. HUGHES: I think that would be one fair  
7 interpretation.

8 JUDGE COLLYER: So if deny means all together and  
9 abridge means some limitations or whatever but not necessarily  
10 all together, right?

11 MR. HUGHES: I think that abridge would mean imposing  
12 substantial impediments on the ability of people to vote. Of  
13 course, linked to on the account of race or color which we can  
14 never lose sight of that fact under the statute.

15 JUDGE COLLYER: No, no, I agree with you and then we  
16 have because of language minority. I agree with you that those  
17 things are there. I was just going back to deny and abridge.

18 MR. HUGHES: I think as I've stated the way that that  
19 operates in this case with the statute that's under  
20 consideration here is deny is are you denied at the poll  
21 because of no photo ID and abridge is are you discouraged from  
22 voting because you don't have the necessary identification to  
23 go to the polls and vote.

24 JUDGE TATEL: Right.

25 MR. HUGHES: Again, the evidence is that a mere

1 statistical disparity in ID does not result in that consequence  
2 which is why we satisfy our burden.

3           You might ask yourself why that's the case. It's  
4 because people who want to vote already have an ID or can  
5 easily get it. And it's instructive here to examine the actual  
6 evidence in this case --

7           JUDGE COLLYER: Wait, but before you -- examine the  
8 actual evidence.

9           MR. HUGHES: Whether there's any actual Texas voter  
10 who does not have an ID or cannot easily obtain it.

11           The Department of Justice says there are 1.5 million  
12 Texas voters who do not have a state ID. If that were remotely  
13 true the courtroom would be filled with such people where at a  
14 minimum the defendants should have been able to bring at least  
15 one member of the Texas House or Senate who voted against SB 14  
16 who could identify an actual Texas voter without ID.

17           But we didn't hear that testimony and, of course, the  
18 defendants tried to find such people and here I think it's  
19 instructive to look at the people they had on their witness  
20 list, initial witness list, that supposedly fell into this  
21 category.

22           JUDGE TATEL: Isn't it the State's burden to show  
23 that it won't have a retrogressive effect?

24           MR. HUGHES: Your Honor, I'm not denying our burden  
25 which I think the social science establishes.

1 JUDGE TATEL: Right.

2 MR. HUGHES: What I'm trying to get at here --

3 JUDGE TATEL: I mean, the Government, technically the  
4 Government didn't need to do anything, right?

5 MR. HUGHES: You're right.

6 JUDGE TATEL: Right. So you have to have evidence  
7 that it will not have a retrogressive effect. And the fact  
8 that the Government hasn't brought in someone who was  
9 discriminated against doesn't answer that question does it?

10 MR. HUGHES: No, it doesn't, Your Honor, but I think  
11 that the lack of the Government to identify an actual person  
12 who falls into this category illustrates why the social science  
13 literature comes out the way it does. Because people who want  
14 to vote already have an identification or can easily get one.  
15 That's what the evidence has shown in this case.

16 We don't have any specific people identified. I think  
17 we had at trial we had, Ms. Rodriguez testified that she might  
18 not have the documents necessary to get a free -- did you have  
19 a question, Your Honor?

20 JUDGE WILKINS: So is it your testimony that there  
21 are zero people out there who don't have photo ID but who are  
22 registered to vote?

23 MR. HUGHES: No, Your Honor, that is not --

24 JUDGE WILKINS: Is that your argument?

25 MR. HUGHES: -- that's not my argument.

1           My argument is that the evidence in the case is  
2 consistent with the social science literature. I think it's  
3 hard to find people who don't have a photo ID.

4           Certainly the defendants have not unearthed anyone. The  
5 only person that came to testify at this trial didn't have one  
6 had all of the necessary documents to get an identification  
7 certificate notwithstanding a declaration that suggested  
8 otherwise, and that was Ms. Rodriguez. And that's of course no  
9 aspersions on her, but that's just consistent with all of the  
10 social science evidence. We can't find these people. That's  
11 because people either have ID or will easily get one and go  
12 ahead and vote.

13           JUDGE TATEL: Those are two different points. I  
14 think it's important to separate those, either have or can  
15 easily get.

16           Dr. Shaw, your witness, let's assume that his  
17 statistics, let's assume that his survey is valid.

18           MR. HUGHES: Is valid?

19           JUDGE TATEL: Is valid.

20           MR. HUGHES: Yes.

21           JUDGE TATEL: He found and he actually asked  
22 questions about not just state ID but also, but also federal  
23 ID, right?

24           MR. HUGHES: Yes, all forms of ID.

25           JUDGE TATEL: He found that there was a subset of

1 people who did not have IDs, correct?

2 MR. HUGHES: That's right, yes, that's right.

3 JUDGE TATEL: So we know that. The record does tell  
4 us that there is a subset of registered voters who lack the ID,  
5 correct?

6 MR. HUGHES: That's right.

7 JUDGE TATEL: Okay. So the Government's argument as  
8 I understand it is that with respect to that subset of people  
9 that even if you're complete, even if Dr. Shaw's numbers are  
10 valid; that is, that there's no racial differential with  
11 respect to the people who have it, that with respect to the  
12 people who don't, the economic burden of obtaining it combined  
13 with the fact that minorities in Texas are disproportionately  
14 poor, that that's what creates the retrogressive effect. In  
15 other words, and that's what distinguishes this case from  
16 Crawford, that's their argument.

17 MR. HUGHES: I don't think that's necessarily their  
18 theory. Their theory is that there's an ID disparity and  
19 Anglos --

20 JUDGE TATEL: What's your response to what I just  
21 said?

22 MR. HUGHES: My response to that is for looking at  
23 Shaw's survey, there is no statistically significant difference  
24 between that no ID population, and if I may --

25 JUDGE TATEL: I said I'll accept it.

1 MR. HUGHES: Okay.

2 JUDGE TATEL: But he does concede, he finds that  
3 there's a significant percentage of minorities, Anglos,  
4 minorities and Anglos who don't have SB 14 qualifying IDs,  
5 right?

6 MR. HUGHES: That's right.

7 JUDGE TATEL: Among that subset of people, the record  
8 evidence shows that there is a, that there is a  
9 disproportionately heavy economic burden on minorities to  
10 obtain it.

11 MR. HUGHES: I do not agree that the record evidence  
12 shows that for that subset of people.

13 JUDGE TATEL: Really?

14 MR. HUGHES: That may be true for the population at  
15 large. But if we are looking at the 10 percent of people who  
16 responded to Dr. Shaw's survey who don't have ID there's  
17 literally no evidence in the record about the socioeconomic  
18 status of those people much less evidence that would tie the  
19 lower --

20 JUDGE TATEL: Right.

21 MR. HUGHES: -- socioeconomic status of those people  
22 to some kind of government sponsored racism which would  
23 necessary to connect to the causation language in the statute.

24 JUDGE TATEL: I want to come back to that.

25 For purposes of my question assume that that, that

1 argument doesn't work. Okay. Just you don't have to concede  
2 anything, let's just assume for the purposes of our discussion  
3 here that that argument, that argument doesn't, that it's not  
4 supportable. That in fact, a disproportionate effect is all  
5 you need, okay.

6 MR. HUGHES: Okay.

7 JUDGE TATEL: What the record does show, this census  
8 data which shows that minorities are proportionately poor. We  
9 know that it costs money to get a birth certificate. We know  
10 that there are many, many counties that don't have the  
11 necessary offices to get them.

12 We know from testimony that some people have to drive  
13 over a 120 miles, have to drive up to a 120 miles to get it.  
14 We know that minorities have a disproportionately low number  
15 have cars. This is all record evidence, correct?

16 MR. HUGHES: I think there's some evidence in the  
17 record. It's generally consistent with what you describe.

18 JUDGE TATEL: It's all in the record.

19 The argument is that Texas has the burden of proof. We  
20 know that there's a subset of people without IDs. And we also  
21 know that the burden falls disproportionately on minorities  
22 because minorities are disproportionately poor.

23 MR. HUGHES: I disagree with the premise that we know  
24 that the burdens falls disproportionately on minorities among  
25 the people that don't have ID.

1           The record evidence is about the whole 25 million person  
2 population of Texas. The relevant population here in your  
3 hypothetical is Dr. Shaw's --

4           JUDGE TATEL: But if you have the burden of proof,  
5 don't you have to establish that that's the case?

6           MR. HUGHES: I think that puts us at two things. I  
7 think we at least satisfy our burden because we have evidence  
8 again that answers the ultimate question.

9           But even directly to your hypothetical, we have proved  
10 through Dr. Shaw's survey that there is no ID disparity and  
11 moreover, there really isn't any record evidence about anyone  
12 that doesn't possess a birth certificate. There's just, there  
13 is no evidence about that. And I think it puts us to an  
14 impossible burden if we have to keep shifting, shifting,  
15 shifting what we proved.

16           We have satisfied our burden with the social science  
17 evidence. We more than satisfied when we get to ID disparity.

18           The Government's whole theory, the Justice Department's  
19 theory and preclearance in their theory now is that ID  
20 disparity is what drives the case. If we show that there's no  
21 ID disparity that should be more than sufficient for us to  
22 satisfy our burden.

23           I don't think it's right that Section 5 requires us to  
24 go figure out how many people have a birth certificate and  
25 whether there's a racially distribution of that and there is no

1 evidence in the case on that in any event.

2 JUDGE COLLYER: I'm sorry, am I interrupting you,  
3 Judge?

4 JUDGE TATEL: No.

5 JUDGE COLLYER: Dr. Shaw's surveys took enormous hits  
6 from other expert witnesses as to whether they, the results are  
7 reliable. That is, with a two percent response rate whether  
8 putting aside everything else, whether one can draw legitimate  
9 conclusions.

10 So if we were and we haven't talked and we haven't  
11 studied it, but if we were to accept that testimony, what does  
12 that do to Texas' case? If Dr. Shaw's surveys are not part of  
13 it, if you don't have anything to counter Dr. Ansolabehere's  
14 analysis that of the voters, and we're not even talking about  
15 people who want to vote in the future, or who aren't voters  
16 yet. He looked at people who are actually registered voters  
17 and whether they could meet the limited number of authorized  
18 identifications that are in SB 14. And that's where he came  
19 out.

20 What is your evidence to rebut that if not Dr. Shaw?

21 MR. HUGHES: In the hypothetical the survey is gone.

22 JUDGE COLLYER: Right.

23 MR. HUGHES: And you say that we set aside all of our  
24 criticisms of Professor Ansolabehere and there's an ID  
25 disparity.

1           Do I have that, your hypothetical? Because we of  
2 course, totally, totally disagree with Dr. Ansolabehere.

3           JUDGE COLLYER: I got this part.

4           MR. HUGHES: In your hypothetical, Your Honor, yes,  
5 we satisfy our burden in the way we have already explained  
6 because the evidence we have is Professor Ansolabehere says in  
7 his article answers the ultimate question of effect. All of  
8 this other stuff is ancillary.

9           The second reason that we carry our burden is that the  
10 social science evidence to the extent that there's any evidence  
11 in the states that already have this empirical evidence that  
12 there's any impact everyone agrees it is not based on race or  
13 color.

14           All of this other stuff about who has an ID, who has a  
15 birth certificate and how far you have to drive is just way  
16 back to the ultimate question of whether there's an effect and  
17 we don't have to guess about whether there's an effect because  
18 we can look at the evidence from Indiana, we can look at the  
19 evidence from Georgia, and the Department of Justice's own  
20 expert concedes both that there's no effect at the polls,  
21 there's no deterrence and he agrees that even in states like  
22 Indiana where there's an ID disparity, no one has been effected  
23 much less on race.

24           I think that evidence is overwhelming, essentially  
25 undisputed and it satisfies our burden.

1           JUDGE WILKINS: Just so that we're clear about your  
2 theory of how we should interpret what on account of race  
3 should be interpreted.

4           I think your argument was that literacy tests, I think  
5 the argument was made in the opening and in your briefs that  
6 literacy tests were stricken down because, in large part  
7 because the educational system was discriminatory against  
8 minorities, but that's not the case anymore where 50 years plus  
9 past Brown v Board of Education.

10           So is it Texas' theory then that there would be no  
11 Section 5 problem with the literacy tests today?

12           MR. HUGHES: I think they are specifically prohibited  
13 under but setting that aside, I think if you're just asking in  
14 the context of Section 5 and again, I think at every case you  
15 have to look at the actual evidence, and certainly I'm not  
16 promoting a literacy test, but if the evidence was that it  
17 didn't deny or abridge the right to vote on account of color  
18 and there was no racially discriminatory purpose, if that were  
19 the evidence, I suppose you could have no violation under those  
20 standards.

21           I think given the historical pedigree that might be an  
22 impossible thing for the evidence to show. But if we are in a  
23 world of a hypothetical I suppose that that's theoretically  
24 possible that the evidence could show that.

25           JUDGE WILKINS: Okay, same question for poll taxing.

1           MR. HUGHES: Again, I think there's an amendment to  
2 the Constitution which bars those. But if we're just looking  
3 at Section 5, I think you have to look at the evidence. And  
4 again, everything you are talking about has been held invalid  
5 in a context of a racially discriminatory implementation of the  
6 procedures plus a whole bunch of evidence that there's a  
7 racially discriminatory effect because of state  
8 institutionalized racism.

9           If you remove all of that historical context and asked  
10 me in a pure hypothetical if none of that exists, all of that  
11 evidence is gone, I suppose you could have a Section 5, there  
12 wouldn't be a Section 5 violation if that's what the evidence  
13 showed and, of course, setting aside other provisions of law I  
14 think would invalidate that.

15           But again, I think it is what does the evidence show  
16 about whether or not there will be a denial or abridgment of  
17 the right to vote on account of race or color and I don't want  
18 to repeat myself, but I think that we have met our burden on  
19 that issue on the social science.

20           I would like to spend some time talking about Professor  
21 Ansolabehere --

22           JUDGE TATEL: Let me make that a little easier for  
23 you. Just let's continue this for a sec. I want to pursue  
24 Judge Collyer's question.

25           Assume that we find flaws in Dr. Shaw's surveys so that

1 we can't rely on them. Assume also that we find flaws in the  
2 Government's, in Dr. Ansolabehere's surveys, okay. So we  
3 basically have no expert testimony we can rely on.

4 Your position I take it is that you've satisfied your  
5 burden of proof with the social science research, correct?

6 MR. HUGHES: Yes, because you do have expert  
7 testimony from Dr. Shaw on the issue not only of whether it  
8 would have an effect, but whether it would have an effect on  
9 race or color and Professor Ansolabehere agrees.

10 JUDGE TATEL: But not on the basis of anything in  
11 this case, correct?

12 MR. HUGHES: Professor Shaw --

13 JUDGE TATEL: No, if we don't accept their surveys  
14 and if we don't accept Dr. Ansolabehere's survey -- research,  
15 we reject all of that --

16 MR. HUGHES: Right.

17 JUDGE TATEL: -- as invalid, an inadequate basis for  
18 making a decision. I'm not saying this isn't adequate. I just  
19 want to be sure I understand your case.

20 Your argument is that Texas has satisfied its burden  
21 based on the social science research, right?

22 MR. HUGHES: Yeah, yes, but I want to make sure that  
23 it's clear that we have expert testimony from Dr. Shaw who  
24 studied what actually empirically happened in Indiana and in  
25 Georgia, studied whether Indiana and Georgia were comparable to

1 Texas in terms of voting behavior and rendered an expert  
2 opinion and because of all of that there would be no effect.

3 So that's our case there. We also have the legal point  
4 that Mr. Mortara made in opening that under Crawford the  
5 burdens of obtaining an ID are not materially different than  
6 voting.

7 JUDGE TATEL: Well, first of all, Crawford is not a  
8 Section 5 case and Crawford made very clear that there was  
9 absolutely no evidence in the record of that case of a  
10 significant burden for a significant group of people, correct?

11 MR. HUGHES: That's, that's --

12 JUDGE TATEL: Okay. You and I agreed earlier that  
13 that would be a different case, right?

14 MR. HUGHES: Right.

15 JUDGE TATEL: Crawford doesn't resolve this case.

16 MR. HUGHES: I wouldn't say that. We have advanced a  
17 legal argument to that effect, Your Honor, and I don't want to  
18 take a bunch of time talking about it unless you do, I'm happy  
19 to.

20 But our argument that Mr. Mortara made in opening is  
21 that it's a legal argument in the holding of Crawford required  
22 an ID and when offered a free one cannot deny or abridge the  
23 right to vote. That's our legal argument.

24 JUDGE TATEL: I think we've got your briefs and we  
25 have discussed. Just one last question and then you can get

1 back to your argument.

2           Even if you are right that you have to show, that a  
3 statistical differential is not enough, it has to be on account  
4 of race.

5           What about the Supreme Court's decision in LULAC which  
6 says the political social and economic legacy of past  
7 discrimination for Latinos in Texas may well hinder their  
8 ability to participate effectively in the political process.

9           MR. HUGHES: I think you --

10          JUDGE TATEL: Seven years ago.

11          MR. HUGHES: I'm familiar with that passage, Your  
12 Honor. I think again, you would have to look at the evidence  
13 and see whether that's tied to any of the issues in this case  
14 and --

15          JUDGE TATEL: Well --

16          MR. HUGHES: Go ahead, Your Honor.

17          JUDGE TATEL: No, you go ahead. I don't want to  
18 interrupt you.

19          MR. HUGHES: I don't think that the evidence in this  
20 case is that possession of forms of identification acceptable  
21 under SB 14 are, like access to that is somehow linked to past  
22 history of discrimination in Texas.

