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NOTE

TEXAS V. HOLDER: HOW TEXAS CAN ENACT A STRINGENT VOTER ID LAW AND AVOID SECTION 3(C) PRECLEARANCE

Brandon S. Baker[†]

I. INTRODUCTION

Since 2000, the United States has witnessed two extremely close statewide elections and claims—real or imagined—of rampant voting fraud. The combination of the two has created a political atmosphere in which some states have looked to new voting restrictions to protect the states' interests in fair and accurate elections. Many states have turned to voter identification laws ("voter ID laws") as a means of combating election fraud, real or perceived. Before discussing the voter ID laws, a quick reminder of three events that greatly influenced political opinions about voting restrictions is warranted.

On November 7, 2000, the nation voted for the President of the United States. More voters voted for Al Gore than George W. Bush,¹ but Bush won the Electoral College with 271 electoral votes to Gore's 266.² While the national results were very close, the Florida results were much closer. After a month of contentious debate, hanging chads, and a decision by the United States Supreme Court, Bush won the Florida electoral votes by a scant 537 votes, or approximately 0.009% of the total vote.³

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1. The final tally showed 50,999,897 (48.38%) voted for Gore and 50,456,002 (47.87%) voted for Bush. FEDERAL ELECTION COMMISSION, 2000 Official Presidential General Election Results, <http://www.fec.gov/pubrec/2000presgeresults.htm> (last updated Dec. 2001).

2. U.S. ELECTORAL COLLEGE, 2000 Presidential Election, <http://www.archives.gov/federal-register/electoral-college/votes/2000.html> (last visited Nov. 18, 2013).

3. Out of 5,963,110 total votes, Bush received 2,912,790 votes, and Gore received 2,912,253. FEDERAL ELECTION COMMISSION, 2000 Official Presidential General Election Results, <http://www.fec.gov/pubrec/2000presgeresults.htm> (last updated Dec. 2001).

Eight years later, Minnesota was home to a statewide election decided by a similarly small margin. Al Franken defeated Norm Coleman in the 2008 Minnesota Senate election by 312 votes or approximately 0.011% of the total vote.⁴

That same year, a national group became a household name because of its activism in the Presidential election. On October 6, 2008, the Association of Community Organizations for Reform Now (“ACORN”) and Project Vote claimed to have registered 1.3 million new voters.⁵ Unfortunately, many of these voter registrations were found to be fraudulent, with ACORN workers being indicted in Nevada,⁶ Florida,⁷ Pennsylvania,⁸ and Wisconsin.⁹

4. The final tally was 1,212,629 votes for Franken and 1,212,317 votes for Coleman out of 2,887,646 total votes. MINNESOTA SECRETARY OF STATE, 2008 Election Results Table by County, <http://www.sos.state.mn.us/Modules/ShowDocument.aspx?documentid=5333> (last visited Nov. 18, 2013).

5. Michael Falcone & Michael Moss, *Group’s Tally of New Voters Was Vastly Overstated*, N.Y. TIMES, Oct. 23, 2008, <http://www.nytimes.com/2008/10/24/us/politics/24acorn.html?pagewanted=all&r=0>. Falcone and Moss point out that ACORN and Project Now only registered approximately 400,000 new voters because many of the registrations were either address changes for existing voters or “were rejected by election officials for a variety of reasons, including duplicate registrations, incomplete forms and fraudulent submissions from low-paid field workers trying to please their supervisors.” *Id.* The author of this Note used the 1.3 million new registrations figure to highlight the country’s perception of the accomplishments of ACORN and Project Vote.

6. ACORN field director Christopher Edwards illegally paid compensation to workers prior to the 2008 elections for registering voters, many of which turned out to be fraudulent. Cara McCoy, *Ex-ACORN official gets probation for voter registration plan*, LAS VEGAS SUN, Nov. 23, 2009, <http://www.lasvegassun.com/news/2009/nov/23/ex-acorn-official-gets-probation-voter-registratio/>. ACORN later pled guilty to illegally compensating workers for registering voters. Eric Shawn, *ACORN Pleads Guilty to Voter Registration Fraud in Nevada*, FOX NEWS, Apr. 6, 2011, <http://www.foxnews.com/politics/2011/04/06/acorn-pleads-guilty-voter-registration-fraud-nevada/>.

7. After a tip from ACORN, eleven ACORN workers were arrested for submitting fraudulent voter registration forms in 2008. *ACORN turns in Fla. workers on voter fraud charges*, USA TODAY (Sep. 9, 2009 11:20 AM), http://usatoday30.usatoday.com/news/nation/2009-09-09-voting-arrests_N.htm.

8. Seven ACORN workers were indicted for filing fraudulent voter registrations prior to the 2008 elections. Dennis B. Roddy, *ACORN workers charged with forging voter registrations*, PITTSBURGH POST-GAZETTE (May 7, 2009 10:22 AM), <http://www.post-gazette.com/breaking/2009/05/07/ACORN-workers-charged-with-forging-voter-registrations/stories/200905070417>.

9. ACORN worker Kevin Clancy fraudulently submitted voter registrations before the 2008 elections. *ACORN worker sentenced to 10 months for election fraud*, CNN, Nov. 18, 2010,

No evidence has surfaced, however, that any of the fraudulent registrations were turned into fraudulent votes. The ACORN fraud has led to fears that someone could turn fraudulent voter registrations into fraudulent votes because few states require proof of identity when voting.

Polls have shown that Americans largely support voting restrictions, like photo ID requirements, to combat potential fraudulent votes. A July 7–19, 2012 poll by The Washington Post found that 74% of Americans support laws that require official, government-issued photo identification before casting ballots.¹⁰ A Pew Hispanic Center Poll found that 71% of Latino registered voters support voter ID laws.¹¹

Because of razor-thin elections and fears that fraudulent voter registrations would turn into fraudulent votes, several states have implemented voter ID laws to prevent fraudulent votes. This Note will address Texas's request for preclearance of its voter ID law in *Texas v. Holder*¹² and why that court's ruling is relevant today even after the Supreme Court in *Shelby County v. Holder*¹³ effectively removed all jurisdictions from the preclearance requirements of Section 5.¹⁴

II. BACKGROUND

A. *Judicial Standards Under Section 5 of the Voting Rights Act of 1965*

In response to discriminatory voting laws during the civil rights era, Congress enacted the Voting Rights Act of 1965. The Supreme Court in *Beer v. United States*¹⁵ explained the reason for Section 5 of the Voting Rights Act:

Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by

http://www.cnn.com/2010/CRIME/11/18/election.worker.sentenced/index.html?_s=PM:CRIME.

10. *Fear of voter suppression high, fear of voter fraud higher*, WASH. POST, Aug. 13, 2012, http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2012/08/12/National-Politics/Polling/release_116.xml?uiid=E1kPqQQZEeGJ93biOpgtBg.

11. *Latino Voters Strongly Support Voter ID Laws, Poll Says*, FOX NEWS LATINO, Oct. 11, 2012, <http://latino.foxnews.com/latino/politics/2012/10/11/latino-voters-strongly-support-voter-id-laws-polls-says/#ixzz296aUNeUY>.

12. *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012).

13. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

14. *See infra* part II.H.

15. *Beer v. United States*, 425 U.S. 130 (1976).

passing new discriminatory voting laws as soon as the old ones had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory. . . . Congress therefore decided, as the Supreme Court held it could, “to shift the advantage of time and inertia from the perpetrators of the evil to its victim,” by “freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.”¹⁶

For a jurisdiction covered by Section 5 of the Voting Rights Act of 1965, Section 5 requires the state prove that a change in voting laws “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.”¹⁷ Although the 89th Congress intended these requirements to be temporary, Congress has renewed Section 5 multiple times with the latest renewal in 2006 extending the requirements for an additional twenty-five years.¹⁸

The burden of proving that a change to voting laws has neither a discriminatory purpose nor discriminatory retrogressive effect rests squarely on the shoulders of the covered jurisdiction.¹⁹ Proving the “absence of [a] discriminatory purpose and effect” is rather difficult because it requires the covered jurisdiction to prove a negative.²⁰

Congress amended the Voting Rights Act of 1965 in 1975 (“1975 Amendments”) in order to “bar[] voting discrimination against certain language minorities—specifically, persons of American Indian, Asian American, Native Alaskan, and Spanish heritage.”²¹ The Voting Rights Act banned the use of any “test or device” as a requirement for voting.²² The

16. *Id.* at 140 (quoting H.R. REP. NO. 94-196, at 57–58 (1975)).

17. 42 U.S.C. § 1973c(a) (2006).

18. *Texas v. Holder*, 888 F. Supp. 2d 113, 122–23 (D.D.C. 2012).

19. *City of Pleasant Grove v. United States*, 479 U.S. 462, 479 (1987) (Powell, J., dissenting) (“The Voting Rights Act shifts the burden of proof to the state actor to prove the absence of discriminatory purpose.”).

20. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997).

21. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 226 (D.D.C. 2008), *rev'd and remanded sub nom.* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

22. *Id.* at 225. The original definition still remains:

1975 Amendments expanded the original definition of “test or device” to include the use of English-only voting materials in jurisdictions in which more than five percent of the voting age population are members of a single language minority.²³ The 1975 Amendments created a three prong test for determining whether a jurisdiction should be covered by Section 5: (1) a single language minority group comprising more than five percent of the voting age population;²⁴ (2) English-only voting materials;²⁵ and (3) less than fifty percent voter registration or participation by the single language minority group in specified elections.²⁶

Because Texas had suppressed minority voting through the use of poll taxes and white primaries rather than literacy tests and grandfather clauses,²⁷ Texas’s voting practices did not meet the definition of “test or device.” While Texas escaped Section 5 coverage in 1965, it could not with the 1975 Amendments.²⁸ As a covered jurisdiction under Section 5, Texas bore the burden of proving that any new voting laws or changes to existing voting laws would have neither a discriminatory purpose nor a discriminatory retrogressive effect.

The phrase “test or device” shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

42 U.S.C. § 1973b(c) (2008).

23. *Nw. Austin Mun. Util. Dist. No. One*, 573 F. Supp. 2d at 226–27. The expanded definition reads:

[T]he term “test or device” shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority.

