

**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

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

This lawsuit challenges Texas's attempt to end straight-ticket voting, which will unjustifiably and discriminatorily burden Texans' fundamental right to vote by producing catastrophic wait times at the polls in the midst of a pandemic.

For the last 100 years, if a Texas voter wished to vote for the candidates running under the banner of a political party, she could use straight-ticket or one-punch voting (STV) to make an initial selection corresponding to that party, which then automatically selected the party's nominee in each race. The voter could then modify her choice in any individual race. Voters and election administrators in Texas have come to rely on STV as an integral component of the voting process. In 2018, approximately two-thirds of voters—over 5.6 million Texans—used STV to cast their ballots. STV reduces voting time (i.e., the time it takes a voter to complete a ballot) and thus decreases wait times at polling places. It is particularly crucial in Texas, where ballots are among the longest in the country: in recent years, voters in Texas's larger counties have had to make selections in as many 95 partisan races. Despite all of this—and in the midst of a pandemic that has cost the lives of thousands of Texans and prevents election administrators from alleviating the long lines that eliminating STV will cause—Secretary of State Hughs will order the elimination of the STV option pursuant to House Bill 25 (HB 25).

Without intervention by this Court, Texas's upending of a century-old voting practice, with no plan to mitigate the resulting long lines, will result in disaster at the polls. Each of the more than 5.6 million Texans who relied on STV in the last federal election will take significantly more time to complete their ballots. In turn, Texas's already lengthy polling-place lines will grow dramatically, forcing Texans to endure unreasonably long wait times and increase their exposure to a deadly virus or forgo their fundamental right to vote altogether.

These burdens will uniquely and disparately impact African American and Hispanic Texans, whose recent increase in political strength was the motivation behind HB 25's enactment. African American and Hispanic Texans use STV at significantly higher rates than white Texans. They also live in more densely populated areas, where wait times at polling places will increase even more dramatically if STV is eliminated. Moreover, due to Texas's long history of discrimination, African Americans and Hispanics endure socioeconomic conditions that make them more vulnerable to the burdens of long lines. And because these voters overwhelmingly support Democratic candidates, the removal of STV will hinder the ability of Democrats to exercise their fundamental right to associate to advance their political beliefs.

Because all of the relevant factors strongly favor a preliminary injunction, the Court should issue an order enjoining HB 25's implementation and requiring the Secretary to ensure all Texans have the option of voting straight ticket in the upcoming November 2020 election.

NATURE AND STAGE OF PROCEEDING AND ISSUES PRESENTED

On March 5, 2020, Plaintiffs Bruni, DCCC, DSCC, and others filed suit challenging HB 25; on March 30, they sought a preliminary injunction halting HB 25's implementation during the November 2020 election. *Bruni v. Hughs*, No. 5:20-cv-35 (S.D. Tex.), ECF Nos. 1, 19. On June 24, and before ruling on the motion for preliminary injunction, this Court dismissed those plaintiffs' claims without prejudice on the ground that the Court "lack[ed] subject-matter jurisdiction to adjudicate th[e] case" because the complaint's allegations did not support a finding of impending injury. *Bruni v. Hughs*, --- F. Supp. 3d ---, 2020 WL 3452229, at *4, *7 (S.D. Tex. June 24, 2020). On August 12, 2020, Plaintiffs in this suit filed a new complaint supplementing those prior allegations and incorporating evidence further demonstrating their impending injury.

This motion presents the issue of whether the Court should preliminarily enjoin HB 25's

implementation. A preliminary injunction “should issue” when a plaintiff shows: (1) “a substantial likelihood of success on the merits,” (2) “a substantial threat of irreparable injury if the injunction is not issued,” (3) “that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted,” and (4) “that the grant of an injunction will not disserve the public interest.” *Speaks v. Kruse*, 445 F.3d 396, 399 (5th Cir. 2006).

ARGUMENT

I. Summary of Argument

If allowed to take effect, HB 25 will violate a bevy of constitutional and statutory provisions. First, HB 25 will impose an unjustified and severe burden on Texans’ fundamental rights to vote and associate under the First and Fourteenth Amendments by producing excessive polling-place lines in the middle of a pandemic. HB 25 will impose its most severe burdens on African American and Hispanic voters, as well as Texans who support the Democratic Party. Second, HB 25’s disproportionate burdens on African American and Hispanic voters will deny them an equal opportunity of political participation in violation of Section 2 of the Voting Rights Act (VRA). Third, HB 25 will violate the Fourteenth and Fifteenth Amendments and Section 2 of the VRA because a substantial and motivating factor behind its passage was an intent to impede African American and Hispanic voters’ electoral participation. Last, HB 25 will violate the First and Fourteenth Amendments because it is intended to impede certain Texans’ electoral participation due to their political beliefs.

If HB 25 is not enjoined, it will irreparably injure Plaintiffs, their members and constituents, and other Texans by denying them their fundamental rights to vote and associate. These interests, and the public’s interest in the vindication of constitutional rights and a fair election, significantly outweigh the minimal burden (if any) the Secretary would encounter by maintaining the status quo of permitting straight-ticket voting.

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

A. HB 25 will violate the First and Fourteenth Amendments by unjustifiably burdening Texans' fundamental rights to vote and associate.

By drastically expanding polling-place lines, HB 25 will unjustifiably burden Texans' fundamental rights to vote and associate with others. To assess this claim, the Court "weigh[s] the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments against the precise interests put forward by the State as justifications for the burden imposed by [HB 25]." *Tex. Indep. Party v. Kirk*, 84 F.3d 178, 182 (5th Cir. 1996). The applicable scrutiny depends on the burden HB 25 imposes on such rights. "When those rights are subjected to severe restriction, the regulation must be narrowly tailored to advance a compelling state interest." *Id.* But even if HB 25's burdens are less than severe, it must be supported by state "interest[s] sufficiently weighty to justify the limitation." *Norman v. Reed*, 502 U.S. 279, 288-89 (1992). Regardless of the level of scrutiny, the Court must take "into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

HB 25 will severely burden Texans' First and Fourteenth Amendment rights in two ways. First, by significantly increasing the amount of time it will take voters to complete their ballots—which are among the longest in the country—HB 25 will dramatically increase polling-place lines, particularly in areas in which minority voters reside. This will force Texans seeking to exercise their fundamental right to vote not only to endure unreasonably long lines at the polls, but also to expose themselves to a heightened risk of contracting COVID-19. Second, HB 25 will disproportionately impact voters who support the Democratic Party, severely limiting their ability to organize and elect the candidates of their choice. No governmental interest justifies these burdens.

1. HB 25 will dramatically increase polling-place wait times, severely burdening Texans' First and Fourteenth Amendment rights.

Under normal circumstances, HB 25's elimination of STV would cause a massive disruption to Texas's elections. In the midst of a COVID-19 pandemic that significantly limits elections administrators' ability to soften HB 25's blow, the result will be disaster.

a. Eliminating the STV option will dramatically increase polling-place lines in November, severely burdening Texas voters.

Particularly in recent years, Texans have relied heavily on STV as an efficient method of expressing their electoral preferences. During the 2018 general election, approximately two-thirds of voters in Texas voted using STV. Stefan Haag & William R. Peck, *Straight-Ticket Voting in Texas 1998-2018* at 1 (Feb. 2019) (Decl. of Bruce V. Spiva, Ex. 1). If HB 25 takes effect, it will take significantly more time for each of those 5.6 million voters to complete their ballots. This result is particularly problematic in Texas, where ballots include an enormous number of partisan races. In 2018, voters in Harris County had *90 to 95 partisan ballot items*, not counting nonpartisan races and ballot questions.¹ In 2016, they had 46 to 50 partisan races, along with nonpartisan races and ballot questions.² In Travis County, voters in 2018 had at least 42 partisan ballot items, as well as numerous nonpartisan races and ballot issues³; in 2016, they had at least 30 partisan races.⁴ Dallas County voters had 63 to 65 partisan items in 2018, and 22 to 25 partisan races in 2016.⁵

¹ See Harris County Election Results (Nov. 6, 2018), <https://www.harrisvotes.com/HISTORY/20181106/cumulative/cumulative.pdf>.

