

No. 14-41127

In the United States Court of Appeals for the Fifth Circuit

MARC VEASEY; JANE HAMILTON; SERGIO DELEON; FLOYD CARRIER;
ANNA BURNS; MICHAEL MONTEZ; PENNY POPE; OSCAR ORTIZ; KOBY
OZIAS; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; JOHN
MELLOR-CRUMLEY; DALLAS COUNTY, TEXAS, Plaintiffs-Appellees,

TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY
COMMISSIONERS, Intervenor Plaintiffs-Appellees,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF
TEXAS; TEXAS SECRETARY OF STATE; STATE OF TEXAS; STEVE
MCGRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS
DEPARTMENT OF PUBLIC SAFETY, Defendants-Appellants.

(caption continued on inside cover)

On Appeal from the U.S. District Court for the Southern District of Texas, Corpus
Christi Division, Nos. 2:13-cv-193, 2:13-cv-263, 2:13-cv-291, and 2:13-cv-348

**EN BANC BRIEF OF AMICUS CURIAE AARP
SUPPORTING APPELLEES AND AFFIRMANCE**

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

v.

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

TEXAS STATE CONFERENCE OF NAACP BRANCHES; MEXICAN
AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF
REPRESENTATIVES, Plaintiffs-Appellees,

v.

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

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

v.

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

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Circuit Rule 28.2.1, undersigned counsel of record certifies that the parties' lists of persons and entities having an interest in the outcome of this case are complete, to the best of undersigned counsel's knowledge, supplemented as follows: other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, and AARP Insurance Plan, also known as the AARP Health Trust.

Undersigned counsel also certifies that Amicus Curiae AARP is a nonprofit corporation with no parent corporation, and further, that AARP has issued no shares or securities.

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP also is organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951.

Dated May 16, 2016

/s/ Daniel B. Kohrman
Daniel B. Kohrman

Counsel for Amicus Curiae AARP

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STATEMENT OF INTEREST OF AMICUS CURIAE¹

AARP is a nonpartisan, nonprofit organization, with a membership, that fights for issues that matter most to families, such as voting rights, healthcare, income security, retirement planning, and protection from financial abuse. AARP strives to address the needs and interests of people 50-plus, and through legal and legislative advocacy, to preserve the means to enforce their rights.

Since 2005, AARP has supported legal challenges to strict state photo ID voting laws, such as Texas Senate Bill 14, 82nd Leg., R.S. (Tx. 2011) (“SB14”). Laws like SB14 impede electoral participation generally, and in particular, burden in-person voting for many eligible older voters, especially disabled, minority, low-income and other vulnerable older voters, including some who have regularly voted at local polling places for decades. AARP favors laws and policies that encourage and do not hinder electoral participation. While AARP supports measures to protect the integrity of voting, it opposes strict voter ID laws such as SB14, which impose a far “heavier burden” than necessary to address verified evidence of electoral fraud. *Crawford v. Marion County Election Board*, 553 U.S. 181, 199 (2008).

¹ Pursuant to Fed. R. App. P. 29(c)(5), AARP certifies: that no party or party’s counsel authored this brief in whole or in part; that no party or party’s counsel contributed money intended to fund the brief’s preparation or submission; and that only Amicus Curiae provided funds to prepare and submit this brief. This brief is filed with the consent of all parties, pursuant to Fed. R. App. P. 29(a).

AARP has filed or joined amicus curiae briefs contesting the validity of state photo ID voting laws in the U.S. Supreme Court in *Crawford*, and in state courts in Indiana, Michigan, Minnesota, Missouri, Pennsylvania and Wisconsin. Moreover, AARP Foundation Litigation has served as co-counsel for plaintiffs in suits seeking to enjoin photo ID voting laws in Arizona and Georgia.

SUMMARY OF ARGUMENT

Amicus Curiae AARP focuses on issues most directly relevant to the rights of older voters. Above all, these encompass the district court's holding that SB14, as applied to fourteen individual plaintiffs, imposes undue burdens on voting in violation of the Fourteenth Amendment. Specifically, the district court found that older voters are particularly likely to suffer harm due to significant costs and other barriers associated with obtaining underlying documents necessary to secure so-called "free" voter ID. Further, AARP rebuts Texas' defense of SB14's restrictions on in-person voting that is premised on state law exemptions of persons age 65 or over, or with a "verifiable" disability, who vote by mail, from a duty to produce photo ID. For older voters, and also for voters with disabilities – a very large share of whom are age 50 or over, these exemptions do not significantly ameliorate the serious harm caused by SB14 in restricting the right to vote in-person. Finally, AARP highlights the strong record evidence that SB14 has an especially discriminatory impact on older minority voters.

ARGUMENT

I. SB14 Imposes An Undue Burden on the Fourteenth Amendment Rights of Older Texans Who Are Eligible to Vote Yet Lack SB14–Compliant Photo ID and Face Serious Impediments to Obtaining It.

A. *Crawford v. Marion County Election Board*, While Rejecting a Facial Challenge to Indiana’s Voter ID Law, Recognized That Laws Like SB14 May Impose A “Heavier Burden” on Certain Subgroups of Voters, Including Some Older Voters.