23          JUDGE TATEL: LULAC says the political social and  
24 economic legacy of past discrimination.

25          The point is, and I'm not saying this is right or not,

1 I'm just trying to get your answer to it, the point is that  
2 there's a disproportionately high number of minorities for whom  
3 SB 14 is an economic burden. Then you have LULAC, Supreme  
4 Court of the United States saying seven years ago or five years  
5 ago that the economic disadvantages are a legacy of racial  
6 discrimination in Texas.

7 MR. HUGHES: Your Honor, it's only an economic burden  
8 for people who don't have a birth certificate, and there's  
9 essentially no evidence in the record that there is any one who  
10 falls into that category.

11 I think we are kind of off on a, I don't want to call it  
12 a tangent but something that is really not fundamental to the  
13 issues in this case. It is certainly not the Justice  
14 Department's theory, they have not put forth any evidence on  
15 that. They tried a case of non ID possession. We have  
16 answered that.

17 Again, these are all of the ancillary questions that  
18 don't get at the ultimate question of whether or not anyone is  
19 denied or abridged the right to vote and moreover, there's no  
20 evidence that there is some racially disproportionate lack of  
21 birth certificate.

22 In fact, the evidence says that notwithstanding the  
23 legacy of Texas, as it applies to Hispanics, that Hispanics  
24 have greater access to citizenship certificates and passports  
25 which is the relevant inquiry here whether that legacy ties to

1 denial of access to ID possession and the evidence is to the  
2 contrary and it's just common sense given the demographics of  
3 Texas and the nature of shared border between Texas and Mexico.

4 JUDGE COLLYER: I don't know that there's evidence,  
5 there's reference to that. I don't know that there's evidence,  
6 but it doesn't matter.

7 Don't take your time on that.

8 MR. HUGHES: The evidence is Professor Shaw's survey,  
9 Your Honor, which found that.

10 JUDGE COLLYER: Okay.

11 MR. HUGHES: I'd like to spend some time talking  
12 about Professor Ansolabehere's or the issue of ID disparity.  
13 This kind of gets to the third way that we satisfy our burden.

14 JUDGE COLLYER: Yeah. You missed number two, I got  
15 number one.

16 MR. HUGHES: Well, number two is that the social  
17 science evidence -- One is no effect.

18 Two is no effect on account of race or color even where  
19 there's an ID disparity in Indiana and Georgia.

20 And the third is about whether there's an ID disparity.  
21 And yesterday Professor Ansolabehere testified at the beginning  
22 of his direct examination that there are a couple of different  
23 ways that you could go about answering that question.

24 One would be to do a survey which we did, I'll talk it  
25 in a minute.

1           The other way is this data base match project that was  
2 employed by Professor Ansolabehere. I want to be clear it's  
3 been the position of the State of Texas since preclearance all  
4 the way through trial that the database match project is  
5 hopelessly flawed and not a valid methodological approach to  
6 determining the answer to anything.

7           I want to talk about what I call show stopper's total  
8 problems with Professor Ansolabehere's approach each of which  
9 alone is sufficient to reject his analysis.

10           The first is that show stopper number one is that the  
11 Department of Justice's database match project includes only  
12 half of the IDs acceptable under SB 14 which leaves Professor  
13 Ansolabehere rendering opinion about who possesses half of the  
14 relevant IDs and no opinion about whether that disparate  
15 possession rate will lead to a differential ability of people  
16 to vote.

17           JUDGE WILKINS: I don't think that you want to argue  
18 that when Texas didn't even subpoena the federal data until two  
19 weeks or something before the close of discovery.

20           MR. HUGHES: Well, Your Honor, you're right, there  
21 were certain sequences in discovery process in this case that I  
22 think given --

23           JUDGE WILKINS: Certain sequences is an  
24 understatement.

25           MR. HUGHES: Well taken, Your Honor.

1           I think even when we, once we actually talked to some of  
2 the agencies, it was unclear even if we had started way earlier  
3 that we could get the data in time. So we went about figuring  
4 it out.

5           JUDGE TATEL: That's not what record shows, sir.

6           I had a hearing where we went through that chapter and  
7 verse, sir. You could have gotten it from some of these  
8 agencies in as short of two or three weeks.

9           MR. HUGHES: Your Honor, I wasn't participating in  
10 that hearing. I'm sorry and I'm not totally familiar with the  
11 details.

12           But given what happened, the way we analyzed whether  
13 Texans possessed all forms of SB 14 ID was to conduct a survey  
14 asking those questions which again, Professor Ansolabehere  
15 suggested was a valid methodological approach.

16           I want to turn now to what I call show stopper number  
17 two on Professor Ansolabehere's approach which is he employed  
18 the same flawed approach that brought down the database match  
19 in Crawford.

20           Mr. Mortara showed in his opening the Crawford District  
21 Court opinion that said the database match there was hopelessly  
22 flawed because the expert in Crawford did not attempt to clean  
23 the bloated voter rolls and the Supreme Court did not disturb  
24 that holding of course.

25           Here the undisputed evidence from the testimony of Keith

1 Ingram, the director of Texas Elections is that the Texas rolls  
2 are bloated.

3           It's also undisputed that Professor Ansolabehere did  
4 nothing to clean the registered voter list. He cleaned the DPS  
5 but not the registered voter list, and that's why we have over  
6 50,000 dead people that Professor Ansolabehere said will be  
7 disenfranchised and hundreds of thousands of people like  
8 Mr. Mortara's brother-in-law Mr. Craft, our law partner Mr.  
9 Byers who the Department of Justice says will be  
10 disenfranchised who moved.

11           Those are nice celebrity examples that Mr. Mortara  
12 showed yesterday but there are categorical problems with what  
13 Professor Ansolabehere did and it's exactly the same thing that  
14 brought down the list in Crawford, and the fact that he didn't  
15 clean the rolls and that the rolls are bloated, those are  
16 undisputed facts and sufficient to bring down his analysis.

17           JUDGE COLLYER: So can we now take this down? It's  
18 in the way of people.

19           MR. HUGHES: I was going to come to it later.

20           JUDGE COLLYER: Never mind.

21           MR. HUGHES: The third show stopper, and this  
22 requires a little bit more explanation is Professor  
23 Ansolabehere employed a completely biased matching protocol.  
24 We are aware of the bias against women. I won't spend any time  
25 on that.

1           But what I want to do is focus on how his approach to  
2 matching was biased to not match Hispanics and that for  
3 Hispanics the disparity that Professor Ansolabehere attributes  
4 to lack of state ID possession is actually attributable to the  
5 biased matching protocol that he used.

6           This is what Dr. Sager explained. I want to begin with  
7 what he did. What Dr. Sager did is he looked at what Professor  
8 Ansolabehere did and he saw that in Professor Ansolabehere's  
9 matched about 45 percent of the people he matched between DPS  
10 and SOS 9 match, very high quality matched.

11           The rest of the people had to be matched on first name,  
12 last name, date of birth. Professor Ansolabehere wanted to  
13 answer the question whether matching on first name, last name,  
14 date of birth, a big piece of the pie would be, one of the  
15 matching protocols would be biased against Hispanics.

16           The way that he did this is he went into the DPS and SOS  
17 and he compared everyone that matched on SSN 9. Again, this  
18 has nothing to do with Professor Sager's attempt to match  
19 people who Professor Ansolabehere said didn't have an ID. This  
20 is his bias opinion.

21           He took everyone who matched on SSN 9, that was about  
22 five and a half million people. And then he looked to see  
23 whether those people had the same name. For 5.2 million of the  
24 people they matched on SSN 9 they had first and last name  
25 matches. That's the pie chart on the left.

1           What it shows is that the SSVR, the Spanish surname of  
2 those people was about 20 percent which is about what you would  
3 see SSVR in the registered voter population in Texas, actually  
4 a little lower.

5           On the right hand side these are people this is almost  
6 500,000 people that we know are the same because they match on  
7 SSN 9, but the database has, they don't match on first name or  
8 last name.

9           And Professor Ansolabehere looked inside of that giant  
10 list, 460,000 people to see what is the SSVR rate in that list,  
11 it's 28 percent. From that he determined that the matching  
12 algorithms that required precise matching between first name  
13 and last name were biased against Hispanics because of name  
14 characteristics of Hispanics so that that leads to the bias  
15 that he saw here and he predicted that he would see exactly the  
16 same thing in the VRNID, and I have got a pie chart for that,  
17 which is exactly what he did.

18           So on the left I have Professor Sager's predicted no  
19 match, and on the right I have got the VRNID and you can see  
20 that they are essentially the same.

21           Again, just to make sure that the Court understands  
22 every single person in the VRNID by definition did not match  
23 first name, you know, by one of the names. And so the bias  
24 that Professor Sager sees translates there and explains the  
25 entire disparity that Professor Ansolabehere attributes to lack

1 of ID possession.

2 Dr. Sager has proved that it's a result of the flaws or  
3 the bias in the matching algorithm.

4 And something very interesting with regard to this issue  
5 happened yesterday in court. And what happened was Dr.  
6 Lichtman got on the stand and he essentially agreed with this  
7 theory. Then Professor Ansolabehere more or less suggested  
8 that it might be possible as well.

9 What they both said is that if Hispanics, if what's  
10 really going on is not an ID disparity. Hispanics actually  
11 have an ID, but there's a little difference between what's on  
12 their ID and what's on the voter roll, then that might lead to  
13 a problem because of what would occur in the polling place.

14 I want to just stop and make sure everyone understands  
15 that Dr. Sager's testimony about the matching bias is  
16 undisputed. No one has an alternate explanation and now what's  
17 happened on the last day of trial is the defendants have  
18 changed their theory of the case. They realize they can't  
19 prove Hispanic ID disparity.

20 Now they're suggesting there's going to be problems at  
21 the polls. But the concerns about problems at the polls for  
22 Hispanics or anyone else with name differences like nicknames,  
23 spaces in names, maiden names and so forth, those are unfounded  
24 because the director of Texas Elections, Keith Ingram,  
25 testified that the implementing regulations of Senate Bill 14

1 will address those issues.

2           And Professor Ansolabehere had no reason to think that  
3 poll workers would not fairly implement those regulations and  
4 allow people with similar but not identical names to go ahead  
5 and vote. And Dr. Lichtman just speculated that poll workers  
6 wouldn't follow the law. But there's no evidence in the case  
7 that Texas poll workers will not follow the law.

8           Texas is entitled to a presumption that they will  
9 lawfully and fairly implement Senate Bill 14 and Section 5  
10 can't be used to invalidate Senate Bill 14 based on speculation  
11 about what poll workers might do in the future which I think  
12 totally disposes of Professor Ansolabehere's findings on  
13 Hispanics ID possession.

14           Now we have to flip and ask ourselves what does his  
15 analysis show about possession of again, just half a loaf of  
16 state IDs for African American voters. Again, here the  
17 evidence, he can't reach any scientifically valid conclusions  
18 on this front because he relied on Catalist and their propriety  
19 algorithm that purports to assign the race of registered  
20 voters.

21           This algorithm has never ever, not a single time been  
22 tested in a state like Texas where the voters don't report  
23 their race. And also, there aren't any benchmarks for  
24 Ansolabehere to compare to here because he only ran his  
25 Catalist algorithm on his 1.9 million population and, of

1 course, he doesn't know the racial break down of that  
2 population, he uses Catalist to try to figure it out.

3           Of course, Professor Shaw's surveys, whatever else you  
4 might think of them, draw, casts some serious doubt on the  
5 validity of using Catalist in Texas because he called 600  
6 people that Catalist said were black and 200 said that Catalist  
7 was wrong.

8           I think Senator Ellis and his family would agree that  
9 Catalist cannot be used to draw scientifically valid  
10 conclusions about possession of IDs amongst black voters in  
11 Professor Ansolabehere's population.

12           The last problem is that as Mr. Mortara showed yesterday  
13 during the cross examination there are both explained and  
14 unexplained reasons why Professor Ansolabehere's approach is  
15 just hopelessly flawed.

16           And Mr. Mortara went through all of the categorical  
17 reasons why thousands upon thousands of people could be, are in  
18 Professor Ansolabehere's no ID list that shouldn't be. People  
19 like Senator Hutchinson, Senator Graham, Senator Van De Blue,  
20 Alicia Ellis, Representative Pena, John Byers, Brandon Craft,  
21 all in different categories, all proving that there are just  
22 hopeless systematic flaws.

23           JUDGE WILKINS: Well, couldn't Texas have taken its  
24 own voter registration database and searched it against its  
25 driver's license and license to carry databases and come up

1 with a protocol that would account for all of these flaws that  
2 you say Dr. Ansolabehere had and then presented us with that  
3 data?

4 MR. HUGHES: Theoretically I think that would be  
5 possible with unlimited time and resources. I think what --

6 JUDGE WILKINS: Well, you have had since, you know,  
7 you went to the Attorney General and sought preclearance a year  
8 ago almost, right?

9 MR. HUGHES: Yes, Your Honor.

10 And what I think our position has been since  
11 preclearance up until now is that because of all of these  
12 problems, it's just not something that can be done to produce  
13 reliable results and that's what Professor Sager testified.

14 He said even with all of the time that I have spent and  
15 all of the different ways of matching, I could look on my  
16 screen and see all sorts of things that would require the  
17 exercise of human judgment and when you have millions of  
18 millions of records, it's just hopelessly impossible to do  
19 which is why we have not tried to do that to establish our  
20 burden.

21 We have looked to the survey, we have looked to the  
22 social science.

23 JUDGE TATEL: When you say the survey, you mean Shaw  
24 survey, that's what you mean?

25 MR. HUGHES: Yes, that is what I was referencing.

1 JUDGE TATEL: Thank you.

2 I'm curious, you have listed I think five problems with  
3 the, with Dr. Ansolabehere's study. Do you think, is it your  
4 view that the first one is itself self-sufficient to reject the  
5 study? That is, that this doesn't consider federal IDs at all?

6 MR. HUGHES: Yes.

7 JUDGE TATEL: Okay. If that's true, then that  
8 eliminates Sager's testimony also, correct?

9 MR. HUGHES: I think Sager's testimony about matching  
10 was merely --

11 JUDGE TATEL: Because it rests on, on the  
12 Ansolabehere's, correct?

13 MR. HUGHES: Correct. I don't think that that part  
14 of his testimony is what I'm talking about.

15 JUDGE TATEL: Which part are you talking about?

16 MR. HUGHES: The Sager piece I was focusing on was  
17 where he showed there is this systematic Hispanic bias in what  
18 Ansolabehere did. There's a whole lot --

19 JUDGE TATEL: I understand. You are relying on  
20 Sager's criticism of Ansolabehere, right?

21 MR. HUGHES: That's right.

22 JUDGE TATEL: That I understand. But there's no  
23 affirmative, there's nothing affirmative left. If we reject  
24 Ansolabehere's study because it doesn't include the federal  
25 databases, then that takes care of Sager also. He has nothing

1 to contribute to the case, correct?

2 MR. HUGHES: We're not even suggesting, we are not  
3 even suggesting --

4 JUDGE TATEL: Right.

5 MR. HUGHES: -- helps to satisfy our burden.

6 JUDGE TATEL: If we reject Shaw because of the  
7 problems the Government has identified, right? Then just to be  
8 -- I hate to repeat myself, but I want to be absolutely sure  
9 when I go back and look at the record after today that the  
10 Texas' evidence of no retrogression is the national social  
11 science evidence plus Dr. Shaw's own experience in Indiana and  
12 what he has looked at in Texas, correct?

13 MR. HUGHES: All of those --

14 JUDGE TATEL: That's it, there's nothing else?

15 MR. HUGHES: Other than the legal point we made about  
16 Crawford --

17 JUDGE TATEL: That I understand.

18 MR. HUGHES: That's right.

19 JUDGE TATEL: That's it?

20 MR. HUGHES: I think I would like to just explain  
21 very briefly in the limited time I have left is that --

22 JUDGE TATEL: Are you going to say something about  
23 the motive also? In the limited time you have left?

24 MR. HUGHES: I can, maybe I should turn there.

25 Actually, I do actually want to talk about Professor

1 Shaw's survey, then I will briefly touch on motive.

2 A couple of criticisms were identified. First was that  
3 he surveyed the wrong population. Professor Ansolabehere said  
4 that we should have gotten a statewide search. But nobody  
5 doubts the validity of what Professor Ansolabehere did in terms  
6 of actually matching people. It's the mismatched people that  
7 is a problem. Sager agrees with what he did and so forth.

8 Given that that's the case, the better survey is to try  
9 to look at the people who might not have ID which is why we  
10 surveyed the 1.9 million.

11 JUDGE TATEL: Right.

12 MR. HUGHES: The Justice Department suggested that  
13 that was a flawed approach. In Crawford and Shaw we should  
14 have done the 1.5 million, but that's just not credible given  
15 what Professor Ansolabehere said in the concluding comments of  
16 his report about the 1.9 million and how many of his  
17 calculations in his report were based on that.

18 The second criticism is the response rate. But the  
19 reason the response rate is so slow is because the list is so  
20 bad. It has dead people on it and people who have moved away.  
21 When you have all of those flaws, you are going to have a low  
22 response rate.

23 JUDGE TATEL: But you still have a low response rate  
24 and there's very powerful evidence in this case both from other  
25 witnesses and from the Pew report that a 2 percent response

1 rate for whatever reason, even if Ansolabehere's data is  
2 flawed, is not something you can make judgments on, right?

3 MR. HUGHES: I think what we would rely on is --

4 JUDGE TATEL: Is what?

5 MR. HUGHES: We will, I agree with you that you have  
6 described the evidence in the case.

7 The other evidence is the testimony of a very  
8 experienced survey research expert with decades and decades of  
9 experience who said okay, we've got this low response rate,  
10 what do we do about it.