² See Harris County Election Results (Nov. 8, 2016), <https://www.harrisvotes.com/HISTORY/20161108/cumulative/cumulative.pdf>.

³ See Travis County Election Results (Partisan Races) (Nov. 6, 2018), https://countyclerk.traviscountytexas.gov/images/pdfs/election_results/20181106cumel.pdf.

⁴ See Travis County Election Results (Partisan Races) (Nov. 8, 2016), https://countyclerk.traviscountytexas.gov/images/pre/election_results/2016.11.08/Run12/20161108cumel.pdf.

⁵ See Dallas County Election Results (Nov. 6, 2018), https://assets01.aws.connect.clarityelections.com/Assets/Connect/RootPublish/dallas-tx.connect.clarityelections.com/ElectionDocuments/2018/General%20181106/181106G%20General%20and%20Joint%20Election%20Canvass%20Final%20Cum%20Totals%20WOverUnders_EL45A.pdf; Dallas County Election Results (Nov. 8, 2016), https://assets01.aws.connect.clarityelections.com/Assets/Connect/RootPublish/dallas-tx.connect.clarityelections.com/ElectionDocuments/2016/General%20161108/161108G%20General%20and%20Joint%20Election%20Canvass%20Final%20Cum%20Totals%20WOverUnders_EL45A.pdf.

By increasing the amount of time most Texans will take to complete their ballots, HB 25 will drastically increase lines at polling places. As Fort Bend Elections Administrator John Oldham explains, “[w]hen the amount of time voters take to complete their ballots increase, wait times at the polls increase.” Decl. of John Oldham (Ex. 2), at ¶ 5. Thus, the “increase in average voting time caused by Texas’s planned elimination of straight-ticket voting will produce a significant increase in wait times at the polls.” *Id.*

Dr. Muer Yang provides an alarming glimpse into what Texans will encounter at the polls in November if HB 25 is not enjoined. Using official turnout and resource-allocation information from Travis and Fort Bend Counties, Dr. Yang utilizes well-recognized queuing models and simulations to illustrate how small increases in average voting time can produce massive increases in wait times. *See* Expert Decl. of Dr. Muer Yang (Ex. 3). This occurs because of the “non-linear relationship between voting time and average wait times: as voting time increases incrementally, each increase produces a larger expansion of average wait times at the polls.” *Id.* ¶ 20.

Consider the disastrous effect eliminating STV could have had on wait times in Travis County on Election Day 2016. Using various scenarios of how significantly STV’s elimination could have increased average voting time, Dr. Yang demonstrates the effect those increases would have had on wait times at the polls. First, if eliminating STV increased average voting time by just 79 seconds—an incredibly conservative scenario—the estimated countywide average wait time would have *nearly tripled*, increasing the proportion of Election Day voters who would have voted at polling places with average waits of more than half an hour from 3% to 24%. *Id.* ¶ 42. Second, if those who previously used STV took just 10 seconds to make a selection in each partisan race, the average countywide wait time would have skyrocketed to more than 48 minutes, with 29% of

tx.connect.clarityelections.com/ElectionDocuments/2016/General%20Election%20161108/161108G%20General%20Final%20Cum%20Totals_EL45A.pdf.

all Election Day voters voting at a polling place with an average wait of *over an hour*. *Id.* ¶ 43. Third, if those who previously used STV took just 15 seconds to make a selection in each partisan race, the average countywide wait time would have been more than 79 minutes, with nearly half of voters voting at polling places with average waits of over an hour. *Id.* ¶ 44.

Dr. Yang also illustrates how eliminating STV would have increased wait times in Fort Bend County on Election Day 2016, where ballots were shorter and polling places were better equipped to withstand delays or an influx of unexpected turnout. Despite a cushion of voting equipment at the county’s polling places, eliminating STV still would have wreaked havoc on the voting process. If voters who previously used STV took just 15 seconds to make a selection in each partisan race, the countywide average wait time would have jumped from no wait at all to nearly 15 minutes, with several polling places predicting average wait times of more than 100 minutes. *Id.* ¶¶ 61-62, tbls. 7, 10. And if eliminating STV caused average voting time to reach 10 minutes—a possibility Fort Bend County officials recognized—the countywide average wait time would have been more than 45 minutes, with more than a quarter of voters voting at polling places with an average wait of over an hour. *Id.* ¶ 63, fig. 5.

For several reasons, eliminating STV will likely force Texas voters to wait even longer than what these results estimate. First, “queuing formulas tend to underestimate the actual wait time in voting lines.” *Id.* ¶ 17. Second, Dr. Yang’s results provide only averages, which tend to “mask and underestimate the real waiting problems at polling places.” *Id.* ¶ 18. Third, because these counties do not collect information about the time at which voters arrived at the polls on Election Day, Dr. Yang’s analyses assume a normal distribution of voters throughout the day; but most in-person voters arrive at polling places at the very beginning or very end of polling hours. *Id.* ¶ 14. For example, Collin County records show that 46% of voters who waited in line on

Election Day 2016 arrived between 7:00 a.m. and 8:00 a.m. *See* Collin County Election Day Vote Centers, Line Length Data (Ex. 4).

Texans *already* wait in extremely long lines. *See* Decl. of Matthew Haley (Ex. 5); Decl. of William Sharry (Ex. 6); Decl. of LaQuita Middleton-Holmes (Ex. 7); Decl. of Dr. Allan Lichtman (Ex. 8), at 58-61. Yet, HB 25 provides counties no resources to mitigate the further increase in lines that it will produce. Indeed, the Secretary has informed county officials that the State will provide no funds for additional resources needed to handle the anticipated increase in voting time.⁶

The significant increase in wait times caused by HB 25 will severely burden Texas voters' fundamental right to vote. Because the vast majority of Texans are ineligible to vote by mail, *see* Tex. Elec. Code §§ 82.001-82.004 (limiting mail-in voting to those who are over 65 years old, incarcerated, disabled, or will be out of town during voting), they must withstand these long lines if they wish to vote. Courts agree that excessive lines at the polls impose severe burdens on voters. There "come[s] a point when the burden of standing in a queue ceases to be an inconvenience or annoyance and becomes a constitutional violation because it, in effect, denies a person the right to exercise his or her franchise." *Nat'l Ass'n for the Advancement of Colored People State Conf. of Pa. v. Cortés*, 591 F. Supp. 2d 757, 764 (E.D. Pa. 2008). This imposes an injury "of the gravest magnitude and will give rise to a violation of at least the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 765. For this exact reason, Texas itself has claimed an interest in reducing the time voters spend completing their ballots. *See Cotham v. Garza*, 905 F. Supp. 389, 399 (S.D. Tex. 1995) (noting the state's argument that increasing the time "voters spend marking their ballots" would cause "other voters [to] be discouraged from voting").

⁶ *See* John Austin, *Changes Coming for Straight-Ticket Ballots*, Cleburne Times-Review (Oct. 7, 2018), https://www.cleburnetimesreview.com/news/changes-coming-for-straight-ticket-ballots/article_808e9396-c8e1-11e8-bf55-cbc94eaab3d2.html.

