IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, *Plaintiff*, v. ERIC H. HOLDER, JR., in his Official capacity as Attorney General of the United States, *Defendant*.	Case No. 1:12-cv-00128 (DST, RMC, RLW)

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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PROPOSED FINDINGS OF FACT

I. Texas's Voter Identification Requirements Prior to Senate Bill 14

1. Existing Texas law provides that an in-person voter may cast a regular ballot upon presentation of his voter registration certificate. TEX. ELEC. CODE § 63.001(b) (TA 000824–26).

2. A registered voter who does not present a voter registration card at the polls may vote if he executes an affidavit stating that he does not have his voter registration certificate at the polling place and presents an acceptable form of identification. TEX. ELEC. CODE § 63.008(a) (TA 000829–30). If a voter appearing at the polls fails to execute an affidavit or provide acceptable identification, the voter may cast a provisional ballot. *Id.* § 63.008(b) (TA 000829–30).

3. Under existing law, the following documents are acceptable forms of identification for voting:

> (1) a driver's license or personal identification card issued to the person by the Department of Public Safety or a similar document issued to the person by an agency of another state, regardless of whether the license or card has expired;
> (2) a form of identification containing the person's photograph that establishes the person's identity;
> (3) a birth certificate or other document confirming birth that is admissible in a court of law and establishes the person's identity;
> (4) United States citizenship papers issued to the person;
> (5) a United States passport issued to the person;
> (6) official mail addressed to the person by name from a governmental entity;
> (7) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter; or
> (8) Any other form of identification prescribed by the secretary of state.

TEX. ELEC. CODE § 63.0101 (TA 000831–34).

4. In some circumstances, a voter must present identification even if he presents his voter registration certificate at the polls. For example, if a voter does not provide a Texas driver's license number, a Texas personal identification card number, or the last four digits of his social security number on his voter registration application, the voter may receive a voter registration card, but he will be required to present a qualifying form of identification when voting. *See* http://votetexas.gov/register-to-vote/need-id. If the voter provides a driver's license, personal identification card, or social security number that does not match DPS or Social Security Administration records, the voter will be registered if he confirms that the information is correct, but he must submit proof of identification to vote. *See* http://www.sos.state.tx.us/elections/laws/advisory2010-11.shtml.

5. Existing law permits qualified voters who expect to be absent from their county of residence on election day, who are disabled, who are 65 or older on election day, or who are confined in jail to vote early by mail without presenting identification. *See* TEX. ELEC. CODE §§ 82.001–004 (TA 000835–36).

II. Senate Bill 14

6. Senate Bill 14 (SB 14) amends existing law to require that voters present one of the following forms of identification when voting in person:

(1) A driver's license, election identification certificate, or personal identification card issued to the person by the Department of Public Safety that has not expired or that expired no earlier than 60 days before the date of presentation;
(2) A United States military identification card that contains the person's photograph that has not expired or that expired no earlier than 60 days before the date of presentation;

(3) A United States citizenship certificate issued to the person that contains the person's photograph;
(4) A United States passport issued to the person that has not expired or that expired no earlier than 60 days before the date of presentation; or
(5) A license to carry a concealed handgun issued to the person by the Department of Public Safety that has not expired or that expired no earlier than 60 days before the date of presentation.

Acts 2011, 82nd Leg., R.S., Ch. 123 § 14 (JA 003110–11).

7. SB 14 requires the Department of Public Safety to issue an election identification certificate to a registered voter who does not have another form of identification required by the bill to vote. SB 14 prohibits the DPS from charging a fee for an election identification certificate. *Id.* § 20 (JA 003114–16). A temporary election identification certificate includes the voter's picture and may be used for voting. *See* Davio Deposition at 112:15–25 (TA 001098).

8. Persons determined to have a disability by the United States Social Security Administration or determined to have a disability rating of at least 50 percent by the U.S. Department of Veterans Affairs may continue to vote at the polls by presenting a voter registration certificate. *Id.* §§ 1, 9 (JA 003102, 3105–07).

9. A voter who does not present the required identification may cast a provisional ballot if he executes an affidavit stating that he "(1) is a registered voter in the precinct in which the person seeks to vote; and (2) is eligible to vote in the election." *Id.* § 15 (JA 003111–12). For the provisional ballot to be counted, the voter must present identification or execute an affidavit within six days of the election. *Id.* § 18 (JA 003113–14).

10. Under SB 14, a provisional ballot will be counted if the early voting ballot board determines that the person is eligible to vote, the person has not already voted, and the person (a) presents the required identification, (b) executes an affidavit stating that "the voter has a religious objection to being photographed and the voter has consistently refused to be photographed for any governmental purpose from the time the voter has held this belief," or (c) executes an affidavit stating that the voter does not have the required identification "as a result of a natural disaster that was declared by the president of the United States or the governor, occurred not earlier than 45 days before the date the ballot was cast, and caused the destruction of or inability to access the voter's identification." *Id.* § 17 (JA 003112–13).

11. SB 14 does not amend the provisions of the Texas Election Code that permit qualified voters to vote early by mail if they are over 65, disabled, confined in jail, or expect to be absent from their county of residence on election day. *See* TEX. ELEC. CODE §§ 82.001–004 (TA 000835–36).

12. The fundamental change made by SB 14 to existing law is the requirement that in-person voters provide a government-issued photo ID when voting.

13. SB 14 is similar to photo voter identification laws passed by Georgia and Indiana.

14. Georgia's voter ID law requires voters to present one of the following forms of identification to vote: a Georgia driver's license; an identification card issued by any Georgia state entity or the United States; a valid United States passport; an employee identification card issued by any Georgia state entity, the United States, or a local political entity; a United States military identification; or a tribal identification card. *See*

GA. CODE ANN. § 21-2-417(a) (TA 000837–38). Like SB 14, Georgia law provides for free voter identification cards. *See id.* § 21-2-417.1(a) (TA 000839–41). Georgia voters who fail to present the required identification may cast a provisional ballot, which will be counted if the voter presents identification to the voter registrar within three days of the election. *See id.* § 21-2-419(c)(1) (TA 000842–43).

15. The United States Department of Justice pre-cleared Georgia's voter identification law after concluding that it complied with section 5 of the Voting Rights Act.

16. Indiana's voter ID law requires in-person voters to present identification that contains the person's name, photograph, and an expiration date. *See* IND. CODE. ANN. §§ 3-5-2-40.5(a), 3-10-1-7.2(a) (TA 000845–56). The identification must be issued by the State of Indiana or the United States, and it must be current or have expired after the most recent general election. *See id.* § 3-5-2-40.5(a) (TA 000845–47). A voter who does not present qualifying identification may cast a provisional ballot, which will be counted if, within 10 days of the election, the voter provides proof of identification, attests to indigency, or attests to a religious objection to being photographed. *See id.* § 3-11.7-5-2.5(a)–(c) (TA 000851–53).

17. The United States Supreme Court upheld Indiana's voter identification law against constitutional challenge. *See Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) (TA 0000091). Indiana is not subject to Section 5's preclearance requirement and has therefore been able to implement its law.

III. SB 14 Will Not Have the Effect of Denying or Abridging the Right to Vote on Account of Race or Color, or Because of Membership in a Language Minority Group.

A. SB 14's Photo ID Requirement Does Not Impose a Legally Significant Burden on Any Voter.

18. Requiring a photo ID to vote does not impose a legally significant burden because proving one's identity with a photo ID is a routine feature of modern life. *See, e.g.*, Commission on Federal Election Reform, Building Confidence in U.S. Elections § 2.5 (2005) ("Photo identification cards currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important."), *quoted in Crawford*, 553 U.S. at 194 (TA 000099).

19. By offering a free photo ID, SB 14 ensures that any voter who is potentially affected by the photo ID requirement can choose to avoid any impact the law might otherwise have on his right to vote by obtaining a free photo ID from the DPS.

20. Furthermore, the State has taken additional steps to reduce any burden imposed by the need to obtain an election identification certificate.

21. The Texas Department of Public Safety currently has 223 driver's license offices. Davio Depo. 135:9 (TA 001100). Free election identification certificates will be available at every DPS driver's license office. *Id.* 137:5–8 (TA 001095).

22. The Texas Legislature appropriated $63 million to improve driver's license services. Davio Depo. 198:22–24 (TA 001101). The Driver's License Division of the DPS will increase its staff by 266 employees, *id.* at 138:18–19 (TA 001095), and the DPS will open six new Mega Centers, five in September 2012 and the sixth in January 2013.

