No. 14-41127

In the United States Court of Appeals for the Fifth Circuit

MARC VEASEY; JANE HAMILTON; SERGIO DELEON; FLOYD CARRIER; ANNA BURNS; MICHAEL MONTEZ; PENNY POPE; OSCAR ORTIZ; KOBY OZIAS; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; JOHN MELLOR-CRUMLEY; DALLAS COUNTY, TEXAS, Plaintiffs-Appellees,

TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS, Intervenor Plaintiffs-Appellees,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS; TEXAS SECRETARY OF STATE; STATE OF TEXAS; STEVE MCGRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, Defendants-Appellants.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND; IMANI CLARK, Intervenor Plaintiffs-Appellees,

v.

STATE OF TEXAS; TEXAS SECRETARY OF STATE; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, Defendants-Appellants.

TEXAS STATE CONFERENCE OF NAACP BRANCHES; MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES, Plaintiffs-Appellees,

v.

TEXAS SECRETARY OF STATE; STEVE MCGRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, Defendants-Appellants.

LENARD TAYLOR; EULALIO MENDEZ, JR.; LIONEL ESTRADA; ESTELA GARCIA ESPINOZA; MARGARITO MARTINEZ LARA; MAXIMINA MARTINEZ LARA; LA UNION DEL PUEBLO ENTERO, INCORPORATED, Plaintiffs-Appellees,

v.

STATE OF TEXAS; TEXAS SECRETARY OF STATE; STEVE MCGRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, Defendants-Appellants.

On Appeal from the U.S. District Court for the Southern District of Texas, Corpus Christi Division, Nos. 2:13-cv-193, 2:13-cv-263, 2:13-cv-291, and 2:13-cv-348

BRIEF FOR AMICUS CURIAE AARP SUPPORTING APPELLEES

Counsel listed on inside cover

DANIEL B. KOHRMAN
IRIS Y. GONZALEZ
AARP FOUNDATION LITIGATION
601 E St., N.W.
Washington, D.C. 20049
Tel: 202-434-2060
Fax: 202-434-6424
dkohrman@aarp.org
Counsel for Amicus Curiae AARP

CERTIFICATE OF INTERESTED PERSON

This case, *Veasey v. Abbott*, is numbered 14-41127. Pursuant to Circuit Rule 28.2.1, undersigned counsel of record, certify that the parties' lists of persons and entities having an interest in the outcome of this case are complete, to the best of undersigned counsel's knowledge. Undersigned counsel also certifies that Amicus Curiae AARP is a nonprofit corporation with no parent corporation, and that no publicly held corporation owns ten percent or more of its stock.

Dated March 10, 2015

/s/Daniel B. Kohrman
Daniel B. Kohrman, D.C. Bar # 394064
AARP Foundation Litigation
601 E St., N.W.
Washington, D.C. 20049
Tel: 202-434-2060
Fax: 202-434-6424
dkohrman@aarp.org
Counsel for Amicus Curiae AARP

CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP also is organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951.

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, and AARP Insurance Plan, also known as the AARP Health Trust.

AARP has no parent corporation, nor has it issued shares or securities.

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

AARP is a nonpartisan, nonprofit organization with a membership that helps people turn their dreams into real possibilities, strengthens communities and fights for issues that matter most to families, such as voting rights, healthcare, income security, retirement planning, affordable utilities and protection from financial abuse. AARP strives to address the needs and interests of people 50-plus, and through legal and legislative advocacy to preserve means to enforce their rights.

Since 2005 AARP has supported legal challenges to strict state photo ID voting laws, such as Texas Senate Bill 14, 82nd Leg., R.S. (Tx. 2011) ("S.B. 14"). AARP's concern has been the likely impediments to in-person electoral participation and the demonstrated actual barriers thereto that photo ID rules impose for eligible older voters, especially disabled, minority, low-income and other vulnerable older voters, many of whom have regularly voted at local polling places for decades.

AARP has filed or joined amicus curiae briefs contesting the validity of state photo ID voting laws in the U.S. Supreme Court, in *Crawford v. Marion County*

[1] Pursuant to Fed. R. App. P. 29(c)(5), AARP certifies: that no party or party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money intended to fund the brief's preparation or submission; and that only Amicus Curiae provided funds to prepare and submit this brief. This brief is filed with the consent of all parties, pursuant to Fed. R. App. P. 29(a).

Election Board, 553 U.S. 181 (2008), and in state courts in Indiana, Michigan, Minnesota, Missouri, Pennsylvania and Wisconsin. Moreover, AARP Foundation Litigation has served as co-counsel for plaintiffs in suits seeking to enjoin photo ID voting laws in Arizona and Georgia.

