No. 12-1028

In The
Supreme Court of the United States

STATE OF TEXAS,

Appellant,

v.

ERIC H. HOLDER, JR.,

Appellee.

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

MOTION TO AFFIRM BY RODRIGUEZ INTERVENOR-APPELLEES

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the district court erred in declining to preclear, under section 5 of the Voting Rights Act, a Texas law narrowing its requirement of voter identification at the polls when Texas failed to carry its burden of showing that the law would not diminish the ability of racial minority voters to elect their preferred candidate of choice.

CORPORATE DISCLOSURE STATEMENT

Southwest Voter Registration Education Project and Mi Familia Vota Education Fund are incorporated as nonpartisan, nonprofit 501c(3) corporations. Southwest Voter Registration Education Project and Mi Familia Vota have no parent corporation or publicly held company owning 10% or more of the corporation's stock.

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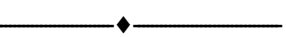
MOTION TO AFFIRM

This brief is submitted on behalf of Rodriguez Intervenor-Appellees, individual Latino voters who would be adversely affected by SB 14 and voter engagement organizations that work in Latino communities in Texas. Rodriguez Intervenor-Appellees are: Victoria Rodriguez, Nicole Rodriguez, Southwest Voter Registration Education Project and Mi Familia Vota Education Fund.

Rodriguez Intervenor-Appellees respectfully submit this motion to affirm the decision of the three-judge panel of the United States District Court for the District of Columbia.



STATEMENT

Senate Bill 14 (SB 14), enacted by Texas in 2011, narrows the state's existing list of acceptable voter identification to five forms of government-issued photo identification. *See Texas v. Holder*, 888 F. Supp. 2d 113, 115 (D.D.C. 2012). Legislative supporters of stricter voter identification claimed that non-U.S. citizens, the overwhelming majority of whom are Latino, prompted the need to tighten the state's voter identification law. *See* DIX003 at 11.[1] Texas officials

[1] Hereinafter, references to "PX" are to Plaintiff's Trial Exhibits, references to "DE" are to Defendant's Trial Exhibits, and references to "DIX" are references to Defendant-Intervenors' Trial Exhibits.

refused to examine the possible adverse effects of SB 14 on racial minority voters until requested by the U.S. Department of Justice ("Department of Justice") in the administrative preclearance process under section 5 of the Voting Rights Act. *See* PX063; PX073.

After providing the Department of Justice two statistical studies indicating that Latino registered voters would be disproportionately affected by SB 14, Texas filed this case seeking preclearance from the U.S. District Court for the District of Columbia ("district court"). At trial, Texas "conceded that '[t]he record does tell us that there is a subset of registered voters who lack the ID [required by SB 14].'" *Texas v. Holder*, 888 F. Supp. 2d at 139. However, Texas was again unwilling to address whether the effects of SB 14 would fall disproportionately on Latino or other minority voters. As a result, the district court denied preclearance of SB 14. *Id.* at 144.

The present appeal by Texas seeks to undercut the protections of section 5 by: shifting the burden of proof, eliminating the inquiry into the effects of the proposed election change, and exempting registration and voting laws from section 5 review entirely. The remaining arguments simply dispute the findings of fact made by the district court.

The question presented by Texas does not warrant plenary review. However Texas's appeal amply demonstrates the state's staunch refusal to evaluate SB 14 for possible racially discriminatory effects (before and during the preclearance process) and

further demonstrates why the protections of section 5 are still needed in Texas today.

A. Factual Background

Although previous bills seeking to narrow Texas's voter identification law had failed in 2005, 2007 and 2009, leaders of the Texas Legislature moved a new voter identification bill to the front of the legislative agenda in 2011. *See* DIX003 at 10. As the 2011 Session commenced, Texas Governor Rick Perry declared voter identification legislation an emergency priority. *See* DE106.

The passage of SB 14 was characterized by heated debate, often turning on issues of race and ethnicity; it was also characterized by procedural irregularities associated with fast-track passage and legislative supporters' refusal to address the question whether SB 14 would have discriminatory effects.

1. Texas Legislators Tied the Need for Stricter Voter Identification to the Specter of Voting by Non-Citizens, Most of Whom are Latino

In the series of legislative sessions leading to the enactment of SB 14 in 2011, Texas officials often referred to non-citizens as a source of voter fraud and as the reason why Texas should narrow its voter identification requirements. *See* DIX003 at 11. State Senator Robert Duncan stated: "The issue here today in this country today [sic] is how do we control illegal

immigration into this state. Certainly there are those out there who would claim that one reason we need to be tighter on voter identification for voter fraud is the fact that we do have a lot of folks coming into this country from other countries. . . ." *Id.* at 13.

A private task force led by six Texas Representatives released a report on illegal immigration which urged the adoption of a law requiring, "Voters to Present a Driver's License or Texas Identification Card at their Polling Place." *Id.* at 12-13.

Texas Lt. Governor Dewhurst issued a public statement following the defeat of a 2007 voter ID bill asserting that with eight to ten million illegal aliens "currently living in the U.S., the basic American principle of one person, one vote is in danger." *Id.* at 14. Also during the 2007 session, Texas Representative Betty Brown indicated that her voter identification proposal, approved by the Texas House, was "designed to keep illegal aliens, noncitizens and people otherwise not qualified from voting." *Id.* (internal quotation marks omitted).

In 2011, Texas officials again promoted SB 14 as a means to prevent voter fraud by non-citizens. *See id.* at 11. Texas Governor Rick Perry stated in constituent correspondence regarding voter identification that he believed undocumented immigrants were committing voter fraud. *See* DIX108. Lt. Gov. Dewhurst wrote to a constituent regarding voter identification stating, "Voter ID will help stamp out voter fraud and increase public confidence in our election process by ensuring that only U.S. citizens – who are legally eligible – vote in Texas elections." DIX003 at 16.

