

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, *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 MCCRAW, 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

**BRIEF OF *AMICI CURIAE* CURRENT AND
FORMER TEXAS ELECTION ADMINISTRATORS
IN SUPPORT OF PLAINTIFFS-APPELLEES**

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(caption continued)

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 MCCRAW,
in his Official Capacity as Director of the Texas Department of
Public Safety, *Defendants-Appellants*.

LENARD TAYLOR; EULALIO MENDEZ, JR.;
LIONEL ESTRADA; ESTELA GARCIA ESPINOSA;
MARGARITO MARTINEZ LARA; MAXIMINA
MARTINEZ LARA; LA UNION DEL PUEBLO ENTERO,
INCORPORATED, *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*.

**SUPPLEMENTAL CERTIFICATE
OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons and entities, as described in 5th Circuit Rule 28.2.1, have an interest in the outcome of this case. This representation, supplemental to that of the parties and other *amici*, is made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Mark White, Dana DeBeauvoir, Oscar Villarreal, Carolyn Guidry,
Amici Curiae
2. Martin J. Siegel, Law Offices of Martin J. Siegel, P.C.,
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AMICI'S STATEMENT OF IDENTITY AND INTEREST

Amici are current and former administrators of elections in Texas. Mark White served as Secretary of State from 1973-77, and later as Attorney General and Governor. The Secretary of State is Texas' chief election officer, charged with assisting county election officials and ensuring compliance with election laws throughout the state. Dana DeBeauvoir is the County Clerk of Travis County, which includes Austin. She oversees elections there and has also acted as an advisor and election observer in Bosnia, Bangladesh, Kosovo, and South Africa during the first election following apartheid. Oscar Villarreal is the Elections Administrator for Webb County, which includes Laredo. He is also the county's voter registrar. Carolyn Guidry is the County Clerk for Jefferson County, which includes Beaumont. She manages all aspects of elections there.

As election administrators, *Amici* are acutely interested in ensuring that voting in Texas is conducted in accordance with the laws and Constitution of the United States, and with the utmost fairness toward all. Moreover, they believe election officials should strive to facilitate turnout and maximize participation by eligible voters, not act to constrict it. They object to Texas' photo identification law because, in their view, it deprives some citizens of the ability to cast ballots and thereby exercise their most sacred political right

in a democracy: claiming their proper “share in the sovereignty of the State.” *Cummings v. Missouri*, 71 U.S. 277, 291 (1866) (quoting Alexander Hamilton: “A share in the sovereignty of the State which is exercised by the citizens at large in voting... ought to stand foremost in the estimation of the law. It is that right by which we exist, as a free people”).¹

INTRODUCTION

One of Texas’ central arguments is that the district court mistook not having photo identification for being shut out of the political process. According to Texas, there is no Voting Rights Act or constitutional violation unless state law causes African Americans and Latinos to *vote* less often than whites, regardless of whether they have photo IDs. Some *amici* supporting Texas make the additional assertion, based on research outside the record, that voter ID laws do not reduce voter turnout.

Neither claim survives scrutiny. In the first place, the district court *did* find that SB 14 will likely lower turnout in Texas, and this finding was recognized by the panel in its partial affirmance of the judgment. In finding a violation of Section 2 and the First and Fourteenth Amendments, the district court did not rely on ID possession alone. Second, two important new studies

¹ No counsel for any party authored this brief in whole or in part, and no party, party’s counsel, or other person contributed money to fund its preparation or submission. All parties have consented to the filing of this brief.

suggest that voter ID laws depress turnout. Most crucially, a 2016 study by the Baker Institute for Public Policy at Rice University and the University of Houston Hobby Center for Public Policy found that a significant fraction of eligible voters who did not cast ballots in the 2014 election in Texas Congressional District 23 chose not to vote because they believed they lacked the necessary ID (though most actually had it). The authors of the study therefore conclude that SB 14 acted to lower turnout in the most recent federal election there. In a second study, University of California and Bucknell researchers determined that minority voters turn out to vote at lower rates in states with strict voter ID laws. Meanwhile, much of the earlier research cited by *amici* who support Texas is methodologically flawed.

To the degree, then, that the Court examines research outside the appellate record in order to discern the effect of voter identification regimes on political participation, the latest and best evidence indicates that such laws diminish voter turnout, particularly by African Americans and Latinos. This evidence mirrors the district court's finding to the same effect.

