

November 16, 2011

Mr. T. Christian Herren, Jr.
Chief, Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 7254-NWB
Washington DC, 20530

RE: Comment under Section 5, Submission No. 2011-2775

Dear Mr. Herren:

The Texas State Conference of NAACP Branches, the Brennan Center for Justice, and the Lawyers' Committee for Civil Rights Under Law write to renew our opposition to Texas's request for preclearance of Senate Bill 14,¹ which would require that voters produce a government-issued photo ID in order to cast a ballot at the polls on Election Day. The State has failed to meet its burden of demonstrating that the photo ID requirement was not motivated by a discriminatory purpose and would not have a retrogressive effect on minority electoral opportunity. We therefore respectfully urge the Attorney General to interpose an objection to this change.

In our previous letter² to the Justice Department (DOJ) commenting on this submission, we explained that the information provided by the State of Texas, as well as other information relating to the change, showed that the State had not met its burden either as to the purpose or effect of the change. In this letter, we focus on the change's retrogressive effect since the additional information provided by the State³ in response to DOJ's request for more information⁴ relates almost entirely to the "effect" portion of the Section 5 test.

¹ Act of May 27, 2011, Senate Bill 14, Chapter 123, 82nd Legislature (2011) ("Senate Bill 14"). Texas originally submitted its request for preclearance to the Department of Justice on July 25, 2011, and the Department requested more information from Texas on September 23, 2011.

² See Letter from Gary Bledsoe, President, Texas State Conference of the NAACP, et al., to T. Christian Herren, Chief, Voting Section, Dep't of Justice (Sept. 14, 2011) (on file with Brennan Center), *available at* http://brennan.3cdn.net/772eab3b160f2da9f7_n4m6ivkrc.pdf.

³ See Letter from Ann McGeehan, Director of Elections, Office of Tex. Sec'y of State, to T. Christian Herren, Jr., Chief, Voting Section, Civil Rights Division, Dep't of Justice (Oct. 4, 2011) (on file with Brennan Center), *available at* http://www.brennancenter.org/page/-/October_4_2011_Additional_Information_Response_on_SB_14.pdf.

However, for the reasons set forth in our prior letter (at pages 13-16), we also continue to believe that the State has not met its burden with regard to showing the absence of a discriminatory purpose. Indeed, the additional information the State has provided in this regard reinforces that conclusion. Specifically, the State provided a chart listing election fraud investigations which demonstrates that allegations of voter impersonation—the sole election fraud issue addressed by a photo ID requirement—are extremely rare in the State.⁵ This further underscores our prior contention that the photo ID requirement was not enacted to further the State’s interest in promoting election integrity.

I. Overview of the retrogressive effect of the new photo ID requirement.

As explained below, the proposed photo ID requirement would be retrogressive in two ways. First, the State’s own data demonstrate that, currently, a disproportionate number of minority voters lack the requisite identification and thus would be required to obtain new identification in order to vote at the polls on Election Day. Second, the State has not met its burden of demonstrating that, following implementation of the change, this disparity would not continue. Accordingly, Texas has failed to show that minority voters would not disproportionately be precluded from voting at the polls on Election Day.

The State focuses much of its submission on attempting to show that the harmful impact of the new photo ID requirement would be diminished by other measures provided for in Senate Bill 14—namely, the establishment of a new “election identification certificate” (EIC) program and a state-sponsored voter education program. However, while these measures may reduce the overall *number* of registered voters who lack the requisite photo ID, the State has not provided any basis on which to conclude that these measures would alter the relative *percentages* of minority and white registered voters who have the requisite ID. The State, therefore, has not shown that these measures would eliminate, or even reduce, the disproportionate effect of the photo ID requirement on minority voters.

Neither the new EIC program nor the proposed voter education program would cure the disparities in photo ID ownership, for several reasons. The requirements for obtaining an EIC would themselves be significantly burdensome in terms of requiring an inordinate amount of personal information and documentation, which likely would discourage minority voters from obtaining one. In addition, as we discussed in our previous comment letter to DOJ regarding this submission, minority voters face greater difficulties in accessing state driver’s license offices, where the EICs would be issued, since they must travel greater distances than white voters on average to reach these offices and have fewer transportation options.

⁴ See Letter from T. Christian Herren, Jr., Chief, Voting Section, Dep’t of Justice, to Ann McGeehan, Director of Elections, Tex. Office of the Tex. Sec’y of State (Sept. 23, 2011) (on file with Brennan Center), *available at* http://brennan.3cdn.net/605e4ef6b1842ab7e7_t8m6bpr50.pdf.

