No. 12-1028

In The
Supreme Court of the United States

STATE OF TEXAS,

Appellant,

v.

ERIC H. HOLDER, JR., et al.,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

MOTION TO AFFIRM OF CERTAIN APPELLEE-INTERVENORS

DECHERT LLP
EZRA D. ROSENBERG
MICHELLE HART YEARY
BRIAN RAPHEL
LINDSEY B. STELCEN
902 Carnegie Center
Suite 500
Princeton, NJ 08540

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
JON M. GREENBAUM
ROBERT A. KENGLE
MARK A. POSNER
Counsel of Record
1401 New York Avenue, NW
Suite 400
Washington, DC 20005
(202) 662-8389
mposner@lawyerscommittee.org

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

THE BRENNAN CENTER
FOR JUSTICE AT NYU
SCHOOL OF LAW
WENDY WEISER
MYRNA PÉREZ
IAN VANDEWALKER
161 Avenue of the Americas
Floor 12
New York, NY 10013

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
SIDNEY S. ROSDEITCHER
1285 Avenue of the Americas
New York, NY 10019

Counsel for the Brennan Center for Justice at NYU School of Law

LAW OFFICE OF GARY L.
BLEDSOE & ASSOCIATES
GARY BLEDSOE
316 West 12th Street
Suite 307
Austin, TX 78701

NAACP NATIONAL
HEADQUARTERS
KIM KEENAN
VICTOR L. GOODE
4805 Mt. Hope Drive
Baltimore, MD 21215

ROBERT S. NOTZON
1507 Nueces Street
Austin, TX 78701

JOSE GARZA
7414 Robin Rest Drive
San Antonio, TX 98209

Counsel for Texas State Conference of NAACP Branches and the Mexican American Legislative Caucus of Texas House Representatives

NAACP Legal Defense and Educational Fund, Inc.
Sherrilyn Ifill
Elise C. Boddie
Ryan P. Haygood
Natasha M. Korgaonkar
Leah C. Aden
99 Hudson Street
Suite 1600
New York, NY 10013

Fried Frank Harris
Shriver & Jacobson LLP
Douglas H. Flaum
Michael B. De Leeuw
Adam Harris
One New York Plaza
New York, NY 10004

Counsel for Texas League of Young Voters Education Fund, Imani Clark, KiEssence Culbreath, Demariano Hill, and Dominique Monday

J. Gerald Hebert
191 Somerville Street, #405
Alexandria, VA 22304

Brazil & Dunn LLP
Chad W. Dunn
K. Scott Brazil
4201 Cypress Creek Parkway
Suite 530
Houston, TX 77068

Counsel for Eric Kennie, Anna Burns, Michael Montez, Penny Pope, Marc Veasey, Jane Hamilton, David De La Fuente, Lorraine Birabil, Daniel Clayton, and Sergio Deleon

John Kent Tanner
3743 Military Road, NW
Washington, DC 20015

American Civil Liberties Union Foundation
Steven R. Shapiro
125 Broad Street
New York, NY 10004

Laughlin McDonald
Nancy Abudu
230 Peachtree Street NW
Suite 1440
Atlanta, GA 30303

American Civil Liberties Union Foundation of Texas
Rebecca Robertson
1500 McGowan Street
Houston, TX 77004

Advancement Project
Penda Hair
Katherine Culliton-Gonzalez
Donita Judge
1220 L Street, NW
Suite 850
Washington, DC 20005

Counsel for Justice Seekers, League of Women Voters of Texas, Texas Legislative Black Caucus, Donald Wright, Peter Johnson, Ronald Wright, Southwest Workers Union, and La Union Del Pueblo Entero

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, none of the Appellee-Intervenors filing the instant Motion to Affirm has a parent corporation or issues stock. The Texas State Conference of NAACP Branches is an affiliate of the national NAACP, the League of Women Voters of Texas is an affiliate of the national League of Women Voters, and the Texas League of Young Voters Education Fund is an affiliate of the national League of Young Voters Education Fund.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Appellee-intervenors, comprising four of the five groups of organizations and individuals granted intervention below, respectfully submit this Motion to Affirm the judgment of the district court.[1]

In 2011, the Texas Legislature enacted Senate Bill 14 ("SB 14"), which established a photo identification requirement for in-person voting that would be "the most stringent in the country." J.S. App. 69. Subject to three narrow exceptions, SB 14 would preclude citizens from voting in person at the polls (on Election Day or during the State's early voting period) unless the voter presents one of six strictly limited forms of government-issued photo identification. Furthermore, for a substantial subset of the hundreds of thousands of registered voters who do not currently have the required identification, SB 14 would create significant practical impediments to obtaining the necessary identification. SB 14 thus

[1] Appellee-intervenors filing this motion include: 1) Texas State Conference of NAACP Branches and the Mexican American Legislative Caucus of Texas House Representatives; 2) Texas League of Young Voters Education Fund, Imani Clark, KiEssence Culbreath, Demariano Hill, and Dominique Monday; 3) Eric Kennie, Anna Burns, Michael Montez, Penny Pope, Marc Veasey, Jane Hamilton, David De La Fuente, Lorraine Birabil, Daniel Clayton, and Sergio Deleon; and 4) Justice Seekers, League of Women Voters of Texas, Texas Legislative Black Caucus, Donald Wright, Peter Johnson, Ronald Wright, Southwest Workers Union, and La Union Del Pueblo Entero.

would have the effect of denying thousands of Texas voters the ability to vote in person, a large number of whom would be disfranchised entirely since absentee voting in Texas is available only to certain specified categories of voters.

The district court conducted an intensely fact-specific review of SB 14, and denied preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The court held that "in this particular litigation and on this particular record, Texas has failed to demonstrate that its particular voter ID law lacks retrogressive effect." J.S. App. 68.

The district court reached this conclusion for two reasons, each of which independently supports the court's judgment. First, the court found that "all of Texas's evidence on retrogression is some combination of invalid, irrelevant, and unreliable," and therefore "Texas has failed to carry its burden" of demonstrating the absence of a retrogressive effect. J.S. App. 55-56. Second, the court found that the evidence submitted by the United States and intervenors affirmatively "suggests that SB 14, if implemented, would in fact have a retrogressive effect on Hispanic and African American voters." J.S. App. 56. In this regard, the Court explained that the Texas law "imposes strict, unforgiving burdens on the poor, and racial minorities in Texas are disproportionately likely to live in poverty." J.S. App. 69.

Given these twin holdings regarding retrogression, the court concluded that there was no need to

decide whether SB 14 also has a discriminatory purpose, in violation of Section 5. The district court emphasized, however, that the record showed that the Texas Legislature had "[i]gnor[ed] warnings that SB 14, as written, would disenfranchise minorities and the poor," and "defeated several amendments" which would have substantially mitigated the retrogressive effect of the new identification requirement. *Id.*

The issues presented in Texas' Jurisdictional Statement do not merit plenary review. As a threshold matter, Texas does not challenge *any* of the district court's factual determinations as being clearly erroneous, notwithstanding that Texas conceded to the district court that its preclearance request "presents [a] largely fact-intensive question." ECF No. 362-1 at 5. Thus, this Court is not being asked to note probable jurisdiction to review the district court's findings of fact.

Texas, instead, makes three legal arguments, none of which has any merit. First, the State contends that probable jurisdiction should be noted to address the constitutionality of Section 5. Br. at 12-13. This is procedurally improper, however, since the district court has not yet ruled on the State's constitutional assertions in this litigation. In addition, there is no validity to the State's constitutional claim. The State asserts that it would be unconstitutional for Section 5 to bar implementation of SB 14 because this Court upheld the identification law adopted by the State of Indiana in *Crawford v. Marion County Election Board*, 553 U.S. 181, 202-03 (2008), and

because SB 14, according to Texas, is essentially no different than the Indiana law. Br. at 12. As the district court found, the two laws differ significantly. J.S. App. 32-33. Accordingly, the factual predicate for Texas' argument is unfounded. More fundamentally, *Crawford* only addressed the question of whether the Indiana law, on its face, violated the right to vote, whereas the district court was required by Section 5 to examine the markedly different questions of discriminatory purpose and effect, with Texas (not the challengers) bearing the burden of proof. Thus, there is nothing inconsistent between the district court's ruling and *Crawford*, even assuming, *arguendo*, Texas is correct regarding the alleged similarity of the two state laws.

The State next argues that all photo identification requirements, including the one enacted by SB 14, are beyond the scope of the preclearance requirement. Br. at 13-14. This contention is refuted by the plain language of Section 5, which requires preclearance of all "standard[s], practice[s], or procedure[s] with respect to voting." 42 U.S.C. § 1973c(a). In addition, this Court's Section 5 jurisprudence – which the State fails to cite, let alone distinguish – unambiguously establishes that Section 5 is to be interpreted broadly, and applies to all changes in balloting procedures. Texas asserts that photo identification laws, whatever their requirements may be, have no potential to deny or abridge the right to vote. Br. at 13-14. But that is contrary to this Court's Section 5

precedent and is contradicted by the district court's finding of SB 14's retrogressive effect.

Finally, Texas asserts that the district court was precluded, as a matter of law, from employing the factual analysis it relied upon to affirmatively conclude that SB 14 likely would be retrogressive. Br. at 15-16. This argument does not provide a basis for reversal, for two reasons. First, the district court separately concluded that Texas did not meet its burden of demonstrating the absence of retrogression, *see* J.S. App. 55-56, and Texas does not challenge the district court's findings of fact in that regard. Second, the findings of fact upon which the district court based its affirmative retrogression holding directly address the actual impact of SB 14 on minority voters, and it is well-established that it is that impact which determines whether a voting change satisfies the Section 5 non-retrogression requirement.