ARGUMENT

I. The District Court Found that SB 14 is Likely to Reduce Voter Turnout

Texas argues that SB 14 does not transgress Section 2 of the Voting Rights Act because, while African Americans and Latinos may possess

required photo identification at lower rates than whites, the law does not cause fewer people to vote. To make out a violation, it claims, “a plaintiff must show that [a law] has, or will have, a negative effect on minority voting. That requires proof of a disparity in voter turnout or registration.” Appellants’ Supp. Brf. 34. “At most,” the state continues, “plaintiffs proved that a small percentage of registered Texas voters did not have SB14-compliant ID at the time of trial, but they did not prove that SB14 will prevent any person from casting a ballot.” *Id.* at 39. It makes the same point when attacking Appellees’ claim that SB 14 infringes the right to vote under the First and Fourteenth Amendments. *See id.* at 52 (“Current rates of ID possession do not prove a substantial burden on the right to vote”).

Two *amici* supporting Texas go farther and argue that, empirically, voter ID laws have not been shown to diminish turnout. Like Texas, the Project on Fair Representation faults the district court for “cit[ing] no evidence that registration and turnout rates – of any race or language group – have declined.” Project on Fair Representation Brf. 22. It then discusses several studies “finding no decrease in turnout as a result of voter-ID laws.” *Id.* at 28. Indiana and fourteen other states urge the Court to reverse the decision below because Indiana’s turnout has not declined after its photo ID law took effect. Indiana and Other States’ Brf., Point III.

As a legal matter, the panel correctly held that showing diminished voter turnout is not essential to establishing a violation of Section 2. *See Veasey v. Abbott*, 796 F.3d 487 n. 21 (5th Cir. 2015), *reh'g en banc. granted*, 815 F.3d 958 n. 21 (5th Cir. 2016).² Factually, Texas and its supporting *amici* are simply wrong in claiming that the district court overlooked SB 14's effect on turnout. On the contrary, the district court found:

[Texas' expert M.V. Hood's] study of the voter turnout in Georgia in the 2012 election reflected an across-the-board suppression of turnout, which he concluded was caused by implementation of that state's photo ID law....

[Plaintiffs' expert] Dr. Burden testified that SB 14 would decrease voter turnout because it increases the cost associated with voting. Because the poor are more sensitive to cost issues, he concluded that SB 14's terms raising the cost of voting would almost certainly decrease voter turnout, particularly among minorities. Dr. Hood admitted that it was a firmly established political science principle that increased costs of voting are related to decreased turnout, which could be expected with respect to the cost of obtaining an EIC unless some other factor outweighed it for the voters.

² The panel correctly recognized that Section 2 requires only an abridgment of the right to vote, which is defined to include “all action necessary to make a vote effective, including... action required by State law prerequisite to voting, casting a ballot, and having such ballot counted.” 52 U.S.C. §§ 10301(a), 10101(e); 796 F.3d at n. 21. “The district court's finding that SB 14 abridges the right to vote by causing a racial disparity in voter ID possession falls comfortably within this definition. Our case law dictates the same outcome.” *Veasey*, 796 F.3d at n. 21; *see also* Appellee United States Supp. Brf. 24-30.

Veasey v. Perry, 71 F. Supp. 3d 627, 655-56 (S.D. Tex. 2014), *aff'd in part, vacated in part*, 796 F.3d 487 (5th Cir. 2015), *reh'g en banc. granted*, 815 F.3d 958 (5th Cir. 2016). The district court also heard from several witnesses who would likely be barred from voting because of practical difficulties in obtaining SB 14-compliant identification, as well as employees of nonprofit organizations who work with homeless and low income citizens and testified about their clients' inability to satisfy the law's requirements. *Id.* at 667-77; *see also* Appellee Texas League of Young Voters Education Fund Supp. Brf. 40-41. In light of this evidence from multiple fact and expert witnesses, the district court concluded that "there was some evidence that photo ID laws suppress voter turnout." *Id.* at 692.

The panel acknowledged this factual finding by the district court: "The district court also credited testimony that SB 14 would decrease voter turnout. *Id.* at 655–56. According to a well-established formula employed by political scientists to assess individuals' likelihood of voting in an election, increasing the cost of voting decreases voter turnout – particularly among low-income individuals, as they are most cost sensitive." *Veasey*, 796 F.3d at 512. The panel correctly deemed this and the district court's other factual findings on disparate impact to be "well-supported," leading it to reject Texas' claim of clear error in the district court's finding that SB 14 causes discriminatory

effects. *Id.* at 513; *see also Frank v. Walker* 773 F.3d 783, 792 (7th Cir. 2014) (Posner J., dissenting from denial of rehearing *en banc*) (“And think: voting is a low-reward activity for any given individual, for he or she knows that elections are not decided by one vote. When the rewards for an activity are low, even a modest cost of engaging in it is a potent discourager”).

