IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

Sylvia Bruni, Texas Democratic Party, DSCC, DCCC, and Jessica Tiedt, Plaintiffs, v. RUTH HUGHS, in her official capacity as the Texas Secretary of State, Defendant.	Civil Action No. 5:20-cv-35

REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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HB 25's elimination of straight-ticket voting ("STV") from Texas's ballots will unjustifiably subject voters across the State to excessively long lines in November. This will severely burden their fundamental right to vote, and in many cases, it will deny them the opportunity to participate in the election altogether. HB 25 will also unjustifiably cause Texans to fail to participate in down-ballot races. These effects will be most severely felt by African American and Hispanic Texans, who disproportionately live in areas with the longest lines and ballots, and who are less able to withstand HB 25's burdens. And because those voters overwhelmingly support Democrats, HB 25's natural effect will be to severely burden Democrats' ability to exercise their fundamental right to effect political change in pursuit of their political beliefs. This set of facts should not surprise anyone—it was the reason HB 25 was enacted.

The Secretary's attempts to poke holes in Plaintiffs' evidence achieve no success. As a result, she resorts to demanding unrealistic evidentiary standards that have no basis in case law, let alone scientific inquiry. On multiple occasions, the Secretary faults Plaintiffs' experts for failing to perform analyses that no expert could perform. On other occasions, she offers facts that are blatantly incorrect. Similarly, the Secretary argues that Plaintiffs' motion should be denied because they have not fully proven their claims. But that is not Plaintiffs' burden: preliminary injunctions are "customarily granted on the basis of . . . evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at [the] preliminary-injunction [phase]." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

Even when providing the STV option, Texas has subjected its citizens, particularly minorities and Democrats, to unconstitutionally long lines. The unjustified danger HB 25 poses to Texas's elections, and the voters who wish to participate in them, demands the conclusion that the status quo should be maintained this fall. The Court should enjoin HB 25's implementation.

I. Plaintiffs are highly likely to succeed in their challenge to HB 25.

A. HB 25 will unjustifiably burden Texans' fundamental rights.

The Secretary's repeated assertions that other states do not have STV offers her no support in defending HB 25's constitutionality. "It is [] not enough for [Texas] to simply rely on the lack of straight-party voting in other states." *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 665 (6th Cir. 2016). Instead, the question is whether the severe burdens HB 25 will impose on Texans are sufficiently justified. They are not.

1. Eliminating STV in Texas will cause excessive polling-place lines.

In the words of the Secretary's expert, an increase in "ballot-marking times, *even by a few seconds*, can result in a polling place suffering from uncontrollable lines and voters waiting an unacceptably long time to vote." Graves Dep., Ex. 1, at 58:11-59:12 (emphasis added). And as a recent study of voting wait times confirms, "the opportunity to vote a straight ticket significantly reduces the time to [complete a] ballot." Second Decl. of Dr. Muer Yang ("Yang II"), Ex. 2, ¶ 22. By "significantly" increasing the amount of time it will take more than two-thirds of Texas voters to complete their ballots, HB 25 will result in voters waiting an "unacceptably long time to vote." Using Travis and Fort Bend Counties as examples, Dr. Yang demonstrated that eliminating STV would have produced this result in 2016. *See* Pls.' Corrected Mem. in Support of Mot. for Prelim. Inj. ("Mot."), ECF No. 29-1, at 6-8; Decl. of Dr. Muer Yang ("Yang I"), ECF No. 19-5.[1]

The Secretary's various red herring arguments do nothing to limit the import of Dr. Yang's analysis. Texas counties do not collect data on the time voters take to complete their ballots. It is thus no surprise Dr. Yang does not have exact data on how long it took voters to complete their

[1] The Secretary's accusation that Dr. Yang used "flawed data" is false. Opp. 7 n.4. The "EVIP Votes" column in the relevant document received from the Travis County Clerk's Office—which Dr. Yang used for his analysis—contains the "number of in-person votes cast at each Travis County polling place on November 8, 2016," which was Election Day. Ex. 3.

ballots in 2016. Def.'s Opp. to Pls.' Mot. for Prelim. Inj. ("Opp."), ECF No. 57, at 6. That fact is irrelevant to his analyses, which provide different scenarios to illustrate how small voting-time increases exponentially expand waiting lines. In any event, a study on which Dr. Graves himself relies demonstrates Dr. Yang's scenarios were likely within the range of the actual voting times in 2016. Yang II ¶¶ 58-63. Similarly, Dr. Yang's estimate that some Travis County voters waited "more than an hour to vote" is in no way inconsistent with a survey's finding that, *statewide*, Texans waited 11 minutes to vote. Opp. 7. In fact, we know that some Travis County voters waited more than an hour on Election Day 2016.[2] This is how averages work: some Texans waited in hours-long lines, while other voters did not. Thus, there is no basis for the Secretary's assertion that Dr. Yang's scenarios skewed "much too high." Opp. 6.[3]

More importantly, the point of Dr. Yang's analyses is not to estimate what happened in 2016; rather, it is to illustrate how polling place wait times quickly become unreasonable due to small increases in voting time, which eliminating STV will cause. Travis and Fort Bend Counties need not be perfectly representative of other Texas counties to understand the implications of this analysis. Opp. 10-12. Eliminating STV will significantly increase voting time across the State, putting voters at an unacceptable risk of long polling-place wait times. Those lines will impose severe burdens on Texans' ability to exercise their fundamental right to vote. Mot. 9.[4]

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[2] Megan Hix, *Students Wait in Longest Lines in Travis County*, Daily Texan (Nov. 8, 2016), https://thedailytexan.com/2016/11/08/students-wait-in-longest-lines-in-travis-county.

[3] The Secretary incorrectly argues that Dr. Yang did not take into account the fact that, after selecting the STV option, voters must still flip through the partisan ballot items on the ballot. *See* Opp. 1, 7. Because the time to do so would not meaningfully increase voting time, Dr. Yang's average-voting-time estimates took this step of the voting process into account.

[4] The Secretary is wrong to assert that Dr. Yang's sample of polling places was non-random. Opp. 11. After completing a random selection of locations, Dr. Yang added the polling places with the lowest and highest voter/machine ratios. The purpose of doing so was simply to demonstrate the best- and worst-case scenarios in each county. Yang II ¶¶ 64-65; Graves Dep. 43:10-45:21.

Similarly, the fact that Dr. Yang is not "analyz[ing] future elections," Opp. 8, is meaningless. It would be impossible to perform this analysis for the upcoming general election because the necessary information is not available. Counties will not select polling places or decide how to allocate their finite universe of voting machines until late summer. And one can only guess as to how many voters will arrive at a given polling place on a given day in a future election. For this reason, the voting-machine reallocations performed by Dr. Graves—which shifts voting machines between polling places *after* knowing how many voters voted at each polling place, Opp. 12—is useless because it has "the unrealistic benefit of 20/20 hindsight." Yang II ¶ 56. While county officials do try to predict voter turnout based on prior elections, they can only make an educated guess. Indeed, while there is no reason to doubt that Travis and Fort Bend Counties officials tried their best to predict voter distribution among polling places in advance of the 2016 election, they clearly misallocated voting machines in many locations. Yang II ¶ 55. Because the "margin of allowable error" when deciding how to allocate voting machines is already "small," eliminating STV makes that margin tiny. *Id.* ¶¶ 56-57.

