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

Texas Alliance for Retired Americans, Sylvia Bruni, DSCC, and DCCC, Plaintiffs, v. RUTH HUGHS, in her official capacity as the Texas Secretary of State, Defendant.	Civil Action No. 5:20-cv-128

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 force voters across the state to stand in long lines this November, significantly increasing their exposure to a deadly virus. Aside from physically endangering voters, HB 25 will severely burden their fundamental right to vote and in many cases deny them the opportunity to participate in the election altogether. These effects will be most severely felt by African American and Hispanic Texans, who disproportionately live in areas with the longest lines, are less able to withstand HB 25's burdens, and experience higher rates of infection of COVID-19 and worse health outcomes as a result. 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.

Unable to defeat Plaintiffs' evidence, the Secretary resorts to a series of straw-man arguments that have no impact on the governing analysis. And on certain occasions, she offers facts that are blatantly false, such as claiming that vehement opponents of HB 25 supported eliminating STV. 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).

The Secretary exaggerates what must occur prior to the upcoming election in order to prevent HB 25 from injuring Plaintiffs, their members and constituents, and voters throughout the State. The fact that counties may have already begun distributing ballots to the tiny portion of Texas voters eligible to vote by mail has no impact on HB 25's effect on wait times *at the polls*. The Court can provide appropriate relief without forcing counties to resend mail-in ballots by

tailoring its injunction to require that the STV option be made available to all in-person voters.

I. Plaintiffs are 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 legality. "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 burden HB 25 will impose on Texans is sufficiently justified. It is 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." 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." Yang Decl. ("Yang I"), ECF No. 6-2 ¶ 34. 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." Dr. Yang illustrates how eliminating STV would have produced this result in the most recent presidential election. *See* Pls.' Mem. in Support of Mot. for Prelim. Inj. ("Mot."), ECF No. 6, at 6-10.

a. The Secretary's arguments regarding Dr. Yang's analyses are outdated, irrelevant, and utilize the wrong data.

The Secretary's various straw-man arguments do nothing to limit the import of Dr. Yang's declaration. Indeed, despite that the analyses Dr. Yang performed in the declaration offered in this case differ significantly from those he performed in his initial declaration in *Bruni*, the Secretary simply repeats the exact same arguments she offered in in *Bruni*, most of which no longer apply

to Dr. Yang's current analyses. The Secretary also offers the outdated declaration that Dr. Graves submitted in *Bruni*, ECF No. 30-7, which responded to analyses completely different from what Dr. Yang presents in this case. *See* Second Yang Decl. ("Yang II"), Ex. 2, at ¶¶ 1-7. As a result, most of the Secretary's and Dr. Graves's arguments are irrelevant. For example, the Secretary repeats her claim that Dr. Yang did not utilize "academic literature" in calculating average voting time in Texas. Def.'s Opp. to Pls.' Mot. for Prelim. Inj. ("Opp."), ECF No. 29, at 12. But Dr. Yang's new analyses calculates voting times based on a regression model developed in academic literature and using Texas-specific information. Yang I ¶¶ 30-32, 50. The same applies to the Secretary's claim that Dr. Yang did not consider evidence of whether STV actually decreased voting time in other states, Opp. 12—again, not true with respect to Dr. Yang's declaration in *this* case. Yang I ¶ 34 (citing study examining voting time across 19 states and finding "the opportunity to vote [STV] significantly reduces the time to ballot"). The same with the claim that Dr. Yang did not consider that Texas voters who use STV still must scroll through their ballot. Opp. 13. Dr. Yang makes no assumptions in that regard. Indeed, his analytical method is no different from that of Dr. Graves: starting from a baseline average voting time, both experts considered what would occur if it took former ST voters a certain amount of time to complete additional partisan items on the ballot. *See* ECF No. 30-7 at ¶¶ 68, 74. What is more, the Secretary's failure to offer an updated declaration by Dr. Graves means that his analysis is using "the wrong data." Yang II ¶ 7.

