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November 10, 2021

IN THE SUPREME COURT OF THE UNITED STATES

No. 2021-1234

Honorable Jane Williams, Petitioner vs.
State of Texifornia, Respondent

On writ of certiorari to the Court of Appeals for the Fourteenth Circuit

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ORDER OF THE COURT ON SUBMISSION

IT IS THEREFORE ORDERED that counsel appear before the Supreme Court to present oral argument on the following issues:

1) Whether Petitioner has standing to bring suit in accordance with the case and controversy requirement of Article III of the Constitution?
2) Whether the Voter-Identification and Anti-Voter Fraud Act violates:
   - **I.** the political speech and voting rights protected by the First Amendment of the United States, as applied to the states through the Due Process Clause?
   - **II.** the Equal Protection Clause of the Fourteenth Amendment?

Issues relating to the 15th and 24th Amendments are not certified and are not before this Court. Nor are advocates to make any statutory arguments, federal or state, other than those related to the Voter-Identification and Anti-Voter Fraud Act of 2010.

UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT
No. 2021-1234

THE HONORABLE JANE WILLIAMS, PETITIONER

vs.

THE STATE OF TEXIFORNIA, RESPONDENT

Before: Chief Circuit Judge BONNIE, and Circuit Judges ANDERSON, and DEBRACCIO,

Chief Circuit Judge BONNER delivered the opinion of the Court, joined by Circuit Judge ANDERSON. Judge DEBRACCIO filed a dissenting opinion.

III. Factual Background and Procedural History

A. The Enactment of the Voter-Identification and Anti-Voter Fraud Act of 2010

On March 17, 2010 the General Assembly of the State of Texifornia adopted the Voter-Identification and Anti-Voter Fraud Act ("the Act"). (See Appendix I.) The Act was sponsored by Texifornia State Senator Ryan Manners (R) and Delegate Kari Lyles (D), and it was signed into law by Governor Brianna Wilbur (R). Despite the fact that the law was sponsored by members of both major parties in Texifornia, it passed with primarily Republican support.[1] The law was supported by all three of the state's living Republican governors (it was opposed by its two living Democratic governors) and the Texifornia Secretary of State Amethyst Jefferson-Roberts. Secretary Roberts's Office is responsible for administering the law. That office supervises the Texifornia Election Commission and exercises oversight power over the state's fifty county board of elections, insofar as it ensures they are in compliance with state law.

Supporters of the Act assert its importance in lowering the risk of voter fraud, a second-degree felony, and increasing public confidence in election results. Supporters concede that there have not been significant numbers of successfully prosecuted cases for voter fraud, however, they assert just one case of voter fraud is sufficient to warrant ensuring that no one's vote counts any more or any less than anyone else's. In explaining his decision to draft the Act, Senator Manners stated, "the Voter-Identification and Anti-Fraud Act is an important step in helping ensure that voter fraud is more difficult to commit." The committee report accompanying the Act stated that the new law is "intended to ensure it is eligible citizens who are determining the outcome of elections and to combat waning public confidence in the integrity of elections in Texifornia."[2] Delegate Rice

[1] The vote in the state senate was 32 to 18 along strict party lines. In the state house of delegates the law passed 60 to 40, with all 58 of the chamber's Republicans and just 2 of the body's Democrats voting "aye."

[2] Regarding public confidence in elections, both Senator Manners and Representative Rice have publically referred to a 2013 poll conducted by Judicial Watch, which found that 75% of Americans believed voter fraud was a problem (36% believed it was a major problem and 39% believed it was a minor problem) while just 15% did not believe it was a problem, and 10% reported having no opinion. Most studies, including those done by the Brennan Center for Justice and the U.S. Department of Justice, dismiss concerns about voter fraud as largely baseless.

affirmed Senator Manner's statement, but acknowledged in an interview with an on-line blogger, Chester Comerford, that the Act "could potentially impact minority communities, married or divorced women, the elderly, and low-income persons more heavily, although this is not certain." Evidence introduced at trial included a press interview with Bobby Bronner, President of the Texifornia Republican Party, conducted out of court, in which he said "the other side has done serious damage to the citizens of Texifornia and the rule of law by inflating voting rolls and increasing the number of ignorant and ill-prepared voters, because if you are too stupid to get an ID, then you are stupid to be allowed to vote." In court, under oath, Bronner said his comments were being misinterpreted, that he had misspoken, and that he had great respect for all people.[3]

B. Voter Fraud History

Evidence at trial indicated that voter fraud has comprised a statistical anomaly over the past decade. According to the U.S. Department of Justice, nationally, out of 197 million ballots cast in federal elections between 2000 and 2005, the federal government indicted only 40 voters for voter fraud. Of these just 26 (65%) were convicted of federal voter fraud. None of these prosecutions occurred in Texifornia. This does not mean that Texifornia has been immune from election fraud which has taken various forms over time. Between 1990 and 2010, there were 35 state prosecutions of voter fraud. Such allegations concern less than .000001% of all ballots cast in Texifornia. Texifornia has ten million citizens. Of those, 6 million are registered to vote. Between 1990 and 2010 there were eleven elections in Texifornia, in which 35 million ballots were cast. The number of ballots cast per election cycle remained fairly consistent over the 20 year period – though there was a slight uptick in presidential election year. Analysis of Texifornia voter fraud prosecutions between 1990 and 2000 finds that there were 16 election fraud prosecutions; eight of which were for voter fraud. All 8 were successful. From 2000 to 2010, there were 32 election fraud prosecutions in Texifornia; 17 of which involved voter fraud. Of these 32 prosecutions, 20 or 62.5% were successful (10 in 2004 and 10 in 2008). 16 of these 20 successful prosecutions were for voter fraud. This represents a 100% or greater increase in both total election fraud prosecutions (8 to 17) and in successful voter fraud prosecutions (8 to 16) in Texifornia since 1990-2000. In total, there was one allegation of voter fraud for every 1.4 million votes cast in Texifornia between 1990 and 2010 (25 out of 35 million). To date, it is unclear what affect, if any, voter-ID laws have had on voter fraud levels.

A recent media study of alleged state election fraud cases finds that between 2000 and 2012 state officials in the 51 states investigated 2,100 cases of alleged election fraud. Of these 2,100 cases: 650 involved allegations concerning voters, 414 involved allegations concerning campaign officials, 126 involved allegations concerning third parties, 261 involved allegations concerning election officials, and in 649 instances it was unknown who was suspected of election fraud. State officials brought charges in 650 cases (See Appendix 2). Of the 650 cases that involved voters, as opposed to election officials, campaign officials, or political parties, 4.6% resulted in convictions, 29.9% resulted in plea bargains; 8.8% resulted in charges being dismissed or acquittal, 25.3% resulted in charges being dropped or not filed, 10.5% resulted in consent orders, and in 23% of the cases the status was unknown or charges were pending.

[3] Voting rolls did increase by 50,000 voters between 2000 and 2008. Of that increase, 75% occurred in rural areas, and 60% of those new voters identified themselves as non-Caucasian. The majority of these new voters were women. Until January 2009, Texifornia had a democratic governor and legislature. That changed in 2008 election when the Republicans won control of both houses of the Texifornia General Assembly and the governorship.

Several studies conducted by Texifornia State University Professor Geronimo Gusmano, Dean of the College of Behavioral and Social Sciences, suggest that low voter confidence in election results is most closely related to a voter's perception that his or her candidate did not win, rather than being predominantly related to concerns of voter fraud.