Elected officials received thousands of constituent letters and emails urging them to enact voter ID legislation to stop illegal immigrants from voting; the letters often used terms such as "criminal aliens," "wetbacks," and other derogatory phrases to refer to ineligible voters who should be stopped by stricter voter ID rules. *See generally* DIX083-104.3.[2]

Texas Representative Debbie Riddle claimed to have personally witnessed voter fraud when she saw a Hispanic, Spanish-speaking woman appear at the polling place who needed assistance to vote because she was unable to communicate in English and was unfamiliar with the voting process. *See* DIX003 at 17. Rep. Riddle stated that this was an example of voter fraud despite the fact that she had no knowledge whether the voter was a citizen or not, only that she was Hispanic and Spanish-speaking. *See id.*; *see also* Riddle Dep. 45:14-52:15.[3]

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[2] *See*, *e.g.*, DIX084 (constituent email stating: "Send the illegal wetbacks home! Make them provide ID's if they are here, period."); DIX088 (constituent email stating: "We are tired of paying these illegals way at our expense . . . Democrats have illegally voted the Blacks for years & they intend to do the same to the Mexicans, voter ID & strict immigration laws will stop this.").

[3] At the same time, legislative supporters of SB 14 were unable to point to evidence showing that impersonation voter fraud was a problem in Texas (whether committed by non-citizens or citizens). In its January 2011 Interim Report, the House Committee on Elections cited the Texas Secretary of State's findings of 24 election code violations between 2008 and 2010. DE536 at 27-28. Of these, two involved voter impersonation allegations. *Id.*

2. Procedural Irregularities Characterized the Enactment of SB 14

In the Texas Senate, where SB 14 was introduced, Lt. Gov. Dewhurst ordered that SB 14 bypass the Senate Elections Committee and proceed directly to the full Senate for consideration. *See* DE103. The following day, the Senate voted to approve SB 14 as a Committee of the Whole and the day after that the Senate passed SB 14. *See* DE503.

During debate, the Senate author of SB 14 refused to answer repeated questions from minority legislators regarding potential adverse effects of SB 14 on minority voters. *See*, *e.g.*, Trial JA0078[4] (responding "not advised" to the question whether there was a disparate racial impact in other states with strict photo voter identification statutes); Trial JA0096-97 (responding "not advised" to the question whether Texas has a larger proportion of minority population than Indiana); Trial JA0098 (responding "not advised" to the question whether eliminating the ability of voters to show government program identification cards would adversely affect minority voters).

In order to overcome the "no" vote of every racial minority senator in the chamber, the Senate suspended its rules and passed SB 14 on a simple majority

[4] Hereinafter, references to "Trial JA" are references to the Joint Appendix filed by the State of Texas on behalf of all parties at the request of the district court. *See* Scheduling Order, *Texas v. Holder*, No. 12-cv-00128 (D.D.C. June 13, 2012), ECF 183.

vote, abandoning its customary two-thirds majority vote requirement for approval of bills. *See* Trial JA1265; DE054 at 2.

SB 14 then moved to the Texas House, where the House Speaker created a new committee to hear only one bill – SB 14. *See* DE409; DE145; *see also* Bonnen Dep. 44:24-45:2. After one public hearing, the special committee approved the bill and sent it to the full House for consideration. *See* DE503.

During the House floor debate on SB 14, Latino and African American representatives raised the question whether SB 14 would adversely affect minority voters. *See* Trial JA2117-24; Trial JA2140-41; Trial JA2147-49; Trial JA2168-71. In response, the House sponsor of SB 14 stated that discrimination in voting no longer exists in Texas and that the Texas Legislature need not discuss the application of the Voting Rights Act to SB 14 because that "is a federal issue to be decided by the federal courts." Trial JA2117; Trial JA2118.

The House passed SB 14 swiftly, rejecting numerous amendments aimed at mitigating the effects of SB 14 on voters who lacked the necessary identification by, for example, permitting voters to use their voter registration cards as identification if a later study showed that SB 14 had a disparate racial effect, Trial JA2146-48, waiving fees for indigent persons to obtain required underlying documents, and requiring driver's license offices to remain open in the evening

and on weekends. *See*, *e.g.*, *Texas v. Holder*, 888 F. Supp. 2d at 144; DIX003 at 28; Trial JA2421-23. Notably, the Texas House rejected several amendments that would have required Texas to evaluate whether SB 14 would have a racially discriminatory impact. *See*, *e.g.*, Trial JA2151-52. Following passage in both chambers, the SB 14 conference committee removed a provision that focused SB 14's voter education program at low-income and minority communities. *See* DE506 at 18-19. The bill analysis prepared in Governor Perry's office prior to his signing SB 14 included no inquiry into the bill's impact on minority voters. Schofield Dep. 51:11-15, 146:3-7.

The legislative debate regarding SB 14 ran parallel to the debate on controversial redistricting plans for Texas House, Texas Senate and U.S. Congress[5] which often touched on the significant demographic changes occurring in Texas. Legislators were aware that the 2010 Census showed that 60% of the total intercensal increase in Texas's population was comprised of Hispanics. *See* DIX003 at 6. Texas Latinos are younger on average than white non-Hispanics (Anglos). *Id.* at 7. Forty-five percent of all children turning 18 (the age of eligibility to vote) in Texas in 2010 were Hispanic. *Id.* at 6.

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[5] Those plans were denied preclearance by the U.S. District Court for the District of Columbia which found racially discriminatory purpose and retrogressive effect in various plans. *See Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012). Texas has appealed the case to this Court.