⁵ See E-mail from Pamela McPeters, Chief of Staff to State Representative Dawnna Dukes, to Voting Section, Civil Rights Division, Dep’t of Justice (Sept. 2, 2011, 4:59pm CST) (on file with Brennan Center) (entitled “Election Code Referrals to the Office of the Attorney General: August 2002-Present”).

Similarly, with regard to the proposed voter education program, there is no substantiation for concluding that the program would eliminate the existing disparities. The State has not yet committed itself to any particular plan nor has it identified any specific steps it would take to ensure that its voter education efforts actually reach voters in black and Latino communities, who often have diminished access to popular communications media.

Moreover, it is at best speculative to conclude that even a well-designed and well-implemented voter education program will significantly reduce the State's existing photo ID disparities, given the nature and scope of the challenges that are posed. Texas's long history of discrimination against its minority residents—along with present-day socio-economic disparities between the State's minority and white residents—often pose significant obstacles to political participation in communities of color.⁶ This makes it doubtful that the State can compensate for creating an additional obstacle to minority participation simply by “getting the word out” that the obstacle now exists. Furthermore, the sheer magnitude of the voter education plan required in this situation raises even further doubts about the efficacy of a centrally-operated program since the State would ultimately need to reach tens of thousands, or even hundreds of thousands, of minority voters spread across the entire State. Moreover, Texas election officials will face major obstacles in attempting to reach the State's communities of color, given their lower literacy rates and diminished access to the internet and other media.⁷

Finally, the State has not shown that Senate Bill 14 is needed to redress an existing problem in the State's administration of elections, given the scant evidence of voter impersonation fraud in the State, the availability of alternative remedies for any such conduct that might occur, and the State's current voter ID requirement. Thus, the State has a clear non-retrogressive alternative—that is, to continue to enforce its current, less onerous, voter ID provisions.

In sum, Texas is seeking to implement a massive change in its rules for voting at the polls, for no valid reason related to the administration of elections in the State. Moreover, it has failed to demonstrate that the proposed change would not disproportionately burden the voting rights of its minority citizens. The State cannot satisfy its non-retrogression burden with mere supposition and speculation.

II. Available data demonstrate that voters of color disproportionately lack the requisite photo ID.

The State has failed to provide DOJ with comprehensive information regarding the number of eligible voters of each race who currently possess a photo ID issued by the Texas state government. However, the information that the State has provided reveals that Latinos, the largest minority group in the State, are substantially over-represented among the population of Texas voters who currently lack a state-issued photo ID. According to the State's own data,

⁶ See, e.g., *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 439-40 (2006) (describing how the “political, social, and economic legacy of past discrimination for Latinos in Texas may well hinder their ability to participate effectively in the political process” (internal quotations omitted)).

⁷ See *infra* Part IV.B.

“Spanish surname”⁸ voters make up 28.96% of registered Texas voters without a state-issued photo ID but only 21.79% of registered voters in the State.⁹ Thus, Latinos represent 32.9% more of the registered voters who lack qualifying identification than would be true if the new requirement were race-neutral based on current voter registration levels.¹⁰ These figures demonstrate that Texas’s Latino voters are significantly less likely to possess a state-issued photo ID than the State’s other voters.¹¹

More specifically, these figures also demonstrate that Latino voters are less likely to possess a state-issued photo ID than the State’s white voters. Although Texas has failed to provide (or even estimate) the number of African-American, Asian-American, and white voters in the State who currently lack photo ID,¹² its data still firmly rule out the possibility that white voters lack ID at the same rate as Latino voters. This is because even if we were to assume that every single African American and Asian American registered voter in Texas currently possesses a valid photo ID—an extremely unlikely assumption¹³—the State’s own reported figure for the percentage of registered Latino voters without a photo ID is so high (6.28%) that it would literally be impossible for the same percentage of registered white voters in Texas to lack photo ID. Put differently, if the same percentage of Texas’s white registered voters as Latino voters lacked a state-issued photo ID, and if all African-American and Asian-American registered voters have photo ID, the total number of Texas voters without an ID would exceed the total number of such voters Texas has reported in its submission.¹⁴

⁸ Texas’s preclearance submission uses the adjective “Spanish Surname” to describe voters of Latino descent. This objection letter uses the word “Latino” instead.

⁹ See E-mail from Ann McGeehan, Director of Elections, Office of the Tex. Sec’y of State, to Jennifer Maranzano, Voting Section, Civil Rights Division, Dep’t of Justice (Oct. 13, 2011, 5:35pm CST) (on file with Brennan Center) (entitled “Spanish Surname Summary Report”). Latinos remain over-represented among the population of voters without a photo ID even relative to their share of Texas’s overall citizen voting-age population, which, at 24.7%, is slightly larger than their share of the State’s population of registered voters. See U.S. CENSUS BUREAU, *2005-9 American Community Survey* (last visited Oct. 20, 2011), available at <http://dataferrett.census> (data obtained by creating a custom table from the *2005-9 American Community Survey* five-year estimates in the U.S. Census Bureau’s *Data Ferrett*).