Id. at 200:6–10 (TA 001095). Each Mega Center will have 25 or more employees. *Id.* at 199:22–25 (TA 001095).

23. There is no evidence that the need to present photo ID at the polls or to obtain a free election identification certificate will prevent any registered Texas voter from voting. The Department of Justice has failed to identify any registered voter who lacks qualifying photo ID, who will be unable to obtain the free election identification certificate, and who is ineligible to vote by mail. *See* Anchia Depo. 138:21–25 (TA 001034).

B. SB 14 Will Not Decrease Voter Turnout Among Lawfully Registered Voters.

24. The available evidence indicates that SB 14 will not decrease voter turnout in Texas among lawfully registered voters. Existing social science evidence indicates generally that photo ID laws do not decrease voter turnout.

25. In addition, voter turnout statistics in both Indiana and Georgia show that turnout did not decrease—and instead happened to increase—after those states' photo ID laws were implemented.

26. Aggregate-level analyses examining the relationship between countywide or statewide turnout and voter ID laws have determined that photo voter ID requirements do not affect turnout. A multistate study of aggregate data from the 2000, 2002, 2004, and 2006 elections, for instance, found that identification requirements had no affect on turnout when controlling for contextual variables, such as population size and demographic factors, or political variables, such as the presence of high-profile races and the level of spending. *See* Expert Declaration of Daron R. Shaw at 2 (TA 000920) (citing

Jason D. Mycoff, et al., *The Empirical Effects of Voter-ID Laws: Present or Absent?*, 42 PS: POL. SCI. & POL. 121 (2009)) (TA 001472). An aggregate analysis of county-level turnout data in Indiana in 2002 and 2006—before and after implementation of that state's voter ID law—found an average turnout increase of two percentage points but no statistically significant increase in turnout at the county level. *See id.* at 2–3 (citing Jeffrey Milyo, The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis, Institute of Public Policy, University of Missouri (Nov. 2007)).

27. Existing individual-level analyses similarly indicate that photo ID requirements have, at most, a negligible impact on individual voters. A 2008 study by Stephen Ansolabehere examined the impact of voter ID laws using the 2006 Cooperative Congressional Election Study (CCES), a 36,500-person national sample. Ansolabehere found that only 23, or .1%, of the 36,500 respondents reported that they were prevented from voting on account of their decision not to obtain and present the required identification. Shaw Report at 5 (TA 000923) (citing Stephen Ansolabehere, *Access Versus Integrity in Voter Identification Requirements*, 63 N.Y.U. ANN. SURV. AM. L. 613 (2008)). In a subsequent analysis based on a 4,000-respondent survey conducted in 2008, 3 of 2,564 voters reported that they were prevented from voting on account of their decision not to obtain and present the required identification, and 7 of 4,000 cited identification requirements as one of multiple reasons for not voting. *See* Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, 42 PS: POL. SCI. & POL. 127 (2009). As Dr. Ansolabehere concluded, "the actual denials of the vote in these two surveys suggest that

photo-ID laws may prevent almost no one from voting." *Id.* at 129. And even those who claim to have been "prevented" from voting would have been able to vote had they taken the simple steps of obtaining and presenting the required identification.

28. The existing political science literature indicates further that a change from a non-photo ID requirement to a photo ID requirement—the type of change effected by SB 14—does not have a race-based impact on turnout. To the extent that the literature has identified any negative impact on turnout, that impact was limited to states that changed from requiring no identification at all to requiring either photo or non-photo ID. Shaw Report at 5–6 (TA 000923–24). Moreover, the authors of that study concluded: "We can reject the hypothesis that there is a substantial racial difference in the impact of voter identification requirements." R. Michael Alvarez, et al., The Effect of Voter Identification Laws on Turnout, Caltech Social Science Working Paper No. 1276R (2008) 18, *available at* http://jkatz.caltech.edu/research/files/wp1267R.pdf (TA 001476).

29. Data from the 2008 CCES indicate that Texas is similar to other states, specifically Georgia and Indiana, in voting habits and in the reasons given by voters for not voting. This similarity suggests that the effect of voter ID laws on turnout in those states—that is, no significant effect at all—will obtain in Texas, too. *See* Shaw Report at 17 (TA 000935).

30. The legislative record includes evidence that voter ID laws would not in fact reduce turnout or disenfranchise voters. In 2009, the House Committee on Elections heard testimony from the elections division director for the Secretary of State of Georgia about the 16 elections that Georgia had held since implementing its voter ID law in

August 2007. JA 006098–99. He testified that his office has never received a single complaint that anyone was disenfranchised or turned away from the polls because they lacked photo ID. *Id.* He also testified that, despite four federal lawsuits, no single individual had alleged that he was burdened by Georgia's voter ID law. JA 006100–01.

31. A witness from the Georgia Secretary of State's office testified before the House Select Committee on Voter Identification and Voter Fraud that despite heated debate about voter ID legislation, the majority of Georgians support requiring photo ID to vote. JA 001557–58.

32. In 2009, the Texas Legislature heard testimony regarding a University of Missouri study indicating that Indiana's voter ID law had no effect on turnout in counties with higher concentrations of minorities, poor, hourly, or less educated voters. JA 006041–42.

33. In 2009, the House Committee on Elections heard testimony from a representative of the Brennan Center indicating that there was no evidence that voter ID requirements adversely affect voter turnout for minorities, indigent, or elderly voters. JA 005758.

C. There Is No Racial Disparity in Possession of ID Required by SB 14.

34. The Justice Department's March 12, 2012 letter denying Texas's administrative preclearance submission cites data provided by the State indicating that 795,555 individuals on the Secretary of State's voter registration list did not have a match in the DPS driver's license database. During the administrative preclearance process, Texas notified the Justice Department that attempting to compare and match individual records from two distinct databases maintained by separate state agencies would result in flawed

data because the two independent systems were not designed for interoperability. Despite the State's warnings about the reliability of the results, on November 18, 2011, the Justice Department notified the Secretary of State that it would deny the State's preclearance submission if the State did not compare the databases using the criteria articulated in DOJ's letter. The comparison analysis required by DOJ instructed the State to "utiliz[e] the demographic data information collected by DPS to compile the requested information" about race and ethnicity." The Secretary of State's January 12, 2012 letter to the DOJ's request stipulated that the State "assembled data as directed by you [the DOJ] and cautioned that the resulting data was unreliable: "Texas' decision to eliminate race as a factor in its voter registration process makes it impossible to generate fully reliable data in response to your request." TA 001354. Accordingly, when the DOJ denied Texas' preclearance submission on March 12, 2012 and claimed that 795,555 registered voters lack photo identification, the denial was based upon database comparisons that the State undertook pursuant to the Department's own instructions—while under the threat of an administrative preclearance denial—and that the State specifically cautioned was flawed because of database incompatibility.

35. Pursuant to the DOJ's database comparison instructions, the Secretary of State provided a list of registered voters whose records were not successfully matched with records in the DPS' driver's license database. As the State cautioned in its January 12, 2012 letter to the Department of Justice, "A number of very common irregularities causes numerous incorrect 'no-match' results." TA 001354.

36. False no match results overstate the number of registered voters who lack a driver's license and stem from the DOJ instructing the Secretary of State to attempt to merge data from two disparate databases maintained by two separate agencies—and that were never intended to be compatible or interoperable. Any voter whose records diverged by one character or digit from one database to the next would result in a no-match when the databases were compared.

37. The matching criteria consisted of first name, last name, and date of birth, and those individuals who provided a DPS ID number when they registered to vote were counted as matching. Thus, the 795,555 voters in the purportedly "at-risk" population included individuals who could not be confirmed to possess a DPS-issued photo ID card. As the Secretary of State's January 15, 2012 letter explained, false no matches were attributable to inconsistent use of nicknames, inconsistent use of suffixes such as "Junior" or "III," misspellings, transposed digits, and clerical data entry errors. The 795,555 figure also overstates the number of voters who will be impacted by SB 14 because it does not account for voters over the age of 65 who are eligible to vote by mail and therefore need not produce a photo identification in order to vote.