Contrary to the Secretary's irrelevant assertion, the point of Dr. Yang's analysis is not to estimate what happened in 2016. Rather, it is to illustrate how even "small increases in voting time can produce significant increases in wait times." Yang I ¶ 20. As a result, Travis and Fort Bend Counties need not be perfectly representative of other Texas counties to understand the implications of his analysis. Opp. 16-17. As Fort Bend County Elections Administrator John

Oldham explains, based on his experiences during a long career in election administration, eliminating STV "*will cause* a significant increase in the average amount of time Texas voters will spend casting their votes during general elections." ECF No. 6-1 at Page 26-28 of 28 ("Oldham"), at ¶ 4 (emphasis added). And Dr. Yang's analyses demonstrate that this increase in voting time will produce significant increases in wait times at the polls. As explained, Mot. 9, those long lines will impose severe burdens on Texans' fundamental right to vote.

Similarly, the fact that Dr. Yang is not "analyz[ing] future elections," Opp. 13-16, is meaningless. The Secretary's own declarant explains that the best way to estimate how many voters will arrive at a polling place in a future election is to look at data from "prior elections." ECF No. 30-1 ¶ 13. And the voting-machine reallocations performed by Dr. Graves—which retroactively shifts voting machines between polling places after the election is over, Opp. 12—is useless because it has "the unrealistic benefit of 20/20 hindsight." Yang II ¶ 18. While there is no reason to doubt that Travis and Fort Bend officials tried their best to predict voter distribution among polling places in advance of the 2016 election, they clearly misallocated machines in many locations. *Id.* ¶ 17. Because the "margin of allowable error" when deciding how to allocate voting machines is already "small," eliminating STV shrinks that margin even further. *Id.* ¶¶ 18-19.

Seeking to minimize 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." ECF No. 30-7 ¶ 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 removed. And by crafting his model this way, Dr. Graves sets up his analysis to predict the smallest possible increase in voting time, and, thus, wait times. Yang II ¶ 9.

Dr. Graves also applied 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," ECF No. 30-7 ¶ 68, Dr. Graves assumes that ST voters will skip a significant number of partisan races on the ballot. *See* Yang II ¶¶ 10-11. For example, he assumed former ST voters in Travis County would cast votes in only *half* of the partisan elections on the ballot. *Id.* Once again, by doing so, he biased his analyses to minimize wait times.

b. The Secretary does not dispute that the COVID-19 pandemic prevents officials from mitigating HB 25's effects.

Despite claiming that the increase in lines caused by HB 25 could be mitigated by measures such as increasing the number of voting machines at polling places, Opp. 17, the Secretary utterly fails to respond to Plaintiffs' evidence that such mitigation efforts will not be possible this November. Mr. Oldham's declaration explains how the ongoing pandemic "causes serious election-administration problems that limit Texas counties' ability to implement measures that would otherwise mitigate the increase in wait times resulting from the elimination of the [STV] option." Oldham ¶ 6. Social distancing requirements will prevent polling places from adding machines and in many instances *require decreasing* the number of machines compared to prior elections. *Id.* ¶ 7. Reluctance among venues to serve as polling places and a pollworker shortage will prevent counties from increasing the number of polling places—and in many instances will *require decreasing* the number of polling places—provided to voters. *Id.* ¶¶ 8-9. And Texas voters will encounter an unusually long ballot this November due to the inclusion of postponed municipal elections. *Id.* ¶ 10. Remarkably, the Secretary does not even acknowledge—let alone dispute—any of this: her opposition brief does not even mention Mr. Oldham's declaration. The Secretary

has thus waived any argument to the contrary.

The Secretary's speculation about other events that might mitigate the long lines caused by HB 25 fare no better. *See* Opp. 14-15. The prospect that more voters within the tiny universe of Texans eligible to vote by mail may do so, *see* Mot. 8, will have little impact on the overall number of voters who appear at the polls to cast their vote. Similarly, the Secretary suggests that, because Texas law will force the vast majority of voters to risk their health by voting in person, some of those voters might forgo their fundamental right to vote altogether, thereby reducing turnout. Opp. 14. But the State's decision to force voters into a choice between their vote and their health cannot immunize its decision to impose *additional* burdens on those same voters. And in any event, record turnout in Texas's July 14 election indicates that, despite the pandemic, in-person turnout this fall will be higher than normal. *See* Pls.' Opp. to Def.'s Mot. to Dismiss ("MTD Opp."), ECF No. 33, at 6-7. Moreover, the fact that Texas voters in November will be offered fewer polling places and fewer voting machines, *and* will have longer ballots, *see* Oldham ¶¶ 7-10, will offset whatever decrease in wait times that depressed turnout might have otherwise produced.