Dr. Graves's declaration, ECF No. 58-6, offers incorrect and irrelevant claims about Dr. Yang's analyses. Dr. Graves primarily objects to Dr. Yang's position that, in the absence of the STV option, there is no basis for expecting that those who would have used the STV option if it were available ("ST voters") will consistently behave differently from those who would not have used that option ("non-ST voters"). According to Dr. Graves, one *must* assume that these groups of voters will behave differently when there is no STV option because "ST voters *are fundamentally different* from non-ST voters." Graves ¶ 65 (emphasis in original). But Dr. Graves admits he has no evidentiary basis for this claim. Graves Dep. 92:20-96:10. He cannot identify a single characteristic that differentiates these two groups of voters—whether it be level of political

participation, partisan affiliation, or the amount of time they could spend at the polling place—other than the mere fact that if the STV option is presented to them, their choice of whether to use that option differs. *Id.* at 90:4-92:19. But in the scenario in which there is no STV, that sole basis for believing these groups would behave differently does not exist: "[b]ecause in the latter scenario there are no differentiating characteristics between the two groups, it is more reasonable to assume that they will behave similarly." Yang II ¶ 10.

The baseless assumption that ST voters and non-ST voters are "fundamentally different" biases Dr. Graves' calculations to systematically underestimate the increase in wait times caused by STV's elimination. To analyze HB 25's effect, Dr. Graves crafts an unrealistic "descriptive model" under which a voter who would have used the STV option if it were otherwise available speeds through the partisan portion of the ballot with the "sole objective to execute the vote as quickly as possible," spending only the amount of time on each partisan race as is necessary to "make a click." Graves ¶ 68. Dr. Graves believes such voters have "no need . . . to deliberate," so the time the voter takes on each partisan item "is nearly instantaneous." *Id.* ¶¶ 68, 72. Unsurprisingly, Dr. Graves offers no evidence suggesting ST voters actually engage in this behavior when the STV option is unavailable. In fact, the descriptive model directly contradicts the views of Fort Bend officials: while Dr. Graves predicts that eliminating STV will increase voting time among ST voters in Fort Bend County by just 48 seconds, County Judge KP George estimates that "time spent in voting booths could increase by seven minutes" if STV is eliminated.[5] By crafting his descriptive model this way, Dr. Graves sets up his analysis to predict the smallest

[5] Beth Marshall, *Fort Bend County Officials Foresee Longer Wait Times Without Straight-Ticket Voting Option in 2020*, Community Impact Newspaper (Mar. 31, 2019), https://communityimpact.com/houston/sugar-land-missouri-city/city-county/2019/03/31/fort-bend-county-officials-foresee-longer-wait-times-without-straight-ticket-voting-option-in-2020/.

possible increase in voting time, and, thus, wait times.

Dr. Graves also applies his model in a manner contrary to his assumptions, further underestimating wait times. Despite modeling ST voters' behavior to be "effectively the same as when there is the STV option," Graves ¶ 68, Dr. Graves assumes that ST voters will skip many of the partisan races on the ballot. *See* Yang II ¶¶ 13-18. In Travis County, Dr. Graves assumed such voters would cast votes in only *half* of the partisan elections. *Id.* ¶ 16. When asked why he did this, Dr. Graves explained he was adopting Dr. Yang's figures, which represented the average number of votes non-ST voters cast in partisan races. Graves Dep. 122:16-123:10. Thus, Dr. Graves's analysis assumed—contrary to his fundamental criticism of Dr. Yang's analysis—that ST voters would behave *the same* as non-ST voters when STV is eliminated. Yang II ¶ 14. Once again, by doing so, he biased his analysis to minimize wait times.

Nevertheless, Dr. Graves's descriptive model still shows that minor variations in voting times caused by eliminating STV can have disastrous effects. Dr. Graves arbitrarily selected five seconds as the amount of time he believed it would take ST voters to make selections on partisan items. Graves Dep. 156:4-157:3. In his second declaration, Dr. Yang demonstrates that if this five-seconds figure is off by just a few additional seconds, substantial increases in wait times would result even under Dr. Graves's descriptive model. Yang II ¶¶ 27-52.

Finally, the Secretary is quite correct that the COVID-19 pandemic will make the November 2020 election unlike any other. But contrary to the Secretary's hopes, there can be no question that the result will be *longer* lines during early and election-day voting. The Secretary has required polling place workers to disinfect voting machines after every use. Ex. 4 at 8 (requiring workers to "[d]isinfect any items that come into contact with voters after such contact"). This requirement will increase wait times. And as many other states have already experienced, the

pandemic will cause a shortage in pollworkers, limiting the number of polling places that can be made available to voters.[6] The need to maintain social distancing requirements in polling places will also limit the number of voting machines that can be used. *See* Ex. 4 at 6 (requiring maintenance of social distancing within polling places). The Secretary's assertion that more Texans will attempt to vote by mail in November than usual, Opp. 9, is belied by the fact that Texas law permits only a tiny fraction of voters to do so. *See* Tex. Elec. Code §§ 82.001-82.004.[7] And expansion of early voting in November, Opp. 9, will by no means mitigate long lines, particularly when voter turnout this fall is expected to be the largest in decades, and early voters in prior elections faced long lines even when the STV option was available.[8]

Lines need not be very long before they prevent voters from exercising their fundamental right to vote. One study found that just "5 people in a voting line tripled the probability of a voter reneging and failing to vote." Expert Decl. of Jason M. Roberts ("Roberts I"), Ex. 5, at ¶ 14.[9] Voters this November will be even less willing to stand in lines than usual due to fears of contracting a life-threatening disease. By dramatically increasing polling-place lines even further,

[6] *See* Alexa Corse, *Long Voting Lines Are Latest Hurdles for Officials Prepping for November Polls*, Wall St. J. (June 18, 2020), https://www.wsj.com/articles/long-voting-lines-are-latest-hurdles-for-officials-prepping-for-november-polls-11592472600.

[7] While it is true that Texas voters have sought judicial relief from the Secretary's refusal to allow voters to cast mail-in ballots rather than risk their wellbeing by standing in line at the polls, such relief so far has been denied. *See* Opp. 9. It would be quite ironic if the Secretary could avoid responsibility for violating voters' constitutional rights due to the possibility that a different court might later find that she has *separately* violated Texans' rights in a different way.

[8] Jim Malewitz, *In Some Counties, Early Voting Means Long Lines*, Texas Tribune (Oct. 24, 2016), https://www.texastribune.org/2016/10/24/some-texas-counties-long-lines-complicate-early-vo/.

[9] Exhibit 5 is an amended version of Dr. Roberts's initial declaration, the original version of which was filed with Plaintiffs' Motion for Preliminary Injunction. ECF No. 19-7. Counsel for Plaintiffs sent a copy of this amended declaration and its underlying materials to the Secretary's counsel on May 13, 2020.

HB 25 will impose a severe burden on Texans' right to vote.[10]

2. HB 25 will cause excessive roll-off among Texas voters.

Beyond producing long lines this November, HB 25 will unjustifiably cause Texans to fail to participate in down-ballot races. Those who use the STV option are at serious risk of rolling off their ballots when that option is eliminated. North Carolina's experience provides a stark example: in the 2014 election immediately following the elimination of STV, roll-off increased from 8.3% to 17.79%, even though the ballot was relatively short. Roberts I ¶ 31. And in 2016, there was a strong relationship between the amount of STV previously used in a county and roll-off. *Id.* ¶ 34. Missouri experienced a similar effect: in the election immediately following the state's elimination of STV, roll-off increased by 80%. Decl. of Allan J. Lichtman ("Lichtman I"), ECF No. 19-2, at 51-52.[11] The Secretary's opposition makes no mention of Missouri's experience.