11 Well, we look at the back end and see who we actually  
12 talked to and what segments of the society they represent. And  
13 for the black and Hispanic surveys the people we talked to were  
14 lower on the socioeconomic scale, lower on the education scale  
15 than the rest of the voter population.

16 JUDGE TATEL: I understand that you brought that out  
17 very nicely at the end of your redirect of Dr. Shaw. But the  
18 criticism of that from the other witnesses is that without a  
19 valid survey, without a valid survey just by looking at the  
20 results you just don't know whether they're representative,  
21 isn't it? That's their point isn't it?

22 MR. HUGHES: That's their point.

23 JUDGE TATEL: What is the answer to that?

24 MR. HUGHES: Professor Shaw's point is that I can  
25 validate the survey by looking --

1 JUDGE TATEL: By just looking at?

2 MR. HUGHES: -- at the back of it seeing if they  
3 satisfy the categories of the demographics that we're worried  
4 about.

5 What the criticisms are worried about is that we are  
6 missing key portions of the population.

7 JUDGE TATEL: No, no, that's not what I think they  
8 said.

9 JUDGE COLLYER: No, no, no. I'm sorry.

10 JUDGE TATEL: Yeah.

11 I think what they said is, I think what they said was  
12 that without a valid -- sure, you may have, you have African  
13 Americans in this survey and you have Latinos in the survey and  
14 you have Anglos and you have wealthy and you have poor, but  
15 what you don't know is whether that's a representative sample  
16 because the response rate was so low.

17 JUDGE COLLYER: Whether the two percent represents  
18 the 98 percent.

19 MR. HUGHES: Right.

20 JUDGE TATEL: What's the answer to that?

21 MR. HUGHES: The answer to that is that Pew while  
22 it's a higher response rate given the higher quality list shows  
23 that even very low response rate surveys can give you a valid  
24 --

25 JUDGE TATEL: Not two percent. Nine percent was the

1 lowest they had, and even at nine percent much of it was not  
2 valid.

3 MR. HUGHES: Some of it was not valid. I won't  
4 quibble.

5 Again, I can only repeat that Professor Shaw looked  
6 behind it and did see that the people he talked to were  
7 consistent with the population of concern. I think that the  
8 survey isn't perfect given the population we were trying to  
9 sample but I think that the testimony of an experienced survey  
10 research expert suggests that all what you are talking about  
11 goes to weight. I don't think that to throw the whole thing  
12 out -- I mean, it is evidence which I think is sufficient to  
13 satisfy our burden which is not beyond a reasonable doubt that  
14 there is no ID disparity in Texas.

15 I see I'm running low on time.

16 JUDGE WILKINS: Before you move on, I have one  
17 question on burden.

18 The testimony from Texas' witness 30(B)(6) witness from  
19 the Department of Public Safety, Ms. Adobio, showed that there  
20 was an exhibit from the DPS website, said that there were some  
21 DPS offices that are the only office for 60 plus miles.

22 Then Senator Uresti testified that in his district that  
23 there were constituents who had to travel a 100 to a 125 miles  
24 each way to get to a DPS office.

25 I looked to see whether you could test in either of

1 those, whether there was evidence in the record that contest  
2 that testimony by Texas and I did not see any.

3 Did I miss that?

4 MR. HUGHES: I don't think that the facts of the  
5 geographic distances are necessarily contested.

6 I would say that people that live in that part of Texas  
7 have to drive long distances to do any number of things just  
8 given the different geographic considerations at issue.

9 JUDGE WILKINS: Okay. Well, Rule 45 of the Federal  
10 Rules of Civil Procedure say that you can't even subpoena  
11 someone to come to a trial that's more than a 100 miles from  
12 where they live because that's unduly burdensome.

13 What are we suppose to -- how does that impact your  
14 argument that there's no burden to someone who lives a 100 plus  
15 miles from the DPS office?

16 MR. HUGHES: I think that the people who choose to  
17 live in that part of Texas, it's just a reality of life that  
18 they have to drive long distances to get there. And as  
19 Ms. Saliga, the font of all knowledge, suggested to me the  
20 other day the testimony is that these people have to drive a  
21 long ways to get to places. Well, if they're driving they have  
22 an ID. The evidence, I just don't think that there's any  
23 evidence that people that live in that part of Texas --

24 JUDGE WILKINS: Doesn't Rule 45 apply in Texas?

25 MR. HUGHES: Well, yeah, of course it does. Of

1 course it does.

2 JUDGE WILKINS: So in Texas it would be unduly  
3 burdensome to subpoena someone for a trial for more than a 100  
4 miles a way, but it's not unduly burdensome for them to drive  
5 over a 100 miles to get an ID to vote?

6 MR. HUGHES: I just don't think that there's any  
7 evidence -- well, I will say two things. I don't think that it  
8 would be unduly burdensome for people who live in that part of  
9 Texas who have, they select to live in a place where they  
10 endure those burdens for all sort of things, going to the  
11 grocery store, going to the hospital, going out to eat. That's  
12 just a fact of life in Texas.

13 I think if you look at our designations of Senator  
14 Uresti's, he agrees that all of those things are true. I don't  
15 think that Section 5 requires the State of Texas to build DPS  
16 centers in very sparsely populated areas of Texas where the  
17 people that live there probably all have driver's license or  
18 there's certainly no evidence to the contrary, and are use to  
19 driving long distances in any event.

20 If I may briefly just pivot to purpose. I think we  
21 agree with the import of Judge Tatel's question of Dr. Flores  
22 that we don't need the help of experts to figure out the  
23 purpose of enacted legislation. That's what Court's do all the  
24 time.

25 Here the legislative record is clear. The purpose of SB

1 14 was to decrease fraud and increase confidence in the  
2 electoral process. The same two purposes that the Supreme  
3 Court held were valid and --

4 JUDGE TATEL: Mr. Hughes, what do we do with the  
5 non-expert testimony that it was, while there may have been a  
6 legitimate purpose, it was a racial motivation?

7 MR. HUGHES: I think that the evidence, the  
8 suggestion that there's some pre-textual purpose is exactly  
9 what was rejected in Crawford on worse facts. No evidence of  
10 in person voter fraud here. We do have evidence of in person  
11 voter fraud. We have evidence of dead people voting.

12 I'm sorry.

13 JUDGE TATEL: What about the evidence of, you know,  
14 the use of unusual procedures? I'm just asking you to react to  
15 the record. I am not saying what I think about this.

16 MR. HUGHES: To answer to the unusual procedures --

17 JUDGE TATEL: Before you answer that, you would  
18 agree, right, that if there's a racial, if there's a mixed  
19 motive behind this thing, in other words, and I'm not totally  
20 sure that I know what that would be, but if it's motivated, if  
21 there's a legitimate interest in reducing fraud, but if it's  
22 also partially motivated by race, you would agree that that's,  
23 that would not survive Section 5?

24 MR. HUGHES: If there's a racially discriminatory  
25 purpose --

1 JUDGE TATEL: No, if part of it is motivated. In  
2 other words, if there's a mixed motive.

3 MR. HUGHES: If you are asking if there's a  
4 legitimate purpose in a racial discriminatory purpose, I think  
5 that if the evidence showed that, that would lead us into a  
6 Section 5 problem. I don't think that the evidence shows that  
7 here.

8 Again, I think all you need to look at is Professor  
9 Ansolabehere's 2007 article that says that everyone wants this,  
10 black voters want it, Hispanic voters want it, everyone does,  
11 and the only people that are out of step with that public  
12 opinion are democrat legislators who oppose the SB 14.

13 That's the DOJ's own expert and in that context, I just  
14 don't see how it's impossible to find that SB 14 was enacted  
15 with a racially discriminatory purpose.

16 I need to sit down.

17 JUDGE COLLYER: Okay. Well, I have you at ten  
18 eleven, twelve maybe. So you still have time.

19 MR. HUGHES: I have twelve minutes by my clock, Your  
20 Honor, I'll go by yours.

21 JUDGE COLLYER: Okay.

22 CLOSING ARGUMENT BY MR. COLANGELO

23 MR. COLANGELO: Good morning. I'm Michael Colangelo  
24 for the Attorney General Eric Holder.

25 Texas Senate Bill 14 is exactly the type of law that

1 Congress had in mind in 1965 when it enacted the Voting Rights  
2 Act in response to decades of evasion of the voting guarantees  
3 in the 15th Amendment.

4           The Voting Rights Act was initially enacted against the  
5 backdrop of restrictive and frequently changing registration  
6 requirements that blocked minority citizens from registering to  
7 vote.

8           Senate Bill 14 in both it's purpose and effect is  
9 functionally no different from these first generation  
10 discriminatory practices that the Voting Rights Act of 1965 was  
11 originally adopted and repeatedly reauthorized to protect  
12 against.

13           As the Court is aware, Texas bears the burden in this  
14 litigation of proving both the absence of a discriminatory  
15 purpose and the absence of retrogressive affect. I'll start  
16 with the discriminatory purpose where Mr. Hughes ended.

17           Obviously, Judge Tatel is right that under both the  
18 statutory textual language and the Supreme Court's application  
19 of it, any discriminatory purpose is prohibited here. So even  
20 if Texas can demonstrate a mixed motive, that motive is  
21 unlawful.

22           We look to the factors that the Supreme Court has set  
23 out in the Arlington Heights case. That has been applied in a  
24 number of Section 5 challenges including Bossier 1, the New  
25 Orleans City Council redistricting case. And one of those

1 factors and a critical one is the historical background in the  
2 sequence of events.

3 JUDGE TATEL: I don't mean to interrupt you, but  
4 could you, I mean, the Courts say the starting point is  
5 retrogression, right?

6 MR. COLANGELO: That's correct.

7 JUDGE TATEL: That's the starting point.

8 I mean, you can make this argument any way you want, but  
9 why don't you just continue. But before you get into the  
10 difference in procedures, tell -- I assume the Government's  
11 position is that the statute, that SB 14 is retrogressive,  
12 correct?

13 MR. COLANGELO: Yes.

14 JUDGE TATEL: So how much, how critical is that to  
15 your conclusion about motive?

16 In other words, suppose we were convinced by Texas that  
17 the statute, that SB 14 was not retrogressive. Would you still  
18 have a motive case?

19 MR. COLANGELO: Absolutely, Your Honor, because  
20 Congress amended the Voting Rights Act in 2006 to overrule the  
21 Supreme Court's decision.

22 JUDGE TATEL: No, no, I know legally you have a case.  
23 That's not my question.

24 There's two parts to Section 5 and if we find that one  
25 isn't met you can still, Texas will still have to satisfy the

1 other.

2           So what I'm asking you is without retrogression evidence  
3 do you, do you still have a case that, do you still have an  
4 argument that this is, this is a racially motivated statute?

5           MR. COLANGELO: Without question, and you are right  
6 that Arlington Heights identifies the effect of a decision as  
7 an important starting point.

8           With that in mind, I'm happy to turn to retrogression.

9           JUDGE TATEL: You can make your argument any way you  
10 want. That's my question about your motive case. How much of  
11 it is dependent on retrogression?

12           MR. COLANGELO: The retrogression conclusion is an  
13 important part of the motive analysis. It is not an outcome  
14 determinative part, and if the Court believe that the law is  
15 not retrogressive --

16           JUDGE TATEL: I didn't say that.

17           MR. COLANGELO: The evidence shows that it's still  
18 discriminatory.

19           JUDGE TATEL: Why don't you go ahead with your  
20 argument, okay.

21           MR. COLANGELO: The background factor that I think is  
22 most pertinent here is the tremendous population growth in  
23 Texas in the last ten years and in particular, the explosion of  
24 minority population.

25           Four million new people in Texas between 2010, 90

1 percent of those individuals are minority. The Supreme Court  
2 held in LULAC in particular in the redistricting case there  
3 that the, among the factors showing discriminatory purpose was  
4 that Texas had acted to take away Latino voting strength as  
5 that community was on the verge of exercising it. That's a  
6 common theme in other Section 5 cases.

7           The Wilkes County Georgia changed to at large districts  
8 in 1978 was rejected by this Court, a three Judge Court here in  
9 the District of Columbia on similar grounds. As the black  
10 population in Georgia was growing, the county moved from single  
11 member districts to at large districts and the Court held that  
12 that was one factor in concluding that the change was motivated  
13 at least in part by racially discriminatory purpose.

14           In addition, Judge Tatel, you asked a little bit about  
15 the departures from normal procedural sequence. Again, that's  
16 another important factor here.

17           JUDGE COLLYER: Excuse me one second.

18           Mr. Hughes, would you just take that down right now.

19           Thanks.

20           Go ahead, sir. I'm sorry, I interrupted you.

21           MR. COLANGELO: Thank you. No problem, Your Honor.

22           The Court has heard a lot of testimony about procedural  
23 maneuvering here and much of it is in the record, so I don't  
24 want to belabor the point, but I want to make one critical,  
25 make the Court aware of one critical fact.

1           There was a lot of discussion including from Senators  
2 Ellis and Uresti and Davis that the departures from standard  
3 practice here were unprecedented, and in particular, the  
4 combination of designating the bill emergency legislation so  
5 that it could be considered right away, and the suspension of  
6 the two-thirds rule exclusively for voter identification  
7 legislation.

8           And when Senator Tommy Williams testified earlier this  
9 week, he said well, that change really wasn't all that unusual.  
10 Voter ID had become a protracted political struggle and he was  
11 aware of other cases where the two-thirds rule was suspended  
12 because of protracted political impasse. He mentioned two  
13 redistricting cases.

14           What he didn't say was that both of those redistrictings  
15 that were enacted on the suspension of the two-thirds rule were  
16 later held to be racially discriminatory.

17           One was the 1980 congressional redistricting where SB 1  
18 of 1981 was objected to by the Attorney General on both  
19 discriminatory purpose and effects ground. It was later  
20 redrawn in part by the Eastern District of Texas in different  
21 litigation.

22           The second example of suspension of the two-thirds rule  
23 for redistricting was the 2003 mid-decade redistricting. That  
24 obviously is the Congressional redistricting and that went up  
25 in LULAC and that Supreme Court held violated Section 2 of the

1 Voting Rights Act.

2           So I think it's highly probative that the procedural  
3 changes that were made here that Texas alleges that were simply  
4 part of the legislative scum, the political back and forth had  
5 in fact only ever been adopted in the electoral context to  
6 enact changes that were later struck down as racially  
7 discriminatory.

8           JUDGE WILKINS: But the change here was to implement  
9 a voter ID law and the evidence that's been put in the record  
10 by Texas is that blacks and Hispanics majority of which across  
11 the nation and in Texas support the law.

12           So how do you respond to that as evidence of lack of  
13 discriminatory purpose?

14           MR. COLANGELO: I don't know that you can draw all of  
15 that much, frankly, from the evidence of popularity that they  
16 have cited for a couple of reasons.

17           One is that obviously if there were a poll that said  
18 literacy tests or poll taxes was popular, that wouldn't prevent  
19 the Court from striking them down as intentionally  
20 discriminatory as they well would and could be.

21           But more importantly, the evidence and testimony in this  
22 case has shown that by and large those polling questions were  
23 both primed and it seems that people didn't know all of the  
24 facts.

25           You can imagine getting a different answer if the

1 question were instead framed like how would you feel about an  
2 ID requirement that is so strict that it might prevent 10  
3 percent of all citizens from voting disproportionately minority  
4 with a racially discriminatory effect would make it difficult  
5 for everyone to get an acceptable ID. Would cost some people  
6 money to do it and was not supported by a showing that it's  
7 strictness was necessary to accomplish it's stated gains. So  
8 I think if you ask people that question, you would probably get  
9 a different answer and might not find majority support.

10 I think there was another interesting moment in the  
11 testimony this week as to the popularity and it was when  
12 Representative Aliseda testified.

13 And you will remember in his testimony on Monday  
14 morning, he acknowledged that the stated goals were to prevent  
15 fraud.

16 He also said there was essentially no evidence of in  
17 person voter fraud. There was essentially no evidence of non  
18 citizen voting and the bill wouldn't stop non citizen voting  
19 anyway.

20 He testified that his constituents wrongly believed that  
21 there was non citizen voting, so he wanted to give them a law  
22 that wouldn't stop a problem that didn't exist because they  
23 wanted it.

24 It doesn't seem to me that that should be or should be  
25 in the Section 5 context, a legitimate basis to take steps that

1 would disfranchise as many voters as SB 14 would.

2           JUDGE TATEL: Let me ask you a general question about  
3 this. In particular, Northwest Austin and whether you think  
4 the Court's decision in Northwest Austin in particular it's  
5 concern about, about equal state sovereignty whether that has  
6 any implications for how we think about this given Crawford.

7           Put another way, Crawford says that seeking to  
8 eliminate to deal with voter fraud is a perfectly legitimate  
9 state goal. Even where there's no evidence of fraud at all.  
10 The Court said there's no evidence of any voter fraud in the  
11 history of Indiana.

12           So how does, are you, do you think that this -- we have  
13 to worry about, about a situation here where we have another  
14 State, Texas, which has, which is covered by the Voting Rights  
15 Act and Indiana is not, that's what implicates the equal  
16 sovereignty point.

17           So here we have a state that has exactly the same  
18 professed motive that Indiana does. That's it's public  
19 statement, they stated it all along, that their purpose is to  
20 eliminate voter fraud. And yet Texas' covered jurisdiction  
21 can't do that, can't follow that goal whereas non covered  
22 states can.

23           Now this doesn't have anything to do with disparate  
24 impact or retrogression, that's different. I'm focusing in on  
25 the motive point and whether your, whether we should worry that

1 given Northwest Austin and in our obligation to avoid, to avoid  
2 interpreting Section 5 in a way that creates a constitutional  
3 problem, we should be extremely careful about second guessing a  
4 covered state's professed reason for passing voter ID.

