UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

Sylvia BRUNI, TEXAS DEMOCRATIC PARTY, DSCC, DCCC, and Jessica TIEDT, *Plaintiffs*,	
v.	Case No. 5:20-cv-35
Ruth HUGHS, in her official capacity as the Texas Secretary of State, *Defendant*.	

AMICUS BRIEF OF HONEST ELECTIONS PROJECT IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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INTEREST OF AMICUS CURIAE[1]

The Honest Elections Project is an independent, nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that voters and their elected representatives put in place to protect the integrity of the voting process. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. It thus has a significant interest in this important case.

INTRODUCTION & SUMMARY OF ARGUMENT

The Secretary of State ably explains why Plaintiffs' five claims challenging HB 25 do not state a claim.[2] *See* Doc. 32 at 19-37. The Project will not belabor those arguments. Instead, this brief emphasizes why, under the proper legal framework, Plaintiffs' first and third counts must be dismissed.

Taking them in reverse order, Plaintiffs' third claim—that HB 25 violates section 2 of the Voting Rights Act of 1965—invites the Court to apply federal law in a way that exceeds Congress's power to enforce the Reconstruction Amendments. Those amendments give Congress the power to remedy intentional racial discrimination, not to prohibit facially neutral and nondiscriminatory laws like HB 25. Accepting Plaintiffs' "results" claim would bring lurking constitutional questions to the forefront and throw section 2's constitutionality into grave doubt.

Plaintiffs' first claim, in turn, asks the Court to strike down HB 25—a neutral, nondiscriminatory law that requires nothing more from all Texas voters than the "usual burdens of voting"—because of its alleged impacts on specific voters. *Crawford v. Marion Cty. Elec. Bd.*, 553 U.S.

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[1] No party's counsel authored this brief in whole or in part, and no one other than amicus and its counsel contributed money to fund the brief's preparation or submission.

[2] The Project takes no position on whether venue is proper in this district, whether the Secretary is a proper defendant, or whether Plaintiffs have standing. *See* Doc. 32 at 6-19.

181, 198 (2008) (opinion of Stevens, J.). But that theory cannot be reconciled with myriad Supreme Court cases holding that equal-protection challenges to neutral, nondiscriminatory laws rise or fall based on a challenged law's impact on voters *categorically*, not individually.

ARGUMENT

I. Plaintiffs' statutory claim fails because, if section 2 of the Voting Rights Act invalidates state laws without proof of intentional discrimination, then section 2 is unconstitutional.

Plaintiffs contend that HB 25's elimination of straight-ticket voting violates section 2 of the Voting Rights Act. *See* Am. Compl. ¶¶97-103. According to Plaintiffs, ballots with no straight-ticket voting option will have a "disproportionate impact" on "African-American and Hispanic voters," ¶102, in part because of those "voters' [allegedly] lower average educational attainment," ¶100. Like the Secretary of State, *see* Doc. 32 at 21, the Project flatly rejects this insulting characterization of Texas voters. But Plaintiffs' problems aren't limited to these offensive statements. Their claim also raises serious constitutional questions. Indeed, adopting Plaintiffs' interpretation of section 2 may well precipitate the statute's demise.

Understanding why requires returning to the constitutional guarantees that section 2 is designed to protect. The "central purpose" of the Fourteenth Amendment's Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993). "Laws that explicitly distinguish between individuals on racial grounds fall within the core of that prohibition." *Id.* "Express racial classifications are immediately suspect because," as the Supreme Court has explained, "absent searching judicial inquiry, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at 642-43 (cleaned up). The Fifteenth Amendment likewise prohibits only those voting laws that draw explicit racial classifications or are "motivated by a discriminatory purpose." *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980).

"As originally enacted," section 2 comported with those first principles. *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 500 (1997). In its original form, section 2 was "an uncontroversial provision that simply restated the prohibitions against ... discrimination already contained in the Fifteenth Amendment." *Id.* Section 2 thus became a mechanism for challenging intentionally discriminatory voting restrictions. Deploying section 2 this way—to protect citizens' Fourteenth and Fifteenth Amendment rights to be free from intentional racial discrimination while voting—raised no constitutional concerns.

But the statutory landscape changed when Congress amended section 2 in 1982 to overrule *Bolden*. Section 2 now prohibits States from "impos[ing] or appl[ying]" any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . in a manner which results in a denial or abridgement" of the right "to vote on account of race or color." 52 U.S.C. §10301(a) (formerly 42 U.S.C. §1973). Those changes meant that a plaintiff now could establish a section 2 violation "if the evidence established that, in the context of the 'totality of the circumstances of the electoral process,' the standard, practice, or procedure being challenged had the result of denying a racial or language minority an equal opportunity to participate in the political process." U.S. Dep't of Justice, Civil Rights Div., Section 2 of the Civil Rights Act, bit.ly/2XGRyuW (last updated Sept. 14, 2018). In other words, "proof of" a racially discriminatory "intent is no longer required to prove a Section 2 violation." *Chisom v. Roemer*, 501 U.S. 380, 394 (1991). This results-without-discriminatory-intent theory of section 2 has come to be known as "results prong" liability. *See, e.g.*, *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 287 (2015) (Scalia, J., dissenting).

