

*Not Our Grandfathers' Mississippi Anymore:*  
Implementing Mississippi's  
Voter Identification Requirement

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DELBERT HOSEMANN  
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My fellow Mississippians,

In 2011, 62 percent of eligible Mississippi voters approved a citizen-initiated State Constitutional Amendment requiring voters to show photo ID at the polls. The law became effective in June 2014.

In the 2016 Presidential Election, 99.9 percent of voters arrived at the polls on Election Day with acceptable photo ID. Almost 6,000 Mississippi Voter ID Cards have been issued to Mississippi citizens. While many other states remain embroiled in expensive litigation over voter ID, Mississippi's law has not been challenged.



The credit belongs to Mississippi voters who have consistently cast their ballot with appropriate photo identification. We trusted each other to implement a constitutional voter ID law, and we succeeded.

Governance begins at the ballot box. Mississippi voters turned a page in the history of our State's electoral process in 2011. Thank you for doing your part to ensure free and fair elections in Mississippi. Our mutual decision and virtually unanimous implementation is our recipe for the future.

A handwritten signature in blue ink that reads "Delbert".

Delbert Hosemann  
Secretary of State

# NOT OUR GRANDFATHERS' MISSISSIPPI ANYMORE: IMPLEMENTING MISSISSIPPI'S VOTER IDENTIFICATION REQUIREMENT

*Delbert Hosemann\**

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\* Elected in November 2007, Secretary Hosemann serves as Mississippi's eighth Secretary of State since 1900. He came to the position with a background in Business and Taxation Law as a former partner of Phelps Dunbar, LLP. He would like to thank Leann Thompson, Senior Attorney of the Policy and Research Division, for her contributions to this article. Copyright © 2017 Office of the Mississippi Secretary of State.

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### INTRODUCTION

On June 25, 2013, the United States Supreme Court placed Mississippi on equal footing with every other state when it ruled Section 4 of the Voting Rights Act of 1965 unconstitutional. The Court ruled the Section 4 formula could no longer be used as a basis for subjecting jurisdictions to preclearance in *Shelby County v. Holder*.<sup>1</sup> Mississippi was ranked first in the country for highest African-American voter registration and fourth for highest African-American voter turnout in the 2014 Midterm Elections.<sup>2</sup> Two years earlier Mississippi had adopted a citizen-passed constitutional voter identification requirement which had already been submitted to the Civil Rights Division of the Department of Justice for preclearance. Given equal constitutional footing with all states and mindful the remaining provisions of the Voting Rights Act continued in full force, our State was at a crossroads. Was our voter identification requirement constitutional? Did our citizens trust each other enough to fairly implement it?

Mississippi's voter identification law was our State's effort to fight voter fraud and increase public confidence in the integrity of the electoral system.<sup>3</sup> Naysayers argued for years a voter identification requirement would place an undue burden on the voting rights of the elderly, low income, and minority voters. The facts are undeniable: 99.9% of Mississippians voting in the June 2014 Congressional Primary Election<sup>4</sup> and the same percentage voting in the November 2016 Presidential Election<sup>5</sup> presented an

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<sup>1</sup> *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

<sup>2</sup> Richie Bernardo, *2016's States with the Highest Political Engagement Among Blacks*, WALLETHUB (Feb. 17, 2016), <https://wallethub.com/edu/where-are-blacks-most-least-politically-engaged/19026/> [<https://perma.cc/ZV5A-MKZV>].

<sup>3</sup> In *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 184 (2008), the United States Supreme Court upheld in a 6-3 decision the constitutionality of Indiana's voter photo identification requirement. The Court found voter identification requirements closely relate to legitimate state interests in preventing voter fraud, modernizing elections, and safeguarding voter confidence. *Id.*

<sup>4</sup> 2014 MISS. SEC. OF STATE ELECTION ACTIVITIES REP. 11.