Courts’ recognition that long polling-place lines impose a severe burden on the right to vote is sensible. “According to a well-established formula employed by political scientists to assess individuals’ likelihood of voting in an election, increasing the cost of voting decreases voter turnout—particularly among low-income individuals, as they are most cost sensitive.” *Veasey v. Abbott*, 830 F.3d 216, 263 (5th Cir. 2016) (en banc); *see also* Lichtman 84 n.133. Long polling-place lines impose significant costs on voters: because of other responsibilities—such as work, school, and/or family obligations—voters have a finite period of time they can commit to standing in a polling-place line. The longer a voter must wait in line, the more likely she is to give up voting or not attempt to vote at all. *E.g.*, Haley ¶ 7. A recent observational study found that having more than five additional voters standing in line tripled the likelihood that a would-be voter would give up on trying to vote. *See* Douglas M. Spencer and Zachary S. Markovits, *Long Lines at Polling Stations? Observations from an Election Day Field Study*, 9 Election L.J. 3, 16 (2010). A different nationwide study following the 2008 election estimates that 11% of Americans who chose not to vote did so because of long lines. Caltech/MIT Voting Technology Project, 2008 Survey of the Performance of Am. Elections 59 (2009) (Ex. 9). And a study of the 2016 election finds that, among registered voters aged 18 to 29 who did not participate in the election, 19% of those with some college experience cited long polling-place lines as a reason they did not vote, as did 27% of those without college experience. Center for Information & Research on Civic Learning & Engagement (CIRCLE), *Why Youth Don’t Vote – Differences by Race and Education* (2018), <https://circle.tufts.edu/latest-research/why-youth-dont-vote-differences-race-and-education>. Long lines also cause all voters—“even among those who do not personally experience long lines”—to lose confidence in the accuracy of elections. Caltech/MIT Voting Technology Project, *Waiting in Line to Vote* 4 (2013) (Ex. 10).

Under normal circumstances, having to wait in excessively long lines is a severe burden on the fundamental right to vote. But this November, Texas voters braving long lines at the polls will be risking their health (and for many, their life). In recent weeks, Texas has experienced a massive resurgence of COVID-19 infections and deaths. By the end of July, over 421,000 cases have been reported in Texas, and more than 6,500 Texans have died from the virus. Decl. of Dr. Catherine Troisi (Ex. 11), at ¶ 28. According to expert epidemiologist Dr. Catherine Troisi, it is “highly unlikely” that an effective vaccine will be available by November, and “herd immunity is unlikely to happen before a vaccine is available.” *Id.* at ¶¶ 24-27. Making matters worse, when humidity decreases in November, transmissions will be “enhanced,” producing an “increased spread of the virus.” *Id.* ¶ 23. “[A]nything that extends the time a voter must stay in line before voting, or increases the amount of time a voter must stand at the voting booth, will increase risk of transmission.” *Id.* ¶ 11 (emphasis added). By doing both during the upcoming general election, HB 25 will put Texans in harm’s way.

b. The COVID-19 pandemic prevents elections administrators from mitigating the increase in polling-place lines caused by HB 25.

Due to the ongoing COVID-19 pandemic, elections administrators are unable to take actions that could otherwise mitigate HB 25’s increase in wait times. First, the need to maintain social distancing within polling places “imposes significant limits on the number of voting machines that can be utilized within a polling place.” Oldham ¶ 7. To ensure social distancing, counties must require that all equipment in the polling place—e.g., voting machines, check-in stations, and ballot drop-off stations—are sufficiently distanced from one another. *Id.* In most instances, this requirement “make[s] it impossible” to “increase the number of voting machines at each polling place to mitigate the effects of eliminating [STV].” *Id.* Even worse, it will require *decreasing* the number of voting machines at many polling places. *Id.* Fort Bend County, for

example, anticipates that social distancing will require reducing the number of voting machines previously used at each polling place *by one third*. *Id.* This result will amplify HB 25’s effect, causing increases in lines that are even more dramatic than what Dr. Yang’s analyses suggest.

Texas counties confronted this problem during the recent July 14 election, where election officials concluded that the need to maintain social distancing would lead to polling places offering “far fewer voting booths” than usual.⁷ Tarrant County elections officials needed to reduce the amount of voting machines at certain polling places by *40 to 60 percent* to maintain proper social distancing.⁸ Collin County decreased the number of voting machines at its main polling place from 20-25 machines *to just eight*.⁹ And while the expected low turnout for a primary run-off kept lines short, the county’s elections administrator explained that the need to sufficiently space voting machines “will really be problematic for November” when turnout is much higher.¹⁰

Second, as November approaches, counties will continue to “los[e] polling places unwilling to host voters during the pandemic.”¹¹ “[T]he pandemic has caused, and will cause, individuals and organizations to be less willing to permit [counties] to use their physical spaces to be used as a polling place.” Oldham ¶ 8. In the run-up to the July 14 election, counties around the state scrambled as venues that previously agreed to serve as polling places backed out at the last minute over fears about the virus. Williamson County lost “one of its busiest sites”; Bexar County “had to pull the county courthouse — a longtime voting site — and several school sites off [its] list of polling places”; and Travis County lost use of “regular voting sites at nursing homes, grocery

⁷ Alexa Ura, *Texans begin voting Monday in runoff elections. Officials are doing what they can to make it safe.*, Tex. Trib. (June 29, 2020), <https://www.texastribune.org/2020/06/29/texas-election-first-test-voting-safety-pandemic/>.

⁸ Lili Zheng, *Primary Run-Offs, Early Voting to Be ‘Contactless’ in Tarrant County*, NBC-DFW (June 24, 2020), <https://www.nbcdfw.com/news/local/primary-run-offs-early-voting-to-be-contactless-in-tarrant-county/2394923/>.

⁹ Ura, *supra* note 7.

¹⁰ *Id.*

¹¹ *Id.*

stores and Austin Community College.”¹² Venues that previously served as polling places in Fort Bend County also dropped out. Oldham Decl. ¶ 8. “It is very difficult . . . to find a substitute location when this occurs,” and if a county cannot find a substitute location, “the number of total polling places will decrease,” increasing congestion at the polling places that remain. *Id.*

Third, widespread fears of contracting COVID-19 have caused, and will continue to cause, a shortage of poll workers throughout the state, who “tend to be older and thus at higher risk for complications from the coronavirus.”¹³ A recent study suggests that “[a]bout 87% of Texas poll workers are over 60.”¹⁴ A shortage of poll workers in July forced Dallas County, at the last minute, to announce that it would be offering “nearly 200 fewer voting centers in part because of fear of the coronavirus.”¹⁵ Bexar and Tarrant Counties similarly had to reduce the number of polling places they planned to offer due to an inability “to find election judges to run the polling places.”¹⁶ Fort Bend County faced the same problem. Oldham ¶ 9. Other states are already acknowledging that poll worker shortages will force them to reduce drastically the number of polling locations they can make available to voters in November. Maryland, for example, just announced that a poll worker shortage will force the State to switch to a voting-center system and “close nearly 80% of the polls” statewide, a plan the Governor lamented will produce “long lines and unsafe conditions, with crowds of people being forced into too few polling places.”¹⁷ What is more, whatever

¹² *Id.*

¹³ Alexa Ura, *Two major Texas counties are trimming polling locations as workers pull out over coronavirus*, Tex. Trib. (July 9, 2020), <https://www.texastribune.org/2020/07/09/texas-voting-coronavirus/>.

¹⁴ John C. Moritz, *Texas primary runoffs: Despite COVID-19 pandemic, poll workers prep for July 14 election*, Statesman (June 23, 2020), <https://www.statesman.com/news/20200621/texas-primary-runoffs-despite-covid-19-pandemic-poll-workers-prep-for-july-14-election>.

¹⁵ Jack Fink, *Pandemic Among Reasons For Nearly 200 Fewer Voting Centers In Dallas County For Primary Runoff*, CBS-DFW (July 13, 2020), <https://dfw.cbslocal.com/2020/07/13/coronavirus-pandemic-fewer-voting-centers-dallas-county-primary-runoff/> (emphasis added).

¹⁶ Ura, *supra* note 13.

¹⁷ Emily Opilo & Pamela Wood, *Maryland Gov. OKs plan for just 360 voting centers statewide for November election amid lack of poll workers*, Baltimore Sun (Aug. 10, 2020), <https://www.baltimoresun.com/politics/bs-md-pol-hogan-election-plan-20200810-evtrbvysvbetob6yggklrcfrs4-story.html>.

substitute poll workers that *can* be found are “less familiar with the voting process, and thus less efficient.” Oldham ¶ 9.