Latinos also make up a substantial majority of the growing electorate comprised of foreign-born U.S. citizens.[6] From 2006 to 2011, the number of naturalized citizens in Texas rose by approximately 150,000.[7]

3. SB 14 Narrows Texas's Existing Voter ID Law to a Small List of Government-Issued Photo Identification Documents

SB 14 narrows the list of acceptable voter identification documents to five forms of government-issued photo identification. *Texas v. Holder*, 888 F. Supp. 2d at 115. Although the following documents are acceptable forms of voter identification under the current law, SB 14 makes these documents the only forms of acceptable identification:

> (1) a driver's license or personal ID card issued by the Texas Department of Public Safety (DPS);

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[6] U.S. Census, "Selected Characteristics of the Native and Foreign-Born Populations (Texas)," 2007-2011 American Community Survey 5-Year Estimates, *available at* http://www.census.gov/acs/www/.

[7] *Compare* U.S. Census, "Selected Characteristics of the Native and Foreign-Born Populations (Texas)," 2007-2011 American Community Survey 5-Year Estimates, *available at* http://www.census.gov/acs/www/ *with* U.S. Census, "Selected Characteristics of the Native and Foreign-Born Populations," 2006 American Community Survey, *available at* http://www.census.gov/acs/www/.

(2) a license to carry a concealed handgun, also issued by DPS;

(3) a U.S. military ID card;

(4) a U.S. citizenship certificate with photograph; or

(5) a U.S. passport.

Id. at 115-16.

SB 14 provides for a newly-created Election Identification Certificate the voter would obtain by traveling to a DPS office and showing documents that would entitle the voter to a driver's license or state identification card. Aside from the cost of obtaining underlying identification documents such as a birth certificate or U.S. naturalization certificate, the Election Identification Certificate would be free of cost. *Id.*[8]

SB 14 eliminates from Texas's current voter identification law many government-issued documents, including: driver's licenses and personal ID cards from states other than Texas, student photo identification cards issued by public universities, employment photo identification cards issued by state and local governments, birth certificates, U.S. naturalization and citizenship certificates without a photo,

[8] SB 14 also contains a provision allowing disabled voters to use their voter registration cards to vote at the polls but only if they also provide written documentation of disability from either the Social Security Administration or the Department of Veterans Affairs. *Texas v. Holder*, 888 F. Supp. 2d at 131.

county-issued voter registration cards and government checks. *Id.* at 115.

In Texas, the only voters exempted from the requirement to vote in person and show identification at the polls are voters who are over age 65 or disabled. *Id.* at 116-17. Notably, the over-65 population in Texas contains the highest proportion of Anglos. Anglos comprise 47% of the Texas population age 18-65 and 68% of the Texas population over age 65.[9]

4. SB 14 Differs Significantly from Voter Identification Laws in Georgia and Indiana

Under SB 14, Texas would accept fewer forms of identification for voting than either Georgia or Indiana. *Compare* DE424 at 9-10 *with* GA. CODE ANN. § 21-2-417(a) *and* IND. CODE ANN. § 3-5-2-40.5(a); *see also* Williams Dep. 196:1-11, 198:5-13; Fowler Dep. 134:10-135:22; Hebert Dep. 310:1-311:22. Unlike SB 14, Georgia's voter identification law accepts a photo identification card issued by any state or federal entity authorized to issue identification, including government-issued student, employee and tribal identification. GA. CODE ANN. § 21-2-417(a). Also unlike

[9] U.S. Census Bureau, 2007-2011 American Community Survey; Tables B01001 (Total Population), B01001B (Black Alone Population), B01001D (Asian Alone Population), B01001H (Non-Latino White Alone Population), and B01001I (Latino Population), *available at* http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

SB 14, Georgia does not bar the use of expired driver's licenses. *Texas v. Holder*, 888 F. Supp. 2d at 128; GA. CODE ANN. § 21-2-417(a).

In Georgia, a free voter identification card can be obtained in every county. 888 F. Supp. 2d at 129; GA. CODE ANN. § 21-2-417.1(a). By contrast 81 counties in Texas lack a DPS office. 888 F. Supp. 2d at 128.

Indiana's voter identification law accepts any federal or Indiana government-issued identification that shows the individual's name, photograph, and an expiration date after the most recent general election. *Id.*; IND. CODE ANN. § 3-5-2-40.5(a). In addition, Indiana's voter identification law contains an indigence exception for the counting of a provisional ballot and provides a 10-day period to validate a provisional ballot, IND. CODE ANN. § 3-11.7-5-2.5(a)-(c); SB 14 contains no indigence exception and allows only a 6-day provisional ballot cure period. DE424 at 12-13.

5. Section 5 Administrative Preclearance Process

Following enactment of SB 14, Texas spent six weeks preparing its request for section 5 administrative preclearance. *See* PX006; PX063. Nevertheless, the preclearance submission merely recited that SB 14 is non-discriminatory and provided no analysis of the impact of the new law. *See* PX063.

Ann McGeehan, an official with the Texas Secretary of State who had prepared more than 1,000

preclearance submissions in her long career with that office, testified that although she prepared an internal statistical analysis of the effects of SB 14, the analysis did not examine whether Spanish surnamed voters were less likely to possess the voter identification required by SB 14. McGeehan Dep. 14:7-21:3, 45:5-10, 225:16-226:5, 237:6-15, 241:2-12. Ms. McGeehan's internal statistical analysis, prepared for the Texas Secretary of State, was not included in the preclearance submission. *Id.* at 238:3-239:15.

Although Texas omitted any statistical analysis of the likely effects of SB 14 from its preclearance submission, Ms. McGeehan acknowledged that two years earlier her office knew that analyzing demographic data related to registered voters might be a part of the preclearance process of a voter identification bill. McGeehan Dep. 266:4-10.

In the final version of the section 5 submission to the Department of Justice, Texas stated, "The Act does not have the intent and will not have the effect of diluting the voting strength of any racial or linguistic minority." PX063 at TA_002992. Ms. McGeehan testified that she included this statement in the submission without having any facts one way or the other with respect to the effect of SB 14 on racial and linguistic minorities. McGeehan Dep. 252:17-254:19.