2. HB 25's long lines will disparately burden African American and Hispanic Texans.

The Secretary does not dispute any of the evidence demonstrating that minorities use STV at higher rates than white voters, or that the burdens resulting from STV's removal will be felt disproportionately by minorities. She does not dispute Dr. Palmer's finding that STV "usage rate was significantly higher among minority voters." Palmer Decl. ("Palmer I"), ECF No. 6-14 at Pages 15-27 of 27, at ¶ 13, tbl. 2. For good reason: 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).

And the Secretary's expert identified *no* county where white use of STV surpassed minority use at a statistically significant level. *See* Alford Decl., ECF No. 30-11, at tbl. 1.

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. 18-19. 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 number of voters who used STV are white. Second Palmer Decl. ("Palmer II"), Ex. 3, at ¶ 5. Such a rule would immunize any number of laws that disparately impact numerically small minority groups.

Ignoring Dr. Palmer's analysis of 26 counties and 75% of Texas voters, the Secretary baselessly claims that Dr. Palmer's analysis was "too limited." Opp. 19. The Secretary's argument that examining 10 counties across multiple elections is insufficient to understand the "broader local context," *id.*, ignores the fact that about 60% of ballots cast in Texas in 2018 came from those 10 counties. Palmer I at ¶ 7. More importantly, the Secretary entirely ignores Dr. Palmer's analysis of 26 Texas total counties, which comprised 75% of 2018 voters. *Id.* at ¶ 7, tbl. 1, fig. 1. These 26 counties account for 72.6% of Texas's overall CVAP, 81.2% of Black CVAP, 76.4% of Hispanic CVAP, and 66.8% of white CVAP. *Id.* at tbl 1. The State offers no response to this analysis and thus does not appear to dispute it. *See* Opp. 19 (arguing only that ten of the counties "are not in any sense representative of the broader local context of Texas voters in general.").

Dr. Alford's "expanded data set" of 48 counties, *id.*, does not impact 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. 4 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, indicated 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 ¶ 4, tbl. A1.

The Secretary next attempts to improperly heighten Plaintiffs' burden, claiming that Plaintiffs failed to identify "individual[s] who will be 'prevented from voting.'" Opp. 19. 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 as a result of HB 25 this fall, Opp. 19, 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. 20. Here, the problem arises because HB 25 will increase lines 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; Lichtman Decl., ECF No.1-4, at 57-58 & tbl. 7; Palmer I at tbl. 2. 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 at tbl. 1. 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. 14-15.[1]

3. 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 ¶ 6, 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. 21. 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.

[1] The Secretary's claim that Dr. Lichtman's analysis does not show statistically significant disparities in wait times among whites and minorities, Opp. 19 n.6, is belied by his findings that in 2012 and 2016, minority Texans were 21.6% more likely to stand in line for more than 30 minutes, and that those results "are statistically significant at the .001 level." Lichtman at 59.

Neither *Feeney* nor the Seventh Circuit's opinion in *Arlington Heights* offer the Secretary any support as to this claim. Opp. 21. The question in *Feeney* was whether a neutral law was motivated by discriminatory intent. *Pers. Adm'r 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).

4. 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. 24. 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. 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. 24. 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." ECF No. 30-7 ¶ 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. 24. 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* MTD Opp. at 26. The Secretary fails to identify a single individual who has been discouraged from running due to STV.

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. 24-25. But actual evidence demonstrates the opposite: after Missouri eliminated STV, support for the Libertarian Party *decreased*. Lichtman at 46. Indeed, the Texas 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.*

The Secretary's anecdotal evidence of "unintentional rolloff" in prior elections does not justify eliminating STV altogether. Opp. 22-23. Even assuming the problem of unintentional roll-off exists, the Secretary fails to explain why that risk "make[s] it necessary" to eliminate STV, forcing voters to endure long lines. *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. 23-24. 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.2. 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 caused by HB 25 will impose disproportionately *severe* burdens.[2]

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. 18-24, other than that necessary rebut the Secretary's responses.[3]

Factor One. The Court should disregard the Secretary's attempt to paper over the State's

[2] 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. 19, she is wrong. Section 2 prohibits laws that "den[y] *or* abridge[]" the vote in a disparate manner. 52 U.S.C. § 10301(a) (emphasis added).
[3] 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).