Fourth, because of the pandemic, voters’ ballots during the 2020 general election will be even longer than usual. In March, Governor Abbot issued a proclamation allowing political subdivisions that would otherwise hold elections in May to postpone those elections until November. As a result, voters “will face a significantly longer general election ballot with previously postponed municipal contests tacked onto the bottom.”¹⁸ “Due to the increase in ballot length in November, average voting time will increase, further increasing wait times at the polls.” Oldham ¶ 10.

In sum, while under normal circumstances counties might be able to mitigate HB 25’s harms, the ongoing pandemic prevents them from doing so during the upcoming general election.

2. HB 25 will most severely burden African American and Hispanic voters.

Aside from its burdens on all Texans, HB 25 will impose disproportionate burdens on African American and Hispanic voters. “Disparate impact matters under *Anderson-Burdick*.” *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1216 (N.D. Fla. 2018). In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), a majority of the Supreme Court agreed that in evaluating burdens, courts should consider not only a law’s impact on the general electorate, but also its impact on identifiable subgroups for whom the burden may be more severe. *Id.* at 199-203 (plurality opinion); *id.* at 212-23, 237 (Souter, J., dissenting); *id.* at 237 (Breyer, J., dissenting). Lower courts, including one in this district, have followed these instructions. *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016) (under *Crawford*, “courts may consider not only a given law’s impact on the electorate in general, but also its impact

¹⁸ *Ura*, *supra* note 7.

on subgroups, for whom the burden, when considered in context, may be more severe”); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627-32 (6th Cir. 2016) (measuring challenged law’s “disparate burden on African-American voters”); *Veasey v. Perry*, 71 F. Supp. 3d 627, 686 (S.D. Tex. 2014) (“This Court reads *Anderson* and *Burdick*, as well as the lead opinion in *Crawford*, to require balancing the state’s interest against the burdens imposed upon the subgroup [of voters most impacted by the challenged law].”), *vacated in part on other grounds*, 830 F.3d 216.¹⁹

HB 25 will have a particularly severe impact on African American and Hispanic Texans, who use STV at significantly greater rates than white Texans. Expert Decl. of Dr. Maxwell Palmer (Ex. 12), at ¶ 11 (finding a “strong relationship” between the a precinct’s minority population and STV usage). In 2018, 82.3% of African Americans and 71.8% of Hispanic voters relied on STV when casting a vote, compared to 60.4% of white voters. *Id.* at tbl. 2. Similar gaps existed in 2014 and 2016. These results are consistent with those of other studies. *E.g.*, Stefan Haag & William R. Peck, *The Effects of Eliminating Straight-Ticket Voting in Texas* 19 (Aug. 2019) (Ex. 13).

If HB 25 takes effect, the disproportionate rate of African American and Hispanic Texans switching away from STV will cause particularly long lines in the communities in which they live. African Americans and Hispanics are concentrated in Texas’s largest counties, which have significantly longer ballots than whiter, less populated counties. Lichtman 21-23 & tbls. 1-2. Moreover, African American and Hispanic voters in Texas already wait in longer lines than white voters. *Id.* at 58-60, tbls. 8-10. Each of these factors will compound HB 25’s effects to produce particularly long lines in African American and Hispanic communities.

Even if the increase in lines caused by HB 25 was uniform, they would nonetheless impose

¹⁹ Other courts reach the same conclusion by finding that, under *Marks v. United States*, 430 U.S. 188, 193 (1977), the *Crawford* plurality’s subgroup-focused analysis is narrowest. *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 544 (6th Cir. 2014) (adopting the subgroup-focused approach because (1) it was endorsed by a majority of the Supreme Court, and (2) “[a]lternatively,” the plurality’s decision controls under *Marks*).

greater relative burdens on African American and Hispanic voters. The relative burden a voting restriction imposes on an individual depends in large part on the voter's socioeconomic status. Less flexible employment, lower educational achievement, less access to transportation, and less access to family-care assistance make political participation significantly more difficult. *Id.* at 83-90; *see* Middleton-Holmes ¶ 6; Sharry ¶ 13. As discussed further below, *see infra* Section II.B, due to Texas's long history of racial and ethnic discrimination, African American and Hispanic Texans on average lag significantly behind white Texans in a wide range of areas, including education, income, poverty, unemployment, vehicle accessibility, literacy, English proficiency, and health insurance coverage. Lichtman tbls. 21-23.

3. HB 25 will severely burden the associational rights of voters who support the Democratic Party.

The disproportionately severe burdens that HB 25 will impose on African American and Hispanic voters will also result in a particularly severe burden on those who support the Democratic Party. As discussed further below, *infra* Section II.B, voting in Texas is severely racially polarized, with African American and Hispanic voters overwhelmingly supporting the Democratic Party, and white voters overwhelmingly supporting the Republican Party. *See* Palmer fig. 4. African American support for Democratic statewide candidates in 2018 ranged between 90.4% and 93%, and Hispanic support for the same candidates ranged between 70.2% and 76.8%. *Id.* at tbl. A4.

In light of African American and Hispanic Texans' preference for the Democratic Party, the fact that those voters will face the severest of HB 25's burdens means that HB 25 will severely impede Texas Democrats' First Amendment right "to associate in the electoral arena to enhance their political effectiveness as a group." *Anderson*, 460 U.S. at 794; *see also Hadnott v. Amos*, 394 U.S. 358, 364 (1969) (noting the First Amendment's protection of the "right to band together for

the advancement of political beliefs”). By impeding the franchise rights of those who support the Democratic Party at a disproportionate rate, HB 25 severely decreases Democrats’ electoral prospects and thus severely burdens their First and Fourteenth Amendment rights.

4. No legitimate governmental interest justifies these burdens.

Regardless of the level of scrutiny that *Anderson-Burdick* calls for in this case, HB 25 will violate the First and Fourteenth Amendments because none of the purported governmental interests identified during HB 25’s passage justify the burdens just described.

While HB 25’s proponents claimed the bill would create a more “informed” electorate, Lichtman 42-44, nothing suggests eliminating STV from Texas’s ballots would produce that outcome. The Sixth Circuit rejected this exact argument when it refused to stay a preliminary injunction preventing Michigan from eliminating STV in 2016. *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 665-66 (6th Cir. 2016). “[I]t is far from evident that” requiring each voter “to look, at least briefly, at each section of the partisan ballot in order to identify and fill in the desired bubble” will “foster[] an engaged electorate,” because, like in Texas, the “party affiliation of each partisan candidate will still appear beside the candidate’s name.” *Id.* “[A] voter desiring to vote for all of the candidates of his or her desired political party may still do so without reading any of the candidate’s names, without knowing the office for which the candidate is running, and without knowing a single fact about either.” *Id.* The Sixth Circuit’s reasoning is particularly apt in Texas, where voters can alter their choices in individual races *after* selecting the STV option. Tex. Elec. Code § 65.007(c). Even with STV, if a Texan wishes to vote for Republican candidates throughout her ballot but nonetheless wants to vote for a particularly qualified Democratic candidate, she can select the STV option and then alter her choice in that specific race.

Nor does eliminating STV produce better candidates by prompting voters to split their tickets (*i.e.*, choose candidates of different parties in different races), as some legislators apparently

believed. Lichtman 44-47. HB 25’s proponents identified no reason to believe that (1) eliminating STV even increases ticket-splitting, or (2) ticket-splitting produces better candidates. *Id.* As for the latter, studies suggest the opposite: ticket-splitting “favors incumbent and well-funded candidates,” enhancing the electoral advantage they already enjoy. *Id.* And as the chair of the Texas Libertarian Party admitted during HB 25’s hearing, eliminating STV would not make Texas elections more competitive for third-party candidates. *Id.* at 46-47.

Finally, to the extent that HB 25 is intended to prevent voters from making mistakes when entering selections on the ballot—as the Secretary has previously suggested—HB 25 is far too blunt a tool for that purpose. Counties need only include warnings at the polling place or as part of the voting process to eliminate concerns that voters will make mistakes when using the STV option. *Eliminating* the century-old STV option and subjecting voters to hours-long lines is by no means an appropriately tailored response to any concern regarding voter mistakes.

B. HB 25 will violate Section 2 of the VRA by denying African American and Hispanic voters an equal opportunity to participate in Texas’s political system.