C. State Trends Toward Voter Identification and Anti-Voter Fraud Laws

Thirty-four states require some form of identification—18 require in-person voters to present photo identification, while 16 accept forms of identification that do not include photographs of the intending voter. Nearly all of these 34 states provide one or more exceptions to the requirement that in-person voters present identification on election day. For example, in Alaska it is possible for election officials to waive the identification requirement if an election official knows the identity of the intended voter, while there are exemptions in Indiana and Tennessee for "indigent" voters who cannot afford the identification. Nine states include religious exemptions for persons with religious objections to being photographed.[4] In Wisconsin an exception is granted for victims of "domestic abuse, sexual assault or stalking," and rather than have their name and address listed on the voter identification, the intending voter receives a "confidential listing."[5] To obtain such an exemption in these states, voters must sign an affidavit and be eligible to cast provisional ballots. Two states (Texifornia and Texas) offer an exemption if the intended voter lacks an identification due to a natural disaster such as a tornado or an earthquake. Section 13 of the Act provided for a free photo ID voters who could prove that they were indigent. Establishing that one is indigent required submitting a certified copy of one's state income tax return. (See Appendix I.)

According to the National Conference of State Legislatures, state voter identification laws are classified as "strict" or "non-strict," and the designation depends on whether a voter must take additional action to protect their vote. A law is considered "non-strict" if it allows voters who do not have proper identification to cast a provisional ballot—it is then election workers who determine proper eligibility (can the election worker identify the voter or can the registrar after the fact otherwise verify the voter's identity, etc.). After eligibility is determined, the provisional ballot is counted. A law is considered "strict" if it requires voters to take further action if they want to cast a ballot if they were unable to provide the proper ID to vote.[6] A provisional ballot is

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[4] These states are: Arkansas, Indiana, Kansas, Mississippi, Texifornia, South Carolina, Tennessee, Texas, and Wisconsin. The rules pertaining to obtaining a religious exemption vary by detail but in general are fairly similar. For example, in Texas and Texifornia, voters who have a religious objection to being photographed may vote a provisional ballot which will be counted if they appear at the voter registrar's office within six days of election day (in Texas) or 72 hours of election day (in Texifornia), and sign an affidavit swearing to the religious objection. While in Mississippi, voters who have a religious objection to being photographed may vote by provisional ballot, this ballot will be counted provided that the voter signs an affidavit within five calendar days after the election.

[5] Under Wisconsin law, a "confidential listing" will be given if the intending voter: a) has an order of protection in effect; b) has an affidavit signed by a sheriff, chief of police, or district attorney verifying the victim continues to be threatened; c) the individual resides in a shelter; or d) the individual gives a statement signed by an authorized representative of a domestic abuse or sexual assault victim service provider. The name and address of the victim (intending voter) is not disclosed on the poll list, but the voter has a government issued identification card with a unique identification serial number from the municipal clerk. The identification is free of charge.

[6] Two states, Arizona and Ohio, are classified as strict, non photo ID states. There a voter is issued a provisional ballot which is counted only if the voter returns to provide proper identification within a certain number of days (in Arizona

cast, and the intending voter later provides the proper identification. Several states, including Texifornia, allow in-person voters to sign an affidavit that: a) swears they cannot produce their photo identification, but that they have such identification; or b) they are the person they claim to be. In all of these states, swearing falsely is considered a crime and the law mandates that election officials inform voters wishing to swear to such an affidavit that if found guilty of swearing falsely they are subject to fine and/or imprisonment. All states, regardless of how they validate voter identification, subject persons who seek to vote under false pretenses to perjury charges.[7]

	Photo ID	**No Photo ID**
Strict	Georgia Indiana Kansas Mississippi North Dakota Texifornia Tennessee Texas Virginia Wisconsin	Arizona Ohio
Non-Strict	Alabama Florida Hawaii Idaho Louisiana Michigan Rhode Island South Dakota	Alaska Arkansas Colorado Connecticut Delaware Kentucky Missouri Montana New Hampshire North Carolina Oklahoma South Carolina Utah Washington

D. Provisions of the Voter-Identification and Anti-Voter Fraud Law of 2010

five days for general elections and three for other elections and in Ohio ten days). Both states accept one photo ID, but voters may also produce two forms of non photo IDs as proof of identity.

[7] There are variations on the "in-person," "day of election voting." Not all voting is "in-person" voting. Early voting exists in 37 states and the District of Columbia allow in-person, voting prior to election day. Three states do mail in ballots to voters for every election-Washington, Oregon, and Colorado. Qualified voters cast ballots during a statutorily designated period prior to Election Day. No excuse or justification is required. Absentee voting occurs in all 51 states and the District of Columbia with an absentee ballot being provided to voters who so request one. Some states offer a "permanent" absentee ballot list—once added, voters need never request it again. The voter returns the ballot by mail or in-person. In 20 of these states an excuse is required (medical hardship, absence related to work, military service, etc.). While in 27 of these states and in the District of Columbia, qualified voters are allowed to vote "no excuse" absentee meaning they need not provide an excuse.

Undisputed evidence at trial revealed that the Act changed much of the election law landscape in Texifornia. Prior to its passage, citizens of Texifornia who were eligible and registered to vote within 30 days of an election were only required to present a registration certificate at the polls; this certificate was mailed to all citizens after they registered.[8] In-person voters who were eligible to vote, but did not bring their registration certificates to the polls could cast a vote by signing an affidavit and presenting a form of photo identification or a personal document such as a bank statement, utility bill, or government document with the individual's name, but not necessarily his or her photo. Doing so within six days resulted in their provisional vote being counted. This all changed with the Act which required in-person, eligible voters to present one of four forms of photo identification to cast their vote. These include: 1) an Texifornia driver license; 2) a United States Passport; 3) an Texifornia-issued photo identification card for those who do not drive; or 4) an Texifornia Concealed Carry license.[9] None of these forms of photo identification can be expired by more than 60 days, and to be valid, the identification must list the holder's correct and current name and address. Of these four forms of photo identification, the Texifornia-issued driver license is the most common form of photo identification presented at the polls. If a voter arrives at a voting center without one of the approved forms of photo identification, he or she may cast a provisional ballot and submit one of the approved methods of photo identification to the State Election Commissioner or to the Election Commissioner of his or her county within 72 hours of the election to have his or her vote counted. Alabama, Georgia, Texifornia, Tennessee, and Virginia are the only states to grant voters seeking to cast a provisional ballot fewer than five days to submit a photo-ID to election officials.

Texifornia's new requirements are among the most restrictive in the nation. Most states accept government employee and student ID cards as viable forms of photo identification—not so in Texifornia. During floor debate, Senator Manners asserted that the rationale for not accepting such ID cards was "to promote administrative efficiency by streamlining the voting process, and making it easier for poll workers to verify a precise number and form of identifications to cut down on fraud." According to the committee report on the Act, the committee heard testimony from two experts on voting who asserted the Act would restrict minority and female turnout and would be likely to benefit the Republican Party. The report included several opinion-editorials from newspapers that reached the same conclusion and urged lawmakers to reconsider their decision to refuse to accept government employee IDs or student IDs as lawful proof of voter identification.

It is stipulated that the State of Texifornia has, in the past, provided free, non-photographic voter ID cards distributed by the Secretary of State's Office.[10] To have obtained such an ID card, individuals were required to go to a County Board of Electors Office with a primary form of ID (a driver license, passport, or a birth certificate) and two secondary forms of ID (including a college

[8] All citizens who are eighteen years of age by the day of election are eligible to register to vote in Texifornia before their eighteenth birthday.

[9] According to the United State Department of State, a new United States passport costs $75 and takes 6 weeks to receive. Expedited service is available at a higher cost, $60 plus mailing costs and it is processed in 3 weeks. A new driver license in Texifornia costs $50 for 5 years. Only Massachusetts, where the cost is $75 for 5 years, and Connecticut, where the charge is $72 for 5 years, charge more per year. An Texifornia Concealed Carry License costs $50 annually and to qualify one must pay $50 to attend a 10 hour firearm safety class. An Texifornia-issued identification card for those who do not drive costs $25 for 5 years.

[10] This was repealed by the Act, and the state no longer issues free non photographic voter ID cards.

ID, government employee ID, utility bills, or bank statements). The average cost for ordering a birth certificate in Texifornia is $20, and it can take up to 4-6 weeks to process. An expedited service is available (depending on the county) for between $30 and $75. These costs are in-line with those charged in other states. Texifornia now issues a photographic non driver license identification card for those who do not drive that costs $25 for 5 years. The requirements to obtain this new state-issued ID card are the same as the requirements to obtain the free, non-photographic ID cards previously issued before the Act. A birth certificate is required for both the photographic, driver and photographic, non driver license. It takes 10 days for name changes on all state-issued IDs to be processed.