recent discriminatory actions simply because they were fixed under compulsion of litigation. Two different courts found that Texas *intentionally discriminated* against its minority voters in 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); *Perez v. Abbott*, 253 F. Supp. 3d 864, 945-62 (W.D. Tex. 2017). That the State followed those courts' command to undo its discrimination, Opp. 26-27, does not negate the original discrimination. The same applies to Texas's alteration of its voter ID law after its invalidation by the Fifth Circuit. *Veasey*, 830 F.3d 216. And 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 breaking the law 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. Feb. 27 2019). Once again, 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. 28. Regardless, there is such evidence here. As explained in Section I.A.2, the socioeconomic disparities between 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. 14-15. 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 ¶ 6 (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. 28-30. 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. at 29-30 (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 candidates 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. *League of United Latin Am. Citizens,*

Council 4434 v. Clements, 999 F.2d 831, 850 (5th Cir. 1993) ("*LULAC*") (en banc). But in a vote-denial case such as this, the challenged law is abridging and denying 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. For this reason, *LULAC* and *Lopez*, vote-dilution cases, are irrelevant on this issue. *See* Opp. 29. Despite that Plaintiffs raised this specific issue in their Motion, *see* Mot. 20 n.22, the Secretary's opposition does not even acknowledge—let alone respond—to the distinction between vote-denial and vote-dilution cases and the impact that distinction has on the governing standard.

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. Once again, the Secretary ignores Plaintiffs' evidence showing that "to the extent that racial voting aligns along party lines, race is the driving mechanism." Lichtman at 63.

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 63-64. 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 race-related issues continue to produce polarization. In ranking lawmakers from Texas on race-related issues, the NAACP recently gave Republicans an average score of 9%, and Democrats 91%. *Id.* at tbl. 11. 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. 12. 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.* Remarkably, 60% of Republicans supported the re-enactment of literacy tests, compared to just 26% of Democrats. *Id.* at fig. 5. 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 13. These results demonstrate race is producing much of the partisan division in Texas. Again, the Secretary offers no response to this evidence.

Moreover, 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 the highest percentage of the white vote among all Democrats. 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. Put simply, race is a major source of partisan division in Texas.

Factor Three. The decision in *Lopez* that the State's at-large judicial elections do not *currently* violate Section 2, *see* Opp. 31-32, does not mitigate the fact that this structure "enhance[s] 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). And the Secretary's defense of the state's large districts ignores that these are policy decision made by elected officials.

Factor Five. The Secretary does not dispute any of the socioeconomic disparities discussed in Plaintiffs' motion. Opp. 32-33. Instead, she offers the irrelevant assertion that African American turnout and registration is higher than Hispanic turnout. *Id.*[4] That is not the question. What matters here is whether minority voters lag behind *white* voters in political participation. As Dr. Lichtman explained in detail, both African American and Hispanic Texans consistently and significantly lag behind white Texans in registration, turnout, and political contributions. Lichtman at 87-90.

Factor Six. The Secretary again invents a new legal standard by pointing to the irrelevant fact that that the individuals who engaged in the undisputed racial appeals discussed in Plaintiffs' motion and Dr. Lichtman's report did not vote on HB 25. Opp. 33. No authority supports the proposition that this is required. She also falsely claims that Plaintiffs identified only "two candidates" who engaged in racial appeals. *Id.* In fact, Plaintiffs identified eight such candidates, four of whom won their elections. *See* Mot. 22-23; Lichtman at 90-95.

Factor Seven. The seventh Senate Factor does not require any sort of partisanship analysis. Opp. 33-34. Indeed, 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

[4] 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 Cnty.*, 92 F.3d 283, 294 (5th Cir. 1996).

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 since *Veasey* was decided. Mot. 23; Lichtman at 95-97, tbl. 26. 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. *Id.*

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 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. 34. 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 current Governor. Palmer I at fig. 4.

Factor Nine. In Section I.A.4, 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.[5] *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. 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 27-30. Nor does the Secretary dispute that legislators' justifications for HB 25 were unsupported by any empirical evidence. Instead, the Secretary offers legally and factually misleading arguments, each of which fail under a modicum of scrutiny.