42 U.S.C. § 1973b(f)(3) (2008).

24. 42 U.S.C. § 1973b(f)(3).

25. *Id.*

26. 42 U.S.C. § 1973b(b) (2008). The specified elections are the Presidential elections of 1964, 1968, and 1972. *Id.*

27. JOE TENBARGE, *TEXAS POLITICS, Voting, Campaigns, & Elections*, 5.3 Historical Barriers to Voting (3d ed. 2009), available at http://texaspolitics.laits.utexas.edu/6_5_3.html.

28. *Nw. Austin Mun. Util. Dist. No. One*, 573 F. Supp. 2d at 227.

B. *History of Texas v. Holder*

On July 25, 2011 Texas requested preclearance of its new voter ID law, Senate Bill 14 ("SB 14"), from U.S. Attorney General Eric H. Holder, Jr.²⁹ In response, the Attorney General requested that Texas disclose the number of voters without a valid Texas photo ID and the percentage of those voters who are minorities.³⁰ Texas provided the data on January 12, 2012, but, as Texas explained, the data was unreliable because the voter registration and state identification databases were not designed to be merged.³¹ On March 12, 2012 the Attorney General denied preclearance because Texas failed to prove its new voter ID law would not have a racially discriminatory effect on voters.³²

While Texas's request for preclearance was still under consideration, the Attorney General denied South Carolina's request for preclearance of its new voter ID law.³³ Recognizing the likelihood of a similar rejection by the Attorney General, Texas filed a request for judicial preclearance of SB 14 on January 24, 2012.³⁴ The court granted Texas's request for an expedited hearing in order to allow Texas to implement SB 14 in time for the November 2012 elections.³⁵

Texas initially sought only a declaratory judgment of preclearance, but Texas later added a second claim that challenged the constitutionality of Section 5.³⁶ Ultimately, at issue in the second claim is the double standard of Section 5—jurisdictions covered by Section 5 bear the burden of proving that voting changes have neither a discriminatory purpose nor a retrogressive effect, while jurisdictions outside of Section 5, however, do not bear the same burden of proof.³⁷

In *Northwest Austin Municipal Utility District No. One v. Holder*,³⁸ the Supreme Court acknowledged that Section 5 was necessary at the time

29. *Texas v. Holder*, 888 F. Supp. 2d 113, 117 (D.D.C. 2012).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 118.

34. *Id.*

35. *Id.* at 118–19.

36. *Id.* at 118.

37. *Id.* at 123–24.

38. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

Congress enacted it,³⁹ but the Supreme Court also signaled a willingness to address the constitutionality of Section 5 at a later time.⁴⁰ That later time came on June 25, 2013 when the Supreme Court handed down the opinion in *Shelby County v. Holder*.⁴¹ The Court held that basing the coverage formula of Section 4 on forty-year-old data was irrational and that if Congress were writing the law today, it would not base its legislation on that data.⁴² This irrational use of forty-year-old data forced the Supreme Court to rule the coverage formula of Section 4(b) unconstitutional.⁴³ Since the provisions of Section 5 only apply to the jurisdictions that meet the coverage formula of Section 4,⁴⁴ the Supreme Court effectively removed the Section 5 preclearance restrictions from all covered jurisdictions.

Because of the reams of paper spent by others discussing the constitutionality of Section 5 and because of the uncertainty of the Supreme Court's position on Section 5, this Note will only address the first claim of *Texas v. Holder*—the preclearance of Texas's voter ID law.

C. *The Texas Voter ID Law*

The Texas legislature passed SB 14 during the 2011 biennial session and added provisions to the Texas Election Code to require voters to present an accepted photo ID when voting.⁴⁵ Under the previous requirements, Texas accepted eight different forms of identification including government-issued photo IDs, utility bills, bank statements, and other official government forms.⁴⁶ As a result of the changes of SB 14, Texas only accepts five forms of photo identification: (1) a Department of Public Safety (DPS) issued driver's license, personal identification card, or the new election identification card ("EIC"); (2) a United States military identification card; (3) a United States citizenship certificate; (4) a United States passport; or (5)

39. *Id.* at 211 ("[E]xceptional conditions . . . justified extraordinary legislation otherwise unfamiliar to our federal system." (citations omitted) (internal quotation marks omitted)).

40. *Id.* at 202 ("At the same time, § 5, which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial federalism costs. These federalism costs have caused Members of this Court to express serious misgivings about the constitutionality of § 5." (citations omitted) (internal quotation marks omitted)).

41. *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013).

42. *Id.* at 2630–31.

43. *Id.* at 2631.

44. *Id.* at 2627.

45. TEX. ELEC. CODE ANN. § 63.001(b) (West 2012).

46. TEX. ELEC. CODE ANN. § 63.0101 (West 2012).

a DPS-issued license to carry a concealed handgun.⁴⁷ These forms of photo ID must not have expired more than sixty days prior to voting.⁴⁸

The DPS will issue a free EIC to any voter lacking an acceptable photo ID.⁴⁹ To receive an EIC, the voter must present “(A) [o]ne piece of primary identification; (B) [t]wo pieces of secondary identification; or (C) [o]ne piece of secondary identification plus two pieces of supporting identification.”⁵⁰ Primary identification consists of either a DPS-issued driver’s license or personal identification card, even if the photo ID has been expired more than sixty days but less than two years.⁵¹ Secondary identification consists of an original or certified copy of a birth certificate issued by a state government or the United States government, a court order indicating an “official change of name and/or gender,” or U.S. citizenship or naturalization papers.⁵² Supporting identification includes a wide range of documents including photo ID from other jurisdictions, Social Security cards, or even a hospital-issued birth certificate.⁵³ If a voter does not have any acceptable form of photo, primary, and secondary identification, the cheapest form of secondary identification is a certified birth certificate, for which the Texas Bureau of Vital Statistics charges \$22.⁵⁴ While an EIC is free, the supporting documentation necessary to acquire an EIC will cost \$22 at a minimum.⁵⁵

The voter ID law contains three exceptions, which allow voters without photo ID to cast a ballot. First, a voter may cast a provisional ballot if he does not have his photo ID at the polls.⁵⁶ The state will accept a provisional ballot provided that the voter within six days of the election presents an accepted photo ID, an affidavit claiming religious objections to photography, or an affidavit stating the voter’s photo ID was destroyed in a natural disaster.⁵⁷ Second, a disabled voter may vote without an accepted

47. *Id.*

48. *Id.*

49. TEX. TRANSP. CODE ANN. § 521A.001(a)–(b) (West 2012).

50. 37 TEX. ADMIN. CODE § 15.182(1) (2013).

51. 37 TEX. ADMIN. CODE § 15.182(2) (2013).

52. 37 TEX. ADMIN. CODE § 15.182(3) (2013).

53. 37 TEX. ADMIN. CODE § 15.182(4) (2013).

54. *Texas v. Holder*, 888 F. Supp. 2d 113, 116 (D.D.C. 2012).

55. *Id.*

56. TEX. ELEC. CODE ANN. § 63.001(g) (West 2012).

57. TEX. ELEC. CODE ANN. § 65.054 (West 2012); *see also* TEX. ELEC. CODE ANN. § 65.0541 (West 2012).

photo ID if the voter presents a voter registration certificate⁵⁸ and proof of the disability from the Social Security Administration or United States Department of Veteran Affairs.⁵⁹ Third, voters who are either disabled or age sixty-five or older may vote by mail without presenting an accepted photo ID.⁶⁰ In order to vote in person, elderly voters would still have to present an accepted photo ID.⁶¹

D. Voter ID Laws of Other Jurisdictions.

1. Indiana

In *Crawford v. Marion County Election Board*,⁶² the Supreme Court upheld Indiana's voter ID law.⁶³ The plaintiffs in *Crawford* challenged the Indiana voter ID law on the grounds that (1) the law substantially burdened the right to vote, (2) the law was not necessary or appropriate in combating voter fraud, and (3) the law would have arbitrarily disenfranchised voters without valid photo ID.⁶⁴ The Court held that the Indiana voter ID law did not "impose[] excessively burdensome requirements on any class of voters."⁶⁵

Indiana's voter ID law requires each voter to provide "proof of identification" when casting a ballot.⁶⁶ Valid proof of identification must (1) show the name of the voter and correspond to the name in the voter's registration record,⁶⁷ (2) contain a photograph of the voter,⁶⁸ (3) not have

58. TEX. ELEC. CODE ANN. § 63.001(h) (West 2012).

59. TEX. ELEC. CODE ANN. § 13.002(i) (West 2012).

60. TEX. ELEC. CODE ANN. §§ 82.002, 82.003 (West 2011).

61. *Texas v. Holder*, 888 F. Supp. 2d 113, 116 (D.D.C. 2012).

62. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

63. *Id.* at 204.

64. *Id.* at 187. Specifically, the plaintiffs alleged:

[T]he new law substantially burdens the right to vote in violation of the Fourteenth Amendment; that it is neither a necessary nor appropriate method of avoiding election fraud; and that it will arbitrarily disfranchise [sic] qualified voters who do not possess the required identification and will place an unjustified burden on those who cannot readily obtain such identification.

Id.

65. *Id.* at 202.