5           What do you think about that?

6           MR. COLANGELO: Well, I think you are asking two  
7 questions and I'll answer them both. I think you are asking a  
8 Northwest Austin question about state sovereignty and  
9 differential treatment of states, and I think you are also  
10 asking the question about the applicability of Crawford here.

11           I think by and large the answer to your first question I  
12 think has to be reserved for if and when we get to the  
13 constitutional claim in this case which I hope we get to  
14 because it means that the Court will have felt that Texas has  
15 not met its burden on Section 5.

16           But obviously, the D.C. Circuit held in the Shelby  
17 County case just a few weeks ago that Congress amassed a  
18 significant and sufficient and substantial record of  
19 intentional voting discrimination in the covered jurisdictions  
20 that justified the Congressional decision to vote reauthorize  
21 and amend the Voting Rights Act in 2006.

22           JUDGE TATEL: That was a facial challenge. I mean,  
23 here we are applying it in a specific situation. We have to  
24 apply the statute in a way that avoids constitutional problems,  
25 correct?

1           MR. COLANGELO: I think that's right although I don't  
2 know that's exactly what Northwest Austin held. Obviously,  
3 Northwest Austin reached a statutory question in order to avoid  
4 confronting a constitutional question at all.

5           It didn't hold that in any way the substantive standard  
6 should be changed in order to avoid a constitutional question.

7           But accepting the premise of your question --

8           JUDGE TATEL: I wasn't suggesting changing the  
9 substantive standards. I was asking you whether given what  
10 Northwest Austin said that the Courts have to be extremely  
11 careful about second guessing a motive of a covered  
12 jurisdiction when the Supreme Court has found that that motive  
13 is perfectly okay in non covered jurisdictions.

14           MR. COLANGELO: The answer to that question is yes,  
15 Courts need to be careful about questioning legislative motive  
16 just as in the special voting rights context Courts also need  
17 to be careful about protecting the right to vote of minority  
18 citizens.

19           In this case Crawford frankly has nothing to do with and  
20 no controlling effect with regard to what the legislators'  
21 stated purpose was for this reason.

22           First of all, in Crawford there was no, there was no  
23 discrimination claim. It was a challenge based on the First  
24 and 14 Amendment, fundamental right to vote.

25           The question there was given the low burden that the

1 Court found on those facts whether the substantial  
2 justifications or legitimate justifications that the legislator  
3 state -- state legislator stated whether those sufficed.

4 The Court in Crawford did not hold that as a matter of  
5 fact, as a factual matter any jurisdiction in the country can  
6 simply invoke the term voter fraud and say that it justifies  
7 any potentially discriminatory measure.

8 JUDGE TATEL: Of course, it didn't. We understand  
9 that.

10 But it did, it did accept that as a legitimate  
11 justification in the situation where there was no evidence of  
12 voter fraud.

13 MR. COLANGELO: I think that's right, Your Honor, but  
14 it also, you know, in some ways it's no different than for  
15 example in an employment discrimination case --

16 JUDGE TATEL: Let's get to the core of it.

17 Is your answer to my question that yes, that we don't  
18 have to worry about Northwest Austin here? That it doesn't  
19 tell us anything at all about how to think about the motive  
20 issue here or is your answer that yes, it does, but the  
21 evidence in Texas is such that we can conclude notwithstanding  
22 Crawford that this statute was racially motivated?

23 Is that your answer? Which one is it?

24 MR. COLANGELO: It's more the former but, I would  
25 phrase it slightly differently.

1           That Northwest Austin doesn't affect how we approach it  
2 here in large part because a racially discriminatory purpose  
3 would violate the Constitution in any event, so it can't  
4 possibly be outside the scope of Congressional enforcement  
5 authority.

6           But if it does, if it does constrain the Court's  
7 evaluation of the evidence here, the facts very clearly show  
8 that Texas can't meet its burden of demonstrating in the  
9 absence of a discriminatory purpose.

10           On the question of the stated legitimate goals I think  
11 it's important to, it's important to remember that on the  
12 record here and the reason that the Arlington Heights factors  
13 for example, look at whether the stated goals were in fact the  
14 goals is that if you conclude they are not, you can conclude  
15 that something else is going on and perhaps most likely racial  
16 discrimination.

17           I think it relates in part, Judge Tatel, to your  
18 question over the course of the trial, or your questions over  
19 the course of the trial regarding whether partisanship was in  
20 fact at play.

21           JUDGE TATEL: Right.

22           MR. COLANGELO: I think an important element of that  
23 question is that the record here not only shows that the Texas  
24 legislature or the legislators who supported the law were  
25 giving other reasons aside from partisanship.

1           The record actually shows that they expressly disclaimed  
2 any reliance on partisanship at all. Our deposition  
3 designations include deposition testimony from the Senate Bill  
4 sponsors saying that partisanship was no part of our purpose.

5           JUDGE TATEL: Of course that's what they said.

6           MR. COLANGELO: Right.

7           JUDGE TATEL: They're not going to say that, they are  
8 not going to say it's racially motivated either.

9           MR. COLANGELO: Exactly. And my point is that to the  
10 extent that the Court thinks partisanship may have been going  
11 on, the Court will already have disbelieved their stated  
12 reasons. Once you've done that, it seems more likely  
13 especially given the other factors we've talked about that a  
14 racially discriminatory purpose was at play.

15          JUDGE TATEL: I just have one more question.

16          I would like to have you go on to retrogression, but how  
17 important to your case, I asked you how important  
18 retrogression, how important to your case is, is the, the  
19 expert testimony about motive?

20          I mean, I understand you have fact witnesses here, you  
21 have Senators and you have Reverend Johnson, and they are all  
22 fact witnesses and they've testified to what they have  
23 testified to. How important to your motive case are the  
24 experts, Dr. or professor --

25          MR. COLANGELO: Kousser?

1 JUDGE TATEL: Kousser and --

2 MR. COLANGELO: Dr. Flores.

3 JUDGE TATEL: Yes, right, how important is that to  
4 your case?

5 MR. COLANGELO: I think the expert testimony from  
6 Doctors Kousser and Flores and others are an important part of  
7 the intentional discrimination prong, but they are by no means  
8 of dispositive.

9 Although we think those analyses are credible and have  
10 not been undermined in any way by the trial, the Court could  
11 conclude and should conclude that Texas hasn't met its burden  
12 on discriminatory purpose even if you disregard the testimony  
13 from Doctors Kousser and --

14 JUDGE TATEL: Can you tell me why we should give  
15 those two witnesses, how their testimony effect -- I asked this  
16 question, you heard me I asked it during trial and I'm still  
17 struggling with it.

18 I mean, as I read Dr. Kousser's testimony for example,  
19 he essentially applied the Arlington Heights factors, right,  
20 and that's this Court's job isn't it?

21 MR. COLANGELO: Your Honor, it's the Court's job to  
22 reach the ultimate conclusion.

23 JUDGE TATEL: What is he contributing to that? I  
24 mean, it's a really interesting report I thought he did and he  
25 collected a lot of interesting materials. But what are the

1 implications of his judgment about the Arlington Heights  
2 factors for what we do here?

3 MR. COLANGELO: I think the implications are those he  
4 testified to in response to your question which include that as  
5 a historian, as a historian with 30 plus years of evaluating  
6 voting changes in this context he brings a perspective to it,  
7 an analytical rigor scientific methodology that the Court can  
8 credit.

9 Having said that, if the Court believes or if the Court  
10 is not inclined to rely on the expert testimony as expert  
11 testimony, all of the facts that are included in all of the  
12 expert reports supporting a showing of discriminatory purpose  
13 --

14 JUDGE TATEL: Yeah, I understand that.

15 MR. COLANGELO: -- are pertinent to the Court's  
16 decision.

17 I'm happy to move on to retrogression, Your Honor.

18 JUDGE TATEL: Wait, I have one more question about  
19 motive.

20 Why don't you go ahead and I'll come back to it if I can  
21 remember it.

22 MR. COLANGELO: I have other points.

23 JUDGE TATEL: You can do it, use your time any way  
24 you want. It's just eventually I would like you to get to  
25 retrogression.

1           MR. COLANGELO: Your Honor accurately stated the  
2 retrogression test. Obviously, Section 5 prohibits any change  
3 that has the effect of denying or abridging the right to vote  
4 on account of race.

5           Section 14, 14 C 1 of the Voting Rights Act defines the  
6 word vote to mean all action necessary to make a vote  
7 effective.

8           Judge Tatel, you quoted the Beer standard  
9 retrogression -- Section 5 prohibits retrogression in the  
10 position of racial minorities with respect to their effective  
11 exercise of the electoral franchise.

12           So taking all of those statements into consideration,  
13 the language of Section 5, the definition of votes in Section  
14 14, the standard set out in Beer which the Court has to follow,  
15 I think that we can conclude from that legal standard that the  
16 test that Texas is proposing is obviously wrong. It can't be  
17 the case and Section 5 has never prohibited only those actions  
18 that make it impossible to vote.

19           So for example, the focus that Mr. Hughes placed on  
20 whether there were people who had shown that it was impossible  
21 for them to get an additional ID, set aside the burdens for  
22 doing it, that's not the standard.

23           And Your Honor, you mentioned the polling place cases,  
24 Mr. Hughes is right, Perkins the Supreme Court case from 1971,  
25 that was the Section 5 coverage case. There are other Section

1 5 cases including the Apache County High School District case  
2 that we cite in our papers which is a substantive determination  
3 of a three Judge Section 5 court. That the polling place  
4 changed in that context was retrogressive.

5 The Perkins standard is important because I think that  
6 is another guide for us so the Court can follow. In Perkins  
7 the Supreme Court said accessibility, prominence, facilities  
8 and prior notice of the polling place location all have an  
9 effect on the person's ability to exercise his franchise.

10 The Apache County case applying that standard to the  
11 facts. And that case held that moving a polling place to  
12 places remote from remote communities can retrogress voting  
13 strength.

14 Among the most important set of facts that came out in  
15 this case is that the free ID is not free. It's simply a  
16 misnomer to call the election identification certificate a free  
17 ID to the contrary that trial testimony in the record  
18 demonstrates convincingly that there are tremendous burdens  
19 associated with getting a free ID, the so-called free ID for  
20 those who don't already have one.

21 If you don't have a driver's license, it's essentially a  
22 re-registration. The kind of re-registration that the Voting  
23 Rights Act was enacted to block. The kind of re-registration  
24 that the Attorney General consistently objected to in the 1970s  
25 and 1980s under Section 5 of the Voting Rights Act.

1           Eighty counties, 80 out of 250 some odd counties have no  
2           DPS office. Another 30 offices have an office that is only  
3           open one or two days a week. The rest of the DPS offices that  
4           open aren't open on weekdays and none stay open later than six.  
5           And in addition, there's a cost for underlying documents.

6           Your Honor asked a few days ago about whether Texas had  
7           contested --

8           JUDGE TATEL: Excuse me.

9           Isn't there an antecedent question here which is which  
10          you yourselves approached to try to figure out with your match  
11          studies which is the extent of the, the extent to which  
12          registered voters lack these IDs.

13          Don't we have to start there?

14          MR. COLANGELO: Yes, Your Honor, I'm happy to move to  
15          that point.

16          JUDGE TATEL: Why don't you start there.

17          MR. COLANGELO: As the Court knows, Dr. Ansolabehere  
18          concluded that 1.5 million registered voters in Texas could be  
19          effected by Senate Bill 14 because they lack allowable forms of  
20          state ID.

21          JUDGE TATEL: But he didn't study the three federal  
22          possible forms, the three federal qualifying forms did he?

23          MR. COLANGELO: That's absolutely right, Your Honor,  
24          and the reason that he didn't is for the reasons that Judge  
25          Wilkins explained. Texas did not take the steps to make that

1 available in this case.

2 JUDGE TATEL: But he was your expert. And he said in  
3 his testimony that he tried to get access to those and  
4 couldn't.

5 MR. COLANGELO: Your Honor, the Attorney General does  
6 not have databases from the State Department, the Defense  
7 Department and the Department of Homeland Security. I think  
8 it's an instructive comparison. The Court I assume is aware  
9 that there is --

10 JUDGE TATEL: I have two questions about that.

11 Number one is just a practical question which is since  
12 he's only studied the state qualifying IDs, how can we rely on  
13 his study to reach a conclusion about SB 14 which also includes  
14 the federal IDs? Do you see my point?

15 MR. COLANGELO: I do precisely.

16 JUDGE TATEL: I didn't understand his answer to my  
17 question when I asked it yesterday and I, maybe he doesn't  
18 answer it.

19 We're faced, we're facing a different question than you  
20 asked him to answer. You asked him to answer the question of  
21 who lacks state IDs.

22 The question we have to ask is whether SB 14 which  
23 includes federal IDs has a retrogressive effect. And I don't  
24 see, at this point I don't see how his study helps us with our  
25 question.

1           MR. COLANGELO: I think it helps you answer your  
2 question in three ways.

3           JUDGE TATEL: Yeah, go ahead.

4           MR. COLANGELO: First, that there's no evidence at  
5 all in the case that there are people who lack state ID who  
6 none the less possess federal ID.

7           The Shaw survey to the extent that the Court credits it  
8 at all, you know, notwithstanding the seriousness --

9           JUDGE TATEL: You know, they identified President  
10 Bush yesterday.

11          MR. COLANGELO: There was no testimony in the record  
12 at all that he has any type --

13          JUDGE TATEL: That he has a passport. I see, okay.  
14 That's your answer to the question?

15          MR. COLANGELO: Well, my answer --

16          JUDGE TATEL: You don't know for sure whether  
17 President Bush has a passport?

18          MR. COLANGELO: No. My serious answer is that this  
19 is a case where Texas has the burden. Texas has to demonstrate  
20 the absence of a retrogressive effect.

21          There's record evidence including from bill supporters  
22 that state issued ID are the most commonly available form of  
23 ID.

24          Texas agrees that federal ID to the extent that anybody  
25 without state ID has it is going to be a much smaller subset.

1 The state has proffered zero evidence at all of federal ID  
2 possession notwithstanding the fact that they could have and  
3 the comparison that I was about to make is that the South  
4 Carolina voter identification --

5 JUDGE TATEL: Let's separate the question that I'm  
6 looking at, okay.

7 MR. COLANGELO: Okay, Your Honor.

8 JUDGE COLLYER: Could we just finish that one  
9 sentence first?

10 Go ahead, what you were you going to say about South  
11 Carolina?

12 MR. COLANGELO: The exact same evidentiary and  
13 discovery dispute arose in the litigation, the Section 5  
14 litigation pending in front of the three different judge court  
15 here in D.C. regarding the South Carolina voter identification  
16 law.

17 The Attorney General made the exact same objections. He  
18 didn't possess the databases, it couldn't be obtained through  
19 discovery, but if the state would simply subpoena it using our  
20 help identifying the relevant two irregularities, privacy act  
21 regulations and appropriate counsel. They could get it and  
22 analyze it in the case.

23 And South Carolina unlike Texas did that. And the trial  
24 record in the South Carolina case which will go to trial at the  
25 end of August will include, we assume we haven't looked at it

1 yet, it hasn't been produced yet that I'm aware of, will  
2 include evidence of that information.

3           So there were two factors here. Texas simply refused  
4 notwithstanding the gymnastics of the Attorney General and the  
5 Court to make available to them through the appropriate  
6 procedures this information, Texas refused to get it.

7           But more importantly, the trial schedule that we were on  
8 at Texas' request simply wouldn't have allowed it. There  
9 wasn't the opportunity by the time they requested it to look at  
10 it.

11           So my serious answer to your question is that to the  
12 extent that the absence of that evidence weighs against anyone  
13 in this case, it has to weigh against Texas not only because of  
14 the burden under Section 5 but because of litigation decisions  
15 they made that resulted in that information not being available  
16 in this case. Notwithstanding that it will become available in  
17 other cases.

18           Separately, Your Honor, there's a legal answer to my  
19 question which is that it is not at all unprecedented for the  
20 Court to deny preclearance in Section 5 cases if it concludes  
21 that, that the evidence is conflicting. We don't think this  
22 case is anywhere close to that.

23           But the City of Rome case, the Supreme Court's 1980  
24 decision in City of Rome after upholding the constitutionality  
25 of the reauthorized 1975 Voting Rights Act, the City of Rome

1 case then went on to consider two voting changes at issue in  
2 that case, an annexation or 60 annexations and method-able  
3 election changes.

4           And what the Supreme Court held in City of Rome was  
5 essentially the city gave us basically no evidence, the three  
6 judge court below had to conclude they didn't meet their burden  
7 and we can't find that that is clearly erroneous.

8           So if you think that the absence of federal ID  
9 possession is pertinent to your conclusion which we don't think  
10 it is, then you have to deny preclearance because Texas simply  
11 hasn't produced any evidence of it at all.

12           Now, going to Dr. Ansolabehere's analysis, his  
13 conclusion was one and a half million effected registered  
14 voters disproportionately minority. Obviously, there was a lot  
15 of testimony about whether or not in fact the number ought to  
16 be lower. And whether in fact the evidence shows a racial  
17 disparity.

18           The most important point that came out this morning was  
19 Texas' concession to Judge Tatel earlier that even accepting  
20 the analysis of all of their own experts there are still  
21 individual registered voters in Texas who lack allowable ID.  
22 They agreed that it was on the order of several hundred  
23 thousand people. I believe that the lowest that Dr. Sager goes  
24 is 167,000 people. There are people without allowable state ID  
25 and Texas concedes that point.