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 about which Ms. Callanen testified, Opp. 37, was not a problem inherent to STV, but rather an issue of voting-machine programming. ECF No. 31-2, at 44:13-46:13. And the former Harris County judge who testified in support of HB 25 simply exemplified the true motivation for passing HB 25: to limit Democratic electoral victories. Lichtman 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. 40. 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. 37-

[5] The Secretary misrepresents the "presumption of legislative good faith." Opp. 35-36. 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).

38, but they offered no data supporting that claim, and one even admitted that HB 25 would not make elections more competitive, Lichtman 46. The Legislature accepted these "unsubstantiated claims," Opp. 40, 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.4.

Additionally, the Secretary misconstrues Plaintiffs' claim and Fifth Circuit case law in raising the rule that courts should not accept opponents' characterizations of proponents' motivations. Opp. 40. 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 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. 27-30. Each of these calls went conspicuously and intentionally unanswered by HB 25's proponents. *Id.* The Fifth Circuit has explicitly stated that such circumstances support a finding of intentional discrimination. *Veasey*, 830 F.3d at 236-37.

The Secretary also fails to explain 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 them, despite that these are standard practices. Mot. 30-31; Lichtman at 36-37. And while there is no Senate committee dedicated to elections, the Senate Committee on State Affairs routinely hears elections bills. Lichtman 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.[6]

[6] *See* Tex. State Senate, Senate Comm. on State Affairs, https://senate.texas.gov/cmte.php?c=570.

And 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.[7]

The Secretary's final two arguments defy 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. 42. But the legislators listed by the Secretary *voted against HB 25's elimination of STV*. MTD Opp. at 35. The vote that the Secretary cites for this proposition was for an amendment to *delay* HB 25's implementation until September 2020, which opponents of eliminating STV reasonably supported. *Id.* Rep. Hubert Vo, who the Secretary claims supported HB 25, Opp. 42, was a vocal opponent of eliminating STV, and took to the floor during debate to explain that doing so would "discourage[]" voters and cause them not to "participate in the process anymore." *Id.*

Second, the Secretary misleadingly asserts that "three fiscal notes" were prepared for HB 25. Opp. 41. But none of those documents were actual fiscal notes. Lichtman at 33-35. Senator Hancock, the bill's sponsor, admitted there was "no fiscal note on this legislation." *Id.* at 34.

Finally, the Secretary badly misreads *Feeney*, which provides her no support. Opp. 36. In the portion of *Feeney* on which the Secretary relies, the Court inquired whether the disparate impact of the challenged law, *by itself*, demonstrated discriminatory intent. 442 U.S. at 275 (inquiring if "the impact of this statute could not be plausibly explained on a neutral ground"). In other words, the Court asked 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 the Court rejected the plaintiff's claim on this basis alone. Opp. 36.

[7] *See House Comm. on Redistricting to Begin Interim Field Hearings*, Tex. House of Representatives (Sept. 9, 2019), https://house.texas.gov/news/press-releases/?id=7050.

That is false. After concluding 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. *Feeney*, 442 U.S. at 276. That latter inquiry is what governs Plaintiffs' claim here, 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 may vote." *Carrington v. Rush*, 380 U.S. 89, 94 (1965). That action is "constitutionally impermissible." *Id.*[8]

Plaintiffs have already explained that, contrary to the Secretary's assertion, Opp. 43-44, this claim is subject to the *Arlington Heights* framework, not *Anderson-Burdick*. MTD Opp. at 37-38. 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.

The comparative STV usage rates among Democratic and Republican voters does not negate the Legislature's intent to discriminate against Texans on the basis of their support for the Democratic party. *See* Opp. 43. 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 burdens minority voters who support Democrats will face as a result of HB 25 are disproportionately more severe, *see* Sections I.A.2, I.A.3, Democrats will as well. In any event,

[8] The Secretary wrongly asserts that *Carrington* does not apply because HB 25 will not "bar" Texans from voting. Opp. 43. Nothing in *Carrington* sets such a requirement. More importantly, HB 25 *will* bar individuals from voting by subjecting them to excessive polling-place lines.

for purposes of this analysis, the critical point is the upward trend of STV usage among minorities and Democrats. As minority and Democratic STV usage consistently increased in recent years, white and Republican usage decreased: between 2004 and 2016, an 11-point shift occurred in STV usage among Democrats and Republicans. Lichtman at figs. 2, 3. Now, STV users in Texas are split evenly between Democrats and Republicans. The Legislature's choice to reject eliminating STV in 2013, but to 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.[9]