<sup>5</sup> Press Release, Miss. Sec'y of State, About 64% of Active, Registered Voters Cast Ballots on November 8 (Nov. 21, 2016) (on file with Miss. Sec'y of State).

acceptable form of photo identification. Mississippians proved our State should no longer be held to a different standard than the rest of the country.

### I. THE VOTING RIGHTS ACT OF 1965

A product of increased pressure to protect the voting rights of racial minorities during the Civil Rights Movement, the Voting Rights Act of 1965 was constructed by Congress to capture jurisdictions with histories of discrimination against African-American voters in the registration process and at the polls.<sup>6</sup> Section 2 of the Act applies nationwide and is a permanent provision banning any “standard, practice, or procedure” which “results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color . . . .”<sup>7</sup>

Mississippi, along with Alabama, Georgia, Louisiana, South Carolina, and Virginia, was subject to the Act’s provisions at its inception due to the coverage formula in Section 4(b).<sup>8</sup> The statutory formula determined which jurisdictions were subject to the Act’s provisions and was based on the 1964 presidential election voter registration and voter turnout data. A jurisdiction was covered by Section 4’s formula if the jurisdiction both (1) “maintained on November 1, 1964, any test or device” as defined in Section 4(c)<sup>9</sup> “for the purpose or with the effect of denying or abridging the right to vote on account of race or color,” and (2) “less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.”<sup>10</sup> United States Attorney General Nicholas

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<sup>6</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C.).

<sup>7</sup> 52 U.S.C. § 10301(a) (2012) (formerly codified at 42 U.S.C. § 1973(a)).

<sup>8</sup> 28 C.F.R. § 51.54 (2012); 28 C.F.R. § 51.55 (2012).

<sup>9</sup> Pub. L. No. 89-110, § 4, 79 Stat. 437, 438-39 (codified as amended at 52 U.S.C. § 10301 (2012)). At enactment, Section 4(c) provided “test or device” meant “any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement of his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.” *Id.*

<sup>10</sup> *Id.*

Katzenbach determined Mississippi had maintained “one or more tests or devices as defined in section 4(c)” of the Voting Rights Act.<sup>11</sup> Bureau of the Census Director Ross Eckler found in Mississippi only 34% of the voting age population voted in the 1964 presidential election.<sup>12</sup>

As a covered jurisdiction under the Act’s formula, Section 5 required such jurisdictions to submit any change affecting voting for approval and preclearance before becoming enforceable.<sup>13</sup> Under Section 5, the covered jurisdiction had the burden of showing the proposed changes “have [neither] the purpose and will not have the effect of denying or abridging the right to vote on account of race or color”<sup>14</sup> and must be measured against the jurisdiction’s benchmark practice to determine whether it would “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”<sup>15</sup>

Covered jurisdictions had two avenues for seeking preclearance: an administrative preclearance process or a judicial preclearance process. Choosing the administrative submission option meant the United States Department of Justice would consider whether the proposed change had a discriminatory purpose or effect.<sup>16</sup> After submission of the covered jurisdiction’s proposed change, the Attorney General had sixty days to interpose an objection.<sup>17</sup> This period could be extended another sixty days if the covered jurisdiction submitted additional information.<sup>18</sup> Should the Department interpose an objection, the change would not be precleared and could not be implemented.<sup>19</sup>

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<sup>11</sup> Determination of the Att’y Gen. Pursuant to Voting Rights Act of 1965, 30 Fed. Reg. 9897 (Aug. 7, 1965).

<sup>12</sup> CURTIS GANS, *VOTER TURNOUT IN THE UNITED STATES 1788-2009*, at 579-80 (2011).

<sup>13</sup> The United States Supreme Court broadly interpreted the scope of Section 5 to include any change in a jurisdiction’s voting practices, even if minor, must be submitted for preclearance. *See generally* *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

<sup>14</sup> *Georgia v. United States*, 411 U.S. 526, 529-30 (1973), *abrogated by* *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

<sup>15</sup> *Beer v. United States*, 425 U.S. 130, 141 (1976).