Seeking to minimize Dr. Roberts's analyses, the Secretary lodges unrealistic methodology criticisms that could be made against virtually any attempt to analyze public policy. For example, Dr. Katz claims no inferences can be taken from Dr. Roberts's analysis because North Carolina's elimination of STV was not "randomly assigned" to voters. ECF No. 58-10, at 3-4. Such a requirement is impossible to satisfy. As Dr. Katz admits, states do not randomly assign their election laws to their citizens. Katz Dep., Ex. 7, 49:10-16. The Equal Protection Clause likely prohibits them from doing so. *See Bush v. Gore*, 531 U.S. 98, 104-05 (2000). "[A]lmost no

[10] The Secretary's assertion that average wait times in North Carolina were greater in 2008 than they were in 2016, *see* Opp. 7, is of no help in determining the effects of that state's elimination of STV in 2013. The Secretary conveniently omits that between 2012 and 2016, wait times in North Carolina *increased*. Ex. 6. In fact, North Carolina's elimination of STV caused the state to experience the *worst wait times in the country* in 2014. Roberts I ¶ 33. Because Texas has significantly longer ballots than North Carolina, the effects of HB 25 will be even worse.

[11] Plaintiffs will separately file a response opposing the Secretary's motion to exclude Dr. Lichtman's testimony. *See* ECF No. 56.

published studies meet this [standard] because randomized policy implementations are virtually non-existent." Second Decl. of Jason M. Roberts ("Roberts II"), Ex. 8, at ¶ 4. In fact, this requirement would invalidate Dr. Katz's own academic work. *Id.* ¶ 5.[12]

To counteract the absence of random assignment, Dr. Roberts examined the relationship between the level at which each county's residents used STV and the roll-off they experienced after STV's elimination. *Id.* ¶ 7. Counties with higher STV usage rates consistently experienced larger roll-off rates. Roberts I ¶ 34. It is thus simply not true that "[a]ll Dr. Roberts shows is that rolloff rates in North Carolina were higher in 2016 than in 2012." Opp. 14.

To illustrate how this roll-off effect might impact voters in Texas in the upcoming election, Dr. Roberts performed a CEM analysis matching North Carolina and Texas counties based on a variety of characteristics. This analysis predicted that eliminating STV will increase roll-off by 1.55% statewide, resulting in "139,000 additional ballots not fully completed." Roberts I ¶ 56. Dr. Katz does not dispute that CEM is a proper methodology for this inquiry. Katz Dep. 147:5-16. Instead, he offers the irrelevant criticism that Dr. Roberts did not match counties based on their Hispanic population. As Dr. Roberts explains, he omitted consideration of Hispanic population because his county-level analysis did not reveal a statistically significant relationship between Hispanic population and use of STV in Texas.[13] Roberts II ¶ 15. Thus, there was "no justifiable

[12] Dr. Katz's claim that Dr. Roberts's roll-off analysis does not account for the proportion of unaffiliated voters in each North Carolina county also makes no difference. *See* Katz Decl., ECF No. 58-10, at 6-7. Because the proportion of independent voters in each county went virtually unchanged between 2012 and 2016, that variable "could not in any way" confound Dr. Roberts's "estimates of the effect of straight ticket removal." Roberts II ¶ 11.

[13] To be clear, this does not contradict Dr. Palmer's conclusion that Hispanic Texans use STV at a statistically significant higher rate than non-Hispanic white Texans, which Dr. Palmer found by analyzing STV usage rates at the much more granular VTD level. Second Expert Decl. of Dr. Maxwell Palmer ("Palmer II"), Ex. 9, ¶¶ 9-10, tbl. 2; Palmer I at tbl. 2. Because counties are a much larger unit encompassing hundreds of VTDs, "county-level data hides important variation

reason to match on this variable." *Id.* In any event, when one incorporates the Hispanic-population variable into the CEM analysis, it predicts an even *greater* roll-off rate. *Id.* ¶ 17.[14]

The Secretary asserts that the Court should not be concerned that eliminating STV will cause voters to fail to complete their ballots. In her view, voters have only themselves to blame if that occurs. Opp. 12-14. Plaintiffs disagree. In a State in which voters are asked to make selections in as many as 95 partisan items, *see* Mot. 5, a voter's failure to complete the ballot cannot be chalked up to indifference. In forcing voters to spend significant time at the polling place when they otherwise would not need to, HB 25 forces voters to choose between participating in the political system and responding to other pressing demands on their time. By forcing voters into that choice, HB 25 severely burdens those Texans' fundamental right to vote.[15]

3. HB 25 will disparately burden African American and Hispanic Texans.

The Secretary does not dispute any of Plaintiffs' evidence demonstrating that minorities use straight ticket voting at higher rates than white voters, or that the burdens resulting from STV's removal will be felt disproportionately by minority voters. Instead, she simply asserts that is not enough. Building on his original analysis, Dr. Palmer examined an expanded set of 26 counties encompassing nearly 75% of 2018 voters, and found "substantively large" differences in STV use among minorities and whites. Palmer II ¶ 16, tbl. 2. In 2018, 82.3% of African Americans and 71.9% of Hispanic voters relied on STV when casting a vote, compared to 60.4% of white voters. *Id.* at tbl. 2; *see* Palmer I at tbl. 2 (finding nearly identical disparities in the original 10 counties).

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in population and STV usage within each county." Palmer II ¶ 10. Indeed, this distinction is one reason why Dr. Alford's county-level analysis is inapposite. *See infra* Section I.B.

[14] Dr. Roberts's second declaration responds to Dr. Katz's other various minor critiques, none of which alter Dr. Roberts's conclusions in any meaningful way. *See generally* Roberts II.

[15] Plaintiffs respond to the Secretary's claim that eliminating STV will "reduce unintentional rolloff," *see* Opp. 12-13, in Section I.A.5, below.

In contrast, the Secretary identified no county where white use of STV surpassed minority use. *See* Alford Decl., ECF No. 58-12, at tbl. 1; Palmer II at ¶ 7.

The Secretary attempts to muddy these clear disparities with irrelevant arguments. First, ignoring these disparities, the Secretary argues that because a larger *total number* of white voters used STV in 2018 than minority voters, HB 25 cannot disproportionately burden minorities. Opp. 16-17. This logic is absurd. Consider a simple example of 100 voters, 30 of which are minority and 70 are white. All 30 minority voters (100% of the minority group) use STV, while 35 white voters (50% of the white group) do so. Under the Secretary's logic, even though minorities use STV at a rate double that of whites, there could be no disparate impact because a larger absolute number of voters who used STV are white. Palmer II at ¶ 11. Such a rule would immunize any number of laws that disparately impact numerically small minority groups.