¹⁰ The figure of 32.9% is derived as follows: the Latino percentage of those lacking state-issued photo identification (28.96%) is 7.17 percentage points higher than the Latino percentage of the registered voters (21.79%). That figure divided by 21.79 equals 32.9%.

¹¹ Statistical significance demonstrated at the 5% level, using a Z test for a single sample proportion.

¹² Instead, the State’s submission divides Texas’s entire population of registered voters into two broad racial categories—specifically, Latino voters and non-Latino voters.

¹³ Several national voter surveys have demonstrated that African-American and Asian-American voters are less likely to own a state-issued photo ID than white voters. See, e.g., FRASURE ET AL., 2008 COLLABORATIVE MULTI-RACIAL POST-ELECTION STUDY (2009), available at <http://cmpstudy.com/index.html> (concluding that African Americans were half as likely as whites to possess state-issued photo ID); MATT A. BARRETO, STEPHEN A. NUÑO, & GABRIEL R. SANCHEZ, VOTER ID REQUIREMENTS AND THE DISENFRANCHISEMENTS OF BLACK, LATINO, AND ASIAN VOTERS 10 (2007) (“For five out of six types of voter identification, Latinos, Asians, Blacks and immigrants were statistically less likely to have access to ID, as compared to Whites and the native born.”), available at http://brennan.3cdn.net/63836ceea55aa81e4f_hlm6bhkse.pdf; see also BRENNAN CTR. FOR JUSTICE, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS’ POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 2 (2006), available at http://www.brennancenter.org/page/-/d/download_file_39242.pdf (noting that “[m]inority citizens are less likely to possess government-issued photo identification”).

¹⁴ We conducted this calculation as follows. First, we used the percentage of registered white voters in Texas listed in the U.S. Census Bureau’s *2010 Current Population Survey* and Texas’ report of the total number of registered

These findings are consistent with several national voter surveys that have found that voters of color are, in fact, significantly less likely to possess a state-issued photo ID than white voters.¹⁵ Absent any evidence to the contrary provided by the State, it appears that these racial disparities also exist in Texas, not only as to Latino voters but as to African Americans and Asian Americans as well. This further underscores the retrogressive impact that Senate Bill 14 would have on minority voting strength if Texas implements its proposed photo ID requirement.

III. Texas’s proposed “election identification certificate” program would not eliminate the disproportionate impact of Senate Bill 14 on minority voters because the program’s burdensome application process and hard-to-access office locations would discourage minority voters from applying.

A. Texas’s proposed application process for “election identification certificates” is highly onerous and will likely deter eligible non-white voters from applying for such a certificate.

The application process that the State has proposed¹⁶ for obtaining an “election identification certificate”¹⁷ is extremely burdensome. The process will therefore likely deter many voters, and particularly voters of color, from applying for an EIC.

The proposed application process would require applicants to provide the Department of Public Safety (DPS) with an inordinate amount of personal information and documentation in order to obtain an EIC. Most EIC applicants, for instance, would need to produce not only a birth

voters in the State to estimate the current number of registered white voters in Texas. This method yields an estimate of 7.80 million white registered voters (with a confidence interval ranging from 7.61 million to 7.99 million). Next, we used the observed *percentage* of registered Latino voters who lack photo ID in Texas (6.28%) to estimate the raw *number* of registered white voters in Texas who would lack ID if white voters had the same ID ownership rate as Latino voters. Doing this calculation reveals that, if white voters actually had the same ID ownership rate as Latino voters, there would be roughly 489,000 white voters in Texas without a state-issued photo ID (with a confidence interval ranging from 478,000 to 501,000). However, it is impossible for this many white voters to lack photo ID given that Texas reports that only 429,026 non-Latino voters lack ID. Accordingly, white voters in Texas necessarily have a higher rate of photo ID ownership than Latinos, regardless of how many voters of other races have ID. See Sundeep Iyer, *Texas’s Own Data Reveals Discriminatory Impact of Voter ID Law*, Brennan Ctr. for Justice (Nov. 14, 2011), http://www.brennancenter.org/blog/archives/texas_own_data_reveals_discriminatory_impact_of_voter_id_law (showing that even if every African-American and Asian-American voter in the State had a valid photo ID, Texas’s data would still demonstrate that Latinos have a lower rate of ID ownership than white voters).

