

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

MARC VEASEY; JANE HAMILTON; SERGIO DELEON; FLOYD CARRIER; ANNA
BURNS; MICHAEL MONTEZ; PENNY POPE; OSCAR ORTIZ; KOBY OZIAS;
LEAGUE OF UNITED LATIN AMERICAN CITIZENS; JOHN MELLOR-
CRUMMEY; KEN GANDY; GORDON BENJAMIN; EVELYN BRICKNER,
Plaintiffs-Appellees

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

v.

GREG ABBOTT, in his Official Capacity as Governor of Texas; CARLOS CASCOS, in
his Official Capacity as Texas Secretary of State; STATE OF TEXAS; STEVE
MCCRAW, in his Official Capacity as Director of the Texas Department of Public
Safety,
Defendants-Appellants

(See inside cover for continuation of caption)

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

**BRIEF OF *AMICUS CURIAE* ELECTRONIC PRIVACY
INFORMATION CENTER (EPIC) IN SUPPORT OF APPELLEES**

MARC ROTENBERG
Counsel of Record
ALAN BUTLER
CAITRIONA FITZGERALD
AIMEE THOMSON
Electronic Privacy Information Center
1718 Connecticut Ave. N.W., Suite 200
Washington, D.C. 20009
(202) 483-1140
Counsel for Amicus Curiae

May 16, 2016

(Continuation of caption)

UNITED STATES OF AMERICA,
Plaintiff-Appellee

TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND; IMANI CLARK,
Intervenor Plaintiffs-Appellees

v.

STATE OF TEXAS; CARLOS CASCOS, in his Official Capacity as Texas Secretary of
State; STEVE MCCRAW, in his Official Capacity as Director,
Defendants-Appellants

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

v.

CARLOS CASCOS, in his Official Capacity as Texas Secretary of State; STEVE
MCCRAW, in his Official Capacity as Director of the Texas Department of Public
Safety,
Defendants-Appellants

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

v.

STATE OF TEXAS; CARLOS CASCOS, in his Official Capacity as Texas Secretary of
State; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department
of Public Safety,
Defendants-Appellants

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, Amicus Curiae Electronic Privacy Information Center (“EPIC”) certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1, in addition to those disclosed in the parties’ certificates of interested persons, have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Electronic Privacy Information Center (EPIC)
2. Counsel for Amicus Curiae EPIC: Marc Rotenberg, Alan Butler, Caitriona Fitzgerald, Aimee Thomson

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29(c), EPIC certifies that it is a District of Columbia 501(c)(3) nonprofit corporation with no parent corporation. No publicly held company owns 10% or more of EPIC stock.

May 16, 2016

/s/ Marc Rotenberg

Marc Rotenberg
Counsel of Record for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICUS 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT..... 3

 I. The federal and Texas constitutions protect an individual’s right to informational privacy. 3

 A. The U.S. Constitution protects the rights of voters to be free from compelled identification and the disclosures of personal matters. 3

 B. The Texas Constitution also protects the privacy rights of Texas voters..... 8

 II. SB 14 places an unconstitutional burden on the right to privacy by requiring voters to obtain a government-issued ID to vote..... 10

 A. SB 14 requires Texas voters to disclose substantial amounts of private information and obtain a government-issued ID in order to vote..... 10

 B. The State has not demonstrated a sufficient interest to justify the burden on voters’ privacy rights imposed by the new ID requirements. 15

