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-CRUMMEY; KEN GANDY; GORDON BENJAMIN; EVELYN BRICKNER, *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, CARLOS CASCOS, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; STATE OF TEXAS; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, *Defendants-Appellants.*

(caption continued on inside cover)

On Appeal from the United States 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.

EN BANC BRIEF OF *AMICUS CURIAE* LAWRENCE CREWS IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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UNITED STATES OF AMERICA, *Plaintiff-Appellee*,
TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND;
IMANI CLARK, *Intervenor Plaintiffs-Appellees*,

v.

STATE OF TEXAS; CARLOS CASCOS, IN HIS OFFICIAL CAPACITY AS 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.

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

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

v.

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

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 29.2, *amicus curiae* provides this supplemental statement of interested persons in order to fully disclose all those with an interest in this brief. The undersigned counsel of record certifies that the following supplemental list of persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amicus Curiae	Counsel
Lawrence Crews	Charles J. Cooper David H. Thompson Peter A. Patterson Brian W. Barnes Harold S. Reeves Cooper & Kirk, PLLC Carrie Severino The Judicial Education Project

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

Lawrence Crews is a citizen of the State of Texas and a legally registered voter. As a registered Texas voter, Mr. Crews has a significant interest in ensuring that his vote is not diluted by fraudulent voting, that the integrity of the electoral process is preserved in his State, and that law-abiding citizens like Mr. Crews are not discouraged from voting and from participating in the political process by the widespread perception that the process is being corrupted.

Amicus intends to demonstrate that SB14 constitutes a reasonable voting regulation enacted to ensure that voters are who they say they are and, by so doing, preserve the integrity of the electoral process. This brief describes the reality of voter fraud, including in-person voter impersonation, in Texas and elsewhere in the United States. *Amicus* submits that while this evidence of voter fraud is troubling, in and of itself, a failure by Texas to respond and to protect the integrity of the voting process would have been far more disturbing to the voters of Texas. SB14 thus represents a reasonable and lawful response to the problem of voter fraud and a prudent effort to promote confidence in the integrity of the process.

Mr. Crews moved for leave to file this brief under Federal Rule of Appellate Procedure 29(a). Undersigned counsel for Mr. Crews have independently authored this *Amicus* Brief, and no one other than Mr. Crews or his counsel contributed money that was intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Election fraud is a serious problem in Texas, and SB14 represents a reasonable effort to combat that problem in a manner that neither diminishes minority voting power nor exacerbates the effects of any past unconstitutional conduct by the State of Texas. Congress did not intend to prohibit States from adopting measures like SB14 when it enacted Section 2 of the Voting Rights Act, nor could it have done so consistent with its limited authority under the Fourteenth and Fifteenth Amendments.

The legislature has a duty to guard the integrity of the polling station and the ballot box and to preserve popular confidence in the rule of law. Corruption at the ballot box undermines the faith of the voters in the electoral process. Left unchecked, this lack of trust ultimately undermines the foundations of our republican form of government.

There is a long and unfortunate history of voter fraud and stolen elections in the State of Texas. It is a history that runs unbroken up to the present day. In each election cycle, the people of Texas learn that the efforts to undermine their system of government continue; from the 257 votes that were found to have been cast by deceased voters in 2012, to the Fort Worth precinct chair candidate convicted of in-person voter impersonation in 2011, to the Dallas County justice of the peace engaged in illegal voting in the 2010 election, Texas voters have every reason to

fear that voter fraud remains a serious problem in their State. Indeed, reports of stolen voter registration cards from around the State elicit only one conclusion: in-person voter impersonation remains a serious threat to the electoral process.

The Texas Legislature reasonably chose to protect the integrity of elections by taking steps to ensure that those presenting themselves at the polling station are, in fact, who they claim to be. Texas has not been alone in so doing; 16 states have now enacted laws requiring voters to present some form of photo-ID at the polling place. The Supreme Court has found that the need to protect voter confidence in the electoral process is a legitimate reason for enacting laws, like SB14, that ensure the integrity of that process. Any suggestion that SB14 addresses a problem that does not exist, or does so in a way that suggests anything but legitimate concern for protecting the electoral process, flies in the face of reality, of the law, and of simple common sense. Indeed, the contention that Texans can be required to present a state-issued photo ID to enter a public building or to purchase Sudafed, but not to enter the voting booth, is an insult to the People of this State.

