IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, Defendant. ERIC KENNIE, *et al.*, Defendant-Intervenors, TEXAS STATE CONFERENCE OF NAACP BRANCHES, *et al.*, Defendant-Intervenors, TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND, *et al.*, Defendant-Intervenors. TEXAS LEGISLATIVE BLACK CAUCUS, *et al.*, Defendant-Intervenors, VICTORIA RODRIGUEZ, *et al.*, Defendant-Intervenors.	CASE NO. 1:12-CV-00128 (RMC-DST-RLW) Three-Judge Court

REPLY MEMORANDUM IN SUPPORT OF THE ATTORNEY GENERAL'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Terms and Abbreviations

2009 Rules	Texas State Senate Rules (2009)
2011 Rules	Texas State Senate Rules (2011)
AGFF	Attorney General's Proposed Finding of Fact
CCES	Cooperative Congressional Election Study
CL	Proposed Conclusion of Law
COTW	Texas Senate Committee of the Whole
CVAP	Citizen Voting Age Population
DA	District Attorney
DL	Driver License
DOJ	U.S. Department of Justice
DPS	Texas Department of Public Safety
ED	Elections Division, Texas Secretary of State
EIC	Election identification certificate
FF	The State of Texas's Proposed Finding of Fact
FN	First Name
HEC	Texas House Elections Committee
HB 218	House Bill 218 (2007)
HB 1706	House Bill 1706 (2005)
HJ	House Journal
ID	Identification

JA	Joint Appendix
LTC	License to carry a concealed handgun
LG	Lieutenant Governor
LN	Last Name
MALC	Mexican American Legislative Caucus of the Texas Legislature
NVRA	National Voter Registration Act of 1993
OP	Plaintiff's Response to the Attorney General's Proposed Findings of Fact and Conclusions of Law and Reply in Support of Plaintiff's Findings of Fact and Conclusions of Law (ECF 264)
PB	Provisional Ballot
PVID	Photographic Voter Identification
RJN	Attorney General's Request for Judicial Notice (ECF 219)
State Affairs	Texas Senate State Affairs Committee
SB 14	Senate Bill 14 (2011)
SB 362	Senate Bill 362 (2009)
SB 363	Senate Bill 363 (2011)
SCVIVF	House Select Committee on Voter Identification and Voter Fraud
SSA	U.S. Social Security Administration
SSN9	Nine-digit social security number
SSVR	Spanish Surname Voter Registration
SOS	Texas Secretary of State
TA	Texas Appendix

TDL/ID	Texas Driver License or Official State Identification Card
TEAM	Texas Election Administration Management System
TBVS	Texas Bureau of Vital Statistics
TR DEP	Trial Deposition
OAG	Texas Office of the Attorney General
VA	U.S. Department of Veterans Affairs
VAP	Voting Age Population
VR	Voter Registration
VRA	Voting Rights Act of 1965
VRNID	Voter Registration - No ID

Witnesses

Abshier	James Abshier, Manager of Record Insurance at TBVS
Aliseda	Rep. Jose Aliseda
Anchia	Rep. Rafael Anchia
Ansolabehere	Dr. Stephen Ansolabehere, Expert, Defendant Attorney General Eric H. Holder Jr.
Armbrister	Ken Armbrister, legislative director for Governor Perry
Beuck	Colby Beuck, Chief of Staff to Rep. Patricia Harless (Bill Sponsor)
Bledsoe	Gary Bledsoe, NAACP
Bonnen	Rep. Dennis Bonnen
Brunson	Blaine Brunson, Chief of Staff to Lieutenant Governor David Dewhurst

Clark	Imani Clark, Intervenor
Davio	Rebecca Davio, Assistant Director, Driver License Division, Texas Department of Public Safety
D. Davis	Denise Davis, former House Parliamentarian, former Chief of Staff to Speaker Joe Straus
K. Davis	Karina Davis, Parliamentarian, Texas State Senate
W. Davis	Sen. Wendy Davis
Dewhurst	Lieutenant Governor David Dewhurst
Duncan	Sen. Robert Duncan
Eiland	Rep. Craig Eiland
Ellis	Sen. Rodney Ellis
Fowler	Meredyth Fowler, Senior Policy Advisor in Office of Joe Straus
Fraser	Sen. Troy Fraser (Bill Sponsor)
Gonzales	Rep. Larry Gonzales
Guyette	Lee Guyette, IT staff, Texas Secretary of State
Harless	Rep. Patricia Harless (Bill Sponsor)
Hebert	Brian Hebert, former staff person, Lieutenant Governor David Dewhurst
Hinojosa	Sen. Juan Hinojosa
Ingram	Keith Ingram, Director of Elections Division
Kemp	Brian Kemp, Georgia Secretary of State

Kennie	Eric Kennie, Intervenor
Kousser	Dr. J. Morgan Kousser, Expert, Defedant Attorney General Eric H. Holder, Jr.
Lucio	Sen. Eddie Lucio
LWV	League of Women Voters of Texas (Defendant-Intervenor)
Ge. Martinez	Germaine Martinez
McCoy	Janice McCoy, Chief of Staff to Sen. Troy Fraser (Bill Sponsor)
McGeehan	Ann McGeehan, Former Director of the Elections Division, Texas Secretary of State
Milyo	Jeffrey Milyo, professor at University of Missouri
Mitchell	Major Forrest Mitchell, OAG
Mycoff	Jason Mycoff, associate professor at University of Delaware
Patrick	Rep. Daniel Patrick
Pickett	Rep. Joe Pickett
Peña	Rep. Aaron Peña
Rathgeber	Julia Rathgeber, Deputy Chief of Staff and Policy Director to Lieutenant Governor David Dewhurst
Riddle	Rep. Debbie Riddle
Rokita	Former Secretary of State of Indiana
N. Rodriguez	Nicole Rodriguez, Intervenor
V. Rodriguez	Victoria Rodriguez, Intervenor
Sager	Thomas Sager, Expert, Plaintiff State of Texas

Schofield	Rep. Mike Schofield
Sepehri	John Sepehri, General Counsel, Texas Secretary of State
Shaw	Darron Shaw, Expert, Plaintiff State of Texas
Shorter	Coby Shorter, Deputy Secretary of State
Smith	Rep. Todd Smith
Straus	Rep. Joe Straus, Speaker of the Texas House of Representatives
Tailor	Wesley Tailor, Director, Elections Division, Georgia Secretary of State
TLBC	Texas Legislative Black Caucus
Uresti	Sen. Carlos Uresti
Van de Putte	Sen. Leticia Van de Putte
Veasey	Rep. Marc Veasey (Defendant-Intervenor)
West	Sen. Royce West
Whelan	Mark Whelan, Technical Lead DPS
Whitmire	Sen. John Whitmire
T. Williams	Sen. Tommy Williams

REPLY IN SUPPORT OF PROPOSED FINDINGS OF FACT

I. UNREBUTTED CIRCUMSTANTIAL EVIDENCE ESTABLISHES THAT SB 14 HAS A DISCRIMINATORY PURPOSE.

130. OP 130 is inaccurate. HB 1706's effect on minority voters was not analyzed. Smith Dep. 84:11-14; Bonnen Dep. 90:6-20.