38. Since the passage of the Voting Rights Act in 1965, the State has not required voters to provide their racial or ethnic background as a condition of registering to vote, nor does the Secretary of State collect that information. Consequently, the SOS voter registration database does not include data indicating voters' racial or ethnic background. Because the SOS could not provide that information, the DOJ instructed the State to attempt to obtain the racial and ethnic information it was seeking by "utilizing the

demographic information collected by DPS." The Secretary of State conducted the data match analysis pursuant to the DOJ's instructions but cautioned that the resulting data was unreliable. "It [is] impossible to generate fully reliable data is response to your request." (SOS January 15 letter at P. 1).

39. The attempt to merge the SOS and DPS databases as instructed by DOJ resulted in false no-matches and dramatically inflated the number of registered voters who lack a DPS-issued photo id. To more accurately assess the number of voters who might be affected by SB 14, the State's expert conducted a survey of voters who were included on the January 12, 2012 no-match list of 795,555 voters.

40. DOJ's Expert, Stephen Ansolabehere, created a second group, comprising 1.9 million registered voters. Dr. Ansolabehere purported to estimate the number of registered voters in the Texas Secretary of State's registered voter list who do not have a valid driver's license, a valid state-issued personal identification card, or a license to carry a concealed handgun. Dr. Ansolabehere did not attempt to determine whether any Texas voters possessed a passport, a U.S. military identification card, or a U.S. citizenship certificate with a photograph.

41. To determine the number of registered voters who might be affected by SB 14, the State of Texas surveyed two groups of voters who potentially lacked qualifying identification under SB 14. These surveys indicate that SB 14's photo identification requirement will not have a disparate impact on Hispanic or African-American voters in Texas.

1. The January 2012 No-Match List

42. The State's expert, Dr. Daron Shaw, first analyzed a survey of actual registered voters who were included in the purported no-match population of 795,555 voters, which SOS produced in January 2012 pursuant to the DOJ's November 18, 2011 instructions ("Jan. 2012 no-match list").

43. Dr. Shaw designed a survey to determine ID possession within the Jan. 2012 no-match population. The survey instrument selected 60,000 people at random and appended phone number information. Two polls were conducted. The first was a 1,238 person general sample meant to represent the entire no-match population (margin of error +/- 2.78%). The second was a 600-person sample of individuals with Spanish surnames (margin of error +/- 4.00%) designed to ensure a statistically significant sample of Hispanic voters. Both surveys featured identical instrumentation except that the Hispanic sample included a Spanish-language instrument and Spanish-speaking interviewers. Shaw Report at 18 (TA 000936).

44. Survey respondents were asked whether they were registered to vote, whether they possessed the forms of identification required by SB 14, and whether they were disabled as defined by SB 14's exemption. They were then asked questions about their voting history, their opinion about voter identification requirements, and the likelihood that they would obtain an election identification card from the DPS if they lacked another qualifying form of ID. Shaw Report at 19 (TA 000937).

45. Eighty-five percent of respondents in the unweighted general sample and 75% of respondents in the weighted sample claimed to possess a driver's license. Shaw Report at

20 & 21 tbl. 8 (TA 000938–39). The survey results were weighted to control for response bias, that is, the greater likelihood that persons of higher socioeconomic status will respond to surveys. Shaw Report at 19 n.5 (TA 000937).

46. Considering the overall rate of ID possession, only 6% of the unweighted sample and 8% of the weighted sample indicated that they did not have one of the forms of ID required by SB 14. Shaw Report at 20 (TA 000938). Of the respondents who did not report possession of qualifying ID, between 59% (unweighted) and 17% (weighted) are over the age of 65, and between 32% (unweighted) and 51% (weighted) indicated a disability as defined by SB 14's exemption.

47. The polling data establish that only 3.3% to 5.8% of the 795,555 persons in the Jan. 2012 no-match population are actually at risk of being affected by SB 14's photo ID requirement. Accepting the higher estimate results in a maximum of 46,425 voters—or .3% of the 12,892,280 registered Texas voters. Shaw Report at 20 (TA 000938).

48. Results for Spanish surnamed respondents in the general sample returned similar overall results, with 5% (unweighted) or 6% (weighted) of respondents indicating that they did not possess any form of ID required by SB 14. Shaw Report at 22 (TA 000940).

49. In the second survey of Spanish-surnamed voters, only 2% (unweighted) to 3% (weighted) of respondents indicated that they did not have at least one form of identification required by SB 14. Shaw Report at 22 & tbl. 9 (TA 000940).

50. The data indicate that the increased ID possession among Spanish surnamed individuals results in large part from a higher incidence of passport and citizenship documentation possession. In the Spanish-surname sample, more than 50% of

respondents reported that they had a passport compared with 42% of Anglo respondents in the general sample. Shaw Report at 22–23 (TA 000940–41).

51. Of 196 African-American respondents in the general sample, 18 reported that they did not have at least one form of ID required by SB 14. Shaw Report at 23 (TA 000941). Ten of those individuals were over 65 years old, and four of the remaining eight reported that they were disabled. *Id.* Thus 4 of 196 African-American respondents would potentially be affected by SB 14's photo ID requirement.

52. Of 1,238 respondents, 19 reported that they lacked any qualifying ID, were not over 65, and were not disabled. Three of those 19 respondents reported that they were not registered to vote. Shaw Report at 23 (TA 000941).

53. In the Spanish-surname sample, 3 of 600 respondents reported that they lacked any qualifying ID, were not over 65, and were not disabled. One of those three reported that he or she was not a United States citizen. Shaw Report at 23 (TA 000941).

54. Thus the survey data show 16 of 1,238 respondents in the general sample, or 1.3%, and 2 of 600 respondents in the Spanish-surname sample, or 0.33% who would be required to obtain a photo ID to vote under SB 14. *See* Shaw Report at 23 (TA 000941).

55. Available data on voting behavior indicates that the actual impact might be even more attenuated, as 8 of the 16 respondents potentially affected by SB 14 are recorded as not voting in a general election since 2002. Shaw Report at 23 (TA 000941).

2. DOJ's No-Match List

56. A survey of the 1.9 million individuals in the Texas voter registration database whom the DOJ's expert claimed to be at risk under SB 14 produced similar results: the data show that there is no disparity in photo ID possession among Texas voters.

57. The survey of the DOJ's 1.9 million was conducted by randomly selecting approximately 98,000 people. Three polls were conducted with this list: (1) a telephone survey of 1,000 randomly selected individuals meant to represent the entire population; (2) a telephone survey of 600 African-American respondents identified through race matching performed by Catalist; and (3) a telephone survey of 600 Hispanic respondents identified through race matching performed by Catalist. *See* Shaw Rebuttal Report at 4–5 (TA 000973).

58. The survey of the DOJ's 1.9 million reveals fundamental flaws in the underlying method of identifying voters by race.

59. The survey of African-American voters in the DOJ's at-risk population, for example, found that only 68% of respondents identified as "black" by Catalist actually identified themselves as black. Shaw Rebuttal Report at 5 (TA 000973). Adjusting the entire at-risk population consistent with this finding would reduce the number of "at-risk" African-American voters from 304,931 to 207,353.

60. The poll results showed that more than two-thirds of respondents reported possession of a valid driver's license. In the general sample, 73% of respondents overall, 76% of Anglo respondents, 72% of African-American respondents, and 70% of Hispanic respondents indicated possession of a valid driver's license. Shaw Rebuttal Report at 6

(TA 000974). In the African-American survey, 70% of those who identified as African-American confirmed possession of a valid driver's license. *Id.* In the Hispanic survey, 68% of respondents who identified as Hispanic confirmed possession of a valid driver's license. *Id.*

61. The general sample indicates that when all forms of ID permitted by SB 14 are considered, 9.38% of Anglos, 9.30% of African-Americans, and 6.18% of Hispanics in the DOJ's at-risk population do not possess at least one of the forms of ID required by SB 14. *Id.* at 8 (TA 000976) (indicating that 7.64% of respondents in the African-American survey and 6.72% of respondents in the Hispanic survey reported a lack of any qualifying ID).

62. Even so, the rate of ID possession indicated by the surveys does not yield the number of voters who are truly "at risk" under SB 14 because accounting for age- and disability-based exemptions (including the ability to vote by mail), the percentage of potentially affected voters falls to 1.9% of Anglo respondents in the general sample, 0.96% of respondents in the Hispanic subsample, and 1.23% of respondents in the African-American subsample. *See id.* (TA 000976).

63. Thus the survey of the DOJ's at-risk population shows that when the full range of acceptable identification, voters who are eligible for a disability-based exemption, and voters over age 65 are accounted for, only 2.4% of the alleged at-risk population, or 0.35% of registered Texas voters, might be affected by SB 14's photo ID requirement. *See id.* at 8–9 (TA 000976–77).