SUMMARY OF ARGUMENT

Amicus Curiae AARP focuses on the claims in this appeal most directly relevant to the rights of older voters. These encompass, above all, the District Court's holding that S.B. 14, as applied to fourteen individual voter plaintiffs, imposes undue burdens on voting in violation of the Fourteenth Amendment. AARP explains how older voters are particularly likely to suffer harm due to significant costs and other barriers associated with obtaining underlying identification necessary to secure so-called "free" voter ID. Further, AARP addresses Texas' effort to justify S.B. 14's restrictions on in-person voting by citing S.B. 14's exemption of persons age 65 or over, or with a certified disability, who vote by mail, from a duty to produce photo ID. For older voters, and voters with disabilities, a very large share of whom are age 50 or over, these exemptions do not significantly ameliorate the serious harm caused by S.B. 14 in restricting the right to vote in-person. Finally, AARP identifies ways in which S.B. 14 has an especially discriminatory impact on older minority voters.

ARGUMENT

I. The Supreme Court's Decision in *Crawford v. Marion County Election Board* is Consistent with the District Court's Conclusions that S.B. 14 Would Impose Undue Burdens, Violating the Fourteenth Amendment, on Persons Such as the Voter Plaintiffs, Many of Whom Are Older Citizens Eligible to Vote Who Lack S.B. 14–Compliant Photo ID and Face Serious Impediments to Obtaining It.

A. While *Crawford* Provides the Proper Legal Framework for This Case, Its Rejection of a Facial Challenge to Indiana's Voter ID Law Does Not Control This As–Applied Challenge to S.B. 14.

The Voter Plaintiffs brought their Equal Protection/Undue Burden claims against S.B. 14 as individuals and as members of adversely affected subgroups of the Texas electorate; such claims focused on "Non-racial [d]iscrimination in [v]oting."[2] The crux of these claims, as upheld by the district court, is that S.B. 14 places "a substantial . . . burden on the right to vote." The district court properly "applie[d] the *Anderson*/*Burdick* balancing test as the standard of review." ROA.27127 (citing *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190 (2008) (citing and discussing *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebreeze*, 460 U.S. 780 (1983)). But the district court recognized a fundamental distinction between this case and *Crawford*, which dictates a different manner of implementing the *Anderson/Burdick* test. That is, "[u]nlike in

[2] *See, e.g., Veasey v. Abbott*, No. 13-CV-00193 (S.D. Tex.) (Doc. 109) (Veasey Plaintiffs' Second Amended Complaint, filed Dec. 6, 2013) (Count 4, 14th Amendment).

Crawford, this Court is confronted with an as-applied challenge to [a] voter ID law"; further distinguishing *Crawford*, the district court explained that it had conducted a "full trial on the merits in which the Court heard abundant evidence of specific Plaintiffs' individual burdens as well as evidence of more categorical burdens that apply to the population represented by the No-Match List."[3] ROA.27129. Hence, the district court's job was to

> . . . determine the nature of SB 14's burden, the nature of the state's justifications, and whether the state's interests make it necessary to burden the Plaintiffs' rights. While Plaintiffs have not demonstrated that any particular voter absolutely cannot get the necessary ID or vote by absentee ballot under SB 14, such an extreme burden is not necessary in an as-applied challenge.

Id. In short, the district court's task *was*, and on appeal this Court's task also necessarily *is*, far more limited than the task before the courts in *Crawford*.

The district court noted that Justice Stevens' lead *Crawford* opinion found an absence of evidence "necessary to assess the burden [of the challenged voter ID law] on a subgroup [of the electorate or on individuals] and therefore [the *Crawford* Court had] evaluated Indiana's law as it applied generally" – *i.e.*, to "all of the registered voters" in the state and not "just those who do not already have

[3] The "No-Match List" is "a list of voter records that did not match with any [records in databases of persons with] SB 14 qualified photo ID." It was created by Dr. Stephen Ansolabehere, of Harvard University, an expert on behalf of plaintiff-appellee United States. ROA.27075-76 and nn. 205-06.

the ID[.]" ROA.27128 (citing 553 U.S. at 201-03). By contrast, the district court declared,

> Justice Stevens' reasoning in dismissing the subgroup-particularized balancing test does not apply here because the type of evidence that Justice Stevens needed in order to consider the burden on the subgroup has been supplied as to Texas voters in this case.

Id. The "subgroups" most heavily burdened by S.B. 14 include older voters.

This difference dissolves Texas' assertion that a simple application of *Crawford* demonstrates that S.B. 14 "do[es] not substantially burden the right to vote." Brief for Appellants ("Tex. Br.") at 14. The *Crawford* Court reasoned that steps required to obtain photo ID in Indiana "surely d[id] not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting" precisely because the Court generalized from the experience of "most voters who need [photo ID]," and did not focus on "specific subsets of potential voters who [the Crawford Court recognized] may have 'a somewhat heavier burden' under voter ID laws" such as S.B. 14. Tex. Br. at 14-15, 22 (quoting *Crawford*, 553 U.S. at 198, 199). Thus, *Crawford* does not provide the cure-all Texas suggests. To the extent Texas acknowledges differences between these consolidated cases and *Crawford*, it attempts to explain them away by exalting the exemptions S.B. 14 provides to some older voters and some voters with disabilities beyond what the record shows to be their actual impact (*see infra*, § I.C.).