The Secretary claims that Dr. Palmer's analysis of the State's 10 largest counties is not representative of the State. But even with Dr. Palmer's expanded data set—which includes urban, suburban, and rural counties, Palmer II at figs. 2 & 3—the State's framing would portray Plaintiffs' evidence as insufficient to understand the "broader local context," Opp. 17, because "only" about 10% of all Texas counties are captured. This ignores that an enormous portion of the State resides in just these 26 counties, including 75% of 2018 voters, 72.6% of Texas's overall CVAP, 81.2% of Black CVAP, 76.4% of Hispanic CVAP, and 66.8% of white CVAP. Palmer II at tbl 1.

Dr. Alford's "expanded data set" of 48 counties, Opp. 17, does not negate Dr. Palmer's findings. The Secretary claims that Dr. Alford's counties reveal "little apparent relationship between" minority population and STV use, *id.*, based solely on Dr. Alford's subjective "visual examination" of a "scatterplot," Alford Dep., Ex. 10, at 166:18-167:5. But this "analysis" neither provides insight into the actual disparities in STV use nor accounts for the large disparities in the

counties' populations. Alford Dep. at 174:16-176:20; *id.* at 188:6-22. For example, Dr. Alford claims that Bexar County, which has a large non-white population but a relatively low level of STV, demonstrates that there is no discernable relationship between race and STV use. Alford at 6. But a *VTD*-level analysis—which Dr. Alford admits is the superior methodology that can reveal differences not apparent when examining county-level data, Alford Dep. at 166:3-13, 205:6-22—exposes stark racial and ethnic differences. In Bexar County in 2018, 81% of African Americans and 65% of Hispanics used STV, compared to only 49% of whites. Palmer II ¶ 10, tbl. A2.

The Secretary next attempts to improperly heighten Plaintiffs' burden, claiming that Plaintiffs failed to identify "individual[s] who will be 'prevented from voting.'" Opp. 18. But *Anderson-Burdick* does not require outright disenfranchisement; rather, it measures the severity of a *burden* on the right to vote. *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005) (under *Anderson-Burdick*, "the franchise" "need not have" been "wholly denied to suffer injury"). Likewise, that Plaintiffs have not identified voters who will face long lines or roll off as a result of HB 25 this fall, Opp. 18, does not undermine their claims. It would be impossible for Plaintiffs to identify such a voter months before the election.

Finally, the Secretary misunderstands a key aspect of Plaintiffs' claim. Whether a state may or may not make a decision that might increase "the length of time it takes an individual voter to vote," is not at issue. Opp. 18. Here, the problem arises because HB 25 will increase lines and produce roll-off at a greater rate in areas where minority populations are disproportionately concentrated. In these counties, an accumulation of compounding factors will cause HB 25 to impose particularly severe burdens on minorities: (1) long ballots, (2) large concentrations of minority voters, and (3) a disproportionate rate of minorities switching away from STV. *See* Alford at tbl. 1; Second Decl. of Allan J. Lichtman ("Lichtman II"), Ex. 11, at 6, tbl. 2; Lichtman I at 55-

56 & tbl. 6; Palmer II at tbl. 1. For example, in Dallas County (which contains 10.1% of the State's minority CVAP), minorities used STV at a rate 22% higher than white voters in 2018, and faced *65* partisan items on the ballot. Lichtman II at tbl. 2. Compounding this effect even further is the long and continuing history of discrimination that has led to stark socioeconomic disadvantages for African American and Hispanic Texans, resulting in a reality in which minority voters are least able to withstand the burdens of long lines and long ballots. Mot. at 12-14.

4. HB 25 will severely burden Democrats' associational rights.

Because HB 25 will most severely burden African American and Hispanic voters, and because those voters overwhelmingly prefer the Democratic party, Palmer II ¶ 12, HB 25 will severely burden Democrats' "right to band together for the advancement of [their] political beliefs." *Hadnott v. Amos*, 394 U.S. 358, 364 (1969). The Secretary's only response to this claim is that, in Texas, a larger total number of white Republicans have historically used the STV option than that total number of minority voters. Opp. 19-20. But that fact is irrelevant to this analysis. The relevant question is not how many total number of voters are impacted by a challenged law, but whether there is a group "for whom the burden, when considered in context, may be *more severe*." *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016) (emphasis added). As just explained, not only does a larger proportion of African American and Hispanic voters rely on STV than white voters, but STV's elimination will impose "more severe" burdens on those voters than white voters. The disproportionately severe burden HB 25 imposes on those voters translates to a disproportionately severe burden on Democrats.

Neither *Feeney* nor the Seventh Circuit's opinion in *Arlington Heights* offer the Secretary any support as to this claim. Opp. 19-20. The question in *Feeney* was whether a neutral law was motivated by discriminatory intent. *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256, 280 (1979) (affirming rejection of claim because plaintiff "failed to demonstrate that the law . . . reflects a

purpose to discriminate on the basis of sex"). But "[u]nder *Anderson-Burdick*, it is not necessary for a plaintiff to show discriminatory intent to make out a claim that the state has unconstitutionally burdened the right to vote." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 n.9 (11th Cir. 2019). And the Secretary misreads *Arlington Heights*, in which the court "reaffirm[ed its] earlier holding that the Village's refusal to rezone had a discriminatory effect." *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1288 (7th Cir. 1977).

5. HB 25's purported purposes do not justify the law's burdens.

Because HB 25 will impose severe burdens on Texans' constitutional rights, the Secretary must show that the law is narrowly tailored to a compelling governmental interest. *Burdick v. Takushi*, 504 U.S. 428, 435 (1992). And because none of the interests identified by the Secretary are compelling, HB 25 fails *Anderson-Burdick*. But even if HB 25 imposes a burden that is less than severe, the Secretary must still prove that the interests she claims HB 25 serves are "sufficiently weighty to justify" the burdens HB 25 will cause. *Norman v. Reed*, 502 U.S. 279, 288-89 (1992). The Secretary has offered no evidence suggesting that is the case.

The Secretary claims eliminating STV will produce "more-informed voting." Opp. 21. But she offers "nothing apart from vague speculation that suggests that a voter will make a more informed choice in filling in each individual bubble rather than choosing to fill in one bubble for a straight-party vote." *Mich. State*, 833 F.3d at 666. The existence of the STV option on the ballot does not influence the amount of research a voter performs before arriving at the polling place. Mot. 15-16. This is particularly so in Texas, where voters can alter their choices in specific races after selecting the STV option. The Secretary offers no evidence to support her bald assertion that, in the absence of STV, voters will consider *more* "news coverage and campaign materials" than they already do. Opp. 21. In fact, this argument contradicts the Secretary's own expert, who asserts that in the absence of the STV option, ST voters will "vote, effectively, a straight ticket" and

"execute the vote as expeditiously as possible" without the "need . . . to deliberate." Graves ¶ 68.

Similarly, the Secretary offers no evidence to support her claim that voters will more closely consider candidate qualifications if the STV option is not available. Opp. 21. Candidates' qualifications are not listed on the ballot. And nothing about the STV option in Texas stops a voter from voting for a different party's candidate if she is more qualified. *See* Pls.' Opp. to Def.'s Mot. to Dismiss ("MTD Opp."), ECF No. 47, at 23. The Secretary fails to identify a single individual who has been "discourage[d] . . . from running" due to STV option. Opp. 21.