131. OP 131 is acccurate.

132. OP 132 is misleading. Rep. Brown, HB 218's author, stated it was "designed to keep illegal aliens, noncitizens and people otherwise not qualified from voting and diluting the legitimate votes cast by citizens." JA 7395-97, 7580-83. Exhibit 299 is admissible. Order at 2, June 14, 2012 (ECF 186).

133. OP 133 is accurate. JA 7230-7323, 8396-8401.

134. OP 134 is misleading. *See* AGFF ¶ 134. The statements put legislators on notice of concerns about the bill's impact on minority voters. FRE 801(c)(2).

135. OP 135 is inaccurate. McCoy has personal knowledge of Sen. Fraser's work on HB 218. McCoy Dep. 26:11-36:11, 44:23-45:2, 68:21-69:2. Sen. Duncan's statement is not hearsay. FRE 801(d)(2).

136. OP 136 is incomplete. LG Dewhurst controls the Senate calendar by recognizing motions to hear bills out of order and by timing COTW sessions. K. Davis Dep. 16:9-20, 36:13-37:9, 209:8-210:6. Bills are often considered out of the order in which they are reported out of committee. *Id.* at 281:2-24.

137. OP 137 is misleading. The Senate rarely passes a bill without suspending the regular order of business. K. Davis Dep. 281:2-24. Since 2004, only 20 to 25 bills out of over 2,000 bills passed the Senate without suspending the regular order of business. *Id*.

138. OP 138 is misleading. Special orders are always considered ahead of the Senate's regular order of business. K. Davis Dep. 48:23-49:12, 123:16-23. In 2011, PVID bills could be set as special orders and heard 24 hours later. TA 2761.

139. OP 139 is inaccurate. Ex. 299 is admissible. *Supra* ¶ 132.

140. OP 140 is inaccurate. In context, Sen. Uresti's ethnicity shows the discriminatory purpose of HB 218 supporters. *See* Uresti Tr. Dep. 9:18-10:12, 22:16-24:3, 12:18-17:15.

141. OP 141 is misleading. Reaffirm AGFF ¶ 141. Only the first recorded vote on HB 218 lists Senators Hegar, Uresti, and Whitmire as absent. JA 8307-08, 8320.

142. OP 142 is incomplete. LG Dewhurst held a verification of the vote because Sen. Whitmire was improperly counted absent. JA 8309-8314. Sen. Uresti arrived in the final moments of the verification vote. Uresti Tr. Dep. 17:20-18:20; 60:7-61:6.

143. OP 143 is misleading. The motion to consider HB 218 failed because it did not receive the support of two-thirds of Senators present. JA 8320-21; Ex. 578 at 6505. All racial and ethnic minority Senators voted in opposition. JA 8320-21.

144. OP 144 is incomplete. LG Dewhurst acknowledged that Rule 5.11(d) was a "change to the rules." Ex. 557, at DE 6228.

145. The parties agree to AGFF ¶ 145.

146. OP 146 is inaccurate. Reaffirm AGFF ¶ 146. Rule 5.11(d) exempts only voter ID legislation from the rule on special orders, making it a singular exemption. Ex. 415.

147. OP 147 is inaccurate. The quoted statement is not hearsay. FRE 801(d)(2). Speaker Straus testified to the accuracy of the quotation. Straus Dep. 143:8-15.

148. OP 148 is unsupported. Since 1981 only apportionment and voter ID were exempt from the 2/3 requirement for special orders. K. Davis Dep. 56:7-57:22, 59:6-16.

149. OP 149 is inaccurate. Ex. 306 is admissible. Order (June 14, 2012) (Doc. 186); FRE 801(d)(2)(D).

150. The parties agree to AGFF ¶ 150.

151. OP 151 is inaccurate. Every line of AGFF ¶ 151 is supported by sworn testimony.

152. OP 152 is misleading. Two key senate staffers knew of no analysis conducted to identify voters without SB 362-compliant PVID. McCoy Dep. 94:19-95:15; Rathgeber 153:20-154:6. McCoy has personal knowledge of Sen. Fraser's work on SB 362. McCoy 26:11-36:11, 118:20-119:6. Ex. 567 at DE 6365-6366 supports AGFF ¶ 152 (corrected citation).

153. OP 153 is misleading. Reaffirm AGFF ¶ 153; *see also* Ex. 567 at 9-10 (corrected citation)**.** Because SB 362 proponents did not have a 2/3 majority it likely would not have been heard absent Rule 5.11(d). T. Williams Dep. 163:1-5; Patrick Dep. 224:24-227:17.

154. OP 154 is inaccurate. Rep. Smith testified that "noncitizen voting was a significant concern" of grassroots supporters of SB 362. Smith Dep. 102:25-104:12.

155. OP 155 is inaccurate. Rep. Smith stated that "as a matter of common sense," minority voters are less likely to have PVID. Smith Dep. 154:1-156:20. Moreover, Dr. Kousser is expected to testify about these facts at trial.

156. OP 156 is misleading. Reaffirm AGFF ¶ 156.

157. The parties agree to AGFF ¶ 157.

158. OP 158 is misleading. Rep. Smith's testimony supports each line of AGFF ¶ 158.

159. The parties agree to AGFF ¶ 159.

160. OP 160 is misleading. Rep. Smith stated that 71 House PVID supporters signed a statement of principles demanding a "hard," "strict" PVID bill. Smith Dep. 111:1-113:9.

161. OP 161 is misleading. A "chub" is a filibuster. Smith Dep. 113:20-114:16.

162. OP 162 is inaccurate. Rep. Smith's testimony supports AGFF ¶ 162. Smith Dep. 63:12-64:13, 159:5-161:15.

163. The parties agree to AGFF ¶ 163.

164. OP 164 is inaccurate. Dr. Kousser is expected to testify to these facts at trial.

165. The parties agree to AGFF ¶ 165.

166. OP 166 is misleading and incomplete. Sen. West asked Sen. Fraser whether the forms of PVID in SB 14 are the least restrictive means of avoiding purported voter fraud. JA 97-98. Sen. Fraser's answer to Sen. West was not responsive. *Id.*

167. OP 167 is inaccurate. McCoy testified that Sen. Fraser attributed the difference in allowable forms of identification between his 2009 and 2011 proposed bills to the fact that voter ID "was working." McCoy Dep. 174:3-13.

168. OP 168 is incomplete. The 2011 Senate re-adopted Rule 5.11(d) from 2009, which allowed PVID bills to be set as a special order by a majority- and not 2/3-vote. Ex. 369 at DE 2659; *see also* K. Davis Dep. 48:23-51:6.

169. OP 169 is inaccurate. Reaffirm AGFF ¶ 169. Ex. 568 at DE 6381 (corrected citation).

170. OP 170 is incomplete. Legislation may not be enacted within the first 60 days of a legislative session absent designation by Governor as an emergency or a suspension of the order of business by a 4/5 majority vote. Tex. Const. art. 3, § 5.