B. S.B. 14 Creates Greater Risks of Disenfranchising Older Voters and Imposes Greater Injury to Their Voting Rights.

S.B. 14 imposes disproportionate harm and risks of harm to the voting rights of older voters for multiple reasons.

Common sense alone indicates that older citizens otherwise eligible to vote in-person are more likely to lack "[t]he only acceptable forms of photo ID" mandated by S.B. 14. ROA.27043. For instance, older people are less likely to have a "United States military ID card containing a photo." ROA.27043. Older people, including those in their early 60s, also are less likely to have a driver's license, and if they have one, to have allowed it to expire. Indeed, Texas has explicit age limits on ease of license renewal; thus, neither online nor phone renewal is available to many older people.[4] Similarly, many older people are unable (or no longer inclined) to travel abroad (if they ever did so), and thus, are less likely to have an unexpired (or at least a recently unexpired) passport. Although older people may have, at most, expired photo ID, and despite the contrary practice of other states, Texas has declined to permit "[e]lderly" voters to "to use expired ID." ROA.20746 (chart noting opposite effect of Kansas, New Hampshire, North Carolina and Tennessee photo ID laws).

[4] *See* "Renew Online or by Phone," Texas Department of Public Safety ("You must [be] younger than 79 years of age"), (Mar. 4, 2015), http://dps.texas.gov/DriverLicense/dlfork.aspx?action=renew.

The record below contains substantial "evidence [of] the costs to obtain . . . forms of photo ID permitted [by S.B. 14] if the voter does not already have an accurate original or certified copy of his or her birth certificate." ROA.27047 and n.65. The burdens of obtaining such birth records are especially great for older people, especially those with modest or non-existent income or savings. Numerous Texas voters testified at trial to their difficulties securing birth certificates needed to obtain a photo ID. To some degree, the problems they identified reflect the sheer passage of time, which makes the task of locating birth records far more onerous.[5] Still further logistical and cost challenges are presented for persons required to obtain a birth certificate issued outside Texas, another dilemma faced by many older voters, who are more likely than younger voters to have moved from their state of birth over the years. *See* ROA.27054, 27097-20799 (testimony of Sammi Bates, a "retiree"born in Mississippi, of Elizabeth Gholar, age 75-plus, and plaintiff Gordon Benjamin, age 65, both born in Louisiana, and of Ken Gandy, age 74, born in New Jersey).

[5] *See, e.g.*, discussion of testimony of plaintiffs Margarito Lara, age 77, Maximina Lara, age 75-plus, Floyd Carrier, age 84, and Gordon Benjamin, age 65, all of whom struggled – Mr. Lara "for more than twenty years" – to obtain a birth certificate; the Lara siblings found none in public records, and so, had to navigate a complex and costly procedure (involving "a 14-page packet of instructions and forms" costing at least $47) to get a "delayed birth certificate." ROA.20796-27099, 99864, 99824.

Another major factor requiring older voters to confront "varied bureaucratic and economic burdens associated with purchasing a proper birth certificate," ROA.27096, is the absence of birth records among people raised "in rural areas," where they were "birthed by midwives or . . . born on farms." ROA.27071. Indeed, nationwide, in 1940, the birth year of most U.S. citizens now 74, an estimated 7.5% of babies were not recorded with a birth certificate.[6] In Texas, nearly twice as many births – an estimated 13.5% – went unregistered.[7] A still greater share of Texas births outside hospitals –19.7%, almost one in five–went unrecorded.[8] An estimated 23% of U.S. births outside of hospitals went unregistered; and "about three in four of the non-white infants were born at home."[9] In 1950, the birth year of most citizens now 64, an estimated 14.8% of Texas births outside of hospitals (and 4% of Texas births overall) were not registered .[10] Once again, a significantly greater share of non-white births in Texas

[6] Sam Shapiro, Development of Birth Registration and Birth Statistics in the United States, 4 Population Studies 86, 97 Fig. 2 (1950) ('Shapiro").

[7] Shapiro at 97, Fig. 2. In 1933, Texas was the last state then in the union admitted to the U.S. Bureau of the Census' "birth registration area," a status reflecting state efforts to demonstrate "birth-registration completeness." *Id*. at 94-96.

[8] Joseph Schachter & Sam Shapiro, Birth Registration Completeness, United States, 1950, 67 Public Health Reps. 513, 516 Tbl. 1 (June 1952) ("Schachter & Shapiro")

[9] Shapiro at 99.

[10] Schachter & Shapiro at 516, Tbl. 1.

went unregistered: 11.1% overall, 23.3% born outside a hospital without a physician, and 17.3% born outside a hospital with a physician.[11]

The district court also found that "[m]istakes tend to crop up on birth certificates of those born at home with the help of midwives . . . ." ROA.27097. Such errors "occur in the names of parent and child, gender of child, date of birth of parents and child, and place of birth." *Id.* A flawed birth certificate requires correction before it can be used by a voter to secure a valid photo ID. *See* ROA.27097-27098 (discussing testimony of Elizabeth Gholar, age 75-plus, who was "required to hire a lawyer … to amend her [Louisiana] birth certificate," and Floyd Carrier, age 84, whose Texas birth certificate "was riddled with mistakes").