The voter Plaintiffs brought their Equal Protection/Undue Burden claims against SB14 as individuals and as members of adversely affected subgroups of the Texas electorate; such claims focused on “Non-racial [d]iscrimination in [v]oting.”² The crux of these claims, as upheld by the district court, is that SB14 places “a substantial . . . burden on the right to vote.” ROA.27127. The district court properly “applie[d] the *Anderson/Burdick* balancing test as the standard of review.” *Id.* (citing *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190 (2008) (citing and discussing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). In doing so, the district court recognized a fundamental distinction between this case and *Crawford*, which dictates a different manner of implementing the *Anderson/Burdick* test. That is, “[u]nlike in *Crawford*, this Court is confronted with an as-applied challenge to [a]

² See, e.g., *Veasey v. Abbott*, No. 2:13-CV-00193 (S.D. Tex.) (Doc. 109) (Veasey Plaintiffs’ Second Amended Complaint, filed Dec. 6, 2013) (Count 4, 14th Amendment).

voter ID law”. ROA.27129. Further distinguishing *Crawford*, the district court explained that it had conducted a “full trial on the merits in which the Court heard abundant evidence of specific Plaintiffs’ individual burdens as well as evidence of more categorical burdens that apply to the population represented by the No-Match List.”³ *Id.* Hence, at least regarding Plaintiffs’ *Anderson/Burdick* claims, the district court had to

. . . determine the nature of SB 14's burden, the nature of the state's justifications, and whether the state's interests make it necessary to burden the Plaintiffs’ rights. While Plaintiffs have not demonstrated that any particular voter absolutely cannot get the necessary ID or vote by absentee ballot under SB 14, such an extreme burden is not necessary in an as-applied challenge.

Id. In short, the district court’s task *was*, and on appeal this Court’s task necessarily *is*, more limited than the task before the court in *Crawford* in addressing Fourteenth Amendment/Undue Burden claims.⁴

The district court noted that Justice Stevens’ lead *Crawford* opinion found an absence of evidence “necessary to assess the burden [of the challenged voter ID law] on a subgroup [of the electorate or on individuals] and therefore [the

³ The “No-Match List” is “a list of voter records that did not match with any [records in databases of persons with] SB 14 qualified photo ID.” It was created by Dr. Stephen Ansolabehere, of Harvard University, an expert on behalf of plaintiff-appellee United States. ROA.27075-76 and nn. 205-06.

⁴ The Court also may treat its charge as broader than in *Crawford*, to the extent that the Court addresses claims that SB14 is constitutionally invalid both on its face *and also* as applied to especially burdened individuals and subgroups under *Anderson* and *Burdick*.

Crawford Court] evaluated Indiana’s law as it applied generally” – *i.e.*, to “all of the registered voters” in the state and not “just those who do not already have the ID[.]” ROA.27128 (citing 553 U.S. at 201-03). By contrast, the district court declared,

Justice Stevens’ reasoning in dismissing the subgroup-particularized balancing test does not apply here because the type of evidence that Justice Stevens needed in order to consider the burden on the subgroup has been supplied as to Texas voters in this case.

Id. The “subgroups” most heavily burdened by SB14 include older voters.

This difference dissolves Texas’ assertion that a simple application of *Crawford* demonstrates that SB14 “do[es] not substantially burden the right to vote.” Brief for Appellants (“Tex. Br.”) at 14; *see* Supplemental En Banc Brief for Appellants (“Tex Supp. Br.”) at 8-9 (making same argument).

The *Crawford* Court reasoned that steps required to obtain photo ID in Indiana “surely d[id] not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting” precisely because the Court generalized from the experience of “most voters who need [photo ID],” and did not focus on “specific subsets of potential voters who [the *Crawford* Court recognized] may have ‘a somewhat heavier burden’ under voter ID laws” such as SB14. Tex. Br. at 14-15, 22 (quoting *Crawford*, 553 U.S. at 198, 199). Thus, *Crawford* does not provide the cure-all Texas suggests.

To the extent Texas acknowledges differences between these consolidated cases and *Crawford*, it fails to rebut strong record evidence of “heavier burden[s]” imposed by SB14 on some eligible voters, including older voters, and especially older voters of color, to secure a valid photo ID. *See, e.g.*, ROA.27092-27103 (testimony of age 65-plus African-American and Latino registered voters). Rather, it attempts to explain away such burdens by exalting the exemptions SB14 provides to some older voters and some voters with disabilities, *see* Tex. Supp. Br. at 9, 54 (noting that SB14 allows nine older plaintiffs to vote by mail), beyond what the record shows to be their actual impact (*see infra*, § I.C.).

B. SB14 Creates Disproportionate and Unnecessary Risks of Disenfranchising Older Voters in Texas.

SB14 heavily burdens the voting rights of older voters⁵ in multiple respects. First, the record below demonstrates that older citizens otherwise eligible to vote in-person are more likely to lack “[t]he only acceptable forms of photo ID” sanctioned by SB14. ROA.27043. For instance, older people are far less likely to

⁵ Obviously “older” has no precise definition generally, nor does Texas’ Election Code define the term. AARP discusses below (i) record testimony from voters in their 60s, 70s and 80s about the burdens they experienced due to SB14’s photo ID rules and (ii) evidence of Texas’ arbitrary exemption of voters age 65 and over, but not of equally needy voters under 65, from photo ID requirements if they vote by mail. AARP itself begins taking members at age 50.

have a “United States military ID card containing a photo.” ROA.27043.⁶ Older people, including those in their early 60s, also are less likely to have a driver’s license; if they have one, they are more likely to have allowed it to expire. Indeed, Texas has explicit age limits affecting the ease of license renewal; neither online nor phone renewal is available to many older people.⁷ Similarly, a significant share of older persons are unable (or no longer inclined) to travel abroad (if they ever had the means to do so); thus, they are less likely than their younger counterparts to have an unexpired (or even a recently expired) passport. Although many older Texans may possess a photo ID that is beyond its effective date, Texas has declined to permit “[e]lderly” voters to “to use expired ID” as the basis for voting in-person, despite the contrary practice of other states. ROA.20746 (chart noting opposite effect of Kansas, New Hampshire, North Carolina and Tennessee photo ID laws).