1           If that's true given the demographics in Texas, given  
2 that the free ID isn't free, given that the poverty rate in  
3 Texas is three times larger for blacks and Hispanics than it is  
4 for whites, given that the rate of auto ownership and  
5 homeownership is considerably lower for minorities than for  
6 whites that even if you have a population of people, of 200,000  
7 people and you don't know what their race is and say they are  
8 randomly distributed then the Court has to conclude and it is  
9 consistent with precedent to conclude that there's an unlawful  
10 racial burden. It's consistent for example, with the Texas  
11 redistricting summary judgment decision that was issued in  
12 December. It's consistent with a number of, a number of other  
13 holdings.

14           I'm sorry, Judge Tatel.

15           JUDGE TATEL: No, go ahead.

16           MR. COLANGELO: There's another important legal  
17 argument here which is essentially Texas' argument that to the  
18 extent that anyone lacks an allowable state ID, it's a function  
19 of their choice, their own individual decision not to get one.

20           But obviously, the choice, the choice argument is an  
21 argument that's been considered and rejected in Section 5 cases  
22 for decades. A version of it was rejected by the Texas  
23 Redistricting Court in its December summary judgment opinion  
24 and there the argument was presented as in the redistricting  
25 context if a minority population has 50.1 percent in a district

1 then there simply can be no retrogression because at 50.1  
2 percent all you have to do is choose to turn out and, and you  
3 can exercise your right to vote.

4           And the Court denied summary judgment to Texas based on  
5 that argument and held that there is no dispute of fact that  
6 because of both historical circumstances and socioeconomic  
7 factors in Texas that the choice argument can't control.

8           A version of that argument was raised and rejected in  
9 the Hale County Section 5 case, a three judge court case in  
10 this court in 1980. That was a case involving at large  
11 districts and it was a county that had a bare black voter  
12 registration.

13           What Hale County argued in that case was well, African  
14 Americans have a slight majority of registered voters. If all  
15 they would do was get out to vote. If their candidates would  
16 simply be more active. If they would simply try harder, if  
17 they would simply choose to exercise the power that they could  
18 exercise, then the changed at large elections wouldn't be  
19 retrogressive.

20           And the three judge court rejected that argument and  
21 rightly because it's not the Section 5 standard.

22           JUDGE WILKINS: But Texas isn't just saying it's a  
23 choice. They're saying that, well A, we don't have any  
24 evidence of the socioeconomic make up of these people who lack  
25 ID, that's the first argument.

1           And B, even if we did, you can't say that that's on  
2 account of race as far as the retrogressive.

3           MR. COLANGELO: Yes, Your Honor, I'm sorry I stepped  
4 away from the podium.

5           First, I don't have the exact record, but my  
6 understanding is that the survey that Texas prepared does  
7 include socioeconomic data specifically as to the population  
8 that they agree lacks ID and we can provide that record cite to  
9 the Court if you would like.

10           I think lacking that data obviously we fallback on to  
11 the fact that it's both Texas' burden and there's no reason to  
12 believe and in fact, every reason to believe the contrary that  
13 the proportion of individuals who lack state issued ID is  
14 likely to be overrepresented by blacks and Hispanics in Texas  
15 than not.

16           But I will turn to the on account of race argument  
17 because the Court is correct that that's, it's a significant  
18 argument that Texas raises. It's also significantly flawed.

19           Essentially Texas argues that the standard for showing a  
20 violation of Section 2 of the Voting Rights Act should control  
21 whether, whether they've shown their, met their burden of  
22 demonstrating the absence of retrogression under Section 5.  
23 There are several problems with that argument.

24           The first is that it has been squarely and repeatedly  
25 rejected by the Supreme Court several times. In the Boucher 1

1 case the Supreme Court said that Section 2 and Section 5 are  
2 different statutes. They prevent different evils, they  
3 require different demonstrations of proof. So it's simply not  
4 the case that there is any precedent from reporting the Section  
5 2 standard.

6 More importantly, the language that every Section 2 case  
7 Texas cites was applying is not the language on account of race  
8 which does appear in both statutes.

9 Rather, those cases were applying the statutory language  
10 in Section 2 totality of the circumstances. If you read the  
11 decisions they cite, every one of them is applying totality of  
12 the circumstances and following the Supreme Court's holding in  
13 Thornburg v. Gingles, Section 2 cases do apply the totality of  
14 the circumstances test that is not the Section 5 test and the  
15 Supreme Court has said that it can't be.

16 There are good reasons why we shouldn't assume post  
17 pre-authorization and Amendment of Section 5 that somehow the  
18 landscape has changed and Boucher 1 may be wrong.

19 As the Shelby County Court held just a few weeks ago in  
20 upholding the reauthorization, one of the reasons that Congress  
21 reauthorized and amended Section 5 was that Section 2 was not  
22 an adequate way of attacking voting discrimination around the  
23 country.

24 In particular, Section 2 litigation the Court held is  
25 intensely complex litigation that is costly and time consuming.

1 It would defeat the, it would defeat the Congressional purpose  
2 of reauthorizing Section 5. Part of which was precisely  
3 because Section 2 couldn't do it alone. It would defeat that  
4 purpose then to compel the Attorney General to apply that  
5 standard in every Section 5 case.

6         There's another important reason why Texas' argument  
7 can't be right. The Supreme Court held in *Morris versus*  
8 *Gressette* that Section 5 was intended to be, the administrative  
9 process was intended to be the speedy alternative to  
10 litigation. Importing costly, time consuming expense of  
11 Section 2 totality of the circumstances standard into every  
12 Section 5 case would totally defeat the purpose that Congress  
13 had in allowing Section 5 changes to be addressed both either  
14 through litigation before a three judge court or through an  
15 administrative submission to the Attorney General.

16         More importantly, to read the Section 2 language on  
17 account of race as I think Judge Wilkins you pointed out to  
18 read that language to require a showing of but for causation  
19 really would authorize literacy tests or poll taxes unless it  
20 could be shown that they were intentionally discriminatory, and  
21 it would functionally collapse the purpose test into the  
22 effects test and that very obviously is not what Congress  
23 intended in including the separate standards.

24         JUDGE TATEL: What was, do you want to say something  
25 about your reaction to yesterday's cross examination of Dr.

1 Ansolabehere on the individual names?

2 MR. COLANGELO: Absolutely, Your Honor. Absolutely.  
3 I'm happy to address those.

4 JUDGE TATEL: Yes, would you.

5 MR. COLANGELO: There were a number of names that  
6 were raised and that were identified as being in the VRNID of  
7 individuals who may in fact have allowable forms of ID. And I  
8 think there are a number of responses to that.

9 The first is there still has been no systematic showing  
10 that Dr. Ansolabehere's analysis is in any way flawed. To the  
11 contrary, the majority of the examples that Mr. Mortara  
12 demonstrated are examples that Dr. Ansolabehere in his initial  
13 report agreed would be included.

14 For example, the case of somebody, a woman who got  
15 married and changed her name, right. Because he did exact name  
16 matching for those set of people who didn't have SSN 9s.  
17 Because he did exact name matching, he knew that it would be  
18 possible that those individuals would end up in the list.

19 But he also knew that Senate Bill 14 requires that the  
20 name on your, that your name on your photo identification  
21 matched the name on the voter registration records, and that  
22 they be required by statute to be substantially similar which  
23 has been interpreted by regulation to mean only slightly  
24 different.

25 Well, whatever only slightly different means, it's a

1 subjective standard that didn't exist before because obviously,  
2 under the benchmark, the voter registration rolls included the  
3 name that you registered with. So there was no possibility of  
4 a mismatch.

5           So to the extent that -- and Dr. Sager agreed with this  
6 point during his cross examination earlier in the week. He  
7 agreed that to the extent that a name mismatch would not be  
8 accepted for voting, to the extent that the bill gives  
9 discretion to poll workers to decide whether Maria Elvira de la  
10 Garza is substantially similar to Maria Elvira de la Jesus, to  
11 the extent that it does that, the inclusion with name  
12 mismatchings is not evidence of an error. It is evidence of  
13 accuracy in his analysis.

14           I think this is an important point because the reaction  
15 that I had to the demonstration of Maria Elvira de la Jesus  
16 compared to Maria Elvira de la Garza was not oh, my goodness,  
17 there's somebody on the list who shouldn't be.

18           My thought was well, that's a Hispanic voter who  
19 actually does have an allowable form of ID, and who still might  
20 not be allowed to vote under Senate Bill 14 depending on the  
21 whim of a poll worker who can decide or not whether de la Garza  
22 and de la Jesus match.

23           And if they decide that they don't apply at his or her  
24 discretion to make that person cast a provisional ballot and as  
25 Mr. Ingram testified on Monday, your chances of getting a

1 provisional ballot counted, I think he testified that his exact  
2 words the odds were not good.

3           So my reaction to the name mismatch was that's a large  
4 population of people whose odds are potentially not good of  
5 having their vote not counted. And to the extent that that  
6 applies more frequently to Hispanics than to whites, my  
7 conclusion is that it enhances the retrogressive effect and  
8 enhances the conclusions that Dr. Ansolabehere reached rather  
9 than diminishing the credibility.

10           One of the other examples were the two examples of the  
11 United States Senators, Kay Bailey Hutchison and Phil Graham.  
12 I assume the point of that demonstration was that Kay Bailey,  
13 Senator Hutchison showed up because she may have registered to  
14 vote with the first name Kay and her driver's license may have  
15 as her first name Katherine.

16           And that Senator Graham may have showed up because he  
17 may have registered to vote as Phil and his driver's license  
18 may show William Phillip.

19           Well again, to the extent that the bill gives discretion  
20 to poll workers to decide whether your nickname or name  
21 variation or shortened form of your name is sufficiently  
22 similar to allow you to vote, that's a kind of discretion that  
23 didn't exist or doesn't exist under the benchmark allows poll  
24 workers the opportunity to discriminate against Hispanics and  
25 is very likely, is much more likely to be applied in favor of

1 white voters particularly former senators than in favor of  
2 Hispanics.

3           Mr. Ingram himself testified on Monday that he has no  
4 idea how poll workers will be instructed to exercise their  
5 discretion. He has no idea. We can assume and stipulate that  
6 many poll workers will know that Kay is a nickname for  
7 Katherine.

8           Mr. Ingram testified under oath that he has no idea  
9 whether poll workers will know what the common nicknames are  
10 for Jose or Jesus for Hispanic voters. So in that regard, we  
11 think it increases the validity of his analysis.

12           Obviously, there were some other categories of voters  
13 that Mr. Mortara demonstrated. Again, these are points that  
14 Dr. Ansolabehere acknowledged in his first report were  
15 included, right. He said that I have to look at people with  
16 expired licenses because for all we know, people with expired  
17 licenses still live in Texas, still have the right to vote, to  
18 the extent they are on the registered voter list they are still  
19 permitted to vote and they may not have renewed their license  
20 because they had a ticket, they couldn't pay the renewal fee,  
21 they don't drive anymore as Representative Martinez testified  
22 about his mother although that was a slightly different case.

23           To the extent that an expired license may indicate that  
24 somebody has moved, it is also just as likely to indicate that  
25 their license is no longer valid. To exclude all of those

1 people from the analysis would be to categorically remove  
2 potentially effected voters.

3 More importantly --

4 JUDGE WILKINS: But there were two people I believe  
5 at the very end of the cross examination who were an exact  
6 match on first name, last name and date of birth, and had valid  
7 Texas driver's license but they were on the no match list.

8 So how do you explain that?

9 MR. COLANGELO: You're right, Your Honor, there were  
10 two people on the list who showed up in that category.

11 And the explanation is that because Texas chose to  
12 present that evidence through cross examination rather than  
13 through expert disclosures which would have been disclosed on  
14 June 1st and we would have had an opportunity to examine, we  
15 don't know what the answer is. We don't know if there's some  
16 other disqualifying factor.

17 As you know, we were not able to authenticate their  
18 underlying database. We did agree that the names that were  
19 included on the spread sheet that we stipulated to were,  
20 represented records that appeared in Dr. Ansolabehere's  
21 analysis.

22 But the candid answer to your question is that at this  
23 point given the way that evidence was presented, we don't know  
24 whether and frankly, Texas hasn't shown whether those are two  
25 antidotal examples or examples of some category that should or

1 should not have been excluded.

2 More importantly, they have not shown in any respect the  
3 size of that category to the extent it should have been  
4 excluded and whether removing that category changes the results  
5 of his analysis at all.

6 I'm sorry, Judge Tatel.

7 JUDGE TATEL: Were you going to change subjects?

8 MR. COLANGELO: No. I was going to wrap up by saying  
9 that Dr. Ansolabehere as every party in this case and as every  
10 expert who testified agreed is one of the foremost experts in  
11 the country on this kind of database analysis. Nobody disputed  
12 that. There really are very few people in the country, if any,  
13 who are better at doing this kind of thing than he is.

14 He conducted this analysis under circumstances that the  
15 Court has already acknowledged included significant discovery  
16 violations, major delays in the production of data and  
17 significant flaws in the data that he was given.

18 So as he disclosed in his reports and testified to on  
19 the stand he drew the soundest conclusions that he could from  
20 the data that he received in the conditions and circumstances  
21 that he received it.

22 Obviously, if he had six months to prepare or 12 months  
23 to prepare he could have answered every question. But he  
24 nonetheless testified notwithstanding the disclosure of these  
25 additional examples, notwithstanding the questioning about

1 these additional examples.

2           He testified that it didn't change his underlying  
3 confidence in his conclusion that there are hundreds of  
4 thousands if not more than a million registered Texas  
5 registered voters without state issued ID who are  
6 disproportionately minority.

7           I am sorry, Judge Tatel.

8           JUDGE TATEL: Do you need his study to prevail? In  
9 other words, earlier you made the point that all of the  
10 witnesses agree that there is a very substantial subset of  
11 registered voters who have no ID. Then you made your point  
12 about, about cost and burden of obtaining the IDs, right?

13           MR. COLANGELO: Yes.

14           JUDGE TATEL: Distance and everything.

15           Is that sufficient by itself?

16           MR. COLANGELO: Without question.

17           And more importantly, I think Mr. Hughes conceded to you  
18 half an hour ago that absent all of the expert testimony in  
19 this case, the only evidence that Texas has proffered to meet  
20 its burden of non retrogression are nationwide social science  
21 surveys.

22           You know, frankly given the differences that the Court  
23 is well aware of between those surveys and circumstances in  
24 Texas, given the circumstances between the Georgia and Indiana  
25 law and the Texas law, this could well have been a case for

1 directed verdict if the only evidence shown was nationwide  
2 social science data from several years ago that does nothing to  
3 address the specific circumstances in Texas.

4 JUDGE TATEL: Let me ask you just a general question.

5 Suppose, suppose Texas had adopted, suppose one, suppose  
6 the legislature had adopted the Amendment that would have made  
7 the qualifying documents free. In other words, it wanted an ID  
8 law but it said okay, we're going to be sure that everybody can  
9 get these things free.

10 And suppose it had also, you know, appropriated some  
11 money to make sure that people can get the documents who, you  
12 know, live in distant parts of the state, you know, like mobile  
13 offices or something.

14 Would that satisfy Section 5 even though, even though  
15 there, even though the data might show that there's a  
16 disproportionately high number of minorities who lack the  
17 necessary documents?

18 MR. COLANGELO: It wouldn't, Your Honor, and you can  
19 reach that conclusion by analogy to the polling place cases.

20 Three judge Section 5 courts have recognized that in  
21 polling place change cases which involve changes that are much  
22 less significant than requiring people to functionally  
23 reregister and get a new document that they don't already have,  
24 that that can be a sufficient burden on the effective exercise  
25 of your electoral franchise to, to cause your voting strength

1 to retrogress.

2           So no, even if they had adopted those ameliorative  
3 amendments the law wouldn't be non-retrogressive.

4           But I think you raise an important point because the  
5 ameliorative amendments are a critical factor both with the  
6 retrogressive analysis but particularly of the purpose  
7 analysis.

8           JUDGE TATEL: So you don't think that a covered state  
9 can adopt a voter ID law at all?

10           MR. COLANGELO: That's not at all the case, Your  
11 Honor, and covered states have adopted voter ID laws.

12           The determination turns on particular circumstances in  
13 each case. The nature of the ID law, the allowable forms of  
14 ID, the demographic circumstances in those, in the varying  
15 states. So it's not at all that there's a --

16           JUDGE COLLYER: Texas actually has a voter ID law.  
17 It's just different from this one.

18           MR. COLANGELO: That's exactly right, Your Honor, and  
19 it's a voter ID law that the Attorney General precleared when  
20 it was initially proposed.

21           The difference is that voter ID law by contracting the  
22 allowable forms of ID only to those with photo, only to a small  
23 subset, only to a small subset far narrower and more  
24 restrictive than any other state in the country that that is  
25 what has the retrogressive effect. And that relates to the

1 point of about ameliorative amendments.

2 I think that Senator Davis' testimony yesterday was  
3 particularly compelling on this point. She testified that in  
4 the course of the legislative debates she kept hearing we want  
5 permission to do what Indiana has done.

6 So she looked at the Texas bill and she looked at the  
7 Indiana law and she said well, our bill is different, why don't  
8 I propose changes that it would make it look more like  
9 Indiana's.

10 And all of those changes were rejected. She proposed  
11 expanding the allowable forms of ID to include state and local  
12 public employees or public colleges and universities. That was  
13 tabled.

14 She proposed allowing the use of expired ID at least  
15 after the date of the last election. So typically for a period  
16 of up to two years. That was rejected.

17 She proposed making the underlying documents free. That  
18 was rejected.

19 She proposed allowing for an indigency exception which  
20 was accepted in the Senate and stripped in the House.

21 She didn't propose but other legislators proposed  
22 allowing other types of photo documentation free including and  
23 accepting medicaid cards. That was rejected.