64. Finally, the survey shows that 46% of the voters who could be impacted by SB 14 (*i.e.*, the 2.4% of persons in the alleged at-risk population) responded that they would be "likely" or "very likely" to get an election identification certificate. *Id.* at 9 (TA 000977).

65. These surveys show that there is no racial or ethnic disparity among the group of registered voters who currently lack a photo ID and would be required to obtain one under SB 14. In fact, the evidence indicates that Hispanic registered voters possess passports and citizenship certificates at higher rates than Anglo registered voters, and it indicates that African-American registered voters are more likely to qualify for SB 14's disability exemption.

3. Analysis of the No-Match Lists Demonstrates the Shortcomings of Data Matching as a Method of Identifying Texas Voters Who Lack Photo ID.

66. Dr. Thomas Sager worked with the Jan. 2012 no match population of 795,955 entries in the voter registration database and performed additional matching using social security numbers to further identify individuals in that group that had voter identification. Sager Report ¶¶ 11-12 (TA 000858). Dr. Sager also identified those entries in this data set that were for individuals over the age of 65 (eligible to vote by mail) or on "suspense" status with SOS (meaning they might not be eligible to vote). *Id.* ¶¶ 14-16 (TA 000858–60). Dr. Sager observed that the lack of full social security information for over half of the entries in this data set likely prevented hundreds of thousands of additional matches. *Id.* ¶ 17 (TA 000860–61).

67. Dr. Sager did the same analysis for a "No Match" set using the same TXSOS criteria from the April 30, 2012 data produced to the defendants in this case. *Id.* ¶¶ 18-24 (TA 000861–64).

68. Dr. Sager also performed an analysis of Professor Ansolabehere's 1.9 million "at risk" population and found it flawed. First, Dr. Sager found that Ansolabehere performed inappropriate "cleaning" exercises that allowed his "at risk" data set to include deceased individuals, ineligible non-citizens, individuals who had moved out of state. In general these "cleaning" exercises biased his total data set in favor of increased numbers. Sager Supplemental Decl. ¶¶ 12-19 (TA 000887–90).

69. When Dr. Sager rematched Ansolabehere's "at risk" population to the DPS databases that had not been "cleaned," he found that only 167,724 entries in Ansolabehere's data set had no past or present state identification, were under 65, and were not on suspense status. The SSVR of this population was 31.6%, higher than the overall SSVR of the voter registration database of 22.5%. Sager Rebuttal Report ¶ 33. But the difference here is so small it should not be considered statistically meaningful. *Id.* ¶¶ 33-37. For example, Dr. Sager found that the name-matching both he and Ansolabehere performed is biased against matching Hispanics, who have more name variants or data entry errors. *Id.* ¶¶ 38, 42 and Ex. B.

70. Dr. Sager's work demonstrates the unreliability and inaccuracy of Ansolabehere's analysis and is consistent with the survey work of Dr. Shaw, which showed that over 70% of Ansolabehere's 1.9 million entries belong to people (if they exist and are still in Texas) who will not be impacted by SB 14. *See supra* ¶ 53.

D. SB 14 Will Not Have a Disproportionate Impact on any Group of Registered Voters.

71. The preponderance of the evidence indicates that SB 14 will not have a disproportionate impact on any group of Texas voters because the statute provides for photo identification at no charge; the photo ID requirement will not affect voter turnout; and the evidence shows that there is no material disparity in possession of qualifying photo ID by different groups of Texas voters.

72. The Department of Justice has failed to produce evidence of any Texas voter who does not have the identification required by SB 14, is not eligible to vote by mail, and cannot obtain a free election identification certificate. Indeed, witnesses have generally been unable to identify a single registered Texas voter who lacks the required identification and is not eligible to vote by mail. *See, e.g.*, Anchia Depo. 138:16–25 (TA 001034); Uresti Depo. 75:9–76:7 (TA 001032–03); Veasey Depo. 51:8–52:4 (TA 001321–22).

73. The Department of Justice has failed to rebut the State's prima facie case by presenting credible evidence that SB 14 will have a disproportionate impact on Hispanic voters, as it alleged in its March 12, 2012 letter denying administrative preclearance.

IV. Senate Bill 14 Was Not Enacted for the Purpose of Denying or Abridging the Right to Vote on Account of Race, Color, or Membership in a Language Minority Group.

74. The legislative record establishes that SB 14 was enacted for the purposes of detecting and deterring voter fraud, as well as preserving public confidence in the electoral system. Senator Troy Fraser, the sponsor of Senate Bill 14, and the bill's

supporters in the House and Senate, repeatedly stated that their purposes in supporting Senate Bill 14 were to deter and detect voter fraud, and safeguard voter confidence in the electoral system. *See* Aliseda Depo 215:7-9, 215:10-216:1 (TA 001005, 001005–06) ("First and foremost, to instill confidence in the system followed by to prevent in-person voter fraud. That's basically it."); Duncan Deposition 207:18, 21-22, 208:10-11, 208:22-23, 209:5-7 (TA 001129, 00130, 00131); Harless Depo. 94:23-24, 95:8-10 (TA 00160, 00161); Patrick Deposition 158:10, 13 (TA 001192); Smith Deposition 175:16-22 (TA 001286) ("Ensuring that every vote that is cast is a legal vote and deterring-making it more difficult for someone to cast an illegal vote and providing the required identification without any financial burdens associated with it other than the costs associated with travel, I suppose, and whatever documents are required to get the document.").

75. After deposing dozens of state legislators and legislative staff members, and after reviewing the record of this case, DOJ is unable to identify any statement made by any Texas legislator that evinces a desire to harm racial minorities.

76. Legislators who supported SB 14 uniformly denied that the bill was enacted for the purpose of decreasing the number of voters from any racial, ethnic, or language minority group. *See, e.g.*, Aliseda Depo 216:2–4, 8, 9–11, 13–17 (TA 001006); Duncan Depo 235:13–23, 236:21–24, 240:16–19 (TA 001132, 001133, 001127).

A. The Texas Legislature Has a Genuine Interest in Addressing Voter Fraud.

1. Voter Fraud Exists in Texas.

77. The legislative record further demonstrates that voter fraud is a well-recognized problem in Texas. SB 14 was designed to help detect illegal conduct at the polling place,

deter those who attempt to illegally interfere with the democratic process, and prevent election fraud in the future.

78. Opponents of voter ID laws recognize that voter fraud exists in Texas. JA 006499–6500 (Testimony of R. Buck Wood) ("[W]hen I say voter fraud what I means is someone who is intentionally going in and trying to rig the system. . . . Okay? I-that does exist in Texas. And, in fact, it exists in all areas of the State, and it is serious.").

79. Even vocal opponents of the bill testified that strengthening the integrity of the electoral system and verifying the identity of people who come to the polls are legitimate goals. Anchia Depo. 83:4-7, 8-11 (TA 001018).

80. The Supreme Court has held that States are not required to present evidence that in-person voter impersonation has occurred at the polls to justify a photo-identification requirement. *See Crawford*, 553 U.S. at 194–96 (TA 000100–01).

81. In this case, the legislative record includes evidence that voter fraud has been documented in Texas.

82. Major Forrest Mitchell testified that he has investigated multiple instances of election fraud that were referred to the Texas Attorney General's Office for investigation since 2005. Mitchell Depo 216:17 (TA 001182). He testified that in-person voting fraud is "incredibly difficult to detect." *Id.* at 216:21 (TA 001182). Further, Major Mitchell testified that in his experience, the only way to detect in-person voter fraud is if someone inside the polling place recognizes the individual attempting to cast a fraudulent ballot. *Id.* at 216–17 (TA 001182); *see also* Veasey Depo. 126:2–6 (TA 001313).

83. Major Mitchell's testimony is substantiated by specific instances of voter fraud evidenced by criminal investigations and testimony in the Legislature. *See*, *e.g.*, (TA 001546, 1558, 1564, 1565)

84. A recent indictment in Tarrant County for voter fraud during a primary election illustrates the problem. *See* Mitchell Depo. 207:9–15, 19–25 (TA 001173); Veasey Depo. 122:4–16 (TA 001309).

85. In 2011, the House Select Committee on Voter Identification and Voter Fraud heard testimony from individuals who had personally witnessed instances of people voting more than once at a single polling place. JA 001682–84, 001761–62.