171. OP 171 is nonresponsive and irrelevant. Reaffirm AGFF ¶ 171.

172. OP 172 is unsupported. Reaffirm AGFF ¶ 172; *see also* Brunson Dep. 64:20-65:13.

173-175. The parties agree to AGFF ¶¶ 173-175. The additional fact in OP 174 is irrelevant.

176. OP 176 is inaccurate. The fact that McCoy did not regard testimony about SB 14's impact on minority voters as important, McCoy Dep. 202:19-204:5, 224:12-25, is circumstantial evidence of discriminatory purpose. *See* COL Section II.A, *infra*.

177. The parties agree to AGFF ¶ 177.

178. OP 178 is misleading. McGeehan did not analyze SB 14's effect on minority voters until she received a request from DOJ. McGeehan Dep. 173:20-176:4; 177:8-178:12.

179. OP 179 is inaccurate. Sen. Williams made the request during debate on SB 14. AGFF ¶ 179.

180-181. The parties agree to AGFF ¶¶ 180-181.

182. OP 182 is misleading. After the match was completed, McGeehan did not release her results because she lacked authority to do so. McGeehan Dep. 186:14-187:15.

183. OP 183 is misleading. ED "routinely used" Spanish surname analysis. McGeehan Dep. 49:16-23; *see also* JA 815-816. Conducting a Spanish surname analysis of

registered voters unmatched with the TDL/ID database would be relatively easy. McGeehan Dep. 191:13-17. McGeehan's contention that the IT department may disagree is unsupported speculation. *Id.* Statements made during the Section 5 administrative review are irrelevant. Order (May 24, 2012) (Doc. 141).

184. OP 184 is erroneous. Sen. Fraser's statements constitute circumstantial evidence of discriminatory purpose. Fraser's reference to data from other states is irrelevant.

185. OP 185 is inaccurate. AGFF ¶ 185 is supported. Ex. 506 at DE 4887; JA 1352.

186. OP is accurate insofar as four additional amendments were introduced and withdrawn prior to a vote. JA 1235-69.

187. OP 187 is misleading. No Senator who is a racial or ethnic minority voted in favor of SB 14. JA 1265.

188. OP 188 is inaccurate. AGFF ¶ 188 is fully supported by sworn testimony. Brunson Dep. 119:7-120:1; McCoy Dep. 216:18-20.

189. OP 189 is inaccurate. Ex. 109 is admissible. Order (June 14, 2012) (Doc. 186).

190. OP 190 is inaccurate. *See* AGFF ¶ 190 and its supporting citations.

191. The parties agree to AGFF ¶ 191.

192. OP 192 is inaccurate. Speaker Straus appoints members to select committees. Straus Dep. 53:18-23.

193. OP 193 is misleading. The fact that "supporters of the bill viewed negotiations with opponents as 'not relevant'" is circumstantial evidence of discriminatory purpose.

194. OP 194 is inaccurate. Rep. Peña testified SB 14 proponents had decided to reject amendments because they knew they had the votes to pass SB 14. Peña Dep. 202:5-23.

195. OP 195 is unsupported insofar as it implies that experts testified on fraud to the SCVIVF. Reaffirm AGFF ¶ 195. The legislative record speaks for itself. JA 1575-1866.

196. OP 196 is accurate but irrelevant. The implication that numerous SB 14 supporters expressed similar views is wholly unsupported. The witness responded, "Well, I support the bill because it would fix the problem whether it exists or not." JA 1507.

197. OP 197 is misleading. Undisputed that Rep. Harless stated she was "not advised" of data estimating the number of voters (or minority voters) who lacked PVID. JA 1978.

198. OP 198 is misleading. Rep. Anchia asked Rep. Harless six times whether SB 14 provided voter education targeted at minorities prior to receiving an answer. JA 1975-77.

199. OP 199 is misleading and incomplete. When asked about differences between SB 14 and other states' PVID laws, Rep. Harless responded, "I have no idea." JA 1978-1979; *see also* Bonnen Dep. 76:22-77:20.

200. OP 200 is accurate insofar as ten additional amendments were introduced and withdrawn. The expressed concerns put the legislature on notice and thus are not hearsay. FRE 801(d)(2).

201. OP 201 is misleading. Reaffirm AGFF ¶ 201. Undisputed testimony and statements show disregard for ensuring SB 14's compliance with Section 5.

202. OP 202 is misleading. Ex. 506 at DE-004887 supports AGFF ¶ 202.

203. OP 203 is misleading. Dr. Kousser is expected to testify to these facts at trial.

204. OP 204 is misleading. Reaffirm AGFF ¶ 204; Ex. 506 at DE 4882-4883, 4886 (corrected citation); JA 1265, 2767.

205. OP 205 is inaccurate. Ex. 327 is admissible. *See* FRE 801(d)(2)(D); Order (June 14, 2012) (Doc. 186).

206. OP 206 is misleading. Reaffirm AGFF ¶ 206 evidences Texas' history of voting discrimination and is relevant circumstantial evidence of discriminatory intent.

II. SB 14 WILL ABRIDGE THE RIGHT TO VOTE ON ACCOUNT OF RACE AND LANGUAGE MINORITY STATUS.

A. SB 14 Imposes Additional Burdens on Voters.

266. FF 266 is inaccurate and incomplete. Elderly and disabled voters are not exempt from SB 14, and time and travel also impart costs. AGFF ¶¶ 19E-19G, 33A-Q, 41E.

267. FF 267 is accurate but incomplete and irrelevant. Requiring voters to "secure" an exemption burdens an existing right to vote.

268. FF 268 is an improper legal conclusion. SB 14 does not concern voting by mail.

269. FF 269 misrepresents AGFF ¶ 13A. Georgia's PVID law permits the use of any expired ID. SB 14 allows only use of ID that has expired within 60 days. JA 3110-11.

270. FF 270 is inaccurate. DPS declined to include documents without cost or non-government documents that DPS "could also verify." Davio Dep. 60:17-61:13, 63:9-13. DPS "routinely issue[s]" DIC-25s and DIC-57s, which lack photos. Ex. 5.

271-272. FF 271-272 are incomplete. DPS has not included distance in satisfaction surveys. Davio Dep. 226:11-16. SB 14 does not fund mobile offices. JA 3126-29. Sen. Uresti will testify to the contents of his affidavit. Most megacenters will be in predominantly Anglo suburbs. TA 2852.

273. FF 273 is inaccurate, misleading, and misapplies the burden of proof. AGFF

¶¶ 23A-23B.

B. SB 14 Will Depress Turnout.

274. FF 274 is misleading and unsupported. AGFF ¶ 30 describes a different hearing and different witness. The testimony states that turnout in Indiana increased from 2006 to 2010 but failed to address other factors affecting turnout. JA 126-27.

275. FF 275 is inaccurate. *Common Cause/Georgia v. Billups* held that plaintiffs suffered an injury because the Photo ID Act required an additional trip to a registrar's office before they would be able to vote. 554 F.3d 1340, 1351 (11th Cir. 2009).