CONCLUSION..... 20

TABLE OF AUTHORITIES

CASES

<i>Borucki v. Ryan</i> , 827 F.2d 836 (1st Cir. 1987).....	5
<i>Buckley v. Am. Constitutional Law Found., Inc.</i> , 525 U.S. 182 (1999)	8
<i>Doe v. Reed</i> , 561 U.S. 186 (2010)	7, 15
<i>Doe v. Reed</i> , 561 U.S. 186 (2010) (Thomas, J., dissenting).....	8
<i>Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia</i> , 812 F.2d 105 (3d Cir. 1987)	5
<i>Hiibel v. Sixth Judicial Dist. Ct. of Nev., Humbolt Cty.</i> , 542 U.S. 177 (2004)...	7, 16
<i>In re Crawford</i> , 194 F.3d 954 (9th Cir. 1999)	5
<i>Maracich v. Spears</i> , 133 S. Ct. 2191 (2013)	17
<i>NAACP v. State of Ala. ex rel. Patterson</i> , 357 U.S. 449 (1958).....	4, 8, 16
<i>NASA v. Nelson</i> , 562 U.S. 134 (2011)	5, 15
<i>Nixon v. Adm’r of Gen. Servs.</i> , 433 U.S. 425 (1977).....	5, 15
<i>Olmstead v. United States</i> , 277 U.S. 438 (1928) (Brandeis, J., dissenting)	3
<i>Plante v. Gonzalez</i> , 575 F.2d 1119 (5th Cir. 1978)	6, 15
<i>Ramie v. City of Hedwig Vill., Tex.</i> , 765 F.2d 490 (5th Cir. 1985)	6
<i>Stanley v. Georgia</i> , 394 U.S. 557 (1969).....	4
<i>Texas Comptroller of Public Accounts v. Attorney General of Texas</i> , 354 S.W.3d 336 (Tex. 2010).....	9, 10
<i>Texas State Emps. Union v. Texas Dep’t of Mental Health & Mental Retardation</i> , 746 S.W.2d 203 (Tex. 1987).....	8, 9
<i>Vara v. Sharp</i> , 880 S.W.2d 844 (Tex. 1994)	9
<i>Whalen v. Roe</i> , 429 U.S. 589 (1977)	4, 15
<i>Woodland v. City of Houston</i> , 918 F. Supp. 1047 (S.D. Tex. 1996), <i>vacated as moot</i> , No. 96-20358, 1996 WL 752803 (5th Cir. Aug. 21, 1996).....	9
<i>Woodland v. City of Houston</i> , 940 F.2d 134 (5th Cir. 1991).....	8
<i>Wyatt v. Fletcher</i> , 718 F.3d 496 (5th Cir. 2013).....	15

STATUTES

Driver’s Privacy Protection Act of 1994, 18 U.S.C. §§ 2721–2725	18
Tex. Admin. Code § 15.182 (West 2016).....	13, 15
Tex. Admin. Code § 15.183(a) (West 2016)	15

Tex. Admin. Code § 15.183(b) (West 2016)	16
Tex. Elec. Code Ann. § 13.002(c) (West 2016)	12
Tex. Elec. Code Ann. § 13.142 (West 2016)	12
Tex. Elec. Code Ann. § 63.0101 (West 2016)	12

OTHER AUTHORITIES

Anita L. Allen, <i>Coercing Privacy</i> , 40 Wm. & Mary L. Rev. 723 (1999).....	7
Application for Texas Election Identification Certificate, DL-14C (Rev. 3/14)	14
Casey C. Sullivan, <i>Georgia Voter Information Data Breach Leads to Lawsuit</i> , Technologist Legal Blog (Nov. 25, 2015).....	18
Damian Paletta, <i>OPM Breach Was Enormous, FBI Director Says</i> , Wall St. J. (July 8, 2015).....	18
David Holmes, <i>Voter ID Laws May Have Actually Increased The Likelihood Of Voter Fraud—By Hackers</i> , Fast Company (May 3, 2016).....	19
FTC Staff Report, <i>Internet of Things: Privacy & Security in a Connected World</i> (Jan 2015).....	17
Jeffrey Rosen, <i>The Purposes of Privacy: A Response</i> , 89 Geo. L.J. 2117 (2001)	7
Jerry Kang, <i>Information Privacy in Cyberspace Transactions</i> , 50 Stan. L. Rev. 1193 (1998).....	4, 7, 8, 19
Julie E. Cohen, <i>Examined Lives: Informational Privacy and the Subject As Object</i> , 52 Stan. L. Rev. 1373 (2000).....	7
Nick Corasaniti & Rachel Shorey, <i>Millions of Voter Records Posted, and Some Fear Hacker Field Day</i> , N.Y. Times (Dec. 30, 2015).....	18
Robert Ellis Smith, <i>Our Vanishing Privacy and What you Can Do To Protect Yours</i> (1993).....	7
Samuel D. Warren & Louis D. Brandeis, <i>The Right to Privacy</i> , 4 Harv. L. Rev. 193 (1890).....	3
Texas Sec’y of State, <i>Voter Registration Application</i>	11
White House, <i>Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Economy</i> (Feb. 23, 2012)	18