Next, the Secretary offers the unsupported views of a handful of individuals to assert that eliminating STV makes "third-party and independent candidates more viable." Opp. 21-22. But actual evidence demonstrates the opposite: after Missouri eliminated STV, support for the Libertarian Party *decreased*. Lichtman II at 13. Indeed, the Libertarian Party representative who testified at HB 25's hearing admitted he was "under no illusion that eliminating [STV] will generate significantly more competition." *Id.* at 12.

The Secretary provides anecdotal evidence of STV causing "unintentional rolloff." Opp. 12-13, 21. Even assuming the problem of unintentional roll-off exists, the Secretary fails to explain why that risk "make[s] it necessary" in any way to eliminate STV, forcing voters to endure long lines and roll off *other* parts of their ballot. *Burdick*, 504 U.S. at 434. She provides no explanation, for example, as to why this issue could not be resolved by the much less burdensome alternative of warning voters that the STV option does not apply to non-partisan ballot items.

The same reasoning applies to the Secretary's anecdotal evidence of "emphasis voting," which occurs when a voter unintentionally de-selects a candidate by touching the candidate's name after making the STV selection. Opp. 22-23. Eliminating STV is in no way necessary to mitigate the issue of emphasis voting. All that is needed is a warning: if a voter who has selected the STV

option later selects a candidate to whom the STV option has already been applied, the voting machine can first warn the voter and ask her if she actually wishes to de-select her choice. Forcing more than 5.6 million Texans to make individual selections in every partisan race on long ballots is far too blunt a tool to ensure that a few voters do not make an easily preventable mistake.

B. HB 25 will violate Section 2 of the VRA by denying minority voters an equal opportunity to participate in Texas's elections.

The Secretary's arguments against Plaintiffs' Section 2 claim depend largely on the arguments refuted in Section I.A.3. As explained, Plaintiffs have shown not only that African American and Hispanic voters use STV at a significantly higher rate than white voters, but also that the long lines and ballot roll-off caused by HB 25 will impose disproportionately *severe* burdens on those minority voters.[16]

Because this evidence demonstrates that HB 25 will impose disparately severe burdens on minority voters, the remaining question is whether those burdens are "caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc). This inquiry is driven by the Senate Factors. Plaintiffs will not repeat the evidence marshaled in support of each factor, *see* Mot. 17-24, other than what is necessary to respond to the Secretary's legally unsupported and irrelevant responses.[17]

Factor One. The Court should disregard the Secretary's attempt to paper over the State's recent discriminatory actions simply because they were fixed under compulsion of litigation. Texas

[16] To the extent the Secretary asserts Plaintiffs' Section 2 claim requires them to show voters will be "prevented from voting" as a result of HB 25, Opp. 18, she is wrong. Section 2 prohibits laws that "abridge[]" the vote in a disparate manner. 52 U.S.C. § 10301(a).

[17] As with Plaintiffs' constitutional claims, the fact that certain other states do not have STV has no relevance to Section 2, which requires "an intensely local appraisal of [HB 25's] design and impact." *Thornburg v. Gingles*, 478 U.S. 30, 78 (1986).

intentionally discriminated against its minority voters when drawing its statewide districts after the most recent census. *Texas v. United States*, 887 F. Supp. 2d 133, 159-62, 163-66, 177-78 (D.D.C. 2012), *vacated and remanded on other grounds*, 570 U.S. 928 (2013). The fact that the State was forced to draw new plans that did not discriminate, Opp. 25, does not erase the fact of the prior discrimination. Similarly, the Secretary cannot minimize the "fear," "anxiety," and "intimidat[ion of] the least powerful among us" generated by her predecessor's 2019 advisory that recklessly and falsely accused tens of thousands of naturalized citizens of unlawfully registering to vote via "ham-handed and threatening correspondence." *Tex. League of United Latin Am. Citizens v. Whitley*, No. SA-19-CA-74-FB, 2019 WL 7938511, at *1 (W.D. Tex. 2019). The fact that the Secretary's predecessor withdrew his action *after being sued* surely does not provide the Secretary any support. At that point, the damage had been done: the fear and anxiety generated by these actions continue to have a lasting effect on the State's minority communities.

No controlling case law supports the Secretary's assertion that the first Senate Factor requires past discrimination to be "linked" to the law being challenged. Opp. 24. Regardless, there is such evidence here. As explained in Section I.A.3, the socioeconomic disparities among whites and minorities in Texas—which are "vestiges" of the State's "long history of official racial discrimination with respect to voting rights," *Lopez v. Abbott*, 339 F. Supp. 3d 589, 611 (S.D. Tex. 2018)—will cause HB 25 to disproportionately burden minority voters. *See* Mot. 13. Thus, the State's historical discrimination is directly contributing to HB 25's disparate impact.

Factor Two. Nothing in the Secretary's response disputes that voting in Texas is racially polarized: across dozens of elections analyzed by experts for both parties, African American support for Democratic candidates was "in the low 90% range," "Hispanic support for the Democratic candidate is in the mid 80% range," and "White support for the Democratic candidate

is in the low to mid to upper 20% range." Alford at 11; *see* Palmer II at ¶ 12 (noting Dr. Alford's agreement on this point). Nothing more is needed to demonstrate racially polarized voting. As the *en banc* Fifth Circuit majority in *Veasey* confirmed, "[r]acially polarized voting exists when the race or ethnicity of a voter correlates with the voter's candidate preference." 830 F.3d at 258; *see also Covington v. North Carolina*, 316 F.R.D. 117, 167 (M.D.N.C. 2016) ("'[R]acially polarized voting' refers to the circumstance in which 'different races . . . vote in blocs for different candidates.'"), *aff'd* 137 S. Ct. 2211 (2017). "[T]he Supreme Court has previously acknowledged the existence of racially polarized voting in Texas"; in *Veasey*, "Texas . . . conceded that racially polarized voting exists in 252 of its 254 counties." 830 F.3d at 258.

The Secretary seeks to import a legal requirement unique to vote-*dilution* cases, claiming Plaintiffs must also prove that the consistent electoral defeats of minority-preferred candidates in Texas are caused by race, rather than party affiliation. Opp. 27-29. But the Secretary fails to identify a single case in which that requirement applies to a vote-*denial* case such as this. *See* MTD Opp. 27 (explaining difference between vote-dilution and vote-denial cases); *Mich. State*, 833 F.3d at 667 (challenge to STV is a vote-denial claim). That is because there is no such requirement in a vote-denial case. The cause of electoral defeats is relevant to vote-dilution cases because the basis for such claims is consistent losses by minority-preferred candidate due to white bloc voting. As the Fifth Circuit has explained, a Section 2 vote-dilution claim "extend[s] only to [electoral] defeats experienced by voters 'on account of race or color,'" so the "circumstances underlying unfavorable election returns," are relevant. *LULAC v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (en banc). But in a vote-denial case such as this, the challenged law is abridging minority voters' ability to *cast a vote*. Whether and why minority-preferred candidates lose elections are irrelevant.

Otherwise, Section 2 would allow a state to pass a law prohibiting a minority group from voting altogether, so long as the group is too small to elect their preferred candidate in the law's absence.

Even if the reasons why Texas's minority and white voters cohesively support different candidates are relevant (they are not), race plays a clear role in each group's selection of their preferred candidates. The Secretary offers a single argument to the contrary: because African Americans and Hispanics cohesively support Democratic candidates, and whites support Republican candidates, and this support does not dramatically differ based on the race of the candidate, racially polarized voting is due to partisanship, not race. Opp. 27-29. But "to the extent that racial voting aligns along party lines, race is the driving mechanism." Lichtman II at 14.