C. Texas' Exemption of Some Older Voters and Some Voters with Disabilities from Photo ID Requirements Does Not Excuse or Significantly "Mitigate" Harms to Older and Other Vulnerable Voters that *Crawford* Said Result from Laws Like S.B. 14.

1. S.B. 14 Exceptions Do Not Resolve the Undue Burden Issue.

The keystone of Texas' response to the Fourteenth Amendment /Undue Burden challenge to S.B. 14 is the outsized assertion that the State "mitigated *any* . . . inconveniences caused by the need to obtain ID by allowing the elderly and disabled to vote by mail and anyone without ID to vote by provisional ballot." Tex. Br. at 11 (emphasis supplied). Texas contends that these exceptions apply to "those most inconvenienced" by S.B. 14, *id.*, and further, that "[t]hese mitigation

[11] *Id*. at 520, Tbl. 3.

steps" go so far as to " address the concerns Justice Stevens articulated about specific subsets of voters who may have 'a somewhat heavier burden' under voter ID laws," *id.* at 22.

The first problem with this celebration of S.B. 14's exceptions is inaccuracy. In general, S.B. 14 does nothing positive for older voters or voters with disabilities. As the three-judge court said in 2012, "SB 14 largely retains Texas's existing rules for elderly and disabled voters. Voters over age 65 [and those with disabilities] will still be able to vote by mail, although they will have to present an SB 14-qualifying photo ID if they choose to vote at the polls." *Tex. v. Holder*, 888 F. Supp. 2d 113, 115 (D.D.C. 2012), *vacated and remanded on other grounds*, 133 S. Ct. 2886 (2013). Also, "disabled Texans [now additionally] will need to provide written documentation of disability from either the Social Security Administration or Department of Veterans Affairs." *Id.* (citing Tex. Elec. Code § 13.002(i)).

S.B. 14 also does not exempt all older people giving rise to concern in *Crawford – i.e.*, "elderly persons born out of State, who may have difficulty obtaining a birth certificate" needed to secure a photo ID. 553 U.S. at 199. It only helps people age 65 or above, thus excluding people in their early 60s, and others in their 50s, with precisely the same problem.[12] Further, Texas, unlike Indiana,

[12] Obviously, "elderly" has no precise definition; but 65 is surely too high a lower bound for identifying older persons likely to have difficulty obtaining out-of-state documentation. AARP, for example, takes members starting at age 50.

provides no option for older people "who can attest that they were never issued a birth certificate" to "present other forms of identification as their primary document," such as ID broadly available to older people above and below age 65, like "Medicaid/Medicare cards and Social Security benefits statements." *Id.* at 199, n.18.[13] Finally, S.B. 14's 65 and over exception does not provide a path to vote in-person, and as discussed below, the vote by mail option it does provide is thought by many to be untrustworthy and of little value.

S.B. 14 also does not exempt all "disabled" people, as Texas contends. Tex. Br. at 11, 22. Rather, it newly restricts exempt voters with disabilities to those with a SSA or VA "verifiable disability." *Accord* ROA.27043. The qualifications for "disability" under these federal programs appear quite arbitrary as criteria for exemption from in-person voting requirements. For instance, VA disability status affords no benefit to older men, and especially older women, who have no connection to the U.S. Armed Forces. The Social Security Disability Insurance (SSDI) program generally requires applicants for benefits to show "total

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[13] Medicaid and Social Security Supplemental Security Income (SSI) benefits are available to eligible low-income people below age 65; Social Security Disability Insurance (SSDI) benefits are available to eligible people unable to work below age 65; and Social Security retirement insurance benefits are available to eligible recipients beginning at age 62.

disability,"[14] *i.e.*, "inability to engage in any substantial gainful activity." 42 U.S.C. § 416(i)(1). This excludes many people with significant, or even severe disabilities – *e.g.*, a share of those using wheelchairs for mobility, or who are blind – who are nevertheless able to work, but who may have great difficulty obtaining photo ID. Thus, the criteria for a disability exemption are not well-tailored to mitigate burdens imposed by S.B. 14.