INTEREST OF THE AMICUS

The Electronic Privacy Information Center (“EPIC”) is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.¹

EPIC routinely participates as *amicus curiae* before federal and state courts in cases concerning the right of informational privacy. *E.g.*, *NASA v. Nelson*, 562 U.S. 134 (2011) (arguing that certain compelled background investigation questions burden informational privacy rights and that the Privacy Act offers insufficient protections); *Doe v. Luzerne County*, 660 F.3d 169 (3d Cir. 2011) (arguing that the surreptitious recording of naked images of the human body by a state actor violates the right to informational privacy); *Smith v. Doe*, 538 U.S. 84 (2003) (arguing that actively publicizing the names and criminal histories of released sex offenders violates their right to be free from unwanted disclosure of personal information); *Greidinger v. Davis et al.*, 988 F.2d 1344 (4th Cir. 1993) (arguing that a Virginia scheme requiring citizens to provide their Social Security Numbers unconstitutionally burdened Virginians’ right to vote).

¹ In accordance with Federal Rule of Appellate Procedure 29, the undersigned states that no monetary contributions were made for the preparation or submission of this brief. This brief was not authored, in whole or in part, by counsel for a party.

SUMMARY OF THE ARGUMENT

The photo identification requirements of Texas Senate Bill 14 (“SB 14”) not only infringe individuals’ right to vote, they are also an unlawful burden on constitutional privacy rights. Individuals should not be subject to excessive identification requirements to exercise fundamental democratic rights. Statutes such as SB 14, which compel the disclosure of detailed personal information, disenfranchise individuals who seek to protect their personal information from data breach, cybercrime, and commercial exploitation. Such identification laws should be narrowly tailored to serve a compelling state interest. Otherwise, they are at odds with constitutional freedoms.

Texans have traditionally voted without the requirement of a government-issued identification card. But SB 14 now requires these same voters to disclose substantial amounts of personal information and obtain an official card in order to vote. These new requirements place a heavy burden on Texans’ constitutional rights. The State has not identified any interests that would outweigh these substantial burdens. Nor has it shown that this statute is narrowly tailored to protect fundamental rights. Absent a compelling interest, the State cannot condition an individual’s right to vote on the presentation of an official ID.

ARGUMENT

I. The federal and Texas constitutions protect an individual's right to informational privacy.

The right to privacy, recognized under both the U.S. Constitution and the Texas Constitution, protects an individual's right to be free from government interference and the disclosure of her personal information.

A. The U.S. Constitution protects the rights of voters to be free from compelled identification and the disclosures of personal matters.

The right to privacy is, in large part, the right to be left alone. In the seminal article on the right to privacy, Samuel Warren and Louis Brandeis concluded that “the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world.” Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 213 (1890). Justice Brandeis later described the right to be left alone as “the most comprehensive of rights and the right most valued by civilized men.” *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). “To protect[] that right,” Justice Brandeis wrote, “every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation.” *Id.*

This right to privacy has many facets fall in “three groupings.” Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 Stan. L. Rev. 1193, 1202 (1998). The first is physical or spatial privacy: “the extent to which an individual's territorial solitude is shielded from invasion by unwanted objects or signals.” *Id.* The second is decisional privacy or autonomy: “an individual's ability to make

certain significant decisions without interference.” *Id.* The third is informational privacy: “an individual’s control over the processing—i.e., the acquisition, disclosure, and use—of personal information.” *Id.* at 1203. Although distinct, Professor Kang notes that these types of privacy “are not sharply separate.” *Id.* Instead, they are “functionally interconnected and often simultaneously implicated by the same event or practice.” *Id.*

The Supreme Court has consistently recognized these elements of the right to privacy. In 1958, for example, the Court identified in the First Amendment the “freedom to associate and privacy in one’s associations.” *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958). In *Stanley v. Georgia*, the Court reaffirmed that “the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy” is a “fundamental” right under the Constitution. 394 U.S. 557, 564 (1969).