¹⁵ See FRASURE ET AL. *supra* note 13; BARRETO ET AL. *supra* note 13, at 10; BRENNAN CTR. FOR JUSTICE, *supra* note 13, at 2.

¹⁶ Tex. Dep’t of Public Safety, *Proposed Rule Concerning Election Identification Certificates* (hereinafter “*Proposed EIC Rule*”) (to be codified at 37 TEX. ADMIN. CODE §§ 15.181-185), *available at* <http://texinfo.library.unt.edu/texasregister/html/2011/oct-14/PROPOSED/37.PUBLIC%20SAFETY%20AND%20CORRECTIONS.html>.

¹⁷ Senate Bill 14 established this new form of photo identification specifically for voters who do not own another form of acceptable photo ID. See Senate Bill 14, at § 20 (codified at TEX. TRANSP. CODE § 521A.001).

certificate but two additional forms of official identification, as well.¹⁸ This requirement would inevitably have a retrogressive impact on minority voters since these voters are “significantly less likely [than white voters] to be able to provide multiple forms of identification, such as a copy of their original birth certificate, or a recent bank statement.”¹⁹

The application’s other onerous requirements would only exacerbate the EIC program’s retrogressive effect on voters. The requirement that EIC applicants submit to fingerprinting by DPS²⁰ is particularly troubling since the fingerprinting requirement would likely discourage many eligible voters from applying for an EIC.²¹ Given that African Americans and Latinos exhibit significantly greater distrust in police and the criminal justice system than whites,²² it is quite possible that many minority voters in Texas would be reluctant to submit to fingerprinting by the State’s “premier law enforcement agency”²³ as a prerequisite for voting.²⁴

¹⁸ Every EIC applicant will need to furnish a birth certificate and two additional forms of identification unless she can furnish a court order “indicating an official change of name and/or gender” or a Texas driver’s license that has been expired for less than two years. *Proposed EIC Rule*, § 115.182.

¹⁹ BARRETO ET AL., *supra* note 13, at 1.

²⁰ See *Proposed EIC Rule*, § 115.183(a) (“An application for an election identification certificate must include: . . . (3) the fingerprints of the applicant.”).

²¹ Some public benefits administrators in California believe that many of the state’s eligible food stamp recipients were deterred from applying for the benefits because the application involved a fingerprinting requirement. According to one administrator, the fingerprinting requirement was “an impediment to folks who would normally show up and perhaps apply for that particular benefit. It’s been borne out that that does have a chilling effect on folks’ participation, even for the very elderly.” Elaine Korry, *Food Stamps Fail To Reach Many in Need*, NPR.ORG (July 25, 2005), <http://www.npr.org/templates/story/story.php?storyId=4767001>. Earlier this year, California legislators voted to repeal the fingerprinting requirement. Associated Press, *Bill Cuts Fingerprinting from Welfare Application*, CBSSACRAMENTO.COM (June 1, 2011, 9:01pm), <http://sacramento.cbslocal.com/2011/06/01/bill-cuts-fingerprinting-from-welfare-application>.

²² See MARK HUGO LOPEZ & GRETCHEN LIVINGSTON, *HISPANICS AND THE CRIMINAL JUSTICE SYSTEM: LOW CONFIDENCE, HIGH EXPOSURE 2* (2009) (observing that 74% of whites surveyed had “a great deal or fair amount of confidence” that the police treat people of different races equally compared to just 37% of African Americans and 45% of Latinos), available at <http://pewhispanic.org/reports/report.php?ReportID=106>; Jon Hurwitz & Mark Peffley, *Explaining the Great Racial Divide: Perceptions of Fairness in the U.S. Criminal Justice System*, 67 J. POL. 762, 763 (2005) (“Quite simply, most whites believe the CJS [i.e., criminal justice system] is fundamentally fair, and most African Americans do not.”), available at <http://www.uky.edu/AS/PoliSci/Peffley/pdf/Hurwitz%20%26%20Peffley%202005%20JOP%20Explaining%20the%20Great%20Racial%20Divide%202.pdf>.

²³ *Education Training, and Research Overview: Law Enforcement Education*, TEX. DEP’T OF PUBLIC SAFETY (last visited Nov. 5, 2011), http://www.txdps.state.tx.us/trainingacademy/police_training/overview.htm.

²⁴ See generally SIMON A. COLE, *SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION* 258 (2001) (noting that “[fingerprinting] technology . . . may be highly prejudicial to those who live in neighborhoods targeted by police or who have an appearance—skin color, dress, and so on—targeted by police”).

B. Texas’s driver’s license offices, where voters must go to obtain an election identification certificate, are not easily accessible for the State’s non-white voters.