66. IND. CODE § 3-11-8-25.1(a) (2013).

67. IND. CODE § 3-5-2-40.5(a)(1) (2011).

68. IND. CODE § 3-5-2-40.5(a)(2) (2011).

expired before the date of the last general election,⁶⁹ and (4) be issued by the United States or the state of Indiana.⁷⁰ Indiana provides a free photo ID to any voter who will be at least eighteen years of age, will be eligible to vote in the next election, and does not have a valid Indiana driver's license.⁷¹

Along with the photo ID requirements, the Indiana voter ID law contains several exceptions that allow a voter to vote without proof of identification. For example, a person who lives and votes in a state-licensed care facility is not required to present photo identification when voting.⁷² Additionally, a voter who cannot or declines to provide photo ID may cast a provisional ballot.⁷³ The county election board must count the ballot if the voter signs an affidavit under the penalty of perjury stating one of three conditions.⁷⁴ First, the voter may provide identification to the county election board and sign an affidavit stating the voter was the person who cast the provisional ballot.⁷⁵ Second, the voter may sign an affidavit stating the voter is indigent and is unable to acquire identification without paying a fee.⁷⁶ Third, a voter may state a religious objection to being photographed.⁷⁷ Voters eligible to cast absentee ballots (*e.g.*, the elderly, disabled, and homebound)⁷⁸ may vote without presenting proof of identification.⁷⁹

While the Indiana photo ID itself is free,⁸⁰ obtaining the photo ID has costs. Voters must travel to an Indiana Bureau of Motor Vehicles (BMV) office to apply for either a driver's license or photo ID card.⁸¹ This travel has an "obvious economic cost" in lost work or paying for transportation.⁸² Moreover, even if a voter qualifies to cast a provisional ballot, the voter must still travel to the county seat within ten days to sign an affidavit, and

69. IND. CODE § 3-5-2-40.5(a)(3) (2011).

70. IND. CODE § 3-5-2-40.5(a)(4) (2011).

71. IND. CODE § 9-24-16-10(b) (2013).

72. IND. CODE § 3-11-8-25.1(e) (2013).

73. IND. CODE § 3-11.7-5-2.5(a) (2011).

74. IND. CODE § 3-11.7-5-2.5(b)-(d) (2011).

75. IND. CODE § 3-11.7-5-2.5(b) (2011).

76. IND. CODE § 3-11.7-5-2.5(c)(2) (2011).

77. IND. CODE § 3-11.7-5-2.5(c)(2)(B) (2011).

78. IND. CODE § 3-11-10-24(a) (2011).

79. IND. CODE § 3-11-10-1.2 (2005).

80. IND. CODE § 9-24-16-10(b) (2013).

81. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 211-12 (2008) (Souter, J., dissenting).

82. *Id.* at 215.

this travel incurs the same types of economic costs.⁸³ In addition to travel costs, the voter must also pay for a certified birth certificate at a cost of three to twelve dollars or a United States passport at a cost of up to \$100.⁸⁴

Although the Indiana voter ID law created new burdens on voters, the *Crawford* Court held that the statute did not impose “excessively burdensome requirements on any class of voters.”⁸⁵ The Court balanced the new burdens on voters in general against Indiana’s interests in protecting the integrity of elections.⁸⁶ Because the petitioners presented a facial attack on the constitutionality of the law, the burden of proof fell to the petitioners.⁸⁷ The experts presented by the petitioners were “utterly incredible and unreliable,”⁸⁸ and the petitioners failed to provide any evidence of the burden imposed on voters without photo identification.⁸⁹ Without sufficient evidence to overcome the “heavy burden of persuasion”⁹⁰ necessary to invalidate the law, the Court found that the State’s “precise interests” outweighed the limited burden on voters’ rights.⁹¹

2. Georgia

In *Common Cause/Georgia v. Billups*,⁹² the Eleventh Circuit, based on the decision in *Crawford*, upheld Georgia’s voter ID law finding that Georgia’s

83. *Id.* at 216–17.

84. *Id.* at 215. The two most common documents presented by an applicant for a photo identification are a birth certificate or a U.S. passport. *Id.* The Indiana Administrative Code provides a list of supporting documents necessary for applying for an Indiana photo identification. See 140 IND. ADMIN. CODE 7-1.1-3(b) (2009).

85. *Crawford*, 553 U.S. at 202 (internal quotation marks omitted).

86. *Id.* at 200. The petitioners asked the Court to balance the burden of the voter ID law on the small group of voters lacking valid photo ID against the State’s interests in election integrity. *Id.* The Court declined stating that “on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.” *Id.* Instead, the Court weighed the burden on all voters against the State’s interests, holding that “[w]hen we consider only the statute’s broad application to all Indiana voters we conclude that it ‘imposes only a limited burden on voters’ rights.’ The ‘precise interests’ advanced by the State are therefore sufficient to defeat petitioners’ facial challenge.” *Id.* at 202–03 (citations omitted) (internal quotation marks omitted).

87. *Id.* at 200.

88. *Id.* (internal quotation marks omitted).

89. *Id.*

90. *Id.*

91. *Id.* at 202–03 (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

92. *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009).

interests outweighed the burden on the voters.⁹³ Interestingly, while the district court did not have the benefit of *Crawford* at the time it ruled on the merits of *Common Cause*, the district court applied the same balancing test as the one eventually employed by the Supreme Court in *Crawford*.⁹⁴ Although Georgia is a jurisdiction that falls under Section 5 of the Voting Rights Act of 1965, the Eleventh Circuit did not place the burden of proof on Georgia; in fact, the court stated that recent decisions in *Crawford* and *Burdick v. Takushi*⁹⁵ do not “place an evidentiary burden on the state when defending a voting regulation.”⁹⁶ The court placed the burden on the petitioners, stating that the petitioners were unable to provide any “admissible and reliable evidence” of the burden of the Georgia voter ID law.⁹⁷

Under the Georgia voter ID law, voters must present “proper identification” to poll workers to vote.⁹⁸ “Proper identification” includes: (1) a Georgia driver’s license; (2) a valid Georgia voter ID card; (3) a valid United States passport; (4) a valid employee identification card issued by the United States, the state of Georgia, or any governmental entity of Georgia; (5) a valid United States military ID; or (6) a valid tribal ID.⁹⁹

If a voter does not have a valid photo ID, he or she may obtain a Georgia voter ID card after presenting (1) a “photo identity document” or non-photo identity document containing the voter’s name and date of birth, (2) documentation of the voter’s date of birth, (3) Georgia voter registration, and (4) documentation of the voter’s principal residence.¹⁰⁰ A wide variety of photo ID cards, such as student ID cards, pilot’s licenses, employee identification cards, and government-issued identification cards, are valid “photo identity documents.”¹⁰¹ Valid non-photo ID documents include, among others, original or certified birth certificates, voter registration applications, state or federal tax returns, or pay stubs.¹⁰² Each county board

93. *Id.* at 1345.

94. *Id.* at 1352–54.

95. *Burdick v. Takushi*, 504 U.S. 428 (1992).

96. *Common Cause*, 554 F.3d at 1353.

97. *Id.* at 1354.

98. GA. CODE ANN. § 21-2-417(a) (2008).

99. *Id.*

100. GA. CODE ANN. § 21-2-417.1(e) (2008).

101. GA. COMP. R. & REGS. 183-1-20-.01(b) (2006).

102. *Id.*

of registrars must provide at least one location that accepts applications for Georgia voter ID cards, and the cards will be free of charge.¹⁰³

Georgia's voter ID law provides several exceptions. Any Georgia driver's license is a valid voter ID regardless of the expiration of the driver's license.¹⁰⁴ A voter unable to present a valid photo ID at the poll may cast a provisional ballot upon signing an affidavit swearing that the voter is eligible to vote.¹⁰⁵ Voters may also cast absentee ballots without presenting a photo ID.¹⁰⁶

3. South Carolina

On October 10, 2012 in *South Carolina v. United States*, the United States District Court of the District of Columbia issued its opinion upholding South Carolina's new voter ID law.¹⁰⁷ In 2011, South Carolina passed legislation modifying its pre-existing voter ID law, requiring the confirmation of the identity of voters at the polls.¹⁰⁸ Under the previous voter ID law enacted in 1988, South Carolina voters could vote with one of three acceptable forms of ID: "(i) a South Carolina driver's license, (ii) a South Carolina DMV photo ID card, or (iii) the non-photo voter registration card given to all registered voters in South Carolina."¹⁰⁹

South Carolina's new law added new forms of acceptable ID, but it does not require photo ID to vote. In addition to a South Carolina driver's license and a Department of Motor Vehicles (DMV) photo ID, voters may use a passport, a military ID, or a new South Carolina photo voter registration card.¹¹⁰ A voter possessing only a non-photo voter registration card may obtain a photo voter registration card by presenting the non-photo voter registration card or by verbally confirming the voter's date of birth and the last four numbers of the voter's social security number.¹¹¹ The free DMV photo ID may be obtained at any DMV office, at least one of

103. GA. CODE ANN. § 21-2-417.1(a) (2008).

104. GA. CODE ANN. § 21-2-417(a)(1) (2008). The statute does not require the Georgia driver's license to be a valid one. *Id.* The statute states all other forms of accepted photo ID must be valid. GA. CODE ANN. § 21-2-417(a)(2)–(6) (2008).

105. GA. CODE ANN. §§ 21-2-417(b) (2008), 21-2-418 (2008), 21-2-419 (2010).

106. GA. CODE ANN. § 21-2-385 (2011).

107. *South Carolina v. United States*, 898 F. Supp. 2d 30, 32 (D.D.C. 2012).

108. *Id.* at 33.

109. *Id.*

110. *Id.*

111. *Id.* at 33–34.

which is located in all forty-six counties.¹¹² The DMV requires the voter to present “proof of South Carolina residency, U.S. citizenship, and Social Security number.”¹¹³ The voter may prove South Carolina residency with a birth certificate or a passport.¹¹⁴

The new photo ID law’s “reasonable impediment” provisions prevent the law from having a discriminatory retrogressive effect—it likely would have a discriminatory retrogressive effect otherwise.¹¹⁵ While a voter without photo ID could vote with the non-photo voter registration card under the prior law, the reasonable impediment provision under the new law permits a voter with a non-photo voter registration card to vote by signing an affidavit stating a reasonable impediment to obtaining a photo ID.¹¹⁶ The voter may cast a provisional ballot simply by signing an affidavit at the polling place stating a “reasonable impediment” to the voter obtaining photo ID.¹¹⁷ Unlike other provisional ballots that require the voter to affirm the ballot at a later time in order for it to be counted, the reasonable impediment ballot is provisional only because a challenger may contest it later.¹¹⁸ Without any action by the voter, the county election board will count reasonable impediment ballots in a manner similar to how absentee ballots are counted.¹¹⁹

The court accepted South Carolina’s standard for reasonableness: “Any reason that the voter *subjectively* deems reasonable will suffice, so long as it is not false.”¹²⁰ If a reasonable impediment ballot is challenged, the county election board may not investigate the reasonableness of the impediment, only the truthfulness of the impediment.¹²¹ Reasonable impediments include lacking a birth certificate, disability or illness, lack of transportation, a busy work schedule, unemployment, family obligations, charitable work,

112. *Id.* at 34.