Nor do any of the three cited exceptions benefit "homeless persons" or "persons who because of economic or other personal limitations [other than, perhaps, disability] may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain state-issued identification." *Crawford*, 553 U.S. at 199. Finally, Texas ignores dramatic differences between the Indiana provisional voting scheme and its own. S.B. 14's regime requires people casting a provisional ballot to return within six days with a photo ID (unless they can show a religious objection to photo ID or that they lost photo ID in a natural disaster). Indiana's regime permitted "indigent" voters to return to the "county clerk's office within 10 days" to complete an affidavit swearing to their identity, their poverty and their inability "to obtain proof of

[14] U.S. Social Security Administration, "Disability Planner: What We Mean By Disability," (Mar. 5, 2015), http://www.ssa.gov/dibplan/dqualify4.htm.

identification without paying a fee." *Id.* at 185 & n.2, 199. It is flatly untrue that "Texas also allows such provisional ballots." Tex. Br. at 22.[15]

At most, S.B. 14's key exemptions benefit *some* older voters, *some* voters with disabilities and *some* other eligible voters without proper photo ID from *some* of the burdens of S.B. 14. Moreover, overall, S.B. 14's exemptions erect a "dual system," in important respects similar to that condemned in the Supreme Court's school cases, in which disfavored groups' right to vote is abridged by unequal access to the ballot. In effect, voters age 65 or over and voters with disabilities without photo ID in Texas are encouraged to settle for a "second-class" right to vote, akin to a provision restricting their access to polling places to fewer hours (say 10am to 4pm, instead of 8am to 6pm) than voters with photo ID. Rather than obviating a need to weigh burdens imposed by S.B. 14 against the law's purposes, and its impact in achieving such purposes, the law's chief exemptions call out for a careful weighing of benefits and costs to fundamental rights.

[15] To be sure, S.B. 14 permits provisional ballot casters to present "alternate 'acceptable' . . . identification," including "utility bills, 'official mail addressed to the person . . . from a governmental entity,' [and] any 'form of identification containing the person's photograph that establishes the person's identity . . . ." *Tex. v. Holder*, 888 F. Supp. 2d at 115 (quoting Tex. Elec. Code § 63.0101 (January 1, 2012)). But this provision is far less generous than Indiana law cited in *Crawford*.

2. Texas' Reliance on Voting by Mail Burdens the Voting Rights of Older People Able to Vote In-Person.

Many older (and younger) voters do not consider voting by mail to be a benefit or opportunity. Rather, they want to vote in-person and see the State's expectation that they will vote by mail as a burden.

The district court heard "substantial testimony that people want to vote in person at the polls, not even in early voting, but on election day." ROA.27110.[16] One witness, Reverend Johnson, described "appearing at the polls as part of his freedom of expression, freedom of association, and freedom of speech." *Id.* By contrast, plaintiff Ken Gandy, age 75, ROA.99824, "who voted by mail rather than not vote at all, said that he felt as though he was being treated like a 'second-class citizen.'" ROA.27110.

The trial record reflects that seven of fourteen Voter Plaintiffs, and seven of the nine "over the age of 65 and/or . . . disabled," each "expressed a reservation about casting their vote by mail." *Id*. The district court noted "agreement that voter fraud . . . takes place in abundance in connection with absentee balloting" – *i.e.*, one way of voting by mail – but not in connection with in-person voting,

[16] *See also id.*, n.373, citing testimony of witnesses Bates (a "retiree," ROA.27087), Eagleton, Benjamin (age 65; *see* ROA.27098), and Gholar ("born in the 1930s," ROA.27097).

ROA.27042, and the district court cited testimony of several witnesses regarding the impact of such fraud on older voters in particular.[17]

3. Texas' Older Voters Exemption Is Misguided, Focusing on Voters Age 65 Plus Whose Turnout is Robust, While Ignoring Voters Age 45-64, Whose Turnout Is Nearly the Lowest in the US.

The gravity of the burdens imposed by S.B. 14 generally, and in particular on various age cohorts, cannot be properly evaluated without examining the problem of voter participation in Texas. That is, it is vital to consider the baseline from which one might measure S.B. 14's impact on voter participation and on alleged voter fraud.

Overall, in the past two election cycles for which data is available, 2010 and 2012, Texas' overall voter participation – *i.e.*, the statewide percentage that actual voters represented of the State's citizens age 18 or over, and thus eligible to vote, was among the lowest in the nation. Indeed, in 2010, at 36.4%, Texas' voter

[17] *See* ROA.27042: "Mr. Wood testified that some campaign assistants befriend the elderly and raid their mailboxes when mail-in ballots arrive from the county." Similarly, Voter Plaintiff Gordon Benjamin, age 65, "expressed his distrust of voting by mail [because] 'mail ballots have a tendency to disappear.'" ROA.27111, 27133-34. Likewise, Calvin Carrier recounted that mail to his father, Voter Plaintiff Floyd Carrier, age 84, "often gets lost" and so "his father does not want to rely on a mail-in ballot to exercise his franchise." ROA.271114, 27134.

participation was lowest in the U.S.[18] In 2012, Texas' 53.8% voter participation was 47th of 51 jurisdictions (states and DC).[19] This data raises serious questions as to the legitimacy of a law such as S.B. 14, which is likely to further reduce voter participation, given the lack of evidence of in-person voter fraud.