The State’s supplemental submission reveals that Texas’s minority voters may face substantial barriers in accessing the driver’s license offices (DLOs) where EICs are issued and, thus, would not be able to obtain them without significant hardship.

The three primary obstacles that hinder minority communities’ access to Texas’s DLOs are transportation access, poverty, and distance. First, Texas’s minority voting-age citizens are less likely to live in households with access to a private vehicle,²⁵ leaving fewer and less convenient transportation options available to black and Latino EIC applicants. These disparities remain even if the populations of Texas cities with major metropolitan transit systems are excluded from the analysis, suggesting that minority voters in Texas’s rural areas experience the same gaps in private transportation access as those who reside in the State’s urban areas.²⁶

Second, since African Americans and Latinos are more likely than whites to live in poverty,²⁷ they face a greater financial disincentive in accessing public transportation for purposes of obtaining the requisite photo ID—assuming public transportation is even available in their area.²⁸

²⁵ According to the 2009 *American Community Survey*, 9.8% of voting-age African Americans and 4.8% of voting-age Latino citizens do not have access to a private vehicle. In contrast, only 2.4% of white voting age citizens do not have access to a private vehicle. U.S. CENSUS BUREAU, *2009 American Community Survey* (last visited Sept. 7, 2011), available at <http://dataferrett.census.gov> (data obtained by creating a custom table from the 2009 *American Community Survey* one-year estimates in the U.S. Census Bureau’s *Data Ferrett*) (demonstrating significance at the 5% level, using a Z test for a single sample proportion).

²⁶ Even if the populations of San Antonio, Houston, Dallas, Austin, Fort Worth, and Corpus Christie—cities with major metropolitan public transit systems—are excluded from this analysis, the racial disparities in the number of Texas households with access to a private vehicle remain stark. According to the 2000 U.S. Census, 16.1% of Texas’s black households and 10.4% of Texas’s Latino households lack access to a private vehicle while only 4.5% of the State’s white households lack access to a private vehicle. U.S. CENSUS BUREAU, *2000 Census* (last visited Sept. 7, 2011), available at http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=DEC&_submenuId=&_lang=en&_ts= (data obtained by creating a custom table from the 2000 US Census Summary File 3 on American FactFinder website).

²⁷ While only 11% of white Texans live below the poverty line, roughly 30% of African Americans and 34% of Latinos in Texas live in poverty. STATE HEALTH FACTS, *Texas: Poverty Rate by Race/Ethnicity, States* (2008-09), <http://www.statehealthfacts.org/profileind.jsp?ind=14&cat=1&rgn=45> (last visited Sept. 1, 2011).

²⁸ Newton County is the only Texas county with no public or regional transit system whatsoever, even for the elderly or people with disabilities. See TEX. DEP’T OF TRANSP., *Rural Transit Systems Contacts* (last visited Sept. 12, 2011), http://www.dot.state.tx.us/drivers_vehicles/public_transit/contacts.htm?type=rural (listing contact information for rural public transit systems in Texas). The county also has the highest rate of Latino households in all of Texas—26.9%—without access to a private vehicle. U.S. CENSUS BUREAU, *2000 Census* (last visited Sept. 7, 2011), available at http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=DEC&_submenuId=&_lang=en&_ts= (data obtained by creating a custom table from the 2000 US Census Summary File 3 on American FactFinder website). Moreover, there is no driver’s license office in the county. See Letter from Ann McGeehan, Director of Elections, Office of Tex. Sec’y of State, to T. Christian Herren, Jr., Chief, Voting Section, Civil Rights Division, Dep’t of Justice (Oct. 4, 2011) (on file with Brennan Center) (“Driver’s License Offices” spreadsheet).

Finally, minority voters who are able to secure the necessary transportation to apply for an EIC would, on average, have to travel farther than white voters to reach their nearest DLO. As we noted in our last letter, Latino voting-age citizens are significantly more likely than other voters to live more than twenty miles away from their nearest DLO location. According to 2010 U.S. Census data, the concentration of Texas's Latino voting-age citizens in these areas is 85.6% greater than it is in the rest of the State.²⁹ In contrast, the concentration of voting-age white citizens in these areas is 34.3% less than it is in the rest of Texas.³⁰ This reveals that the State's eligible Latino voters will face substantially greater obstacles in obtaining an EIC than eligible white voters. More importantly, it suggests that the State's proposed EIC program will not likely cure existing racial disparities in photo ID ownership among Texas voters and, in fact, may even exacerbate these disparities.

IV. The Texas Secretary of State has failed to demonstrate that Senate Bill 14's voter education program adequately addresses the stark racial disparities among Texas voters in internet access, literacy rates, and television viewing habits.