113. *Id.* The requirements for obtaining a DMV photo ID did not change from pre-existing law. *Id.*

114. *Id.* The court did not address the cost of the birth certificate because South Carolina recognizes a lack of a birth certificate as a valid reason for casting a provisional ballot. *Id.* at 36.

115. *Id.* at 40.

116. *Id.* at 35.

117. *Id.*

118. *Id.* at 42.

119. *Id.* at 36.

120. *Id.*

121. *Id.* at 36–37.

and any of a myriad of other reasons.¹²² South Carolina will provide check boxes on the affidavit for many of these reasons along with an area to list any other reason.¹²³ This provisional ballot process falls into what the Supreme Court characterized as “curing problems and alleviating burdens, not as creating problems and imposing burdens.”¹²⁴

In addition to the reasonable impediment provision, South Carolina’s new photo ID law contains another ameliorative provision for a free photo ID.¹²⁵ Under the prior law, voters had to go to their county’s DMV office and pay a \$5 fee for a DMV photo ID.¹²⁶ South Carolina’s new photo ID law made the DMV photo ID free and also created a new free photo voter registration card available at each county’s elections office.¹²⁷

In addition to not having a discriminatory retrogressive effect, the court found that the new voter ID law did not violate the discriminatory purpose test under Section 5.¹²⁸ Evidence of a discriminatory purpose would be either “(i) a race-based law or (ii) a race-neutral law with racially discriminatory effects.”¹²⁹ The stated purpose of the new voter ID law is to confirm the identity of the voter and thereby deter voter fraud and enhance the public’s confidence in South Carolina’s electoral system.¹³⁰ This purpose is race-neutral, and, as the court noted in its analysis, the law creates no racially discriminatory effects.¹³¹ Moreover, the “text of the final law . . . reflects legislators’ efforts to avoid discriminatory retrogressive effects on African-American voters.”¹³²

Out of the recently precleared or court-approved voter ID laws, the court noted that only South Carolina enacted both of the ameliorative provisions of a free photo voter registration card and of a broad provisional ballot process.¹³³ Because of South Carolina’s implementation of these ameliorative provisions, the court described South Carolina’s voter ID law

122. *Id.* at 36.

123. *Id.* at 40–41.

124. *Id.* at 42 (citing *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 199 (2008)).

125. *South Carolina*, 898 F. Supp. 2d at 33–34.

126. *Id.* at 34.

127. *Id.* at 33–34.

128. *Id.* at 45.

129. *Id.*

130. *Id.* at 43.

131. *Id.* at 45.

132. *Id.*

133. *Id.* at 46.

“as significantly more friendly to voters currently without qualifying photo IDs than the voter ID laws in Indiana, Georgia, New Hampshire, and Texas.”¹³⁴ Since the voter ID law is more voter friendly than other approved voter ID laws, the court held that there was no discriminatory retrogressive effect on voters and that the ameliorative provisions supported the conclusion that there was no discriminatory purpose.¹³⁵

E. *The Arguments of Texas v. Holder*

Texas made two arguments at trial: (1) Section 5 is inapplicable to voter ID laws because the right to vote is not abridged or denied,¹³⁶ and (2) the Supreme Court upheld the limited burden placed on voters’ rights by voter ID laws.¹³⁷ The basis for Texas’s first argument was that the minor inconveniences of voter ID laws are similar to the inconveniences of voter registration laws.¹³⁸ Citizens who refuse to register to vote have *chosen* not to vote.¹³⁹ Similarly, citizens who have no acceptable photo ID and who do not acquire photo ID prior to an election have *chosen* not to vote.¹⁴⁰ In both cases, “the choice lies with prospective voters, so voting rights can hardly be considered to have been ‘denied’ or ‘abridged’ by the state.”¹⁴¹

The first argument failed to sway the court, which stated that the “argument completely misses the point of section 5.”¹⁴² A jurisdiction covered by Section 5 must prove that *any* change in voting procedures will not “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”¹⁴³ The court pointed out the problem with a blanket statement claiming all voter ID laws would only impose minor inconveniences.¹⁴⁴ For example, if a state charged \$500 to obtain an acceptable form of ID or forced voters to travel to a “distant and inaccessible” state capital to obtain the ID, the inconvenience would by

134. *Id.*

135. *Id.* at 48.

136. *Texas v. Holder*, 888 F. Supp. 2d 113, 123 (D.D.C. 2012).

137. *Id.* at 124.

138. *Id.* at 123.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)).

144. *Id.* at 124.

no means be minor.¹⁴⁵ The court then chided Texas by claiming that if the Texas voter ID law only imposed minor inconveniences on voters, SB 14 would easily be precleared.¹⁴⁶ On this point, the court ignored the reality of political influences on the Attorney General and, to a lesser extent, the courts. Political pressure from small vocal groups could influence a decision by either the Attorney General or the courts and could prevent easy preclearance of any voting law change.

The court then compared Texas's "voter choice" argument to a similar argument Texas made in *Texas v. United States*¹⁴⁷ only a year earlier.¹⁴⁸ That court held that Texas's retrogression analysis showing no retrogressive effect on Hispanics if they chose to vote at the same rates as whites was too simplistic and needed to take into account more complex variables such as educational and economic conditions.¹⁴⁹ Similarly, Texas's "voter choice" argument in the voter ID case did not consider educational and economic conditions of minorities—the argument failed, just as it did with the *Texas v. United States* court.¹⁵⁰

Texas based its second argument on *Crawford v. Marion County Election Board* where the Supreme Court upheld Indiana's voter ID law reasoning that it "imposes only a limited burden on voters' rights."¹⁵¹ Because of the similarities in purpose and procedure, Texas asserted that *Crawford* controlled in this case.¹⁵² Considering the Supreme Court ruling in *Crawford*, Texas queried, "[I]f Indiana can implement a photo ID law to protect against voter fraud, why can't Texas do the same?"¹⁵³

The United States countered Texas's argument by pointing out that Indiana is not a covered jurisdiction under Section 5 and that the case presented a First and Fourteenth Amendment facial challenge.¹⁵⁴ The plaintiff bore the burden of proving that the Indiana voter ID law was

145. *Id.*

146. *Id.*

147. *Texas v. United States*, 831 F. Supp. 2d 244 (D.D.C. 2011).

148. *Holder*, 888 F. Supp. 2d at 124.

149. *Id.*

150. *Id.*

151. *Id.* (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202–03 (2008)).

152. *Id.*

153. *Id.* The purpose of both Indiana's and Texas's voter ID laws is to prevent in-person voter fraud. Both laws require voters to present photo ID when voting, and both require the state's driver's license offices to provide free photo ID. *Id.*

154. *Id.* at 124–25.

invalid “in *all* its applications.”¹⁵⁵ In this case, however, Texas bore the burden of proving its voter ID law lacked a discriminatory purpose and a retrogressive effect on minority voting rights.¹⁵⁶

The court decided the correct answer was somewhere between these two arguments.¹⁵⁷ *Crawford* did not control the case for two key reasons. First, the *Crawford* Court considered “*only* the statute’s broad application to *all* *Indiana voters*.”¹⁵⁸ In this case, the focus was limited to racial minorities.¹⁵⁹ Second, *Crawford* addressed a facial constitutional challenge while this case faced the question of discriminatory purpose and retrogressive effect under Section 5.¹⁶⁰ Texas bore the burden of proof under section 5 while the plaintiff bore the burden of proof in *Crawford*.¹⁶¹

At the same time, the court recognized the persuasiveness of *Crawford* in this case.¹⁶² The Supreme Court held that Indiana had a compelling state interest in preventing in-person voter fraud, although “the record contains *no* evidence of any such fraud actually occurring in Indiana at any time in its history.”¹⁶³ Contrary to the United States’ argument at trial that the absence of voter fraud in Texas made Texas’s interests a pretext for discrimination, the court upheld Texas’s interest in preventing voter fraud.¹⁶⁴ The court reasoned that “[a] state interest that is unquestionably legitimate for Indiana—without *any* concrete evidence of a problem—is unquestionably legitimate for Texas as well.”¹⁶⁵ Therefore, the inquiry into discriminatory purpose could not rely on documented in-person voter fraud in Texas.¹⁶⁶

The important provision of free valid photo ID provided by Indiana was a second reason for *Crawford*’s persuasiveness.¹⁶⁷ The *Crawford* Court held

155. *Id.* at 125 (quoting *Georgia v. United States*, 411 U.S. 526, 538 (1973)).

156. *Id.*

157. *Id.*

158. *Id.* (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202–03 (2008)).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 194 (2008)).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 126.

that obtaining a free photo ID from the state does not qualify as a substantial burden:

For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.¹⁶⁸

The court was quick to point out the Supreme Court's language stating that a trip to the driver's license office was insubstantial for "most voters"—leaving open the possibility that for some the burden may be substantial.¹⁶⁹ This distinction between "most" and "all" would turn out to be a key factor in the court's rejection of Texas's preclearance request.

Balancing *Crawford* and Section 5, the court provided the standard Texas had to meet for preclearance of its voter ID law: Even if a disproportionate number of minority voters lacked valid photo ID, Texas could prove a lack of retrogressive effect by showing that voters could obtain valid a photo ID without cost or major inconvenience.¹⁷⁰

F. *The Evidence*

The court evaluated evidence from Texas, the United States, and Defendant-Intervenors concerning whether the Texas voter ID law would disproportionately affect minorities lacking valid photo ID.¹⁷¹ Saying the court was underwhelmed with the evidence would be generous—the court ultimately rejected *all* of the evidence presented in court by *all* of the parties regarding the effects of voter ID laws on minority voters.¹⁷² Because the evidence presented by Texas failed to carry the burden of proof and uncontested record evidence showed a disproportionate effect on minorities, Texas failed to demonstrate its voter ID law lacked a discriminatory retrogressive effect.¹⁷³

168. *Id.* (quoting *Crawford*, 553 U.S. at 198).