That tectonic shift in the statutory landscape triggered two crucial constitutional questions. The first is whether Congress has power to enact this version of section 2—one that reaches nondiscriminatory election laws. After all, "Congress has no power to act unless the Constitution authorizes it to do so." *United States v. Comstock*, 560 U.S. 126, 159 (2010) (Thomas, J., dissenting).

"Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrisson*, 529 U.S. 598, 607 (2000). And since Congress passed the Voting Rights Act as an exercise of its power to enforce the Reconstruction Amendments, *South Carolina v. Katzenbach*, 383 U.S. 301, 327-28 (1966), the question becomes whether Congress has the remedial power under the Fourteenth or Fifteenth Amendments to invalidate nondiscriminatory state and local laws.

Congress does not. To assess whether an exercise of Congress's power to enforce the Reconstruction Amendments is proper, courts assess the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). "Lacking such a connection, legislation may become substantive in operation and effect." *Id.* By its own terms, section 2's "results" prong does not enforce the injury that the Fourteenth and Fifteenth Amendments rightly remedy and prevent—the Constitution's ban on intentional racial discrimination. In fact, "[w]hen Congress amended §2 in 1982, it clearly expressed its desire that §2 *not* have an intent component." *Bossier Parish*, 520 U.S. at 482. Yet if Congress can deploy its enforcement authority to prohibit nondiscriminatory laws that have a disparate impact on minority voters, "it is difficult to conceive of a principle that would limit congressional power." *Boerne*, 521 U.S. at 529. For "Congress does not enforce a constitutional right by changing what the right is." *Id.* at 519. Because that is precisely what section 2's results prong tries to do, applying section 2 as Plaintiffs request would exceed the scope of Congress's enforcement authority.

Second, section 2's "results" prong, if it requires States to maintain voting laws for strictly race-based reasons, also conflicts with the Equal Protection Clause. The Equal Protection Clause's "central mandate" is "racial neutrality in governmental decisionmaking." *Miller v. Johnson*, 515 U.S. 900, 904 (1995). Accordingly, race cannot be the "predominant factor" in fashioning election laws. *Id.* at 916; *see also Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009). That principle

applies equally to "laws mandating that third parties"—including state and local governments—"discriminate on the basis of race." *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring). Here again, Plaintiffs' theory of "results" liability does precisely that. It would require Texas to make race the predominant factor in its rules governing how Texans cast their ballots. But Congress lacks a compelling interest in forcing States and localities to engage in racial discrimination in order to avoid a disparate impact. *Ricci*, 557 U.S. at 594-95 (Scalia, J., concurring).

The Project is not the first to recognize these problems. A retired Justice of the Supreme Court has observed that "encourag[ing] or ratify[ing] a course of" conduct so inconsistent with the Equal Protection Clause merely "to find compliance with a statutory directive" would expose a "fundamental flaw" in section 2. *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring). And perhaps because section 2's results prong raises such "serious constitutional questions," *LULAC v. Perry*, 548 U.S. 399, 446 (2006), the Supreme Court has never passed on the constitutionality of "results prong" liability, *see Chisom*, 501 U.S. at 418.

Plaintiffs' claim squarely raises these difficult and weighty constitutional questions. This Court could avoid them by dismissing it. But granting Plaintiffs the relief they request will inevitably set these questions on a course for further review.

II. Plaintiffs' *Anderson-Burdick* claim fails because HB 25 imposes only reasonable, nondiscriminatory voting requirements on all Texas voters.

Plaintiffs also contend that HB 25's elimination of straight-ticket voting is unconstitutional. While Plaintiffs assert that HB 25 will "unduly burden all Texans' fundamental right to vote," they make no allegations supporting that conclusory statement. Am. Compl. ¶89. Instead, they allege that the long lines, increased wait times, and "decrease[d] voter confidence," ¶88, that will supposedly result from the absence of straight-ticket voting will affect *some* Texas voters. *See* ¶¶55-65. Plaintiffs do not—and cannot plausibly—allege that all voters, in all places, during both early and regular voting, will face prohibitive wait times or will lose faith in Texas elections if, like in 44 other States, straight-

ticket voting is not an option. Plaintiffs' allegations that HB 25 will burden *some* voters do not state a constitutional violation.