A. The Secretary of State's "Request for Proposals" does not satisfy Texas's burden to disprove retrogression under Section 5 of the Voting Rights Act nor does it satisfy DOJ's request for a "detailed description of the voter education program that the State will implement."

The State's response to DOJ's recent request for a "detailed description of the voter education program that the State will implement pursuant to [Senate Bill 14]"³¹ is inadequate on its face.³² In fact, the State's response to DOJ does not even purport to describe an actual plan for educating voters about the new photo ID requirements; rather, it merely indicates that the Secretary of State has issued a Request for Proposals (RFP) soliciting voter education program plans from private contractors.³³ By its very definition, however, a "Request for [Voter Education] Proposals" is not a voter education proposal. A covered jurisdiction, such as Texas,

²⁹ This information was obtained by using ArcMap10 software to tabulate the total population living in Census block groups that were in their entirety at least ten miles from the nearest DLO location. DLO locations were obtained from the Texas Department of Public Safety's *Texas Driver's License Office Map*, available at http://www.txdps.state.tx.us/administration/driver_licensing_control/rolodex/search.asp; 2010 Census block group population data were obtained from the Texas Legislative Council, available at ftp://ftpgis1.tlc.state.tx.us/2011_Redistricting_Data/2010Census/Population. For a more detailed explanation of this analysis with accompanying graphics, see Sundeep Iyer, *Unfair Disparities in Voter ID: The Accessibility of Texas Driver's License Office Locations*, BRENNAN CTR. FOR JUSTICE, (last visited Nov. 9, 2011), http://www.brennancenter.org/blog/archives/the_accessibility_of_texas_dlo_locations.

³⁰ Iyer, *supra* note 29.

³¹ Letter from T. Christian Herren, Jr., Chief, Voting Section, Dep't of Justice, to Ann McGeehan, Director of Elections, Tex. Office of the Tex. Sec'y of State (Sept. 23, 2011) (on file with Brennan Center for Justice), available at http://brennan.3cdn.net/605e4ef6b1842ab7e7_t8m6bpr50.pdf.

³² Senate Bill 14 mandates that the Texas Secretary of State develop a voter education program to notify voters about the new photo ID requirement but provides few concrete details about what this program should ultimately entail. See Senate Bill 14, at § 20.

³³ See OFFICE OF THE TEX. SEC'Y OF STATE, REQUEST FOR PROPOSAL NO. 12111: HELP AMERICA VOTE ACT OF 2002 VOTER EDUCATION AND OUTREACH OPPORTUNITIES, at 1-19 (issued Oct. 3, 2011), available at http://esbd.cpa.state.tx.us/docs/307/97119_1.pdf.

cannot circumvent its non-retrogression burden simply by asserting a generalized intent to adopt a plan for educating voters about a new voting qualification.³⁴

B. The Secretary of State’s “Request for Proposals” will not yield a voter education program capable of effectively reaching African-American and Latino communities and overcoming significant racial disparities among Texas voters in both literacy rates and media access.

The State’s failure to furnish an actual voter education proposal is particularly problematic in light of the significant racial disparities that exist among Texas’s voters in access to communications media. As we noted in our last letter to DOJ, black and Latino voting-age citizens in Texas are significantly less likely to have internet access than whites. While 78.3% of Texas’s eligible white voters have internet access, only 58.7% of eligible Latino voters and 55.1% of eligible African-American voters have internet access, according to recent U.S. Census data.³⁵ This discrepancy reveals the difficulty that many minority voters would face in trying to access the web-based components of the Secretary of State’s voter education efforts described in the RFP.

Other racial disparities among Texas voters render other aspects of the RFP similarly ineffective for reaching the State’s minority voters. For instance, the racial disparities in literacy rates among Texas voters, which we highlighted in our last letter,³⁶ diminish the overall effectiveness of the RFP’s presumed billboards, mailings, and other print-based voter education efforts in Texas’s minority communities. Similarly, the RFP’s proposed television announcements will be less likely to reach Latino voters than other voters since Latinos watch

³⁴ The Supreme Court has recognized that “[t]he discriminatory potential in seemingly innocent or insignificant changes can only be determined after the *specific* facts of the change are analyzed in context.” *NAACP v. Hampton Cnty. Election Comm’n*, 470 U.S. 166, 176 n.21 (1985) (emphasis added) (quoting testimony of Drew Days III, former Assistant U.S. Attorney General, Civil Rights Division, Department of Justice, at *Hearings on Extension of the Voting Rights Act Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong., 1st Sess., 2122 (1981)).

³⁵ U.S. CENSUS BUREAU, *2010 Current Population Survey* (last visited Sept. 7, 2011), available at <http://dataferrett.census.gov> (data obtained by creating custom table from Current Population Survey’s *Internet and Computer Use Supplement* with the U.S. Census Bureau’s *Data Ferrett*).