86. The House Select Committee heard testimony in 2011 that the Office of the Attorney General had investigated approximately 12 cases of voter impersonation since 2002. JA 001825–26.

87. This evidence of in-person voter fraud meets the evidentiary standard the Supreme Court held to be sufficient in *Crawford*, which held that photo ID legislation is justified by evidence of other types of voting fraud in the enacting state and instances of in-person ballot fraud in other states. *See Crawford*, 553 U.S. at 194–95 (TA 000099–100) (holding that Indiana's law, which addressed only in-person voter fraud, was justified by the threat of voter fraud even though the record contained "no evidence of any such fraud actually occurring in Indiana at any time in its history"); *id.* at 195 n.12 (alluding to "scattered instances of in-person voter fraud" in other states as justification for Indiana's in-person voter identification requirement).

88. The record in this case shows multiple cases of election fraud in Texas. Accordingly, under *Crawford*, the Texas Legislature had more than an adequate factual basis to determine that there was a need to deter such activity.

2. Inflated Voter Rolls Create a Risk of Voter Fraud.

89. The Supreme Court has held that reducing inflated voter rolls is a neutral, nondiscriminatory state interest in passing voter identification laws. *See Crawford*, 553 U.S. at 196–97 (TA 000100–01) ("[T]he fact of inflated voter rolls does provide a neutral and nondiscriminatory reason supporting the State's decision to require photo identification.").

90. The National Voter Registration Act (NVRA) hinders the ability of States to promptly remove persons who have moved out of state from the list of registered voters. Under the NVRA, a State "shall not" remove a person from the list of registered voters on the ground that he has moved unless the registrant "confirms in writing" that he has moved outside the jurisdiction in which he is registered, or unless the registrant fails to respond to a notice mailed to him and fails to vote in two consecutive federal elections following the notice. See 42 U.S.C. § 1973gg-6(d) (TA 000815–21).

91. The Texas voter-registration rolls include names of persons who have died, persons who have moved out of the State, and felons and noncitizens ineligible to vote. *See, e.g.*, TA 001335–36, 1338 (Testimony of Sen. Williams); JA 003876–79 (Testimony of Harris County official); JA 003185–88 (Testimony of Ann McGeehan).

92. When voter-registration rolls contains names of persons who have died and persons who have moved out of the State, this situation presents opportunities for persons

to fraudulently impersonate another voter when appearing to vote at the polls, absent a requirement that the voter present photo identification when appearing to vote at the polls.

93. A voter-identification law that permits poll workers to accept non-photo identification, such as utility bill or the voter registration certificate that the Secretary of State mails to each voter's residence, does not detect or deter voter impersonation as effectively as a photo-identification requirement, as it offers opportunities for voters to impersonate other members of their household.

3. Non-Citizens on the Voter Rolls Create a Risk of Fraud.

94. The presence of non-citizens on the voting rolls also creates the opportunity for voter fraud for the obvious reason that non-citizens are not eligible to vote.

95. There is evidence that non-citizens register to vote in Texas. Aliseda Depo 103:17–104:6 (TA 000989–90) (testifying to personal knowledge of at least three non-citizens who are registered to vote in Bee County).

96. There is also evidence of voting by non-citizens. Aliseda Depo 184:18–20, 184:22, 185:2–3, 185:5–8 (TA 000997, 000998).

97. Even legislators who opposed SB 14 did not deny that non-citizens are registered to vote in Texas, and they conceded that efforts to prevent non-citizens from voting would not indicate a discriminatory purpose. Anchia Depo 59:13–19 (TA 001015).

98. Texas law does not require anyone to provide documents proving his U.S. citizenship when registering to vote. Instead, Texas requires that a person registering to vote sign a statement, under penalty of perjury, declaring that he is a U.S. citizen, and

provide either a Texas driver's license number or the last four digits of his social-security number.

99. At least one federal court of appeals has held that the National Voter Registration Act (NVRA) prohibits States from requiring proof of citizenship from persons seeking to register to vote. *See Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (holding that the NVRA preempts Arizona law requiring prospective voters to provide documentary proof of citizenship).

100. Texas law requires proof of citizenship from persons seeking a state driver's license, consistent with the requirements of the federal REAL ID Act.

101. Texas law permits legal, noncitizen residents to obtain driver's licenses, but these licenses are marked as noncitizen driver's licenses in a manner that poll workers can identify.

102. Texas law prohibits undocumented immigrants from obtaining any type of driver's licenses, including those who entered the country but have overstayed their visa.

103. Senate Bill 14 prohibits noncitizens from obtaining election identification certificates available to citizens free of charge who register to vote but cannot afford to obtain a driver's license or other form of government-issued photo identification.

104. Senate Bill 14 will deter noncitizens who register to vote from illegally voting at the polls, because undocumented immigrants are unable to obtain driver's licenses and noncitizens' driver's licenses are marked as noncitizen driver's licenses in a manner that poll workers can identify. Although it remains possible for noncitizens to obtain some of the forms of government-issued photo identification required by Senate

Bill 14, such as passports and concealed-handgun licenses, they will be unable to use the most easily available forms of photo identification, such as driver's licenses and election identification cards, if they illegally attempt to vote at the polls.

4. Voter Fraud is Difficult to Detect and Prosecute.

105. In-person voter fraud is inherently difficult to detect. Aliseda Depo at 176:9–12, 176:14 (TA 000986). Absentee ballot fraud is easier to detect and prosecute because it leaves a paper trail. JA 005832–33 (Brennan Center testimony).

106. Voter fraud is also difficult to prosecute. Aliseda Depo 130:7–12 (TA 000993) (testifying to the difficulty of prosecuting unlawful assistance charges). Elderly voters, for instance, may be reluctant to testify against vote harvesters—individuals who influence elderly people in filling out mail-in ballots—which leaves prosecutors to rely on third party witnesses. Aliseda Depo 130:20–133:16 (TA 000993–96).

107. Local prosecutors may choose not to prosecute voter fraud because it is a low priority compared to other crimes. JA 005803–04 (prosecution of voter fraud is the lowest priority for prosecutors); JA 006512 ("Local prosecutors—it's true local prosecutors don't do this, because they've got rapes and murder and all this other stuff.").

108. Local prosecutors may not prosecute voter fraud for political reasons. JA 006531–32 (political sensitivity of voter fraud prosecution prevents district attorneys from prosecuting voter fraud).

B. The Texas Legislature Has a Valid Interest in Maintaining Confidence In the Electoral Process.

109. Voter fraud has the potential to reduce public confidence in elections and, as a result, in government itself. *See Crawford*, 553 U.S. at 194 (TA 000099).

110. Maintaining voter confidence is a valid, nondiscriminatory reason for enacting voter identification laws. *See id.* at 197 ("[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.").

111. The bipartisan Carter-Baker commission has endorsed photo-identification requirements as a means of inspiring public confidence in the electoral system. *See* Commission on Federal Election Reform, Building Confidence in U.S. Elections § 2.5 (2005) (JA 004614) (noting that the "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.").

112. Texas voters have expressed their concern with the integrity of the electoral system to their elected representatives. *See* Pena Depo. 65:11–66:12 (TA 001202–03) (explaining that constituents had expressed frustration with corruption in South Texas); *id.* at 212:14–213:7 (TA 001218–19) (explaining that individuals in Hidalgo County "want honest elections").

113. There is evidence that election fraud in Texas has diminished voter confidence to the point that some individuals have been discouraged from voting at all. *See* Aliseda Depo 198:24–195:2 (TA 001002) (explaining that individuals told him during his campaign that they did not vote because of fraud).

114. Legislators who had heard concerns about the integrity of elections understood that their constituents wanted the Legislature to take measures to combat corruption and voter fraud. JA 002694–95; Pena Deposition 66:13–17 (TA 001203). Statements on the floor of the House of Representatives indicate that supporters of the bill were motivated by a desire to combat corruption in the electoral system. JA 002689–93 (Rep. Aliseda); Pena Depo. 210:9–211:8 (TA 001216–17).

115. The legislative record shows that preserving public confidence in the electoral system was a purpose underlying the passage of SB 14. Indeed, the Legislature received evidence that passing a voter identification law could increase participation in the electoral process by enhancing public confidence in elections.

C. Texans Overwhelmingly Support Voter ID Laws.

116. Both the legislative and public records are replete with evidence that the majority of Texans favor laws that require photo ID to vote.