Of course, this Court owes substantial deference to the district court’s factual findings. Under the applicable “clear error” standard, such findings need only be “plausible in light of the record viewed in its entirety,” even if this Court “might have weighed the evidence differently.” *Ali v. Stephens*, ___ F.3d ___, 2016 WL 1741573 at * 4 (5th Cir., May 2, 2016) (quotation omitted). “The credibility determination of witnesses, including experts, is peculiarly within the province of the district court. Consequently, we give deference to the findings and credibility choices trial courts make with respect to expert testimony.” *League of United Latin Am. Citizens No. 4552 v. Roscoe Indep. Sch. Dist.*, 123 F.3d 843, 846 (5th Cir.1997); *accord, e.g., Perez v. Bruister*, ___ F.3d ___, 2016 WL 2343009 at * 13 (5th Cir., May 3, 2016) (rejecting challenge to court’s finding because “it simply quarrels with [an] expert opinion” when the court “was free to credit or discredit his testimony.... This is not clear error”). *Amici* may have rounded up materials outside the appellate record that, they claim, differ from the district court’s factual

determinations. But these cannot justify ignoring the decision of a district judge who carefully considered testimony from witnesses required to explain their conclusions in open court and submit to cross examination. *See, e.g., Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 724 (9th Cir. 2014) (*amicus* role does not extend to offering facts contrary to record), *cert. denied*, 135 S. Ct. 1158 (2015).

II. The District Court's Finding is Supported by Recent Research Analyzing SB 14 and Other Voter ID Laws

In any event, to the degree the Court considers outside research bearing on the question whether SB 14 will affect voter turnout, the most recent and relevant studies suggest that it already has.

In 2015, the Baker Institute for Public Policy at Rice University and the University of Houston Hobby Center for Public Policy examined whether SB 14 affected turnout in the 2014 election in Texas Congressional District 23. *See* Bill Hobby, Mark P. Jones, Jim Granato, and Renee Cross, *The Texas Voter ID Law and the 2014 Election: A Study of Texas's 23rd Congressional District* (August 2015), <https://bakerinstitute.org/media/files/files/e0029eb8/politics-VoterID-Jones-080615.pdf>. The study's investigators surveyed 400 registered voters in District 23 who didn't vote in the 2014 election, asking why they stayed away from the polls. *Id.* at 2. Respondents were questioned

about the level of agreement (“strongly agree, agree, neither agree nor disagree, disagree, strongly disagree”) with seven reasons for not voting:

1. “You or a family member was ill.”
2. “You had transportation problems.”
3. “You were too busy, with conflicting work, family or school schedules.”
4. “You didn’t like the candidates or the issues.”
5. “You weren’t interested and felt your vote wouldn’t make a difference.”
6. “You were out of town.”
7. “You did not possess any of the state approved forms of photo identification needed to cast a vote in person.”

Id. at 5.

Among the study’s respondents, 12.8% strongly agreed or agreed with the seventh, ID-related reason as their explanation for not voting, with 5.8% giving it as their principal reason. *Id.* at 6. This was true although only 2.7% of respondents actually lacked one of the state-approved forms of ID. *Id.* at 7. One percent of respondents both lacked a photo ID and gave that as a reason for not voting. *Id.* Hence, the study’s authors conclude: “The most prominent impact of the legislation was that due entirely to a misunderstanding or a general lack of information of the photo identification requirements under the law, somewhere between one out of every 10 and one out of every 20 non-voters in CD 23 did not participate in the general election process in 2014.” *Id.* at 8. This effect was especially pronounced among Latino voters, who make up 58.8% of registered voters in District 23. *Id.* at 9. “Latino non-voters

were significantly more likely than Anglo non-voters to strongly agree or agree that a lack of photo ID was a reason that they did not cast a ballot in the November 4 contest.” *Id.*

In addition, SB 14 may have changed the outcome of the Congressional race in District 23, where Will Hurd defeated the incumbent, Pete Gallego, by only 2,400 votes. Four to five times more respondents who gave their lack of a photo ID as a reason for not voting stated that they would have voted for Gallego over Hurd. *See id.* at 12. “[W]hile the results of this survey do not allow us to conclude that Gallego would have been re-elected in the absence of the voter photo ID law, they do indicate that the law did have a disproportionate impact on his supporters, and therefore may have possibly cost him the election.” *Id.*