II. The remaining relevant factors support a preliminary injunction.

Absent an injunction, HB 25 will violate the constitutional rights of Plaintiffs, their members and constituents, and vast swaths of Texas voters by causing massive lines at the polls in the upcoming general election. Sensibly, the Secretary does not dispute that this amounts to irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Instead, the Secretary badly exaggerates the burden that an injunction protecting voters' fundamental rights would impose on election administration. The fact that some counties have already mailed paper ballots to the small number of Texas voters eligible to vote by mail, Opp. 3, has no effect on the Court's ability to prevent massive disenfranchisement through long lines *at the polls*. To protect the vast majority of Texas voters who must vote in person, the Court can limit administrative disruption by tailoring its injunction to require that STV be made available at least to all in-person voters.

Requiring that STV be made available to in-person voters would not cause the disruption the Secretary claims. To the extent counties have already printed paper ballots for in-person voters, those can easily be reprinted with an STV option: that process takes only 7 to 10 days. ECF No.

[9] As already explained in Plaintiffs' opposition to the Secretary's motion to dismiss, MTD Opp. at 38-39, this claim does not raise a political question.

30-1 ¶ 6. And the Secretary overstates how long it would take to program voting machines so as to include an STV option. According to the Secretary's declarant, counties have largely completed the process of loading and ordering ballots items on voting machines. ECF No. 30-1 ¶ 9. Thus, as Dr. Dan Wallach—a Texas-based expert in electronic voting systems—explains, "enabling or disabling straight-ticket voting is largely" as simple as "flipping a switch." Wallach Decl., Ex. 5, at ¶ 11. That is particularly the case in Texas, where "every certified voting system . . . has support for straight ticket voting," and "every election administrator and their staff has prior experience at configuring their voting systems with straight ticket voting." *Id.* at ¶ 10. Indeed, adding the STV option to a voting machine's programming "is no more complicated than any other change to the ballot programming, such as fixing a typo in a candidate's name, or repairing the list of contests for a specific ballot style." *Id.* ¶ 11. As such, "[w]ith even an extra day or two of effort, making the necessary changes and validating the accuracy of those changes" resulting from an injunction requiring the inclusion of the STV option on voting machines "should be entirely feasible." *Id.* ¶ 14.

In baldly claiming otherwise, neither the Secretary nor her declarant explain their claim that adding the STV option would require re-testing every single "possible combination of votes on each individual ballot." ECF No. 30-1 ¶ 9. The existence of STV does not change any of the "possible combination of votes" on a ballot, as an STV option does not add or remove any candidates or races to a ballot. Instead, the STV option is a means of selecting the candidates and races that are already loaded on the ballot.

More importantly, to whatever extent an injunction would burden election administration, the public has stronger countervailing interests in (1) not forcing voters to expose themselves to an increased risk of infection of a deadly virus, and (2) preventing the denial of the fundamental

right to vote. 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); *see also Ingebretsen v. Jackson Pub. Sch. Dist*., 88 F.3d 274, 280 (5th Cir. 1996). The Secretary does not contest this.

Finally, *Purcell* does not bar the relief Plaintiffs request, *see* Opp. 7-8, because early voting in Texas still does not start for more than another month. Courts have routinely imposed far more disruptive injunctions against election laws under shorter timelines. *See*, *e.g.*, *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (preliminarily enjoining voter ID requirement approximately three weeks before election).[10]

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

The Secretary incorporates by reference her incorrect standing, immunity, venue, and laches arguments offered in the motion to dismiss. Opp. 5-6, 8-10. Plaintiffs' opposition to that motion explains why none of these arguments have merit. *See* MTD Opp. at 4-23, 39-40.

IV. Conclusion

Plaintiffs respectfully request that the Court enjoin HB 25's implementation, or, in the alternative, enjoin HB 25's implementation to the extent that it applies to in-person voting.

[10] *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 Day); *Bryanton v. Johnson*, 902 F. Supp. 2d 983 (E.D. Mich. 2012) (removing citizenship question from absentee ballot and registration applications approximately four weeks before Election Day); *Sanchez v. Cegavske*, 214 F. Supp. 3d 961 (D. Nev. 2016) (ordering additional in-person voter registration and early voting locations approximately four weeks before Election Day); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) (enjoining in part an omnibus election law approximately five weeks before Election Day).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 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
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