Procedurally, Texas separately contends that the pendency of *Shelby County v. Holder*, No. 12-96, in this Court precluded the State from submitting a definitive jurisdictional statement in this case because, if the Court upholds the constitutionality of Section 5, the Court's rationale allegedly could affect this appeal. The State, accordingly, requests that, if Section 5 is upheld, the Court order supplemental briefing in this case, before deciding whether to note probable jurisdiction, "to sharpen the issues and address how this case should proceed." Br. at 12.

There is not, however, *any* connection between the constitutional issue presented in *Shelby County* and the statutory preclearance issues resolved by the district court's judgment, and thus it is highly unlikely that a ruling upholding Section 5 would alter the course of this appeal.[2] Moreover, even if *Shelby County* were to effect some alteration to the preclearance standards, the appropriate course of action would then be for this Court to vacate and to remand, so as to allow the district court, in the first instance, to reweigh the facts in light of the *Shelby County* holding. *See Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003).

Texas' proposed course of action is even more incongruous given the representations it made to the district court when the State successfully urged entry of a separate judgment, under Rule 54(b) of the Federal Rules of Civil Procedure, regarding the court's denial of preclearance to SB 14. In its November 30, 2012 district court filing, Texas argued that it was urgent that a separate judgment be entered because the State wished to implement SB 14 in local elections to be conducted in May and November of

[2] The question presented in *Shelby County* is whether Congress acted within its Fourteenth and Fifteenth Amendment authority when, in 2006, it reauthorized Section 5 for an additional period of years. The district court judgment, on the other hand, did not decide any question regarding Congress' constitutional authority. Instead, it addressed only questions of fact and statutory interpretation pertaining to whether SB 14 satisfies the Section 5 preclearance standards. J.S. App. 71-73.

2013, and the State thus needed a preclearance ruling from this Court *before* this Court's *Shelby County* decision is issued. ECF No. 362-1 at 5-7. Yet, Texas not only does not include any request for expedited review in its jurisdictional statement, it proposes a special, extended review process at the jurisdictional stage involving a superfluous, supplemental round of briefing.

For these reasons and as further explained below, this Court should affirm the judgment of the district court that SB 14 is not entitled to Section 5 preclearance, and should deny Texas' request for supplemental briefing at the jurisdictional stage.

STATEMENT OF THE CASE

1. Under current law, in order to vote in person (either on Election Day or during the early voting period), Texans are required to present personal identification to poll officials, but have some flexibility as to the form of identification that is acceptable.

a. In the first instance, voters are required to present a voter registration certificate, which is a postcard Texas election officials are required to deliver to every registered voter as proof that the individual is properly registered to vote in the State. The certificate includes substantial information concerning the identity of the voter, including the voter's name, gender, and birthdate. J.S. App. 2.

b. In the alternative, Texans who appear at the polls without their registration certificate may cast a regular ballot so long as they: (i) "execute an affidavit stating that they do not have their certificate"; and (ii) present one of "eight broad categories of documents." J.S. App. 2-3. Acceptable documents include identification issued by the Texas Department of Public Safety ("DPS") regardless of whether it is current or expired, or non-photo identification, such as a birth certificate, utility bill, or government mail addressed to the voter. J.S. App. 3.

2. Texas did not produce any evidence at trial that current law is not providing an adequate means for accurately identifying voters at the polls. Since 2002, Texas has brought prosecutions regarding three instances in which individual voters sought to impersonate another individual to cast a ballot at a polling place. Trial Tr., 65:20-67:12, July 9, 2012 PM.

3. Beginning in 2005, the Texas Legislature engaged in a lengthy and highly contentious effort to replace the existing identification requirements with a more restrictive identification system. In 2005 and 2007, the State House passed bills that would have mandated that voters present one form of photo identification or two forms of non-photo identification for in-person voting; these bills failed in the State Senate. In 2009, the Senate passed a photo identification bill over the continuing strong opposition to such legislation; this was achieved by proponents creating an extraordinary exception to the State Senate's governing procedures which applied only to the voter

identification legislation. That bill, however, was defeated in the State House. Trial Tr., 78:13-79:5, 83:23-84:1, July 9, 2012 PM.

4. In 2011, the Texas Legislature enacted SB 14.[3] This legislation is stricter than the bills which had passed only one legislative house in the preceding three sessions. All African-American legislators and most Latino legislators who voted opposed the bill. ECF No. 207-3 at 55 (JA_001265).

a. SB 14 would eviscerate the voting protections provided by the existing voter identification requirements by generally barring voters from using their voter registration certificate for voting, and by mandating that individuals produce one of six forms of government-issued photo identification in order to vote in-person. Five of these forms of identification exist today: a driver's license or identification card issued by DPS; a license to carry a concealed handgun issued by DPS; a U.S. military identification; a U.S. citizenship certificate; or a U.S. passport. SB 14 further provides that the identification may not be expired more than 60 days. J.S. App. 3-4. The Legislature rejected amendments that sought to expand the range of allowable photo identification. J.S. App. 69-70.

[3] SB 14 is quoted in full in the Supplemental Appendix to the brief, at pages Supp. App. 1 to 18.

b. SB 14 would create a new, sixth form of photo identification for in-person voting, called an "Election Identification Certificate" ("EIC"). This identification is a modified version of the state identification card already issued by DPS. The EIC would be available only at DPS offices, and could be obtained only by presenting one of several limited forms of identification, *i.e.*, an expired driver's license or DPS-issued identification card, an original or certified copy of a birth certificate, U.S. naturalization papers, or a court order indicating a change of name and/or gender. Although DPS would not charge a fee for an EIC, voters who lack the required underlying identification would need to pay to obtain the necessary document(s). J.S. App. 4-6. The Legislature defeated an amendment that would have waived such fees for indigent voters. J.S. App. 69-70. EIC applicants also would be subjected to fingerprinting by DPS. Supp. App. 24-25.[4]

c. SB 14 would allow only three narrow exceptions to the photo identification requirement.

First, certain disabled individuals would be permitted to apply, pre-election, for an exemption by providing written documentation of their disability to the registrar from the Social Security Administration or Department of Veterans Affairs. Supp. App. 1-2.

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[4] The regulations governing the issuance of EICs are quoted in full in the Supplemental Appendix, at pages Supp. App. 19 to 28.

Second, voters who have a religious objection to being photographed could cast a provisional ballot, but that ballot would be counted only if these voters then went to the registrar's office, within six days after the election, to execute an affidavit swearing to the religious objection. Supp. App. 13-14. Third, voters who lose their photo identification in a natural disaster – provided that the disaster is declared by the President or governor and occurs within 45 days of the election – also could cast a provisional ballot that would be counted if the voters appeared before the registrar within six days of the election and executed an affidavit swearing to the loss. *Id*.

d. Those voters who appear to vote without the requisite identification, and who do not satisfy any of the exceptions, would not be allowed to cast a ballot that would be counted without subsequently presenting the required photo ID. These voters could complete a provisional ballot, but their ballots would be counted only if they then presented the requisite identification to the registrar within six days of the election. Supp. App. 1, 5-7, 12-14.

5. On July 25, 2011, Texas submitted SB 14 to the Attorney General for Section 5 preclearance. After requesting and obtaining additional information from the State, the Attorney General denied preclearance on March 12, 2012, stating that Texas had failed to show that SB 14 would not have a retrogressive effect. J.S. App. 7-8. Specifically, the Attorney General found that, based on the data Texas had provided, Latino voters were more than twice as likely as

non-Latino voters to lack a state driver's license or identification card, and the new EIC would not mitigate this disparate effect on Latino voters. *Id*.

6. Before the Attorney General issued his decision, Texas filed its "Expedited Complaint for Declaratory Judgment," on January 24, 2012, alleging a single claim for a declaratory judgment granting preclearance to SB 14. ECF No. 1. Following the Attorney General's issuance of his objection letter, Texas filed an Amended Complaint, on March 15, 2012, which preserved the preclearance claim as "Claim One" and added a separate "Claim Two" alleging that Section 5 is unconstitutional. ECF No. 25.

7. The district court granted permissive intervention, under FED. R. CIV. P. 24(b), to minority individuals and several organizations representing minority voters. J.S. App. 10; *see also* ECF No. 17, Minute Order, Apr. 13, 2012. In order to minimize the potential "litigation burden" on Texas, J.S. App. 10, the district court ordered defendant-intervenors to generally litigate as a single unit during all phases of the litigation, including discovery, briefing, and trial, and required intervenors to avoid duplicating the United States' submissions to the court. J.S. App. 10; Minute Order, Apr. 13, 2012; ECF No. 183.

8. In recognition of the "federalism concerns" associated with Section 5, J.S. App. 11, the district court granted Texas' request to expedite the litigation so that, if the court were to preclear SB 14, Texas

could implement the statute during the November 2012 election. J.S. App. 10-11. The court set discovery to close on June 15, 2012, less than five months after Texas' Complaint was filed, and scheduled trial on Texas' preclearance claim for the week of July 9, 2012. ECF No. 43. The court postponed consideration of Texas' constitutional arguments, specifying that Texas' Claim Two would be addressed only if and after preclearance was denied. J.S. App. 12.

9. The district court found, however, that Texas repeatedly sought to gain unfair litigation advantage from the expedited schedule. The State slow-walked its discovery responses with "the aim of delaying Defendants' ability to receive and analyze data and documents in a timely fashion." ECF No. 107 at 2. In particular, Texas failed to timely produce "its key state databases, which [were] central to Defendants' claim that S.B. 14 has a disparate and retrogressive impact on racial and/or language minority groups." *Id.* This "seriously hindered Defendant-Intervenors' ability to prepare and offer expert testimony based on [the State's] data." J.S. App. 13. The district court sought to halt Texas' misconduct, but Texas "repeatedly ignored or violated directives and orders . . . designed to expedite discovery." ECF No. 107 at 2. The district court ultimately declined to postpone trial or impose sanctions, although it "would [have been] well within its discretion" to do so. *Id.* at 3.