169. *Id.*

170. *Id.*

171. *Id.* at 127.

172. *Id.*

173. *Id.*

1. Texas

To show a lack of discriminatory retrogressive effect, Texas presented two main forms of evidence. First, Texas presented social science evidence demonstrating the stringency of a voter ID law does not affect voter turnout.¹⁷⁴ Texas's main evidence was a 2009 paper authored by Harvard political scientist Dr. Stephen Ansolabehere, who happened to be a key expert witness in this case for the United States.¹⁷⁵ After a nationwide telephone survey of eligible voters, Dr. Ansolabehere concluded that "almost no one . . . stay[s] away from the polls for want of appropriate identification."¹⁷⁶ The United States countered this evidence with a 2011 study by Dr. Michael Alvarez of the California Institute of Technology that applied a statistical regression model to voting data from all fifty states showing that voter ID laws "will depress overall voter turnout by approximately 10%."¹⁷⁷ Texas did not present any evidence disputing Dr. Alvarez's study, and the court ruled that Texas failed to prove "any sort of academic consensus about the impact of voter ID laws."¹⁷⁸

In addition to Dr. Ansolabehere's study, Texas presented a study by University of Texas political scientist Dr. Daron Shaw that analyzed Indiana's and Georgia's experiences with voter ID laws.¹⁷⁹ Dr. Shaw's study showed virtually no one was turned away at the polls in Indiana and Georgia due to a lack of photo ID.¹⁸⁰ Texas asked the court to draw three conclusions from the study: "(1) photo ID laws ultimately prevent very few people from voting; (2) photo ID laws have no disproportionate effect on racial minorities; and (3) disparate ID possession rates have little effect on turnout."¹⁸¹ The court rejected all three conclusions because of dissimilarities between the Texas voter ID law and those in Indiana and Georgia, dissimilarities in the racial demographics of the three states, and dissimilarities in the travel burdens required to obtain photo ID.¹⁸²

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 127–28.

181. *Id.* at 128.

182. *Id.* at 128–29.

The court also found particularly relevant Dr. Shaw's findings that photo ID laws might dissuade voters from even attempting to cast a ballot.¹⁸³ A survey of Indiana voters showed 7% of the voters listed a lack of proper ID as at least one reason for their failure to vote.¹⁸⁴ While Dr. Shaw correctly pointed out the problems with addressing multiple reasons for not voting, the court found that even the possibility of a voter ID law discouraging up to 7% of voters from voting prevented the court from accepting Texas's assertion that voter ID laws generally have no effect on voter turnout.¹⁸⁵

The second form of evidence presented by Texas was telephone surveys of Texas voters showing that a photo ID requirement does not disproportionately affect minority voters.¹⁸⁶ In January 2012, Texas provided to the Attorney General a list of voters who could not be matched to the DPS ID database.¹⁸⁷ Dr. Shaw conducted a telephone survey of these voters and found the voter ID law would not have a disparate effect on minorities.¹⁸⁸ The court found the results of the survey to be flawed.¹⁸⁹ The most serious problem was the "extraordinarily low response rates" of 2%.¹⁹⁰ The court also criticized Dr. Shaw's selective reduction of the number of affected African-American voters, calling it "both inappropriate and methodologically unsound."¹⁹¹

Texas also entered into evidence a second telephone survey conducted by Dr. Shaw that purported to show that a photo ID requirement does not disparately affect minorities. Dr. Shaw surveyed the voters on Dr. Ansolabehere's no-match list¹⁹² and found a similar lack of acceptable ID across white, African-American, and Hispanic races.¹⁹³ Once again, Dr. Shaw's survey suffered from an unacceptably low response rate of 2%, including response rates of 2.5% for African-Americans and 2.1% for Hispanics.¹⁹⁴ Moreover, the Court found the survey deviated from other

183. *Id.* at 129.

184. *Id.*

185. *Id.* at 129–30.

186. *Id.* at 130.

187. *Id.*

188. *Id.* at 130–31.

189. *Id.* at 131.

190. *Id.*

191. *Id.*

192. *See infra* part II.F.2.

193. *Holder*, 888 F. Supp. 2d at 134–35.

194. *Id.* at 135.

industry standards and, therefore, rejected the survey due to its unreliability.¹⁹⁵

2. United States

The United States attempted to prove the retrogressive effects through a study performed by Dr. Ansolabehere.¹⁹⁶ The study attempted to show the number of Texas voters who lacked state-issued photo ID and the disproportionate effect on minorities.¹⁹⁷ To compile a no-match list of Texans with no photo ID, Dr. Ansolabehere cross-referenced the Texas voter registration database with both the Texas DPS driver's license and personal ID card database and the Texas concealed-carry license database.¹⁹⁸

In order to prevent false positives from corrupting the data, Dr. Ansolabehere removed "duplicative and immaterial entries" from the DPS and concealed-carry license databases.¹⁹⁹ The removed records were those with duplicate Social Security numbers, expired driver's licenses, and driver's licenses marked as "deceased."²⁰⁰ Incredibly, Dr. Ansolabehere also *failed to remove nearly 50,000 deceased voters* from the voter registration database, which increased the number of voters on the no-match list by that same amount.²⁰¹

Since the Texas voter registration database contains no race information, Dr. Ansolabehere used a Catalist, LLC analysis of surnames and addresses to determine the race of the voter.²⁰² The results of cross-referencing the no-match list with the Catalist database were:

195. *Id.* at 137.

196. *Id.* at 131.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* (internal quotation marks omitted). Dr. Ansolabehere explained [Driver's license] records that correspond to deceased persons, expired licenses, and other cases may very well match to individuals on the [voter registry]. They should not be considered valid matches as they are not valid voters or do not have a valid state identification for purposes of voter identification. Keeping these cases in the matching process would create false positives in the match and lead to "too many" matches.

Id. at 132.

201. *Id.*

202. *Id.* Catalist, LLC was also at the center of a voter registration controversy in Virginia. The Voter Participation Center's voter registration drive resulted in voter registration forms being sent to many ineligible voters including the deceased, out of state voters, and pets. *See*

- 1) If ambiguous cases are treated as no-matches, 20.71% of registered African American voters, 17.49% of registered Hispanic voters, and 10.85% of registered white voters cannot be matched with IDs in the Texas databases;
- 2) If ambiguous cases are treated as matches, 15.97% of registered African American voters, 14.32% of registered Hispanic voters, and 9.65% of registered white voters cannot be matched with IDs in the Texas databases.²⁰³

The United States asserted that regardless of how ambiguous cases were treated, the evidence showed a disproportionate likelihood of Texas minorities not having photo ID.²⁰⁴ The court, however, had “serious doubts as to whether Catalist’s algorithm accurately identified the racial composition of voters” in the databases.²⁰⁵

The court rejected Dr. Ansolabehere’s study on multiple grounds. First, the methodological flaw of failing to remove 50,000 dead voters from the voter registration database inflated the no-match list.²⁰⁶ Second, Dr. Ansolabehere only examined state-issued qualified ID; his failure to examine all acceptable forms of photo ID—namely federally-issued passports, military ID, and citizenship certificates—also inflated the no-match list.²⁰⁷ Third, Texas provided evidence showing as many as 32% of the people whom Catalist identified as minorities self-identified as not being a minority.²⁰⁸ Finally, Texas showed that Dr. Ansolabehere’s no-

Wesley P. Hester, *UPDATE: Romney camp asks Va. to probe voter forms*, RICHMOND-TIMES DISPATCH, July 25, 2012, http://www.timesdispatch.com/news/update-romney-camp-asks-va-to-probe-voter-forms/article_46e1b142-4c67-569a-b9c6-4ff2edca7d27.html; Hans Von Spakovsky, *VA Org Mailing Voter Registration Forms based on Partisan Firm Catalist’s Data*, BREITBART (July 25, 2012), <http://www.breitbart.com/Big-Government/2012/07/25/Catalist-Strikes-Again>.

203. *Holder*, 888 F. Supp. 2d at 132–33.

204. *Id.* at 133.

205. *Id.*

206. *Id.* The court quipped that “[w]e can think of no good reason for [the dead voters] inclusion. After all, Lyndon Johnson’s 1948 Senate race notwithstanding, the dead cannot vote in Texas.” *Id.*

207. *Id.*

208. *Id.* at 133–34. Dr. Shaw conducted a survey finding only 68% of those identified by Catalist as being “black” self-identified as being “black.” The court found numerous methodological flaws with Dr. Shaw’s studies, but also realized that “even the possibility that 32% of those classifications are wrong is simply too high.” *Id.* at 134.

match list failed to take “substantially similar” names into account.²⁰⁹ For example, “Bob Thomas” could not be matched with “Robert Thomas,” nor could “Juan Gonzalez” be matched with “Juan Gonzales.”²¹⁰ Moreover, the no-match list did not take into account a married woman using her married name in one database and her maiden name in the other.²¹¹ Because of all of these problems, the court found Dr. Ansolabehere’s study to be “unreliable.”²¹²

3. Defendant-Intervenors

Defendant-Intervenors provided evidence purporting to show 9.7% of voters with Spanish surnames lacked valid ID compared to only 7.5% of the general population.²¹³ The Defendant-Intervenors came to this conclusion based on an analysis of voter registration forms filed after January 1, 2004 at which time Texas required the registrant to provide either a driver’s license number, personal ID number, or last four digits of the Social Security number.²¹⁴ The data indicated 56.4% of Texas voters registered on or after January 1, 2004.²¹⁵ Of the voters with a Spanish surname, 9.7% failed to provide a driver’s license or personal ID number compared to 7.5% of the general population.²¹⁶

The court found the Defendant-Intervenors’ evidence to be incomplete and unreliable.²¹⁷ To begin with, the study failed to account for all forms of valid ID in a similar fashion to Dr. Ansolabehere’s study.²¹⁸ For all of its flaws, Dr. Ansolabehere’s study purported to cover the entire voter registry—the Defendant-Intervenors’ study only accounted for 56.4% of Texas voters.²¹⁹ Moreover, the Defendant-Intervenors ignored concealed-carry licenses even though the licenses are an accepted form of photo ID.²²⁰

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 137.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 138.