117. Polling data considered by the Texas Legislature indicated that voter identification requirements were very popular among Texas voters. JA 006056 (2009 House Committee testimony regarding Rasmussen report stating that 57% of Americans favor voter identification laws); *see also* JA 001166–70 (Lighthouse Poll). Opponents of SB 14 were not aware of any evidence to the contrary. Anchia Depo 77:3–12 (TA 001016).

118. The evidence indicates that voter ID legislation is supported by a majority of Texans regardless of race, language minority status, or political affiliation. Aliseda Depo 125:10–16, 125:19–126:2 (TA 0000991–92) (testifying to support for voter ID

among Hispanic elected officials in Texas); Pena Depo 79:18–25 (TA 001196). Representative Angie Chen Button testified during floor debate on SB 14 that constituents in her district who had come to Texas from Mexico, China, Taiwan, South Korea, Pakistan, India, and other regions "wanted a more secure voting method in place and strongly supported the voter ID bill." JA 002240.

119. Legislators indicated that their constituents supported voter ID legislation. *See* Pena Deposition 79:18–20 (TA 001196).

120. Support for voter ID legislation in the Texas Legislature was divided among political, not racial, lines. Republicans in the Senate uniformly supported SB 14; Democrats uniformly opposed it. JA 002939; Patrick Depo. 164:8–12 (TA 001093). SB 14 was supported by all Republican members of the Texas House, including Hispanic and African-American members. Anchia Depo. 101:1–3 (TA 001020) (noting that Representatives Aaron Pena, Jose Aliseda, John Garza, Dee Margo, James White, and Stefani Carter voted for SB 14). Democrats overwhelmingly opposed the bill, though two Democratic House members voted for the bill—Representative Joe Pickett of El Paso and Craig Eiland of Galveston. JA 003091–92.

121. Professor Shaw's analysis of various nationwide and Texas polls confirms that voter ID laws enjoy substantial popular support among all voters. In a February 2011 YouGov/Polymetrix poll of 800 registered Texas voters, for example, 75% of respondents agreed "that registered voters should be required to present a government-issued photo ID at the polls before they can be allowed to vote[.]" Shaw Report at 32, Exh. B (TA 000950). The survey showed that eighty percent of Anglo respondents, 63%

of African-American respondents, and 68% of Hispanic respondents agreed. *See id.* It also showed that 59% of Democrats, 70% of independents, and 92% of Republicans agreed with the statement. *Id.* Indeed, no fewer than five polls consistently indicate that voter ID laws are supported by a majority of voters regardless of race, language minority status, or political affiliation. *See* Shaw Report at 24–25 & Exh. B (TA 000942–43, 946–51).

122. Professor Shaw's own survey of Texas voters indicates that photo ID requirements are popular even among the 795,555 individuals on the Jan. 2012 no-match list. Of the general sample, 65% (unweighted) and 61% (weighted) indicated support for photo ID requirements. Shaw Report at 24 (TA 000942). The results were 71/69% (unweighted/weighted) among Anglo respondents, 59/55% among Spanish-surnamed respondents, and 51/57% of African-American respondents. *Id.* In the Spanish-surname sample, 65% (unweighted) and 64% (weighted) indicated support for photo ID requirements. *Id.*

123. Opponents of SB 14 did not deny the fact of widespread public support for voter identification laws. Anchia Depo 138:12–15 (TA 001034). Nor did opponents of SB 14 dispute that it is acceptable and politically rational for legislators to support policies that are favored by their constituents. Anchia Depo 137:23–138:11 (TA 001033–34).

D. The Record Contains No Evidence that SB 14 Was Enacted for the Purpose of Denying or Abridging the Right to Vote.

124. In contrast to the substantial evidence that SB 14 was enacted with a legitimate, nondiscriminatory purpose, there is no evidence that the Legislature enacted the bill for the purpose of denying or abridging the rights of minority voters.

125. No witness was aware of any evidence that the Legislature enacted SB 14 for the purpose of preventing minority voters from voting. *See, e.g.*, Anchia Depo 134:18–135:1 (TA 001030–31); Pena Depo 156:22–157:3 (TA 001213–14); Uresti Depo 42:3–21 (TA 001299); Veasey Depo 135:14–137:15 (TA 001327–29).

126. The Department of Justice submitted affidavits from four members of the Texas Legislature stating their belief that SB 14 was enacted, at least in part, for the purpose of harming minority voters.

127. Representative Rafael Anchia testified that he did not draft his affidavit; rather, the affidavit was drafted for him by an employee of the Department of Justice. Anchia Depo 13:6–10 (TA 001014). He testified that he did not know of a single member of the House of Representatives who was motivated by a discriminatory purpose in voting for SB 14. Anchia Depo 134:7–135:1 (TA 001031–32).

128. Similarly, Representative Marc Veasey testified that his affidavit was drafted by the Department of Justice. Veasey Depo. at 33:4–19; 35:7–14 (TA 001315, 1317). Representative Veasey did not recall making any changes to the declaration. *See id.* at 35:19–21 (TA 001317). Representative Veasey identified only one member of the House who he believed voted for SB 14 for the purpose of harming minority voters, and

he testified that he had no evidence that any other member of the Legislature voted for SB 14 for a discriminatory purpose. *See id.* at 134:14–137:17 (TA 001326–29).

129. Despite its opposition to the bill itself, the *Dallas Morning News* published an editorial contending that SB 14 was not enacted with a discriminatory purpose:

> The legislative process that produced the law in Texas was very open — the public debate included hearings and testimony. No one can argue that Texans did not know what drove legislators to enact the law. The record of deliberation is there for all to read.

See Editorial, *Abbott is right, Holder is wrong*, DALLAS MORNING NEWS (April 19, 2012), *available at* http://www.dallasnews.com/opinion/editorials/20120419-editorial-abbott-is-right-holder-is-wrong.ece (TA 001471).

PROPOSED CONCLUSIONS OF LAW

I. Introduction

In *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193 (2009) (TA 000437), the Supreme Court recognized that Voting Rights Act (VRA) section 5's preclearance requirement and coverage formula "raise serious constitutional questions" and impose "substantial federalism costs" on the States. 557 U.S. at 202, 204 (citation omitted) (TA 000444–45). The Supreme Court further held that courts must interpret and apply the VRA in a manner that avoids these serious constitutional questions and mitigates the "federalism costs" associated with the preclearance regime. *Id.* at 203; *see also Shelby County v. Holder*, No. 11-5256, 2012 WL 1759997, at *7 (D.C. Cir. May 18, 2012) (TA 000650) ("In *Northwest Austin*, the Supreme Court signaled that the extraordinary federalism costs imposed by section 5 raise substantial constitutional concerns.").

Northwest Austin adopted an aggressive interpretation of the VRA's bailout provisions because "underlying constitutional concerns compel a broader reading of the bailout provision." 557 U.S. at 227 (TA 000457). This Court must likewise interpret section 5's application to Texas Senate Bill 14 in a manner that mitigates the "underlying constitutional concerns raised by section 5. Order (Doc. 167) at 4 n.2. *Northwest Austin* forbids a federal court to deny preclearance to any State law unless the language of the VRA specifically and unambiguously compels that result. Any ambiguity—or even *potential* ambiguity—in the preclearance-related provisions in the VRA must be

construed in favor of the State. *See Northwest Austin*, 557 U.S. at 208, 210 (TA 0000447, 448).

Moreover, we do not write on a blank slate with respect to state laws requiring the presentation of photo identification in order to vote at the polling place. In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the Supreme Court upheld the constitutionality of Indiana's photo identification law. *Crawford* held that photo-identification laws serve the legitimate purpose of preventing the risk of in-person voter fraud—even if the record contains no evidence of voter impersonation in the State that enacts the law. *Id.* at 194–96 (opinion of Stevens, J.) (TA 000099–100) ("The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history. . . . It remains true, however . . . that not only is the risk of voter fraud real but that it could affect the outcome of a close election."); *id.* at 204 (Scalia, J., concurring in the judgment) (TA 000105). The State of Texas's interest in deterring and detecting voter fraud is clear from the record given the substantial evidence of election fraud—including some of the notoriously difficult to detect voter impersonation cases that were not present in indiana's record in the *Crawford* case. *See* Findings of Fact ¶¶ 74–104. C*rawford* also held that photo-identification laws serve another legitimate purpose: safeguarding public confidence in the integrity of the electoral process. *Id.* at 197 (opinion of Stevens, J.) (TA 000101). Finally, *Crawford* held that the "the fact of inflated voter rolls . . . provide[s] a neutral and nondiscriminatory reason supporting the State's decision to require photo identification,"—even if the State's own negligence contributed to the inflation of its registration lists. *Id.* at 196-97 (opinion of Stevens, J)

(TA 000100–01); *id.* at 209 (Scalia, J., concurring in the judgment) (TA 000108); *see also* Findings of Fact ¶¶ 89–104.