Finally, the panel erred by failing to give sufficient weight to the grave doubts about whether Section 2 exceeds Congress' authority to enact remedial legislation under the Fourteenth and Fifteenth Amendments to the extent that it preempts state laws that are not significantly likely to exacerbate or result in constitutional violations. The Court need not reach that constitutional issue in this

case because Plaintiffs failed to prove that SB14 actually affects minority registration or voting. Especially in light of the constitutional avoidance canon, Plaintiffs' failure to meet their evidentiary burden is fatal to their Section 2 claims.

ARGUMENT

I. COMBATING VOTER FRAUD AND RESTORING CONFIDENCE IN THE INTEGRITY OF THE ELECTORAL PROCESS ARE LEGITIMATE STATE AIMS THAT ARE PROMOTED BY SB14.

Plaintiffs have argued that "evidence of the rarity of in-person fraud, especially but not only impersonation, was largely unrebutted," Veasey-LULAC Appellees' Br. on the Merits at 24 (Mar. 3, 2015) ("Veasey-LULAC Appellees' Br."), and that the Legislature thus lacked a legitimate reason for enacting SB14. But the Legislature had ample reason for enacting SB14, as the evidence of voter fraud—and, specifically, of voter impersonation that is catalogued below—reveals. As the United States Supreme Court has found, moreover, the perception among voters that in-person impersonation threatens the integrity of the electoral process provides an adequate basis for state laws, like SB14, that require voters to present photo-ID at the polling place.

A. Voter Fraud Presents a Serious Threat to the Integrity of Elections and to Voter Confidence in the Electoral Process.

It strains credulity for Plaintiffs to claim that Texas' effort to combat voter fraud and reduce the opportunities for in-person voter impersonation is unwarranted by the reality of voter fraud. The specter of voter fraud has hung over

the integrity of the electoral process in the United States from the birth of the republic.[1] For decades, the State of Texas, in particular, has been plagued by widespread fraud at the polling station. The 1948 Democrat Senate primary remains one of the most notorious examples of election fraud in American political history; the election ultimately turned on the "votes" of 100 people, a substantial number of whom later testified that they had not cast a vote in the election.[2]

And while Plaintiffs might wish to respond that this evidence of election chicanery is ancient history no longer relevant to the reality of American politics, the evidence is clear and incontrovertible that voter fraud continues to call into question the integrity of elections for every level of state and federal government, from the Presidency to the county sheriff. A recent investigation conducted by the North Carolina State Board of Elections discovered 35,750 cases of voters with both first and last name and date-of-birth matches who were registered in both North Carolina and in another State, and who had actually voted in both States in

[1] *See*, *e.g.*, TRACY CAMPBELL, DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD, AN AMERICAN POLITICAL TRADITION—1742-2004 xvi–xvii (2005) (noting that the American political process has been "deeply corrupted . . . for over two hundred years" and that voting fraud "is a deeply embedded culture within American politics that considers cheating fully justifiable"); LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS 276 (1996) ("Our nation has a long and depressing history as a happy haven for the vote thief."); Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 271 (2007) ("Voting fraud of course is a long-standing plague of democratic elections.").

[2] ROBERT A. CARO, MEANS OF ASCENT: THE YEARS OF LYNDON JOHNSON 360–61 (1990).

the 2012 general election.[3] In 2004, a Washington state judge determined that 1,678 votes had been cast illegally in the state's gubernatorial election.[4] The validity of the 2000 Miami mayor's race was tainted by substantial numbers of suspect absentee ballots. CAMPBELL at 286–91, *supra* note 1. Investigators established that at least 748 illegal votes were cast by ineligible voters during the 1996 Dornan-Sanchez congressional race, a race in which the margin of victory was under 1,000 votes.[5] And a Madison County, Georgia convenience store owner was recently sentenced to 10-years of probation and a fine for falsifying numerous voter registration cards as part of a scheme to influence the result of a 2012 local sheriff's election.[6] The United States Department of Justice launched more than 180 investigations into election fraud in 2002 that ultimately resulted in charges against 89 individuals and 52 convictions. *See* COMMISSION ON FEDERAL ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 45 (2005) ("Carter-Baker Comm'n Rep.").[7]