A separate portion of the draft Texas preclearance submission that did address possible negative effects of SB 14 on racial minority voters was removed by the Texas Attorney General's office before

the submission was sent to the Department of Justice. DIX059; DIX060 (deleting from the draft submission: "Lastly, to the extent persons belonging to racial or linguistic minorities disproportionately suffer from poverty and thereby currently lack photo identification, the Act creates an entirely new identification document. . . ."); DIX061.

On September 23, 2011, the Department of Justice asked for more information from Texas regarding the effect of SB 14. *See* PX073. In response, Texas provided two statistical studies showing that Latino registered voters are significantly less likely to be matched to individuals holding driver's licenses and state identification cards in the state's DPS database. *See* PX074; PX082.

Ultimately the Department of Justice denied preclearance because "[e]ven using the data most favorable to the state, Hispanics disproportionately lack either a driver's license or a personal identification card issued by DPS, and that disparity is statistically significant." PX087 at 3. The Department of Justice further found that "the state has failed to propose, much less adopt, any program for individuals who have to travel a significant distance to a DPS office, who have limited access to transportation, or who are unable to get to a DPS office during their hours of operation [and Texas] also has not developed any specific proposals to educate either voters about how to comply with the new identification requirement or poll officials about how to enforce the proposed change." *Id.* at 5.

6. Preclearance Litigation

Two weeks after providing the Department of Justice its second analysis showing that Latinos would be adversely affected by SB 14, Texas filed suit seeking preclearance of SB 14 in the U.S. District Court for the District of Columbia. *See* PX082; Complaint, *Texas v. Holder*, No. 12-cv-00128 (D.D.C. Jan. 24, 2012), ECF 1.

A number of individual voters and organizations intervened in the preclearance lawsuit including Victoria Rodriguez, Nicole Rodriguez, Southwest Voter Registration Education Project and Mi Familia Vota Education Fund (collectively, "Rodriguez Intervenor-Appellees"). *See* Minute Order, *Texas v. Holder*, No. 12-cv-00128 (D.D.C. Apr. 13, 2012). The Rodriguez Intervenor-Appellees provided the district court with information regarding the effects that SB 14 would have on them as individuals as well as on Latino voters in Texas.

Victoria and Nicole Rodriguez were 18-year-old registered voters living in San Antonio, Texas. Day 2 PM Trial Tr. at 123:12-16, 131:21-23. With their high school student identification and voter registration cards, Victoria and Nicole Rodriguez could vote under Texas's current voter identification statute but they did not possess any of the government-issued photo voter identification required by SB 14. *Id.* at 124:13-25. Victoria and Nicole Rodriguez lacked driver's licenses and their parents' work schedules prevented them from driving the sisters to the DPS during the

limited weekday hours in which the agency was open in order to apply for Election Identification Certificates. *Id.* at 125:1-4, 8-15; *see Texas v. Holder*, 888 F. Supp. 2d at 140 ("This concern is especially serious given that none of Texas's DPS offices are open on weekends or past 6:00 PM, eliminating for many working people the option of obtaining an EIC on their own time.") Living in a family of limited financial means, Victoria and Nicole Rodriguez were unable to pay for other transportation to the DPS.

The Southwest Voter Registration Education Project provided further evidence regarding the hurdles Latino voters would face under SB 14, testifying that:

> Latinos are often among the working poor[,] . . . Latinos struggling to afford groceries, rent, and child care may not be able to afford . . . a copy of a birth certificate in order to get a voter ID [and] [f]or working class Latinos, the requirement of travelling to the DPS during regular business hours may prevent them from obtaining ID because their work hours are not flexible.

Id. (internal quotation marks omitted).

At trial, Texas neither introduced evidence to rebut the testimony of the Rodriguez Intervenor-Appellees nor attempted to prove, through its own analysis of state and federal databases, that the effects of SB 14 would be non-discriminatory. Texas instead focused on trying to discredit its initial

studies showing that Latino voters disproportionately lacked voter identification required by SB 14. Texas made no independent effort to study, through its own database analysis, the rates at which Texas registered voters possess the identification required by SB 14. *See id.* at 138 (Texas did not submit "reliable evidence as to the number of Texas voters who lack photo ID, much less the rate of ID possession among different racial groups."); *see also* Day 2 AM Trial Tr. at 52:17-59:22, 55:18-21; Day 3 AM Trial Tr. at 30:15-31:18, 32:11-33:24, 34:12-35:16.

Although it hired an expert in surveys to conduct telephone polling, Texas purposefully chose not to have its expert sample the population of registered voters in Texas in order to determine the rates at which Texas voters possess identification acceptable under SB 14. Day 3 AM Trial Tr. at 30:15-31:18, 32:11-33:24, 34:12-35:16, 71:6-25, 78:20-80:16, 118:17-120:1.

Similarly, although Texas hired an expert in statistical analysis, Texas did not have its expert assemble the state's databases to try to match the state's registered voters to individuals who possess Texas driver's license, state identification card and concealed carry license databases. *See* Day 2 AM Trial Tr. at 55:18-21. Texas's expert witness instead relied, without verification, on a state database assembled by the Department of Justice. *Id.* Under questioning by the district court, Texas's expert admitted that he had then added to this database individuals who are ineligible to vote, such as non-citizens and dead

people, but who would increase the voter identification "match" rate. Day 2 AM Trial Tr. at 52:17-59:22.