As part of its enactment policy, the Act required that the changes be publicized on the state's websites, in county clerk offices, in county election commission offices, and posted in voting locations with website links providing information on how to receive a government-issued/state approved voter photo identification, should a citizen lack one of the accepted forms of photo identification. There are no allegations to-date that any official failed to publicize the new law.

E. The 14th Superior Court District of the State of Texifornia

Trial judges in Texifornia are known as superior court judges. Texifornia elects these judges in partisan elections to six-year terms, and each judge represents one district. Elections featuring incumbents are rarely contested and it is even rarer that an incumbent is defeated. In fact, in fifty years of electing its judges, just ten Texifornia judges have failed to achieve re-election.

This case stems from a hotly contested Texifornia superior court primary election that occurred in 2012. The race included five candidates. The top two finishers would face each other in a general election. The most prominent candidates were a young district attorney, Andrea Sommerville, and the incumbent Judge Jane Williams. Sommerville and Williams are registered as a Republican and a Democrat respectively. The primary election occurred in the 15th district in Sisyphus County—a rural county whose residents, regardless of their race or religion, are largely low- income.

Evidence at trial indicated that Judge Williams is a citizen of Texifornia and that she had been elected to five separate, six-year terms as a state trial judge in Sisyphus County. Judge Williams is a devout Catholic, philanthropist, and self-made woman who worked her way through law school at night. Prior to 2012, when Judge Williams faced a challenger, she has been re-elected with an average of 72.3% of the vote.

F. Sisters of Divine Providence and the Voter Identification and Anti-Voter Fraud Law of 2010

Upon passage of the Act, Judge Williams who attends St. Andrew's Church, learned that many of the nuns at The Sisters of Divine Providence (the convent associated with St. Andrew's) would be adversely impacted by the Act's stipulation that registered and eligible in-person voters must now bring one of the four acceptable forms of photo identification. At least 75% of the nuns, who have long supported Judge Williams, entered the convent at a young age and had no need of a driver license after becoming members of the convent. While most of the nuns are registered to vote, the majority are no longer eligible to vote under the Act because of the voter identification. According

to the trial record, none of these nuns have intentions of obtaining a driver license, a United States Passport, an identification card for those who do not drive, and/or an Texifornia Concealed Carry license, due to the time and expense required and/or because of their shared religious objections to obtaining a hand gun license.

To save money and reduce fraud associated with operating multiple centers that distribute IDs, Texifornia has closed all but two centers that issue driver licenses and state photo identification cards; these two centers are located in the state capitol and another major city. Residents of Sisyphus County live as far as 200 miles from the nearest center. There are other states with similar laws and commuting distances. In fact, there are citizens in Alabama and Texas, for example, who have to drive further distances to obtain or even renew their driver license. In Mississippi, Alabama, and Georgia, centers are only open two days per week. While drivers may renew their licenses on-line, license holders must appear in-person to submit name changes and under state law, drivers must appear in-person for a new eye test and an updated photograph every ten years. These new licenses are mailed between ten and fourteen calendar days after they are requested. A number of Judge Williams's political supporters, many of whom are economically disadvantaged, live in these rural areas and have to travel extended distances to obtain an ID.

G. Alleged Injury

In January of 2012, Judge Jane Williams, a white female, 53 years of age, became engaged to be married on July 5, 2012. Judge Williams's name prior to her marriage on July 5, 2012 was Jane King. Her new name, for which she filed the legal paperwork in-person at the DMV on July 6, 2012 was Jane Williams. Because it takes ten to fourteen calendar days to obtain a new license with a name-change, Judge Williams had not received her new license by July 7, 2012.

On July 5, 2012, Judge Williams was married in a religious ceremony. After the ceremony, she signed a marriage license with her new name. It was signed by the appropriate officials and properly certified. At trial, Judge Williams stated that as she understood it, her name was now Williams. She also stated that she was an honest and deeply religious person and that in accordance with her principles her name became the same as her husband's.

On July 7, 2012, Judge Williams presented herself for the primary election with her old voter identification card that had her maiden name on it. In her deposition, she stated that she lacked the proper photo ID because of the delay in processing her request for a name change. When asked for photo identification, she produced her marriage license and she informed the poll worker that the driver license did not have her proper name on it because she had been married two days before and would be going by her husband's last name. She argued that a voter registration card had been sufficient to vote in prior elections. The voting rolls listed her name as Jane King, but she was informed by the polling workers, who looked at her marriage license, that her inability to produce the proper ID meant that she would be unable to vote.

When asked by county election officials to provide proof, Judge Williams argued that the voter identification law discriminated against women who were taking their husband's name and against women who were reverting to their maiden name after divorce. She pointed to her name on the primary ballot (listed as Jane King) and said, "that's me, you can verify that was my name

and I should be allowed to vote. Go look up my picture on the Superior Court website." Judge Williams became increasingly frustrated with poll workers at the voting poll center for not allowing her to vote by accepting her non-photo voter identification, including one worker (Wendell Davis) who admitted in a later deposition that he worked on the Sommerville campaign. Mr. Davis, began lecturing Judge Williams that she should have attended to this before the election, that the voter identification law was a reasonable regulation, and that it was her own fault that she did not have the proper ID. Mr. Davis added that she should have "early voted" in the two weeks prior to election day when her name was still Jane King. Judge Williams, responded that it was her right as an American to vote on election day, in-person. She expressed the view that she wanted to wait until election day to ensure that her ballot reflected everything she had learned about the issues and candidates on the ballot and that she did not like relying on the mail to vote. She told Mr. Davis that she did not appreciate his paternalistic attitude about how she should have voted.

As the argument began to be more heated another polling worker, Georgina Abbott, threatened to call local law enforcement if both Mr. Davis and Judge Williams did not lower their voices and act in a civilized manner. Mr. Davis reiterated that Williams did not have proper identification. At that point, Judge Williams, who knew that she would not have the correct ID to cast a provisional ballot, left for her car. Along the way, she was approached by a local university newspaper reporter, named Bradley Tater, who asked whether she had a statement. The judge, agitated over the whole affair, hollered at Mr. Tater to turn the cellphone camera off. The judge's only statement was "Texifornia was going to hell in a handbasket thanks to the voter identification law which hurts low- income voters, racial minorities, nuns, and women." The next day, the reporter uploaded the video of Judge Williams, onto Youtube along with a news story of the event. Subsequent to the primary, several local news outlets covered Judge Williams's story of failing to participate in the voting process, and Sommerville used the video in a campaign ad that served as proof that Williams had not even cast a ballot on her own behalf. Williams even became the target of several radio-talk show hosts who called Democrats "nothing but a bunch of whiners who ignore the rules when convenient."

Judge Williams and Ms. Sommerville finished first and second with Judge Williams garnering 37% and Ms. Sommerville 33% of the vote. In the general election, Ms. Sommerville was elected with 53% of the vote after the video went viral and additional monies poured in to Sommerville's campaign. Judge Williams filed this suit in United States District Court for the Central District of Texifornia, alleging that the Act arbitrarily abridged two of her rights. First, her right to engage in political speech and to vote as protected by the First Amendment, as incorporated to the states through the Due Process Clause of the Fourteenth Amendment. Second, her right to the equal protection of the law under the Fourteenth Amendment.

Texifornia contends that Judge Williams does not have standing to bring this suit because she has not been deprived of her right to vote and is under no imminent threat of having her right to vote infringed. Judge Williams argues irreparable harm because she was arbitrarily prohibited from voting on election day. Further, Williams argues she suffered additional harm because the law also prohibited her supporters from voting, including but not limited to, the aforementioned nuns, other women whose names on their photo-IDs are incorrect due to name changes associated with marriage, and other low-income residents in Sisyphus County.