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[3] Kim Strach, Marc Burris & Veronica Degraffenreid, Presentation to Joint Legislative Elections Oversight Committee (Apr. 2, 2014), http://goo.gl/dddb15.
[4] Amy Argetsinger, *Judge Upholds Win For Wash. Governor*, WASHINGTON POST (June 7, 2005), http://goo.gl/2tfYh0.
[5] Jackie Koszczuk, *Proof Of Illegal Voters Falls Short, Keeping Sanchez In House*, CNN ALL POLITICS (Feb. 7, 1988), http://goo.gl/3SGctR.
[6] Zach Mitcham, *Shafiq sentenced for election fraud*, MADISON J. TODAY (May 11, 2015), http://goo.gl/gZakLa.
[7] The Commission on Federal Election Reform was a bipartisan commission, co-chaired by former President Jimmy Carter and James A. Baker, III, that was formed after the 2004 election to examine the state of the electoral process in the United States and to offer recommendations on improving it. The Commission's Report is available at http://goo.gl/KFsw1N.

This fraud not only undermines public confidence in the integrity of the electoral process, but has also been outcome-determinative in several elections. In 2014, a court threw out the returns in the Magoffin County, Kentucky judge-executive election, citing a "raft of improprieties, including a lack of required information on applications for absentee ballots; precinct officers failing to document how they identified voters and improperly helping people vote; and residents casting early ballots at the county clerk's office when there was no Republican election commissioner present as required."[8] The result of the 2014 Turkey Creek, Louisiana mayoral election was also tossed out after it was discovered that a campaign employee had paid mentally impaired individuals $15 each for their votes.[9] The result of the City Council election in Perth Amboy, New Jersey was also invalidated after it was found that the winning campaign had taken advantage of nursing home residents, including a blind man, the majority of whom could not remember where they lived or even that they had voted.[10]

Sadly, Texas has not been immune. Indeed, voting "fraud in contemporary Texas is still breathtaking in its boldness and scope, amply fulfilling the state's

[8] Bill Estep, *Judge throws out election results in 2014 Magoffin judge-executive race*, LEXINGTON HERALD LEADER (Feb. 20, 2015), http://goo.gl/OLjeaI.
[9] *New election ordered in Turkey Creek mayor's race*, KATC (Dec. 3, 2014), http://goo.gl/uVV8ke.
[10] Sergio Bichao, *Perth Amboy Democrat should face voter fraud criminal probe, GOP leader says*, MYCENTRALJERSEY.COM, Mar. 30, 2015, http://goo.gl/fidkKM.

'bigger and better' stereotype."[11] From 2002 to 2012, the Texas Attorney General obtained numerous indictments, guilty pleas, and convictions in cases of election fraud.[12] Indeed, in 2012 alone, there were 257 instances of deceased individuals voting in municipal and primary elections that were detected and referred to the Attorney General.[13] These statistics confirm that the cemetery vote remains as vital in Texas today as it ever was in Chicago.

And cases of egregious election fraud continue to shock the State. In 2011, a Fort Worth precinct chair candidate admitted to voter impersonation after the person impersonated showed up to cast his ballot later that same day.[14] A Dallas County justice of the peace was sentenced to five years for illegal voting in the 2010 election,[15] while a Port Lavaca city councilwoman was convicted and sentenced to five years for registering noncitizens to vote in the same election cycle.[16] In 2006, a Nueces County woman was caught escorting elderly voters into