10. The district court commenced a week-long trial on July 9, 2012 at which the court heard "live testimony from 20 witnesses," and also received

"thousands of pages of deposition testimony, expert reports, scholarly articles, and other paper evidence." J.S. App. 15. The district court issued its opinion on August 30, 2012, one day before the date Texas identified as the deadline for beginning the process of implementing SB 14 in the November election.

a. The court began its analysis with the well-established principle, which Texas did not contest, that Section 5 places the burden on the State to prove the absence of a discriminatory purpose or retrogressive effect. J.S. App. 20. The court then found that "all of Texas' evidence on retrogression is some combination of invalid, irrelevant, and unreliable." J.S. App. 55-56. Accordingly, the State failed to meet its burden of demonstrating that SB 14 would not "'lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" J.S. App. 56 (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)).

b. Although the district court concluded that "we could end our inquiry here," J.S. App. 55, the court went on to consider evidence submitted by the United States and intervenors, and found that SB 14 "will almost certainly have [a] retrogressive effect." J.S. App. 69. The court explained that this conclusion "flows from three basic facts." J.S. App. 56. First, it was "undisputed by Texas" that "a substantial subgroup of Texas voters, many of whom are African American or Hispanic, lack [the] photo ID" required by SB 14. J.S. App. 56. Second, the uncontested facts also showed that "the burdens associated with

obtaining ID will weigh most heavily on the poor." *Id.* Third, "undisputed U.S. Census data," J.S. App. 60, showed that "racial minorities in Texas are disproportionately likely to live in poverty." J.S. App. 56. In short, SB 14 "imposes strict, unforgiving burdens on the poor, and racial minorities in Texas are disproportionately likely to live in poverty." J.S. App. 69.

c. The district court also rejected several legal claims by Texas, including: (i) an assertion that photo identification requirements are inherently only a "'minor inconvenience[ ],'" J.S. App. 21, and thus, purportedly, could never "deny[ ] or abridg[e] the right to vote," *id*. (quoting 42 U.S.C. § 1973c(a)); (ii) an assertion that SB 14, as a matter of law, could not be retrogressive or have a discriminatory purpose in light of this Court's decision in *Crawford v. Marion County Election Board*, *supra*, rejecting a challenge to Indiana's voter identification law based on the burden placed on the right to vote, J.S. App. 23-28; and (iii) an assertion that a voting change may not be found retrogressive under Section 5 where the new law has a negative impact on minority voters, in part because of those voters' depressed socioeconomic status, J.S. App. 64-67.

11. Following the district court's ruling, all parties moved for summary judgment regarding the constitutionality of Section 5. ECF Nos. 347, 349, 350. After this Court granted certiorari in *Shelby County*, the district court, on November 16, 2012, ordered the parties to show cause why a ruling on the constitutional issues should be not be deferred until after this

Court's decision in *Shelby County*. ECF No. 357. In response, Texas moved for entry of a separate final judgment on the preclearance issue (three months after the district court's denial of preclearance). ECF No. 362. On December 17, 2012, the district court granted Texas' motion for entry of judgment on Claim One of the Amended Complaint, and stayed all action regarding Claim Two (the constitutional issues) "until the Supreme Court decides *Shelby County*." J.S. App. 73.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED PRECLEARANCE BASED UPON ITS NOW UNCONTROVERTED FINDINGS OF FACT REGARDING RETROGRESSION

Applying the non-retrogression standard first articulated in *Beer v. United States*, *supra*, the district court properly concluded that the photo identification requirement enacted by SB 14 may not be precleared. J.S. App. 68. Texas did not meet its burden since its evidence was entirely "unpersuasive, invalid, or both," and "uncontested record evidence conclusively show[ed]" that the process of obtaining the required identification, for those without it, would weigh more heavily on minority voters, and thus SB 14 is, in fact, retrogressive. *Id.*

This Court reviews a district court's findings of fact on appeal "only for 'clear error.'" *Easley v.*

Cromartie, 532 U.S. 234, 242 (2001); *see also Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). In its Jurisdictional Statement, Texas does not argue that any of the district court's findings of fact are clearly erroneous. Accordingly, the State provides no basis for this Court to grant plenary review to consider the propriety of the district court's findings of fact. In any event, the district court's findings are well-supported by the record evidence.

A. The District Court Properly Evaluated Texas' Evidence in Concluding That the State Failed to Demonstrate the Absence of Retrogression

The district court properly concluded that the evidence Texas submitted regarding retrogression was fundamentally flawed and that the State, accordingly, failed to meet its burden of proof. The State essentially made two factual arguments, one which focused on the circumstances present in Texas and the other which looked at what has occurred in other States when those States enacted voter identification laws.

The State's Texas-specific evidence principally consisted of two telephone surveys which purported to show that white and minority voters in the State possess the currently-available forms of SB 14 identification at the same rates. The district court correctly found that the surveys were "scientifically invalid." J.S. App. 38. Most significantly, the surveys had

"extraordinarily low response rates" of approximately two percent. J.S. App. 38; *see also* J.S. App. 48. Such response rates provide no assurance that the surveys obtained information from representative samples of Texas voters, and thus, as the intervenors' expert statistician, Dr. David Marker, testified, the surveys were "'really irrelevant.'" J.S. App. 50.[5] The surveys had other problems as well, including the fact that the surveyor failed to follow standard statistical practice with regard to weighting his results, and restricted the surveys to individuals with landlines and thus ignored voters who only have cell phones. J.S. App. 38-39, 50-52.[6]

As to what has occurred in other States, Texas argued that SB 14 could not have a retrogressive

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[5] The State's expert essentially conceded this point, testifying "that he had never obtained such low response rates during any of the live interview telephone surveys he conducted over the course of his career." J.S. App. 48.

[6] The State claimed that even if Latino voters are less likely than white voters to possess the types of State-issued identification valid under SB 14, that disparity disappears when the acceptable federal identification is considered. This is because, according to Texas, Latino voters possess passports and citizenship certificates at a higher rate than white voters. J.S. App. 48. The State, however, was unable to prove this because it voluntarily relinquished the opportunity to obtain the federal government's passport and citizenship-certificate databases. The State's "dilatory approach to discovery prevented it from obtaining" these databases within the shortened discovery period necessitated by the July 9 trial date, J.S. App. 14, and the State declined the district court's offer to delay trial in order to allow it to obtain the databases. J.S. App. 15.

effect on minority voters because these States' photo identification laws allegedly have not negatively affected voter turnout. J.S. App. 29. In this regard, the State made the sweeping assertion that social scientists have determined that photo identification requirements never depress voter turnout, regardless of the stringency of the requirement, and submitted copies of studies that the State claimed supported this assertion. J.S. App. 29-30. But, as the district court found, at least one major study (submitted by the United States) reached "precisely the opposite conclusion," and Texas "failed to produce any evidence undermining the validity of [that] study." J.S. App. 30. Therefore, "the effect of voter ID laws on turnout remains a matter of dispute among social scientists." *Id.*

In the same vein, Texas likened SB 14 to photo identification laws adopted in Indiana and Georgia, the two States with the most longstanding photo ID laws, claiming that those laws have not negatively affected voter turnout. J.S. App. 31. But "circumstances in Georgia and Indiana are significantly different from those in Texas." J.S. App. 31-32. "[M]ost important, SB 14 is far stricter than either Indiana's or Georgia's voter ID laws." J.S. App. 32. SB 14 allows for fewer forms of photo identification, and imposes heavier burdens on individuals who need to obtain the necessary ID. J.S. App. 32-33.[7] Furthermore,

[7] For example, SB 14 generally prohibits the use of expired photo identification, whereas voters in Indiana may use identification

(Continued on following page)

the minority populations of the three States differ considerably; most notably, neither Indiana nor Georgia, unlike Texas, has a substantial Latino population. J.S. App. 34. In addition, the evidence was ambiguous as to whether Indiana's law, in fact, has depressed voter turnout in that State. J.S. App. 35.

B. The District Court Relied Upon Substantial Evidence in Concluding That SB 14 Would Have a Retrogressive Effect on Minority Voters Who Currently Lack the Necessary Photo ID

The district court also properly looked beyond Texas' evidence, and correctly determined that SB 14 likely would have a retrogressive effect on African-American and Latino voters.

Although the State's Texas-specific statistical analyses were flawed, the State did not dispute that between five and nine percent of the approximately 13.6 million registered voters in the State lack the necessary identification. J.S. App. 37-39, 47-48.[8] The

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with an expiration date after the most recent general election, and Georgia voters may use a driver's license as identification regardless of when it expired. J.S. App. 32. Similarly, the costs of obtaining the identification needed to obtain a Texas EIC would be greater than the comparable costs in Indiana and Georgia, and many Texans, unlike residents of Indiana and Georgia, would be forced to travel long distances to apply for identification. J.S. App. 32-33.

[8] As of the November 2012 election, there were 13,646,226 registered voters in Texas. Texas Sec. of State, "Turnout and

(Continued on following page)

State also did not dispute that its analyses indicated "that, *at a minimum*, racial minorities are proportionately represented within this subgroup." J.S. App. 57 (emphasis in original). Accordingly, the district court found that "a substantial subgroup of Texas voters, many of whom are African American or Hispanic, lack [the] photo ID" required by SB 14. J.S. App. 56.[9]

Among those who currently lack the necessary identification, the poor in particular would face significant obstacles in obtaining the new EIC (the form of identification the State created to purportedly offer redress to voters lacking the other forms of acceptable identification). The obstacles would include: the cost involved in obtaining the requisite underlying identification (if that identification is not already in hand); significant travel costs (in terms of both time and money) in journeying to a DPS office, given the limited number of DPS offices in rural areas (almost one-third of Texas counties lack a DPS

Voter Registration Figures (1970-current)," http://www.sos.state.tx.us/elections/historical/ 70-92.shtml (last visited Apr. 30, 2013).