The district court also noted that Texas had the opportunity but failed to conduct discovery of federal agencies that would show how many registered voters in Texas could meet the requirements of SB 14 with a U.S. passport, citizenship certificate or military identification card. *Texas v. Holder*, 888 F. Supp. 2d at 120. The trial court referred to this information as "crucial to Texas's case" and found the failure by Texas to pursue the information "inexplicabl[e]." *Id.*[10]

B. The District Court Denied Preclearance After Concluding That Texas Failed to Carry its Burden of Proof Under Section 5

The district court denied Texas's request for preclearance because, following extensive discovery and trial, Texas failed to show 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." *Texas v. Holder*, 888 F. Supp. 2d at 115 (citing *Beer v. United States*, 425 U.S. 130, 141 (1976)). After finding that Texas did not provide any

[10] The district court noted that it had accommodated Texas's request for expedited discovery and a summer trial even when "Texas's failure to act with diligence or a proper sense of urgency" and late production of critical computer data "seriously hindered Defendant-Intervenors' ability to prepare and proffer expert testimony based on this data." *Texas v. Holder*, 888 F. Supp. 2d at 119-20.

evidence of the rates of possession of voter identification that would satisfy SB 14, and did not provide any information about the likely impact of SB 14 in Texas (as opposed to studies of different voter identification laws in different states), the district court concluded that Texas had failed to meet its burden of proof under section 5. 888 F. Supp. 2d at 143-45.

The district court properly noted that: "[U]nder section 5, the covered jurisdiction bears the burden of proof. This means that a covered jurisdiction must show by a preponderance of the evidence that a proposed voting change *lacks* both (1) discriminatory purpose and (2) retrogressive effect." *Id.* at 123. The district court further noted that "the burden of proof in section 5 cases is both 'well established,' and uncontested by Texas." *Id.* (citing *Georgia v. United States*, 411 U.S. 526, 538 (1973)).

Before reaching the merits of the preclearance request, the district court addressed two preliminary arguments made by Texas. First, in response to the claim by Texas (raised again it its Jurisdictional Statement) that voter identification laws can never "deny[ ] or abridg[e] the right to vote," 42 U.S.C. § 1973c(a), the district court properly observed that all election changes in covered jurisdictions must be precleared under section 5 and that although some voter identification laws might be easily shown to be non-discriminatory, this fact does not negate the requirement of section 5 review. 888 F. Supp. 2d at 123.

Second, the district court addressed whether this Court's disposition of poll tax and Fourteenth Amendment "undue burden" claims in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008), precluded section 5 review of SB 14. *Texas v. Holder*, 888 F. Supp. 2d at 124-26. The district court concluded that although *Crawford* was helpful in recognizing the state's interest in preventing voter fraud, and the level of burden imposed by voter identification laws on voters in general, *Crawford* did not address the question whether SB 14's burdens fall disproportionately on racial or language minorities in Texas so as to create a retrogressive effect in violation of section 5. *Id.* at 126.

Turning to retrogressive effect, the district court found that Texas failed to demonstrate that 1) voter identification laws have little effect on turnout and 2) Anglo, Black and Latino voters possess the forms of identification required by SB 14 at equal rates. The district court concluded that because "Texas has submitted nothing more, [we] conclude that the state has failed to meet its burden of demonstrating that SB 14 lacks retrogressive effect." *Id.* at 127.

For example, the district court found, with respect to social science evidence, that Texas pointed to one study claiming that voter identification laws did not have a significant effect on turnout but did not address the opposite conclusion in another, more recent study. *Id.*

With respect to the impact of SB 14 in Texas, Texas provided the results of studies of different voter

identification laws in Georgia and Indiana. The district court concluded that the studies were not persuasive because SB 14 is stricter than the voter identification laws of Georgia and Indiana and "[a]s [Texas's expert] himself notes, although Indiana and Georgia both have 'a sizable black population,' neither state has 'Hispanic populations on the order of those in Texas.' Of course, different minority groups have different cultural and historical experiences, and may accordingly be affected differently by similar laws." *Id.* at 129 (internal citations omitted). Ultimately, the district court properly found it "completely inappropriate to compare Hispanics in Texas with African Americans in Indiana or Georgia." *Id.*

The district court found that Texas's evidence on the rate of identification possession in Texas (based on telephone surveys of no-match voters) was characterized by methodological flaws that rendered them unreliable. *Id.* at 131, 134-37. The district court also did not rely on a study by the Department of Justice because it suffered from methodological flaws. *Id.* at 133-34.

The district court concluded, consistent with the requirements of section 5, that "Texas bears the burden of proving that nothing in SB 14 'would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.' Because all of Texas's evidence on retrogression is some combination of invalid, irrelevant, and unreliable, we have little trouble concluding that

Texas has failed to carry its burden." *Id.* at 138 (citing *Beer*, 425 U.S. at 141).

The district court also noted that "[u]ndisputed record evidence demonstrates that racial minorities in Texas are disproportionally likely to live in poverty and, because SB 14 will weigh more heavily on the poor, the law will likely have retrogressive effect." *Id.* at 127. This finding was in addition to the district court's conclusion that Texas failed to carry its burden of proof under section 5. Thus, although Texas makes much of the district court's findings on this issue, the dispositive ruling in the case is that Texas did not carry its burden under section 5.

In conclusion, the district court "emphasize[d] the narrowness of this opinion." *Id.* at 144:

> Specifically, we have decided nothing more than that, in this particular litigation and on this particular record, Texas has failed to demonstrate that its particular voter ID law lacks retrogressive effect. Nothing in this opinion remotely suggests that section 5 bars all covered jurisdictions from implementing photo ID laws.

Id.

The district court concluded that it was possible for a jurisdiction to meet its burden of proof under section 5 with respect to a voter identification law. *Id.* Noting the Department of Justice's preclearance of the Georgia voter identification law the district court

stated, "[t]he contrast with Senate Bill 14 could hardly be more stark." *Id.*

ARGUMENT

THE QUESTION PRESENTED IS NOT SUBSTANTIAL

Before and after SB 14's passage, Texas staunchly refused to evaluate the potential effects of its new law, rejected every legislative amendment that sought to counteract SB 14's potential negative effects on minority voters, and submitted an administrative preclearance request that claimed, with no support, that SB 14 would be race-neutral in effect.