[11] SABATO AND SIMPSON at 293, *supra* note 1.
[12] *See generally* Election Code Referrals to the Office of the Attorney General Prosecutions Resolved, https://goo.gl/0MCGLL.
[13] *See generally* Election Code Referrals to the Office of the Attorney General August 2002 – Present, https://goo.gl/6ni5RY.
[14] Mitch Mitchell, *Fort Worth woman admits guilt in voter fraud case as national debate continues*, STAR-TELEGRAM (June 7, 2015), http://goo.gl/AA1xbg.
[15] *Medrano v. State*, 421 S.W.3d 869, 873 (Tex. App. 2014). *See also Jenkins v. State*, 468 S.W.3d 656, 672–91 (Tex. App. 2015) (reversing conviction for voting illegally in an election in which defendant knew he was not eligible to vote and remanding with instructions on mistake of law defense).
[16] *Former Port Lavaca Councilwoman Briseno to Serve Five Years in Prison for Voter Fraud*, OFFICE OF THE ATTORNEY GENERAL, June 25, 2007, https://goo.gl/evCLng.

polling sites and illegally casting their ballots without their consent.[17] A Starr County man was indicted for double-voting in the November 2006 general election, while four co-defendants were charged with carrying out an elaborate mail-in ballot scheme.[18] In 2005, a Beeville woman was indicted on a charge of illegal voting after the registrar alleged that she had filled out a ballot in her dead mother's name for the 2004 election.[19] And the list goes on: a Refugio County Commissioner who pleaded guilty to the felony of tampering with government documents during a primary election, an East Texas former State Senator who was indicted for official oppression in trying to keep two candidates for a water board off the ballot, and many other instances of voting fraud relating to the illegal possession, handling, and transport of mail-in ballots.[20]

Not all of these cases involved in-person impersonation. Not all of them would have been detected as a result of SB14. But all of these cases reveal that efforts to subvert the democratic process through fraudulent voting remain a real and a serious problem. And while SB14 will not put a stop to all voter fraud, it will

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[17] Mary Ann Cavazos, *Robstown Woman Indicted and Jailed in Voter-Fraud Case*, CORPUS CHRISTI CALLER TIMES (June 16, 2006), http://goo.gl/7Eqh7H.
[18] *See Five Rio Grande Valley Residents Indicted for Voter Fraud Allegedly from 2006 Election Cycle*, EDINBURG POLITICS, June 1, 2007, http://goo.gl/JuflQN (scroll down to headline).
[19] Cavazos, *Robstown Woman Indicted*, *supra* note 17.
[20] *See*, *e.g.*, *Refugio County Commissioner Pleads Guilty to Election Fraud Scheme*, SE TEXAS RECORD (Oct. 9, 2007), http://goo.gl/OUQi8U; *Reeves County Woman Convicted for Voter Fraud*, OFFICE OF THE ATTORNEY GENERAL (June 28, 2006), https://goo.gl/FUmlsH; April Castro, *Ex-senator charged with abuse of office*, MYPLAINVIEW.COM (July 5, 2007), http://goo.gl/Eu1hSk.

put a stop to some of the more brazen attempts to corrupt the voting process, and it is a step toward restoring public confidence in the integrity of that process and in the rule of law.

B. In-Person Voter Impersonation Is a Serious Threat to the Electoral Process and to Public Confidence in the Integrity of that Process.

Plaintiffs may counter that, although they can no longer deny that voter fraud is a serious problem, the specific problem of in-person voter impersonation that SB14 is intended to combat is nevertheless not a genuine problem. Once again, Plaintiffs would simply be wrong on the facts. Although the prevalence of in-person voter-impersonation is disputed, "there is no doubt that it occurs." *See* Carter-Baker Comm'n Rep. 18. The problem is admittedly hard to detect in the absence of a photo-ID requirement, given the slim odds that the individual poll worker will know that the person standing before them is not the person whom they claim to be. It is perhaps not surprising, therefore, that, between 2002 and 2012, there were only five successful prosecutions for in-person voter impersonation in Texas.[21] A post-election review of ballots that had been cast in Harris County in the 1992 presidential election by individuals who had signed

[21] *See* Election Code Referrals to the Office of the Attorney General Prosecutions Resolved, https://goo.gl/0MCGLL. The defendants were Lorenzo Antonio Almanza (10-03-10343-CR); Reyna Almanza (10-03-10342-CR); Jack Carol Crowder (1215818); Melva Kay Ponce (B--05-2101-0-CR-B); Delores McMillian (11082011CCL-A).