Basic history demonstrates the inextricable link between race and party in Texas. From the late 19th Century to the signing of the Civil Rights Act and VRA in the mid-1960s, minorities in the South supported Republicans and whites Democrats. *Id.* at 14-15. At that point, however, "the parties reversed" their stances on racial issues: Democrats became associated with "racial values, policies, and attitudes appealing to African Americans, and Republicans the reverse." *Id.* As a result, minority and white voters reversed their party alignment. *Id.*

Today, the parties' outsized disagreements over issues relating to race continues to produce the polarization among racial groups. Consider the NAACP's rankings of Texas U.S. Senators and Congressmen regarding race-related issues. On average, Republicans received a score of 9%, while Democrats received a score of 91%. *Id.* at tbl. 4. Texans' views on race also diverge according to party affiliation. According to recent polling, Texas Republicans and Democrats sharply diverged on overtly racial issues. *Id.* at tbl. 5. When asked if Texas's voting laws are discriminatory, 73% of Democrats responded yes, compared to just 10% of Republicans. *Id.* 75% of Democrats supported the removal of confederate monuments, compared to just 9% of Republicans. *Id.* 81%

of Democrats agreed there is a large amount of racial and ethnic discrimination in the United States, compared to just 14% of Republicans. *Id.* 60% of Republicans supported the re-enactment of literacy tests, compared to just 26% of Democrats. *Id.* at fig. 4. But on *non*-racial issues, Republicans and Democrats aligned much more closely: far narrower margins separated them on issues involving taxes, background checks for gun purchases, sex and sexual-orientation discrimination, fracking, and the death penalty. *Id.* at tbl 6. These results clearly demonstrate that race is producing much of the division between Democrats and Republicans in Texas.

Primary elections—which the Secretary agrees are relevant for this analysis—also reveal clear voting differences between racial groups when a minority candidate is on the ticket. *See* Alford Dep. at 251:12-253:20 (explaining that primary elections remove the element of partisanship). Exit polls from 2008 demonstrate that Texas voters in the Democratic presidential primary were sharply divided along racial lines: 84% of African American voters supported Barack Obama, while the majority of white voters supported Hillary Clinton. Lichtman II at tbl. 9. Just 16% of African American voters supported Clinton, while 44% of white voters supported Obama. *Id.* Race was much more of a determining factor than other variables including sex, age, education, and income. *Id.* at tbl. 10, fig. 8. The same pattern emerged in this year's Democratic Senate primary, for which pre-election polls showed 77% of white voters supported white candidates and just 23% of white voters supporting minority candidates. *Id.* at tbl. 11. By contrast, minority voters split 60-40 in favor of minority candidates. *Id.* Polls for the upcoming Democratic Senate runoff indicate the same: 61% of African American voters support the African American candidate, and 79% of white voters support the white candidate. Lichtman II at tbl. 12. Other primary elections in Texas have painted a similar picture. *Id.* at App'x B, tbls. 2, 3.

Dr. Alford's analysis demonstrates that, in 2018, irrespective of party, white support for minority candidates was lower than for white candidates. Alford Dep. at 296:16-298:5; Alford at tbl. 4. The lone minority Republican candidate garnered the smallest proportion of the white vote, while his white Democratic opponent obtained a higher percentage of the white vote than any other Democrat in the elections examined. Alford Dep. at 293:3-14; Alford at tbl. 4. His analysis in a different case reveals that Hispanic Texans tend to support Democratic judicial candidates by an additional five percentage points when that candidate was Hispanic rather than white. Alford Dep. at 302:19-303:3; Alford at App'x 3, tbl. 1. Race is a major source of partisan division in Texas.

Factor Three. As already explained, MTD Opp. 26, the decision in *Lopez* that the State's at-large judicial elections do not currently violate Section 2, *see* Opp. 30, does not mitigate the fact that these structures "enhance the *opportunity* for discrimination." *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1120 n.16 (5th Cir. 1991) (emphasis added).

Factor Five. The Secretary does not dispute any of the socioeconomic disparities discussed in Plaintiffs' motion. Opp. 31. Instead, she offers the irrelevant assertion that African American turnout and registration is higher than Hispanic turnout. *Id.*[18] That is not the question. What matters here is whether minority voters lag behind *white* voters in political participation. As Dr. Lichtman explains in detail, both African American and Hispanic Texans consistently and significantly lag behind white Texans in registration, turnout, and political contributions. Lichtman II at 32-37.

Factor Six. The Secretary again invents a new legal standard by pointing to the irrelevant fact that that the individuals who engaged in racial appeals discussed in Plaintiffs' motion and Dr.

[18] Though the Secretary does not explain this point, it perhaps is meant to imply that these socioeconomic disparities are not causing depressed political participation among minority voters. But "[p]laintiffs are not required to prove a causal connection between these factors and a depressed level of political participation." *Teague v. Attala Cty.*, 92 F.3d 283, 294 (5th Cir. 1996).

Lichtman's report did not vote on HB 25. Opp. 31. No authority supports the proposition that this is required. Moreover, the Secretary does not dispute that the racial appeals identified by Plaintiffs occurred. She instead falsely claims that Plaintiffs identified only "two candidates" who engaged in racial appeals. *Id.* But in fact, Plaintiffs identified eight such candidates, four of whom won their elections. *See* Mot. 22; Lichtman I at 68-73.

Factor Seven. The seventh Senate Factor does not, as the Secretary would have it, require any sort of partisanship analysis. Opp. 32. Not only does this position lack any support in controlling case law, the en banc Fifth Circuit has said the exact opposite: holding that the law at issue violated Section 2, the court explained that the seventh factor weighed in the plaintiffs' favor solely because "African Americans comprise 13.3% of the population in Texas, but only 1.7% of all Texas elected officials," and "Hispanics comprise 30.3% of the population but hold only 7.1% of all elected positions." *Veasey*, 830 F.3d at 261. These disparities have not materially improved in the four years since *Veasey* was decided. Mot. 23; Lichtman I at 73, tbl. 14. Even if one considered partisan politics in this factor, it would not change the outcome: while every single Texas official elected statewide is a Republican, not a single one is African American, and only three are Hispanic. Lichtman I at tbl. 14.

Factor Eight. The Secretary's decision not to engage with any of the evidence Plaintiffs offered on this issue, *see* Mot. 23-24, should be considered a concession of this factor. In a puzzling attempt to demonstrate otherwise that Texas's government is responsive to the needs of African Americans and Hispanics, the Secretary offers two pieces of evidence: (1) a poll that recently found a majority of both groups refused to say that they approved of the Governor's performance, and (2) in response to a court's finding that the Legislature unconstitutionally discriminated *against* minorities, the Legislature agreed to consider the interests of minority groups. Opp. 32-33.

This evidence indicates that Texas is *not* responsive to minority needs. In any event, a more accurate depiction of minority Texans' view of the State's elected officials is their voting behavior. African American and Hispanic voters in Texas have overwhelmingly voted against those who have been elected to office in Texas, including the Governor. Palmer I at figs. 4, 5.

Factor Nine. In Section I.A.5, above, Plaintiffs explain that HB 25's purported purposes are either illogical or can be served through significantly less burdensome measures.