By disproportionately subjecting African Americans and Hispanics to long polling-place lines, HB 25 will also violate Section 2 of the VRA. 52 U.S.C. § 10301(a). Congress passed the VRA “to prevent . . . invidious, subtle forms of discrimination,” including “needlessly burdensome laws with impermissible racially discriminatory impacts.” *Veasey*, 830 F.3d at 247. A violation of Section 2 can “be proved by showing discriminatory effect alone.” *Id.* at 243.²⁰ The “essence” of this claim is that HB 25 “interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives.” *Veasey*, 830 F.3d at 273 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)).

The pertinent analysis follows two steps. The first “inquires about the nature of the burden

²⁰ Section 2 of the VRA also guards against intentional discrimination, as discussed below. *See infra* Section II.C.

imposed [by the law] and whether it creates a disparate effect in that ‘members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.’” *Id.* at 244. As already explained in Section II.A.2, HB 25 will disparately impact African American and Hispanic Texans, for whom elimination of STV will create the largest increase in polling-place lines. Rather than repeat that discussion, this Section focuses on the second step of the Section 2 analysis.

The second step asks whether there is a “causal link between the burden on voting rights” created by the challenged law “and the fact that this burden affects minorities disparately because [the law] interacts with social and historical conditions that have produced discrimination against minorities currently, in the past, or both.” *Veasey*, 830 F.3d at 245. To make this determination, courts look to an authoritative list of factors set forth in the Senate Judiciary Committee report that accompanied Congress’s creation of Section 2’s disparate-impact claim. *Id.* Commonly referred to as the “Senate Factors,” they “provide salient guidance from Congress and the Supreme Court on how to examine the current effects of past and current discrimination and how those effects interact with a challenged law.” *Id.* at 246. They “are not exclusive, and ‘there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.’ Not every factor will be relevant in every case.” *Id.* (quoting *Gingles* 478 U.S. at 45).

Each of the relevant factors confirms that eliminating STV would interact with conditions in Texas to deny African Americans and Hispanics equal electoral opportunities. *Id.* at 256.²¹

Factor One: Texas’s long history of official voting-related discrimination.

Texas has a long and ongoing history of official voting-related discrimination. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 439-40 (2006) (*LULAC*); *Perez v. Abbott*, 253

²¹ Senate Factor Four does not apply to modern elections in Texas, where slating processes are not used.

F. Supp. 3d 864, 959 (W.D. Tex. 2017). For more than a century, Texas directly and systemically barred African Americans and Hispanics from voting. *See* Lichtman 8-11. Texas has conceded this history in other litigation. *Perez*, 253 F. Supp. 3d at 959.

Texas continues this discrimination, but often in more subtle forms. Following the most recent redistricting cycle, two different federal courts found that Texas intentionally diluted minority voting strength when drawing its maps. *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*, 253 F. Supp. 3d at 945-62. Less than ten years ago, Texas enacted the most restrictive photo identification law in the country. Every court to review that law found it harmed minority voters across the state. *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012); *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014); *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015); *Veasey*, 830 F.3d 216.

Just last year, the Texas Secretary of State issued an advisory decision to county registrars claiming to have a list of 95,000 non-citizens who were registered to vote, but blatantly failed to account for prior non-citizens who had become naturalized. Lichtman 13-14. A federal judge called the actions of the Secretary and the Attorney General in this debacle “ham-handed and threatening,” and explained that these actions stoked “fear and anxiety” among the state’s minority population and “intimidate[d] the least powerful among us.” *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).

Recently, a disproportionate number of polling places in minority communities have been shuttered. Lichtman 14-15. And despite many opportunities to mitigate the state’s long history of discrimination relating to voting, the Texas Legislature has rejected numerous recent bills that would have afforded minority voters greater access to the ballot. *Id.* at 14.

Factor Two: Texas voters are racially and ethnically polarized.

There can be no doubt that elections in Texas are characterized by racially and ethnically polarized voting. *Perez*, 253 F. Supp. 3d at 946 (finding it “undisputed” that “voting in Texas is strongly racially polarized”). Numerous courts have reached the same conclusion. *Veasey*, 830 F.3d at 258. Dr. Palmer confirms this consensus. In each of the last three federal elections, voters in Texas broke along racial and ethnic lines. Palmer fig. 4. In 2018, this polarization was particularly stark, with African Americans supporting Democratic candidates at a rate no lower than 90.4%, Hispanic voters supporting Democratic candidates at a rate no lower than 70.2%, and white voters supporting Democratic candidates at a rate no higher than 23.2%.²²

Factor Three: Texas’s voting practices enhance the opportunity for discrimination.

Throughout Texas, at-large voting and the use of large legislative districts provide opportunities to discriminate against African Americans and Hispanics. Texas employs at-large voting for its highest courts, a practice that *Gingles* itself highlighted as an example of a practice that enhances discrimination. 478 U.S. at 45; *see also Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 714 (S.D. Tex. 2017) (finding this factor met when city in Texas employed a majority-vote requirement). Despite its stature as the second largest and second most populous state, Texas refuses to create reasonably-sized legislative districts. Lichtman 81-83. Moreover, while some of Texas’s largest counties encompass thousands of miles and millions of people, they hold numerous at-large elections and keep the number of county-commissioner precincts low. *Id.* These practices enable white voters to vote as a bloc to defeat minority-preferred candidates. *Id.*

²² Because Plaintiffs assert a vote denial claim, as opposed to a vote dilution claim, *see Mich. State*, 833 F.3d at 667 (explaining that a challenge to the elimination of STV is a vote-denial claim), Plaintiffs in this case have no obligation to prove the “cause” of Texas’s polarized voting. But even if this was relevant to Plaintiffs’ claim, it is undisputable that race plays a primary role in the divide between the two major political parties in Texas. *See* Lichtman 63-80.

Factor Five: The effects of discrimination impair African American and Hispanic Texans' ability to participate in the political process.

It cannot be disputed that Texas's history of discrimination against African Americans and Hispanics has led to racial and ethnic disparities in all aspects of daily life. In 2017, African American and Hispanic Texans' median household incomes were \$45,092 and \$46,855 respectively, compared to white Texans' \$76,361. Lichtman tbl. 21. While 18.9% of African Americans and 20.7% of Hispanics in Texas live in poverty, the poverty rate among white Texans is 8.5%. *Id.* The unemployment rate is 7.7% for African Americans and 5.7% for Hispanics; for white Texans, it is 4.1%. *Id.* While 70.4% of white Texans own their home, only 40.3% of African American Texans and 57.4% of Hispanic Texans do. *Id.* 3.6% of white Texans lack access to a vehicle, compared to 5.6% of Hispanic Texans, and 11.4% of African American Texans. *Id.*

This trend continues in the areas of health and education. 9.8% of white Texans lack health insurance, compared to 14.9% of African American and 26.9% of Hispanic Texans. *Id.* at tbl. 23. The infant mortality rate among African Americans in Texas is a shocking 1.1%; among Hispanic Texans, the rate is .54%; and among white Texans, the rate is .49%. *Id.* 94% of white Texans over age 25 are high school graduates, compared to 89.6% of African Americans and just 66.2% of Hispanics of the same age. *Id.* at tbl. 22. 38.6% of white Texans hold a bachelor's degree or higher, compared to 24.3% of African Americans and 14.5% of Hispanics. *Id.* 1.2% of white Texans speak English less than "very well," compared to 2% of African Americans and 29.7% of Hispanics. *Id.* 62% of Hispanic Texans and 47% of African American Texans read at an eighth-grade proficiency level or above, compared to 80% of white Texans. *Id.*

These disparities lead to diminished political participation among African Americans and Hispanics. *See id.* at 86-90. Those with fewer resources have less capacity to engage in political participation. *Id.* at 83-84 & nn.132, 133. Socioeconomic hardships make it more difficult for

minority voters to spend time traveling to a polling place, waiting in line, and actually voting. *Id.* And for a disproportionate number of minority Texans, this reality puts other forms of political participation—such as campaigning for candidates, lobbying officeholders, or making campaign contributions—completely out of reach. *Id.* at 89-90, tbl. 25.