Texifornia argues Judge Williams must show actual or threatened injury as a result of the challenged law and demonstrate that the Act unconstitutionally restricts her own rights, not the rights of those who are not party to lawsuit. Since Williams could have voted, but chose not to, she had no injury- in-fact.

Judge D.R. Fair of the District Court for the Central District, at the close of the Plaintiff's case in chief, granted a Defense motion to dismiss for lack of standing brought pursuant to the Federal Rules of Civil Procedure, Rule 12(b)(1). As a jurisdictional matter, the movant must present a challenge contesting the sufficiency of the pleadings, and the court must evaluate them in the light most favorable to the Plaintiff. Judge Fair ruled in favor of Texifornia and ruled against Petitioner on the issue of standing brought under Article III's case and controversy requirement.

H. Demographics and History Surrounding the Act

It is stipulated that over the past decade, the demographics in many counties have shifted, with a growth in the percentage of eligible voters who are women. Women now comprise 53% of the voters in Texifornia and 60% of those who vote in both the state and in Sisyphus County. The number of female voters within the state is projected to continue steadily increasing over the next five years. Within Texifornia politics, partisan lines are indirectly related to gender. A 2009 Gallup poll found that, regardless of race or age, more women voted for Democratic candidates than any other candidates. This holds true in Texifornia, with most women supporting female Democratic candidates over others.

Most rural counties in Texifornia are also comprised of a majority of low-income people. In fact, in these rural counties, the average number of people living below the poverty line is 58%. These rural counties have smaller populations than the majority of urban counties.

In 2012, more than 300,000 eligible voters in Texifornia did not have a driver license. This comprises roughly 5% of those registered to vote. Such is on par with the national average. Of these, the majority were women. Only 66% of women in Texifornia have their correct name listed on their ID. These statistics are even lower among racial minorities and the low-income residents. It is unclear why so many women in Texifornia have IDs that do not list their correct name. Approximately 70% of all women in Texifornia a well as in the United States change their name when married, 10% hyphenate their maiden name and new name, and 20% keep their maiden name. In addition, many women also choose to change their name after becoming divorced.

Nationally, women have a higher voter turnout than men in elections. This gap widens when single men and women voter statistics are compared. In 2012, there was a 12.5% drop in the number of female voters who cast ballots in the Texifornia 2012 general election. It is unclear if this was related to or caused by the enactment and enforcement of the Act.

Petitioner, Jane Williams, is a citizen of Texifornia and a judge. Judge Williams argues the law was enacted with a discriminatory intent and has a discriminatory impact; she contended the photo ID requirements of the Act placed a substantial burden on the fundamental right to vote for women, and especially for women of color. She states that not being able to vote on primary election day was injury alone, in addition to her loss on election day, to give her standing. The District Court

found in favor of the State of Texifornia and ruled against her claims. Petitioner appeals this ruling. We affirm. Owing to the time sensitive nature regarding the legal issues in this case because of the upcoming 2016 Presidential elections, we resolve the questions certified before the court and reach the merits of the case presented. The two sides have stipulated to these facts.

Chief Circuit Judge BONNER delivered the majority opinion.

A. Standing

The "case and controversy" clause of Article III of the U.S. Constitution requires that cases have at their core, an identifiable controversy that may be remedied. U.S. CONST. art. III, § 2, cl. 1. We review questions of standing *de novo*. *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 635 (5th Cir. 2012). Parties seeking access to federal court bear the burden of establishing their standing. See *Id.* Thus, the burden of establishing standing is on Petitioner. Petitioner has not met this burden. This case is governed by the tripartite test set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The parties have stipulated that only the first two prongs are under contention. Accordingly, we turn our attention now to the initial inquiry of this test, which involves whether or not there exists an "injury in fact," which is a "concrete and particularized . . . invasion of a legally protected interest." *Id*. at 560.

"A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l. Union*, 442 U.S. 289, 298 (1979) (internal citation omitted). Petitioner has not shown she has the "personal stake in the outcome" necessary to have standing in this case. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977). Such a personal stake is necessary. While voters lacking the means to obtain appropriate ID may have standing to bring suit, Petitioner does not allege that she could not have voted and has no explanation as to why she did not vote in early elections while her photo ID was still valid. She clearly knew her marriage was pending. This is a matter of when she could vote, not if she could vote.

The Act's requirements were widely publicized in advance of the elections, and Judge Williams, as an elected official, should have been especially aware of them. Petitioner does not claim that she was unaware of the Act's requirements or that she had insufficient notice to apply for a new, updated ID in time for the elections. Petitioner may not bring suit on behalf of another individual.

1. Generalized and Widely-Shared Injuries

If one were to find that injury occurred it would fall under a generalized injury shared by the public at large, not the particularized injury required to establish standing. At the outset, we must be mindful that "[t]he constitutional role of the courts . . . is to decide concrete cases--not to serve as a convenient forum for policy debates." *Massachusetts v. EPA*, 549 U.S. 497, 547 (2007) (internal citation omitted). Thus, **"**the threshold question [is] whether [Petitioner has] alleged a case or controversy within the meaning of Art. III of the Constitution or only abstract questions not currently justiciable by a federal court." *Babbitt v. United Farm Workers Nat'l. Union*, 442 U.S. 289, 297 (1979) There is no "precise test" for judging what is abstract or generalized and what is

a real and thus justiciable "case or controversy." *Id. at 297.* The Court instructs us that "[t]he basic inquiry is whether the "conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Id. at 298* (internal citations omitted). In keeping with this treatment of cases of "generalized" claims or grievances, we find this issue—which involves voter requirements affecting all voters in Texifornia—appropriately left for legislators to consider. Petitioner contends that this claim constitutes a particularized injury that is also widely shared. But the dissent's reliance on *FEC v. Akins*, 524 U.S. 11 (1998), to find standing under that definition is misplaced. *Lujan* still dictates that we rely "upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." 504 U.S. at 560. We find this issue more appropriate for the legislative branch, in keeping with precedent.

2. Causation

The second prong of the *Lujan* test requires that if an injury has been found, "there must be a causal connection between the injury and the conduct complained of." *Id*. at 560. Petitioner was not permitted to vote during a primary election, but this outcome is related to her own actions and is not the consequence of the Voter ID Law. Although the facts stipulate that the new voter ID requirements were well publicized by the state, Petitioner chose not to update her ID in advance of the elections. Petitioner does not allege this resulted from a lack of understanding or education regarding the Act or a lack of ability. The facts clearly indicate she could have voted had she availed herself of the early voting when there was no question of her name and identification. She should be denied standing, since she had the opportunity to vote.

B. Voting Rights and the First Amendment

Petitioner raises a trio of novel questions. First, and more generally, whether voting is a form of speech. Put another way, whether there is a First Amendment right to vote. If there is such a right, then the second question would have us decide whether the Act violates the First Amendment. Finally, we are asked whether the Act includes a sex-classification in violation of the Fourteenth Amendment. We reject both claims.

1. First Amendment Voting Rights

Petitioner asserts the Act abridges a First Amendment right. While the right to vote is constitutionally protected elsewhere, we do not find the existence of a First Amendment guarantee of the franchise. Precedent finds that the impetus to prove the First Amendment violation, belongs to the "party invoking the First Amendment's protection." *Voting for Am., Inc. v Steen*, 732 F.3d 382, 388 (5th Cir. 2013) (internal citation omitted). Petitioner has failed to demonstrate that the action of casting a ballot is tantamount to political speech and consequently does not meet this burden. The First Amendment would protect Petitioner's right to speak to others about her political views. However, voting is done privately, anonymously, and does not carry with it First Amendment rights. Petitioner failed to plead, prove, and preserve any arguments under the Voting Rights Act, where this suit arguably belongs. It is too late for her to do so now.

2. Voting is Not Expressive Conduct

Although the Supreme Court has held that some forms of conduct could warrant First Amendment protection, such conduct must be "inherently expressive" and possess certain "communicative elements." *Id*. at 388. Its jurisprudence requires that conduct demonstrate an "intent to convey a particular message" and a strong likelihood "that the message would be understood by those who viewed it" for First Amendment protection to arise. *Id.* (internal citation omitted). An individual's intent to express an idea is not sufficient to trigger First Amendment strict scrutiny.