C. HB 25 is the result of an intent to depress minority political participation.

The Secretary ignores much of the intent evidence Plaintiffs present, which demonstrates that "racial discrimination" was "one purpose" behind HB 25. *Veasey*, 830 F.3d at 230. She does not dispute that HB 25 was passed at a time during which African American and Hispanic Texans—who disproportionately used STV—were growing in political strength and beginning to win elections. Mot. at 26-27. And like the legislators who passed HB 25, she dismisses the concerns raised by numerous legislators and community leaders who testified that HB 25 would disparately impact minorities. *Id.* at 27-31. Instead, the Secretary offers legally and factually misleading arguments, each of which fail under a modicum of scrutiny.[19] Likewise, the Secretary does not dispute that legislators' justifications for HB 25 were unsupported by any empirical evidence. *Id.* at 15-16; *supra* Section I.A.5.

The Secretary overstates and misrepresents the testimony in favor of HB 25 heard during public hearings. For example, the "detrimental real-world effects," of STV that Jacquelyn Callanen testified about, Opp. 35, was not any problem inherent to STV, but rather that the nuances of

[19] The Secretary misrepresents the "presumption of legislative good faith." Opp. 34. This means nothing more than it is Plaintiffs' initial burden to prove discriminatory intent was one of the motivating factors behind HB 25. *Veasey*, 830 F.3d at 230. In *Abbott v. Perez*, on which the Secretary relies to artificially heighten Plaintiffs' burden, the Supreme Court reversed because the district court had switched the burden by requiring the State in the first instance to show past discrimination did not taint the challenged plan. 138 S. Ct. 2305, 2324 (2018).

voting-machine programming often cause issues, and that on one occasion voter confusion arose when the voting machines were incorrectly calibrated. ECF No. 58-3, at 44:13-46:13. She further admitted that as Bexar County Elections Administrator, she would tell voters "the best thing about our equipment is you can vote straight party." *Id.* at 44:22-24. And the Secretary's example of "a former district court judge in Harris County" who testified against HB 25 exemplifies one of the true motivations for passing HB 25. Ms. Lunceford, a former Harris County Republican judge, supported HB 25 because she blamed STV for her and other Republicans' electoral defeat: she admitted she supported HB 25 because straight-ticket voting was "why [she's] no longer a judge" and "the only reason we all lost." Lichtman I at 30.

Next, the Secretary holds HB 25's proponents and opponents to different standards. For example, she claims that no "data" on HB 25's disproportionate impacts was presented during legislative hearings or debate. Opp. 38. But likewise, no "data" was presented by any of HB 25's proponents as to any of the claims they made. During legislative hearings, third-party representatives claimed STV was harmful to their ability to compete in Texas elections, Opp. 35-36, but they offered no data supporting that claim (and one even admitted that HB 25 would not make elections more competitive). The Legislature accepted these "unsubstantiated claims," Opp. 38, but disregarded all testimony that HB 25 would disparately harm minorities. Likewise, no witness before the Legislature provided any "data" or other evidence for the still-unsubstantiated claim that removing STV would result in voters performing more research about candidates prior to voting or choosing more qualified candidates. *See supra* Section I.A.5.

Additionally, the Secretary misconstrues the directive not to ascribe opponents' characterizations of proponents' motivations. Opp. 38. Opponents of HB 25 did not accuse the bill's proponents of intentionally discriminating, and Plaintiffs do not rely on any such evidence.

Instead, time and again, legislators and witnesses raised concerns about the disparate use of STV in Texas and the impact HB 25 would have on minorities, and they called for the Legislature to do its due diligence to ensure minority voting rights would not be harmed. Mot. at 28-31. Each of these calls went conspicuously and intentionally unanswered by HB 25's proponents. *Id.* The Legislature's feigned ignorance on this issue spoke volumes.

Likewise, the Secretary fails to explain away procedural deviations marring HB 25's passage. She offers no explanation for why debate was not allowed on proposed amendments or why HB 25's sponsor refused to take a position on any amendments until explicitly questioned about this procedural deviation. Mot. at 32; Lichtman I at 35-36. And while there is no Senate committee dedicated to elections, there is a Senate Committee on State Affairs, which routinely hears elections bills. Lichtman I at 33. Even now, while the Legislature is adjourned, the State Affairs Committee is tasked with evaluating numerous aspects of election administration, including election security, mail-in ballots, and polling station access.[20] Moreover, while it may be the case that the Legislature does not hold hearings across the State while it is in session, it routinely holds hearings throughout the State on significant elections issues.[21]

The Secretary's final two arguments fail as they mistake basic facts. First, the Secretary misrepresents what she calls the "most basic information related to the passage of the challenged bill—the final vote tally," falsely claiming that eight Democratic legislators voted for HB 25. Opp. 40. But the legislators listed by the Secretary *did not vote for HB 25*. Rather, they voted for an amendment to *delay* its implementation. Lichtman II at 9-10. In reality, the vote on HB 25's

[20] *See* Tex. State Senate, Senate Comm. on State Affairs, https://senate.texas.gov/cmte.php?c=570 (listing "elections" and a wide range of election-related issues as one of the committee's interim charges).

[21] *See House Comm. on Redistricting Interim Field Hearings*, Tex. House of Representatives (Sept. 2019), https://house.texas.gov/news/press-releases/?id=7050.

passage fell largely along party lines, with just three Democrats voting in favor. *Id.* at 10-11. The Secretary likewise misleadingly asserts that "three fiscal notes" were prepared for HB 25. Opp. 39. But none of those documents were actual fiscal notes. Even Senator Hancock, the bill's Senate sponsor, admitted there was "no fiscal note on this legislation." Lichtman II at 11-12. The documents the Secretary cites included no analysis whatsoever of the costs of implementing HB 25—the entire purpose of a fiscal note—and instead baselessly claimed that "[n]o fiscal implication to units of local government is anticipated." *Id.* But as was clear from the legislative record, significant costs could be expected as a result of HB 25. In Dallas County alone, county officials estimated costs of nearly $1 million. *Id.*; *see id.* App'x A (comparing HB 25's "fiscal notes" to a prior fiscal note).

Finally, in arguing that Plaintiffs cannot satisfy this claim, the Secretary badly misreads *Feeney*, which provides her no support. Opp. 34. In the portion of *Feeney* on which the Secretary relies, the Court inquired whether the disparate impact of the challenged law, *by itself*, demonstrated an intent to discriminate. 442 U.S. at 275 (inquiring whether "the impact of this statute could not be plausibly explained on a neutral ground"). In other words, the Court was asking whether the law's impact alone rendered it "unexplainable on grounds other than" gender. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). The Secretary suggests that the Court rejected the plaintiff's claim on this basis alone. Opp. 34. That is false. After concluding that the law's impact was not by itself sufficient to give rise to a claim of intentional discrimination, the Court then analyzed the "dispositive question," which was "whether the [plaintiff] has shown that a gender-based discriminatory purpose has, at least in some measure, shaped" the law at issue. *Id.* at 276. That latter inquiry is what governs this intentional discrimination claim, for which Plaintiffs point to much more than just HB 25's disparate effect.