Still further doubt as to the validity of S.B. 14–and the efficacy of the 65 and over exemption–is raised by data on older voter participation. In 2012, Texas had relatively average voter participation among the age cohorts affected by the older voter exemption: Texas ranked 18th of 41 states reporting in voter participation among citizens age 75-plus. Texas ranked 33rd of 46 states reporting in voter participation among citizens age 65-74. For older voters age 45-64, however–*i.e.*, for those not exempt from S.B. 14–Texas ranked 44th compared to the 50 states and DC.[20]

In 2010, Texas had less robust voter participation among the age cohorts affected by the older voter exemption, but worst in the nation voter participation among older voters not affected by the older voters exemption. Texas' voter

[18] Voting and Registration in the Election of November 2010 – Detailed Tables, U.S. Census Bureau (last revised Nov. 2, 2011) ("V&R2010"), Table 4a, www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html.

[19] Voting and Registration in the Election of November 2012 – Detailed Tables, U.S. Census Bureau (last revised May 8, 2013) ("V&R2012"), Table 4a, www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html.

[20] V&R2010 (Table 4c, Reported Voting and Registration of the Total Voting Age Population, by Age, for States: November 2010).

participation among citizens age 75-plus ranked 43rd of all states and DC, and 42nd among citizens age 65-74; however, Texas voters age 45-64 ranked dead last compared to the 50 states and DC.[21]

In short, the older voter exemption is arbitrary and ill-conceived to "mitigate" S.B. 14's impediments to older voter participation. It targets age cohorts arguably far less in need of assistance, than older Texas citizens age 45-64 whose already low electoral participation is likely to be further reduced by S.B. 14.

4. Texas' Reliance on a Vote by Mail Option Burdens the Voting Rights of People with Disabilities Able to Vote In-Person.

The proposition that people with "verifiable" disabilities are favored by, and should appreciate, special privileges to vote by mail without photo ID, unlike people without disabilities, even if they are actually able to vote in-person like people without disabilities – *i.e.*, in the mainstream – is profoundly patronizing, insulting, and harmful. *See, e.g., Rivera-Flores v. Bristol-Myers Squibb Caribbean,* 112 F.3d 9, 12 (1st Cir. 1997) (prohibiting waivers of claims by employees in severance agreements "would display the same stereotyping and patronizing attitudes toward the disabled which Congress hoped to remedy in enacting the ADA."). In the wake of S.B. 14, such an exemption no longer simply provides a choice; instead, Texas' arguments reflects a stigmatizing presumption

[21] V&R2012 (Table 4c, Reported Voting and Registration of the Total Voting Age Population, by Age, for States: November 2012).

that a portion of voters with disabilities able to meet generally applicable voter eligibility requirements will be satisfied by voting by mail. The notion that special rules for people with disabilities may be benign, while connected to rules excluding them from the mainstream, is gravely inconsistent with the ethos underlying virtually all federal and state disability anti-bias laws. *See Olmstead v. L.C.*, 527 U.S. 581, 597 (1999) ("Unjustified isolation, we hold, is properly regarded as discrimination based on disability.").

S.B.14's disability exemption corroborates many of Congress' "Findings and Purposes" regarding disability-based bias at the outset of the Americans with Disabilities Act of 1990, as amended (ADA), 42 U.S.C. §§ 12101, *et seq*.:

> (1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; . . . ;
>
> (2) discrimination against individuals with disabilities persists in such critical areas as . . . voting . . . ;
>
> (3) individuals with disabilities continually encounter various forms of discrimination, including . . . overprotective rules and policies, . . . exclusionary qualification standards and criteria, . . . and relegation to lesser services, programs, . . . , benefits, . . . , or other opportunities;
>
> (4) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, [and] full participation . . . for such individuals; and
>
> (5) the continuing existence of unfair and unnecessary discrimination . . . denies people with disabilities the opportunity

> . . . to pursue those opportunities for which our free society is justifiably famous . . . .

42 U.S.C. § 12101. In *Tennessee v. Lane*, 541 U.S. 509 (2004), the Supreme Court declared that Title II of the ADA was "designed to address . . . pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights, including . . . voting." *Id.* at 524 (citing, *inter alia*, decision condemning denial of access to county polling places of mobility-impaired individuals).

Texas' citation of the vote by mail disabilities exemption as a principal source of "mitigation" of S.B. 14's restrictions on voting rights also clashes with the focus on access to polling places, rather than non-mainstream voting procedures for voters with disabilities. In Texas, as in *Disabled in Action v. Bd. of Elections*, 752 F.3d 189 (2d Cir. 2014), "the relevant benefit is the opportunity to fully participate in . . . voting . . . . This includes the option to cast a private ballot on election days." *Id.* at 199 (finding that elections board, "[b]y designating inaccessible poll sites and failing to assure their accessibility through temporary equipment, procedures, and policies on election days, . . . denie[d] plaintiffs meaningful access to its voting program"). Thus, voters with disabilities "need not . . . prove that they have been disenfranchised or otherwise 'completely prevented from [voting]' to establish discrimination under Section 504 [of the Rehabilitation Act of 1973] or Title II [of the ADA]." *Id.* (quoting *Shotz v. Cates*,

256 F.3d 1077, 1080 (11th Cir. 2001)). "Indeed, to assume the benefit is anything less – such as merely the opportunity to vote at some time and in some way – would render meaningless the [ADA's] mandate." *Id. See also Alexander v. Choate*, 469 U.S. 287, 304 (1985) ("Section 504 seeks to assure evenhanded treatment [of] handicapped individuals [in] programs receiving federal assistance.").