The dissent claims that casting a vote for legislation or a candidate implies agreement with the associated values and political beliefs. We disagree. While voters may intend to communicate their political views and personal beliefs, it is impossible to effectively do so in such a limited forum and in such a way that those reading the votes can divine what any particular voter intended by casting his or her ballot a certain way. The franchise, if it were speech, would be a most limited form. The options are predetermined: "yea," "nay," or writing a name on a ballot. Voters do not have the opportunity to explain why they chose to vote for or against a proposition or what portions of a candidate's philosophy they do or do not agree with. None of this is effectively communicated to those who view the results of the poll. The primary purpose of voting is not to create a forum for political speech, but to elect governing officials and enact legislation. Voting is a procedural function that is not "inherently expressive," regardless of a voter's intent to communicate. *Id.* As the Court stated in *Burdick v. Takushi,* "[a]ttributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." 504 U.S. 428, 438 (1992) (internal citation omitted). Furthermore, Petitioner does not allege she was unable to communicate a particular political ideal or a personal belief; her primary concern was the outcome of her campaign, not any expected ability to convey a message via the ballot.

The dissent urges application the nonpublic forum analysis of *Minn. Majority v. Mansky*, 708 F.3d 1051 (8th Cir. 2013) to the facts at hand. It seizes on this case because it involved political speech at a public polling place. The standard from *Mansky* requires that regulations be content/viewpoint neutral and reasonable. While we disagree with the dissent with regard to whether Petitioner has a First Amendment claim, we agree that this would be the correct standard and that polling places are nonpublic forums. We find that the Act satisfies the nonpublic forum standard.

3. Burdick Balancing Test

There is no precedent explicitly disavowing the franchise as expression protected by the First Amendment. But our jurisprudence has, by its repeated use of lower standards of constitutional review in voting rights cases and deliberate avoidance of First Amendment analysis, spoken clearly. For example, in *Burdick*, a recent landmark voting rights decision, the Court refused to apply the strict scrutiny standard to First Amendment speech challenges and instead adopted a balancing test that weighs the importance of the state's interests against the "character and magnitude of the asserted injury" to voting rights. 504 U.S. at 434 (internal citation omitted). We apply this standard in our analysis of the Fourteenth Amendment claim.

4. Fourteenth Amendment Claim

Crawford v. Marion County Election Board, 553 U.S. 181 (2008) is the ruling precedent with respect to voter ID laws. There the U.S. Supreme Court upheld an Indiana voter ID law, fairly

similar to the Act here, applying the *Burdick* test. The mere fact that a voter ID law imposes costs upon citizens does not render it invalid in the face of compelling state interests in assuring integrity at the ballot and voter confidence in elections. *See Id.* at 202. It is true that the Indiana law in *Crawford* permitted more forms of ID than the Texifornia law and offered free voter IDs, however, our application of *Crawford*'s central holding remains unaltered. The simple fact is that obtaining a low-cost photo ID is not a substantial burden beyond those imposed by the voting process, even if nominal amounts of money and time are required. Nor is it unreasonable for the state to expect that persons who wish to vote to meet reasonable deadlines.

While noting some difficulties accompanying the Act's requirements that may potentially impact women in different ways than men, Petitioner has failed to demonstrate that any particular voter cannot obtain the requisite photo ID under the Act. Petitioner herself could have voted by early ballot when her ID was still accurate or, in light of the advertised ID requirements, could have taken steps to procure an updated ID sufficiently in advance of the election. She offers no claim she was unable to do so or explanation as to why she did not. This challenge bears a striking resemblance to *Common Cause/Georgia v. Billups*, where the 11th Circuit rejected a voter-ID law challenge because plaintiffs "failed to identify a single individual who would be unable to vote because of the Georgia statute." 554 F.3d 1340, 1354 (11th Cir. 2009).

5. Discriminatory Animus

Petitioner asserts that the challenged provisions of the Act represent sex-based classifications and as such the state must satisfy intermediate scrutiny. In its application of this standard, the Petitioner would have us strike down the Act because it rests on gender-based animus and as such constitutes invidious discrimination. We disagree and apply rational basis, which the state passes.

The Texifornia Act protects against fraud; it does not draw distinctions based upon gender. While the dissent relies heavily on *Kirchberg v. Feenstra, 450 U.S. 455 (1981),* it fails to acknowledge the vital distinction between that case and the one at bar. *Kirchberg* dealt with a law that explicitly created categories based on gender. The Act does not do that and was not crafted with the intent of distinguishing between men and women or situating them differently.

Assuming arguendo that the intermediate standard of scrutiny applies to this case, Petitioner's case also fails. In *Califano v. Webster,* 430 U.S. 313 (1977) the Court held that a statute, which intentionally treated men and women differently, was constitutional in light of the government interest the statute professed and achieved. It is well established that gender classifications, to withstand equal protection scrutiny, "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 317 (Internal citation omitted).

We first analyze the statutory or administrative scheme to ascertain if its objective is important and permissible. After determining the reasons for the classification, we must do a balancing test to determine how well the classification serves the government's stated end and whether a less discriminatory mechanism might serve that government's purpose.

The facts show that Texifornia has articulated several important interests. Among these are administrative efficiency, voter confidence, and cutting down on fraud. We will defer to election experts as to how to best run elections in an efficient fashion. We observe that while the number of prosecuted cases of voter fraud in Texifornia is not large, there has been a 100% increase in fraud, a staggering percentage when compared to other states. The facts show that Texifornia has found that this issue concerns a great many voters. What is more, the Supreme Court has acknowledged the legitimate state interests in preventing voter fraud and safeguarding voter confidence. *See Crawford.* Texifornia need not show "specific, local evidence of fraud in order to justify preventative measures." *Voting for Am.,* 732 F.3d at 394. We find that Texifornia has an important government interest, eliminating voter fraud, at its core, and that the law substantially serves that interest.

Subsequent to *Califano,* the Court seemed to add to its Intermediate Scrutiny analysis the need for the state to provide an "exceedingly persuasive justification." *See Kirchberg,* 450 U.S. at 461 (internal citations omitted). It is not clear that this is the new standard and, if it is, that it applies here. The Act has only a marginal impact and only on married women who have chosen voluntarily to take their husband's name. Thus, applicability issues aside, Texifornia has interests and has demonstrated a need for the Act that constitute "exceedingly persuasive justifications." *Id.*

We find that Petitioner has not shown direct evidence that any legislator supporting the Act did so with discriminatory intent. Accordingly, the circumstantial evidence provided must be treated with caution. Under the traditional canons of statutory interpretation, judges are not to second guess a legislature's stated purpose, absent clear and compelling evidence to the contrary. For example, in *Voting for Am.*, the Fifth Circuit recognized:

> Our task as a federal court is, to the extent possible, to construe the provisions to avoid a constitutional conflict. . . . The determination of whether a democratically enacted statute is constitutional on its face requires that "every reasonable construction must be resorted to [ ] in order to save a statute from unconstitutionality." 732 F.3d at 387 (internal citations omitted).

A classification is not automatically invalid if it has a disproportionate impact on women as a class of persons. (See *Geduldig v. Aiello*, 417 U. S. 484, 497, n. 20 (1974) rejecting *ipso facto* conclusions that because classifications had an impact on women that the classification was based on "gender as such.") In *Geduldig,* the classification related to women receiving pregnancy disability benefits, and while only women can become pregnant, that fact alone was not determinative. "The program divides potential recipients into two groups—pregnant woman and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes." *Id.* at 496 n.20. Here, the Act divides persons who change their name from those who do not just as it divides those who have the required ID from those who do not. The Act may impact one gender more than the other but that fact alone does not render it unconstitutional.