24 I think there's an interesting analogy to the rejection  
25 of that amendment. In the inclusion of the license to carry

1 identification, there was an NVRA decision in the Northern  
2 District of Georgia a few months ago, Georgia NAACP case. That  
3 was a case involving Section 7 of the NVRA. The obligation to  
4 make voter registration opportunities available at the state  
5 offices that provide public assistance.

6 In the course of denying summary judgment in that case,  
7 the District Court held that it was, he didn't reach findings  
8 of fact, but he held that it was particularly striking that  
9 Georgia was resisting making voter registration opportunities  
10 available at public assistance centers while automatically  
11 registering Georgians with a handgun license at the time of  
12 application for a handgun license. He pointed out the obvious  
13 racial disparities and he said that's a striking fact that we  
14 may want to look into more.

15 I think that the rejection of the expanded allowable  
16 forms of ID including those that are much more likely to be  
17 held by minority voters and the inclusion of identification  
18 like the license to carry a concealed handgun is much more  
19 likely to be held by white voters is additional and probative  
20 evidence of discriminatory purpose.

21 JUDGE COLLYER: We wouldn't object if you finished  
22 early, but I don't want to cut you off.

23 MR. COLANGELO: I'll accept your invitation, Your  
24 Honor, to be piffy, pointed and concise. I'm happy to  
25 conclude.

1 I think that the record in this case shows that Senate  
2 Bill 14 could prevent up to 10 percent of the minority of it's  
3 population from voting on election day. That is a new barrier  
4 that will disfranchise voters the day that it goes into effect,  
5 a barrier that they currently don't have to overcome under the  
6 benchmark practice.

7 It is functionally no different than a re-registration  
8 that the Voting Rights Act was originally enacted to prevent.  
9 It makes it more difficult and necessary for people to get an  
10 acceptable form of ID.

11 It will cost some people money. It is not supported by  
12 any showing that it's strictness was necessary to prevent  
13 fraud. It was enacted against the backdrop of huge explosive  
14 growth in the Hispanic population.

15 There's record evidence of the legislative testimony  
16 recounted in Dr. Flores' report. One bill supporter said we  
17 have to act now in light of these demographic changes.

18 And to the extent that it relied on procedural  
19 alleviations that had been used in the past, those changes had  
20 been used in the past to enact other discriminatory voting  
21 rights laws.

22 To the extent that there are any open questions in the  
23 Court's mind about Texas' failure to present evidence on  
24 federal ID possession or their failure to demonstrate that name  
25 mismatches would be honored at the polls, those are questions

1 that have to be resolved against Texas and not resolved against  
2 minority voters who the Voting Rights Act was intended to  
3 protect and whose right to vote could otherwise be denied or  
4 abridged.

5 JUDGE TATEL: Is there anything in the record that  
6 relates to this question of federal ID? Do you know whether  
7 there's anything in the record about it other than just, you  
8 know, general conclusions? Do we have any evidence about  
9 whether Hispanics have certain kinds of federal ID in higher  
10 numbers than others or passports or anything like that?

11 MR. COLANGELO: My recollection is that Dr. Shaw in  
12 his telephone surveys to the extent that the Court finds them  
13 credible which they're not, that Dr. Shaw did include questions  
14 on federal ID possession, but at least as is reported in his  
15 expert disclosures to the Court, he didn't report any  
16 percentages that I'm aware of of people who lack a state ID but  
17 possess a federal ID.

18 So in other words, he presented some aggregate numbers.  
19 I'm not aware that he presented any numbers that would answer  
20 the question of who lacks the state ID and who has a federal  
21 ID.

22 JUDGE WILKINS: One final question related to kind of  
23 how you phrased your conclusion.

24 Is it the Attorney General's position that we only look  
25 at the effect that Senate Bill 14 will have on Texas, Texans

1 who have already registered to vote or that the ultimate test  
2 we should look at its effect on both the registered voters and  
3 the, those who are eligible to register?

4 MR. COLANGELO: The latter, Your Honor.

5 And in our reply brief on proposed findings of fact and  
6 conclusions of law we include this point.

7 We say that the record evidence has focused on  
8 registered voters who lack allowable ID because that's the  
9 population of people for whom we have the most information.

10 But we also believe that the effect of the bill on folks  
11 who are eligible to vote but who are not -- I'm sorry, eligible  
12 to register to vote but who currently unregistered, that's also  
13 a fact that bears on the Court's retrogression analysis.

14 JUDGE TATEL: Is that because that falls under the  
15 category of the effective exercise of the electoral franchise?

16 MR. COLANGELO: Yes, yes.

17 Texas has not met its burden on Section 5 of the Voting  
18 Rights Act and respectfully request that the Court deny it's  
19 request for declaratory judgment.

20 JUDGE COLLYER: Thank you very much.

21 It is seven minutes after. We will be back at, let's  
22 say 25 after.

23 (Morning recess @ 11:07 a.m.)

24 (Proceedings resumed at 11:25 a.m.)

25 JUDGE COLLYER: Mr. Rosenberg, are you going to do

1 the argument for all of the intervenors or are you going to  
2 split time also?

3 MR. ROSENBERG: With the Court's permission, I will  
4 make the presentation for about the first half hour or so, and  
5 then the last portion of our time will be taken up by  
6 Mr. Hebert.

7 JUDGE COLLYER: Okay, alrighty. Well then, I will  
8 give you a high sign.

9 MR. ROSENBERG: Thank you. I also have my own little  
10 clock here to give me a little comfort.

11 JUDGE COLLYER: Better than me.

12 MR. ROSENBERG: Mr. Hebert will probably take around  
13 ten minutes. So I told him around 30 minutes to let me know  
14 and we will go from there. But thank you, Your Honor.

15 JUDGE COLLYER: Thank you, sir.

16 CLOSING ARGUMENT BY MR. ROSENBERG

17 MR. ROSENBERG: Ezra Rosenberg from Dechert LLP on  
18 behalf of the Texas State Conference of NAACP Branches and the  
19 Mexican American Legislative Caucus of the Texas House of  
20 Representatives.

21 As I said, I will be delivering the first portion of the  
22 argument today.

23 Very briefly, again I am in the somewhat both enviable  
24 and unenviable position of having followed an excellent  
25 presentation by the Department of Justice and we will try to

1 focus our remarks so as not to repeat much of anything of what  
2 DOJ said, Mr. Colangelo said.

3 I would, however, like to begin by thanking again the  
4 Court and the law clerks for just the unbelievable work that  
5 the Court has done in bringing this to trial. Acknowledge as  
6 the Court did to my opponents for their civility and  
7 professionalism.

8 The marvelous attorneys at the Department of Justice  
9 with whom I have had the pleasure of working and most of all,  
10 to salute my co-counsel whose skill and dedication really leave  
11 me humbled and have honored me by allowing me to make this  
12 presentation on their behalf.

13 I will deal mostly with retrogressive issues, but I want  
14 to start just briefly with one point which is a response to a  
15 point that Mr. Hughes made on purpose where he said that  
16 purpose of this act was to stop in person fraud.

17 Now at the beginning of this case in the one minute  
18 opening that I made, I mentioned the fact that SB 14 was a  
19 solution in search of a problem. And if anything, and there  
20 was a lot that was proved in this trial, but one thing that was  
21 certainly proved was that the purpose of SB 14 was not to stop  
22 in person fraud.

23 Major Mitchell testified, and I think as Your Honors  
24 recall, he started with the spread sheet and had 320 examples  
25 of fraud that he narrowed it to six and under cross examination

1 it was five and then at 4 and then 3 and then there were two.  
2 Two possible examples of in person fraud which SB 14 might have  
3 prevented in 10 years of elections out of 46,500,000 votes  
4 cast.

5           And as we know that SB 14 can only stop, if anything, in  
6 person fraud. So if it was a vehicle to stop fraud generally,  
7 it was a very poor choice and for that reason alone as  
8 Mr. Colangelo mentioned, this Court can disregard the stated  
9 purpose, view it for what it is which is pretext.

10           JUDGE TATEL: What do you do with Crawford?

11           MR. ROSENBERG: With Crawford --

12           JUDGE TATEL: There was no evidence there either.

13           MR. ROSENBERG: There was no evidence there, but here  
14 we do have solid evidence of no examples of in person fraud.  
15 Of course, Crawford --

16           JUDGE TATEL: I don't think there was in Crawford  
17 either wasn't there? Didn't Justice Stevens say there was no  
18 evidence of any discrimination, any voter fraud in the  
19 Indiana's history?

20           MR. ROSENBERG: That's correct. He did say that,  
21 that's what the Court did say in the context of the facial  
22 challenge.

23           But here we have a law which during the enactment  
24 process the people who were supporting it said over and over  
25 again that there is in person voter impersonation. That's

1 where the pretext comes in. That there is, there are examples  
2 of non citizens voting. Over and over again you heard this and  
3 at this trial it was clear that those purported statements of  
4 fact that were proffered in support of SB 14 pretextual.

5 I'd like to turn now to the effects issue and the  
6 retrogression issue. Because I think the trial proved here  
7 that what it proved was that there was no proof by the state,  
8 it was a complete failure of proof.

9 They did not at any point put forward their own analysis  
10 of the universe of Texas voters or eligible voters in terms of  
11 the racial breakdown and the potential, the possession of the  
12 documents required by SB 14. That was their burden, they  
13 didn't do it.

14 What they did do was simply nitpick at Dr.  
15 Ansolabehere's analysis. That is not enough. That does not  
16 meet their burden.

17 What we do have, however, is a lot of evidence in the  
18 other direction. There are trends that are consistent and in  
19 one direction, and they indicate that minorities in the State  
20 of Texas are less likely to hold the documents, the state ID  
21 documents, and I'll get to the federal ID documents in a  
22 minute, the state ID documents that are required by SB 14.

23 The first, the most important evidence of course is Dr.  
24 Ansolabehere's highly statistical study to that effect. And in  
25 response to the questions that have been posed several times

1 this morning that Dr. Ansolabehere didn't take into account the  
2 federal ID as Mr. Colangelo said, that is the State's problem.

3 But more so as Your Honors I think remember at, I don't  
4 know if it was a May 3rd hearing or shortly thereafter, Your  
5 Honors posed the question to the State of Texas which do you  
6 want? This trial in July or time to do the federal discovery  
7 and they said we want this trial in July.

8 And we respectfully submit they cannot argue otherwise  
9 and say somehow the defendants now are, did not produce a full  
10 report because they did not have the time to do the necessary  
11 and appropriate study that this case entailed and believe me,  
12 on behalf of the defendant intervenors as Your Honors know, it  
13 was a struggle to do what we had to do in the short time that  
14 we did, and I really I would loved to have had another several  
15 weeks, months, actually.

16 JUDGE COLLYER: Let's be frank about it.

17 MR. ROSENBERG: The second major piece of evidence in  
18 favor of the trend is Dr. Sager's analysis. As was indicated,  
19 there you still have at a minimum a 163,000 Texans without the  
20 required ID.

21 You have a Hispanic proportion. On top that as Dr.  
22 Lichtman showed there was another million who Dr. Sager did not  
23 include who he should have included such as those who are over  
24 65.

25 The other point I want to make about Dr. Sager in

1 response to what Mr. Hughes said today in his almost wholesale  
2 reliance on the so-called Hispanic bias in Dr. Ansolabehere's  
3 report is this. Even assuming and we agree with Mr. Colangelo  
4 that the so-called Hispanic bias, if anything, aggravates the  
5 situation because of what, of the problem with discretion at  
6 the polling place.

7           But even assuming that Dr. Sager's theory is correct, he  
8 made a gross error because he applied it against the entirety  
9 of Dr. Ansolabehere's results. Not the part that would be  
10 effected by the so-called Hispanic bias. Let me explain what I  
11 mean.

12           Dr. Sager began his analysis by looking at the data and  
13 doing an SS, SSN 9 sweep on it and he came out with 5.5 million  
14 true matches. He then did another sweep on that same data of  
15 just the first name, last name, date of birth. And that  
16 produced 500,000 non matches of a population that should have  
17 been complete matches.

18           He looked at the relative Hispanic proportion of the  
19 populations and saw that you had 22 percent in the so-called  
20 true matches and 29 percent of the false matches and he said  
21 ahh, that's your Hispanic bias. Then he compared it to Dr.  
22 Ansolabehere's study and said, all of Dr. Ansolabehere's study  
23 the entire universe is effected by that bias, but that's wrong.

24           Because as we know the bulk of what Dr. Ansolabehere  
25 found was based upon a social security 9 sweep which could not

1 possibly have been effected by the bias. And if I'm not saying  
2 it as clearly as I should, let me give a quick example.

3           If I am weighing myself on a scale that is biased at ten  
4 percent increase and Mr. Posner is weighing himself on the  
5 scale without any bias, if we were going to average the two  
6 together, there would be a five percent bias.

7           But it would depend on whose proportion, whose weight  
8 bore a larger proportion to the total. I don't know what the  
9 answer is as between Mr. Posner and me, but if for example, my  
10 weight or a larger possession, a larger percentage and I was on  
11 the bias scale, then that would increase the contribution of  
12 the bias.

13           If it was in the opposite direction it would decrease  
14 the contribution of the bias, but in no event could you apply  
15 the bias across both scales because one is biased and one is  
16 not. But what Dr. Sager did was apply it against both the  
17 supposedly biased and the supposedly unbiased. So so much more  
18 the so-called dispositive role of Hispanic bias.

19           The last point on this trend I would like to talk about  
20 is a piece of evidence that was not discussed at all in court  
21 but clearly in evidence because earlier this week Your Honors  
22 granted our motion for judicial notice.

23           And if I may, Your Honors, present you with copies of  
24 the, our reply in support of their, our joint request for  
25 judicial notice because that's what the order said and is now

1 in evidence.

2 JUDGE COLLYER: Would you do us a favor, just note  
3 out-loud what it is without the details as to the nature of  
4 what this document would have us take judicial notice?

5 MR. ROSENBERG: Yes.

6 This document is in two parts. The first part asks for  
7 judicial notice of census data and that's in paragraphs 1  
8 through 8 on pages 2 and 3.

9 And the second part, and this is the part I want to talk  
10 about now, are provisions of Texas law and voter registration  
11 data as modified by Texas because Texas had a few quibbles,  
12 reviewed it and we resubmitted it, and this was granted.  
13 That's why judicial notice was granted and that's paragraphs 1  
14 through 13 on pages 3 through 6. So I'm focusing on the second  
15 part of this document.

16 And this is data that's taken directly from TEAM which  
17 is the Texas voter registration database. Now TEAM not only  
18 reflects who was registered in Texas, but also indicates the  
19 name of the person, whether the registered has a Spanish  
20 surname and whether the individual, when the individual  
21 registered he or she provided a driver's license or a personal  
22 identification card number.

23 By the way, Judge Tatel, I think this goes directly to  
24 one of the questions you asked earlier about do we have any  
25 data other than from experts --

1 JUDGE TATEL: Right.

2 MR. ROSENBERG: -- that supports the trend and the  
3 direction and the conclusion that minorities are  
4 disproportionately impacted.

5 This last item is key. The last item being that the  
6 form asks for driver's license or personal ID because on  
7 January 1, 2004 Texas law went into effect requiring that when  
8 someone registered to vote, if he or she does have a driver's  
9 license or personal identification number he or she must  
10 provide that on the form at the time of voting.

11 So we did something that's fairly straightforward  
12 particularly for lawyers. We simply looked at how many Spanish  
13 surnamed individuals were in the TEAM database who had a  
14 driver's license or personal ID appended to their name. How  
15 many non Spanish surnamed individuals had a driver's license or  
16 ID card number on their registration record for those drivers  
17 who registered on or after January 1, 2004.

18 So to begin with if Your Honor, I direct Your Honors to  
19 paragraph 7 on page -- I'm sorry, paragraph 6 on page 4 going  
20 to page 5, it supports the proposition that 56.4 percent of the  
21 active and suspense voters in the voter database registered on  
22 or after January 1, 2004, so we're dealing with more than half  
23 of the voter registration base.

24 Amongst --

25 JUDGE TATEL: 56 percent have what?

1           MR. ROSENBERG: 56.4 percent of the active and  
2 suspense voters in the entire database registered on or after  
3 January 1.

4           JUDGE TATEL: Oh, I see, got you.

5           MR. ROSENBERG: This is just in the context of how  
6 large of a proportion the database we are dealing with.

7           Amongst Spanish surname voters, 9.7 percent of those  
8 registered voters did not have a driver's license or personal  
9 ID card listed in their registration record, and that you'll  
10 find in paragraph 12 of the document that has been granted  
11 judicial notice.

12          JUDGE WILKINS: Just so that we're clear, the  
13 personal ID card is a state ID, not one of the, not whether  
14 they may have a passport or something else?

15          MR. ROSENBERG: Right. This is the same, this is the  
16 card that they get from DPS. Many people who don't drive and  
17 can use that as of now for support when they apply to vote.

18          Among non Spanish surname voters 7.5 percent do not have  
19 either the driver's license or the personal ID number listed,  
20 so what does that tell you?

21          Well, you compare the 9.7 percent of Spanish surname  
22 people who do not have the ID compared to the 7.5 percent of  
23 the non Spanish surname people who do not have the ID and you  
24 see that again it's an arithmetical 9.7 percent over 7.5  
25 percent I am told equals 29 percent. This we would submit is a

1 very substantial facial difference.

2           Now I want to note that this rate for non Spanish  
3 surnamed individuals is a combination of the Anglo rate and  
4 other races including African Americans.