sworn statements affirming their eligibility to vote revealed, however, that 6,707 of those voters were ineligible to vote in Harris County, and a total of 1,262 had *never* been registered to vote *anywhere*.[22] In the same election, 3,000 unregistered and ineligible people cast ballots in Tarrant County.[23] No prosecutions resulted.[24] What these cases reveal, therefore, is that in-person impersonation and voter deception at the polling place, while hard to detect and hard to prosecute, is nevertheless a reality in the State of Texas.

Beginning in 2007, moreover, witnesses have testified before the Legislature that in-person voter impersonation is more common in the State of Texas than these five convictions would suggest.[25] Hidalgo County elections administrator Teresa Navarro described how voter registration cards had been issued to imaginary voters, and how people had then been caught distributing those cards to

[22] SABATO AND SIMPSON at 294, *supra* note 1.
[23] *Id.*
[24] *Id.* ("Surprise: not a single one of the 6,707 illegal voters was prosecuted because it is very difficult to prove criminal intent.").
[25] *See* A Bill Relating to Requiring a Voter to Present Proof of Identification: Hearing on Tex. H.B. 218 Before the House Comm. on Elections at 2:41:15, 80th Leg., Reg. Sess. (Feb. 28, 2007), http://goo.gl/8I9sa5 (testimony of Ed Johnson). Mr. Johnson's testimony runs from 2:41–2:59 in the proceedings of the cited committee hearing. He testified that he had seen "numerous cases" of people having their identity stolen, including one incident of one candidate filling out false voter registration applications for hundreds of voters who actually lived outside of his district, and then voting for them on election day (the easiest way to perpetrate this fraud would have been through absentee ballots, but Mr. Johnson did not specify how the ballots were cast). Mr. Johnson had also seen false voter registration cards for real voters submitted by registration drives, which effectively changes these voters' real address. He also testified that he had found ineligible voters on the rolls, identified from their response to a jury summons, along with other additional ineligible voters who have registered and voted.

real people who weren't registered to vote.[26] In South Texas, in particular, as local government watchdog Fern McClaugherty has found, voter fraud is a major problem.[27] There have also been widespread reports of stolen voter registration cards, a crime that makes sense only if one is intending to impersonate legal voters.[28]

Texas is, of course, not the only State in which fraud has resulted from the lack of photo-ID voter laws. In Milwaukee, Michael Zore voted twice in 2006 by going to the polling stations of two Milwaukee, Wisconsin suburbs in the space of six hours. Mr. Zore claimed that he had simply forgotten that he had voted, but the evidence offered at trial showed that he signed up to vote using a false address after he had already voted in another precinct earlier in the day.[29] Had Mr. Zore been required to present a photo-ID, his use of this false address would have been discovered. Another double voter, James Scherzer, an attorney, cast two ballots in the same election several times in 2000 and 2002; he did this by voting in Kansas and then crossing the state line and voting again in Missouri. Mr. Scherzer

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[26] Sara Perkins, *Valley officials, observers at odds over need for new voter ID law*, THE MONITOR (Apr. 24, 2007), http://goo.gl/bUzJYp.
[27] *Id.*
[28] *See also* A Bill Relating to Requiring a Voter to Present Proof of Identification: Hearing on Tex. H.B. 218 Before Senate Comm. on State Affairs at 4:16:15, 80th Leg., Reg. Sess. (Apr. 30, 2007), http://goo.gl/V1RRJp (testimony of Skipper Wallace, State Legislative Chairman for the Republican County Chairmen's Association). Mr. Wallace's testimony runs from 4:15 – 4:24 in the proceedings of the cited committee hearing.
[29] Derrick Nunnally, *Man convicted of double voting: "I forgot" doesn't get Tosa resident off hook*, MILWAUKEE J. SENTINEL (Aug. 23, 2007), http://goo.gl/Ug4qqo.

acknowledged, "I was wrong in what I did."[30] And his case was but one of dozens of potential double-voting cases in Kansas City.[31]

There is, in short, more than enough evidence of in-person voter impersonation in Texas and from around the United States to justify the decision of the Legislature to address the problem. And, regardless of whether one believes that voter impersonation is widespread or rare, there can be no serious dispute that its real effect can be substantial because, in a close election, even a small amount of fraud could make the margin of difference. Carter-Baker Comm'n Rep. 18.