218. *Id.*

219. *Id.*

220. *Id.*

Additionally, the Defendant-Intervenors' study relied on an identification number provided by the registrant.²²¹ The number could be either the registrant's eight-digit state-issued ID number or the last four digits of his or her Social Security number.²²² The court found this evidence "barely probative" of photo ID possession rates because more people are likely to memorize their Social Security number instead of their state ID number, and, thus, they are more likely to write in the last four digits of their Social Security numbers.²²³ Because of these flaws in the Defendant-Intervenors' study, the court flatly rejected it.²²⁴

4. Summary

Before presenting its holding, the court summarized the evidence presented by the parties. In the court's opinion, no evidence presented by any of the parties conclusively proved the effects of voter ID laws on minority voter turnout.²²⁵ None of the parties presented any reliable evidence regarding the photo ID possession rate of Texas voters, much less the ID possession rate of minorities.²²⁶ Because the court viewed the Texas voter ID law as much more restrictive than Indiana's and Georgia's, lessons learned in Indiana and Georgia were not probative of the effects of the Texas voter ID law.²²⁷ With the finding that all of Texas's evidence on discriminatory retrogressive effects was "some combination of invalid, irrelevant, and unreliable," the court could have denied preclearance, but it chose to further analyze the discriminatory retrogressive effects of the Texas law.²²⁸

G. *The Decision*

In issuing its opinion, the court began by pointing out that its decision is not simply a case of Texas's inability to "prove a negative"²²⁹—record evidence showed that the Texas voter ID law would have a discriminatory

221. *Id.* at 137.

222. *Id.* at 138.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997).

retrogressive effect on minorities.²³⁰ The court relied on three facts to support its conclusion:

(1) a substantial subgroup of Texas voters, many of whom are African American or Hispanic, lack photo ID; (2) the burdens associated with obtaining ID will weigh most heavily on the poor; and (3) racial minorities in Texas are disproportionately likely to live in poverty.²³¹

Texas failed to refute these facts, and the court rejected preclearance of Texas's voter ID law.

1. A Substantial Subgroup of Texas Voters Lack Photo ID

The court chose a curious manner to address the fact that a substantial subgroup of Texas voters do not have approved photo ID.²³² After flatly panning Dr. Shaw's evidence of photo ID possession rates in Texas, the court used Dr. Shaw's studies and testimony to show that, at a minimum, "racial minorities are proportionately represented" in the subgroup of Texas voters who do not possess approved photo ID.²³³ The intent of the court seems to be to show that even by Texas's evidence, the voter ID law affects minority voters. Curiously, the court seems to have accepted the studies, which it previously declared statistically flawed, as a baseline. Regardless, Texas's counsel conceded that there are a significant number of whites and minorities who do not have approved photo ID.²³⁴

2. The Burdens Associated with Obtaining ID Will Weigh Most Heavily on the Poor

The second fact relied upon by the court was the most damaging for Texas's case. Texas did not contest the economic burdens the voter ID law placed on those who do not possess photo ID.²³⁵ While a voter could obtain an EIC free of charge, the cheapest option for obtaining the underlying documents would be \$22 for a state-certified birth certificate.²³⁶ Compared

230. *Holder*, 888 F. Supp. 2d at 138.

231. *Id.*

232. *Id.*

233. *Id.* at 138–39.

234. *Id.* at 139.

235. *Id.*

236. *Id.*

to Indiana's cost of three to twelve dollars for a birth certificate,²³⁷ the cost of a Texas birth certificate is significantly more burdensome.

The economic costs also extend to a trip to a DPS office to obtain an EIC. Because eighty-one of Texas's 254 counties do not have a DPS office, the trip to the DPS office is even more burdensome for the voters in counties lacking an office.²³⁸ According to testimony from State Senator Carlos Uresti, some voters in his district have to travel 100 to 125 miles to the nearest DPS office.²³⁹ The court believed this 200 to 250 mile round trip would be a substantial burden on even the most committed citizens.²⁴⁰ Texas Representative Trey Martinez Fischer testified that these areas have a heavy concentration of minority voters.²⁴¹ Moreover, for a voter who by definition is not licensed to drive, transportation to a DPS office is even more burdensome.²⁴² Even in the City of Houston, public transportation to a DPS office is difficult.²⁴³ Rural areas of Texas are less likely to have public transportation making DPS offices almost inaccessible to voters without a driver's license.²⁴⁴ Texas attempted to mitigate this burden by explaining that citizens in the desolate areas of Texas do not mind traveling long distances because that is a reality of life for those who choose to live in those areas of the state.²⁴⁵ This argument failed to persuade the court, which doubted that "Texans are preternaturally unperturbed by the prospect of traveling 200 to 250 miles" in order to obtain an EIC.²⁴⁶

The court also found burdensome the wages voters would lose because of their travels to a DPS office.²⁴⁷ Texas DPS offices were not open on weekends or past 6:00 PM, and wait times at DPS offices could be as long as three hours.²⁴⁸ The poorer citizens working for hourly wages would be less able, and thus less likely, to take time off from work to obtain an EIC.²⁴⁹ The

237. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 215 (2008).

238. *Holder*, 888 F. Supp. 2d at 139.

239. *Id.*

240. *Id.* at 140.

241. *Id.* at 139.

242. *Id.* at 140.

243. *Id.*

244. *Id.* at 141.

245. *Id.*

246. *Id.* at 142.

247. *Id.* at 140.

248. *Id.*

249. *Id.*

court stated that “[a] law that forces poorer citizens to choose between their wages and their franchise unquestionably denies or abridges their right to vote.”²⁵⁰

3. Racial Minorities in Texas Are Disproportionately Likely to Live in Poverty

The third fact upon which the court relied was the disproportionate effect that the Texas voter ID law would have on minorities. Texas asserted that if its voter ID law denied or abridged the right to vote, that it did so because of factors like “poverty or lack of vehicular access.”²⁵¹ Texas argued:

The “effects” prong of section 5 does not extend to laws that merely have a disparate impact on the races. It allows courts to deny preclearance only if the effect of SB 14 is to deny or abridge the right to vote “on account of” race or color, or “because of” one’s membership in a language minority group.²⁵²

The economic costs were on account of factors like poverty—not race, color, or membership in a language minority group.²⁵³ Therefore, according to Texas, the court could not deny preclearance under Section 5’s effect element.²⁵⁴

The court found Texas’s argument “entirely unpersuasive.”²⁵⁵ U.S. Census data shows that “the poverty rate in Texas is 25.8% for Hispanics and 23.3% for African Americans, compared to just 8.8% for whites.”²⁵⁶ Census data also show that “13.1% of African Americans and 7.3% of Hispanics live in households without access to a motor vehicle, compared with only 3.8% of whites.”²⁵⁷ Texas had never imposed burdens on voters such as the burdens imposed by the voter ID law.²⁵⁸ Because of these new burdens, many minority voters would be “unable to vote in the next

250. *Id.*

251. *Id.* at 142.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 140.

257. *Id.*

258. *Id.* at 141.

election.”²⁵⁹ The court believed that this disparate impact on minorities was, simply put, “retrogression.”²⁶⁰

Texas’s argument was also unpersuasive because Congress passed the Voting Rights Act for the purpose of prohibiting “the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race.”²⁶¹ The economic burdens of the voter ID law is similar to past “notorious devices” such as poll taxes, which were also “race neutral” like Texas’s law.²⁶²

The court criticized Texas’s reading of Section 5 because it collapsed the effect prong with the purpose prong.²⁶³ The court reasoned that if race-neutral retrogressive effects are removed from the equation, the only law in violation of Section 5 would be one with a discriminatory purpose; in other words, only “a law that disenfranchises African Americans *because* they are African Americans” would violate Section 5.²⁶⁴ The court pointed to a plain reading of Section 5 under which a covered jurisdiction must prove a voting procedure change “*neither* has the purpose *nor* will have the effect of denying or abridging the right to vote on account of race.”²⁶⁵ A coterminous interpretation of purpose and effect would violate the Supreme Court ruling that “Congress *plainly* intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent.”²⁶⁶ Furthermore, Texas was unable to cite any authority excusing “retrogression [that] was proximately caused by something other than race.”²⁶⁷

The court held that Texas had failed to prove that its voter ID law lacked a retrogressive effect on minorities.²⁶⁸ Under the court’s reasoning, two changes to the law would push the court much closer to granting preclearance to the state if the state ensured “(1) that all prospective voters can easily obtain free photo ID, and (2) that any underlying documents required to obtain that ID are truly free of charge.”²⁶⁹ The court compared

259. *Id.*

260. *Id.*

261. *Id.* at 142. (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969)).

262. *Id.*

263. *Id.* at 143.

264. *Id.*

265. *Id.* (quoting 42 U.S.C. § 1973c(a) (1982)).

266. *Id.* (quoting *City of Rome v. United States*, 446 U.S. 156, 172 (1980)).

267. *Id.*

268. *Id.* at 144.