⁶ In 2014 only 9.2% of all U.S. military personnel were age 40 or above. Office of the Deputy Assistant Secretary of Defense (Military Community and Family Policy) (under contract with ICF International, <http://www.icfi.com/workforce>), *2014 Demographics, Profile of the Military Community* (September 2014), at 35-36, <http://download.militaryonesource.mil/12038/MOS/Reports/2014-Demographics-Report.pdf>.

⁷ See “Renew Online or by Phone,” Texas Department of Public Safety (“You must [be] younger than 79 years of age”), <http://www.txdps.state.tx.us/DriverLicense/dlfork.aspx?action=renew> (last visited May 12, 2016).

The record below contains substantial evidence that significant costs may be involved “to obtain . . . forms of photo ID permitted [by SB14] if the voter does not already have an accurate original or certified copy of his or her birth certificate.” ROA.27047 and n.65. The burdens of obtaining such records are especially great for older people, particularly those with modest or no income or savings. Numerous Texas voters testified at trial to their difficulties securing birth certificates needed to obtain a photo ID. The problems they identified partly reflect the sheer passage of time, which makes the task of locating birth records far more onerous.⁸ Further logistical and cost challenges confront persons required to obtain a birth certificate issued outside Texas. This dilemma is faced by many older voters, who are more likely than younger voters to have moved from their state of birth over the years. *See* ROA.27087, 27097-20799 (testimony of Sammi Bates, a “retiree” born in Mississippi; testimony of Elizabeth Gholar, age 75-plus, and plaintiff Gordon Benjamin, age 65, both born in Louisiana; and testimony of Ken Gandy, age 74, born in New Jersey).

⁸ *See, e.g.*, discussion of testimony of plaintiffs Margarito Lara, age 77, Maximina Lara, age 75-plus, Floyd Carrier, age 84, and Gordon Benjamin, age 65, all of whom struggled – Mr. Lara “for more than twenty years” – to obtain a birth certificate. The Lara siblings found none in public records, and so, had to navigate a complex and costly procedure (involving “a 14-page packet of instructions and forms” costing at least \$47) to get a “delayed birth certificate.” ROA.20796-27099, 99864, 99824.

Another major factor requiring older voters to confront “varied bureaucratic and economic burdens associated with purchasing a proper birth certificate,” ROA.27096, is the absence of birth records among people raised “in rural areas,” where they were “birthed by midwives or . . . born on farms.” ROA.27071. Indeed, nationwide, in 1940, the birth year of most U.S. citizens now 76, an estimated 7.5% of babies were not recorded with a birth certificate.⁹ In Texas, nearly twice as many births – an estimated 13.5% – went unregistered.¹⁰ A still greater share of Texas births outside hospitals –19.7%, almost one in five – went unrecorded.¹¹ The negative impact of these trends almost certainly was more pronounced for people of color born in Texas. Although state-specific data are not available for 1940, in that year “about three in four of [all U.S.] non-white infants were born at home.”¹² Hence, in all likelihood, at least 19.7% of non-white births

⁹ Sam Shapiro, *Development of Birth Registration and Birth Statistics in the United States*, 4 Population Studies 86, 97 Fig. 2 (1950) (“Shapiro”).

¹⁰ Shapiro, *supra* note 9, at 97, Fig. 2. In 1933, Texas was the last state then in the union admitted to the U.S. Bureau of the Census’ “birth registration area,” a status reflecting state efforts to demonstrate “birth-registration completeness.” *Id.* at 94-96.

¹¹ Joseph Schachter & Sam Shapiro, *Birth Registration Completeness, United States, 1950*, 67 Public Health Reps. 513, 516 Tbl. 1 (June 1952) (“Schachter & Shapiro”).

¹² Shapiro, *supra* note 9, at 99.

in Texas - the statewide average, and possibly a far greater share¹³ took place without issuance of a birth certificate.

In 1950, the birth year of most citizens now 66, an estimated 14.8% of Texas births outside of hospitals (and 4% of Texas births overall) were not registered.¹⁴ A significantly greater share of non-white births in Texas went unregistered: 11.1% overall, 23.3% born outside a hospital without a physician, and 17.3% born outside a hospital with a physician.¹⁵ In short, historical birth registration data for the U.S. and Texas strongly support the proposition that older voters required to produce birth records to get a photo ID bear a heavy burden.

The district court identified still other problems with birth records required by SB14, reinforcing the conclusion that Texas' voter ID law imposes heavy burdens on voters, including older voters, who lack SB14-compliant ID. Judge Ramos observed that “[m]istakes tend to crop up on birth certificates of those born at home with the help of midwives” ROA.27097. Such errors “occur in the names of parent and child, gender of child, date of birth of parents and child, and place of birth.” *Id.* And such flawed birth certificates require correction before they can be used by voters to secure valid photo ID. *See* ROA.27097-98

¹³ An estimated 23% of all U.S. births outside hospitals went unregistered. *Id.*

¹⁴ Schachter & Shapiro at 516, Tbl. 1.