Factor Six: Texas’s political campaigns feature racial appeals.

Racial appeals are a common feature of contemporary Texas politics. Here, Plaintiffs highlight just a few of the many recent incidents discussed in Dr. Lichtman’s report. *See* Lichtman 90-95. In 2014, after musician Ted Nugent referred to President Obama as a “subhuman mongrel” and a “chimpanzee”; stated that African Americans could not “honestly celebrate the legacy of Dr. King” until they “admit[ted] to the self-inflicted destructo-derby they are waging”; and declared that he would like to “shoot” undocumented immigrants “dead,” then-gubernatorial candidate Greg Abbott made Nugent a prominent face of his campaign. *Id.* at 91-92. Not to be outdone, then-Agriculture Commissioner candidate Sid Miller, who had appointed Nugent the Treasurer of his campaign, refused to “distance” his campaign from Nugent’s statements, explaining that if Miller’s campaign “had concerns about some of the things that Mr. Nugent has said or done,” they “wouldn’t have reached out to [Nugent] and asked him to become involved in our campaign on such a high level.” *Id.* at 92. Both of these candidates were elected.

The most recent federal election was no better. U.S. Representative Pete Sessions ran a digital ad with his African American opponent’s name over a picture of a dark hand over the mouth of a white woman. *Id.* at 95. And Dallas County Commissioner candidate Vic Cunningham told the *Dallas Morning News* that it would only be “Christian” if his children married people who were also “Caucasian.” *Id.*

While Texans may be accustomed to these racial appeals, their damage is no less harmful. Such appeals divide the electorate along racial and ethnic lines, and they cause voters to support

particular candidates due to racial and ethnic stereotypes.

Factor Seven: African American and Hispanic candidates are rarely elected to public office despite their large portion of the population.

African Americans and Hispanics are vastly underrepresented in Texas's public offices. Despite that African Americans and Hispanics together make up 42.7% of the state's citizen voting-age population, among all 29 offices elected in statewide partisan elections, *not a single seat* is held by an African American individual, and Hispanics occupy just three. Lichtman 95. This paltry representation "contextualizes the degree to which vestiges of discrimination continue to reduce minority participation in the political process." *Veasey*, 830 F.3d at 261.

Factor Eight: Texas is not responsive to the needs of its minority communities.

As the discussion above indicates, Texas is not responsive to the needs of its minority communities. Texas's history of discrimination speaks for itself, as do the stark racial and ethnic disparities in socioeconomic wellbeing. Recent legislative action (and inaction) by the State further confirms that it is unresponsive to minority Texans' interests. For example, Texas refuses to adopt the Medicaid expansion available under the Affordable Care Act, despite the fact that its African American and Hispanic citizens are disproportionately more likely than its white citizens to lack coverage. Lichtman 97. Texas also ranks third-to-last in financial support of its public schools, enrollment of which is disproportionately African American and Hispanic. *Id.* at 98-99.

Instead of ensuring that its minority residents have access to health care and quality education, the Legislature enacts legislation targeting racial and ethnic minorities for harassment. In 2017, Texas passed SB 4, an anti-immigration law that authorized police to inquire into the immigration status of anyone they detain or arrest, even during minor traffic stops. *Id.* at 99-100. Every major Hispanic organization in the state opposed the law, as did police chiefs across the state. *Id.* "Ignoring clear and supported objections about the racially disparate impact of a proposed

law is probative of a lack of responsiveness to minority concerns.” *Patino*, 230 F. Supp. 3d at 717.

Factor Nine: The policy underlying the elimination of STV is tenuous.

As discussed, *supra* Section II.A.4, no legitimate governmental interest justifies HB 25’s elimination of STV. Instead, as the following Section explains, the justifications HB 25’s proponents gave for its passage were blatant pretext for their actual motive: diminishing political participation among African American and Hispanic Texans.

* * *

Each of the relevant Senate Factors strongly supports the conclusion that HB 25’s disparate impact on African American and Hispanic voters will deny them an equal opportunity to participate in Texas’s political process. As a result, HB 25 will violate Section 2 of the VRA.

C. HB 25 will violate the Fourteenth and Fifteenth Amendments because a substantial and motivating factor behind its passage was an intent to impede political participation by African American and Hispanic Texans.

Laws “conceived or operated as purposeful devices to further racial discrimination” violate the Fourteenth and Fifteenth Amendments and Section 2 of the VRA. *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (internal quotations omitted). “Racial discrimination need only be one purpose, and not even a primary purpose” of the challenged law. *Veasey*, 830 F.3d at 230 (citing *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009)). Because “[p]roving the motivation behind official action is often a problematic undertaking,” the applicable analysis considers a series of non-exhaustive factors: (1) disparate impact on the protected class²³; (2) “[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes”; (3) “[t]he specific sequence of events leading up to the decision”; (4) departures from usual legislative procedures or the usual weighing of substantive factors of a decision; and (5) “legislative or

²³ Plaintiffs have already explained how the removal of STV will disparately burden African American and Hispanic Texans. *Supra* Section II.A.2.

administrative history,” including contemporaneous statements by legislators. *Veasey*, 830 F.3d at 230-32, 324; *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-268 (1977). In a Section 2 claim asserting intentional discrimination, courts also consider the presence of racially polarized voting. *See N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 222-23 (4th Cir. 2016). In making its determination, the Court considers “direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendant’s actions.” *Brown*, 561 F.3d at 433. “[T]o require direct evidence of intent would essentially give legislatures free rein to racially discriminate so long as they do not overtly state discrimination as their purpose and so long as they proffer a seemingly neutral reason for their actions.” *Veasey*, 830 F.3d at 235-36. Here, the evidence shows that a substantial factor behind HB 25’s enactment was an intent to diminish electoral participation among African American and Hispanic Texans in violation of the Fourteenth and Fifteenth Amendments and Section 2 of the VRA.

When a plaintiff shows racial discrimination was a “substantial” or “motivating” factor behind a law, the burden shifts to the defendant to demonstrate the law would have been enacted absent any racial purpose. *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). In evaluating the defendant’s evidence, “courts must scrutinize the legislature’s actual non-racial motivations to determine whether they alone can justify the legislature’s choices.” *McCrory*, 831 F.3d at 221 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). Importantly, partisanship-related justifications do not cure a violation: “intentionally targeting a particular race’s access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose.” *Id.* at 222; *see also Veasey*, 830 F.3d at 241 n.30. As discussed above, *see supra* at II.A.4, and further below, HB 25 does not serve any of the justifications its proponents gave for the law’s passage.

1. The Texas Legislature acted on an incentive to suppress minority votes.

The sequence of events leading to HB 25’s passage makes clear that HB 25 was meant to combat increasing African American and Hispanic electoral strength. This is nothing new in Texas. *See Perez*, 253 F. Supp. 3d at 959 (noting Texas’s pattern of enacting “restrictive and discriminatory voting laws . . . in response to a perception of increased voting power by emerging demographic groups” (citing *Veasey*, 830 F.3d at 241 n.30)). In the years preceding HB 25’s passage, Texas’s minority population, which uses STV at a much higher rate, grew significantly relative to the white population. Between 2008 and 2018, Texas’s minority citizen voting-age population (CVAP) increased from 39.4% to 42.7%, while its white CVAP fell from 56.4% to 52.2%—about a 7.5-point shift. Lichtman tbl. 3. And because African American and Hispanic Texans overwhelmingly support Democratic candidates, *see supra* Section II.A.3; Palmer fig. 4, this shift altered the partisan landscape in Texas: between 2012 and 2016, Republican’s partisan advantage statewide fell significantly. Lichtman 24. Simultaneously, between 2004 and 2016, STV usage shifted 11 points in favor of Democrats. *Id.* at 25-26, fig. 2. When white Texans held a much stronger demographic and electoral advantage in 2013, the Legislature rejected legislation to eliminate STV. *Id.* at 27-28. But in 2017, when minority usage grew to the point at which it harmed Republicans’ electoral prospects, the Legislature decided to eliminate STV.