Name changing is a personal decision. In opposite sex marriages, it is traditionally the woman who changes her name. This is not a rule of law, as not all women change their names. Recent studies conducted by Google Consumer and the New York Times indicate women taking their

husband's last name after marriage is decreasing.[11] A 2013 *Facebook/Daily Beast* survey found that of 14 million married females (ages 20 to 79 and currently active on *Facebook* in the US), 65% in their 20s and 30s, 68% in their 40s, 75% in their 50s, and 90% over 60 abandoned their maiden name.[12] As in *Geduldig*, the classification of a woman changing her name after marriage will not include large numbers of women who do not, and will also include men who have chosen to hyphenate their names along with their wives in symbolic choice. All the Act does is to require, like any other change in legal status, the proper paperwork be filed no matter the gender of the intending voter. Texifornia is *not* one of the nine states that allow men entering opposite sex marriage to change their name by simply paying for a marriage license (which costs $50). It is more difficult and it is five times more expensive for men to adopt their wife's name.

The evidence demonstrates that the legislature enacted the Act to deter and detect voter fraud, and to preserve voter confidence in the integrity of elections. A law does not violate the Equal Protection Clause by virtue of the fact that it affects one group more than others. See *Arlington Heights* 429 U.S. at 266 (1977). Put simply, while there are times when a pattern is so "stark" that no conclusion other than an intent to discriminate is plausible, "such cases are rare." *Id.* Absent such a "stark" pattern, "impact alone is not determinative." *Id.* We find not intent on the part of Texifornia to discriminate against anyone least of all the Petitioner.

It is not sufficient for Petitioner to identify a statistical disparity. Petitioner must demonstrate that the challenged policy caused the alleged disparity. Our colleague mistakenly links the alleged impacts to the Act, rather than to social and historical conditions in the past and present.

Crawford determined that inconvenience in obtaining a photo ID does not represent a significant burden beyond that imposed by the voting process. *See Crawford*, 553 U.S. at 198. Although there is a significant percentage of women voters in Texifornia whose correct names are not listed on their IDs, there is no demonstration that this is a result of inability to obtain a corrected ID rather than choice not to. This court affirms the District Court's decision. The Act stands.

Judge DEBRACCIO, concurring and dissenting in part.

The majority has erred in its decision that Petitioner failed to prove standing. Further the Act is unconstitutional under the First and Fourteenth Amendments.

I. Standing

A. Injury in Fact

The burden to prove injury is light because of the recognition that the party alleging harm has suffered an injury that is shared by all members of the public. *See Common Cause/Georgia v. Billups,* 554 F.3d 1340 (11th Circuit 2009). The Supreme Court has rejected the argument that

[11] These studies found that prior to 1970, 14% of women kept their maiden. In the 1970s, 17% kept their maiden name. In the 1980s, 14% kept their maiden name. In the 1990s, 18% kept their maiden name. In the 2000s, 19% kept their maiden name. That figure has risen to 22% in current 2010 decade.

[12] The statistics are based on Facebook comparisons of relationship status as "married" and partner's name as the same or hyphenated. Whether couples actually changed their names legally was not verified.

injury must be "significant." A small injury, "an identifiable trifle" is sufficient to confer standing. *Id*. The Eleventh Circuit has recognized in a voter ID case that if a person had "possessed an acceptable form of photo identification, they would still have standing to challenge the statute that required them to produce photo identification to cast an in-person ballot. A plaintiff need not have the franchise wholly denied to suffer injury." *Id.* at 1351. Requiring a registered voter either to produce photo identification to vote in-person or to cast an absentee or provisional ballot is an injury sufficient for standing." Id. at 1352.

The majority, relying almost exclusively on *Lujan*, argues that Petitioner cannot show an injury in fact that is "concrete and particularized." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). It overlooks a vital distinction between the two cases. In *Lujan*, the environmentalists were not members of the ecosystems affected by the challenged legislation and were arguing for standing based on a global ecosystem nexus, which the Court rejected. By contrast, petitioner is a member of the affected group of Texifornia citizens—eligible, registered, in-person voters—who have had their access to the ballot restricted. Petitioner was denied the opportunity to exercise her right to suffrage, not because she was disqualified under the United States Constitution or the Texifornia Constitution, but because she did not present one of the required forms of photo ID. Unnecessary barriers erected around the ballot are injurious in and of themselves.

Judge Williams was denied her right to vote on election day. No law or constitutional right can be time shifted. She had the right to vote but was denied it on the day scheduled for elections. There is enough injury to Williams to warrant her standing. Moreover, a number of her supporters were denied access to the voting booth. This may have cost her the election, thus giving her standing.

The Fifth Circuit has held that "discrimination can constitute an injury because it positions similar parties unequally before the law; no further showing of suffering based on that unequal positioning is required for purposes of standing." *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 636 (5th Cir. 2012) (internal citation omitted). Petitioner is positioned differently from other registered and eligible voters because she did not have a photo ID. Had she voted early or by absentee ballot, the requirement of a photo ID would not have obstructed her access to the ballot.

Increased probability of a future injury is also sufficient to confer standing. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 525 n.23 (2007) ("[E]ven a small probability of injury is sufficient to create a case or controversy") (internal citation omitted); *Babbitt v. United Farm Workers Nat'l. Union*, 442 U.S. 289, 298 (1979) ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.") (internal citation omitted). As a member of a rural community lacking a center to issue driver licenses or voter IDs, it is highly probable that others may find themselves without access to an approved ID. The limited seventy-two hour window a voter has to procure updated or replaced ID—should it be outdated, lost, or stolen—may prevent even an eligible voter who cast a provisional ballot from being able to obtain and submit an ID in time for it to be counted.

B. Generalized and Widely-Shared Injuries

Petitioner has not suffered an injury that can be considered common to members of the general public as citizens. *See Lujan*, 504 U.S. at 575 (internal citation omitted). Injuries shared by many voters have still been held as grounds for an individual to have standing in a claim, provided that an individual experience the injury in a particular way. "Such an interest, where sufficiently concrete, may count as an 'injury in fact.' This conclusion seems particularly obvious . . . where large numbers of voters suffer interference with voting rights conferred by law." *FEC v. Akins*, 524 U.S. 11, 24 (1998).

Massachusetts v. EPA, provides a strong example of this principle in practice. In that case, the state alleged a particularized injury related to global warming: Massachusetts claimed it was losing shoreline. The Court unanimously recognized that the economic cost of remedying this provided clear injury and standing to the state; the plaintiff experienced a particularized harm, even though global warming might reasonably be said to affect the entire planet. *See Massachusetts,* 549 U.S. at 521–26. In keeping with this precedent, Petitioner experienced a particularized injury when denied the right to vote. That she is not alone in her injury does not deprive her of standing. "To deny standing to persons who are in fact injured simply because many others are also injured would mean that the most injurious and widespread government actions could be questioned by nobody." *Id.* at 526 n.24 (internal citation omitted).

C. Causation

The injuries to Petitioner were a direct result of the Act. Petitioner was registered and eligible to vote but was denied for not showing a specific form of photo ID and was not offered a provisional ballot. Under *Lujan*, "standing depends considerably upon whether the plaintiff is [herself] an object of the action (or forgone action) at issue. If [she] is, there is ordinarily little question that the action or inaction has caused [her] injury." 504 U.S. at 561–62. Since Petitioner was ultimately denied her right to vote, she has standing.

II. Voting Rights

A. Burden on Voting Rights

I turn now to the Fourteenth Amendment claim. The Act assumes that the ability to cut down on the miniscule number of cases of voter fraud each year justifies the burden placed on thousands of women because they chose to change their identity. It is stipulated that there has been a statistically insignificant number of prosecuted voter fraud cases over the past years. Furthermore, most voter fraud does not occur through in-person voting: the only voting method targeted by the Act's restrictive measures. Because there is no great need for these measures and because they are not substantially drawn to achieve an important state interest, the Act is invalid. I would reverse.