276. FF 276 is inaccurate and misleading. The 2011 peer-reviewed article omits the preliminary conclusion in the 2008 working paper, suggesting that the analysis on which Texas relies did not survive the referee process. Ex. 551 at 26-30. Dr. Ansolabehere testified that he had no basis to disagree with a conclusion in the 2008 working paper, which relied on regression that explained away differences by "controlling for demographic characteristics." TA 1495; *see also* Ansolabehere Dep. 208:16-22. Dr. Ansolabehere limited his analysis to the match rate of the voter registration list to TDL/ID database and LTC database and the extent to which that affects voters in different racial and language minority groups. Ansolabehere Dep. 253:7-255:10.

C. Data-Matching Is a Superior Method to Identify Voters Harmed By SB 14.

277. FF 277 is irrelevant and assumes an improper standard. COL Section I.A, *infra*.

278. FF 278 is misleading. The list of 1,893,143 voters is not a "No Match List[]."

279. FF 279 is misleading and misstates the burden of proof. The State has failed to provide credible evidence concerning possession of federal identification. Individuals

lacking enumerated state-issued ID are less likely to be able to vote under SB 14.

280. FF 280 is unsupported and fails to address individual proposed findings. The VRNID list uses accurate methodology to determine a credible and complete picture of TDL/ID and LTC possession across Texas. AGFF ¶¶ 33A-33Q, 65A-70.

281. FF 281 is inaccurate and misleading. Texas maintains an extensive list maintenance program and purges dead voters from its database. *See* Tex. Elec. Code § 16.001. Dr. Ansolabehere matched VR records to DL records marked deceased, but this may evince an improper match, not that the voter is deceased. Ex. 545 ¶ 40; AGFF ¶ 65D.

282. FF 282 is pure speculation. There is no proof that holders of expired licenses have moved. Voters who have moved are purged. Tex. Elec. Code § 16.032-.033.

283. FF 283 is inaccurate and misleading. AGFF ¶ 65E. Ineligible voters are purged from the VR database. *See* Tex. Elec. Code § 16.033(d)(1). Texas has provided no evidence that records marked as non-citizens in the LTC list can be matched to the VR database, and its expert acknowledged that this could not have a serious effect. TA 890.

284. FF 284 is misleading. Suspense voters are valid voters. Tex. Elec. Code § 16.032.

285. FF 285 is misleading. Past ability to obtain ID does not establish current ability or obviate the burden to acquire ID imposed by SB 14.

286. FF 286 is inaccurate and misleading. Not all recently expired TDL/IDs are eligible for renewal by mail, telephone, or online. McGeehan Dep. 153:3-8. The critical distinction is whether a person can vote under SB 14, not their method of DL renewal.

287. FF 287 is misleading. Individuals ID expired 60+ days belong on the VRNID list.

288. FF 288 is inaccurate. Disabled voters and those over 65 who lack needed ID are

burdened because they can no longer vote in person, must request a ballot at least 7 days before an election, Tex. Elec. Code § 84.007(c), have an greater opportunity to spoil a ballot, *id.* §§ 86.008, 87.041(b), and are deprived of poll-worker assistance.

289. FF 289 is accurate.

290. FF 290 is inaccurate. Dr. Ansolabehere applied his three-step matching algorithm to the entire VR database. Ex. 544 ¶¶ 24-26.

291. FF 291 is inaccurate. The evidence cited was not timely disclosed and must be excluded under Rule 37. In addition, the spreadsheet does not purport to show Spanish Surname rate among all entries in the VR database that include full SSN.

292. FF 292 is misleading. There is no alternative methodology to determine additional valid matches. Exact matches does not create bias in a meaningful sense because SB 14 requires a match to an ID. JA 3102-18; 1 Tex. Admin. Code § 81.71. To the extent discretion exists, it may be exercised in a discriminatory manner. TA 935 fig.8.

293-296. FF 293-296 are inaccurate and based on evidence that was not timely disclosed and must be excluded under Rule 37. A disparate number of women and Spanish surnamed voters lacking matching ID establishes only that these voters are less likely to hold identification that will allow them to vote under SB 14. JA 3102-18. Dr. Sager's supplemental report made no similar finding. TA 903.

297-298. FF 297-298 are inaccurate and misleading. Dr. Sager excluded categories of voters who lack state-issued ID necessary to vote under SB 14. AGFF ¶¶ 65B-65E. The fact that Spanish surnamed voters are more likely not to match to a record of a state-issued ID indicates a discriminatory effect, *see* AGFF ¶¶ 65F-65G, not bias. *Supra* ¶¶

293-296.

"300." FF "300" is inaccurate. Dr. Ansolabehere accurately determined the voters lacking state ID and the racial disparity among them. AGFF ¶¶ 33A-33Q, 65A-69.

D. Dr. Shaw's Surveys Provide No Credible Evidence of the Impact of SB 14.

299. FF 299 is improper, inaccurate, and partly repetitive of FF 288. The State has abandoned any claim to the accuracy of Dr. Shaw's first survey. Stipulation ¶ 3 (June 29, 2012) (Doc. 245-1). Dr. Shaw's VRNID survey is wholly unreliable, and his only comparisons to the target population – the VRNID list – show wild disparities and do not establish a representative sample along socioeconomic metrics. *See* TA 2547-48.

300. FF 300 is inaccurate and irrelevant. The AG requested only data concerning individuals lacking state-issued ID required by SB 14, broken out by race. TA 1355.

301. FF 301 is incomplete. This disclosure was untimely and prejudicial.

302-303. FF 302-303 are inaccurate and are unsupported insofar as it fails to set out any inaccuracy in AGFF ¶ 44. Surveys and their results do not speak for themselves, as they are technical documents that require analysis. *See* Shari Seidman Diamond, *Reference Guide on Survey Research*, *Reference Manual on Scientific Evidence* (2d ed. 2000).

304. FF 304 is inaccurate, unsupported, and partly repetitive of FF 288. Texas has failed to individually rebut AGFF ¶¶ 46-54 and 62-63. Dr. Shaw also failed to use full-filter questions to ask respondents to actually look at their ID, *see* Diamond, *supra*, § IV.B at 250, failed to rotate between opinion and document possession question batteries, *id.* § IV.E at 255, failed to achieve a response rate at a level acceptable for use in federal court, *id.* § III.D, and failed to establish that his respondents were representative of the

VRNID list and targeted subpopulations, *infra* ¶ 299.

305. FF 305 is inaccurate and misleading. AGFF ¶¶ 55A-55G address flaws in Dr. Shaw's survey, not Dr. Ansolabehere's match. A low response rate is indicative that the survey failed to gather data about the VRNID list and may have been an inappropriate means by which to attempt to do so, particularly given the possibility of analyzing the complete databases of individuals who hold state-issued ID. *See* Diamond, *supra*, § IV.G.2 (describing inappropriateness of telephone surveys to analyze hard-to-reach populations).