[9] The district court found that the statistical studies submitted by the United States and intervenors also were flawed, and thus declined to accept the studies' conclusion that minority voters currently lack the required photo ID to a greater degree than white voters. These studies, however, were fully consistent with the court's finding that a large subgroup of voters lack the necessary identification, and that, at the least, minorities currently lack the ID to the same extent as whites. J.S. App. 39-46, 53-55.

office) and in urban minority areas as well; and the cost to the working poor in taking time off from work to apply at a DPS office, since none are open on weekends or past 6 p.m., and the wait time at a DPS office can be up to three hours. J.S. App. 57-60.[10] *See Perkins v. Matthews*, 400 U.S. 379, 388 (1971) (polling place "[l]ocations at distances remote from black communities . . . might well have [a racially discriminatory] effect.").

In response, Texas proffered the mere unsupported opinion of its counsel that the burdens on those lacking ID would not be significant. J.S. App. 61-62, 64. In this Court, Texas asserts that "SB 14 mitigates any inconvenience" for persons lacking photo identification simply because no fee would be charged for obtaining an EIC. Br. at 14. But this ignores – without disputing – the district court's findings regarding the true costs associated with obtaining an EIC.

Lastly, the significant burdens on the poor imposed by SB 14 translate directly to a retrogressive impact on African-American and Latino voters since the poor, in Texas, are disproportionately African-American and Latino. The poverty rate among minorities in Texas is nearly triple the white rate. J.S. App. 60. In

[10] The Legislature rejected amendments to SB 14 which would have provided the underlying identification for free, reimbursed poor Texans for travel costs, and provided for evening and weekend hours at DPS offices. J.S. App. 69-70.

addition, minority voters would find it significantly more difficult to journey to a DPS office. Minorities are more likely than whites to reside in a household without access to a motor vehicle (by a factor of two to three), and public transportation to DPS offices is limited. J.S. App. 60-61.

In the district court, Texas sought to minimize SB 14's impact by pointing to the fact that the statute would not apply to persons who vote absentee. J.S. App. 62. Absentee voting, however, is not an adequate substitute for in-person voting. Individuals who are eligible to vote absentee nonetheless may wish to vote in person for a variety of reasons, including "habit, a sense of civic pride, or simply because they wish to follow the news all the way up to Election Day before selecting a candidate." J.S. App. 62-63. Furthermore, Texas restricts absentee voting to a few categories of voters (persons who are away from home on Election Day and during in-person early voting, are disabled, are 65 or older, or are in jail). TEX. ELEC. CODE §§ 82.001-82.004. The evidence at trial suggested that "far more white voters than minorities will be eligible to cast absentee ballots" since persons 65 or older in Texas are disproportionately white. J.S. App. 63. Thus, SB 14's exception for absentee voters, together with the State's absentee voting system, likely exacerbates, rather than mitigates, the retrogressive effect of SB 14.

Texas now asserts that SB 14 could not affect "*anyone's* right to vote" because voters lacking the

necessary identification would be able to cast a provisional ballot at the polls, insinuating that all provisional ballots cast without identification would "ultimately be counted." Br. at 14 (emphasis in original; internal quotation marks omitted). But SB 14, by its terms, clearly prohibits in-person ballots from being counted unless the voter produces the required identification either at the polls or within six days of the election (unless the voter qualifies for one of the three narrow exceptions). Supp. App. 5-7, 13-14. Thus, the availability of provisional balloting does not mitigate the burdens SB 14 imposes on voters who lack the necessary identification.[11]

In sum, the evidence which Texas neither disputed in the district court nor disputes on appeal demonstrates that, if SB 14 were to be implemented, minority voters who lack identification would find it

[11] Texas also contends that the district court's analysis of the interaction between SB 14 and minority voters' socioeconomic status was "incomplete" because "the court made no attempt to analyze whether poor minority citizens were more likely than poor white citizens to lack photo identification." Br. at 16 (emphasis omitted). But any such inquiry was irrelevant to the court's analysis since the court concluded that, even if minority and white voters currently possess photo ID to the same extent, SB 14 would have a retrogressive effect on minority voters who do *not* currently have the necessary ID because of the obstacles Texas created to their obtaining it. Likewise, it is irrelevant whether, as Texas claims, there are not "reliable data linking income, race, and photo-identification-possession for Texas citizens," Br. at 16, since the court's analysis was not premised on any current differential rate of "photo-identification possession" based on either "income" or "race."

significantly more difficult to obtain the necessary identification, and therefore SB 14 would have a retrogressive effect on minority voters.[12]

II. Texas' Claims Of Legal Error By the District Court Are Without Merit

A. The Constitutionality of Section 5 Is Not Properly Before the Court in This Appeal and, in Addition, Texas' Constitutional Claim Lacks Merit

Texas asserts that "[t]he Court should note probable jurisdiction to determine whether Section 5

[12] As the district court emphasized, Texas had within its means to enact a photo identification law which would not have a retrogressive effect on persons who currently lack the required identification. The Texas Legislature, however, defeated amendments that sought to achieve that end. J.A. App. 69-70. This contrasts with what occurred in South Carolina, a State which also adopted a restrictive photo identification law in 2011, but which included in its law a broad alternative means of identification for voters who appear to vote without the prescribed ID. That law was granted preclearance by the District Court for the District of Columbia. *South Carolina v. United States*, 2012 WL 4814094 (D.D.C. Oct. 10, 2012). In its ruling, the district court noted that white voters in South Carolina possessed the acceptable forms of photo identification at a higher rate than African-Americans, and that this "racial disparity, combined with the burdens of time and cost of transportation inherent in obtaining a new photo ID card, might have posed a problem for South Carolina's law under the [non-retrogression requirement]." *Id.* at *8. The additional alternative means of identification, however, "eliminate[d] any disproportionate effect or material burden that South Carolina's voter ID law otherwise might have caused." *Id.* at *9.

is unconstitutional when it is applied to block a covered jurisdiction from implementing a statute that closely resembles facially valid legislation in non-covered jurisdictions." Br. at 12. In this regard, the State attempts to contrast the district court's denial of preclearance with this Court's holding in *Crawford v. Marion County Election Board*, *supra*, that Indiana's photo ID statute does not impose a facially unconstitutional burden on the right to vote. According to Texas, its constitutional claim would survive a ruling in *Shelby County* upholding Section 5 because *Shelby County* is a facial challenge, whereas Texas' claim, allegedly, involves a different, as-applied challenge. Br. at 12.

Texas' constitutional argument is not properly presented by this appeal. This Court repeatedly has held that a petitioner or appellant may not obtain review of an issue that was not passed upon by the lower court(s). *United States v. Williams*, 504 U.S. 36, 41 (1992) (collecting cases). In this case, all constitutional issues raised by Texas in this litigation remain pending before the district court, and none have been ruled upon by that court. J.S. App. 71-73.

Moreover, Texas' Notice of Appeal does not put at issue any constitutional claim. Texas appealed from "the final judgment entered in this case . . . on December 17, 2012." J.S. App. 74. That judgment, as the district court made clear in its December 17, 2012 Order, was entered only as to Claim One of Texas' Amended Complaint, which does not include Texas' constitutional arguments. J.S. App. 71-73.

There also are significant substantive reasons why Texas' constitutional claim does not merit plenary review. First, it rests on a flawed factual premise since, as the district court found, SB 14 does not, as Texas asserts, "closely resemble[ ]" the Indiana law. Br. at 12. The two statutes include provisions which differ considerably, and the demographics of the two States also are substantially different. As noted, Texas does not dispute these findings as being clearly erroneous. *See* J.S. App. 32-35.

Second, there is nothing constitutionally unusual or suspect about a voting provision being invalidated as racially discriminatory, whether under Section 5 or under another statutory provision or the Constitution, although the provision may be valid insofar as the constitutional right to vote is concerned. As a general matter, of course, that a practice or procedure may be lawful when judged against one legal standard does not insulate it from being found unlawful when judged against a different standard. This principle fully applies when the legal standards at issue are the constitutional right to vote and Section 5, and *Crawford* did not hold otherwise since that case only addressed whether the Indiana law complied with the constitutional right to vote, and did not examine whether that law was racially discriminatory. Thus, the district court's retrogression holding is not inconsistent with *Crawford*.

Finally, to the extent that Texas' constitutional argument is that photo identification laws adopted by covered and non-covered jurisdictions are subject to

somewhat different legal standards, that simply restates one of the issues already presented to the Court in *Shelby County*. This differential legal treatment of photo ID provisions merely is a particular, and not atypical, example of the fact that Section 5 applies to a limited number of jurisdictions. As this Court is aware, the issue of Section 5's disparate geographic coverage has been extensively briefed by the parties in *Shelby County*, consistent with this Court's earlier discussion of this issue in *Nw. Austin Mun. Utility Dist. No. 1 v. Holder*, 557 U.S. 193, 203 (2009).[13]

For these reasons, plenary review of Texas' constitutional claim is unwarranted in this appeal.