³⁶ Letter from Gary Bledsoe, President, Texas State Conference of the NAACP, et al., to T. Christian Herren, Chief, Voting Section, Dep’t of Justice (Sept. 14, 2011) (on file with Brennan Center), available at http://brennan.3cdn.net/772eab3b160f2da9f7_n4m6ivkrc.pdf. As we noted in the letter:

The best available data on literacy rates across Texas reveal that the counties with the highest rates of Level 1 literacy also have the highest minority voting-age populations. Since individuals with a Level 1 literacy level cannot identify or enter background information on a social security card, they would not benefit from written notices describing the various forms of photo identification now required for voting under Senate Bill 14.

Id. (citing NATIONAL INSTITUTE FOR LITERACY, *THE STATE OF LITERACY IN AMERICA: ESTIMATES AT THE STATE, LOCAL, AND NATIONAL LEVELS*, 243-53 (1998), available at <http://www.eric.ed.gov/PDFS/ED416407.pdf>; U.S. CENSUS BUREAU, *2010 Census* (last visited Sept. 7, 2011), available at http://factfinder.census.gov/servlet/CustomTableServlet?_ts=333464942224).

less television than other groups.³⁷ Although the RFP does not even mention a telephone component of the State's voter education plan, any phone-based education efforts would also be less likely to reach voters of color than white voters given racial disparities in telephone access among Texas's eligible voting population.³⁸

Thus, in order to effectively notify black and Latino voters about Senate Bill 14's new photo ID requirements, the State would have to make a concerted effort to overcome these various gaps in minority voters' access to popular communications media. Since these voters are statistically less likely than white voters to own a government-issued photo ID in the first place,³⁹ Texas's voter education program would not only need to inform these voters about the existence of the new photo ID requirement but also about how and where they might obtain a form of ID that satisfies the new requirement.

While the State has yet to identify a specific plan for achieving this, its RFP suggests that it has already underestimated the costs of such an effort. The RFP's "Cost Proposal" section—which was omitted from the RFP excerpt that Texas submitted to DOJ—instructs the proposer to "assume a total budget of no more than \$3,000,000.00."⁴⁰ This figure represents an average expenditure per registered voter of only 20 cents, and pales in comparison to the estimated costs of voter education in other, smaller states that have recently considered new voter ID laws. The Missouri Secretary of State, for instance, estimated in 2010 that it would cost more than \$5.5 million per year to inform the State's four million voters about new photo ID requirements.⁴¹ Conducting a similar analysis earlier this year, the Institute for Southern Studies estimated that

³⁷ THE NIELSEN COMPANY, CROSS-PLATFORM REPORT: QUARTER 1, 2011, at 7 (2011) (surveying over 20,000 people nationally and concluding that Latino television viewers watch roughly 20 fewer hours of television per month, on average, than white viewers), available at <http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2011-Reports/Nielsen-cross-platform-report-Q1-2011-reissued.pdf>.

³⁸ According to the 2009 *American Community Survey*, 2.1% of voting-age black citizens and 2.2% of voting-age Latino citizens in Texas do not have telephones compared to just 1.4% of white voting-age Texas citizens. U.S. CENSUS BUREAU, 2009 *American Community Survey* (last visited Sept. 7, 2011), available at <http://dataferrett.census> (data obtained by creating a custom table from the 2009 *American Community Survey* one-year estimates in the U.S. Census Bureau's *Data Ferrett*) (demonstrating significance at the 5% level, using a Z test for a single sample proportion).

³⁹ See *supra* Part II (discussing the disproportionate number of minority voters who lack photo ID in Texas); see also LORRIE FRASURE ET AL., 2008 COLLABORATIVE MULTI-RACIAL POST-ELECTION STUDY (2009), available at <http://cmpstudy.com/index.html> (concluding that African-Americans were significantly less likely than whites to possess state-issued photo ID); MATT A. BARRETO, STEPHEN A. NUÑO, & GABRIEL R. SANCHEZ, VOTER ID REQUIREMENTS AND THE DISENFRANCHISEMENTS OF LATINO, BLACK, AND ASIAN VOTERS 10 (2007) available at http://brennan.3cdn.net/63836ceea55aa81e4f_hlm6bhkse.pdf ("For five out of six types of voter identification, Latinos, Asians, Blacks and immigrants were statistically less likely to have access to ID, as compared to Whites and the native born.").