B. Equal Protection Violation

Americans believe in liberal access to ballots for candidates and causes. [13] Thus, procedures that erect barriers, formal and otherwise, to voting are presumed to be unconstitutional. These can include a flat-out statement that a class of persons cannot vote, as well as exhaustive lists of

[13] *See* the persuasive opinion of *Applewhite v. Commonwealth*, No. 330 M.D. 2012 (Pa. Commw. Ct. Jan. 17, 2014) (holding Pennsylvania's voter ID law violated both state constitutional and statutory law).

requirements intended to string intended voters along until they run out of time or tire of the process and remain on the sidelines. To my mind, a state runs afoul of this tradition even if its policies and practices do not completely foreclose a voter's ability to register or cast a ballot, but instead create a scheme that is designed to separate voters and would-be-voters based upon factors unrelated to voting competency and at times based on who grows exhausted by the process.

Women overwhelmingly elect to change their names after marriage or due to divorce. The need to update IDs occurs more often for female voters. The Act, with its rigorous requirements and limited time frame to obtain and produce a corrected ID afterward, as in the case of provisional ballots, arbitrarily limits the franchise for women. Let us not forget that as recently as the 1970s some state laws required a woman to use her husband's name to vote, to conduct business, banking, and/or to get a passport. The role of women in society has changed, and the majority needs to realize it. The changes that started two generations ago continue – to paraphrase the old Bob Dylan lyric -- it is for this court to be cognizant of these changes and to "lend a hand." Alas, the majority has chosen to "stand" in the way and to "block" these changes.

The Act unconstitutionally distinguishes between men and women by erecting barriers that are statistically much more burdensome on a female voters than male voters. It draws distinctions between women by burdening the voting access of those who wish to change their name. A law may constitute invidious discrimination, even if the state's rationale for it is reasonable, so long as its restrictions are "irrelevant to the voter's qualifications." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189 (2008). Texifornia makes distinctions between registered, eligible voters based on the method of voting and whether or not they chose to change their name. This distinction is unrelated to an individual's qualifications to vote and thus is irrational. Had Petitioner voted by absentee ballot, which does not require a photo ID, or had she not wanted to change her name, she would have been allowed to vote. The fact that Petitioner could potentially have taken steps to avoid the impact of the Act does not mean that it does not have a discriminatory affect. The Court explicitly rejected a similar argument made in *Kirchberg v. Feenstra*, 450 U.S. 455, 460-61 (1981) where Kirchberg claimed Feenstra was the "architect of her own predicament." The Court further held that "'absence of an insurmountable barrier' will not redeem an otherwise unconstitutional discriminatory law." Id. at 461 (internal citation omitted).

In *Califano v. Webster,* 430 U.S. 313 (1977), the Court noted that there was nothing wrong with refusing to accept a state's interests *prima facie* without determining if they are genuine. *Califano* instructs us that is it insufficient for courts to simply accept the stated purpose of the statute in question as proof of its intention or impact. The effect of legislation and the motives for passing can and should be examined, and must be found satisfactory. To properly perform this we are to ask whether the state offered an "exceedingly persuasive justification" when arguing that its means substantially advance an important state interest. *See Kirchberg,* 450 U.S. at 461 (internal citations omitted). The majority fails to heed this precedent and does not sufficiently scrutinize the Act.

The state claims that the law promotes administrative efficiency. This may be true and that can be a weighty interest. But the Court has consistently ruled that "[g]ender-based classifications may not be based on administrative convenience." *Michael M. v. Superior Court, Sonoma City,* 450

U.S. 464, 476, 478 (1978) (Stewart, J., Concurring). More is needed and under proper analysis, becomes readily apparent that such is lacking here. Despite its purported goal, the Act is a thinly veiled attempt to suppress a growing number of female votes and maintain partisan advantage. The Texifornia Republican Party leader publicly disparaged voters who lacked an ID meeting the Act's requirements, including the 66% of women in Texifornia whose names were listed incorrectly on their IDs. The Act's sponsors have noted its likely disparate impact on women and have offered no reason for measures, like the halved amount of time to present an ID after casting a provisional ballot, that disproportionally limit female access to the ballot. Nor is the standard for justifying government interests in gender cases satisfied by Texifornia's stated goal of preventing fraud when balanced against the thousands of women burdened and prevented from exercising their right to suffrage. With an overwhelming majority of women choosing to change their names after marriage or due to divorce, the stringent requirements for updated IDs and to obtain a provisional ballot under the Act, and the limited number of DMVs in Texifornia, the state has erected a series of unconstitutional barriers to the ballot for some women.

Though preventing voter fraud may be a state interest, Texifornia may not insulate gender-discrimination laws merely by invoking that interest.

III. Discussion

A. Voting as a First Amendment Right

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (internal citation omitted). The First Amendment and the right to vote are linked throughout our jurisprudence, with the Supreme Court acknowledging repeatedly that the vote gives the populace a "voice" in the political process. Although not explicitly granting the right, the First Amendment is an implicit assurance of the franchise through the freedom of expression provision. The same assurance can be found among many state laws and constitutions.

B. Voting as Political Expression

I refuse to classify the vote as a mere procedural process undergirding a governmental structure. But it is the assignment of political expression that grants the franchise its unique place within democracy. The voice of the people communicates certain messages that impact the decision-making process of politicians at all levels. If voting were purely a formulaic method of determining the next governmental leader, election outcomes would have little sway on seated politicians and their legislative behavior. While the vote may not communicate a message as particular as an individual voter's internal motivations for his or her decision, the standard for expressive conduct does not require that an action be able to convey any and all ideas. The vote is certainly capable of expressing whether or not an individual agrees with a politician and his or her respective ideals. There is little doubt that this communication is also understood by governing officials, who respond to election results through their own voting patterns. The franchise clearly meets the standard for protected expression.

C. The Balancing Test and Strict Scrutiny

In my view, the application of strict scrutiny to these facts is warranted. Primarily, because I find political speech to be implicated by these facts. Even if political speech was not implicated, strict

scrutiny is the correct test. See *Voting for Am.* The majority is correct that *Burdick* utilized the balancing of the interests test, which is a lower standard of scrutiny. *Burdick* revolved around the content of the ballot and the right of a voter to vote for whom he wanted. Here, the claim is related to an individual voter's direct access to the ballot. Such goes beyond ballot content or casting a ballot for a specific candidate, rather, this is about being able to cast an in-person vote at the polls. I find it logical to apply higher scrutiny to cases involving individual access to the franchise, while using a lower scrutiny in cases dealing with rights of candidates and ballot content. Thus, I would apply strict scrutiny. The Act is not narrowly tailored to a compelling interest. Thus, it fails.

I admit that my views may run contrary to *Crawford v. Marion County Election Board,* 553 U.S. 181 (2008). There the Court applied *Burdick* to a right of access case. *Ibid,* at 190 n.8. However, it did not foreclose the possibility of implementing a higher standard of scrutiny, should the burden be greater. It also indicated that, even under the balancing test, some burdens on the right to vote may be found unconstitutional under more exacting levels of scrutiny. While it is unfortunate that the *Crawford* Court did not see fit to grant the fundamental right to vote the higher standard of scrutiny typically afforded to First Amendment cases, this is by no means a disavowal of First Amendment protection for the right to vote. The time for that protection has arrived.

D. Nonpublic Forum

I agree with the majority to the extent that voting polls are nonpublic forums and I concur with the conclusion that *Minn. Majority v. Mansky,* 708 F.3d 1051 (8th Cir. 2013) identifies the correct test. Where I differ is in the conclusion that the court draws from its application. I find that the Act may be content/viewpoint neutral but I do not accept that it is reasonable. Any law that forces a citizen to miss out on casting an in-person vote, whether it be because of unreasonable hurdles, i.e., the 72 hours to cast a provisional ballot, conjoined with the time it takes to get a name change and the requirement that such be done in-person, are unreasonable. So are the costs associated with the Act, the policy of not accepting student or public employee IDs, and the limits related to casting an absentee ballot, create an unreasonable regulatory scheme that must be repealed. I would apply nonpublic analysis and find the Act unconstitutionally violates the First Amendment.