Throughout the preclearance process, Texas ignored the question of discriminatory effects and its obligations under section 5. Finally, when asked by the Department of Justice to conduct an analysis of SB 14 for administrative review under section 5, Texas produced two studies showing that Latino voters would be adversely affected by SB 14's narrowing of the current voter identification law. Two weeks later Texas abandoned the administrative preclearance route and filed the instant case claiming it should be allowed to implement SB 14 and, in the alternative, that section 5 is unconstitutional.

At trial, despite the opportunity to develop a record showing that SB 14 would not discriminate, Texas did the opposite. Expert witnesses for Texas

limited their analyses of registered voters in ways that made it impossible to determine the rates at which voters possessed satisfactory identification under SB 14. Texas refused to conduct discovery of federal agencies to learn the relative rates at which minority voters in Texas possessed U.S. military identification, citizenship certificates and passports (identification required by SB 14).

Having made no effort to prepare its case, or even inquire into the facts, at trial Texas was forced to attack its preliminary analyses showing that Latino voters would be disproportionately affected by SB 14. Ultimately, Texas failed to establish, as required by section 5, that the narrowing of its current voter identification law to a small list of government-issued photo ID would not "have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b). Not surprisingly, the district court declined to grant preclearance to SB 14.

In this appeal, Texas claims that it is "entitled" to an order allowing SB 14 to take effect. Jurisdictional Statement ("J.S.") at 10, 11, *Texas v. Holder*, No. 12-1028 (Feb. 18, 2013). Texas's appeal, similar to the state's strategy throughout the case, refuses to tackle the effects of SB 14 or the question of discrimination.

Texas does not argue that it has been free from discriminatory practices such that it is entitled to be released from section 5, nor could it. *Compare League*

of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) (concluding that Texas discriminated against Latino voters in violation of section 2 of the Voting Rights Act) *with* 42 U.S.C. § 1973b (providing for section 5 bailout only if within ten years "no final judgment of any court of the United States . . . has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision.").

Instead Texas challenges the notion that registration and voting requirements can discriminate against minority voters and insists that it should be allowed to implement SB 14 regardless of the law's effect on voters. In addition, Texas points to states other than Texas, and voter identification laws other than SB 14, instead of addressing the facts of the case. Finally, Texas argues that it should not bear the burden of showing that its voter identification restrictions are non-discriminatory.

The question presented in the Jurisdictional Statement is not substantial. Section 5's requirement that jurisdictions demonstrate non-discrimination is rational and almost always met, except, as here, where the jurisdiction refuses to inquire into or provide any evidence on the effect of its proposed election change. Also rational is section 5's requirement that Texas do more than recite that its proposed change is non-discriminatory – Texas must prove its claim.

Continuing decades of recalcitrance (punctuated by section 5 administrative objections and judicial findings of racial discrimination in voting), Texas refused to show that SB 14 would not adversely affect racial minority voters. Although the district court did not reach the question of discriminatory purpose, the focus of SB 14's supporters on a primarily Latino population, without evidence that Latinos or non-citizens were committing voter fraud, procedural irregularities in the enactment of SB 14, simultaneous enactment of redistricting plans that two federal courts found were likely to discriminate against Latino voters,[11] and Texas's refusal to evaluate the effects of SB 14 before and during litigation, raise a strong inference of discriminatory purpose. With respect to retrogressive effect, Texas's own initial studies suggest that Latino voters will be adversely affected by SB 14.

Rather than demonstrating "constitutional flaws" in section 5, J.S. at 3, this case exposes the behavior of Texas when it hopes to not be covered by section 5.

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[11] *See Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012); Orders, *Perez v. Perry*, No. 11-cv-00360 (W.D. Tex. Mar. 19, 2012), ECF 690 (State House plan), 691 (congressional plan).

A. Section 5 Properly Places the Burden of Proof on the Jurisdiction Seeking to Change its Election Procedures

Texas argues that it should not bear the burden of proof in this preclearance lawsuit. *See* J.S. at 11 (citing as an example of the "constitutional difficulties" with section 5 a "reversed" burden of proof).

At trial, Texas acknowledged numerous times that it bore the burden of proof under section 5. *See*, *e.g.*, Day 1 AM Trial Tr. at 6:15-18 ("[I]t's Texas' burden here to prove that Senate Bill 14 neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color[.]"); Day 5 AM Trial Tr. at 5:24-6:3 (explaining "how Texas satisfies its burden").

However, on appeal Texas has changed course. Conceding in its brief that its evidence of identification-possession in Texas was limited to telephone surveys of no-match voters (as opposed to a sample of all registered voters), Texas nevertheless argues that SB 14 should have been precleared. *See* J.S. at 6-7 (stating that Texas looked at the "no-match" list as opposed to the population of Texas's registered voters and presented social science research on the effect of voter identification laws in states other than Texas).

Texas claims, in essence, that SB 14 should have been precleared even if there is *no* evidence as to its effects on Texas voters, asserting that because the district court concluded that no party presented reliable statistical evidence on the impact of SB 14,

"[t]hat should have been more than sufficient to grant preclearance of SB 14." J.S. at 15.

Section 5 requires jurisdictions to bear the burden of proof that a proposed voting change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. . . ." 42 U.S.C. § 1973c; *see Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997) ("To obtain judicial preclearance, the jurisdiction bears the burden of proving that the change 'does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.'" (internal citation omitted)); *Georgia v. Ashcroft*, 539 U.S. 461, 466, 471-72 (2003); *Beer v. United States*, 425 U.S. 130, 136-37 (1976). Placing the burden of proof on the jurisdiction is sensible, "particularly since the relevant facts relating to the conduct of voting officials are peculiarly within the knowledge of the States and political subdivisions themselves." *South Carolina v. Katzenbach*, 383 U.S. 301, 332, 335 (1966) (concluding there is "nothing inappropriate" in placing the section 5 burden of proof on the jurisdiction).