It is with these principles in mind that we undertake our section 5 obligation to demonstrate that Texas Senate Bill 14 "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color," 42 U.S.C. § 1973c(a) (TA 000813–14), or because of membership in a language minority group, 42 U.S.C. § 1973b(f)(2) (TA 000807–12).[1]

II. Texas Senate Bill 14 Does Not Have the "Purpose . . . of Denying or Abridging the Right to Vote On Account of Race or Color" or Membership in a Language Minority Group Under the VRA.

Section 5 of the VRA requires a covered jurisdiction to demonstrate that its law "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color," 42 U.S.C. § 1973c(a) (TA 000813–14), or "because he is a member of a language minority group." *See* 42 U.S.C. § 1973b(f)(2) (TA 000807–12). This language of section 5 largely tracks section 1 of the Fifteenth Amendment, which states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV (TA 000806). The "language minorities" protected by the Voting Rights Act are defined in terms or racial or ethnic categories, and voting laws that purposefully discriminate against these groups are laws that deny or abridge the right to vote "on account of race [or] color" in violation of the

[1] A "language minority group" is defined to include American Indians, Asian Americans, Alaskan Natives, and persons of Spanish heritage. 42 U.S.C. § 1973aa-1a(e).

Fifteenth Amendment. When section 5 instructs this court to deny preclearance to laws that have the "purpose . . . of denying or abridging the right to vote on account of race or color," this command extends only to laws that have "the purpose" of violating the Fifteenth Amendment.

Myers v. Anderson, 238 U.S. 368 (1915) (TA 000414), holds that a law will not violate the Fifteenth Amendment so long as "there is a reason other than discrimination on account of race or color discernible upon which the standard may rest." *Id.* at 379 (TA 000416–17). And when *Guinn v. United States*, 238 U.S. 347 (1915) (TA 000291), invalidated the "Grandfather Clause" as contrary to the Fifteenth Amendment, the Court held that the Fifteenth Amendment inquiry turns on whether it is "possible to discover any basis of reason for the standard thus fixed other than the purpose" to circumvent the Fifteenth Amendment." *Id.* at 365 (TA 000297). A State law will not violate the Fifteenth Amendment if it "possible to discover any basis of reason for the standard" other than the purpose of circumventing the Fifteenth Amendment, or if "there is a reason other than discrimination on account of race or color discernible upon which the standard may rest." This approach requires an objective inquiry into the purpose of Senate Bill 14, and does not turn on the subjective thought processes of legislators or constituents who may have supported the law.

Any construction of section 5's "purpose" prong that permits courts to deny preclearance to laws that do not violate the Fifteenth Amendment, as interpreted in *Myers* and *Guinn*, is forbidden by *Northwest Austin*. Interpreting section 5's "purpose" prong to require a State to demonstrate that its laws satisfy not only the Fifteenth Amendment but

also some prophylactic requirement would even more serious constitutional questions—and section 5 cannot be given that construction absent unmistakably clear statutory language.

The State of Texas will satisfy section 5's purpose prong if it demonstrates that it is "possible to discover any basis of reason for [Senate Bill 14]" other than the purpose of circumventing the Fifteenth Amendment, or if "there is a reason other than discrimination on account of race or color discernible upon which [Senate Bill 14] may rest." *See Guinn*, 238 U.S. at 365 (TA 000297); *Myers*, 238 U.S. at 379 (TA 000416–17). Senate Bill 14 easily satisfies this standard. There are no fewer than three "bas[es] in reason" that can explain the Texas Legislature's decision to enact Senate Bill 14: The ineligible voters that appear on the State's voter-registration rolls, Findings of Fact ¶¶ 89–104, the desire to deter and detect voter fraud, Findings of Fact ¶¶ 77–88, 105–08, and the desire to safeguard public confidence in the integrity of the electoral process, Findings of Fact ¶¶ 109–15.

Texas is not required to prove that any individual legislator who supported Senate Bill 14 was actually motivated by these "bas[es] in reason" for the law. It is enough that they present a reasonable explanation for the legislature's decision to enact Senate Bill 14. Interpreting section 5's purpose prong to require a judicial inquiry into the subjective motivations of state legislators would aggravate the constitutional difficulties with section 5's preclearance regime. *See Vill. of Arlington Heights v. Metro. Dev. Corp.*, 429 U.S. 252, 268, n.18 (1977) (TA 000782) ("[J]udicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of

government."); *see also Soon Hing v. Crowley*, 113 U.S. 703, 710 (1885) (TA 000709); *Whitney v. Morrow*, 112 U.S. 693, 696 (1885) (TA 000798). *Northwest Austin* therefore compels preclearance courts to limit their inquiry to whether the State has provided a reasonable, nondiscriminatory explanation for its law.

Even if the "purpose" prong of section 5 required this Court to inquire further into the legislative purpose behind SB 14, then it must accept the public statements from the bill's sponsors and supporters as reflecting the true purpose of the law. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) (TA 000395) ("In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation.") (citation and internal quotation marks omitted); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (TA 000138); *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) ("[W]e ordinarily defer to the legislature's stated intent.") (TA 000358); *see also Cleveland Area Bd. of Realtors v. City of Euclid*, 88 F.3d 382, 387-88 (6th Cir. 1996) (TA 000061–62). Because the author and other legislative supporters of Senate Bill 14 publicly stated that the purposes of the law were to deter and detect voter fraud and safeguard public confidence in the election system, *e.g.*, Findings of Fact ¶¶ 74–76, a section 5 preclearance court is bound to accept those publicly stated purposes as the actual purposes of the law.

Clover Leaf Creamery specifically holds that litigants may not undermine the publicly stated legislative purpose of a statute by resorting to evidence from legislative history: The Justices were critical of the trial court for failing to "assume that the

objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation." 449 U.S. at 463 n.7 (TA 000395–96). They noted that the legislative history "supports" the conclusion that "the principal purposes of the Act were to promote conservation and ease solid waste disposal problems," and would not allow the plaintiffs to undermine this stated legislative purpose—even though the plaintiffs produced evidence that some legislators acted out of other motives. The "principal purposes" from the statute's legislative history were deemed controlling and could not be impeached by efforts to uncover the subjective motivations of individual legislators. *Id.*; s*ee also Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 595, 598 (1961) (TA 000755, 761–62, 764) (concluding that Pennsylvania's Sunday-closing law had not been enacted with the purpose of promoting religion, and basing this conclusion on its analysis of publicly available legislative history without taking any testimony from legislators).

Courts have repeatedly recognized that even if an individual legislator acts with suspect motives, those motives are not to be attributed to the legislature as a whole. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 131 (1810); *United States v. O'Brien*, 391 U.S. 367, 383–84 (1968) (TA 000777); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) (TA 000633–34); *Hispanic Coal. on Reapportionment v. Legislative Reapportionment Comm'n*, 536 F. Supp. 578, 586 (E.D. Pa. 1982) (TA 000308), *aff'd* 459 U.S. 801 (1982). A section 5 preclearance Court, especially post-*Northwest Austin*,

would be bound to do so here, even if it believed that a few members of the Texas Legislature voted for Senate Bill 14 for impermissible purposes.

Northwest Austin precludes any construction of section 5's purpose prong that permits a preclearance court to reject a legislature's publicly stated purpose for a law by resorting to the subjective motivations of individual legislators. It is enough for the State to show that publicly stated purposes of the law are nondiscriminatory, and Texas has made that showing. Findings of Fact ¶¶ 74–76. Indeed, even if this Court were to decide that section 5's "purpose" prong requires inquiry into the subjective motivations of individual legislators, Texas has carried that burden as well because the legislative record, and the extensive depositions of individual legislators and their staff members, are bereft of any evidence of an improper desire to deny or abridge the right to vote of persons on account of their race, color, or membership in a language minority group. Findings of Fact ¶¶ 74–76, 124–29.

III. Senate Bill 14 Does Not Have the "Effect . . . of Denying or Abridging the Right to Vote on Account of Race or Color" or Membership in a Language Minority Group.