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[13] Texas also claims that Section 5's "constitutional difficulties" are demonstrated by the district court's placement of the burden of proof on Texas, and the district court's grant of intervention to multiple private parties who, according to Texas, "slow[ed] down proceedings that must be streamlined to have any chance of passing constitutional muster." Br. at 11. This Court, however, in *South Carolina v. Katzenbach*, upheld Section 5's assignment of the burden of proof to covered jurisdictions, given Congress' appropriate determination "to shift the advantage of time and inertia from the perpetrators of [discrimination] to its victims." 383 U.S. 301, 328, 335 (1966). Likewise, in *Georgia v. Ashcroft*, this Court upheld the authority of district courts to grant intervention to private litigants in Section 5 cases. 539 U.S. at 476-77. In the instant case, moreover, it was Texas, not the intervenors, who repeatedly interfered with the progress of the litigation by failing to comply with the district court's discovery orders.

B. The District Court Properly Concluded That Photo Identification Laws Are Subject to Preclearance

Texas contends that voter identification laws, on their face, may never "deny or abridge" the right to vote within the meaning of Section 5. According to Texas, such laws inherently impose such "minor inconveniences on voters" that they could never violate Section 5, and therefore should not be subject to Section 5 review. Br. at 13.

As the district court concluded, Texas' "argument completely misses the point of Section 5." J.S. App. 21. The State ignores entirely this Court's long line of authority regarding the types of voting provisions covered by – and which thus may be found discriminatory under – Section 5, and cites not a single Section 5 case in support of its contention.

In *Presley v. Etowah County*, 502 U.S. 491 (1992), this Court reviewed and summarized its many decisions regarding the types of provisions that require preclearance. The Court re-affirmed its holding in *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), "that the scope of § 5 is expansive within its sphere of operation." 502 U.S. at 501. *See Allen*, 393 U.S. at 565 ("The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race."), 566 ("Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way."). Thus, Section 5

applies to "*all* changes to rules governing voting, changes effected through *any* of the mechanisms described in the statute. Those mechanisms are 'any qualification or prerequisite' or any 'standard, practice, or procedure with respect to voting.'" *Presley*, 502 U.S. at 501-02 (emphasis added). Furthermore, with regard to the type of change effected by SB 14, Section 5 applies to all changes regarding "the manner of voting." *Id.* at 502.

Here, a voter identification requirement for in-person voting plainly is a voting "prerequisite" or a "standard, practice, or procedure with respect to voting," and is a procedure that concerns "the manner of voting." Furthermore, it is equally plain that a restriction on who is allowed to vote in person has the potential to be discriminatory, as demonstrated by the district court's findings regarding SB 14's retrogressive effect. Texas also studiously avoids the possibility that a particular photo ID law may be enacted with an unlawful discriminatory purpose, notwithstanding that the district court did not reach that issue in this instance. It follows, therefore, that any change concerning voter identification at the polls, including SB 14, requires preclearance and must be shown to have neither a discriminatory purpose nor a discriminatory effect.

Texas makes three assertions in support of its argument. First, the State cites to *Burdick v. Takushi*, 504 U.S. 428 (1992), a case in which this Court held that Hawaii's prohibition on write-in voting did not impose an unconstitutional burden on

the right to vote. Br. at 13. But this Court's resolution of that constitutional question said nothing about the scope of the preclearance requirement since, in the very same Term *Burdick* was decided, this Court reaffirmed in *Presley* that changes affecting write-in voting must be precleared. 502 U.S. at 502.

Second, Texas analogizes photo identification requirements to laws requiring voter registration and "a trip to the polling place," claiming that such laws "have never been held to 'deny' or 'abridge' the right to vote." Br. at 13. This assertion is surprising and perplexing, to say the least. Texas cannot seriously argue that voter registration changes and changes regarding a voter's "trip to the polling place" are inherently so inconsequential that they do not require preclearance. *Perkins*, 400 U.S. at 387-88 (Section 5 applies to all polling place changes); *Allen*, 393 U.S. at 564-65 (rejecting claim that Section 5 *only* applies to voter registration changes). Likewise, as a substantive matter, it is not open to debate that a voter registration law or a polling place change potentially may have a discriminatory purpose or effect within the meaning of Section 5.[14]

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[14] For example, the very first objection interposed by the Attorney General to a Texas voting change, after Texas became covered in 1975, was to a statewide voter registration change. U.S. Dept. of Justice, "Section 5 Objection Determinations," http://www.justice.gov/crt/about/vot/sec_5/tx_obj2.php (last visited Apr. 30, 2013). *See also Perkins*, 400 U.S. at 388 (discussing the "obvious potential" for polling place changes to deny or abridge the right to vote).

Third, Texas cites to Justice Stevens' plurality opinion and Justice Scalia's concurring opinion in *Crawford* that Indiana's photo identification law did not impose an unconstitutional burden on the right to vote. Br. at 13-14. But *Crawford* was not a Section 5 or a racial discrimination case, and thus did not address the scope of the preclearance requirement, or whether photo ID requirements potentially may have a discriminatory purpose or a retrogressive effect. Accordingly, as was true in *Burdick*, the holding in *Crawford* that the Indiana photo ID procedure did not impose an unconstitutional burden on voting says nothing about whether that type of change requires preclearance under Section 5.

C. The District Court Appropriately Relied on the Interaction Between SB 14 and Socioeconomic Factors in Finding that SB 14 Would Be Retrogressive

Texas contends that the district court's retrogression analysis, insofar as the court found that SB 14 is affirmatively discriminatory, was improper as a matter of law. Texas argues that the district court improperly "relied on [a] socioeconomic disparate-impact analysis" in reviewing the circumstances pertinent to voters who currently lack the necessary identification. Br. at 15 (emphasis omitted). Texas further claims that the district court's logic is "novel," and that its approach is "untethered from . . . the text of Section 5" because Section 5 does not address "socioeconomic status – it is targeted to discrimination

'on account of race or color' or language minority status." Br. at 15 (quoting 42 U.S.C. § 1973c(a)).

Texas' argument again is directly contrary to Section 5 precedent and also is contrary to the core concerns that led Congress to enact the Voting Rights Act. Moreover, the State again cites to no Voting Rights Act precedent in support of its contention.

There are four reasons why the district court's analysis was appropriate. First, as a general matter, Section 5 is concerned with "the reality of changed practices as they affect [minority] voters." *Georgia v. United States*, 411 U.S. 526, 531 (1973). Thus, the effect standard is "intended to halt actual retrogression in minority voting strength," *Lockhart v. United States*, 460 U.S. 125, 133 (1983), and "any assessment of the retrogression of a minority group's effective exercise of the electoral franchise depends on an examination of all the relevant circumstances," *Georgia v. Ashcroft*, 539 U.S. at 479.

This "reality" based review properly includes an assessment of the impact of a change in light of minority voters' socioeconomic status. For example, under Section 2 of the Voting Rights Act, minority voters' socioeconomic status may be considered in determining whether, under a "totality of circumstances" analysis, a redistricting or method of election is discriminatory. *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 440 (2006) (in evaluating the effect on minorities of Texas' congressional redistricting plan, it was relevant that the "political,

social, and economic legacy of past discrimination for Latinos in Texas . . . may well hinder their ability to participate effectively in the political process.") (internal quotation marks omitted); *see also Thornburg v. Gingles*, 478 U.S. 30, 45 (1986) (Section 2); *White v. Regester*, 412 U.S. 755, 768 (1973) (Fourteenth Amendment).

Second, voting discrimination premised on minority voters' lower socioeconomic status was one of Congress' core concerns when it enacted the Voting Rights Act, and it follows, therefore, that Congress intended that Section 5, in appropriate instances, would bar such discrimination. Congress adopted the preclearance provision (and the Act's other specially targeted remedies) in response, in part, to certain States' long and notorious history of enacting devices which discriminated "proximately based on something other than race." J.S. App. 65. This included "poll taxes, literacy tests, grandfather clauses, and property qualifications," *id.* (internal quotation marks omitted), which all involved discrimination proximately based on socioeconomic status except for the grandfather clauses' reliance on ancestry. *See Katzenbach*, 383 U.S. at 311 (following Reconstruction, certain States enacted literacy tests for voter registration which discriminated "based on the fact that . . . in each of the . . . States, more than two-thirds of the adult Negroes were illiterate while less

than one-quarter of the adult whites were unable to read or write").[15]

Congress, moreover, explicitly recognized in the Voting Rights Act the strong link between racial discrimination and discrimination that has a socioeconomic component. In 1965, Congress suspended literacy tests, 42 U.S.C. § 1973b, and subsequently enacted a permanent ban, 42 U.S.C. § 1973aa. Congress also declared in 1965 that poll taxes may have "the purpose or effect of denying persons the right to vote because of race or color" because poll taxes "preclude[ ] persons of limited means from voting or impose[ ] unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise." 42 U.S.C. § 1973h(a).

Accordingly, there is nothing "novel" or "untethered" about Section 5 reaching present-day versions of racial discrimination which is "proximately based" on minority voters' depressed socioeconomic status. Instead, it is fully consistent with Congress' intent that Section 5 be given the "broadest possible scope." *Allen*, 393 U.S. at 566-67.

Third, the Attorney General's practice in enforcing Section 5 is "especially relevant." *Lopez v. Monterey*

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[15] *See also United States v. Texas*, 252 F. Supp. 234, 245 (W.D. Tex. 1966) (three-judge court), *aff'd*, 384 U.S. 155 (1966) (Texas, in 1902, made voting contingent on payment of a poll tax, which restricted the franchise of the State's minority residents based on their socioeconomic status).

County, 525 U.S. 266, 281 (1999). This Court "traditionally [has] afford[ed] substantial deference to the Attorney General's interpretation of § 5 in light of [his] 'central role . . . in formulating and implementing' that section." *Id.* (quoting *Dougherty County Bd. of Ed. v. White*, 439 U.S. 32, 39 (1978) (ellipses in original)). As is relevant here, the Attorney General's longstanding practice has been to include in the Section 5 analysis the impact that a voting change may have on minority voters due to their having a lower socioeconomic status. For example, in *Dougherty County*, this Court noted that the Attorney General has interposed several objections to increases in candidate filing fees. 439 U.S. at 40. Such changes may have a discriminatory effect precisely because of the burden they may impose on persons with lesser financial means who, in turn, are often disproportionately minority (as is the case in Texas).