¹⁵ *Id.* at 520, Tbl. 3.

(discussing testimony of Elizabeth Gholar, age 75-plus, who was “required to hire a lawyer ... to amend her [Louisiana] birth certificate,” and of Floyd Carrier, age 84, whose Texas birth certificate “was riddled with mistakes”).¹⁶

The burdens imposed by SB14 on older voters forced to retrieve ancient birth records, which may not exist at all, may be quite onerous, especially for older voters born-out-of-state and older persons of color. Such burdens cannot be justified under *Anderson* and *Burdick*, even in light of *Crawford*.

C. Texas’ Exemption of Some Older Voters and Some Voters with Disabilities from Photo ID Requirements Does Not Excuse or “Mitigate” Unconstitutional Infringement of the Rights of Such Voters.

1. The Age and Disability Exceptions to Photo ID Requirements Do Not Resolve the Undue Burden Issue.

The keystone of Texas’ response to Fourteenth Amendment/Undue Burden challenges to SB14 is the outsized assertion that the State “mitigated *any* . . . inconveniences caused by the need to obtain ID by allowing the elderly and disabled to vote by mail and anyone without ID to vote by provisional ballot.”

¹⁶ See also *North Carolina St. Conf. of the NAACP v. McCrory*, Nos. 1:13CV658, 1:13CV660, 1:13CV861, 2016 U.S. App. LEXIS 55712, at *99-104, 111 (M.D.N.C. Apr. 25, 2016) (discussing difficulties faced by older voters – Alonzo Phillips, age 61, and Rosanell Eaton, age 93 – and voters with disabilities – Esther and Faydeen Kent – all of whose birth certificates contained errors or discrepancies with their current ID and, thus, prevented them from securing photo ID needed to vote, without their relying on a “reasonable impediment” exception). Unlike SB14, North Carolina’s voter ID law allows voting in-person upon presentation of an “alternative” ID and completion of a declaration that the voter lacks photo ID due to a “reasonable impediment.” *Id.* at *58-59.

Tex. Br. at 11 (emphasis supplied). Texas contends that these exceptions apply to “those most inconvenienced” by SB14, Tex. Br. at 11; Tex. Supp. Br. at 9 (same), and further, that “[t]hese mitigation steps” go so far as to “address the concerns Justice Stevens articulated about specific subsets of voters who may have ‘a somewhat heavier burden’ under voter ID laws,” Tex. Br. at 22.

The first problem with this salute to SB14’s exceptions is inaccuracy. In fact, SB14 does little for older voters or voters with disabilities. As the three-judge court said in 2012, “SB 14 largely retains Texas’s existing rules for elderly and disabled voters. Voters over age 65 [and those with disabilities] will still be able to vote by mail, although they will have to present an SB 14-qualifying photo ID if they choose to vote at the polls.” *Tex. v. Holder*, 888 F. Supp. 2d 113, 116 (D.D.C. 2012), *vacated and remanded on other grounds*, 133 S. Ct. 2886 (2013). Also, “disabled Texans [now additionally] will need to provide written documentation of disability from either the [U.S.] Social Security Administration or [U.S.] Department of Veterans Affairs.” *Id.* (citing Tex. Elec. Code § 13.002(i)).

SB14 plainly does not exempt all older people giving rise to concern in *Crawford* – *i.e.*, “elderly persons born out of State, who may have difficulty obtaining a birth certificate” needed to secure a photo ID. 553 U.S. at 199. It only helps people age 65 or above, thus excluding people in their early 60s and others in

their 50s with precisely the same problem.¹⁷ Further, Texas, unlike Indiana, provides no option for older people “who can attest that they were never issued a birth certificate” to “present other forms of identification as their primary document,” such as ID broadly available to older people above and below age 65, like “Medicaid/Medicare cards and Social Security benefits statements.” *Id.* at 199, n.18.¹⁸ Finally, SB14’s age 65- and-over exception does not provide a path to vote in-person, and as discussed below, the vote-by-mail option it does provide is thought by many to be untrustworthy and of little value.

¹⁷ As noted above, “older” has no precise definition; but 65 surely is too high a lower bound for identifying persons likely to have difficulty obtaining out-of-state documentation because of their age.

¹⁸ “Most people qualify for Medicare beginning at age 65.” Towers Watson, *How do I Determine my Medicare Eligibility?*, <https://medicare.oneexchange.com/medicare/medicare-eligibility/>; accord Centers for Medicare and Medicaid Services, *Original Medicare (Part A and Part B) Eligibility and Enrollment*, <https://www.cms.gov/medicare/eligibility-and-enrollment/origmedicarepartabeligenrol/index.html>. Eligible low-income persons, including approximately 323,800 Texans ages 45-64 and 447,400 age 65 or above (2011 data), receive Medicaid benefits. Kaiser Family Foundation, *Medicaid Enrollment By Age*, <http://kff.org/medicaid/state-indicator/medicaid-enrollment-by-age/>. Social Security Disability Insurance (SSDI) benefits are available to people below age 65 unable to work, including, as of 2014, 617,848 in Texas. Kaiser Family Foundation, *Total Disabled Social Security Disability Insurance (SSDI) Beneficiaries, Ages 18-64*, <http://kff.org/medicare/state-indicator/total-disabled-social-security-disability-insurance-ssdi-beneficiaries-ages-18-64/>. Social Security retirement insurance benefits are available to eligible recipients beginning at age 62. U.S. Social Security Administration, *Number of Primary Beneficiaries by Age and Sex* <https://www.ssa.gov/oact/progdata/benefits/primaries.html>.