Texas's insistence that the Department of Justice or intervenors bear the burden of proving that SB 14 is discriminatory contrasts with its litigation strategy of denying these same parties access to the information about the purpose and effect of SB 14. When the Department of Justice and intervenors sought discovery of Texas officials on the purpose of SB 14, Texas invoked legislative privilege and the district

court "shielded all evidence relating to 'legislative acts' or 'a legislator's motivations with respect to a bill.'" *Texas v. Holder*, 888 F. Supp. 2d at 119 (internal citation omitted). Texas also "repeatedly ignored or violated directives and orders of this Court that were designed to expedite discovery." *Id.* (quoting Order, *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012), ECF 107 at 2). The district court further noted that the failure of Texas "to produce its voter registry, DPS ID, and license-to-carry databases to the United States . . . seriously hindered Defendant-Intervenors' ability to prepare and proffer expert testimony based on this data." *Id.* Combined with Texas's complaint that it should not bear the burden of proof under section 5, its failure to provide information about SB 14 to other parties suggests that Texas's true position is that the purpose and effect of SB 14 should not be examined at all.

B. Differences Between Georgia, Indiana and Texas Preclude Texas's Reliance on Other States to Prove That SB 14 is Non-Discriminatory

Instead of attempting, through conducting a match of its own databases, to analyze the rates at which Texas voters possess SB 14-required identification, and addressing the accessibility of Election Identification Certificates for Texas voters who lacked SB 14-required identification, Texas relies on the experience of Georgia and Indiana with very different voter identification laws to predict the effects of SB

14 in Texas. The differences between the laws, as well as differences in the electoral contexts of the states, prevent Texas from answering questions about SB 14's effects by referring to Georgia and Indiana.

First, the voter identification laws in Georgia and Indiana are more expansive in their documentation requirements when compared to SB 14. *Texas v. Holder*, 888 F. Supp. 2d at 128. Second, Georgia and Indiana permit voters to show a greater variety of underlying documents (some of which are free of cost) to obtain a free voter identification card from the state. Under SB 14, the underlying documents required to obtain an Election Identification Certificate require a fee (e.g., $22 for a copy of a Texas birth certificate or $345 for a U.S. naturalization certificate). *Id.* at 116, 128. Third, SB 14 imposes greater burdens of travel on voters seeking to obtain an Election Identification Certificate because "81 Texas counties have no [DPS] office, and 34 additional counties have [DPS] offices open two days per week or less." *Id.* at 128 (internal citation omitted). By contrast, every Georgia and Indiana county has an office that is required to issue no-cost voter identification. *Id.* at 128-29.

Finally, and perhaps most important, Texas conceded that Georgia and Indiana contain "a sizable black population," but that neither state has "Hispanic populations on the order of those in Texas." *Id.* at 129 (internal citation omitted). The Latino citizen voting age population in Georgia is 3.41% and the Latino citizen voting age population in Indiana is

2.98%. U.S. Census Bureau, 2009-2011 American Community Survey, Table B05003H (Latino Population), *available at* http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml. By contrast, the Latino citizen voting age population in Texas is 26.46%. *Id.* This Court has found that Texas Latino voters face a "political, social, and economic legacy of past discrimination . . . [that] may well hinder their ability to participate effectively in the political process," *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006) (citing *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986) (internal quotation marks and citation omitted). The district court properly found it "completely inappropriate to compare Hispanics in Texas with African Americans in Indiana or Georgia."[12] *Texas v. Holder*, 888 F. Supp. 2d at 129.

Because the Georgia, Indiana and Texas voter identification laws differ in both requirements and demographic and historical contexts, the Court has no occasion to reach Texas's question whether section 5 is unconstitutional when it blocks "legislation in a covered jurisdiction that closely resembles facially valid legislation in a non-covered jurisdiction." J.S. at 3.

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[12] Texas disputes the district court's findings of fact regarding the degree of similarity between the Georgia, Indiana and Texas voter identification laws. Texas's request for different findings of fact does not warrant plenary review.

The Indiana voter identification litigation did not address the question of race discrimination. *See Ind. Dem. Party v. Rokita*, 458 F. Supp. 2d 775, 839 (S.D. Ind. 2006) (noting that plaintiffs did not allege any discrimination based on race); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (addressing claims that voter identification law substantially burdens the right to vote and is a poll tax). Texas merely begs the question whether SB 14's requirements have a racially discriminatory effect when it states that SB 14 "would have been perfectly permissible if adopted by a non-covered state." J.S. at 13.

Texas's claim of an unconstitutional flaw in section 5 is further undermined by the administrative preclearance of Georgia's voter identification law. Because section 5 looks at circumstances in the jurisdiction seeking to implement a voting change, it operates to block election laws only where they are racially discriminatory in purpose or effect and permits implementation where they are not. That one type of voter identification law in Georgia lacks a racially discriminatory effect on voters and a different voter identification law in Texas may have a racially discriminatory purpose or effect merely shows that section 5 preclearance turns on a fact-specific inquiry.

C. Texas's Claim That Registration and Voting Laws can Never Discriminate Against Minority Voters Lacks Foundation

Texas argues that SB 14 can't deny or abridge "*anyone's* right to vote." J.S. at 14 (emphasis in original). In support of this claim, Texas asserts that "registration laws (and in-person voting) have never been held to 'deny' or 'abridge' the right to vote, even though some voters inevitably decide that the benefits of voting are simply not worth the burdens." J.S. at 13 (emphasis in original omitted).