5           As Dr. Shaw testified, we know that from the social  
6 science literature it's likely that the African American rate  
7 of not having a driver's license is actually much lower than  
8 that of the Anglo rate so in fact, what, it is reasonable to  
9 conclude that the Anglo rate is actually lower than 7.5 percent  
10 of non possession and therefore, creates even a bigger  
11 disparity between Hispanics and Anglos as to possession of  
12 these documents.

13           Now at the outset these data enjoy very, one very  
14 important advantage over other data discussed in this case  
15 because it was not necessary to perform any matching studies.  
16 And I think as we've all learned, every matching study is going  
17 to have some false positives, some false negatives, some  
18 problems that you just can't work around. This doesn't have  
19 that.

20           We're just dealing with a straight facial arithmetical  
21 look at the state's own data. We understand it's a subset of  
22 the universe. We are not saying it is the entire universe, but  
23 it's a pretty large subset of that universe.

24           So our point is not that this is definitive. Our point  
25 is it's three-fold. First, this is another piece of evidence

1 that points solidly in the direction of a disparate impact on  
2 minorities as a result of SB 14.

3           Second, this undermines Dr. Sager's theory that the  
4 entirety of the so-called Hispanic disparity that he found and  
5 that he applied across the entirety of Dr. Ansolabehere's  
6 analysis could be attributed to a possible matching bias.

7           Because Dr. Sager testified that the State of Texas  
8 directed him to the TEAM database and suggested that he use the  
9 TEAM database and compare it to the DLS database as an accurate  
10 reflection of who has a license in the State of Texas.

11           If Dr. Sager was correct that there was this huge  
12 Hispanic bias, one would expect that you wouldn't see any  
13 difference between the Spanish surnames and the non Spanish  
14 surnames in the TEAM database but you do see it, so that's  
15 another piece of evidence that helps to undercut Dr. Sager's  
16 analysis.

17           It also, and this is the third point on this piece of  
18 evidence, illustrates one of Dr. Shaw's conclusions. Dr.  
19 Shaw's conclusion, I am now switching from Sager to Shaw, were  
20 not based on a representative sample when he conducted his  
21 surveys based on Dr. Ansolabehere's 1.9 million enlarged VRNID.

22           Because according to Dr. Shaw, approximately 73 percent  
23 of Dr. Ansolabehere's 1.5 million expanded VRNID is suppose to  
24 estimate all those who are registered to vote but who did not  
25 have either form of this required state ID.

1           In effect .73 times about 1.85 million is a notch under  
2 50,000. So Dr. Shaw's survey essentially says that under --  
3 I'm sorry -- that .73 had the ID -- thank you -- and that .27  
4 did not have the ID; .27 times 1.85 million equals a notch  
5 under 500,000. So Dr. Shaw's survey essentially concludes that  
6 under 500,000 individuals who are registered lack both forms of  
7 the state required ID.

8           That does not make sense in the context of the TEAM  
9 data. By the way, that 500,000 includes not only driver's  
10 license but LTC.

11           If Your Honors look, refer Your Honors to paragraph 11  
12 of the judicial notice document, among the 508, there are  
13 500,080,221 active/suspense voters who registered on or after  
14 January 1, 2004 and who are missing the ID, 580,000.

15           That compared -- so essentially what you're doing is you  
16 are comparing under 500,000 people whom Dr. Shaw say do not  
17 have either a state driver's license or a license to carry of  
18 the entire universe of voters in Texas, while we can see from  
19 the TEAM data itself that over almost 600,000 people, just of  
20 those people who registered since January 1, 2004 don't have  
21 just a driver's license.

22           JUDGE WILKINS: But it is possible that someone who  
23 registered in '05 who didn't have a driver's license could have  
24 gotten one or a state photo ID since then, right?

25           MR. ROSENBERG: Absolutely, Your Honor, and it's also

1 possible that someone who registered initially with an ID does  
2 not have an ID now, someone who registered without an ID then  
3 does have an ID now.

4 I would submit that there's no basis upon which to  
5 suggest that there would be any racial or ethnic distribution  
6 that would effect that figure. There may be, but we don't  
7 know, but yes.

8 That's why I said we are saying this is definitive proof.  
9 We are just saying that this is directional and very, very  
10 supportive of Dr. Ansolabehere's conclusions.

11 Briefly I would like to -- if I can check my own time.

12 JUDGE COLLYER: We're going to, your 30 minutes is up  
13 at 11:56.

14 MR. ROSENBERG: Thank you, Your Honor.

15 Very briefly then, I'm going to just go through what I  
16 refer to as Dr. Shaw's 2 percent solution. I think that we  
17 have heard a lot about that. We have heard Dr. Marker, we  
18 heard Dr. Lichtman and Dr. Ansolabehere talk about that you  
19 cannot, you can't draw any conclusions whatsoever from this  
20 survey with such a low response rate.

21 But that was not the only reason. Not only was there a  
22 lower response rate, there was a lower append rate, but they  
23 may not have appended to names on the VRNID because of the  
24 limitation of a last name and address factor that was used to  
25 locate people.

1           It was easier to append as Dr. Shaw said phone numbers  
2 to Anglos than to blacks. It includes 400,000 of the ambiguous  
3 numbers from Dr. Ansolabehere's enlarged VRNID. There were no  
4 cell lines attempt. There were calls made only once.

5           He did not validate the responses. He did not weigh the  
6 vote. There's absolutely no basis upon which to allow Dr.  
7 Shaw's report to even be considered quite frankly, and that's  
8 dramatized by Dr. Lichtman's testimony yesterday. The out  
9 land-dish percentages that Dr. Shaw's survey resulted in when  
10 you look at the LTC results, when you look at the veterans  
11 disability results and when you look at the social security  
12 disability results.

13           And on top of the disparate results that you see is the  
14 issue of burden and Mr. Colangelo went I thought terrifically  
15 into the burden issue. I'm not going to burden the Court with  
16 a lot more. But I do just want to make a couple of points.

17           One, we heard from each of the five legislators who  
18 testified about the burdens that their constituents will be  
19 under because of this law. That testimony was put on without  
20 objection. It was repeated and it was not refuted.

21           We heard from Lydia Camarillo of the Southwest Voter  
22 Registration Education Program. Perhaps we heard most movingly  
23 from Reverend Johnson about the effect of this statute on his  
24 constituents.

25           Witness after witness testified repeatedly without

1 objection, without refutation about the lack of adequate  
2 driver's license facilities, about the distances that voters  
3 would have to travel to get to the driver's license facilities.

4 About the lack of public transportation, about the long  
5 wait lines, about the intimidation that some of their  
6 constituents would feel going into the facilities and in fact,  
7 under the new regulations having to be fingerprinted in order  
8 to get the EIC.

9 We heard about it from legislators in Houston, in  
10 Austin, and Dallas Fort Worth along the border of new Mexico  
11 repeatedly without objection and without a hint of rebuttal.

12 We heard about the cost. The additional burden of the  
13 \$23 for a birth certificate, another \$8 if you are doing it by  
14 mail, \$145 for a passport, 16 to \$18 for the driver's license.

15 And, of course, we have in the record by judicial notice  
16 the census data concerning the disparate poverty levels as  
17 between minorities and Anglos.

18 None of this is cured in any way by the ability of  
19 people over the age of 65 to vote by mail. Voters age 65 or  
20 older had the right before SB 14 to vote either by absentee  
21 ballot or by mail whether or not they had a photo ID. After SB  
22 14, they no longer have that right to vote in person if they do  
23 not have the voter ID.

24 Director Ingram of the Secretary of State's office said  
25 that absentee ballot is very different than voter ID than

1 voting in person, and Rev. Johnson discussed, and I will just  
2 quote very, very briefly.

3 "I have a group of African American senior citizens  
4 women, they want to go to the voting polls and stand in line at  
5 the voting polls. There's a certain degree of dignity for them  
6 to do this."

7 These people appreciate the sacred right to vote and  
8 they are not going to vote absentee. These are people who it  
9 would be a sin to take the right to vote from these old women,  
10 and no, they don't drive, they don't have no picture ID, they  
11 don't go international nowhere so they don't have a passport  
12 but they vote. This is not a minor burden we're dealing with.

13 I'm speaking with my co-counsel with Mr. Garza, with Mr.  
14 Mr. Figueroa, with Mr. Sanchez, it won't effect people like  
15 them. They have told me that, of course, they carry their IDs.

16 It's going to effect people who need the protection, the  
17 lower income minorities. The elderly who fought for this right  
18 to vote. The young people who are trying to set a pattern of  
19 voting.

20 This case is about people like Lydia Camarillo who toils  
21 through cities and farms to get people registered to vote is  
22 having her efforts undercut at the very time that she's trying  
23 to get these people interested in the system.

24 It's for people like Victoria and Nicole Rodriguez who  
25 boarded a plane for the first time to fly across the country to

1 testify about their right to vote. And who by the way, were  
2 allowed to get on the plane and walk into this courtroom simply  
3 with their student photo ID which they're not allowed to do in  
4 order to vote in Texas. And Rev. Johnson who explained in his  
5 soft voice we paid for it with funerals.

6 Over and over again in the legislative hearings and I  
7 think Major Mitchell and Representative Aliseda talked about  
8 well, we have to stop fraud, we have close elections in Texas,  
9 one vote makes a difference.

10 And we agree, one vote makes a difference, and if one  
11 vote makes a difference, tens of thousands of hundreds of  
12 thousands votes make even more of a difference and that's what  
13 this case is about.

14 Thank you very much. I turn it over to Mr. Hebert  
15 unless this Court has any questions.

16 JUDGE COLLYER: None from me. Thank you.

17 No, thank you very much, Mr. Rosenberg.

18 Mr. Hebert, nice to see you.

19 MR. HEBERT: Thank you, Your Honor, and may it please  
20 the Court.

21 JUDGE COLLYER: And you wanted 15 minutes, right?

22 MR. HEBERT: Yes, please.

23 JUDGE COLLYER: Okay.

24 CLOSING ARGUMENT BY MR. HEBERT

25 MR. HEBERT: And I will ask my co-counsel to give me

1 a warning when I have five left if that will be helpful.

2 I want to start with a couple of things. First, I want  
3 to start and I'm going to address a little bit of effect but  
4 then really go into purpose but Dr. Ansolabehere's analysis and  
5 even Dr. Sager's, assuming that it's correct, established that  
6 blacks and Hispanics are substantially over represented among  
7 registered voters who can't be matched to a valid state photo  
8 ID under SB 14. This imbalance, however, can only be rectified  
9 if the group of registered voters who lack a state photo ID but  
10 possess a valid federal photo ID.

11 Now no evidence has been presented by any expert in this  
12 case of that particular group of registered voters. The only  
13 evidence on federal voter ID is Dr. Shaw's information.

14 However, the testimony of Dr. Marker and Dr. Lichtman  
15 established that first of all, that survey is so totally  
16 fatally flawed that no conclusions reliable can be drawn from  
17 it.

18 But secondly, the survey data presented there on the  
19 possession of federal IDs it doesn't isolate voters who lack  
20 state IDs but possess that federal ID. Now Judge Tatel queried  
21 about this earlier.

22 Testimony presented by Wendy Davis, Senator Davis  
23 yesterday demonstrates that those with a federal ID have to  
24 have a state ID to get that first. That was the whole point of  
25 her flow chart which is in the record as joint appendix 1165 to

1 show that.

2           Now, the state failed to produce any evidence of how  
3 many people with a required federal ID like a passport do not  
4 possess the state ID required to vote under SB 14.

5           Now it's not plausible that compared to Anglos who lack  
6 a state ID blacks who lack state IDs would disproportionately  
7 possess the federal IDs under SB 14 and the same can be said  
8 for Latinos.

9           But regardless of the IDs that Latinos possess, it's  
10 undisputed here by Texas that Latinos will still face the  
11 problems of mismatch names on the database disproportionately  
12 which to quote Beer adversely effects their quote effective  
13 exercise of the electoral franchise.

14           And moreover, given the discretion that's afforded local  
15 election officials under SB 14, both blacks and Latinos are  
16 going to face an insuperable additional barrier of  
17 discriminatory application of photo ID laws at the polls which  
18 Texas has not rebutted on this case.

19           Now Judge Tatel has asked about Crawford and I want to  
20 go right to that because Crawford you're correct, first of all,  
21 was decided on summary judgment. There was no trial.

22           It was a facial application and it was really not a case  
23 that looked at the intent of the Indiana legislature like this  
24 evidence has looked at the intent of the Texas legislature.  
25 But even assuming that voter fraud combating is a legitimate

1 state goal, it is uncontested in this record that to the extent  
2 that voter fraud exists in Texas, it almost never happens in  
3 person and usually happens by mail or by election officials,  
4 and this law does nothing to combat that.

5 Now I'm going to maintain and I would ask this Court to  
6 specifically find that preventing voter fraud as alleged here  
7 was merely a pretext, a cloak for voter suppression.

8 You see, in Texas this whole issue of voter fraud and  
9 this whole issue of a voter ID, it has been tinged with race  
10 from day one. And I'm going to prove it to you right now.

11 How do we know this? We heard Major Mitchell testify  
12 here that the Attorney General of Texas went around the state  
13 and spent I don't know, hundreds of thousands of dollars  
14 educating local DAs on how to combat the voter fraud. But you  
15 see, when Texas talks about preventing voter fraud they see it  
16 as a crime being committed by black people and Latino people.

17 Now how do we know this? Well, here's this, here's a  
18 power point slide that is Exhibit 134, Defendant's Exhibit  
19 134.

20 This is Attorney General Abbott pictured and here is his  
21 power point slide. It's a 71 slide power point. Not a single  
22 slide on this presentation talks about the need for a photo ID  
23 but it sure talked about mail in fraud.

24 Well, let's see what Texas Attorney General told local  
25 district attorneys to look for with regard to mail in ballot

1 fraud. He said they use unique stamps and look at the stamp, a  
2 sickle cell anemia stamp, test early for sickle cell and it  
3 pictures an African American woman holding an African American  
4 child. You don't have to be a rocket scientist to figure out  
5 whether that's a queue on race, it's racist just in its face.

6 Now that's not enough. Even when he went to talking  
7 about a warning about in person voter fraud who do we see.  
8 Black people lined up at the polls in this photo, that's who he  
9 shows when he's talking about early voting fraud in person.

10 And just to give one more example Defendant's Exhibit  
11 298 which I'm not going to bring up now is an article that  
12 quotes Betty Brown, a republican who was in the legislature in  
13 2009. Now she didn't vote for the photo ID, she was a white  
14 republican but she sure would have I believe if she had been  
15 there.

16 Because she said -- Can you bring that up.

17 Here's the exhibit. She says Asians, a North Texas  
18 legislator during House testimony on voter ID legislation said  
19 that Asian descent voters should adopt names if they have this  
20 mismatch problem that are quote, easier for Americans to deal  
21 with. Close quote. Now, she then suffered a huge outrage from  
22 the Asian American community about that and rightfully so.

23 We have a litany of unusual procedures that Texas has  
24 employed to get SB 14 enacted. In prior sessions the democrats  
25 in the Senate had the benefit of the two-thirds rule. Now they

1 only comprised just a little over a third so that was very  
2 helpful to them.

3           And by the way, every democrat in the State legislature  
4 represent a district that's majority -- in the Senate  
5 represents a district that's majority minority. So we're  
6 talking about the folks who are really trying to protect  
7 minority voting rights.

8           Now they had that benefit but what did Texas do among  
9 other things? They did away with the two-thirds rule through  
10 all of these unusual procedures that you heard about in the  
11 trial and just to jam the law through finally in 2011.

12           And they did away with the two-thirds rule just for the  
13 photo ID which I think speaks volumes about their intent.

14           Now Senator Ellis and Senator Davis and others talked  
15 about intent. When he asked Senator Fraser the bill sponsor  
16 why he was sponsoring this bill, this Anglo republican, he said  
17 I drew the bean this time.

18           Now wouldn't it have been nice to have Senator Fraser  
19 take the witness stand and have Texas produce that sponsor of  
20 the bill, but no, they didn't do that.

21           Wouldn't it have been nice to hear Representative  
22 Harless, the sponsor in the House, but no, they didn't produce  
23 her either.

24           Wouldn't it have been nice to hear Lieutenant Dewhurst  
25 and Ann McGeehan, the Secretary of State resource person who

1 testified before the legislature, but Texas brought none of  
2 those people and they have failed to bring these people forward  
3 in much the same way they failed to bring people here in the  
4 redistricting hearing to explain how the lines were drawn.  
5 Everybody kept pointing to somebody else and Texas should be  
6 held accountable for their failure of proof.

7           Now as my co-counsel Mr. Rosenberg has said, there are  
8 many people who don't, aren't going to be effected by this law.  
9 But there are people who are going to be effected.

10           And the census data in this record show that minorities  
11 in Texas blacks, Latinos, they're disproportionately poor  
12 according to every socioeconomic measure. Senate Bill 14 will  
13 harm the poor. It will harm the downtrodden and they are  
14 already suffering daily the debilitating effects of their  
15 poverty. Their cause is now our cause too.

16           Texas rejected amendment after amendment that would have  
17 given them some relief from this unjust law. They could have  
18 kept their photo ID law but still given the indigent, the poor,  
19 the homeless some relief.

20           Our client, Eric Kennie, and some of the clients  
21 possessed that Mr. Harris, the young Texas voters, they have  
22 testified that they don't have a birth certificate.

23           Mr. Kennie was born in a car. He's indigent, he's been  
24 homeless. And of course, like most homeless indigent people he  
25 has been arrested a few times. But he still votes today. But

1 he doesn't have an ID and he can't go spend \$22 to buy a birth  
2 certificate or \$23 because there is no birth certificate for  
3 him.