306. FF 306 is inaccurate. AGFF ¶¶ 58-61, 64; *supra* ¶¶ 302-305.

III. THE STATE HAS FAILED TO CARRY ITS BURDEN OR TO REBUT THE ATTORNEY GENERAL'S EVIDENCE OF A DISCRIMINATORY PURPOSE.

A. Substantial Evidence Supports a Finding of Discriminatory Purpose.

307. FF 307 is inaccurate and misleading. Ample circumstantial evidence exists that SB 14 was passed with discriminatory purpose. AGFF ¶¶ 130-206. Bare assertions by SB 14 supporters do not negate this evidence, and many legislators refused to fully answer questions about purpose on the basis of legislative privilege. Harless Dep. 98:10-99:11; Gonzales Dep. 165:23-166:21; Patrick Dep. 161:15-162:6; Riddle Dep. 236:25-237:4; T. Williams Dep. 260:1-12. Ms. Garduno's cited testimony is misleading, as she testified that SB 14 was passed with a discriminatory purpose. Garduno Dep. 79:2-6.

308. FF 308 is inaccurate. Legislators testified that SB 14 was enacted with discriminatory purpose based on personal knowledge. *See, e.g.*, Anchia Dep. 106:14-

108:18, 140:11-141:8; Veasey Dep. 56:19-58:4, 131:8-132:1; Uresti Dep. 33:14-36:11; AGFF ¶¶ 125-28.

309. FF 309 is unsupported and inaccurate. Dr. Kousser testified that "both sides" sought to create a favorable legislative record for the preclearance process. Kousser Dep. 93:1-5, 94:6-19, 95:14-96:2. The anticipation of review or litigation is irrelevant, and any insinuation about bill opponents' motives is unsupported. *See* COL Part II, *infra*.

310. FF 310 is misleading and unsupported. PVID legislation considered between 2005 and 2011 imposed increasingly strict requirements on voters. AGFF ¶¶ 130, 133, 150, 166-167. Opponents' statements indicate notice of the impact on minority voters.

311. FF 311 is misleading and inaccurate. Sen. Ellis testified that the quoted statement was "mere political talk" designed to put Sen. Fraser "at ease" and persuade him to vote for Sen. Ellis's amendment. Ellis Dep. 79:18-81:12.

B. Texas's Stated Purposes for SB 14 Are Pretextual.

312. FF 312 is incomplete. The Carter-Baker report did not reach a conclusion as to the amount of voter fraud that exists. JA 4638.

313. FF 313 is irrelevant. SB 14 addresses in person voter impersonation. AGFF ¶ 86B.

314. FF 314 is irrelevant and unsupported. Texas fails to cite evidence that voter fraud occurred in any of these elections or that "few votes are cast" in local elections.

315. FF 315 is misleading. AG admits that Texas has convicted at least one person for an election-related crime under Texas law. TA 2681, 2683.

316. FF 316 is irrelevant. Major Mitchell never testified before the legislature.

317. FF 317 is misleading to the extent it suggests that voters do not to present ID when voting in person under Texas's current law. Tex. Elec. Code § 63.0101 (2010).

318. FF 318 is unsupported and misleading. Dr. Ansolabehere stated that Texas identified 50,439 records of deceased persons in the data provided to DOJ for this litigation. Ex. 545 ¶ 40. The Carter-Baker Report speaks for itself and should be considered in its entirety. JA 4613-4664.

319. FF 319 is misleading. Major Mitchell testified to information not before legislators during consideration of SB 14. Mitchell Dep. 99:15-104:23; AGFF ¶ 83A.

320. FF 320 is misleading. The referenced witnesses relayed no evidence of voter fraud convictions, JA 184, 1541-42, and their accounts went unchallenged. *Id*. The legislature heard testimony from the SOS that in-person voter fraud is rare. JA 3174-3175; Ex. 505.

321. FF 321 is unsupported and irrelevant. Legislators' belief that PVID legislation was popular is not inconsistent with a discriminatory purpose. Ex. 547 ¶ 29. The Lighthouse Poll cited is inadmissible hearsay. JA 1158.

322. FF 322 is unsupported. There is no evidence that occurrences of in-person voter fraud exceed the OAG's investigations of it. The legislature neglected to look into local enforcement of voter fraud despite a recommendation to do so. Ex. 378 at DE 2865.

323. FF 323 is incomplete. Between August 2002 and June 2010, the OAG received 267 referrals of potential election code violations, not all of which warranted "a full fledged prosecution." JA 3136. All other facts in FF 323 are unsupported.

324. FF 324 is misleading and incomplete. The OAG testified that it had investigated 289 cases of mail-in voter fraud since 2002. JA 1826-27.

325. FF 325 is irrelevant. *See* COL Section II.B, *infra*. The Carter-Baker Report speaks for itself and should be considered in its entirety. JA 4613-64.

326. FF 326 is incomplete and misleading. Rep. Peña was not testifying about in-person voter impersonation, and testified that SB 14 would not stop voter fraud. Peña Dep. 132:1-9; 125:5-127:5; 131:2-12; 132:15-133:6. The Carter-Baker Report speaks for itself and should be considered in its entirety. JA 4613-4725.

327. FF 327 is inaccurate and irrelevant. The failure to address the most prevalent forms of voter fraud in light of the burdens SB 14 imposes on minority voters is circumstantial evidence of pretext. *See* COL Section II.B, *infra*. Whether "[a]ny measure against voter fraud may boost voter confidence" is irrelevant.

328. FF 328 is misleading. The infrequency of in-person voter fraud is evidence of pretext in light of the burdens SB 14 imposes on minorities. AGFF ¶¶ 18-70, 77-88.

329. FF 329 is misleading. AGFF ¶ 81A does not address "incentives" for voter fraud, and Rep. Peña did not testify to instances of vote buying. Peña Dep. 113:14-24.

330. FF 330 is irrelevant and misleading. Major Mitchell never testified before the legislature. The legislative record contains no evidence that non-citizens have been convicted for illegally voting. T. Williams Dep. 148:25-150:4; AGFF ¶ 94A.

331. FF 331 is incomplete. Citizenship status is not included on a Texas DL. Tex. Trans. Code § 521.121(e).

332. FF 332 is undisputed.

333. FF 333 is undisputed except that Texas's citation governs ID cards, not DL.

334. FF 334 is incomplete as citizenship status is not included on a Texas DL. *Supra* FF

331. FF 334 is otherwise undisputed except that Texas's citation governs ID cards.

335. FF 335 is unsupported and irrelevant. Texas cites no evidence of voting by undocumented noncitizens. Ex. 79 at DE 509 (listing numerous deterrents).

336. FF 336 is nonsensical. The cited paragraphs do not exist in the filing referenced.

REPLY IN SUPPORT OF PROPOSED CONCLUSIONS OF LAW

Texas has failed to meet its burden of establishing that SB 14 neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. *See* 42 U.S.C. § 1973c. The State has largely abandoned its experts' initial reports, and its remaining evidence concerning the effect of SB 14 bears no credible weight. Moreover, Texas's assertions of a plausible race-neutral purpose do not eliminate the likelihood of an additional purpose to discriminate, corroborated by substantial circumstantial evidence.

The Attorney General has presented credible evidence that SB 14 will prevent hundreds of thousands of Texans from voting, that these voters will be disproportionately Hispanic or black, and that Texas legislators enacted SB 14 to achieve this result. This evidence falls neatly into the framework established by opinions applying Section 5. Texas either ignores those cases or urges this Court to do so, but *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009), did not sweep away decades of cases. As a result, Texas is not entitled to a declaratory judgment permitting implementation of SB 14.