SB14 also does not exempt all “disabled” people, as Texas contends. Tex. Br. at 11, 22. Rather, it newly restricts exempt voters with disabilities to those with a Social Security Administration or Department of Veteran’s Affairs (VA) “verifiable disability.” ROA.27043. The qualifications for “disability” under these federal programs are quite arbitrary as criteria for exemption from in-person voting requirements. For instance, VA disability status affords no benefit to older men, and especially older women, who have no connection to the U.S. Armed Forces. The Social Security Disability Insurance (SSDI) program generally requires applicants for benefits to show “total disability,”¹⁹ *i.e.*, “inability to engage in any substantial gainful activity.” 42 U.S.C. § 416(i)(1). This excludes many people with significant, or even severe disabilities – *e.g.*, a share of those using wheelchairs for mobility, or who are blind – who are nevertheless able to work, but who may have great difficulty obtaining photo ID. Thus, the criteria for a disability exemption are not well-tailored to mitigate burdens imposed by SB14.

Nor do any of the three cited exceptions benefit older or younger “homeless persons” or “persons who because of economic or other personal limitations [other than, perhaps, disability] may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain state-issued identification.” *Crawford*, 553 U.S. at 199.

¹⁹ U.S. Social Security Administration, *Disability Planner: What We Mean By Disability*, (Mar. 5, 2015), <http://www.ssa.gov/dibplan/dqualify4.htm>.

Finally, Texas ignores dramatic differences between the Indiana provisional voting scheme and its own. SB14's regime requires people casting a provisional ballot to return within six days with an SB14-compliant photo ID (unless they can show a religious objection to photo ID or that they lost their photo ID in a natural disaster). ROA.27131-32; Tex. Elec. Code §§ 63.001(g), 63.011, 65.054, 65.0541(a) (West Supp. 2014). By contrast, Indiana's regime permitted "indigent" voters to return to the "county clerk's office within 10 days" to complete an affidavit swearing to their identity, their poverty and their inability "to obtain proof of identification without paying a fee." *Crawford*, 533 U.S. at 185 & n.2, 199. It is flatly untrue that "Texas also allows such provisional ballots." Tex. Br. at 22.

At most, SB14's key exemptions benefit *some* older voters, *some* voters with disabilities and *some* other eligible voters without proper photo ID from *some* of the burdens of the photo ID requirement. Moreover, overall, SB14's exemptions erect a "dual system," in important respects similar to that condemned in the Supreme Court's school cases, *see, e.g., United States v. Fordice*, 505 U.S. 717, 728 (1992), in which disfavored groups' right to vote is abridged by unequal access to the ballot. In effect, voters age 65 or over and voters with disabilities without photo ID in Texas are encouraged to settle for a "second-class" right to vote, akin to a provision restricting their access to polling places to fewer hours

(say 10am to 4pm, instead of 8am to 6pm) than voters with photo ID. Rather than obviating this Court's duty to weigh SB14's burdens against the law's impact on voter fraud, the law's chief exemptions call out for a careful weighing of benefits and costs to fundamental rights.

2. Requiring Voters Age 65 or Older Without SB14-Compliant ID to Vote by Mail Heavily Burdens the Voting Rights of Older People Able to Vote In-Person.

Many older voters do not consider having a sole option to vote by mail – as Texas contends – the same as being free of “any substantial obstacle to voting.” Tx. Supp. Br. at 9. Rather, they want to vote in-person. As reflected in the record below, they see the State's expectation that they will vote by mail as a burden.

The district court heard “substantial testimony that people want to vote in person at the polls, not even in early voting, but on election day.” ROA.27110.²⁰ One witness, Reverend Johnson, described “appearing at the polls as part of his freedom of expression, freedom of association, and freedom of speech.” *Id.* Plaintiff Ken Gandy, age 75, ROA.99824, “who voted by mail rather than not vote at all, stated that he felt as though he was being treated like ‘a second-class citizen.’” ROA.27110.

²⁰ See also ROA.27110 n.373, citing testimony of witnesses Bates (a “retiree,” ROA.27087), Benjamin (age 65, ROA.27098), and Gholar (“born in the 1930s,” ROA.27097).