Finally, as noted above, the definition of disability for purposes of establishing eligibility for Social Security Disability Insurance benefits – on which Texas largely relies to exempt voters from S.B. 14 based on "disability" in voting by mail – is focused on inability to work, not difficulty voting in-person or obtaining a photo ID. Thus, it is surely under-inclusive, affording no help to many people with disabilities that make it very hard or impossible for them to obtain photo ID, but which do not preclude them from working.

Texas should expand, not restrict, access to the voting mainstream for older and younger voters with disabilities. S.B. 14 moves in the opposite direction.

II. Evidence of S.B. 14's Racially Discriminatory Impact on Older African American and Latino Voters Powerfully Supports the District Court's Findings that Appellants Violated the Fourteenth Amendment and Section 2 of the Voting Rights Act.

The racially discriminatory impact of S.B. 14 in impeding in-person voting by older African-Americans and Latinos compounds the undue burdens imposed

by the law on such voters, and powerfully supports Plaintiffs' and Plaintiffs'-Intervenors' constitutional and statutory claims of racial bias in voting.

The district court properly observed that "[t]he right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise." ROA.27135 . In that vein, the district court examined the significance of S.B. 14's restrictions on in-person voting by members of Texas' two principal minority groups and found it to be profound and especially adverse. In doing so, the district court repeatedly focused on evidence of injury to older minority voters.

Restrictions on the right to vote in-person in Texas, the district court found, are particularly detrimental to minority voters, especially older minority voters. Casting a ballot at the polls on election day, for instance, "[f]or some African-Americans . . . is a strong tradition – a celebration – related to overcoming obstacles to the right to vote." *Id.* at ROA.27110. To reach that conclusion, the district court relied on testimony regarding "senior citizens [who] resent being told to vote by mail and [who] want to personally go to the polls, especially those who 'literally fought for the right to vote.'" ROA.27110 n.373, 27136 (quoting testimony of Voter Plaintiff Hamilton). The district court highlighted testimony regarding the experience of older African-Americans who grew up in southern states like Texas:

> … if you understand Black American in the terms of Blacks in the south . . . going to vote and standing in line to vote is a big deal. It's much more important for an 80-year-old Black woman to go to the voting poll, [and] stand in line, because she remembers when she couldn't do this."

ROA.27110 n.373 (testimony of Reverend Johnson).

The district court cited comparable testimony by older Latino voters to the same effect, that impediments to voting in-person are especially devastating to minority voters, who "remember being effectively abridged or denied within their lifetimes." ROA.27135 n.477 (*citing*, *inter alia*, testimony of Voter Plaintiffs Eulalio Mendez, Jr. (age 83; *see* ROA.99030) and Margarito Martinez Lara (age 77; *see* ROA.27096).

A similar pattern emerges in the district court's findings regarding the impact of requirements to produce documentation of identity in order to obtain a photo ID. In concluding the evidence was "clear that a photo ID law would hurt minorities' [voting rights]" ROA.27071-72, the district court relied on testimony from Mr. Lara (age 77) and State Representative Anchia that "along the border" (an area of dense Latino population), "a lot of people . . . who were birthed by midwives or who were born on farms, didn't have the requisite birth certificates and were in limbo." ROA.27071.[22] Nationwide data from 1940 and 1950 also suggest that the births of large numbers of older Texas voters of color went

[22] *See* ROA.27096 (testimony of Mr. Lara that "[h]e was born in what he described as a 'farm ranch' in Cameron County Texas.").

unregistered.[23] Likewise, the testimony at trial about discriminatory burdens created by "Delayed Birth Certificates for Unregistered Births," Amended Birth Certificates to Correct Errors," and Out-of-State Birth Certificates," all mostly consisted of statements by older Latino and African-American plaintiffs and other witnesses. ROA.27096-99.[24]

This pattern of disproportionate harm to older minority voters who are required to produce identity documents that have been lost or damaged, or were never created in the first place, in significant part because of past conditions of racial inequality and discrimination, has appeared in photo ID lawsuits in other states. For instance, in the Wisconsin case, plaintiff Bettye Jones, an African-American woman born at home in rural Tennessee in 1935 never had a birth certificate prepared. *See Frank v. Walker*, 17 F. Supp. 3d 837, 858 n.17 (E.D. Wis. 2014), *rev'd on other grounds*, 768 F.3d 744 (7th Cir. 2014). The district court in *Frank* noted that "[m]issing birth certificates are . . . a common problem for older African-Americans voter who were born in the South because midwives did not