The Supreme Court set out the constitutional rights to informational privacy and autonomy in *Whalen v. Roe*, 429 U.S. 589 (1977). In *Whalen*, the Court considered a New York state law mandating increased disclosure of medical information, analyzing the impact on two constitutional privacy interests. The first was “the interest in independence in making certain kinds of important decisions”—or the right of autonomy. *Id.* at 599–600. The other was “the individual interest in avoiding disclosure of personal matters”—or the right to informational privacy. *Id.* at 599 (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *Stanley*, 394 U.S. 557; and others). The Court affirmed this characterization four months later. *See Nixon v. Adm’r of Gen. Servs.*,

433 U.S. 425, 457 (1977) (“One element of privacy has been characterized as ‘the individual interest in avoiding disclosure of personal matters.’” (quoting *Whalen*, 429 U.S. at 599)).

The Court recently reaffirmed the right to informational privacy. Writing for the Court, Justice Alito stated “[w]e assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*.” *NASA v. Nelson*, 562 U.S. 134, 138 (2011). The Court subsequently concluded that when the government acts as an employer, the collection of certain types of personal information “do[es] not violate a constitutional right to informational privacy.” *Id.* at 159 (citing *Whalen*, 429 U.S. at 605).

Several federal circuit courts have recognized these constitutional privacy rights. “We have observed that the relevant Supreme Court precedents delineate at least two distinct kinds of constitutionally protected privacy interests: One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.” *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999) (internal quotation marks omitted); *see also Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 109 (3d Cir. 1987) (declaring that it is “now established that the United States Constitution provides some protection of an individual’s privacy,” which extends to the rights of informational privacy and autonomy); *Borucki v. Ryan*, 827 F.2d 836, 839 (1st Cir. 1987) (finding that the right to privacy is “limited to those which are fundamental or implicit within the concept of ordered liberty,” and observing that the right to privacy “also encompasses an interest in avoiding disclosure of

personal matters” (internal quotation marks omitted)).

In *Plante v. Gonzalez*, this Court affirmed that “Americans have a constitutional right to privacy.” 575 F.2d 1119, 1127 (5th Cir. 1978). The Fifth Circuit characterized the two rights identified in *Whalen* as the “interest in autonomy,” and the “interest in avoiding disclosure, or confidentiality.” *Id.* at 1128. This Court later clarified that the confidentiality right included the right to be free from “the government inquiring into matters in which it does not have a legitimate and proper concern.” *Ramie v. City of Hedwig Vill., Tex.*, 765 F.2d 490, 492 (5th Cir. 1985).

The importance of protecting informational privacy goes beyond the constitutional imperative. “There is both empirical evidence and normative philosophical argument supporting the proposition that paradigmatic forms of privacy (e.g., seclusion, solitude, confidentiality, secrecy, anonymity) are vital to well-being.” Anita L. Allen, *Coercing Privacy*, 40 Wm. & Mary L. Rev. 723, 756 (1999). Indeed, the “cornerstone of a democratic society is informed and deliberate self-governance.” Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject As Object*, 52 Stan. L. Rev. 1373, 1426 (2000). But public examination of private information “chills experimentation with the unorthodox, the unpopular, and the merely unfinished.” *Id.*; see also Robert Ellis Smith, *Our Vanishing Privacy and What you Can Do To Protect Yours* 4 (1993) (“Without privacy there is no safe haven to know oneself. There is no space for experimentation, risk-taking, and making mistakes.”).

Informational privacy promotes autonomy, which is “an essential

independence of critical faculty and an imperiousness to influence.” Cohen, *supra*, at 1424. Informational autonomy “comports with important values concerning the fair and just treatment of individuals within society,” including “the fundamental dignity of persons” and a “concomitant commitment to egalitarianism.” *Id.* at 1423. Autonomy “promotes a vital diversity of speech and behavior” necessary to avoid living in “communities governed by apathy, impulse, or precautionary conformism.” *Id.* at 1425, 1427.