The trial record reflects that seven of fourteen voter Plaintiffs, and seven of the nine “over the age of 65 and/or . . . disabled,” each “expressed a reservation about casting their vote by mail.” *Id.* The district court noted “agreement that voter fraud . . . takes place in abundance in connection with absentee balloting” – *i.e.*, one way of voting by mail – but not in connection with in-person voting, ROA.27042. The district court also cited testimony of several witnesses regarding the impact of absentee voting fraud on older voters in particular.²¹

SB14’s supporters fail to recognize the huge difference between vote-by-mail as *an option* and as *the only option* for older voters. Thus, it is no answer to older Texans’ claims of disenfranchisement due to lesser treatment to observe that “Oregon requires *all* of its citizens to vote by mail.” Brief of the Project on Fair Representation as *Amicus Curiae* in Support of Defendants-Appellants (“Proj. Br.”) at 25 n. 11. Nor is it equally justifiable for Texas to restrict older voters *only* to voting-by-mail as it would be to “allow[] some, but not other, citizens to vote absentee,” *id.* (citing *McDonald v. Bd. of Comm’rs of Chicago*, 394 U.S. 802

²¹ See ROA.27042: “Mr. Wood testified that some campaign assistants befriend the elderly and raid their mailboxes when mail-in ballots arrive from the county.” Similarly, voter Plaintiff Gordon Benjamin, age 65, “expressed his distrust of voting by mail [because] ‘mail ballots have a tendency to disappear.’” ROA.27111, 27133-34. Likewise, Calvin Carrier recounted his experience that mail to his father, voter Plaintiff Floyd Carrier, age 84, “often gets lost” and so “his father does not want to rely on a mail-in ballot to exercise his franchise.” ROA.271114, 27134.

(1969)), at least where, unlike here, the state had not also “precluded [those so restricted] from voting [in-person].” *McDonald*, 394 U.S. at 808 & n.6. In short, it is not “obviously rational for Texas to require elderly voters lacking SB14-compliant ID to vote [only] by mail,” Proj. Br. at 25 n. 11, but rather, arbitrary and unjust.

3. The Older Voters Exemption Imposes An Undue Burden By Arbitrarily Focusing on Voters Age 65 Plus Whose Turnout Is Robust, While Ignoring Voters Age 45-64 Whose Turnout Is Nearly the Lowest in the US.

The gravity of the burdens imposed by SB14 generally, and in particular on various older voter cohorts, cannot be properly evaluated without examining the problem of voter participation in Texas. That is, it is vital to consider the baseline from which one might measure SB14’s impact on voter participation and on alleged voter fraud.

Overall, in the past two election cycles for which data are available, 2010 and 2012, Texas had among the lowest overall voter participation in the nation. Indeed, in 2010, at 36.4%, Texas’ voter participation – *i.e.*, the statewide percentage that actual voters represented of the State’s citizens age 18 or over, and thus eligible to vote – was lowest in the United States.²² In 2012, Texas’ 53.8%

²² U.S. Census Bureau, *Voting and Registration in the Election of November 2010 – Detailed Tables*, (last revised Nov. 2, 2011) (“V&R2010”), Table 4a, www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html.

voter participation was 47th of 51 jurisdictions (states and DC).²³ These data raise serious questions as to the legitimacy of a law such as SB14, which is likely to further reduce voter participation, given the lack of evidence of in-person voter fraud. ROA.27040-42.

Data on older voter participation cast still further doubt as to the validity of SB14 and the efficacy of the 65-and-over exemption. In 2012, Texas had relatively average voter participation among the age cohort affected by the older voter exemption: Texas ranked 23rd out of the 50 states and D.C. in voter participation among citizens age 65-plus. For older voters age 45-64, however – *i.e.*, for those not exempt from SB14 – Texas ranked 44th compared to the 50 states and DC.²⁴

In 2010, Texas had less robust voter participation among age cohorts affected by the older voter exemption, but nearly worst in the nation voter participation among older voters not affected by the older voters exemption. Texas' voter participation among citizens age 75-plus ranked 43rd of all states and

²³ U.S. Census Bureau, *Voting and Registration in the Election of November 2012 – Detailed Tables*, (last revised May 8, 2013) (“V&R2012”), Table 4a, www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html.

²⁴ V&R2012 (Table 4c, Reported Voting and Registration of the Total Voting Age Population, by Age, for States: November 2012).

DC, and 42nd among citizens age 65-74; however, Texas voters age 45-64 ranked next to last compared to the 50 states and DC.²⁵

In short, the older voter exemption is arbitrary and ill-conceived to “mitigate” SB14’s impediments to older voter participation. It targets age cohorts seemingly far less in need of assistance than older Texas citizens whose already low electoral participation is likely to be further reduced by SB14.

4. Reliance on a Vote-by-Mail Option for Voters with Disabilities Heavily Burdens the Voting Rights of People with Disabilities Able to Vote In-Person.

The proposition that people with “verifiable” disabilities should appreciate, without qualification, special arrangements permitting them to vote by mail without photo ID, even if they are actually able to vote at the polls, in-person, alongside people without disabilities, *i.e.*, those in the mainstream – is profoundly patronizing, insulting, and harmful. *See, e.g., Rivera-Flores v. Bristol-Myers Squibb Caribbean*, 112 F.3d 9, 12 (1st Cir. 1997) (reasoning that a blanket ban on waivers of claims in severance agreements by employees with disabilities “would display the same stereotyping and patronizing attitudes toward the disabled which Congress hoped to remedy in enacting the ADA”). In tandem with SB14, the disability exemption provides a sole option of vote-by-mail and, thus, restricts choice. It reflects a stigmatizing assumption about voters with disabilities able to

²⁵ V&R2010 (Table 4c, Reported Voting and Registration of the Total Voting Age Population, by Age, for States: November 2010).

meet generally applicable voter eligibility requirements – i.e., that voters with disabilities not requiring special accommodation, unlike non-disabled voters, will be satisfied without a chance to vote in-person. Separation from the mainstream is inconsistent with the ethos underlying federal and state disability anti-bias laws. *See Olmstead v. L.C.*, 527 U.S. 581, 597 (1999) (“Unjustified isolation, we hold, is properly regarded as discrimination based on disability.”).