Overall, the authors of the Baker Institute/Hobby Center study conclude:

These findings suggest that the most significant impact of the current Texas voter ID law is confusion and subsequently *depressed voter turnout*. This is potentially a critical consequence in highly competitive elections such as the 2014 congressional race in CD-23. The study also shows that the Latino non-voters were significantly more likely than Anglo non-voters to strongly agree or agree that a lack of photo ID was a reason that they did not cast a ballot in the 2014 general election, which is especially relevant in a district in which roughly three-fifths of the registered voters are Latino.

Id. at 13 (emphasis added).

Because the suppression of turnout uncovered in District 23 is attributable largely to confusion over what forms of identification will be accepted at the polls and whether voters actually have the necessary photo ID, the study's authors posit that a "well-designed and well-funded public voter education campaign... could go a long way towards ameliorating most of the adverse impact" of SB 14. *Id.* at 8. But the district court found that the Texas legislature's "failure to fund SB 14 was clear at trial – no real educational campaign was initiated, and the individuals such a campaign needed to reach knew little, if anything, about the change in the law, including which photo IDs were allowed and the availability of EICs." 71 F. Supp. 3d at 649. The study's authors similarly conclude that that "the very modest public outreach campaign carried out in 2014 by the Texas Secretary of State and some county election officials to educate registered voters about the state's new photo identification law was sub-optimal, at least in CD-23." Jones, *et al.*, *supra*, at 8.

Moreover, even those who actually lack SB 14-compliant identification – that is, not simply those mistaken about whether they do – form a significant group of nonvoters. If 1% of nonvoters lack photo ID and don't vote at least in part for that reason, *see id.* at 7, it would account for up to 90,000 missing votes throughout Texas in the 2014 general election. *See* Texas Secretary of

State Carlos H. Cascos, Turnout and Voter Registration Figures (1970-current) (2016), <http://www.sos.state.tx.us/elections/historical/70-92.shtml> (quantifying registered and actual voters in 2014 general election).

A second recent study conducted by researchers at the University of California at San Diego and Bucknell University also suggests that photo ID laws decrease minority turnout. See Zoltan Hajnal, Nazita Lajevardi, and Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes*, (February 2016), <http://pages.ucsd.edu/~zhajnal/page5/documents/VoterIDLawsSuppressionofMinorityVoters.pdf>. The UCSD and Bucknell researchers compared minority turnout in states with strict voter ID laws – those that require presentation of an ID to vote, including Texas – against minority turnout in states lacking the ID requirement across 51 elections from 2006 to 2014. They found:

There are substantial drops in minority turnout in strict voter ID states and no real change in white turnout. Hispanic turnout is 7.1 points lower in strict voter ID states than it is in other states in general elections and 5.3 points lower in primary elections. For Blacks, the gap is negligible in general elections but a full 4.6 points in primaries. For Asian Americans the difference is 5.4 points and 6.2 points. And for multi-racial Americans turnout is 5.3 points lower in strict voter ID states in general elections and 6.7 points lower in primary contests. White turnout is relatively flat and, if anything, increases slightly in strict identification states.

Id. at 14-15.

Recognizing that other factors in strict voter ID states could be causing lower minority turnout, the researchers controlled “for a range of state level electoral laws, campaign dynamics, and individual characteristics.” *Id.* at 16. But they found the same results: “there are strong signs that strict identification laws decrease turnout for Latinos, Blacks, Asian Americans, and some indications that they also do so for multi-racial Americans.” *Id.* For example, after applying controls, the researchers found that Latinos were 10% less likely to vote in general elections in strict ID states than in other states, while African-American turnout would decline by 8.6 points in primary elections in strict ID states. *Id.* Strict voter ID laws “serve not only to diminish minority participation, they also increase the gap in the participation rate between whites and non-whites.” *Id.* at 17. While the study’s results do not “definitively show a causal connection between voter ID laws and turnout,” they “strongly suggest that these laws do, in fact, have real consequences for the makeup of the voting population. Where they are enacted, racial and ethnic minorities are less apt to vote.” *Id.* at 28-29.

III. Studies Cited by *Amici* Supporting Texas are Flawed

Two *amici* supporting Texas – The Project on Fair Representation and a group of fifteen states led by Indiana – cite research purporting to show that

voter identification laws have no effect on voter turnout, but the studies have limitations that cast doubt on their conclusions.