Finally, this Court's decision in *Dougherty County*, regarding the voting change at issue in that case, supports the conclusion that Section 5 addresses voting discrimination based on minority voters' socioeconomic status. The question presented in that case was whether Section 5 applied to a rule adopted by a Georgia school board which required school employees to take an unpaid leave of absence when campaigning for elective office. *Id*. at 34. In resolving this issue, the Court concluded that the school board provision, on its face, was a "standard, practice, or procedure with respect to voting," *id.* at 37-40, and also concluded that the provision had a "potential for

discrimination [so as] to demonstrate the need for preclearance," *id.* at 42.

As to this latter question, the Court applied the principle of *Georgia v. United States*, that Section 5 is concerned "with the reality of changed practices as they affect [minority] voters." *Dougherty County*, 439 U.S. at 41 (internal quotation marks omitted). The Court explained that the school board rule might impose "substantial economic disincentives" on candidacies for office, *id.* at 40, which in turn could have a discriminatory effect on minority voters, *id.* at 42.

Texas, for its part, cites to one case, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), which was not decided under the Voting Rights Act. That case only held that poverty is not a suspect classification under the Equal Protection Clause. *Id.* at 27-28. Texas does not explain the relationship between that holding and Section 5's non-retrogression standard, and none is apparent.[16]

For these reasons, the district court properly sought to assess "the reality of [Texas'] changed practices as they affect [minority] voters." *Dougherty*

[16] Moreover, even if the constitutional analysis were relevant to Section 5, Texas misstates the *Rodriguez* holding. The State asserts that the case stands for the proposition that "the Constitution does not equate discrimination on account of poverty with discrimination on account of race." Br. at 15. But the decision did not discuss any relationship between wealth discrimination and racial discrimination. 411 U.S. at 19-20, 27-28.

County, 439 U.S. at 41 (internal quotation marks omitted), by examining the interaction between SB 14 and the socioeconomic status of African American and Latino voters in Texas.

CONCLUSION

The judgment of the United States District Court for the District of Columbia should be affirmed.

Respectfully submitted,

DECHERT LLP
EZRA D. ROSENBERG
MICHELLE HART YEARY
BRIAN RAPHEL
LINDSEY B. STELCEN
902 Carnegie Center
Suite 500
Princeton, NJ 08540

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
JON M. GREENBAUM
ROBERT A. KENGLE
MARK A. POSNER
Counsel of Record
1401 New York Avenue, NW
Suite 400
Washington, DC 20005
(202) 662-8389
mposner@lawyerscommittee.org

THE BRENNAN CENTER FOR
JUSTICE AT NYU SCHOOL OF LAW
WENDY WEISER
MYRNA PÉREZ
IAN VANDEWALKER
161 Avenue of the Americas
Floor 12
New York, NY 10013

*This document does not purport to present NYU School of Law's institutional views, if any on the topic.

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP
SIDNEY S. ROSDEITCHER
1285 Avenue of the Americas
New York, NY 10019

Counsel for the Brennan Center for Justice at NYU School of Law

LAW OFFICE OF GARY L. BLEDSOE
& ASSOCIATES
GARY BLEDSOE
316 West 12th Street
Suite 307
Austin, TX 78701

NAACP NATIONAL HEADQUARTERS
KIM KEENAN
VICTOR L. GOODE
4805 Mt. Hope Drive
Baltimore, MD 21215

ROBERT S. NOTZON
1507 Nueces Street
Austin, TX 78701

JOSE GARZA
7414 Robin Rest Drive
San Antonio, TX 98209

Counsel for Texas State Conference of NAACP Branches and the Mexican American Legislative Caucus of Texas House Representatives

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
SHERRILYN IFILL
ELISE C. BODDIE
RYAN P. HAYGOOD
NATASHA M. KORGAONKAR
LEAH C. ADEN
99 Hudson Street, Suite 1600
New York, NY 10013

FRIED FRANK HARRIS
SHRIVER & JACOBSON LLP
DOUGLAS H. FLAUM
MICHAEL B. DE LEEUW
ADAM HARRIS
One New York Plaza
New York, NY 10004

Counsel for Texas League of Young Voters Education Fund, Imani Clark, KiEssence Culbreath, Demariano Hill, and Dominique Monday

J. Gerald Hebert
191 Somerville Street, #405
Alexandria, VA 22304

Brazil & Dunn LLP
Chad W. Dunn
K. Scott Brazil
4201 Cypress Creek Parkway
Suite 530
Houston, TX 77068

Counsel for Eric Kennie, Anna Burns, Michael Montez, Penny Pope, Marc Veasey, Jane Hamilton, David De La Fuente, Lorraine Birabil, Daniel Clayton, and Sergio Deleon

John Kent Tanner
3743 Military Road, NW
Washington, DC 20015

American Civil Liberties Union Foundation
Steven R. Shapiro
125 Broad Street
New York, NY 10004

Laughlin McDonald
Nancy Abudu
230 Peachtree Street NW
Suite 1440
Atlanta, GA 30303

American Civil Liberties Union Foundation of Texas
Rebecca Robertson
1500 McGowan Street
Houston, TX 77004

ADVANCEMENT PROJECT
PENDA HAIR
KATHERINE CULLITON-GONZALEZ
DONITA JUDGE
1220 L Street, NW
Suite 850
Washington, DC 20005

Counsel for Justice Seekers, League of Women Voters of Texas, Texas Legislative Black Caucus, Donald Wright, Peter Johnson, Ronald Wright, Southwest Workers Union, and La Union Del Pueblo Entero

May 9, 2013

SUPPLEMENTAL APPENDIX

S.B. No. 14

AN ACT

relating to requirements to vote, including presenting proof of identification; providing criminal penalties [new provisions are underlined; deleted provisions are struck-through].

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 13.002, Election Code, is amended by adding Subsection (i) to read as follows:

(i) An applicant who wishes to receive an exemption from the requirements of Section 63.001(b) on the basis of disability must include with the person's application:

(1) written documentation:

(A) from the United States Social Security Administration evidencing the applicant has been determined to have a disability; or

(B) from the United States Department of Veterans Affairs evidencing the applicant has a disability rating of at least 50 percent; and

(2) a statement in a form prescribed by the secretary of state that the applicant does not have a form of identification acceptable under Section 63.0101.

SECTION 2. Section 15.001, Election Code, is amended by adding Subsection (c) to read as follows:

(c) A certificate issued to a voter who meets the certification requirements of Section 13.002(i) must contain an indication that the voter is exempt from the requirement to present identification other than the registration certificate before being accepted for voting.

SECTION 3. Effective September 1, 2011, Subchapter A, Chapter 15, Election Code, is amended by adding Section 15.005 to read as follows:

Sec. 15.005. NOTICE OF IDENTIFICATION REQUIREMENTS. (a) The voter registrar of each county shall provide notice of the identification requirements for voting prescribed by Chapter 63 and a detailed description of those requirements with each voter registration certificate issued under Section 13.142 or renewal registration certificate issued under Section 14.001.

(b) The secretary of state shall prescribe the wording of the notice to be included on the certificate under this section.

SECTION 4. Subsection (a), Section 15.022, Election Code, is amended to read as follows:

(a) The registrar shall make the appropriate corrections in the registration records, including, if necessary, deleting a voter's name from the suspense list:

(1) after receipt of a notice of a change in registration information under Section 15.021;

(2) after receipt of a voter's reply to a notice of investigation given under Section 16.033;

(3) after receipt of a registration omissions list and any affidavits executed under Section 63.006 [~~63.007~~], following an election;

(4) after receipt of a voter's statement of residence executed under Section 63.0011;

(5) before the effective date of the abolishment of a county election precinct or a change in its boundary;

(6) after receipt of United States Postal Service information indicating an address reclassification;

(7) after receipt of a voter's response under Section 15.053; or

(8) after receipt of a registration application or change of address under Chapter 20.

SECTION 5. Effective September 1, 2011, Subchapter A, Chapter 31, Election Code, is amended by adding Section 31.012 to read as follows:

Sec. 31.012. VOTER IDENTIFICATION EDUCATION. (a) The secretary of state and the voter registrar of each county that maintains a website shall provide notice of the identification requirements for voting prescribed by Chapter 63 on each entity's

respective website in each language in which voter registration materials are available. The secretary of state shall prescribe the wording of the notice to be included on the websites.

(b) The secretary of state shall conduct a statewide effort to educate voters regarding the identification requirements for voting prescribed by Chapter 63.

(c) The county clerk of each county shall post in a prominent location at the clerk's office a physical copy of the notice prescribed under Subsection (a) in each language in which voter registration materials are available.

SECTION 6. Effective September 1, 2011, Section 32.111, Election Code, is amended by adding Subsection (c) to read as follows:

(c) The training standards adopted under Subsection (a) must include provisions on the acceptance and handling of the identification presented by a voter to an election officer under Section 63.001.

SECTION 7. Effective September 1, 2011, Subsection (a), Section 32.114, Election Code, is amended to read as follows:

(a) The county clerk shall provide one or more sessions of training using the standardized training program and materials developed and provided by the secretary of state under Section 32.111 for the election judges and clerks appointed to serve in elections ordered by the governor or a county authority. Each

election judge shall complete the training program. Each election clerk shall complete the part of the training program relating to the acceptance and handling of the identification presented by a voter to an election officer under Section 63.001.