A. Senate Bill 14 Does Not "Deny or Abridge" the Right to Vote.

Jurisdictions throughout the United States regulate the voting process in ways that might impose minor inconveniences on persons who want to cast a ballot, yet these laws do not "deny" or "abridge" the right to vote within the meaning of the Voting Rights Act. For example, laws requiring citizens to register to vote prior to an election do not "deny" or "abridge" anyone's right to vote—even though many citizens decide that the benefits of voting are not worth the burdens associated with registering to vote.

Similarly, States that require their citizens to appear in person at the polls to cast their ballots, rather than permitting everyone to vote by mail as Oregon does, do not "deny" or "abridge" anyone's right to vote—even though many citizens will decide that the benefits of voting are not worth the burdens associated with traveling to the polls. Citizens who are capable of registering to vote and traveling to the polls, but *choose* not to, have not had their right to vote denied or abridged by these laws.

The Supreme Court held in *Crawford* that the inconveniences associated with obtaining a photo identification are no greater than "the usual burdens of voting." *See* 553 U.S. at 198 (opinion of Stevens, J.) (TA 000102) ("[T]he inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."); *id*. at 209 (Scalia, J. concurring in the judgment) (TA 000108) ("The universally applicable requirements of Indiana's voter-identification law are eminently reasonable. The burden of acquiring, possessing, and showing a free photo identification is simply not severe, because it does not 'even represent a significant increase over the usual burdens of voting.' And the State's interests are sufficient to sustain that minimal burden.") (internal citations omitted). A section 5 preclearance court cannot conclude that Senate Bill 14 represents a "denial" or "abridgment" of the right to vote while remaining faithful to the Supreme Court's analysis in *Crawford*—especially when Senate Bill 14 mitigates those inconveniences by offering election identification certificates free of charge to registered voters who lack photo identification and allowing voters to cast provisional ballots if they appear at the

polls without photo identification. *See Crawford*, 553 U.S. at 199 (TA 000103) ("The severity of that burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted.").

B. Senate Bill 14 Does Not "Deny or Abridge" the Right to Vote "On Account of Race or Color," or "Because" of One's Membership in a "Language Minority Group."

Section 5 instructs this court to deny preclearance to laws that have "the effect . . . of denying or abridging the right to vote *on account of* race or color," or the effect of "deny[ing] or abridg[ing] the right of any citizen of the United States to vote *because* he is a member of a language minority group." *See* § 1973c(a) (emphasis added) (TA 000813–14); § 1973b(f)(2) (emphasis added) (TA 000807–12). The "effects" prong of section 5 does not extend to laws that merely have a disparate impact on the races. It allows courts to deny preclearance only if the effect of SB 14 is to deny or abridge the right to vote "*on account of*" race or color, or "*because of*" one's membership in a language minority group. *See, e.g.*, *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 594–95 (9th Cir. 1997) (explaining that "a showing of some relevant statistical disparity between minorities and whites" is not sufficient to prove discrimination "on account of race or color" under Section 2 of the Voting Rights Act).

A state-law voting qualification that is facially neutral and enacted with benign purposes will violate the "effects" prong of section 5 if it is administered by racially biased election officials who selectively enforce these laws to deny minorities the right to vote *on account of their race*. *See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 312-13 (1966) (TA 000722–23). Section 5's "effects" prong requires a State seeking

preclearance to show only that its law will not have the effect of *violating the Fifteenth Amendment*, by denying or abridging the right to vote on account of race or color or because of one's status in the racial or ethnic categories that constitute a language-minority group.

A Court cannot interpret section 5's "effects" prong to extend beyond the category of laws that have the effect of violating the Fifteenth Amendment. The language of section 5's "effects" prong tracks section 1 of the Fifteenth Amendment. *Compare* U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.") (TA 000806), *with* 42 U.S.C. §§ 1973c(a), 1973b(f)(2) (TA 000807–14) (requiring courts to deny preclearance to laws that have "the effect of denying or abridging the right to vote on account of race or color," or the effect of "deny[ing] or abridg[ing] the right of any citizen of the United States to vote because he is a member of a language minority group."). There is no statutory language in the "effects" prong of section 5 that purports to reach beyond state laws that have the "effect" of violating the Fifteenth Amendment.

Any construction of section 5's "effects" prong that would allow courts to withhold preclearance from state laws that do *not* have the "effect" of violating the Fifteenth Amendment would be unconstitutional under *Northwest Austin*. The very existence of a "preclearance" requirement for duly enacted state laws is already a constitutionally questionable proposition. *See Northwest Austin*, 557 U.S. at 202–03 (TA 000444–45); *Shelby County*, 2012 WL 1759997, at *31 (TA 000685). But even if the

Fifteenth Amendment permits the federal government to establish a "preclearance" regime that compels States in section 5 jurisdictions to secure approval from the Department of Justice or a panel of federal judges before those laws may take effect, the Constitution does not allow a preclearance regime that allows these federal officials to deny preclearance to State laws *that do not violate the Fifteenth Amendment* but that merely have a disparate impact on minority voters.

At the very least, an interpretation of section 5 that permits DOJ or the federal courts to withhold preclearance from state laws that do not actually violate the Fifteenth Amendment but merely have a disparate impact on some voters raises grave constitutional concerns, and *Northwest Austin* compels courts to construe section 5 to avoid this grave constitutional question absent specific and unambiguous statutory language to the contrary.

Senate Bill 14 does not have the "effect" of denying or abridging the right to vote *on account of race or color* or *because of* one's membership a language minority group. Neither does Senate Bill 14 diminish the ability of any citizen of the United States to elect his preferred candidates of choice—let alone diminish that ability on account of race or color, or because of one's membership in a language minority group. To the extent Senate Bill 14 could even be said to affect the right to vote, it does so only on account of one's decision not to obtain government-issued photo identification, not race or color or membership in a language minority group.

Under Senate Bill 14, every citizen retains the "ability" to cast a ballot, because persons who lack government-issued photo identification can obtain election

identification certificates free of charge from DPS. That some voters may *choose* not to obtain this identification does not mean that they lack the "ability" to do so, or that their "ability" to elect their candidates of choice has somehow been "diminished." And the Intervenors in this lawsuit demonstrate that it is truly a choice not to obtain an election identification certificate; DOJ and the Intervenors have failed to identify any registered voter for whom it would be impossible to obtain photo identification, Findings of Fact ¶¶ 23, 71–73. And this is confirmed by the political-science literature demonstrating that photo-identification laws do not decrease voter turnout. Findings of Fact ¶¶ 24–33; Shaw Report (TA 000922–23).

Laws requiring citizens to register to vote before an election, and laws requiring citizens to appear in person at the polls to cast their ballots, do not have the effect of diminishing the ability of any citizen of the United States to elect his preferred candidate of choice within the meaning of section 1973c(b)—even though these laws may cause some citizens to choose not to vote. Senate Bill 14 no more effects a diminution of a voter's ability to elect his preferred candidates of choice than these other laws. *See Crawford*, 553 U.S. at 198 (opinion of Stevens, J.) (TA 000101–02).

DOJ apparently believes that *Beer v. United States*, 425 U.S. 130 (1976), requires courts to deny preclearance to any law that has a disparate impact on minority voters. *See* DOJ Letter of March 12, 2012 at 2 (TA 001366) ("The voting changes at issue must be measured against the benchmark practice to determine whether they would 'lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.' ") (quoting *Beer* v. *United States*, 425 U.S. 130, 141 (1976)) (TA

000007–8). To the extent that *Beer* suggests that "nonretrogression"—rather than compliance with the Fifteenth Amendment—should govern preclearance decisions under section 5, that "nonretrogression" doctrine must be limited to the context of legislative reapportionment. *See Beer*, 425 U.S. at 141 (TA 000007) ("It is thus apparent that *a legislative reapportionment that* enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5.") (emphasis added); *see also Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329 (2000) (TA 000561) ("In *Beer v. United States*, 425 U.S. 130 (1976), this Court addressed the meaning of the no-effect requirement *in the context of an allegation of vote dilution*.") (emphasis added). *Beer* cannot be construed to establish that any law with a disparate impact on minority voters has the "effect" of denying or abridging the right to vote *on account of* race or color, or *because of* one's membership in a language-minority group, within the meaning of section 5 of the VRA, because this interpretation of *Beer* will cause section 5 to exceed Congress's powers under section 2 of the Fifteenth Amendment, or at the very least will present serious constitutional questions that this Court is obligated to avoid under *Northwest Austin*.

Dated: June 20, 2012

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