Informational privacy is also essential to human interaction. Having control over one’s personal information helps individuals avoid the embarrassment that accompanies the disclosure of certain personal details or the prejudice that arises from the misuse of personal information. Kang, *supra*, at 1212, 1214; *see also* Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 *Geo. L.J.* 2117, 2121 (2001) (“But knowledge of private information poses special threats to individuals’ ability to structure their lives in unconventional ways.”). Privacy also helps individuals construct intimacy with others by preserving a body of personal information that can be selectively shared to communicate trust. Kang, *supra*, at 1212–13.

These privacy interests are implicated not only by the disclosure of intimate details, but also by government-compelled identification schemes. *See, e.g., Doe v. Reed*, 561 U.S. 186, 196 (2010) (concerning the application of a state disclosure statute to referendum petition signatures); *Hibel v. Sixth Judicial Dist. Ct. of Nev., Humbolt Cty.*, 542 U.S. 177, 184 (2004) (concerning a state requirement that individuals identify themselves during a police stop); *Buckley v. Am.*

Constitutional Law Found., Inc. (“*ACLF*”), 525 U.S. 182 (1999) (finding unconstitutional state requirements that initiative-petition circulators wear identification badges and file reports containing the circulators’ names and addresses); *NAACP v. Alabama*, 357 U.S. at 462 (holding unconstitutional a statute requiring a political group to disclose the identities of its members).

These government identification schemes not only burden informational privacy rights, but can also interfere with the free exercise of participation in the electoral process. As the Court explained in *ACLF*, a state law requiring petitioners to display a name badge created a “heightened” injury “because the badge requirement compels personal name identification” at a time when the individual’s “interest in anonymity is greatest.” 525 U.S. at 199. Justice Thomas later emphasized the “‘vital relationship between’ political association and ‘privacy in one’s associations’” and the need to apply strict scrutiny to laws that compel such disclosures. *Doe v. Reed*, 561 U.S. 186, 232 (2010) (Thomas, J., dissenting).

B. The Texas Constitution also protects the privacy rights of Texas voters.

The Texas Supreme Court has recognized that an individual’s “right to be let alone” is implicit in the Texas Constitution and requires that any government intrusion on personal privacy satisfy strict scrutiny. *Texas State Emps. Union v. Texas Dep’t of Mental Health & Mental Retardation* (“*TSEU*”), 746 S.W.2d 203, 205 (Tex. 1987); *Woodland v. City of Houston*, 940 F.2d 134, 138 (5th Cir. 1991) (stating that in *TSEU*, the Supreme Court of Texas “first declared that the Texas constitution implicitly recognizes a right of privacy”).

In *TSEU*, the Court stated that “[w]e hold that the Texas Constitution protects personal privacy from unreasonable intrusion. This right to privacy should yield only when the government can demonstrate that an intrusion is reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means.” 746 S.W.2d at 205. In that case, the Texas Supreme Court held that a state agency’s polygraph policies violated the right to privacy protected by the Texas Constitution. *Id.*

Courts have repeatedly found that the right to privacy under the Texas Constitution is broader than the right under the U.S. Constitution. *See, e.g., Vara v. Sharp*, 880 S.W.2d 844, 853 (Tex. 1994) (“While the United States Supreme Court has all but abandoned the right of privacy as a justification for the exclusionary rule under the federal constitution, privacy has added potency under the Texas Constitution.”); *see also Woodland v. City of Houston*, 918 F. Supp. 1047, 1053 (S.D. Tex. 1996), *vacated as moot*, No. 96-20358, 1996 WL 752803 (5th Cir. Aug. 21, 1996) (“The protection of rights guaranteed in the United States Constitution is an absolute minimum that the states must meet. Texas has surpassed this minimum.”).

Though the *TSEU* standard has not been applied to informational privacy, the Texas Supreme Court addressed informational privacy in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, finding that state employees have a privacy interest in their dates of birth. 354 S.W.3d 336, 345 (Tex. 2010). In that case, the Court held that state employee birth dates were exempt from disclosure under an exemption to the Texas Public Information Act. *Id.* The Court expressed

concern over the issue of identity theft and the ease in which data can be accessed with new technologies: “[I]nformation deemed useful to be publicly available under the old transactions technology’ is now ‘too available in a world of wired consumers.’” *Id.* at 344 (quoting Alessandro Acquisti & Ralph Gross, *Predicting Social Security Numbers From Public Data*, 106 Proc. Nat’l Acad. Sci. 10975, 10980 (2009)).