I. TEXAS HAS FAILED TO PROVE THAT SENATE BILL 14 DOES NOT HAVE A RETROGRESSIVE EFFECT.

SB 14 is precisely the type of voting change targeted by the effect prong of Section 5: an impediment to voting that will cut away at "gains that have already been *realized* by minority voters." *See Texas v. United States*, 831 F. Supp. 244, 262 (D.D.C. 2011) (three-judge court). Texas's challenge to the retrogression standard is a scarcely concealed and meritless constitutional attack on the effect prong. Dr. Ansolabehere's analysis of Texas's databases is the only reliable evidence of the effect of SB 14: the disenfranchisement of hundreds of thousands of minority voters.

A. Retrogression Abridges the Right to Vote on Account of Race, Color, or Language Minority Status under Section 5 of the VRA.

For over 35 years, the Supreme Court repeatedly held that the effect prong bars "voting-procedure changes . . . that 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). *Beer* established more than a safe harbor in redistricting cases. Tex. Reply at 44. Rather, the *Beer* retrogression standard has served as a guidepost in every subsequent Section 5 case applying the effect prong. *See, e.g.*, *Riley v. Kennedy*, 553 U.S. 406, 412 (2008).[1] Courts have applied the retrogression standard to a range of other changes, such as annexations, *see, e.g.*, *City of Pleasant Grove v. United States*, 479 U.S. 462, 473 (1987); the creation of elected judgeships, *see, e.g.*, *New York v. United States*, 874 F. Supp. 394, 397-98 (D.D.C. 1994) (three-judge

[1] *See also Georgia v. Ashcroft*, 539 U.S. 461, 466 (2003), *superseded in part*, 42 U.S.C. § 1973c(b), (d); *Reno v. Bossier Parish Sch. Bd.* (*Bossier Parish II*), 528 U.S. 320, 324 (2000), *superseded in part*, 42 U.S.C. § 1973c(c); *Reno v. Bossier Parish Sch. Bd.* (*Bossier Parish I*), 520 U.S. 471, 478-79 (1997); *City of Pleasant Grove v. United States*, 479 U.S. 462, 473 (1987); *City of Lockhart v. United States*, 460 U.S. 125, 132-36 (1983).

court); and polling place changes, *see, e.g.*, *Apache County High Sch. Dist. No. 90 v. United States*, No. 77-CV-1518, at 13 (D.D.C. Jun. 13, 1980) (three-judge court).[2]

The text and history of Section 5 fully support this established standard. The effect prong bars implementation of voting changes that "will have the effect of denying or abridging the right to vote on account of race[,] color" or language minority status. 42 U.S.C. § 1973c(a). The Oxford English Dictionary defines "abridge" as "to curtail, lessen, or diminish (a right, privilege, etc.); to reduce the extent or scope of (authority, power, etc.)." *Oxford English Dictionary*, *Abridge, v.* (3d ed. 2009).[3] Because Section 5 focuses on voting *changes*, a preclearance determination must determine whether the new practice, as compared to the old practice, would have the effect of abridging the right to vote of a minority group. Logically, when a jurisdiction conditions the exercise of the right to vote on bearing a new burden, paying a new cost, or clearing a new hurdle, that right has been abridged. Texas's reference to current or pre-existing burdens on voting is a *non sequitur*, *see* Tex. Reply 36, because Section 5 is concerned with abridgments that change the effectiveness of one's vote below a critical minimum, not in comparison to boundless ideal. *See, e.g.*, *City of Lockhart v. United States*, 460 U.S. 125, 135 (1983) ("Although there may have been no improvement in their voting strength, there was no

[2] The State's argument that no court has applied *Beer* to voter ID requirements, Tex. Reply at 44, is disingenuous at best. As Texas is well aware, no court has issued an opinion on the merits of a request for judicial preclearance of voter ID. However, the retrogression standard has been repeatedly applied to administrative submissions of voter ID requirements. *See* 28 C.F.R. § 51.54(b). The Attorney General's interpretation of Section 5 is afforded substantial deference. *See Lopez v. Monterey County*, 525 U.S. 266, 281 (1999); *see also Georgia v. United States*, 411 U.S. 526, 536-41 (1973).

[3] *See also Merriam Webster's Collegiate Dictionary* 4 (10th ed. 2001) ("to reduce in scope"); *Black's Law Dictionary* 6 (8th ed. 2004) ("to reduce or diminish").

retrogression either.").[4]

Texas' reading of the phrase "on account of" race, color, or language minority status in Section 5 essentially reads the effect standard out of Section 5, by limiting the effect prong to instances of intentional discrimination, which the purpose prong already addresses. Rather, under *Beer*, the effect standard prohibits new voting changes that "worsen the position of minority voters," *Reno v. Bossier Parish* (*Bossier Parish II*), 528 U.S. 320, 324 (2000), through denial or abridgement of the right to vote in jurisdictions where Congress found a significant history of discrimination against minority voters that has already placed them at a significant disadvantage. This Court must interpret "on account of" in order to avoid rendering the effect provision surplusage. *See, e.g.*, *Cooper Ind. Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 166 (2004). The constitutionality of the effect prong has been repeatedly upheld. *See Lopez v. Monterey County*, 525 U.S. 266, 283 (1999); *see also City of Rome v. United States*, 446 U.S. 156, 173 (1980) ("Because the statutory meaning and congressional intent [to prohibit retrogression] are plain . . . we are required to reject the appellants' suggestion that we engage in a saving construction and avoid the constitutional issues they raise. . . . [T]he prior decisions of this Court foreclose any argument that Congress may not . . . outlaw voting practices that are discriminatory in effect.").

[4] Take for example a change in polling places. Of course a voter who casts a ballot in person must travel to a polling place. That is an existing, nondiscriminatory condition on the right to vote, the benchmark practice under the retrogression standard. However, the movement of polling places to "[l]ocations at distances remote from black communities" increases the cost of voting and in turn abridges the existing right to vote. *Perkins v. Matthews*, 400 U.S. 379, 388 (1971); *see also id.* (holding that polling place changes must be submitted precisely because they have "an obvious potential for 'denying or abridging the right to vote on account of race or color.'" (quoting 42 U.S.C. § 1973c(a))); *Apache County High Sch. Dist. No. 90*, at 13 (denying preclearance on this basis).

Texas' reading of the "on account of" language would contradict the reading that the Supreme Court has given to that language in other provisions of the Voting Rights Act. Under Section 4, the Court determined that a facially neutral literacy test in a jurisdiction with low black literacy rates had the "effect of denying . . . the right to vote on account of race or color." *Gaston County v. United States*, 395 U.S. 285, 293, 297 (1969).[5] Similarly, under Section 2 the Court held that "the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters." *Thornburg v. Gingles*, 478 U.S. 30, 61-74 (1986) (rejecting the use of "multiple regression analysis" to take into account variables such as income and education).