Citing the vote-by-mail option as justification for restricting in-person voting also ignores Congress’ findings introducing the Americans with Disabilities Act of 1990 (ADA):

- (1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; . . . ;
- (2) discrimination against individuals with disabilities persists in such critical areas as . . . voting . . . ;
- (3) individuals with disabilities continually encounter various forms of discrimination, including . . . overprotective rules and policies, . . . exclusionary qualification standards and criteria, . . . and relegation to lesser services, programs, . . . , benefits, . . . , or other opportunities; [and]
- (4) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, [and] full participation . . . [.]

42 U.S.C. § 12101. Likewise, the Supreme Court has condemned “unequal treatment in the administration of state services and programs,” including denial of access to polling places for mobility-impaired individuals. *Tennessee v. Lane*, 541

U.S. 509, 524 (2004). Further, Texas’ citation of the disabilities exemption as “mitigating” SB14’s restrictions on voting rights clashes with *Disabled in Action v. Bd. of Elections*, 752 F.3d 189 (2d Cir. 2014), which stressed access to polling places, rather than non-mainstream voting accommodations for voters with disabilities. The Second Circuit declared: “the relevant benefit is the opportunity to fully participate in . . . voting This includes the option to cast a private ballot on election days.” *Id.* at 199. Thus, voters with disabilities “need not . . . prove that they have been disenfranchised or otherwise ‘completely prevented from [voting]’ to establish discrimination under Section 504 [of the Rehabilitation Act of 1973] or Title II [of the ADA].” *Id.* at 198 (quoting *Shotz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001)). “Indeed, to assume the benefit is anything less – such as merely the opportunity to vote at some time and in some way – would render meaningless the [ADA’s] mandate.” *Id.* at 199.

Finally, the definition of “disability” used to establish eligibility for Social Security Disability Insurance benefits – on which Texas largely relies to exempt disabled voters from SB14 – is focused on inability to work, not difficulty voting in-person or obtaining a photo ID. Thus, this definition is surely under-inclusive, affording no help to many people whose disabilities make it very hard or impossible for them to obtain photo ID, but not to hold a job or to vote in-person.

Texas should expand, not restrict, access to the voting mainstream for older and younger voters with disabilities. SB14 moves in the opposite direction.

II. Evidence of SB14’s Racially Discriminatory Impact on Older African-American and Latino Voters Powerfully Supports the District Court’s Findings that Appellants Violated the Fourteenth Amendment and Section 2 of the Voting Rights Act.

The racially discriminatory impact of SB14 in impeding in-person voting by older African-Americans and Latinos compounds the undue burdens imposed by the law on older voters generally, and powerfully supports Plaintiffs’ and Plaintiffs’-Intervenors’ constitutional and statutory claims of racial bias in voting.

The district court properly observed that “[t]he right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.” ROA.27135. In that vein, the district court examined the significance of SB14’s restrictions on in-person voting by members of Texas’ two principal minority groups and found it to be profound and especially adverse. In doing so, the district court repeatedly focused on evidence of injury to older minority voters.

SB14, the district court found, is particularly detrimental to minority voters, especially older minority voters. Casting a ballot at the polls on election day, for instance, “[f]or some African-Americans . . . is a strong tradition – a celebration – related to overcoming obstacles to the right to vote.” ROA.27110. To reach that conclusion, the district court relied on testimony regarding “senior citizens [who]

resent being told to vote by mail and [who] want to personally go to the polls, especially those who ‘literally fought for the right to vote.’” ROA.27136 (quoting testimony of Plaintiff Hamilton), 27110 n.373 (same). The district court highlighted testimony regarding the experience of older African-Americans who grew up in southern states like Texas:

. . . if you understand Black American in the terms of Blacks in the south . . . going to vote and standing in line to vote is a big deal. It’s much more important for an 80-year-old Black woman to go to the voting poll, [and] stand in line, because she remembers when she couldn’t do this.”

ROA.27110 n.373 (testimony of Reverend Johnson).

The district court cited comparable testimony by older Latino voters to the same effect – that impediments to voting in-person are especially devastating to minority voters who “remember being effectively abridged or denied within their lifetimes.” ROA.27135 n.477 (*citing, inter alia*, testimony of voter Plaintiffs Eulalio Mendez, Jr. (age 83, *see* ROA.99030) and Margarito Martinez Lara (age 77, *see* ROA.27096)).

A similar pattern emerges in the district court’s findings regarding the impact of requirements to produce documentation of identity in order to obtain a photo ID. In concluding that the evidence was “clear that a photo ID law would hurt minorities’ [voting rights],” ROA.27071-72, the district court relied on testimony from Mr. Lara (age 77) and State Representative Anchia that “along the

border” (an area of dense Latino population), “a lot of people . . . who were birthed by midwives or who were born on farms, didn’t have the requisite birth certificates and were in limbo.” ROA.27071.²⁶

Nationwide data from 1940 and 1950 also suggest that the births of large numbers of older Texas voters of color went unregistered.²⁷ Likewise, Latinos and African-Americans testified at trial about discriminatory burdens created by their need to obtain “Delayed Birth Certificates for Unregistered Births,” “Amended Birth Certificates to Correct Errors,” and/or “Out-of-State Birth Certificates” to comply with SB14. ROA.27096-99.²⁸

Photo ID lawsuits throughout the country repeatedly have revealed a pattern of disproportionate harm to older minority voters who are required to produce identity documents that have been lost or damaged – or were never created in the first place – in significant part because of past conditions of racial inequality and discrimination. For instance, in the Wisconsin case, plaintiff Bettye Jones, an

²⁶ See ROA.27096 (testimony of Mr. Lara that “[h]e was born in what he described as a ‘farm ranch’ in Cameron County Texas”).