2012 and 2016 election results from Harris County, one of Texas’s most diverse counties, confirms this motive. In 2016, Harris County voters cast 70,000 more Democratic straight-ticket votes than Republican straight-ticket votes, but just four years earlier, that margin was only 3,000 votes. Lichtman 29. This drastic shift resulted in Democrats sweeping all 34 down-ballot countywide offices. *Id.* HB 25’s Republican proponents recognized this shift, and they lobbied to repeal STV for that very reason. At a House hearing on HB 25, a defeated Harris County Republican judge claimed STV was responsible for her defeat and “the only reason [Republicans]

all lost” in 2016. *Id.* at 30. At the same hearing, a former Bexar County resident explained she supported the bill because Republicans “in [] large population areas [] g[o]t swept out of office because of the straight party Democrat voting.” *Id.* After another Democratic electoral sweep in 2018, the Harris County GOP Chairman echoed these sentiments, lamenting that Republicans did not repeal STV before 2018: “I’ve been warning about it for years. . . . At the last minute, [lawmakers] put [STV] back in for 2018, and I told some legislators then, ‘2018 will not be the same as 2014.’”²⁴ Increased STV usage in Texas’s largest and most diverse counties, and the resulting Republican losses, were key factors in the Legislature’s decision to eliminate STV. But as the Fifth Circuit has explained, racial discrimination as a means to a partisan end is no less unlawful than racial discrimination for its own sake. *Veasey*, 830 F.3d at 241 n.30 (“Intentions to achieve partisan gain and to racially discriminate are not mutually exclusive. . . . [A]cting to preserve legislative power in a partisan manner can also be impermissibly discriminatory.”); *see also McCrory*, 831 F.3d at 222-23 (“[T]argeting a particular race’s access to the franchise because its members vote for a particular party . . . constitutes discriminatory purpose.”).

2. HB 25’s proponents knew the law would have a disproportionate impact on African American and Hispanic voters, yet they offered no response.

Against this backdrop, HB 25’s legislative history reveals its proponents’ systematic refusal to engage with HB 25’s discriminatory impact. During HB 25’s consideration, legislators and community members expressed grave concerns that the bill would unlawfully and discriminatorily impact Texans of color. Repeatedly claiming ignorance of that impact, HB 25’s proponents offered unsupported, pretextual reasons to pass the law anyways. This repeated pattern demonstrates that race was a motivation behind HB 25. *Veasey*, 830 F.3d at 236.

²⁴ Emma Platoff, *Straight-ticket voting ends in 2020. For some down-ballot Republicans, that wasn’t soon enough.*, Tex. Tribune (Nov. 16, 2018), <https://www.texastribune.org/2018/11/16/straight-ticket-voting-ed-emmett-harris-county-texas/>.

During debate over HB 25, opponents accurately pointed out that minority voters rely on STV at much higher rates than white voters. Lichtman 37-41. For example, Representative Turner (D), highlighted “that precincts with a higher percentage of African American and Hispanic voters have more straight party ballots than precincts with lower percentages of African American and Hispanic voters.” Lichtman 47. Republicans—notably HB 25’s author—Representative Simmons, disregarded these facts, responding only that he was “not advised.” *Id.* at 38, 47; *see Veasey*, 830 F.3d at 236-237 (legislator’s statement that he was “not advised” of possible disparate impact was relevant to intent inquiry). When asked if he would have offered the bill if he had been aware that it would disenfranchise African Americans and Hispanic voters, Simmons refused to provide an answer. Lichtman 47-48.

In response to concerns that legislators had not actually considered whether HB 25 would violate the VRA, Simmons first claimed that HB 25 had “[n]othing to do with race.” *Id.* at 48. But he later admitted that no one had examined HB 25’s racial impact, despite repeated calls for such an inquiry. *Id.* at 38; *Veasey*, 830 F.3d at 237 (legislator’s refusal to delay implementation of bill until an impact study had been completed was relevant to intent inquiry). Despite his admission that he “did not commission . . . any study, related to this bill,” Simmons nonetheless claimed that he did “not believe this bill disenfranchises any voter.” Lichtman 40-41, 47-48. In reaching this conclusion, which Simmons conceded was baseless, he and the Legislature failed to consult any minority leaders, such as from the Mexican-American Legislative Caucus, the Black Legislative Caucus, NAACP, MALDEF, LULAC, the Urban League, Southwest Voter, or Mi Familia Vota. *Id.* at 37. And despite repeated concerns about HB 25’s disparate impact, the Legislature, without any debate or reasoning, rejected amendments to have the United States Department of Justice evaluate whether HB 25 violated the VRA or the U.S. Constitution. *Id.* at 31-32; *Veasey*, 830 F.3d at 237 (legislator’s refusal to explain rejection of amendments, both at the time and in subsequent

litigation, was circumstantial evidence relevant to intent to discriminate). The Legislature's awareness that HB 25 would suppress minority voting, its deliberate disregard of that fact, and its clear political motivation to suppress minority voting, all combine to support the conclusion that the Legislature passed HB 25 because of its disparate impact on minority voters.

Numerous legislators also raised concerns about increased lines at the polls. One observed:

[L]ong waits at polling places already are huge problems in some parts of Texas, especially in urban areas where many voters line-up to vote for many races on the ballot. On the first day of early voting for the November, 2016, election, for example, long waits—sometimes hours—were reported in Bexar, Harris, Nueces, and Denton counties Lines and ballot fatigue can exhaust voters' patience, and eliminating the straight-party option would only make things worse and cause many either to skip down-ballot races altogether or not go to the polls at all. The effect would be to suppress voting and voter turnout.

Lichtman 56. HB 25's proponents again offered no response and admitted that they had not reviewed any studies regarding the potential for increased voting times, longer lines, and decreased turnout. *Id.* at 40-41. They also disregarded concerns raised by election officials who testified that STV's elimination would cause longer polling-place lines, require increased budgets, and hit largest counties the hardest. *Id.* at 56-57; *Veasey*, 830 F.3d at 237. The Legislature rejected a proposed amendment that would have made elimination of STV contingent on counties' determining that sufficient funding would be allotted to address wait times at polls. Lichtman 31. In fact, they failed to include *any* measures that would address HB 25's increased burdens on counties. When asked who would cover the costs resulting from HB 25, Simmons responded he was "not advised as to what [those costs] would be or wouldn't be," disregarding evidence that HB 25 would increase Dallas County's election costs by nearly a million dollars. *Id.* at 35.

Proponents also ignored Texas's uniquely lengthy ballots. Simmons explicitly disregarded the fact that ballots in Dallas and Harris Counties can have nearly 100 items. *Id.* at 61. Implying he was not concerned that voters may not complete their ballots, he stated: "[o]f course, it's obviously their

choice as to how they want to handle that.” *Id.* The Legislature also rejected an amendment that would have permitted an STV option in counties with 25 or more items on the ballot. *Id.* at 31.

After hearing the dire warnings regarding HB 25’s impact on minority voters, the Legislature’s explicit disregard and refusal to take any measures to lessen the disproportionate burden on African American and Hispanic voters—even with repeated opportunities to do so—demonstrate that a substantial motivation behind HB 25 was the intent to depress minority turnout in Texas’s elections.

Meanwhile, the reasons HB 25’s proponents gave for passing the law—which were based solely on the unsubstantiated, personal opinions of a few legislators—were blatantly pretextual. For example, proponents claimed HB 25 would lead to a more informed electorate. But, as discussed, *supra* Section II.A.4, there is no evidence supporting this hypothesis. When confronted by this fact, Simmons admitted he was not aware of “any empirical data” supporting this primary justification for HB 25. Lichtman 42. When asked if any such study had been conducted in connection with HB 25, Simmons again claimed he was “not advised.” *Id.* at 42-43. And when another proponent of HB 25 was asked if he was aware of “any studies or any evidence” supporting this claim, he too could not point to a single source; instead, he said he thought “there’s a lot of belief” that this hypothesis was true. *Id.* at 43. Proponents also claimed the law would produce better candidates and campaigns. But, again, not one of them indicated any knowledge of any evidence to support this supposition. *Id.* at 44-47.