C. Congress and the States Have Acted to Prohibit and Prevent Voter Fraud.

Texas is by no means alone in requiring voters to present some form of voter-ID at the polling station. The United States Congress and all 50 States, as well as the District of Columbia and Puerto Rico, have enacted some form of voter-ID law. Thirty-four States require voters to present some form of ID at the polls. These laws represent a reasonable response to the recommendations of Carter-Baker and reflect a nationwide groundswell of popular support for combatting polling-place fraud and to restoring faith in the democratic process.

In 2002, Congress enacted the Help America Vote Act of 2002 (HAVA),

[30] Greg Reeves, *People voting twice in Kansas, Missouri*, BILLINGS GAZETTE (Sept. 5, 2004), http://goo.gl/cdEyiq.
[31] *Id.*

Pub. L. No. 107-252, 116 Stat. 1666 (codified at 52 U.S.C. § 20901 *et seq*.). Section 303 of HAVA mandates that all States require either photo ID or some form of approved non-photographic ID for all first-time voters who register to vote by mail and do not provide verification of their identity with their mail-in registration. *See* 52 U.S.C. § 21083(b). HAVA made clear that this is only a "minimum requirement[ ]," that "nothing in this subchapter shall be construed to prevent a State from establishing election technology and administration requirements that are more strict," *id*. § 21084, and it left choices about methods to the discretion of the States, *id.* § 21085.

In 2005, the Commission on Federal Election Reform found that "[t]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." Carter-Baker Comm'n Rep. 18. The Commission urged the States to go beyond HAVA and recommended "a photo ID system for voters designed to increase registration with a more affirmative and aggressive role for states in finding new voters and providing free IDs for those without driver's licenses." *Id.* at ii. Specifically, the Commission recommended:

> [T]o make sure that a person arriving at a polling site is the same one who is named on the list, *we propose a uniform system of voter identification* based on the "REAL ID card" or an equivalent for people without a drivers license.

Id. at iv (emphasis added). The Commission believed that this would "result in both more integrity and more access." *Id.* at ii.

Following upon the recommendation of the Carter-Baker Commission, the legislatures of Georgia, Indiana, Kansas, Mississippi, North Dakota, Tennessee, Virginia, and Wisconsin have enacted photo-ID voter identification laws comparable to SB14.[32] In these jurisdictions, voters must provide one of several permissible forms of photo identification in order to vote. Those who lack acceptable photo identification must vote on a provisional ballot and take additional steps after Election Day for it to be counted. For instance, the voter may be required to return to an election office within a few days after the election and present an acceptable ID to have the provisional ballot counted. If the voter does not return with one of the prescribed forms of identification, the provisional ballot will not be counted.

Alabama, Florida, Idaho, Louisiana, Michigan, Rhode Island, and South Dakota, in turn, now require some form of photo identification, but do not always require the voter without photo-ID to take remedial action in order for his vote to be counted.[33] For example, Alabama voters who do not show a photo ID are asked to cast a provisional ballot; Alabama also provides, however, that the vote is

[32] *See* GA. CODE ANN. §§ 21-2-417, 21-2-417.1; IND. CODE ANN. §§ 3-5-2-40.5, 3-11-8-25.1(a); KAN. STAT. ANN. §§ 25-2908, 25-1122, 25-3002, 8-1324(g)(2); MISS. CODE ANN. § 23-15-563; N.D. CENT. CODE ANN. § 16.1-05-07(1); TENN. CODE ANN. § 2-7-112; VA. CODE ANN. § 24.2-643(B); WIS. STAT. ANN. §§ 5.02(6m), 6.79(2)(a).