II. SB 14 places an unconstitutional burden on the right to privacy by requiring voters to obtain a government-issued ID to vote.

A. SB 14 requires Texas voters to disclose substantial amounts of private information and obtain a government-issued ID in order to vote.

Texas, like most other states, has traditionally imposed minimal privacy burdens on voters. To vote in person, a Texas voter had only to present a voter registration certificate, which was provided to the voter upon registration. *Veasey v. Abbott*, 796 F.3d 487, 494 (5th Cir. 2015); Tex. Elec. Code Ann. § 13.142 (West 2016).² “Voters appearing without the certificate could cast a ballot by signing an affidavit and presenting one of multiple forms of identification,” including “a

² To register to vote, an applicant must provide her: name, date of birth, gender, telephone number, residential and mailing addresses, and several statements affirming citizenship, residence in the county, lack of mental incapacitation, and lack of disqualifying felony conviction. Tex. Elec. Code Ann. § 13.002(c) (West 2016); Texas Sec’y of State, *Voter Registration Application*, <https://webservices.sos.state.tx.us/vrapp/index.asp> (last visited May 12, 2016). The applicant must also provide a Texas Driver’s License or Personal ID number; if she doesn’t have either of those documents, the last four digits of her Social Security Number; and if she doesn’t have a Social Security Number, check a box stating that the applicant has not been issued a Texas Driver’s License or Personal ID Number or Social Security Number. Tex. Elec. Code Ann. § 13.002(c)(8).

current or expired driver's license, a photo ID (including employee or student IDs), a utility bill, a bank statement, a paycheck, a government document showing the voter's name and address, or mail addressed to the voter from a government agency.” *Veasey*, 796 F.3d at 494.

SB 14 altered the status quo by requiring Texas voters to disclose much more personal information to exercise their right to vote. First, in addition to registering, a Texas voter must now also obtain one of six qualified state or federal government-issued photo IDs. Tex. Elec. Code Ann. § 63.0101 (West 2016); *Veasey*, 796 F.3d at 494.

Second, the Election Identification Certificate (“EIC”)—the only qualified photo ID issued solely for the purpose of voting—requires voters to obtain and provide copies of many sensitive identification documents.

To obtain an EIC, a voter must present one of the three categories of documents/sets of documents:

1. One piece of primary identification, or
2. Two pieces of secondary identification, or
3. One piece of secondary information plus two pieces of supporting identification.

Tex. Admin. Code § 15.182 (West 2016).

Texas law defines primary, secondary and supporting identification as follows:

- Primary identification

- Texas driver's license or personal identification card that has been expired for less than two years.
- Secondary identification
 - Original or certified copy of birth certificate;
 - Original or certified copy of court order with name and date of birth indicating an official change in name and/or gender;
 - U.S. citizenship or naturalization papers without photo.
- Supporting identification
 - Voter registration card;
 - School records;
 - Insurance policy (at least two years old);
 - Texas vehicle or boat title or registration;
 - Military records; unexpired military dependent identification card;
 - Original or certified copy of marriage license or divorce decree;
 - Social Security card;
 - Pilot's license;
 - Photo driver's license or photo ID issued by another (United States) state, U.S. territory, or the District of Columbia that is within two years of the expiration date;
 - An offender identification card or similar form of identification issued by the Texas Department of Criminal Justice;
 - Forms W-2 or 1099;
 - Numident record from the Social Security Administration;

- Texas driver license or personal identification certificate expired more than two years;
- Professional license issued by Texas state agency;
- Identification card issued by government agency;
- Parole or mandatory release certificate issued by the Texas Department of Criminal Justice;
- Federal inmate identification card;
- Federal parole or release certificate;
- Medicare or Medicaid card;
- Selective Service card;
- Immunization records;
- Tribal membership card from federally recognized tribe;
- Certificate of Degree of Indian Blood;
- Veteran's Administration card;
- Hospital issued birth record; or
- Any document that may be added to § 15.24 of this title.

Id.