Every election law "invariably impose[s] some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). For "[e]ach provision of a code, 'whether it governs the registration and qualification of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.'" *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

Given that reality, a claim that an election law violates a voter's Fourteenth Amendment rights hinges on "the extent to which [the] challenged regulation burden[s]" those rights. *Id.* at 434. An election law that "imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters" is "'generally'" justified by "'the State's important regulatory interests.'" *Id.* (quoting *Anderson*, 460 U.S. at 788). After all, there is no constitutional right to be free from "the usual burdens of voting." *Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181, 198 (2008). Only when an election law "subject[s]" voting rights "to 'severe' restrictions" does a court apply strict scrutiny and assess whether the law is "'is narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

When assessing a burden's severity, courts must look at the burden's impact "categorically" upon all voters, without "consider[ing] the peculiar circumstances of individual voters." *Crawford*, 553 U.S. at 206 (Scalia, J., concurring in the judgment). That follows from numerous Supreme Court cases. For example, in holding that Hawaii's ban on write-in voting "impose[d] only a limited burden on voters' rights to make free choices and to associate politically through the vote," the Court looked at the ban's effect on Hawaii's voters generally, rather than on the plaintiff specifically. *Burdick*, 504 U.S. at 439, 436-37. In rejecting the New Party's challenge to Minnesota's ban on fusion candidates, the Court examined the ban's effect on "minor political parties" generally, not on the New Party

specifically. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 361-62 (1997). And in rejecting voters' challenge to Oklahoma's semi-closed primary election, the Court emphasized that "Oklahoma's semiclosed primary system does not severely burden the associational rights of the state's citizenry" *generally*—irrespective of its effect on the individual plaintiffs specifically. *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). In short, each of those precedents "refute[s] the view that individual impacts are relevant to determining the severity of the burden" that "a generally applicable, nondiscriminatory voting regulation" imposes. *Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment).

That the Court's precedents require assessing burdens categorically should be no surprise; the Equal Protection Clause itself compels the categorical approach. In fact, "weighing the burden of a nondiscriminatory law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence." *Id.* at 207 (Scalia, J., concurring in the judgment). "A voter complaining about such a law's effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional." *Id.* (citing *Washington v. Davis*, 426 U.S. 229, 248 (1976)). In short, the "Fourteenth Amendment does not regard neutral laws as invidious ones, *even when their burdens fall disproportionately on a protected class*." *Id.*

A plaintiff hoping to avoid the categorical rule—and instead litigate a claim based on an alleged person-specific burden—cannot denigrate the categorical rule by contending it merely comes from Justice Scalia's concurrence for three Justices in *Crawford*. To be sure, Justice Scalia's opinion puts the finest point on the categorical rule. But he did not conjure the rule from thin air. Rather, Justice Scalia states the rule after painstakingly analyzing and synthesizing a host of prior majority opinions—all of which remain good law today. *See* 553 U.S. at 205-08. What is more, Justice Scalia specifically noted that Justice Stevens's three-Justice opinion "neither rejects nor embraces the [categorical] rule of [the Supreme Court's] precedents." *Id.* at 208. Justice Stevens never disputes that conclusion.

In short, the categorical rule applies here. And under it, Plaintiffs fail to state a claim that HB 25 unduly burdens their Fourteenth Amendment rights. HB 25's elimination of straight-ticket voting epitomizes "a generally applicable, nondiscriminatory voting regulation." *Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment). If it imposes any burden at all, that burden is "[o]rdinary and widespread, ... requiring 'nominal effort' of everyone." *Id.* (quoting *Clingman*, 544 U.S. at 591). After HB 25, all voters in Texas "have the same right as any voter to read the instructions in front of them and to follow them to ensure their intended vote is recorded." *Tex. Democratic Party v. Williams*, No. 1:07-cv-115-SS, 2007 WL 9710211, at *5 (W.D. Tex. Aug. 16, 2007), *aff'd*, 285 F. App'x 194 (5th Cir. 2008). Any idiosyncratic effects it might have on particular voters thus "are not severe," *Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment), and are amply justified by the State's important interests of producing more informed voting and better qualified candidates, making elections more competitive, and reducing roll off, *see* Doc. 32 at 22-23.

CONCLUSION

The Court should grant Defendant's motion and dismiss Plaintiffs' claims under the First and Fourteenth Amendments, and under section 2 of the Voting Rights Act of 1965, for failure to state a claim.

Respectfully submitted,

Dated: April 17, 2020

/s/ Dallin B. Holt

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CERTIFICATE OF COMPLIANCE

This brief complies with section 7(A) of Your Honor's Court Procedures in Civil Cases because it is 8 pages—less than half the number of pages allowed for parties' memoranda of law. *Cf.* Fed. R. App. P. 29(a)(5) (allowing amicus briefs to be half the length of parties' principal briefs). This brief is also prepared in 12-point Garamond font, with double-spaced lines and 1-inch margins.

Dated: April 17, 2020

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CERTIFICATE OF SERVICE

I filed this brief with the Court via ECF, which will electronically notify all counsel of record.

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