4           So this how mean spirited and how callous can you be  
5 with a law and how discriminatory to deny those kinds of  
6 people, people who need our protection the most.

7           Now there's a recent effort as was alluded to earlier to  
8 get Section 5 declared unconstitutional. I say that the  
9 redistricting case and this case gives us Exhibits A and B for  
10 why Section 5 is still needed. It's discriminatory plans and  
11 photo ID law are infected with discriminatory intent. They  
12 would have gone into effect but for Section 5 and they would  
13 have had effect.

14           So this Court should find that not only that Texas has  
15 failed to meet its burden of proof, I urge the Court to make an  
16 affirmative finding that SB 14 was in fact enacted with a  
17 discriminatory purpose and will have a retrogressive effect.

18           In addition, to concluding that Texas has failed to meet  
19 its burden and the Court should make that finding why? Because  
20 the overwhelming evidence supports that kind of a finding.

21           Courts of our nation are great levelers of justice. As  
22 you begin your judicial deliberations and on behalf of those in  
23 Texas who need your protection blacks and Latinos throughout  
24 the state, those registered without an ID and those who want to  
25 be on the rolls but aren't, 40 percent of Texas, we ask you to

1 deny the declaratory judgment that Texas seeks from this unjust  
2 law.

3 Thank you very much.

4 JUDGE COLLYER: I have a question before you sit  
5 down.

6 MR. HEBERT: Okay.

7 JUDGE COLLYER: Most Voting Rights Act panels faced  
8 with the question of retrogression and alleged ill purpose stop  
9 if they find retrogression and do not reach purpose.

10 Determining that if they find change of law, whatever is  
11 retrogressive that invalidates it and they don't have to  
12 address purpose which gets closer to the, what Texas  
13 consistently reminds us as their sovereign rights as to State  
14 of Texas.

15 So my question to you is you have urged us to make an  
16 affirmative finding on discrimination retrogression and not  
17 just failure of proof. If we were to find retrogression, why  
18 could we not stop there without going forward and also finding  
19 as long as we say we're not going to reach, we're not going to  
20 make a no finding, we're not going to make any finding, why  
21 would that not be sufficient?

22 MR. HEBERT: Well, as someone who spends a lot of  
23 time in the U.S. Supreme Court, I would believe that a record  
24 on the, challenging the constitutionality of Section 5 which  
25 Texas has done, that the Supreme Court would be hugely

1 benefited in looking at the terms of a burden on the State of  
2 Texas to try to examine the issue of retrogression and  
3 discriminatory intent. So that would be, I think, my first  
4 response that I think it would be extremely helpful to do that.

5           And there have been other cases where Courts have  
6 actually looked at purpose first like Bugsby versus Smith is a  
7 good example of that, a case that I tried back here with  
8 Mr. Posner actually in 1982 or '80.

9           JUDGE COLLYER: Yeah.

10           MR. HEBERT: So those cases are important.

11           After all, under Section 5 I think it's important that  
12 on a high profile issue like this where other cases are pending  
13 that involve photo ID, like the South Carolina case alluded to,  
14 I think it's important given the need of uniformity of  
15 decisions by the D.C. Court to actually have legal precedent on  
16 the issue of intent. Because this Court is the only Court that  
17 can decide Section 5 issues and that's why Congress designated  
18 this Court uniquely so.

19           JUDGE COLLYER: Thank you, sir.

20           Any other questions?

21           JUDGE TATEL: No.

22           JUDGE COLLYER: Thank you.

23           All right, Mr. Hughes, by my clock I think you have 11  
24 minutes left.

25           Is your clock different than that, sir?

1 MR. HUGHES: My clock was 12 but I'll take your --

2 JUDGE COLLYER: Well, I'll give you 12 if your clock  
3 says 12. I'm feeling at least a minute generous because you've  
4 been a few minutes generous to the Court as we went along.

5 MR. HUGHES: I wish I could have all of those minutes  
6 back now, Your Honor.

7 (Laughter.)

8 JUDGE COLLYER: Well, I appreciate that, but I'll  
9 give you one of them.

10 MR. HUGHES: Thank you, I'll settle for one.

11 JUDGE COLLYER: Okay.

12 REBUTTAL ARGUMENT BY MR. HUGHES

13 MR. HUGHES: I'd like to start by talking about the  
14 moving and shifting goal posts the Department of Justice and  
15 the defendants have identified in this case.

16 This case began with the Department of Justice having a  
17 theory about ID disparity both in preclearance and in  
18 litigation here. When the State of Texas put forth evidence  
19 from the social science literature that showed regardless of ID  
20 disparity, no one's ability to vote much less on an account of  
21 race or color will be effected, and then when we completely  
22 took down their analysis on ID disparity showed Professor  
23 Ansolabehere's method was totally flawed, the theory shifted.

24 It shifted yesterday and even more today, and now we're  
25 talking about name mismatches between Hispanic identifications

1 in their driver's license and at the voting on the voter rolls.

2 But what no one has discussed is Texas has an ID regime  
3 now. And in Dr. Shaw's report he reports that 60 percent of  
4 Texas voters are asked to show photo ID now, and under current  
5 Texas law it permits people to vote. When there are  
6 differences between the ID, they show they can show a driver's  
7 license now, Professor Shaw testified to that. Ms. McGeehan  
8 testified to that in her deposition.

9 And people are allowed to vote now, and there's  
10 literally zero evidence in the record that the way that Texas'  
11 SB 14 will be implemented will be any different than the  
12 current law. It's just a brand new theory because the  
13 defendants don't like what happened to their ID disparity  
14 theory.

15 And another point here is that the implementing  
16 regulations that put forth the different, the ability to  
17 account for different names are subject to a separate  
18 preclearance proceeding and if the Justice Department has  
19 concerns about that, they can take that up then.

20 The next point I'd liked to cover is the other new  
21 theory that we heard from Mr. Rosenberg who I thought maybe  
22 should be awarded a Ph.D. for essentially a new expert opinion  
23 in his closing about what the self-reporting of ID possession  
24 to DPS shows and SOS shows and it's completely debunked by the  
25 testimony of Keith Ingram on the first day of the trial when he

1 said that self-reporting information to the Texas Secretary of  
2 State about possession of driver's license and so forth is  
3 hopelessly inaccurate and incomplete and certainly this  
4 untested new theory is not a way to prove that there's ID  
5 disparity in Texas.

6           The next point I want to make is we have not conceded  
7 there are hundreds of thousands of voters in Texas that don't  
8 have an ID. I want to make sure my answer to Judge Tatel's  
9 question is clear.

10           It is true that Professor Shaw surveyed a 1.9 million  
11 population and roughly 10 percent of those surveyed said they  
12 didn't have an acceptable form of ID. But our position is that  
13 this 1.9 million is massively bloated and that's what Professor  
14 Sager does and it has dead people and people that have moved.

15           So that actual population is much, much, much smaller  
16 and yes, Professor Shaw's survey mentioned some people without  
17 ID but nowhere on the order of magnitude as suggested by the  
18 defendants.

19           And now I want to talk about impossible burdens.

20           JUDGE TATEL: Could you just before you do that.

21           MR. HUGHES: Yes.

22           JUDGE TATEL: What's your answer to Mr. Colangelo's  
23 response to my question about the federal databases?

24           He said the very simple answer to this Texas could have  
25 asked for it and never did.

1 MR. HUGHES: That's right where I was going to go.

2 JUDGE TATEL: Oh, good, excellent.

3 MR. HUGHES: Because I want to talk about possible --

4 JUDGE TATEL: That's what I thought you were going to  
5 say.

6 What's the answer?

7 MR. HUGHES: The answer is that Texas doesn't need to  
8 buy in to the Department of Justice's theory about how to prove  
9 non retrogression.

10 They have a theory that database matching is the way to  
11 go. We think it's hopelessly flawed. Getting the federal  
12 databases and more database matching wouldn't have solved any  
13 of that.

14 To the extent that the Department of Justice wanted to  
15 do database matching is their theory which they did, they have  
16 known about this case for a year. They weren't dependent on us  
17 to ask at any particular time for the databases, they could  
18 have asked for them earlier. Their expert wanted it, they  
19 didn't.

20 Their decision about how they were going to try the case  
21 is totally unrelated to our decision and our ultimate strategic  
22 determination that the way to prove non retrogression has  
23 nothing to do with database matching but everything to do with  
24 the social science which actually answers the ultimate question  
25 of whether this law will effect people's ability to vote.

1           JUDGE WILKINS: But Texas didn't do a survey of the  
2 voter registration of all the registered voters and see, you  
3 know, who had IDs and who didn't and what their demographics  
4 were to prove non retrogression, right?

5           MR. HUGHES: Well, that is true. We did not do a  
6 survey of all of the registered voters.

7           I can explain why we did the survey the way we ended up  
8 doing it, and that is we do agree that you can match and prove  
9 through social security 9 matching, a very precise matching and  
10 figure out, you know, to a high degree of certainty who  
11 actually has ID.

12           The problem comes in the unmatched set and we went  
13 through those ad nauseam yesterday with Professor Ansolabehere.  
14 We just think it's indeterminate that more database matching  
15 can answer the question for that unmatched set.

16           So we just surveyed the unmatched set to see what ID  
17 possession rates would be in there because we are fairly  
18 confident, very confident in that matched set so we didn't see  
19 a need to survey that set.

20           JUDGE TATEL: The we, you are talking now about Dr.  
21 Shaw?

22           MR. HUGHES: I am talking about Dr. Shaw.

23           JUDGE TATEL: If his surveys are invalid then what?

24           MR. HUGHES: Again, it goes to the very first thing  
25 that Mr. Mortara mentioned in his opening and I mentioned

1 earlier this morning, it's that the social science analysis  
2 answers the ultimate question.

3           No social scientist, no one who actually wanted to know  
4 what the effect of photo ID was on whether people were going to  
5 be denied the right to vote or deterred from the polls on  
6 account of race or color would just stop when they figured out  
7 there was an ID possession. That would be -- no social  
8 scientist would do that.

9           That's why Professor Ansolabehere didn't do that. He  
10 looked to see what actually happens when these are implemented  
11 and he looked at both the Indiana 2006 and the Georgia 2008  
12 where we have very similar laws --

13           JUDGE COLLYER: But they're not really similar.

14           Texas has a more narrow law than either of those two  
15 states. But and so I think that's somewhat different.

16           Texas has a different population mix that's at issue  
17 here that isn't at issue in Georgia or Indiana.

18           And Dr. Ansolabehere's said well, I have the second  
19 article, the second one, the 2009 article that you cited from  
20 him was based on the same data as the 2007 article. I've  
21 forgotten the dates of those two articles. But they were all  
22 based on the same data set and he was just reminding it for the  
23 second one.

24           So the question is whether that's up to date data and  
25 whether it's reflective of the population in the State of Texas

1 after the 2010 census.

2           Coming to my question, but ahh, I have a question, thank  
3 you.

4           I'm finally getting to the question.

5           Texas defends based on the social science data. The  
6 United States and the intervenors oppose preclearance on the  
7 basis of on the ground information in the State of Texas.

8           Now, if you were going to measure those two and you're  
9 absolutely right, what you say about the social science data,  
10 Mr. Hughes, you're a great lawyer, you don't dissemble at all.  
11 That's what it says. They are pretty good too and they're not  
12 dissembling. That's what the facts show in the State of Texas.

13           Shouldn't we rely more on what's in the State of Texas  
14 than on generic national social science data?

15           MR. HUGHES: No, Your Honor.

16           JUDGE COLLYER: I love the fact --

17           MR. HUGHES: Let me explain very clearly our response  
18 to this.

19           JUDGE COLLYER: Yes.

20           MR. HUGHES: Social science studies two states that  
21 are relevant here, Indiana and Georgia, very similar photo ID  
22 laws where the evidence shows there's actual ID disparity in  
23 those states. That's the evidence undisputed.

24           And the evidence in the social science literature shows  
25 there's no turnout impact. People aren't denied the right to

1 vote at the polls and they're not deterred from going to the  
2 polls, that's their own expert.

3 JUDGE COLLYER: I understand.

4 MR. HUGHES: Let me connect the dots.

5 Then Professor Shaw came and said, this is all in his  
6 first report. He compared the voting behavior of people in  
7 Texas to the voting behavior of people in Indiana and Georgia  
8 in terms of turn out based on race and so forth.

9 All of those factors he said these are comparable and I  
10 can't as a social scientist say that voting behavior here is  
11 similar even in the states where they have an ID disparity  
12 there's no impact, in my social science opinion, this  
13 translates into me being able to say as a social scientist to a  
14 reasonable degree of scientific certainty that SB 14 will not  
15 have an effect on people's ability to vote in Texas much less  
16 on account of race or color. They don't have a contrary expert  
17 opinion.

18 Professor Ansolabehere has no opinion on that. He just  
19 has an opinion that there's ID disparity on half the list.

20 There is no political scientist who has analyzed the  
21 social science literature and told Professor Shaw that he's  
22 wrong. It is essentially unrebutted and that is what the state  
23 needs to meet its burden.

24 What the DOJ would have you believe is that beyond that  
25 we need to talk to every registered voter or do a multi million

1 dollar study or do a super complicated database match.

2           We don't need to do that. We have Professor Shaw. His  
3 testimony gets us all the way there and it is essentially  
4 un rebutted.

5           JUDGE COLLYER: That's without his surveys.

6           MR. HUGHES: That's totally without his surveys.

7           You know, if we need to do the things that the  
8 Department of Justice is suggesting that we need to do here  
9 today like look at voting age population or study everybody who  
10 may or not have a birth certificate then Northwest Austin leads  
11 directly to the conclusion that Section 5 is in trouble if they  
12 are right.

13           Two reasons. Georgia had to do none of those things and  
14 the arbitrary and capricious nature of the preclearance process  
15 should inform the Court's assessment of whether we have met our  
16 burden.

17           And second as I have explained, the social science gets  
18 us over the hump and they do not have an answer to the social  
19 science. None. ID disparity is not an answer because the  
20 social science takes all of that into account.

21           JUDGE WILKINS: Did you cite any of that social  
22 science in your letter to the Attorney General seeking  
23 preclearance?

24           MR. HUGHES: I do not believe so, Your Honor.

25           I would like to make one last point about, in my

1 remaining 30 seconds about --

2 JUDGE COLLYER: You have a minute and a half.

3 JUDGE TATEL: Let me just, you can charge this, just  
4 charge the answer to me if you like.

5 What is the arbitrary and capricious nature of the  
6 preclearance process here? Is your point -- well, what is your  
7 point about that? I want to be sure I understand.

8 MR. HUGHES: My point is that if we have this ever  
9 shifting burden where we have put forth the social science.  
10 They say well, it's all about ID disparity. We completely  
11 demolish their entire theory of disparity which I think --

12 JUDGE TATEL: Suppose your social science evidence  
13 isn't sufficient? I mean, you are assuming the answer to the  
14 question.

15 Obviously. Yeah, I mean, if it's sufficient and the  
16 Court and it's rejected then we do have a Section 5 problem,  
17 but suppose --

18 I'm sorry, go ahead, Judge.

19 JUDGE WILKINS: I'm sorry to interrupt you. Go  
20 ahead.

21 JUDGE TATEL: Suppose the circumstances in Georgia  
22 and Indiana are sufficiently different so that the social  
23 scientist's conclusions about the first two states don't  
24 translate easily to Texas?

25 MR. HUGHES: I guess the point about Georgia is their

1 law got precleared.

2 JUDGE TATEL: I wasn't asking you that question.

3 The question is whether the circumstances in those two  
4 states, we'll take Georgia whether the circumstances in Georgia  
5 or whether the judgment about Georgia given the nature of its  
6 photo ID, it's ID law and the conditions existing in Georgia  
7 are sufficiently similar in Texas to reach the conclusion you  
8 were suggesting.

9 MR. HUGHES: I think that the evidence that Dr. Shaw  
10 put forth connects those dots for the Court.

11 JUDGE TATEL: Okay. But If they don't -- if they do,  
12 then I see your point about arbitrary and capricious, but if  
13 they don't, then you don't have that kind of problem, correct?

14 MR. HUGHES: I think you're right, that's the point I  
15 was trying to make.

16 JUDGE TATEL: Now I understand.

17 JUDGE WILKINS: But I guess what I am failing to  
18 understand is how could the Attorney General have been  
19 arbitrary and capricious in not considering an argument that  
20 you never made?

21 MR. HUGHES: You're right, Your Honor, that point is  
22 well taken.

23 What I guess now I'm shifting to talk about are just the  
24 numerous changes in burden that the Attorney General is  
25 suggesting we need to satisfy now in the litigation. That's

1 the other piece of it that I was trying to make.

2 JUDGE WILKINS: Okay.

3 MR. HUGHES: I see, Your Honor, that I'm out of time.

4 JUDGE COLLYER: Yes.

5 MR. HUGHES: So I think I have said enough and I will  
6 ask the Court to enter a judgment in our favor preclearing SB  
7 14 and if I could just conclude by thanking the panel for their  
8 indulgence and patience for presiding over this trial.

9 JUDGE COLLYER: Thank you very much, Mr. Hughes.  
10 Thank you everybody.

11 The case is now submitted and the Court will consider  
12 and hope to issue a decision in quick order.

13 Thank you again to counsel for their terrific, terrific  
14 work. The amount of effort that has gone into this cannot be  
15 overstated and we appreciate it. Thank you.

16 (Trial adjourned @ 12:35 p.m.)

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CERTIFICATE

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the stenographic notes provided to me by the United States District Court, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

\_\_\_\_\_  
/s/Crystal M. Pilgrim, RPR

\_\_\_\_\_  
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