Finally, and in addition to the supporting identifying documents, an EIC applicant must also provide his or her:

- Name;
- Place and date of birth (city, county, state, country);

- Mother and father’s last names (at birth);
- Fingerprints;³
- Photograph;
- Signature;
- Brief description (eye color, hair color, race, height, weight);
- Sex;
- Residence address;
- Whether US citizen;
- County of residence.

Tex. Admin. Code § 15.183(a) (West 2016); Application for Texas Election Identification Certificate, DL-14C (Rev. 3/14).⁴

EIC applicants will also be asked to provide verification of Social Security Number documentation, but if “the applicant fails or refuses to provide that social security information, the election identification certificate will be issued without such documentation unless state or federal statute requires otherwise.” Tex. Admin. Code § 15.183(b).

SB 14 has clearly imposed privacy burdens that did not previously exist on those seeking to vote in Texas.

³ The fingerprinting of EIC applicants has been halted at the request of the Secretary of State, but the requirement still exists in the Texas Administrative Code. *Veasey v. Perry*, 71 F. Supp. 3d 627, 687 & n.458 (S.D. Tex. 2014).

⁴ <http://www.dps.texas.gov/internetforms/forms/DL-14C.pdf>.

B. The State has not demonstrated a sufficient interest to justify the burden on voters' privacy rights imposed by the new ID requirements.

The State's authority to compel individuals to identify themselves and disclose their personal information is strictly limited by the Constitution. *See Whalen*, 429 U.S. at 598–604 (upholding a New York state law requiring collection of certain prescription information on the grounds that it did not “pose a sufficiently grievous threat to” the challengers’ constitutional privacy rights); *Nixon*, 433 U.S. at 457–65 (finding provisions of the Presidential Recordings and Materials Preservation Act constitutional given the applicable legal protections in place to prevent disclosure of private recordings or materials). While courts have not clearly identified what standard of review applies in constitutional privacy cases, they have made clear that “scrutiny is necessary.” *Plante*, 575 F.2d at 1134 (applying a “balancing test” to the informational privacy right claims while noting that it “may be consistent with the standard of review” in “autonomy” cases, which is “something approaching equal protection ‘strict scrutiny’”); *see also NASA v. Nelson*, 562 U.S. at 138 (finding that a less stringent standard applies where the government is collecting personal information in its capacity as an employer).

This Court has applied a balancing test in cases that involve disclosure of personal information where no other fundamental rights are burdened. In such “pure disclosure” cases, the Government’s interest in collecting personal information must “outweigh” the individual’s “right to privacy.” *Wyatt v. Fletcher*, 718 F.3d 496, 514 (5th Cir. 2013). But where the government’s collection of personal information also impacts other fundamental rights, more exacting scrutiny is required. *See Doe v. Reed*, 561 U.S. at 196 (applying the “exacting” First

Amendment standard to disclosure of petitioner signatures); *Hiibel*, 542 U.S. at 184 (upholding a “narro[w]” and “precise” statute that only required a suspect disclose his name during a police stop); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (finding an unconstitutionally vague requirement to provide “credible and reliable” identification also “implicated consideration of the constitutional right to freedom of movement”); *NAACP v. Alabama*, 357 U.S. at 462 (holding unconstitutional a statute requiring a political group to disclose the identities of its members, which would be “an effective restraint on freedom of association”).

SB 14 implicates informational privacy rights and must be subject to exacting scrutiny. The lower court found, after a lengthy consideration of the State’s arguments, that there is no evidence these additional identification measures promote any of the state’s legitimate interests. *Veasey*, 71 F. Supp. 3d at 691–93 (rejecting the State’s arguments that these new restrictions promote interests in (1) detecting and deterring fraud, (2) non-citizen voting, (3) improving confidence in elections, (4) increasing voter turnout, or (5) bloated voter registration rolls). The same arguments that the lower court found inadequate to justify the State’s new burdens on the right to vote are similarly inadequate to justify the State’s new burdens on informational privacy and autonomy. The new identification requirements are not narrowly tailored to promote any legitimate government interest, and the State has not shown that such requirements are necessary or that a less burdensome alternative was unworkable.