⁴⁰ OFFICE OF THE TEX. SEC'Y OF STATE, REQUEST FOR PROPOSAL NO. 12111: HELP AMERICA VOTE ACT OF 2002 VOTER EDUCATION AND OUTREACH OPPORTUNITIES, at 13 (issued Oct. 3, 2011), available at http://esbd.cpa.state.tx.us/docs/307/97119_1.pdf.

⁴¹ See TOVA WANG & JENNIFER LOHR, VOTER IDENTIFICATION IN KANSAS: A MISPLACED PRIORITY 4 (2011) ("Missouri estimated it would cost \$16.9 million over three years for TV announcements and other outreach to the state's 4 million voters.") (citing MISSOURI COMMITTEE ON LEGISLATIVE RESEARCH OVERSIGHT DIVISION, FISCAL NOTE L.R. NO. 4048-02, BILL NO. HJR 64 (2011), [http://www.moga.mo.gov/oversight/OVER10/\\$spdf/4082-02N.ORG.PDF](http://www.moga.mo.gov/oversight/OVER10/$spdf/4082-02N.ORG.PDF)), available at http://www.demos.org/sites/default/files/publications/VoterID_Kansas_Demos.pdf.

North Carolina would need to spend \$14 million on voter education for its six million voters if the State enacted its own photo ID requirement for voting.⁴² In contrast, Texas's RFP indicates that it intends to spend significantly less than either of these states to educate its 15 million eligible voters about Senate Bill 14's new photo ID requirements.

The State's RFP also reveals an unrealistic timeline for educating voters about the new ID requirements. The RFP's proposed schedule sets the "Project start date" at January 4, 2012, only two months before the State's 2012 primary election.⁴³ This leaves an extremely narrow window of time for the State to identify those eligible voters who currently lack photo ID and to inform them of the new ID requirements. Moreover, since the State must notify voters of the new ID requirements far enough in advance of the election to give them sufficient time to actually obtain the new IDs—as well as any requisite documentation needed to apply for those IDs⁴⁴—the State has even less time to conduct voter education. Given the obvious importance of timely voter education to the equitable implementation of new voter ID laws,⁴⁵ Texas's RFP does not provide a practical schedule for effectively educating voters about Senate Bill 14's new ID requirements. Accordingly, DOJ should interpose an objection to the new law.

Finally, as discussed above, Texas has not provided any basis on which to conclude that even a well-designed education program would significantly alter the racial disparities that currently exist among Texas voters who lack the requisite photo ID. Because of the longstanding problems that minority voters face in participating on an equal basis in the electoral process, curing the disparities that exist with regard to ownership of government-issued photo ID requires more than a good publicity campaign.

V. Conclusion

Texas has failed to show that Senate Bill 14 will not have a retrogressive impact on African-American and Latino voters, and also has failed to demonstrate the absence of a

⁴² See Chris Komm, *Voter ID Laws Carry Heavy Price Tag for Cash-Strapped States*, INSTITUTE FOR SOUTHERN STUDIES (Jan. 27, 2011), <http://www.southernstudies.org/2011/01/voter-id-laws-carry-hefty-price-tag-for-cash-strapped-states.html>.

⁴³ OFFICE OF THE TEX. SEC'Y OF STATE, REQUEST FOR PROPOSAL NO. 12111: HELP AMERICA VOTE ACT OF 2002 VOTER EDUCATION AND OUTREACH OPPORTUNITIES, at 9 (issued Oct. 3, 2011), *available at* http://esbd.cpa.state.tx.us/docs/307/97119_1.pdf.

⁴⁴ Applicants for a state driver's license in Texas are typically required to produce a variety of identification documents that are often not freely or readily available, such as birth certificates, which cost \$22 in Texas. See TEX. TRANSP. CODE ANN. § 521.142 ("The application must include any other information the department requires to determine the applicant's identity, competency, and eligibility."); TEX. DEP'T OF STATE HEALTH SERVICES, *Certified Copy of a Birth Certificate* (last visited Sept. 1, 2011), http://www.dshs.state.tx.us/vs/reqproc/certified_copy.shtm. In addition, Senate Bill 14 itself permits the Texas Department of Public Safety to ask voters seeking an "election identification certificate" (i.e., the no-fee photo ID card that the bill creates for people with no other acceptable form of photo ID) for the same documentation required to apply for a state driver's license application. Senate Bill 14, § 20.

⁴⁵ See, e.g., *Common Cause/Georgia League of Women Voters v. Billups*, 439 F. Supp. 2d 1294, 1346 (2006) (noting the importance of ensuring that state election officials have "sufficient time" to notify voters of new photo ID requirements such that voters have "sufficient time to make arrangements to travel . . . and obtain the cards").

discriminatory purpose. Accordingly, we urge the Attorney General to interpose a Section 5 objection to the proposed photo ID requirement.

Respectfully submitted,

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