The Project on Fair Representation cites three studies, though some are reported in multiple articles. *See* Project on Fair Representation Brf. 27-28.³ First, each of these analyzed turnout in elections that occurred in 2008 or earlier. But most of the strictest voter ID laws are more recent, including SB 14, enacted in 2011. In fact, the district court found the Texas law to be the strictest in the country. *See* 71 F. Supp. 3d at 642. SB 14 erects higher barriers to voting than other states' laws by limiting the kinds of accepted identification in ways favoring Anglo voters, by failing to provide for a

³ The Project on Fair Representation cites: (1) two articles by Stephen Ansolabehere, both of which report results from the same survey of voters in 2006 (the Cooperative Congressional Election Survey), though the later article also includes survey data from 2008 primary election voters, *see* Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, PS: POL. SCI. & POL. (Jan 2009); Stephen Ansolabehere, *Access Versus Integrity in Voter Identification Requirements*, 63 N.Y.U. ANN. SURV. AM. L. 613 (2008); (2) two papers from Jason D. Mycoff, *et al.*, both of which report on the same analysis of aggregate and individual-level data from four federal elections in 2002-06, *see* Jason D. Mycoff, Michael M. Wagner, and David C. Wilson, *The Empirical Effects of Voter-ID Laws: Present or Absent?* PS: POL. SCI. & POL. 121 (Jan. 2009); Jason D. Mycoff, Michael M. Wagner, and David C. Wilson, *The Effect of Voter Identification Laws on Aggregate and Individual Level Turnout*, AM. POL. SCI. ASS'N MEETING PAPER (Aug. 2007); and (3) a paper by Jeffrey Milyo analyzing aggregate turnout in Indiana in two midterm elections conducted after implementation of that state's voter ID law, *see* Jeffrey Milyo, *The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis*, Rep. 10-2007, Inst. Pub. Pol'y, Univ. Mo. (Nov. 2007). *See* Project on Fair Representation Brf. 27-28.

mechanism such as an affidavit documenting the inability to obtain an ID, and in other ways. *See* Appellee Texas State Conference of NAACP Branches Supp. Brf. 2. “The rapid and very recent proliferation of these laws means that any research that examines the vote in anything but the last election cycle or two will miss most of the effect of these laws. As a result, most existing studies are likely to understate the significance of these laws.” Hajnal, *et al.*, *supra*, at 5. By contrast, the Baker Institute/Hobby Center and UCSD/Bucknell studies are more recent and therefore capture the disenfranchising effects caused by the latest, strictest requirements.

Second, some studies even from the period before 2008 suggest that voter ID laws dampen turnout, though these are ignored by *Amici*. *See, e.g.*, R. Michael Alvarez, Delia Bailey, and Jonathan Katz, *The Effect of Voter Identification Laws on Turnout* 21 (October 2007), http://vote.caltech.edu/sites/default/files/vtp_wp57.pdf (finding no change in aggregate turnout but finding, using individual-level data, that “voter identification requirements of the strictest forms... have a negative impact on voter participation relative to the weakest requirement of stating one’s name”); Timothy Vercellotti and David Anderson, *Protecting the franchise, or restricting it? The effects of voter identification requirements on turnout* 13 (2006), <http://moritzlaw.osu.edu/blogs/tokaji/voter%20id%20and%20turnout%20stu>

dy.pdf (finding “reduced probabilities of voting of about 3 to 4 percent for the entire sample, with larger differences for specific subgroups,” including Latinos). Texas’ own expert agreed that voter ID suppressed turnout in Georgia in the 2008 election. *See Veasey*, 71 F. Sup. 3d at 655; *see also Frank*, 773 F.3d at 791 (Posner J., dissenting from denial of rehearing *en banc*) (“There is evidence... that photo ID requirements for voting, especially of the strict variety found in Wisconsin, are likely to discourage voting”).

Third, the two studies conducted by Milyo and Mycoff, *et al.* rely in whole or part on aggregate turnout data indicating whether a particular jurisdiction’s overall turnout declined, held steady, or rose following institution of voter ID. Similarly, Indiana and other states cite gross turnout statistics in Indiana to argue that “[t]here has been no pattern of decline in voter turnout since Indiana’s voter ID law took effect in 2005.” Indiana and Other States’ Brf. 25. As Appellees’ expert witnesses Matt Barreto and Gabriel Sanchez pointed out, though, this overlooks the key point that aggregate turnout can rise for any number of reasons at the same time specific voters who lack required identification are disenfranchised. ROA.43656. “Regardless of aggregate turnout rates, harm is still being faced by the hundreds of thousands of individuals who lack ID and will not be able to vote in future elections.” *Id.* (emphasis in original).