Even if the Court were to apply a pure balancing test, the new identification requirements should be rejected. Individuals have a strong interest in limiting the

disclosure of their sensitive information, including their biometrics and identifying documents. For example, Congress has recognized that heightened protections are required even where state departments of motor vehicles are permitted to collect personal information as necessary to issue licenses. *See* Driver’s Privacy Protection Act of 1994, 18 U.S.C. §§ 2721–2725; *Maracich v. Spears*, 133 S. Ct. 2191, 2200 (2013) (finding that exceptions to the DPPA’s prohibition on disclosure of personal information must be narrowly construed). The most effective way to protect personal information is to not collect it in the first place unless it is strictly necessary. *See, e.g.*, FTC Staff Report, *Internet of Things: Privacy & Security in a Connected World* iv (Jan 2015)⁵ (“[L]arger data stores present a more attractive target for data thieves, both outside and inside a company – and increases the potential harm to consumers from such an event.”); White House, *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Economy* 19, 21 (Feb. 23, 2012)⁶ (discussing the need for security and focused collection of personal data). The State has not shown that the collection of these new identifying documents is necessary to its voting system.

Voters would be entirely justified in refusing to submit copies of their sensitive identification documents given the recent failures of government agencies

⁵ <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/150127iotrpt.pdf>.

⁶ <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf>.

to protect such records. *See* Damian Paletta, *OPM Breach Was Enormous, FBI Director Says*, Wall St. J. (July 8, 2015).⁷ Recent breaches of voter information, in particular, have exposed millions to identity theft and financial fraud. *E.g.*, Casey C. Sullivan, *Georgia Voter Information Data Breach Leads to Lawsuit*, Technologist Legal Blog (Nov. 25, 2015)⁸ (discussing a breach of six million Georgia voters’ names, addresses, Social Security Numbers, birthdates, and driver’s license records); Nick Corasaniti & Rachel Shorey, *Millions of Voter Records Posted, and Some Fear Hacker Field Day*, N.Y. Times (Dec. 30, 2015)⁹ (discussing database posted online containing the names, addresses, phone numbers, party affiliation, voting history, and demographics of 191 million voter records); *see generally* David Holmes, *Voter ID Laws May Have Actually Increased The Likelihood of Voter Fraud—By Hackers*, Fast Co. (May 3, 2016)¹⁰ (finding that states that passed voter ID laws have “made their elections more vulnerable to hackers”).

Forcing individuals to submit these documents as a condition of voting also burdens their “control over the processing” of their personal information and interferes with their “ability to make certain significant decisions,” which are both

⁷ <http://www.wsj.com/articles/breach-was-enormous-fbi-director-says-1436395157>.

⁸ <http://blogs.findlaw.com/technologist/2015/11/georgia-voter-information-data-breach-leads-to-lawsuit.html>.

⁹ <http://www.nytimes.com/2015/12/31/us/politics/voting-records-released-privacy-concerns.html>.

¹⁰ <http://www.fastcompany.com/3059524/voter-id-laws-may-have-actually-increased-the-likelihood-of-voter-fraud-by-hackers>.

core components of their privacy rights. Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 Stan. L. Rev. 1193, 1202 (1998). The State would need to provide a compelling reason to adopt these new restrictions given the heavy burden they impose, but it has failed entirely to do so.

CONCLUSION

EPIC respectfully requests that this Court affirm the district court's decision.

Respectfully submitted,

/s/ Marc Rotenberg

MARC ROTENBERG

Counsel of Record

ALAN BUTLER

CAITRIONA FITZGERALD

AIMEE THOMSON

Electronic Privacy Information Center

1718 Connecticut Ave. N.W., Suite 200

Washington, D.C. 20009

(202) 483-1140

Counsel for Amicus Curiae

May 16, 2016

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because it contains 4,228 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word for Mac 2011 in 14 point Times New Roman.

May 16, 2016

/s/ Marc Rotenberg

Marc Rotenberg

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2016, I electronically filed the foregoing *Brief of Amicus Curiae Electronic Privacy Information Center in Support of Appellees* with the Clerk of the United States Court of Appeals for the Fifth Circuit using the CM/ECF system. All parties are to this case will be served via the CM/ECF system.

May 16, 2016

/s/ Marc Rotenberg

Marc Rotenberg