269. *Id.*

the Texas law to Georgia's, which provides a free election ID in each county and accepts a broader array of supporting documents.²⁷⁰ Finally, the court stated that if Texas had passed several defeated amendments, such as waived fees for the indigent and travel cost reimbursements, the amendments "could have made this a far closer case."²⁷¹

H. *Subsequent Developments and Section 3(c) Preclearance*

Texas appealed the *Texas v. Holder* ruling to the Supreme Court, and, after the Court issued its ruling in *Shelby County v. Holder* on June 25, 2013, the Court vacated the *Texas v. Holder* ruling on June 27, 2013.²⁷² Before the Court had even vacated the ruling, Texas enacted its voter ID law.²⁷³

On August 22, 2013, in the United States District Court for the Southern District of Texas, Attorney General Eric Holder filed a complaint under Sections 2 and 12(d) of the Voting Rights Act.²⁷⁴ The United States made many of the same allegations that it argued in *Texas v. Holder*, including those based on evidence the *Texas v. Holder* court found to be flawed.²⁷⁵ Holder asked the court to find the Texas voter ID law violates Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.²⁷⁶ He also asked the court to enjoin Texas from enforcing its voter ID law, to authorize the appointment of federal election observers under Section 3(a) of the Voting Rights Act, and to *place Texas under the preclearance provisions of Section 3(c) of the Voting Rights Act.*²⁷⁷

270. *Id.*

271. *Id.* The court specified five amendments that would mitigate the burdens of the voter ID law: (1) fee waivers for indigent persons needing underlying documents; (2) reimbursed EIC-related travel costs; (3) expanding the acceptable forms of ID to include student and Medicare ID cards, (4); extended hours of operation for DPS offices, and (5); allowing provisional ballots for indigents without photo ID. *Id.*

272. *Texas v. Holder*, 133 S. Ct. 2886 (2013).

273. Press Release from John Steen, Texas Secretary of State (June 25, 2013), available at <http://www.sos.state.tx.us/about/newsreleases/2013/062513.shtml>.

274. Complaint at 1, U.S. v. Tex., No. 2:13cv263 (filed Aug. 22, 2013), available at <http://www.justice.gov/iso/opa/resources/7472013822155117860058.pdf>.

275. The Attorney General draws conclusions from comparisons between the Texas voter registration and DPS ID datasets. The Attorney General also determined the percentage of Hispanics in these datasets by "Spanish surname analysis," likely the Catalist analysis. *Id.* at 9; cf. *supra* part IIF.2.

276. Complaint at 14, U.S. v. Tex. No. 2:13cv263.

277. *Id.*

Little case law exists regarding the Section 3(c) preclearance standards, probably because the Section 3(c) preclearance has been unnecessary with so many jurisdictions under the Section 5 preclearance already. Justice Clarence Thomas's concurring opinion in *Shelby County* addressed the remedy of forcing an uncovered jurisdiction into the preclearance regime under Section 3(c)²⁷⁸ if a court finds a violation of the Fourteenth and Fifteenth Amendments.²⁷⁹ In a footnote, the Supreme Court in *Reno v. Bossier Parish School Board* stated that if a federal court finds a voting law or practice violates the Constitution "it may assume for that jurisdiction a function identical to that of the District Court for the District of Columbia in § 5 preclearance proceedings."²⁸⁰

Section 3(c) preclearance is a seldom-used power of the courts, and the standards for placing a jurisdiction under Section 3(c) preclearance remains to be defined. Should a state be placed under preclearance if a court finds a minor part of a law violates the Fourteenth and Fifteenth Amendments? Should a state be placed under preclearance for all of its voting changes if one law is found unconstitutional? How long should a state be placed under preclearance if a constitutional violation is found?

Although the decision in *Texas v. Holder* has been vacated, it foreshadows what is to come when Texas goes back to court to defend its voter ID law. The playing field has changed because Texas no longer has the burden of proving a lack of discriminatory retrogressive effect and discriminatory purpose, and the United States now has the burden of proof. Texas is not under Section 5 preclearance, but, if the U.S. District Court for the Southern District of Texas finds a violation of the Fourteenth and Fifteenth Amendments, Texas is likely to find itself under preclearance once again—this time under Section 3(c). Therefore, Texas should not view *Shelby County* as a license to enact whatever voting law it desires, but it should look to *Texas v. Holder* to learn how it should shape its voter ID law.

III. THE SOLUTION FOR TEXAS: ELIMINATE THE BURDENS

In its analysis of the discriminatory retrogressive effects of the Texas voter ID law, the *Texas v. Holder* court focused mainly on the economic

278. Section 3(c) is codified in 42 U.S.C. § 1973a.

279. *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2644 (2013) (Thomas, J., concurring).

280. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 333 n.2 (2000).

costs associated with obtaining an EIC.²⁸¹ Every law forcing an economic cost on a citizen weighs most heavily on the poor. Unfortunately, a disproportionately large percentage of minorities in Texas live in poverty.²⁸² Therefore, a burden will be disproportionately placed on minorities when any new voting law imposes an economic cost on voters, causing a discriminatory retrogressive effect.²⁸³

Since Texas cannot eliminate poverty, the economic costs of its voter ID law will continue to have a discriminatory retrogressive effect. On the other hand, Texas *can* eliminate the burdens of the voter ID law and mitigate the discriminatory retrogressive effects. Eliminating the burdens would not only be fair to minorities, but it would also be fair to the poor in general who may have to pay three hours of wages²⁸⁴ just to exercise their right to vote.

The rest of this Note will suggest ways Texas can eliminate the burdens of its voter ID law while maintaining a stringent law, unlike the South Carolina law that permits voting without a photo ID. None of the suggestions here are anything more than common sense. Hopefully, this Note has explained the reasons that these common sense suggestions are necessary.

A. *The Economic Costs of Acquiring an EIC*

The economic cost of obtaining the necessary government-issued photo ID is the main source of a discriminatory retrogressive effect. The main focus of both *Texas v. Holder* and *South Carolina v. United States* was the economic cost of acquiring a photo ID. Texas and South Carolina provide a stark contrast between a voter ID law imposing significant economic costs on poor voters and one imposing minimal economic costs.

1. Underlying Documents

The biggest economic burden for most voters without approved photo ID is the \$22 cost of a certified birth certificate. For a minimum wage

281. *Texas v. Holder*, 888 F. Supp. 2d 113, 144 (D.D.C. 2012). The court stated voter ID laws “might well be precleared if they ensure (1) that all prospective voters can easily obtain free photo ID, and (2) that any underlying documents required to obtain that ID are truly free of charge.” *Id.*

282. *Id.*

283. *Id.* at 127.

284. See *infra* part III.A.1.

worker making \$7.25 per hour,²⁸⁵ the worker must work approximately three hours just to pay for the certified birth certificate. The *Texas v. Holder* court recognized that this fee “weighs disproportionately on those living in poverty.”²⁸⁶ Since Hispanics make up a disproportionate percentage of those living in poverty, this burden created a discriminatory retrogressive effect.²⁸⁷

Reducing the cost of a birth certificate is the simplest change Texas can implement to reduce the burdens leading to a discriminatory retrogressive effect. The Supreme Court in *Crawford* and the United States District Court for the District of Columbia in *South Carolina v. United States* have provided a framework for reasonable fees for certified birth certificates. The *Crawford* Court determined three to twelve dollars for a certified birth certificate was a reasonable burden for the voters of Indiana.²⁸⁸ The *South Carolina v. United States* court praised South Carolina for its completely free photo voter ID card that a voter may obtain with a free non-photo voter ID, describing the free card as ameliorative of the burdens of the voter ID law.²⁸⁹ With these two decisions, Texas can deduce that a three to twelve dollar fee for a certified birth certificate is reasonable for a jurisdiction outside Section 5, and no fees are viewed as ameliorative of any burdens created by a voter ID law for a jurisdiction under Section 5. The *Texas v. Holder* court believed that a \$22 fee for a certified Texas birth certificate was significantly higher than the reasonable fees in Indiana²⁹⁰ and that the fee was a burden on the Hispanic working poor.²⁹¹

Texas must reduce the burden of obtaining a birth certificate for voters seeking an EIC. While Texas is no longer a Section 5 jurisdiction, Texas may well find itself under Section 3(c) preclearance. With this in mind, Texas should reduce the cost of the birth certificate below the \$12 fee that the Supreme Court found reasonable in *Crawford*. Texas need not drop the price of a certified birth certificate for everyone—just those seeking one for the purpose of obtaining an EIC. Texas could completely eliminate this burden by simply offering a free certified birth certificate at the DPS in conjunction with the voter applying for an EIC. If only 5% to 6% of the

285. UNITED STATES DEPARTMENT OF LABOR, Minimum Wage Laws in the States – January 1, 2013, <http://www.dol.gov/whd/minwage/america.htm>.

286. *Holder*, 888 F. Supp. 2d at 140.

287. *Id.*

288. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 215 (2008).

289. *South Carolina v. U.S.*, 898 F. Supp. 2d 30, 46 (D.D.C. 2012).

290. *Holder*, 888 F. Supp. 2d at 128.

291. *Id.* at 140.

population does not have valid photo ID,²⁹² offering free birth certificates to voters would not significantly hurt Texas's budget. Texas could even limit the reduced-cost or free birth certificate to one per voter.

Reducing the cost or eliminating it altogether would enable minority voters to acquire the key underlying document within the framework of reasonable fees. This reduction would eliminate the discriminatory retrogressive effect for most, if not all, voters who live within a reasonable distance from a DPS office.

Thinking even further outside of the box, why require a birth certificate at all for voters born in Texas? The DPS issues certified birth certificates,²⁹³ so it can verify birth records electronically based on data provided by the voter. There is little difference between the voter providing information for a birth certificate followed by presenting that paper birth certificate at the time of applying for an EIC and the voter providing all of the necessary information one time to the DPS. Combining services such as these would enable Texas to reduce the burdens of its voter ID law.

2. Number of Accepted Underlying Documents Necessary for an EIC

The *Texas v. Holder* court stated another option for reducing Texas's burdensome fees for the underlying documents necessary for an EIC is to expand the accepted types of underlying documents similarly to Georgia's voter ID requirements.²⁹⁴ Under the Georgia law, the state accepts twenty-four different types of identification including student ID cards, cards accepted by any level of government for access to buildings or the provision of benefits, copies of state or federal tax returns, paycheck stubs, and Social Security, Medicare, and Medicaid statements.²⁹⁵ As the court explained, the greater the number of underlying documents accepted, the more likely the voter would be able to satisfy the requirements for little or no cost.²⁹⁶

Texas should expand the accepted types of underlying documents, but it should not do so at the expense of the efficacy of the voter ID law. Texas should reduce the burden on voters by accepting official government cards (e.g., government-issued licenses and cards used for accessing government buildings), student ID cards, and official government documents (e.g.,

292. *Id.* at 130.