SECTION 8. Chapter 62, Election Code, is amended by adding Section 62.016 to read as follows:

Sec. 62.016. NOTICE OF ACCEPTABLE IDENTIFICATION OUTSIDE POLLING PLACES. The presiding judge shall post in a prominent place on the outside of each polling location a list of the acceptable forms of identification. The list must be printed using a font that is at least 24-point. The notice required under this section must be posted separately from any other notice required by state or federal law.

SECTION 9. Section 63.001, Election Code, is amended by amending Subsections (b), (c), (d), and (f) and adding Subsections (g) and (h) to read as follows:

(b) Except as provided by Subsection (h), on [~~On~~] offering to vote, a voter must present to an election officer at the polling place one form of identification described by Section 63.0101 [~~the voter's voter registration certificate to an election officer at the polling place~~].

(c) On presentation of the documentation required under Subsection (b) [~~a registration certificate~~], an election officer shall determine whether the voter's name on the documentation [~~registration certificate~~] is on the list of registered voters for the

precinct. If in making a determination under this subsection the election officer determines under standards adopted by the secretary of state that the voter's name on the documentation is substantially similar to but does not match exactly with the name on the list, the voter shall be accepted for voting under Subsection (d) if the voter submits an affidavit stating that the voter is the person on the list of registered voters.

(d) If, as determined under Subsection (c), the voter's name is on the precinct list of registered voters and the voter's identity can be verified from the documentation presented under Subsection (b), the voter shall be accepted for voting.

(f) After determining whether to accept a voter, an election officer shall return the voter's documentation [~~registration certificate~~] to the voter.

(g) If the requirements for identification prescribed by Subsection (b) are not met, the voter may be accepted for provisional voting only under Section 63.011. For a voter who is not accepted for voting under this section, an election officer shall:

(1) inform the voter of the voter's right to cast a provisional ballot under Section 63.011; and

(2) provide the voter with written information, in a form prescribed by the secretary of state, that:

(A) lists the requirements for identification;

(B) states the procedure for presenting identification under Section 65.0541;

(C) includes a map showing the location where identification must be presented; and

(D) includes notice that if all procedures are followed and the voter is found to be eligible to vote and is voting in the correct precinct, the voter's provisional ballot will be accepted.

(h) The requirements for identification prescribed by Subsection (b) do not apply to a voter who is disabled and presents the voter's voter registration certificate containing the indication described by Section 15.001(c) on offering to vote.

SECTION 10. Subsection (a), Section 63.0011, Election Code, is amended to read as follows:

(a) Before a voter may be accepted for voting, an election officer shall ask the voter if the voter's residence address on the precinct list of registered voters is current and whether the voter has changed residence within the county. If the voter's address is omitted from the precinct list under Section 18.005(c), the officer shall ask the voter if the voter's residence, if [~~as~~] listed, on identification presented by the voter under Section 63.001(b) [~~the voter's voter registration certificate~~] is current and whether the voter has changed residence within the county.

SECTION 11. Effective September 1, 2011, Chapter 63, Election Code, is amended by adding Section 63.0012 to read as follows:

Sec. 63.0012. NOTICE OF IDENTIFICATION REQUIREMENTS TO CERTAIN VOTERS. (a) An election officer shall distribute written notice of the identification that will be required for voting beginning with elections held after January 1, 2012, and information on obtaining identification without a fee under Chapter 521A, Transportation Code, to each voter who, when offering to vote, presents a form of identification that will not be sufficient for acceptance as a voter under this chapter beginning with those elections.

(b) The secretary of state shall prescribe the wording of the notice and establish guidelines for distributing the notice.

(c) This section expires September 1, 2017.

SECTION 12. Section 63.006, Election Code, is amended to read as follows:

Sec. 63.006. VOTER WITH REQUIRED DOCUMENTATION [~~CORRECT CERTIFICATE~~] WHO IS NOT ON LIST. (a) A voter who, when offering to vote, presents the documentation required under Section 63.001(b) [~~a voter registration certificate indicating that the voter is currently registered in the precinct in which the voter is offering to vote,~~] but whose name is not on the precinct list of registered voters[~~,~~] shall be accepted for voting if the voter also presents a voter registration certificate indicating that the voter is currently registered:

(1) in the precinct in which the voter is offering to vote; or

(2) in a different precinct in the same county as the precinct in which the voter is offering to vote and the voter executes an affidavit stating that the voter:

(A) is a resident of the precinct in which the voter is offering to vote or is otherwise entitled by law to vote in that precinct;

(B) was a resident of the precinct in which the voter is offering to vote at the time the information on the voter's residence address was last provided to the voter registrar;

(C) did not deliberately provide false information to secure registration in a precinct in which the voter does not reside; and

(D) is voting only once in the election.

(b) After the voter is accepted, an election officer shall:

(1) indicate beside the voter's name on the poll list that the voter was accepted under this section; and

(2) enter the voter's name on the registration omissions list.

SECTION 13. Section 63.009, Election Code, is amended to read as follows:

Sec. 63.009. VOTER WITHOUT CERTIFICATE WHO IS NOT ON LIST. A [~~(a) Except as provided by Subsection (b), a~~] voter who does not present a voter registration certificate when offering to vote, and whose name is not on the list of registered voters for the precinct in which the voter is offering to vote, shall be accepted for provisional voting if the voter executes an affidavit in accordance with Section 63.011.

[~~(b) If an election officer can determine from the voter registrar that the person is a registered voter of the county and the person presents proof of identification, the affidavits required by Sections 63.007 and 63.008 are substituted for the affidavit required by Section 63.011 in complying with that section. After the voter is accepted under this subsection, an election officer shall also indicate beside the voter's name on the poll list that the voter was accepted under this section.~~]

SECTION 14. Section 63.0101, Election Code, is amended to read as follows:

Sec. 63.0101. DOCUMENTATION OF PROOF OF IDENTIFICATION. The following documentation is an acceptable form [~~as proof~~] of photo identification under this chapter:

(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 [~~or a similar document issued to the person by an agency of another state, regardless of whether~~

~~the license or card has~~] 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 [~~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 certificate [~~papers~~] issued to the person that contains the person's photograph;

(4) [~~(5)~~] 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

[~~(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~~].

SECTION 15. Section 63.011, Election Code, is amended by amending Subsections (a) and (b) and adding Subsection (b-1) to read as follows:

(a) A person to whom Section 63.001(g) [~~63.008(b)~~] or 63.009 [~~63.009(a)~~] applies may cast a provisional ballot if the person executes an affidavit stating that the person:

(1) is a registered voter in the precinct in which the person seeks to vote; and

(2) is eligible to vote in the election.

(b) A form for an affidavit required by this section must [~~shall~~] be printed on an envelope in which the provisional ballot voted by the person may be placed and must include:

(1) a space for entering the identification number of the provisional ballot voted by the person; and

(2) a space for an election officer to indicate whether the person presented a form of identification described by Section 63.0101.

(b-1) The affidavit form may include space for disclosure of any necessary information to enable the person to register to vote under Chapter 13. The secretary of state shall prescribe the form of the affidavit under this section.

SECTION 16. Subsection (b), Section 64.012, Election Code, is amended to read as follows:

(b) An offense under this section is a felony of the second [~~third~~] degree unless the person is convicted of an attempt. In that case, the offense is a state jail felony [~~Class A misdemeanor~~].

SECTION 17. Subsection (b), Section 65.054, Election Code, is amended to read as follows:

(b) A provisional ballot shall [~~may~~] be accepted [~~only~~] if the board determines that:

(1) [~~;~~] from the information in the affidavit or contained in public records, the person is eligible to vote in the election and has not previously voted in that election;

(2) the person:

(A) meets the identification requirements of Section 63.001(b) at the time the ballot was cast or in the period prescribed under Section 65.0541;

(B) notwithstanding Chapter 110, Civil Practice and Remedies Code, executes an affidavit under penalty of perjury that states 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 under penalty of perjury that states the voter does not have any

identification meeting the requirements of Section 63.001(b) 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; and

(3) the voter has not been challenged and voted a provisional ballot solely because the voter did not meet the requirements for identification prescribed by Section 63.001(b).

SECTION 18. Subchapter B, Chapter 65, Election Code, is amended by adding Section 65.0541 to read as follows:

Sec. 65.0541. PRESENTATION OF IDENTIFICATION FOR CERTAIN PROVISIONAL BALLOTS.

(a) A voter who is accepted for provisional voting under Section 63.011 because the voter does not meet the identification requirements of Section 63.001(b) may, not later than the sixth day after the date of the election:

(1) present a form of identification described by Section 63.0101 to the voter registrar for examination; or

(2) execute an affidavit described by Section 65.054(b)(2)(B) or (C) in the presence of the voter registrar.

(b) The secretary of state shall prescribe procedures as necessary to implement this section.

SECTION 19. Section 66.0241, Election Code, is amended to read as follows:

Sec. 66.0241. CONTENTS OF ENVELOPE NO. 4. Envelope no. 4 must contain:

(1) the precinct list of registered voters;

(2) the registration correction list;

(3) the registration omissions list;

(4) any statements of residence executed under Section 63.0011; and

(5) any affidavits executed under Section 63.006 [~~63.007~~] or 63.011.

SECTION 20. Subtitle B, Title 7, Transportation Code, is amended by adding Chapter 521A to read as follows:

CHAPTER 521A. ELECTION IDENTIFICATION CERTIFICATE

Sec. 521A.001. ELECTION IDENTIFICATION CERTIFICATE.

(a) The department shall issue an election identification certificate to a person who states that the person is obtaining the certificate for the purpose of satisfying Section 63.001(b), Election Code, and does not have another form of identification described by Section 63.0101, Election Code, and:

(1) who is a registered voter in this state and presents a valid voter registration certificate; or

(2) who is eligible for registration under Section 13.001, Election Code, and submits a registration application to the department.