On the contrary, this Court and other federal courts have invalidated facially-neutral registration laws because they denied or abridged the right to vote on account of race. *See*, *e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966) (upholding Voting Rights Act's ban on literacy tests because "[t]his was a legitimate response to the problem, for which there is ample precedent in Fifteenth Amendment cases."); *Louisiana v. United States*, 380 U.S. 145, 153 (1965) (interpretation test); *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (procedural requirements for voter registration) (explaining that the Fifteenth Amendment "hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race."); *Guinn v. United States*, 238 U.S. 347, 364-65 (1915) (grandfather clause) ("It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition

of servitude, prohibited by the Fifteenth Amendment, but the standard itself inherently brings that result into existence[.]"); *United States v. Logue*, 344 F.2d 290, 292 (5th Cir. 1965) (explaining that a "voucher requirement, imposing as it does a heavier burden on Negro than white applicants, is inherently discriminatory as applied in a county such as Wilcox.").

The district court properly noted that "Congress passed the Voting Rights Act precisely to prohibit election devices proximately based on something other than race – 'notorious devices' such as 'poll taxes, literacy tests, grandfather clauses, and property qualifications.'" *Texas v. Holder*, 888 F. Supp. 2d at 142 (citing *Shelby Cnty., Ala. v. Holder*, 679 F.3d 848, 853 (D.D.C. 2012) and *Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969)). Noting that "Texas's reading of section 5 collapses its effect element into its purpose element," the district court explained:

> In fact, the very point of such devices was that they were supposedly "race neutral," thus giving states an end-run around the Fifteenth Amendment's prohibition on racial discrimination in voting. Yet under Texas's interpretation, section 5's effect element could not have reached any of these laws.

Texas v. Holder, 888 F. Supp. 2d at 142-43.

It is well-established that facially neutral election laws can, because of local circumstances, demographic factors and interaction with past voting practices, work to disenfranchise minority voters.

Instead of answering the question whether SB 14 "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer v. United States*, 425 U.S. 130, 141 (1976), Texas insists that because SB 14 can never "deny" or "abridge" the right to vote, voters who do not vote under SB 14 simply "choose not to take advantage" of the law's provisions. J.S. at 14. *But see Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 685 (1966) (rejecting dissenter's argument that civic responsibility is served by "weeding out those who do not care enough about public affairs.").

Texas's further arguments that SB 14 should be precleared because it imposes "minimal burdens no different from the burdens of advance registration or in-person voting," J.S. at 3, are merely an attempt to elevate factual disputes into a legal issue. Texas concedes that under its current voter identification law, a voter may produce a much broader range of documents to prove her identity when compared to SB 14. *See* J.S. at 4 n.1 ("The preexisting (or 'benchmark') Texas law provided that an in-person voter may cast a regular ballot upon presentation of a voter-registration certificate, TEX. ELEC. CODE § 63.001(b), or upon execution of an affidavit and presentation of another form of identification, TEX. ELEC. CODE § 63.008(a), such as a birth certificate, official government mail, or a utility bill. *See* TEX. ELEC. CODE § 63.0101."). The district court found, and Texas does not dispute, that SB 14 "is more stringent than existing Texas law." *Texas v. Holder*, 888 F. Supp. 2d at

115. Furthermore, the Texas Election Code provides that an individual may register to vote by mail from any location and need not attach any identification documents at the time of registration. *See* TEX. ELEC. CODE § 13.002.

Similarly, Texas disputes the district court's findings regarding the validity of its telephone surveys of no-match voters. Texas's disagreement with the district court over these findings of fact does not warrant the Court's plenary review.

D. This Case is a Poor Vehicle Through Which to Address the Question of how Much Racial Consideration is Appropriate

Texas suggests that section 5 creates a "problematic tendency for jurisdictions to take race into account." J.S. at 16. This case represents a poor vehicle through which to address that question since Texas refused to address race at any stage of the enactment and preclearance review of SB 14.

Texas officials adamantly refused to conduct any inquiry into or address any questions regarding the racial effects of SB 14 during the legislative process. The House sponsor of SB 14 openly declared that Texas should not discuss its obligations under section 5 to avoid racial discrimination because that was a "federal issue." Trial JA2118. Texas rejected all amendments intended to ameliorate racial effects of SB 14, altered its preclearance submission to delete a reference to a possible racial impact and refused to

conduct a study of racial effects during the preclearance process until requested by the Department of Justice. In litigation, Texas repeatedly declined to conduct discovery or have its experts make an independent inquiry into the racial effects of SB 14 on all Texas voters.

Unless completely ignoring racial effects constitutes a "problematic tendency for jurisdictions to take race into account," this case is a poor vehicle through which to address the question "how much" racial consideration is "too much." J.S. at 16. The Court need not accept Texas's invitation to declare that jurisdictions are constitutionally bound not to conduct an inquiry into whether their proposed laws are racially discriminatory.

E. The Present Appeal Should Not be Held Pending Disposition of *Shelby County, Alabama v. Holder*

On February 27, 2013, this Court heard oral argument in *Shelby Cnty., Ala. v. Holder*, No. 12-96. The Court will decide the question "whether Congress' decision in 2006 to reauthorize section 5 of the Voting Rights Act [ ] under the pre-existing coverage formula of section 4(b) of the [Voting Rights Act] exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution." Brief for Federal Respondent, at I, *Shelby Cnty., Ala. v. Holder*, No. 12-96 (Jan. 2013).

Regardless of the outcome in *Shelby Cnty.*, the decision of the district court is correct and should be affirmed. Texas abandoned its obligations to consider the effects of SB 14 and ensure that its new voter identification law avoided discrimination. Instead, Texas refused at each stage to evaluate the racial effects of SB 14. Its failure even to attempt to make the required showings in the preclearance process and ultimate attack on section 5 reveals Texas's continued hostility towards federal non-discrimination requirements in voting. Texas should be held to the requirements of section 5 and not rewarded for rejecting its responsibilities under the statute.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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