3. HB 25 was enacted under extremely unusual procedures and represents an enormous departure from century-old law.

Procedural and substantive deviations during HB 25’s passage also “afford evidence that improper purposes . . . play[ed] a role” in its passage. *Arlington Heights*, 429 U.S. at 267. By eliminating a century-old practice in Texas, HB 25 will bring an enormous substantive change to this State’s law. And the Legislature enacted HB 25 hastily, deviating from normal procedure.

The Legislature held just two brief public hearings in Austin; no hearings were held in any

other part of the state, including any of its numerous other minority-dense areas. Lichtman 37. One of the two hearings that did occur was before the Senate Committee on Business and Commerce, which does not hear election-related bills. *Id.* at 32-33. When questioned about this deviation from usual practice, Republican Senator Hancock offered the clearly pretextual explanation that bills are “very often” heard in committees on which the bill’s author sits, suggesting he had authored HB 25. *Id.* at 32. But Senator Hancock then quickly admitted that he neither authored HB 25 nor played any role in its creation. *Id.* at 32-33. Moreover, unlike other legislation altering the voting process, no meaningful fiscal note was created for HB 25. *Id.* at 33-35, App’x A, B.

Even the Legislature’s procedure of rejecting amendments seeking to ease HB 25’s burdens on minority voters were abnormal. Republicans refused to engage in debate on ameliorative amendments, and the bill’s author refused to explain or even take a position on any amendment, as is customary. *Id.* at 36-37. Another legislator called this refusal “rather extraordinary.” *Id.* at 37.

Each of these procedural deviations demonstrates HB 25’s proponents’ desire to pass the bill as quickly as possible, with little debate or public input. The purpose of these deviations were to avoid a meaningful examination of the bill, which would have confirmed the repeated concerns about HB 25’s racially discriminatory effect. These deviations are even more alarming considering that Texas has had a form of STV for more than a century. *See Arlington Heights*, 429 U.S. at 267.

4. The historical background of HB 25 weighs in favor of finding that a motivating factor behind HB 25 was intent to discriminate.

Finally, as discussed, *supra* Section II.B, Texas has a long and well-recognized history of electoral discrimination against both African Americans and Hispanics. *See* Lichtman 8-18. While these practices have evolved from overtly racist to subtler forms of discrimination, they are anything but a relic of the past. Such “official actions taken for invidious purposes,” especially those that are “reasonably contemporaneous with the challenged decision,” are relevant in

determining discriminatory purpose. *Veasey*, 830 F.3d at 232.

Texas continues to discriminate against African American and Hispanic Texans when it comes to voting. In fact, during the Legislature’s debate on HB 25, one legislator noted that in just the preceding three months, federal courts had issued three separate rulings finding Texas had intentionally discriminated against minority voters. Lichtman 39-40. Simmons’s only response was that he was unaware of such rulings because he had “been busy down here.” *Id.* at 40.

D. HB 25 will violate the First and Fourteenth Amendments because its purpose is to impede certain Texans’ political participation due to their political beliefs.

Because HB 25 was also intended to diminish electoral participation among voters who support the Democratic Party, it will independently violate the First and Fourteenth Amendments. The Equal Protection Clause prohibits “fencing out” from access to the franchise rights of “a sector of the population because of the way they may vote.” *Carrington v. Rash*, 380 U.S. 89, 94 (1965); *McCrary*, 831 F.3d at 222 (noting “legislatures [may not] restrict access to the franchise based on the desire to benefit a certain political party”). Likewise, the First Amendment protects citizens against “a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views.” *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring). To determine whether a law was motivated by such intent, a court considers the same *Arlington Heights* factors discussed in the Section above. After a plaintiff demonstrates the challenged law was passed with the intent of impeding the political participation of voters based on their partisan preferences, the defendant must then prove the law would have passed without this discriminatory intent. *Arlington Heights*, 429 U.S. at 270 n.21.

As already explained, HB 25 was passed to limit the rising political power of African Americans and Hispanics. *Supra* Section II.C. A primary reason for this was the way those voters vote: in Texas, African Americans and Hispanics overwhelmingly support Democratic candidates.

Supra Section II.A.3. Thus, a primary purpose of HB 25 was to prevent “a sector of the population” from casting votes “because of the way they may vote.” *Carrington*, 380 U.S. at 94. Punishing voters due to their political beliefs is anathema to the First Amendment.

In the absence of these impermissible motivations, Texas would not have passed HB 25. The law does not serve any of the pretextual interests its proponents described. *Supra* Section II.A.4. Because the true motivations behind HB 25 were to depress political turnout of racial and ethnic groups due to their political beliefs, it violates the First and Fourteenth Amendments.

III. Plaintiffs and all Texas voters will suffer irreparable harm absent an injunction.

HB 25 will violate the constitutional rights of Plaintiffs, their members and constituents, and other Texans. It is well established that, where a plaintiff establishes a constitutional violation, no further showing of irreparable injury is necessary. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of [constitutional] freedoms . . . unquestionably constitutes irreparable injury.”); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012) (same).

The increased polling-place lines HB 25 will produce will substantially and irreparably injure Plaintiffs, their members and constituents, and other Texas voters. “Courts routinely deem restrictions on fundamental voting rights irreparable injury.” *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (*LWVNC*); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (*OFA*) (“When constitutional rights are threatened or impaired, irreparable injury is presumed.”). This is because “once the election occurs, there can be no do-over and no redress.” *LWVNC*, 769 F.3d at 247. Because these harms—which strike at the very heart of a fair and democratic society—cannot be remedied post-election, they are by definition irreparable. *Patino v. City of Pasadena*, 229 F. Supp. 3d. 582, 590 (S.D. Tex. 2017) (finding irreparable harm and noting, in a vote dilution case, that “holding an election under the dilutive map undermines the integrity of the democratic system”); *OFA*, 697 F.3d at 436.

IV. The balance of equities and the public interest weigh in favor of a preliminary injunction.

The balance of the equities and the public interest also heavily favor a preliminary injunction. The balance of equities are simple: an injunction will relieve Texans of significant burdens on their fundamental right to vote, while requiring the Secretary to maintain the status quo of offering STV—as it has done for a century—will impose no meaningful burden. And the public interest is always served by injunctions preventing violations of constitutional rights. *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996). This is particularly so when voting rights are at issue, because “[t]he public interest . . . favors permitting as many qualified voters to vote as possible.” *OFA*, 697 F.3d at 437. If HB 25 is not enjoined, it will directly interfere with the fundamental rights of millions of Texas voters and the political causes they support.

CONCLUSION

Plaintiffs request that the Court issue a preliminary injunction barring HB 25’s implementation, and requiring the Secretary to allow STV to be offered in the upcoming November general election, as well as any future election occurring during the pendency of this litigation.

August 12, 2020

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**Pro Hac Vice Application Forthcoming*

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CERTIFICATE OF CONFERENCE

Plaintiffs have filed this Motion and the Complaint in this case simultaneously. Pursuant to the Local Rules and Standing Orders and Procedures of this Court, I hereby certify that counsel for movant Plaintiffs attempted to obtain respondent Defendant's position on this Motion by contacting the Office of the Attorney General of Texas. The Attorney General's Office informed counsel for Plaintiffs that it is not yet representing the Secretary in this lawsuit, and as a result, it could not provide the Secretary's position on this Motion. As a result, Plaintiffs cannot yet report the Secretary's position on this Motion. Plaintiffs will file an amended certificate of conference upon learning the Secretary's position regarding this Motion.

Certified to on August 12, 2020

/s/ Skyler M. Howton

Skyler M. Howton

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. As no counsel of record has appeared for Defendant, I further certify that I will have a copy of the foregoing document personally served on Defendant through a third-party process server.

/s/ Skyler M. Howton

Skyler M. Howton