293. *Order Certified Birth Certificate Online*, TEXAS DEPARTMENT OF PUBLIC SAFETY, <https://tx-dps.com/orders/birth-certificates/> (last visited Nov. 3, 2013).

294. *Holder*, 888 F. Supp. 2d at 128.

295. GA. COMP. R. & REGS. 183-1-20-.01(4)(b) (2006).

296. *Holder*, 888 F. Supp. 2d at 128.

Social Security, Medicare, and Medicaid statements). On the other hand, Texas should not damage the efficacy of the voter ID law by accepting underlying documents that are easily forged. For example, Georgia accepts multiple types of documents that could be easily forged—two types of applications²⁹⁷ and paycheck stubs.²⁹⁸ Increasing the accepted types of underlying documents would allow Texas to reduce the burden on minority voters and would move the voter ID law closer to what the *Texas v. Holder* court believed was a reasonable burden.

Combining an increased number of accepted types of underlying documents and reduced fees for certified birth certificates would eliminate a significant issue for Texas regarding the burdens of the voter ID law. If Texas accomplishes both, it would address one of the biggest faults the court found with the Texas voter ID law.

3. Distance to a DPS Office

The most daunting of the burdens to fix is the distance between DPS offices. The *Texas v. Holder* court placed great weight on the fact that some voters in Texas State Senator Carlos Uresti's District 19 would have to travel 100 to 125 miles each way to the nearest DPS office.²⁹⁹ The map of his district³⁰⁰ illustrates the problems faced by Texas. According to Uresti's population analysis of his district,³⁰¹ the counties of Bexar, Atascosa, and Medina account for 72% of the population of his district.³⁰² When the counties of Maverick and Val Verde are included, 85% of the population of Uresti's district lives within those five counties.³⁰³ The rest of Uresti's district is one of the least populated areas of Texas. Placing DPS offices in

297. Specifically, Georgia accepts a voter registration application and a marriage license application. GA. COMP. R. & REGS. 183-1-20-.01(4)(b)(2)(iii), (vi) (2006).

298. GA. COMP. R. & REGS. 183-1-20-.01(4)(b)(2)(ix) (2006).

299. *Holder*, 888 F. Supp. 2d at 139–40.

300. THE SENATE OF TEXAS, Senator Carlos I. Uresti: District 19, <http://www.fyi.legis.state.tx.us/fyiwebdocs/pdf/senate/dist19/m1.pdf> (last visited Nov. 18, 2013).

301. THE SENATE OF TEXAS, Senator Carlos I. Uresti: District 19, <http://www.fyi.legis.state.tx.us/fyiwebdocs/PDF/senate/dist19/r4.pdf> (last visited Nov. 18, 2013).

302. The total population of District 19 is 800,501. *Id.* The population of Uresti's portion of Bexar County is 490,006. *Id.* The population of Medina County is 46,006. *Id.* The population of Uresti's portion of Atascosa County is 43,923. *Id.*

303. The population of Maverick County is 54,258, and the population of Val Verde is 48,879. *Id.*

areas with very small populations would not be economically feasible for Texas.

In contrast to Texas, South Carolina, Georgia, and Indiana provide at least one location per county for voters to obtain photo ID. South Carolina has at least one DMV office in all of its counties.³⁰⁴ Georgia law requires each county to provide a location for voters to obtain photo ID.³⁰⁵ Indiana has at least one BMV office in every county.³⁰⁶ Unlike Texas, though, these states do not have immense open spaces that are sparsely populated. It is feasible for these states to provide locations to obtain photo ID in every county.

Regardless of the differences between Texas and the other states, the *Texas v. Holder* court heavily criticized Texas for the long distances some voters would have to travel in order to obtain an EIC.³⁰⁷ The court compared the burden of a Texas voter traveling to a DPS office to that of Indiana voters traveling to a BMV office, noting that some Texas voters would be forced to travel 200 to 250 miles round-trip.³⁰⁸ While the *Crawford* Court held that “the inconvenience of making a trip to the BMV . . . does not qualify as a substantial burden on the right to vote,” the court held that a 100 to 125 mile one-way trip to a DPS office does qualify as a substantial burden.³⁰⁹ To overcome this burden, Texas must reduce the distance some Texas voters are forced to travel to DPS offices.

To address this issue, Texas would have to make major changes by increasing the number of DPS offices in low population counties, allowing other agencies to provide EICs, or providing alternative locations. Opening new brick-and-mortar DPS offices in sparsely populated counties is not economically feasible for the taxpayers of Texas. An alternative to opening new DPS offices would be to create mobile offices that visit these sparsely populated counties multiple times each year. This option would permit voters to greatly reduce their travel distance, time off from work, and burdens of the costs of traveling 200 to 250 miles round trip.

Another option would be to permit the county government in counties lacking a DPS office to issue the EIC. The counties already administer the voter registration cards. The county or state would incur an additional cost

304. *South Carolina v. United States*, 898 F. Supp. 2d 30, 34 (D.D.C. 2012).

305. *Texas v. Holder*, 888 F. Supp. 2d 113, 129 (D.D.C. 2012).

306. *Id.* at 129.

307. *Id.* at 140.

308. *Id.* at 139–40.

309. *Id.* (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008)).

in purchasing the photography and computer equipment necessary to produce the EIC, but this cost would be money well spent. One problem with this is the sheer size of some Texas counties. For example, Brewster County in State Senator Uresti's District 19 is 6,192 square miles.³¹⁰ The county seat is in Alpine, TX.³¹¹ Voters living near Big Bend National Park in Brewster County, TX must travel approximately seventy miles to Alpine.³¹² Contrary to the *Texas v. Holder* court's disbelief that "Texans are preternaturally unperturbed by the prospect of traveling" long distances,³¹³ these voters travel this distance regularly for groceries, supplies, and any other necessities they cannot find in the desert of West Texas.

4. Operating Hours of DPS Offices

The *Texas v. Holder* court criticized Texas for not providing voters the opportunity to obtain an EIC from a DPS office on their own time outside of normal working hours.³¹⁴ Between long waiting times at DPS offices and no hours of operation outside of normal working hours, the Hispanic working poor in Texas would have to forego income from hourly jobs in order to acquire an EIC.³¹⁵ This problem would seem to be a simple one that Texas could address for a relatively small cost.

At trial, Texas DPS offices were open no later than 6:00 PM and not open at all on weekends.³¹⁶ Extending the hours of DPS offices is the simplest solution to the problem of working-poor voters obtaining an EIC outside of normal business hours. The DPS should hold Saturday operating hours occasionally throughout the year—especially in the months leading up to voter registration deadlines—to allow voters to visit the DPS outside of normal work hours. For those voters who work on Saturdays in addition to the full workweek, opening DPS offices occasionally during evening hours would provide an additional opportunity for voters to get their EICs outside of normal work hours.

310. THE COUNTY INFORMATION PROGRAM, TEXAS ASSOCIATION OF COUNTIES, Brewster County Profile, <http://www.txcip.org/tac/census/profile.php?FIPS=48043>.

311. *Id.*

312. Driving Directions from Big Bend National Park, TX to Alpine, TX, GOOGLE MAPS, <http://maps.google.com> (follow "Get Directions" hyperlink; then Search "A" for "Big Bend National Park, TX" and search "B" for Alpine, TX"; then follow "Get Directions" hyperlink).

313. *Holder*, 888 F. Supp. 2d at 142.

314. *Id.* at 140.

315. *Id.*

316. *Id.*

Since Texas enacted its voter ID law, it held extended hours every Saturday from September 14, 2013, through November 2, 2013, for voters to obtain EICs.³¹⁷ While this is a good start for Texas, it is not enough. Only select DPS offices held extended hours, and the DPS did not hold weekday evening hours.³¹⁸ If Texas continues to hold extended hours periodically, it will reduce one burden of its voter ID law. Instead of holding extended hours multiple Saturdays in a row at select locations, Texas should stagger the Saturdays over every location. By holding extended evening and weekend hours at every DPS location, Texas could easily eliminate this burden.

B. *Provisional Ballots*

Provisional ballots are a key mitigating factor in the analysis of the retrogressive effects of voter ID laws. The court suggested Texas allow indigent persons to cast provisional ballots, although they do not have photo ID, as a means of ameliorating the discriminatory retrogressive effects.³¹⁹ Considering the Texas voter ID law provides a provisional ballot process for those who forgot to take their photo ID to the polling place or those whose photo ID had been destroyed in a natural accident,³²⁰ the court seems to be alluding to a “reasonable impediment” provisional ballot process similar to South Carolina’s. There voters can cast a provisional ballot that will be counted although the voter does not possess an approved photo ID.³²¹ The pertinent question is whether a voter ID law is legitimate and worthwhile if a voter can cast a ballot *without* approved photo ID. If Texas wishes to maintain a stringent voter ID law, the ameliorative provisional ballot process seems to be unavailable as a means for reducing any discriminatory retrogressive effects. Texas could perhaps enact a reasonable impediment provisional ballot process for one Presidential election cycle to allow Texas voters to acclimate themselves to the new voter ID law, but a permanent one would defeat the purpose of a voter ID law.

317. *Select Driver License Offices Open Saturdays to Issue Election Identification Certificates*, TEXAS DEPARTMENT OF PUBLIC SAFETY, Sept. 13, 2013, http://www.txdps.state.tx.us/director_staff/media_and_communications/pr091313.htm.

318. *Id.*

319. *Holder*, 888 F. Supp. 2d at 144.

320. TEX. ELEC. CODE ANN. § 65.054 (West 2012).

321. *South Carolina v. United States*, 898 F. Supp. 2d 30, 35 (D.D.C. 2012).

V. CONCLUSION

Although Texas has enacted its voter ID law, the law is far from safe from court review. Unless Texas reduces the burdens its law places on poor minority voters, the courts are likely to find it in violation of the Fourteenth and Fifteenth Amendments. Texas would quite possibly be forced into Section 3(c) preclearance at that point, and the Lone Star State would end up right back where it started. With the common sense reforms discussed in this Note, Texas should be able to prevent the courts from overturning its law. Moreover, if Texas enacts these reforms, it will create a law that is fair to poor voters of all races.