[33] ALA. CODE § 17-9-30; FLA. STAT. ANN. § 101.043; IDAHO CODE ANN. §§ 34-1106(2), 34-1113, 34-1114; LA. STAT. ANN. § 18:562; MICH. COMP. LAWS ANN. § 168.523; R.I. GEN. LAWS § 17-19-24.2; S.D. CODIFIED LAWS §§ 12-18-6.1, -6.2 and -6.3.

accepted when two election officials can sign sworn statements saying they know the voter.[34] These statutes are in the main comparable to SB14, but incorporate modifications that reflect the experimentation that the States, the laboratories in our federal system, are now performing as they seek out the best solution to the problem of voter fraud and the best means for restoring voter confidence in the democratic process. Indeed, as of April 2016, 34 states have enacted laws requiring that their voters show some form of ID at the polls. The Court should exercise restraint, lest it put a premature end to this effort of the democratic process to police itself.

D. The Supreme Court's Holding in *Crawford* Establishes that SB14 Serves a Legitimate State Aim of Promoting Voter Confidence.

"A State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). Even if the voters only fear that their vote is being diluted by fraudulent voting, they will lose confidence in the integrity of elections; the functioning of the democratic process will suffer, in turn, because "[v]oters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). While the State's interest in promoting public confidence in the election process is "closely

[34] ALA. CODE § 17-9-30(e) and (f).

related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008).

Even if there had not been a single documented case of in-person voter fraud in the State of Texas, therefore, the photo ID requirement of SB14 would remain a legitimate means for promoting voter confidence in the integrity of the electoral process. Indeed, in *Crawford* itself, the Court had confronted a record that "contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." *Id.* at 194. The Court concluded that, even in the absence of such evidence, a photo ID requirement serves other interests, including safe-guarding voter confidence, that sufficed to support its enactment. *Id.* at 197.

That voter ID laws promote voter confidence is a legislative fact that the lower courts are no longer free to reject or revisit. As the Seventh Circuit explained in *Frank v. Walker*, that laws like SB14 promote public confidence is a "proposition about the state of the world, as opposed to a proposition about [the litigation]." 768 F.3d 744, 750 (7th Cir. 2014). For the Supreme Court's pronouncements to be binding on the lower courts, and for the uniformity of federal law to be ensured, such a factual proposition, once accepted by the Supreme Court, cannot be reviewed, revised, or rejected by those lower courts:

> Photo ID laws promote confidence, or they don't; there is no way they could promote public confidence in Indiana (as *Crawford* concluded) and not in Wisconsin. This means that they are valid in every state—holding constant the burden each voter must bear to get a photo ID—or they are valid in no state. Functionally identical laws cannot be valid in Indiana and invalid in Wisconsin (or the reverse), depending on which political scientist testifies, and whether a district judge's fundamental beliefs (his "priors," a social scientist would say) are more in line with the majority on the Supreme Court or the dissent.

Id. A law, like those that promote voter confidence in the integrity of the electoral process in the states of Indiana and Wisconsin, will also promote voter confidence in Texas. Plaintiffs' assertion that "evidence of the rarity of in-person fraud, especially but not only impersonation, was largely unrebutted," Veasey-LULAC Appellees' Br. at 24, is, therefore, simply irrelevant; it is now settled that voter ID laws serve the valid public purpose of promoting confidence in the democratic process even in the absence of evidence of in-person voter fraud.

II. RULING THAT SB14 VIOLATES SECTION 2 WITHOUT REGARD TO ITS IMPACT ON MINORITY VOTER PARTICIPATION WOULD IMPLICATE SERIOUS CONSTITUTIONAL QUESTIONS THAT THIS COURT SHOULD AVOID.