Texas again invokes *Northwest Austin* where precedent and statutory text offer no support for the State's radical theories. Constitutional avoidance cannot trump Section 5's unambiguous bar on retrogressive voting changes. The fact the Indiana law upheld in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), against a facial challenge that did not allege discriminatory effect or purpose has no bearing on whether Texas's more restrictive voter ID law abridges the right to vote on account of race, color, or language minority status. Tex. Reply at 38. Nor can the Court "avoid" a constitutional question by wholly nullifying the effect prong. Tex. Reply at 41, 44. *See*

[5] The State's assertion that there is no basis on which to attribute disparities in identification possession to past and current discrimination is belied by common sense (and ignores the state's burden of proof). Minority voters in Texas are disproportionately poor and under-educated, *see* RJN ¶¶ 9-15, and past discrimination is in part responsible for these lingering disparities. *See, e.g., LULAC v. Perry*, 548 U.S. 399, 439 (2006). Finally, the Speaker of the Texas House recognized the logical point that "poor people would be less likely" to hold the ID needed to vote under SB 14. Straus Dep. 116:1-11; *see also, e.g.*, Matt A. Barreto *et al., The Disproportionate Impact of Voter-ID Requirements on the Electorate – New Evidence from Indiana*, 42 PS 111, 113 tbl. 2 (2009).

City of Rome, 446 U.S. at 173.[6] The avoidance canon is a shield to protect the enactments of Congress, not a sword offered to litigants dissatisfied with the legislative process. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). The State fails to recognize the difference between the burdens imposed by Section 5 and "constitutional problems." Tex. Reply at 53 (citing *Nw. Austin*, 557 U.S. at 202-04); *see also Shelby County v. Holder*, 679 F.3d 848, 862-73 (D.C. Cir. 2012) (holding that "current burdens" are "justified by current needs").

Finally, Texas attempts to cabin the scope of Section 5 based on the holdings of several unsuccessful Section 2 lawsuits under that statute's results test. But as the Supreme Court has emphasized, "we have consistently understood these sections to combat different evils and, accordingly, to impose very different duties upon the States." *Reno v. Bossier Parish School Bd.* (*Bossier Parish I*), 520 U.S. 471, 477 (1997). Decisions such as *Ortiz v. City of Philadelphia Office of City Comm'rs*, 28 F.3d 306 (3d Cir. 1994), have simply upheld laws challenged under Section 2 where the plaintiff has failed to demonstrate that the law "interacts with social and historical conditions to deny minority voters equal access to the political process." *Id.* at 312-15 (3d Cir. 1994); *see also Wesley v. Collins*, 791 F.2d 1255, 1260-61 (6th Cir. 1986) (same).

B. The Only Plausible and Credible Evidence Before the Court Establishes that SB 14 Will Have a Retrogressive Effect on Minority Voters.

[6] The State also argues that "Congress does not have power under the Fifteenth Amendment to prevent States from enacting or enforcing voting laws that merely have a disparate impact on minorities." Tex. Reply at 42. This argument is beyond the scope of the State's statutory claim. *See* Initial Scheduling Order ¶ 1 (Mar. 27, 2012) (Doc. 43). It is also wrong. *See, e.g.*, *Lopez*, 525 U.S. at 283 ("'[U]nder the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect.'" (quoting *City of Rome*¸ 446 U.S. at 175)).

Under Texas's current voter identification law, voters may present their voter registration card or one of numerous other forms identification. *See* Tex. Elec. Code § 63.0101 (2010). SB 14 severely contracts the list of acceptable ID. AGFF ¶ 12A. For those who lack an enumerated ID, SB 14 will require travel to a driver license office, effectively a re-registration requirement far in excess of a post-card application. AGFF ¶¶ 19A, 19G-19N. Moreover, for those who lack the documentation necessary to apply for an EIC, obtaining such documents will cost at least $22. AGFF ¶¶ 19B-19F.

Again, *Crawford* does not address the State of Texas, SB 14, or retrogression. The Court did not opine whether minority voters are more or less likely to be included among "most voters" in Indiana who may not be substantially burdened by obtaining identification or whether Texas's greater poverty rates, more expensive birth certificates, expansive geography, and reduction in services at driver license offices might magnify this burden. *See*, *e.g.*, 553 U.S. at 198 n.17 (noting a cost as little as $3 to obtain a birth certificate).

Dr. Ansolabehere has provided the only credible evidence concerning the population that will be effected by SB 14. His match between the voter registration database, driver license database, and license to carry database concluded that 1,501,977 voters unambiguously lack state-issued ID required by SB 14 and that these voters are disproportionately Hispanic or black. AGFF ¶¶ 33D-33E. Moreover, 535,736 of these voters actually cast a ballot in 2008, again disproportionately Hispanics and blacks. AGFF ¶¶ 33F, 33H. Although some of these individuals may possess federal identification that meets the requirements of SB 14, as explained further below, the State

has not presented credible evidence that they do, let alone that federal identification corrects for the racial disparity in state ID possession. AGFF ¶¶ 41F-41K, 55A-55G.

The State's critiques of Dr. Ansolabehere bear little serious consideration. The Texas voter registration database is the admitted set of valid voters in Texas, and the object of Dr. Ansolabehere's inquiry was to determine how many of these voters possess state-issued ID required by SB 14. Because Texas purges dead voters, *see* Tex. Elec. Code § 16.001, a match between a voter and a driver license record marked deceased suggests a false match. *See* Ansolabehere Dep. 97:13-98:12.[7] Driver licenses expired by more than 60 days cannot be used to vote under SB 14, JA 1437, and the suggestion that expired licenses represent voters who have moved out of state is pure conjecture.[8] Voters aged 65 or older who arrive at a polling place without identification required by SB 14 cannot cast a regular ballot. AGFF ¶ 41D.[9] Nor can disabled voters without identification required by SB 14 cast a regular ballot unless and until they re-register and present documentary proof of disability. JA 1429. Finally, the State's purported evidence of bias against matching Spanish surnames rests on a match to expired driver

[7] Even if Dr. Ansolabehere had purged voters matched to a driver license file marked deceased, he would have excluded only 50,439 voters, 3.3% of the VRNID list. *See* Ex. 545 ¶ 40. There is no evidence that this group contains a disproportionate share of Anglo, black, or Hispanic voters.

[8] Not all state-issued ID that expired less than two years ago can be renewed online. Moreover minority voters are less likely than Anglos to have internet access. AGFF ¶ 65B. In any case, conditioning voting on knowing and meeting a novel requirement that disproportionately affects black and Hispanic voters abridges the right to vote on account of race and language minority status. *See* Section I.A, *supra*.

[9] Voting absentee requires that the clerk receive a ballot request no more than 60 and no less than 7 days before each election, Tex. Elec. Code § 84.007(c), and voters who fail to make an advance request must vote in person subject to SB 14. Absentee voting creates numerous opportunities to spoil and application or a ballot, *see, e.g.*, *id.* §§ 86.008, 87.041(b), and deprives voters of poll-worker assistance, which is particularly critical given criminal penalties in Texas for assisting multiple absentee voters in submitting applications. *See id.* § 84.004

licenses, a plainly faulty methodology, and does not address black voters. AGFF ¶¶ 294-296.