For example, Barreto and Sanchez explain that African-American turnout in Georgia increased in 2008 despite the disenfranchisement caused by voter ID:

Our report’s findings and those from our academic research suggest that the registration and turnout levels of Blacks in Georgia would have been *even higher* in 2008 if it were not for the voter ID law put in place in 2007. Thus, the fact that more African Americans... voted in Georgia in 2008 does not prove voter ID laws had no effect, it only proves that among African Americans who had valid photo ID, they voted at much higher rates.

ROA.43657 (emphasis in original). *Amici’s* reliance on aggregate turnout figures therefore misses the point: constant or higher overall turnout does not disprove the claim that voter ID laws disenfranchise a discrete subset of eligible voters. *See* Appellee United States’ Supp. Brf. 29.

Fourth, some studies *Amici* cite, such as Ansolabehere’s, appear to rely on survey respondents to indicate whether or not they voted, but “[s]elf-reported turnout is much higher than actual turnout.” Hajnal, *et al.*, *supra*, at 6. “Racial minorities, in particular, are particularly prone to over-report their participation in elections. All of this makes it extremely difficult to assess the racial and class effects of voter ID laws using self-reported turnout.” *Id.* (omitting citations). The UCSD/Bucknell study, on the other hand, uses turnout figures validated against official state voting records. *See id.* at 7.

Finally, Indiana and other states cite a 2015 study by a law professor, Michael Pitts, as “support[ing] the conclusion that Indiana voters have not been disenfranchised by the law.” Indiana and Other States’ Brf. 23 (citing Michael J. Pitts, *Empirically Measuring the Impact of Photo ID Over Time and its Impact on Women*, 48 IND. L. REV. 605, 606 (2015)). Pitts concluded that the state’s voter ID law has had little effect on voting because very few Indianans requested and cast provisional ballots in recent elections. *See* Pitts, *supra*, at 612-13. Provisional ballots are offered to voters who appear at polling places without the requisite identification. Yet Pitts acknowledges that, however valid this methodology might be for measuring disenfranchisement among potential voters who show up to vote, it ignores eligible voters who don’t:

In fairness, it is certainly true that a study of provisional balloting cannot account for all the disfranchisement caused by a photo identification law. There are undoubtedly other ways that photo identification laws cause disfranchisement...

Perhaps the strongest possibility for a lack of actual disfranchisement showing up in provisional balloting would be that potential voters remain at home because they know they do not possess a valid photo identification.

Pitts, *supra*. at 613-14.

While Pitts speculates that few people choose not to vote because they believe they lack the necessary ID, *see id.* at 614, he acknowledges that, as of

2015, “[o]ther potential studies, such as post-election surveys about the reasons for not voting that specify lack of valid identification as the sole cause of not voting, do not appear to exist.” *Id.* at 606. Consequently, he observes: “Most importantly, other research needs to more definitively pin down just how many persons are staying away from the polls because they know they cannot meet a photo identification requirement.” *Id.* at 623.

This is precisely the type of analysis performed by the Baker Institute and Hobby Center *after* Pitts’ study. As discussed in Point II, *supra*, researchers at those institutions surveyed non-voters in Texas Congressional District 23 and revealed that a significant portion chose not to vote because, accurately or not, they believed they lacked the necessary identification. Pitts’ conclusions are therefore of limited value now that the type of assessment he conceded was wanting and necessary has been performed in the very state under consideration in this case.

CONCLUSION

This Court needn’t venture beyond the record to answer the question whether voter ID laws affect turnout. The district court heard from fact and expert witnesses on the topic and found that SB 14 will likely result in fewer Texans voting – particularly African Americans and Latinos. If the Court is inclined to canvass outside research, however, the most relevant and recent

studies suggest that SB 14 has already resulted in lower voter turnout, particularly among minority voters. These assessments support the district court's findings that Texas' voter ID law violates the Voting Rights Act and the Constitution.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. Civ. P. 32(a)(7)(B) because this brief contains 4,674 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief is printed in a proportionally spaced typeface using the Microsoft Word for Mac program in 14 point, Times New Roman font in body text and 13 point, Times New Roman font in footnote text.

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