(b) The department may not collect a fee for an election identification certificate or a duplicate election identification certificate issued under this section.

(c) An election identification certificate may not be used or accepted as a personal identification certificate.

(d) An election officer may not deny the holder of an election identification certificate the ability to vote because the holder has an election identification certificate rather than a driver's license or personal identification certificate issued under this subtitle.

(e) An election identification certificate must be similar in form to, but distinguishable in color from, a driver's license and a personal identification certificate. The department may cooperate with the secretary of state in developing the form and appearance of an election identification certificate.

(f) The department may require each applicant for an original or renewal election identification certificate to furnish to the department the information required by Section 521.142.

(g) The department may cancel and require surrender of an election identification certificate after determining that the holder was not entitled to the

certificate or gave incorrect or incomplete information in the application for the certificate.

(h) A certificate expires on a date specified by the department, except that a certificate issued to a person 70 years of age or older does not expire.

SECTION 21. Sections 63.007 and 63.008, Election Code, are repealed.

SECTION 22. Effective September 1, 2011:

(1) as soon as practicable, the secretary of state shall adopt the training standards and develop the training materials required to implement the change in law made by this Act to Section 32.111, Election Code; and

(2) as soon as practicable, the county clerk of each county shall provide a session of training under Section 32.114, Election Code, using the standards adopted and materials developed to implement the change in law made by this Act to Section 32.111, Election Code.

SECTION 23. The change in law made by this Act in amending Subsection (b), Section 64.012, Election Code, applies only to an offense committed on or after January 1, 2012. An offense committed before January 1, 2012, is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose. For purposes of this section, an offense is committed before January 1, 2012, if any element of the offense occurs before that date.

SECTION 24. Effective September 1, 2011, state funds disbursed under Chapter 19, Election Code, for the purpose of defraying expenses of the voter registrar's office in connection with voter registration may also be used for additional expenses related to coordinating voter registration drives or other activities designed to expand voter registration. This section expires January 1, 2013.

SECTION 25. Every provision in this Act and every application of the provisions in this Act are severable from each other. If any application of any provision in this Act to any person or group of persons or circumstances is found by a court to be invalid, the remainder of this Act and the application of the Act's provisions to all other persons and circumstances may not be affected. All constitutionally valid applications of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this Act invalid in a large or substantial fraction of relevant cases, the remaining valid applications shall be severed and allowed to remain in force.

SECTION 26. Except as otherwise provided by this Act, this Act takes effect January 1, 2012.

EIC REGULATIONS

RULE § 15.181. Eligibility for Election Identification Certificate

(a) An applicant must be at least 17 years and 10 months of age in order to apply for an election identification certificate.

(b) An applicant must affirm that the person is obtaining the certificate for the purpose of satisfying Election Code, §63.001(b) and does not have another form of identification described by Election Code, §63.0101.

(c) An applicant must:

(1) Be a registered voter in this state and present a voter registration card issued to the individual; or

(2) Be eligible for voter registration under Election Code, §13.001 and submit an application for voter registration.

(d) An applicant who has been issued any of the following documents is not eligible to receive an election identification certificate:

(1) A driver license, election identification certificate, or personal identification certificate issued by the department that has not expired or that expired no earlier than 60 days before the date of application;

(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 application;

(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 application; or

(5) A license to carry a concealed handgun issued to the person by the department that has not expired or that expired no earlier than 60 days before the date of application.

RULE § 15.182. Identification of Applicants

An applicant for an election identification certificate must provide documents satisfactory to the department. All documents must be verifiable.

(1) An original applicant for an election identification certificate must present:

(A) One piece of primary identification;

(B) Two pieces of secondary identification; or

(C) One piece of secondary identification plus two pieces of supporting identification.

(2) Primary Identification. A Texas driver license or personal identification card issued to the person

that has been expired for 60 days and is within two years of expiration date may be presented as primary identification.

(3) Secondary identification. These items are recorded governmental documents (United States, one of the 50 states, a United States territory, or District of Columbia):

(A) Original or certified copy of a birth certificate issued by the appropriate State Bureau of Vital Statistics or equivalent agency;

(B) Original or certified copy of United States Department of State Certification of Birth (issued to United States citizens born abroad);

(C) Original or certified copy of court order with name and date of birth (DOB) indicating an official change of name and/or gender; or

(D) U.S. citizenship or naturalization papers without identifiable photo.

(4) Supporting identification. The following items consist of other records or documents that aid examining personnel in establishing the identity of the applicant:

(A) voter registration card;

(B) school records;

(C) insurance policy (at least two years old);

(D) Texas vehicle or boat title or registration;

(E) military records;

(F) unexpired military dependant identification card;

(G) original or certified copy of marriage license or divorce decree;

(H) Social Security card;

(I) pilot's license;

(J) unexpired photo DL or photo ID issued by another (United States) state, U.S. territory, the District of Columbia;

(K) expired photo DL or photo ID issued by another (United States) state, U.S. territory, or the District of Columbia that is within two years of the expiration date;

(L) an offender identification card or similar form of identification issued by the Texas Department of Criminal Justice;

(M) forms W-2 or 1099;

(N) Numident record from the Social Security Administration;

(O) expired Texas driver license or personal identification certificate (expired more than two years);

(P) professional license issued by Texas state agency;

(Q) identification card issued by government agency;

(R) parole or mandatory release certificate issued by the Texas Department of Criminal Justice;

(S) federal inmate identification card;

(T) federal parole or release certificate;

(U) Medicare or Medicaid card;

(V) Selective Service card;

(W) immunization records;

(X) tribal membership card from federally recognized tribe;

(Y) Certificate of Degree of Indian Blood;

(Z) Veteran's Administration card;

(AA) hospital issued birth record; or

(BB) any document that may be added to §15.24 of this title (relating to Identification of Applicants) other than those issued to persons who are not citizens of the U.S.

RULE § 15.183. Application Requirements

(a) An application for an election identification certificate must include:

(1) the applicant's full name:

(A) A married woman may use her maiden name or she may adopt the surname of her husband or the surname of a previous husband. No name will be used that has not been documented. Middle names will not be substituted for first names. Three full names will be used, unless the applicant does not have three names, including the maiden name. This section applies to both sexes.

(i) When change of name occurs because of marriage, divorce, annulment, or death of spouse, the certificate holder may choose to keep her current married name, revert to her maiden name, or adopt a previous husband's surname. Name changes for reasons other than those set out above require a court order verifying such change.

(ii) Certificate holders who request a name change may apply for a duplicate and exercise the same privilege in name selection as an original applicant.

(B) Foreign language names will be spelled out as they appear on the identification documents presented. English versions of names will not be substituted for the actual name.

(C) Ecclesiastical names such as Brother Thomas, Sister Mary, or Father Kelly are not used.

(2) the applicant's place and date of birth;

(3) the fingerprints of the applicant; this does not apply to an applicant who is permitted and utilizes an alternative method for renewing or duplicating an election identification certificate;

(4) a photograph of the applicant;

(5) the signature of the applicant; the applicant's usual signature, in ink, is required on all applications for an election identification certificate:

(A) The primary purpose of the signature is to identify the applicant and verify the information given on the application.

(B) If an applicant cannot write his name, he may make his "mark." This is usually a cross in the place of his signature followed by the applicant's printed name. The Driver License field employee shall sign under the applicant's "mark" showing who printed the applicant's name.

(6) a brief description of the applicant;

(7) the sex of the applicant;

(8) the residence address of the applicant;

(9) whether the applicant is a citizen of the United States; and

(10) the county of residence of the applicant.

(b) Social Security number. Applicants for an election identification certificate will be asked to provide verification of Social Security number documentation.

If the applicant fails or refuses to provide that social security information, the election identification certificate will be issued without such documentation unless state or federal statute requires otherwise. Acceptable documents to provide verification of Social Security number are listed in §15.42 of this title (relating to Social Security Number).

(c) Notarizations. The applicant must verify original election identification certificate applications before a person authorized to administer oaths. The following officials may administer such oaths or affirmations:

(1) within the State of Texas:

(A) a judge, clerk, or commissioner of any court of record;

(B) a notary public;

(C) a justice of the peace;

(D) authorized employees of the Department of Public Safety;

(2) general:

(A) in the absence of evidence to the contrary, it is presumed that all notarizations are legally made;

(B) the omission of the seal by officers normally required to use same for notarization invalidates the oath;

(C) notarized election identification certificate applications must be dated not more than six months prior to date of application.

RULE § 15.184. Expiration, Renewal, and Replacement of Election Identification Certificate

(a) Expiration.

(1) An Election Identification Certificate expires on the first birthday of the cardholder occurring after the sixth anniversary of the date of the application.

(2) An Election Identification Certificate issued to a person 70 years of age or older does not expire.

(b) Renewal.

(1) An applicant for renewal of an election identification certificate must present evidence of eligibility, under §15.181 of this title (relating to Eligibility for Election Identification Certificate) plus one other piece of personal identification if the election identification certificate is not presented, if necessary to identify the applicant, prior to renewal.

(2) An election identification certificate may be renewed 12 months before expiration date. Earlier renewals will be accepted for good cause.

(3) The department may provide certificate holders with alternate methods of renewing or duplicating an election identification certificate.

(c) Applications for Replacements and Corrections. An application for replacement will be accepted in any of the following cases:

(1) when an election identification certificate has been lost, destroyed, marred, or mutilated;

(2) when there has been a change of name and/or gender.

RULE § 15.185. Cancellation and Surrender

The department may cancel and require surrender of an election identification certificate upon confirmation that the certificate was issued to a person not entitled thereto.