The State has abandoned its own database matches, as well as Dr. Shaw's first round of surveys. *See* Stipulation ¶¶ 1-3 (June 29, 2012) (Doc. 245-1). Dr. Shaw's VRNID surveys are the State's only remaining analysis of ID possession, and they are entirely unreliable. First, Dr. Shaw began with a list of 1.9 million voters, 400,000 of whom are not on the final VRNID list and likely have state-issued ID. AGFF ¶ 55A. Second, Dr. Shaw attached phone numbers to only 35.4% of randomly selected records, introducing substantial potential response bias. AGFF ¶ 41H. Third, the three surveys completed only 2.5%, 2.1%, and 2.0% of calls, introducing even more non-random selection. AGFF ¶ 55B. Thus Dr. Shaw reached as few as one of every 141 randomly selected voters. The resulting potential for response bias violates all ordinary polling models, exceeding OMB standards for policy decisions, AGFF ¶ 41F, standards applied in legal proceedings, *see* Shari Seidman Diamond, *Reference Guide on Survey Research* § III.D, *Reference Manual on Scientific Evidence* (2000),[10] and every live-interview survey Dr. Shaw has previously conducted. Shaw Dep. 249:15-250:1.

The State's claims concerning social science are similarly baseless. Every peer-reviewed paper measuring the effect of photo ID requirements has found that such laws suppress turnout. AGFF ¶¶ 24H, 26. Moreover, observations from Indiana and Georgia

[10] For example, Judge Weinstein has questioned the use of a survey with a 62.6% response rate and permitted its use only when satisfied that the respondents closely resembled the surveyed population along relevant metrics. *See Rosado v. Wyman*, 322 F. Supp. 1173, 1181-82 (E.D.N.Y.), *aff'd*, 437 F.2d 619 (2d Cir. 1970), *aff'd*, 402 U.S. 991 (1971).

are insufficient sources from which to presume the effect of SB 14. AGFF ¶¶ 24B, 24G. Finally, the State advances no basis for its novel theory that a restriction must reduce overall turnout in order to abridge minority voters' rights.

II. TEXAS HAS FAILED TO PROVE THAT SENATE BILL 14 DOES NOT HAVE A DISCRIMINATORY PURPOSE.

Texas has also failed to carry its burden to establish that SB 14 lacks any discriminatory purpose. Again the State refuses to acknowledge the basic legal framework. However when the full range of relevant evidence is properly applied, it becomes clear that the State cannot prove that SB 14 lacks any discriminatory purpose.[11]

A. The Purpose Prong Requires a Searching Analysis of Available Circumstantial and Direct Evidence.

Under the purpose prong, Texas must prove that a discriminatory purpose cannot have been even "a motivating factor." *Bossier Parish I*, 520 U.S. at 488; *see also* 42 U.S.C. § 1973c(a), (c). Since 1977, the Supreme Court has applied a systematic approach to evidence of a discriminatory purpose, *see Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977); *see also Bossier Parish I*, 520 U.S. at 488. This analysis is not limited to direct evidence; rather it requires "a 'sensitive inquiry into such circumstantial . . . evidence as may be available.'" *Bossier Parish I*, 520 U.S. at 488 (quoting *Arlington Heights*, 429 U.S. at 266).

In support of the superficial analysis that it proposes, the State again returns to

[11] The Attorney General has presented circumstantial evidence available despite the carefully choreographed passage of SB 14 and key legislators' assertions of privilege. Defendant-intervenors have presented substantial direct evidence of a discriminatory purpose. No party has conceded that direct evidence is unavailable.

Guinn v. United States, 238 U.S. 347 (1915), and *Myers v. Anderson*, 238 U.S. 368 (1915). However *Arlington Heights* expressly built on *Guinn* when it held as follows:

> Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. *Guinn v. United States*, 238 U.S. 347 (1915). . . . The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a [stark] pattern, . . . , impact alone is not determinative, and the Court must look to other evidence.

429 U.S. at 266 (additional citations omitted). Moreover, *Myers* only refused to assume in the absence of evidence that a law was intended to discriminate when a logical alternative existed and the provision made no express distinction on the basis of race. *See* 238 U.S. at 379. *Guinn* followed the inverse logic: where there is no possible explanation beyond race, a court must assume purposeful discrimination. *See* 238 U.S. at 364-65. To the extent that either opinion would have foreclosed a thorough inquiry, the doctrine has been modified by later decisions that bar subtle discrimination tolerated a century ago. *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 626 (1982).

B. Abundant Circumstantial Evidence Rebuts the State's Superficial Claim that SB 14 Lacks Any Discriminatory Purpose.

Applying *Arlington Heights* reveals ample evidence of discriminatory purpose. The only credible analysis of identification possession establishes that SB 14 will disproportionately impact minority voters, *see* Section I.B, *supra*, and Texas's history of discrimination continues to the present. *See, e.g., Perez v. Perry*, No. 5:11cv360 (W.D. Tex. Mar. 19, 2012) (Doc. 690) (Ex. 558). Against this backdrop, the sequence of events and procedural deviations needed to pass SB 14 strongly evince discriminatory purpose.

The nexus between the sequence of events and procedural deviations is the effect

of SB 14, which entirely predictable. *See Bossier Parish I*, 520 U.S. at 487. Thus the introduction of increasingly restrictive bills – over the consistent opposition of minority legislators, coinciding with extraordinary growth in minority population and minority political participation, and beyond the restrictions imposed in any other State – is circumstantial evidence that the purpose of SB 14 was to achieve its likely result: the disproportionate exclusion of minority voters from the electorate. Legislators' willingness to subordinate the legislative rules to pass a bill predicted to disenfranchise minority voters – without any evidence to the contrary – is also directed tied to a legislative purpose, particularly when the issue was not particularly important to most Texas voters. Shaw Dep. 232:24-233:19.

Texas may not simply assert that the State had a permissible purpose without addressing evidence that SB 14 also had a purpose to discriminate. It is legitimate to address the possibility of in-person voter impersonation, but the use of a proverbial sledgehammer to kill a gnat evinces that more than one purpose motivated the Bill. Tex. Reply at 52. Other states that have enacted photo-ID requirements with far lesser restrictions, such as counting provisional ballots for voters without ID after comparing the signature to registration records. *See* R.I. Gen. Law § 17-19-24.3. Other purported purposes have narrowed as well, as Texas has admitted that SB 14 will not prevent all noncitizen voting and has narrowed its claim to target undocumented workers. Tex. Reply at 52. Public pronouncements aimed to garner support were not nearly so narrow. Ex. 547 at 11-12. Similarly, the State contends that it could not allow use of student IDs because they do not establish domicile in Texas, but the federal ID that is sufficient under

SB 14 provides even lesser proof of a tie to Texas.

Texas's failure to rebut any of the *Arlington Heights* factors with credible contrary evidence and its solitary reliance on the superficial pronouncements of legislators who have since invoked legislative privilege demonstrates that the State has failed to establish that SB 14 lacks any discriminatory purpose.

III. CONCLUSION

For the reasons set out in the Attorney General's Proposed Findings of Fact and Conclusions of Law (Doc. 223) and as set forth above, Texas has failed to carry its burden under Section 5 of the Voting Rights Act. Therefore the Court should deny the State's request for a declaratory judgment permitting implementation of SB 14.

Date: July 5, 2012

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