D. HB 25 is the result of viewpoint discrimination.

As just explained, Texas enacted HB 25 because it would disproportionately impede the political participation of minority voters. One reason the State did so was because of those voters' support for the Democratic party. In other words, HB 25 was intended to "[f]enc[e] out from the franchise a sector of the population because of the way they vote." *Carrington v. Rush*, 380 U.S. 89, 94 (1965). That action is "constitutionally impermissible." *Id.*[22]

Plaintiffs have already explained that, contrary to the Secretary's assertion, Opp. 42, this claim is subject to the *Arlington Heights* framework, not *Anderson-Burdick*. *See* MTD Opp. 35-36. Thus, the relevant question here is "whether invidious discriminatory purpose was a motivating factor." *Arlington Heights*, 429 U.S. at 266. As just explained in the section above, it plainly was.

Republican STV usage rates do not negate the Legislature's intent to discriminate against Texans on the basis of their support for the Democratic party. *See* Opp. 41. It is not the rate at which Democrats use STV that is important, but rather the disproportionate harms that they will encounter when STV is eliminated. Because the minority voters who support Democrats will disproportionately suffer the detriments of HB 25, *see* Section I.A.3, Democrats will as well. In any event, "for purposes of the intent analysis, the critical point is the upward trend" of STV usage among minorities and Democrats. Lichtman II at 8. While minority and Democratic STV usage has consistently increased in recent years, white and Republican usage has decreased: between 2004 and 2016, an 11-point shift occurred in STV usage among Democrats and Republicans. Lichtman I at fig. 3. Now, STV users in Texas are split evenly between Democrats and Republicans. Lichtman II at 8. The Legislature's choice to reject eliminating STV in 2013, but to

[22] The Secretary wrongly asserts that *Carrington* does not apply because HB 25 will not "bar" Texans from voting. Opp. 42. Nothing in *Carrington* sets such a requirement. More importantly, HB 25 *will* bar individuals from voting by subjecting them to excessive polling-place lines.

do so four years later, demonstrates they chose to do so only when the partisan trends reached a tipping point, and thus eliminating STV would be politically beneficial.

As also already explained, Plaintiffs' viewpoint discrimination claim does not raise a political question. MTD Opp. 36-37. The Secretary's citations to two new cases, Opp. 42, do not offer her any support. In *Coalition for Good Governance*, the court determined that the plaintiffs' claim that inadequate measures had been taken to prevent the transmission of COVID-19 during the upcoming election was merely a political dispute over policy. *Coal. for Good Governance v. Raffensperger*, No. 1:20-cv-1677, 2020 WL 2509092, at *3 (N.D. Ga. May 14, 2020). And Judge Pryor's sole concurrence in *Jacobson*—which failed to convince either of the other judges on the panel—involved a case challenging the inherent unfair political advantage conferred by a law governing the ordering of candidates on the ballot. *Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193, 1213 (11th Cir. 2020). By contrast, Plaintiffs here challenge affirmative conduct by the State meant to burden a select group of voters because of their political beliefs. That action squarely violates the First Amendment's basic purpose, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995), and is justiciable.

II. The remaining relevant factors support a preliminary injunction.

Absent an injunction, HB 25 will violate the constitutional rights of Plaintiffs, their members, and other Texas voters. The Secretary does not dispute that this amounts to irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Similarly, the balance of the equities and the public interest heavily favor granting a preliminary injunction. The public interest is always served by preventing violations of constitutional rights. *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996). Because "it is in the public interest to override legislation that . . . infringes on an individual's federal constitutional rights," an "injunction preventing the enforcement of an unconstitutional law serves, rather than contradicts, the public interest." *De*

Leon v. Perry, 975 F. Supp. 2d 632, 665 (W.D. Tex. 2014), *aff'd sub nom. De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015). The Secretary contests none of this.

Preserving the status quo by enjoining HB 25's implementation this fall will not risk any disruption of Texas's elections. As the Secretary admits, Opp. 43, we are still more than two months away from the date on which the Secretary will certify candidates for the ballots, before which ballots cannot even be prepared. That is more than enough time for election officials to offer a form of voting they have provided for a century. Indeed, courts have routinely imposed far more disruptive injunctions against election laws under much shorter timelines. *See, e.g.*, *Ga. State Conf. NAACP v. Georgia*, No. 17-CV-1397, 2017 WL 9435558 (N.D. Ga. May 4, 2017) (granting motion for preliminary injunction filed less than seven weeks before election).[23] In the past week, two federal courts have granted preliminary injunctions relevant to upcoming elections. One enjoined the use of a law affecting ballots for the November general election. *Pavek v. Simon*, No. 19-CV-3000, 2020 WL 3183249 (D. Minn. June 15, 2020). And the other enjoined various election procedures for Alabama's *July 14* election. *People First of Ala. v. Merrill*, No. 20-CV-00619, 2020 WL 3207824 (N.D. Ala. June 15, 2020).

Contrary to the Secretary's assertion, Opp. 43-44, *Veasey* supports issuing an injunction

[23] *See also Fla. Democratic Party v. Detzner*, No. 4:16-CV-607, 2016 WL 6090943, at *1 (N.D. Fla. Oct. 16, 2016) (requiring cure period for ballots with signature mismatches based on motion filed one month before Election Day); *Fla. Democratic Party v. Scott*, No. 16-CV-626, 2016 WL 6080225 (N.D. Fla. Oct. 12, 2016) (extending voter registration deadline and deadline for counties to submit and amend early voting plans based on motion filed four weeks before election); *Bryanton v. Johnson*, 902 F. Supp. 2d 983 (E.D. Mich. 2012) (enjoining the inclusion of a citizenship verification question on absentee ballot and voter registration applications based on motion filed seven weeks before election); *Sanchez v. Cegavske*, 214 F. Supp. 3d 961 (D. Nev. 2016) (ordering counties to open more in-person voter registration and early voting locations based on motion filed seven weeks before election); *U.S. Students Ass'n Found. v. Land*, 585 F. Supp. 2d 925 (E.D. Mich. Oct. 13, 2008) (prohibiting rejection of voter registrations due to voters' ID cards being returned undeliverable and requiring removal of "cancelled" designation from voter registration records based on motion filed seven weeks before election).

under the timeline before this Court. In its opinion—published on July 20, 2016—the Fifth Circuit instructed the district court on remand to "fashion[] interim relief for the . . . November 2016 election" to remedy the law's violation of Section 2. *Veasey*, 830 F.3d at 242. *Veasey* involved a photo ID law, and the district court's injunction remediating the law's discriminatory effects required educating poll workers and voters about its implementation. Nonetheless, the district court granted its injunction as late as August 10, 2016. *Veasey v. Abbott*, No. 2:13-cv-193 (S.D. Tex.), ECF No. 895. By contrast, enjoining HB 25 would require no educational efforts and would simply leave Texas law the way it has been for a century.

III. The flawed arguments from the Secretary's Motion to Dismiss do not alter the outcome.

The Secretary incorporates by reference the incorrect venue, Eleventh Amendment, and standing arguments asserted in her motion to dismiss. Opp. 4-5. Plaintiffs' opposition to that motion explains why none of these arguments have merit. *See generally* MTD Opp. Rather than also incorporating by reference the laches and unclean hands arguments asserted in her motion to dismiss, the Secretary simply repeats the same arguments in her opposition here. Opp. 44-45. Plaintiffs have already refuted these arguments. *See* MTD Opp. 37-40.

IV. Conclusion

The Court should preliminarily enjoin the implementation of HB 25.

June 19, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Skyler M. Howton
Skyler M. Howton