There is good reason to doubt the constitutionality of Section 2 to the extent that it is read to prohibit state election laws that have a disparate impact that is not closely connected to specific unconstitutional conduct by state actors. As *Shelby County v. Holder*, 133 S. Ct. 2612, 2622 n.1 (2013), shows, general evidence of racial disparities and decades-old evidence of discrimination is not enough to justify remedial election law legislation under the Fourteenth and Fifteenth

Amendments. To the contrary, Congress' power to enact remedial legislation under those amendments is circumscribed by the "congruence and proportionality" standard announced in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), and under that standard state practices disallowed by Congress must at a minimum be significantly likely to exacerbate or result in constitutional violations, *see id.* at 532 ("RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."); *see also Board of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001). The Fourteenth and Fifteenth Amendments prohibit only *purposeful* discrimination by *state actors*, *see City of Mobile v. Bolden*, 446 U.S. 55, 62, 66 (1980), and laws that do not redress "specific, identified, unconstitutional wrongdoing" are subject to constitutional attack, *Hayden v. Pataki*, 449 F.3d 305, 335–36 (2d Cir. 2006) (Walker, C.J., concurring). A broad interpretation of Section 2 like that applied by the district court could lead to federal courts striking down numerous reasonable and long-standing voting laws such as in-person voting requirements, Tuesday voting, and even the basic requirement to register to vote in the first place. *See Frank*, 768 F.3d at 754. Indeed, as applied by the district court in this case, Section 2 likely would invalidate *any* State law that imposes *any* marginal burden on voting. Such an outcome would not be "congruent and

proportional" to enforcing the Constitution's prohibition of purposeful denial of the franchise on account of race.

The panel gave short shrift to concerns about Section 2's constitutionality, observing in a footnote that courts have repeatedly upheld the constitutionality of its results test. Opinion at 27 n.24 (Aug. 5, 2015); *see also Bush v. Vera*, 517 U.S. 952, 990–91 (1996) (O'Connor, J., concurring) (collecting cases). But the cases cited by the panel predate *City of Boerne*, and the Supreme Court has never directly ruled on this issue. This Court need not do so either, for Plaintiffs were not able to prove one of the essential elements of a Section 2 vote denial claim: that SB14 actually denies minority voters the opportunity to vote.

If adopted, the panel's approach would exacerbate concerns about Section 2's constitutionality by imposing liability without *any* finding that SB14 actually affects minority registration or voting. Thus, although the district court found that registered white voters possess SB14-compliant ID at a somewhat higher rate than Hispanic or African-American voters, the district court did not find that this disparity in ID possession translates into a disparity in actual voter participation. Do registered voters who do not possess photo ID actually vote, and, if so, at what rate by racial group? What proportion of white and minority registered voters who did not already have the required ID when SB14 became law will take the minimal steps necessary to obtain it? Of those who will not, why will they not? The Court is

left to speculate about these important questions, and the answers might reveal that SB14 has no effect at all on minority voting strength. Those who assert Section 2 claims bear the evidentiary burden, *Voinovich v. Quilter*, 507 U.S. 146, 155–56 (1993), and Plaintiffs did not prove their case. Under these circumstances, there is no need for this Court to confront difficult questions about Section 2's constitutionality.

The Supreme Court has read Section 2 narrowly to avoid doubts about its constitutionality. Thus, in *League of United Latin American Citizens (LULAC) v. Perry*, the Court rejected an interpretation of Section 2 that would have "unnecessarily infuse[d] race into virtually every redistricting, raising serious constitutional questions." 548 U.S. 399, 445–46 (2006). Similarly, a plurality of the Court in *Bartlett v. Strickland* rejected a reading of Section 2 that would have raised "serious constitutional concerns under the Equal Protection Clause." 556 U.S. 1, 21 (2009). Justice Kennedy, in particular, has taken care to reserve the constitutional questions that are implicated by expansive interpretations of Section 2. *See Johnson v. De Grandy*, 512 U.S. 997, 1031 (1994) (Kennedy, J., concurring); *Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting). The Supreme Court's Section 2 precedents thus reflect a studied concern for reading Section 2 in a manner that is circumscribed by constitutional

limitations and avoids constitutional questions, and this Court should take the same approach here.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below and order entry of judgment for the Defendants.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief of Amicus Curiae Lawrence Crews in Support of Defendants-Appellants was served on the 22nd day of April, 2016, via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses. I further certify that service will be accomplished by the appellate CM/ECF system on all parties or their counsel, except for the following individuals who will be served by First Class USPS Mail:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,623 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), and with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

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