[23] See Shapiro, n. 6 above, at 99 (indicating three-fourths of U.S. non-white births took place at home in 1940); Shachter & Shapiro, n. 8 above, at 516, Tbl. 1 (about one-fifth of births in Texas in 1940 went unrecorded); and id. at 520, Tbl. 3 (an estimated 11.1% of non-white births in Texas in 1950 went unregistered).
[24] *See* ROA.27097 ("Mr. Carrier, an 84-year-old retiree from China, Texas, was born at home"; he "contacted three different counties trying to locate his birth certificate to no avail.").

issue birth certificates." *Id.*[25] In one of three consolidated cases now pending in a federal trial court in North Carolina, lead individual plaintiff Rosanell Eaton is a 92-year-old African American woman, born and raised in North Carolina, who alleges injuries related to attending segregated schools, experiencing "forced separation in private and public places of accommodation," using segregated drinking fountains, and enduring various acts of intimidation during her many years civic and civil rights activities. Eaton served for 40 years as an assistant pollworker and 20 years as an election judge. "Mrs. Eaton, who was born at home, has a current North Carolina driver's license." Yet "the name on her certified birth certificate does not match the name on her driver's license or the name on her voter registration card." Thus, Eaton alleges, she "will incur substantial time and expense to correct her identification documents to match her voter registration record in order to meet the new [photo ID voting] requirements . . . in North Carolina."[26]

In a similar fashion, the district court's ruling identifying racial and ethnic discrimination as a basis for invalidating S.B. 14 overlaps in important ways with

[25] Ultimately, "Jones only received a state ID card because her daughter made multiple inquiries and took Jones to two different DMV service centers. A voter in Jones' position who is less tenacious will have to go through the difficult process of obtaining a delayed birth certificate in order to preserve her right to vote." *Id.*

[26] *North Carolina State Conference of the NAACP v. McCrory*, No. 13-cv-658 (M.D. N.C.) (Doc. 1) (Complaint, filed Aug. 12, 2013) (¶ 21, pp. 7-9).

other evidence of the law's burden on older voters. That is, the history of racial and ethnic discrimination in Texas related to voting rights of minority citizens has special resonance for older minority voters.

The district court specifically noted "a clear and disturbing pattern of discrimination against [African-Americans and Latinos] in the name of combating voter fraud in Texas." ROA.27033. The court further observed that "[b]ecause of past discrimination and intimidation, there is a general pattern of African Americans no having the power to fully participate" in the electoral process. ROA.27034. In addition, the court discussed Texas' history of "[r]acially [p]olarized [v]oting," *id*., possible linkage between "Texas' long history of racial discrimination" and the fact that "African-Americans and Hispanics remain underrepresented within the ranks of publicly elected officials," ROA.27036, and finally, "Texas'[] electoral history . . . of subtle and sometimes overt racial appeals by political campaigns" *Id*. In each of these areas, the burden of history falls heaviest on older minority voters who have lived to witness and endure each of these phenomena.

CONCLUSION

For the reasons set forth above, Amicus Curiae AARP urges the Court to affirm the judgment of the District Court.

Respectfully submitted,

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/s/Daniel B. Kohrman
Daniel B. Kohrman, D.C. Bar#394064
Iris Gonzalez, D.C. Bar # 987156
AARP Foundation Litigation
601 E St., N.W.
Washington, D.C. 20049
Tel: 202-434-2060
Fax: 202-434-6424
dkohrman@aarp.org
Counsel for Amicus Curiae AARP

CERTIFICATE OF COMPLIANCE

1. The foregoing Brief of Amicus Curiae AARP Supporting Appellees complies with FED. R. APP. P. 32(A)(7)(B)'s type-volume limitation because the brief contains 6,197 words, excluding the parts of the brief that Fed. R. App. P. 32(a)(7)(B)(iii) exempts.

2. The foregoing Brief of Amicus Curiae AARP Supporting Appellees complies with FED. R. APP. P. 32(A)(5)'s type-face requirements and Fed. R. App. P. 32(a)(6)'s type style requirements because the brief has been prepared in a proportionally spaced type-face using Microsoft Word 2010 in Times New Roman 14-point font.

Dated March 10, 2015

/s/Daniel B. Kohrman
Daniel B. Kohrman, D.C. Bar#394064
Iris Y. Gonzalez, D.C. Bar # 987156
AARP Foundation Litigation
601 E St., N.W.
Washington, D.C. 20049
Tel: 202-434-2060
Fax: 202-434-6424
dkohrman@aarp.org
Counsel for Amicus Curiae AARP

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Dated March 10, 2015

/s/Daniel B. Kohrman
Daniel B. Kohrman, D.C. Bar#394064
Iris Y. Gonzalez, D.C. Bar # 987156
AARP Foundation Litigation
601 E St., N.W.
Washington, D.C. 20049
Tel: 202-434-2060
Fax: 202-434-6424
dkohrman@aarp.org
Counsel for Amicus Curiae AARP