²⁷ See Shapiro, *supra* note 6, at 99 (indicating that three-fourths of U.S. non-white births took place at home in 1940); Schachter & Shapiro, *supra* note 8, at 516, Tbl. 1 (about one-fifth of births in Texas in 1940 went unrecorded), and at 520, Tbl. 3 (an estimated 11.1% of non-white births in Texas in 1950 went unregistered).

²⁸ See ROA.27097 (“Mr. Carrier, an 84-year-old retiree from China, Texas, was born at home[.]” He “contacted three different counties trying to locate his birth certificate to no avail.”).

African-American woman born at home in rural Tennessee in 1935 never had a birth certificate prepared. *See Frank v. Walker*, 17 F. Supp. 3d 837, 858 n.17 (E.D. Wis. 2014), *rev'd on other grounds*, 768 F.3d 744 (7th Cir. 2014). The district court in *Frank* noted that “[m]issing birth certificates are . . . a common problem for older African-Americans voters who were born in the South because midwives did not issue birth certificates.” *Id.*²⁹ *See Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 Pa. Commw. Unpub. LEXIS 757, *87 (Pa. Commw. Aug. 15, 2016) (declining to strike down altogether Pennsylvania voter ID law, yet finding: “A somewhat heavier burden is placed on certain individuals, such as persons born out-of-state who may have difficulty obtaining a useful birth certificate Others, such as the elderly and infirm who have difficulty traveling to [state] Drivers’ License Centers . . . also face a somewhat heavier burden.”), *vacated and remanded on other grounds*, 54 A.3d 1, 4-5 (Pa. 2012) (noting likely harm to “the elderly, disabled . . . and the financially disadvantaged” due to difficulties in their obtaining needed documents such as birth certificates).

In the North Carolina voter ID case, *North Carolina St. Conf. of the NAACP v. McCrory*, No. 13-cv-658, 2016 U.S. App. LEXIS 55712 (M.D. N.C. Apr. 29, 2016), lead individual plaintiff Rosanell Eaton, a 93-year-old African-American

²⁹ Ultimately, “Jones only received a state ID card because her daughter made multiple inquiries and took Jones to two different DMV service centers. A voter in Jones’ position who is less tenacious will have to go through the difficult process of obtaining a delayed birth certificate in order to preserve her right to vote.” *Id.*

woman born and raised in North Carolina, alleged injuries related to attending segregated schools, experiencing “forced separation in private and public places of accommodation,” using segregated drinking fountains, and enduring various acts of intimidation during her many years of civic and civil rights activities. *North Carolina St. Conf. of the NAACP v. McCrory*, No. 13-cv-658 (M.D. N.C.) (Doc. 1) (Complaint, filed Aug. 12, 2013, ¶ 21). Eaton served for 40 years as an assistant poll worker and 20 years as an election judge. *Id.* She “ha[d] a current North Carolina driver’s license [yet] the name on her certified birth certificate does not match the name on her driver’s license or the name on her voter registration card.” *Id.* Thus, Eaton alleged, she would “incur substantial time and expense to correct her identification documents to match her voter registration record in order to meet the new [photo ID voting] requirements” *Id.*

In a similar fashion, the district court’s ruling identifying racial and ethnic discrimination as a basis for invalidating SB14 overlaps in important ways with other evidence of the law’s burden on older voters. That is, the history of racial and ethnic discrimination in Texas related to voting rights of minority citizens has special resonance for older minority voters.

The district court specifically noted “a clear and disturbing pattern of discrimination [against African-Americans and Latinos] in the name of combating voter fraud in Texas.” ROA.27033. The court further observed that “[b]ecause of

past discrimination and intimidation, there is a general pattern of African-Americans not having the power to fully participate” in the electoral process. ROA.27034. In addition, the court discussed Texas’ history of “[r]acially [p]olarized [v]oting,” *id.*, possible linkage between “Texas’ long history of racial discrimination” and the fact that “African-Americans and Hispanics remain underrepresented within the ranks of publicly elected officials,” ROA.27036, and finally, “Texas’[] electoral history . . . of subtle and sometimes overt racial appeals by political campaigns.” *Id.* In each of these areas, the burden of history falls heaviest on older minority voters who have lived to witness and endure each of these phenomena.

CONCLUSION

For the reasons set forth above, Amicus Curiae AARP urges the en banc Court to affirm the judgment of the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. The foregoing Brief of Amicus Curiae AARP Supporting Appellees complies with FED. R. APP. P. 32(A)(7)(B)'s type-volume limitation because the brief contains 6901 words, excluding the parts of the brief that Fed. R. App. P. 32(a)(7)(B)(iii) exempts.

2. The foregoing Brief of Amicus Curiae AARP Supporting Appellees complies with FED. R. APP. P. 32(A)(5)'s type-face requirements and Fed. R. App. P. 32(a)(6)'s type style requirements because the brief has been prepared in a proportionally spaced type-face using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: May 16, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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