Because I judge the Act to violate the First and Fourteenth Amendments, I respectfully dissent.

Appendix I

The Texifornia Voter-Identification and Anti-Voter Fraud Act

The State of Texifornia does hereby make the following findings:

FINDING: Voter fraud is a serious issue that strikes at the very heart of our great democracy. A voter identification law that requires that eligible voters present a valid photographic identification will reduce voter fraud and will raise voter confidence in the American political electoral system.

The State of Texifornia does hereby enact the following public act:

Section 1: DEFINITIONS. In this act the following terms are employed:

(A) Valid Photo Identification Card: A publicly issued document that bears the photograph, current name, and current address of the person to whom it was issued and has an expiration date which has not been exceeded.
(B) Eligible Voter: A citizen of the United States and the State of Texifornia eligible to vote under federal and state law.
(C) Official public election officials: Elected or appointed state or county personnel responsible under state or county law for organizing and supervising public elections (both primary and general).
(D) Indigent means to be below the most current annual national poverty threshold as issued by the United States Census Bureau.

Section 2: Prior to casting a ballot in-person in any public election held in the State of Texifornia, all eligible voters must present to state election officials a valid photo identification card bearing the photograph and current name and address of the person to whom it was issued and containing an expiration date. No voter shall be required to produce more than one valid photo identification card bearing the voter's photograph as well as his or her legal name. No person seeking to register to vote will be required to provide photo identification. Valid photo identification cards shall be limited to:

(i) an Texifornia driver license;
(ii) a United States Passport;
(iii) an Texifornia-issued identification card for those who do not drive; and/or
(iv) an Texifornia Concealed Carry license.

Section 3: Official public election officials shall ask for valid photo identification and shall inspect identifications presented to them to ensure that they are valid under this law. Official public election officials will not seize any identification cards except if directed by a law enforcement official who is present.

Section 4: If an intended voter lacks a valid photo identification card, he or she may cast a provisional ballot. For this ballot to be counted he or she must within 72 hours personally submit a valid photo identification to the State Election Commissioner or to the Election Commissioner of his or her County within 72 hours. At the time of casting a provisional ballot, the voter must sign an affidavit that either swears that he/she cannot produce his/her valid photo identification but that he/she has such identification, or that he/she is the person he/she claims to be. Public

election officials shall inform voters wising to swear to the aforementioned affidavit that if found guilty of swearing falsely they are subject to fine and/or imprisonment.

Section 5: Texifornia will no longer issue or accept free non-photographic voter identification cards.

Section 6: A birth certificate will be required for an Texifornia driver license or an Texifornia- issued photographic non driver license.

Section 7: Texifornia will establish the cost of the identifications listed in Section 2 of this Act with the exception of a United States Passport.

Section 8: The Secretary of State for the State of Texifornia will ensure that the provisions mandated by this Act will be publicized on the state's websites, in county clerk's offices, in county election commission offices, and posted in voting locations with website links providing information on how to receive a government-issued/state approved valid voter photo identification. There will also be links to websites of the Government of the United States regarding how to lawfully obtain a passport.

Section 9: Violating this Act is felony. Any person violating or seeking to violate any section of this Act or seeking to assist or assisting any person to violate any section of this Act shall be subject to a fine not to exceed $1,000.00 OR imprisonment not to exceed 90 days in a state correctional institution to be designated by the State Secretary of Corrections. Any person convicted under this law on three or more occasions shall be subject to fine AND/OR imprisonment of no more than $5,000 AND not less than $2,500 AND/OR imprisonment not to exceed 180 days in a state correctional institution to be designated by the State Secretary of Corrections.

Section 10: The provisions of this Act do not apply to absentee ballots submitted by mail by active members of the United States armed forces or to ballots cast by persons living in a state licensed skilled-needs facility such as a nursing home. All other absentee ballots must be accompanied by a copy of the voter's valid photo identification document.

Section 11: All voters may vote in "early election" within 14-30 days prior to the primary or election provided they meet the criteria above.

Section 12: Voters who have a religious objection to being photographed or do not have photo identification due a natural disaster, may cast a provisional ballot and sign an affidavit in the voter registrar's office within 72 hours of the election in order to ensure their vote is counted.

Section 13: Each county shall issue a photographic voter identification card, free of charge, to all persons who qualify as indigent. To qualify as indigent a voter must submit a certified copy of his/her state tax income tax returns and swear an oath that he/she does not have an acceptable form of identification; and that he/she is eligible to vote in Texifornia.

Section 14: This Act will take effect January 1, 2012.

Appendix II:

State Election Fraud Prosecutions and Voter Fraud Prosecutions, 2000-2012

State	Voter Fraud Prosecutions	Total Election Fraud Prosecutions	Strict Photo ID Laws
AL	5	16	YES
AK	1	9	NO
AR	1	6	NO
AZ	6	7	NO
CA	10	56	NO
CO	15	22	NO
CT	84	196	NO
DE	1	1	NO
FL	17	39	NO
GA	80	301	NO
HI	0	0	NO
IA	10	49	NO
ID	8	12	NO
IL	5	23	NO
IN	1	62	YES
KS	97	216	YES
KY	4	110	NO
LA	0	4	NO
MA	0	1	NO
MD	0	2	NO
ME	3	3	NO
MI	4	17	NO
MN	10	10	NO
MO	2	17	NO
MS	9	74	NO
MT	1	2	NO
NB	1	2	NO
NV	0	2	NO
NH	20	20	YES
NJ	1	44	NO
NM	1	10	NO
NY	1	17	NO
NC	15	22	NO
ND	3	3	NO
OH	13	77	NO
OK	0	1	NO

State	Voter Fraud Prosecutions	Total Election Fraud Prosecutions	Strict Photo ID Laws
OR	31	33	NO
PA	5	23	YES
RI	5	5	NO
SC	0	2	YES
SD	0	1	NO
TF	17	32	YES
TN	10	14	YES
TX	17	32	YES
UT	0	51	NO
VA	32	35	YES
VT	0	0	NO
WA	35	270	NO
WI	45	57	YES
WV	0	16	NO
WY	4	4	NO
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Issue ONE Cases Cited:

- *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)* http://caselaw.findlaw.com/us-supreme-court/429/252.html
- *Babbitt v. United Farm Workers Nat'l. Union*, 442 U.S. 289 (1979) http://caselaw.findlaw.com/us- supreme-court/442/289.html
- *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) http://caselaw.findlaw.com/us-supreme-court/504/555.html
- *FEC v. Akins*, 524 U.S. 11 (1998) http://caselaw.findlaw.com/us-supreme-court/524/11.html
- *Massachusetts v. EPA,* 549 U.S. 497 (2007) http://www.supremecourt.gov/opinions/boundvolumes/549bv.pdf
- *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009)*
- *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630 (5th Cir. 2012) http://www.nyls.edu/documents/media_center/the_media_center_library_u_s_cases/time-warner-cable-inc-v-hudson.pdf

Issue TWO Cases Cited:

- *Geduldig v. Aiello*, 417 U. S. 484 (1974) https://supreme.justia.com/cases/federal/us/417/484/case.html
- *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)* http://caselaw.findlaw.com/us-supreme-court/429/252.html
- *Califano v. Webster,* 430 U.S. 313 (1977) https://supreme.justia.com/cases/federal/us/430/313/case.html
- *Michael M. v. Superior Court, Sonoma City,* 450 U.S. 464 (1978) https://supreme.justia.com/cases/federal/us/450/464/case.html
- *Kirchberg v. Feenstra, 450 U.S. 455 (1981) http://caselaw.findlaw.com/us-supreme-court/450/455.html#461*
- *Burdick v. Takushi,* 504 U.S. 428 (1992) http://caselaw.findlaw.com/us-supreme-court/504/428.html
- *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008) http://www.supremecourt.gov/opinions/boundvolumes/553bv.pdf
- *Voting for Am., Inc. v Steen*, 732 F.3d 382 (5th Cir. 2013)**

*** Raises concerns related to multiple issues of this case**