<sup>16</sup> 28 C.F.R. § 51.10 (2012).

<sup>17</sup> *Id.* §§ 51.9, 37.

<sup>18</sup> *Id.* § 51.39.

<sup>19</sup> *Lopez v. Monterey Cty.*, 519 U.S. 9, 20-22 (1996); *Clark v. Roemer*, 500 U.S. 646, 652-53 (1991).

On the other hand, if a covered jurisdiction sought judicial preclearance, it filed a declaratory judgment action against the United States Attorney General in the United States District Court for the District of Columbia and a three-judge panel considered whether the voting change had a discriminatory purpose or effect.<sup>20</sup> If the district court denied preclearance, the covered jurisdiction could appeal directly to the United States Supreme Court.<sup>21</sup>

In 1965, Sections 4 and 5 were temporary under the Act and set to expire after five years,<sup>22</sup> but Congress reauthorized the Act for another five years in 1970.<sup>23</sup> The coverage formula was also extended to jurisdictions which had a voting test and less than 50% voter registration or turnout as of 1968, sweeping in several counties in California, New Hampshire, and New York.<sup>24</sup> Congress reauthorized the Act again in 1975, this time expanding its reach to jurisdictions having a voting test and less than 50% voter registration or turnout as of 1972 and amending the definition of “test or device” to include the practice of providing English-only voting materials in places where over 5% of voting-age citizens spoke a single language other than English.<sup>25</sup> Congress reauthorized the Act for another twenty-five years in 1982<sup>26</sup> and again in 2006 without change to the coverage formula.<sup>27</sup>

## II. HOUSE BILL 1533

In 2009, the Office of the Secretary of State’s legislative agenda included supporting the adoption of a voter identification requirement for Mississippi elections. Opponents voiced their concerns regarding the placement of undue burdens on the voting rights of elderly, low income, and minority voters. The Secretary

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<sup>20</sup> 52 U.S.C. § 10304 (2012) (formerly codified at 42 U.S.C. § 1973).

<sup>21</sup> *Id.* § 10304(a).

<sup>22</sup> *See supra* note 5 and accompanying text.

<sup>23</sup> Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970).

<sup>24</sup> *Id.* §§ 3-4.

<sup>25</sup> Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 101, 202, 89 Stat. 400, 400-02 (1975).

<sup>26</sup> Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982).

<sup>27</sup> Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006).

of State's staff carefully studied similar laws in other states, which already passed federal scrutiny. The *Crawford* decision confirmed voter identification as a state's right in conducting elections.

During the 2009 Mississippi Legislative Session, the Secretary supported Representative Mark Formby's House Bill 1533.<sup>28</sup> The legislation contained a voter identification requirement and provisions for early voting crafted by House Republicans with active input from the Secretary and his staff.<sup>29</sup> The proposed legislation was the result of bipartisan compromise at a time when the House of Representatives was controlled by the Democratic Party and the Senate by the Republican Party. House Bill 1533 passed out of the House of Representatives by a vote of 78 to 44<sup>30</sup> and was the first time voter identification legislation had garnered bipartisan support in the House of Representatives.

Upon transmittal to the Senate, the Secretary of State and his staff worked closely with Senate Elections Committee Chairman Terry Burton and met with Senate Elections Committee members one-by-one to discuss the legislation.<sup>31</sup> Assurances were given the bill would be passed by the committee and most likely be sent to conference.<sup>32</sup> When the bill was called up on the deadline day for committee action, there was little discussion of the bill other than a brief explanation of its contents and Senator Burton communicated the bill was supported by then Governor Haley Barbour's office.<sup>33</sup> Before Senator Burton could make a motion for title sufficient do pass, which would move the legislation from the Elections Committee to the Senate for a vote, Senator Merle Flowers made a motion to table the bill—a lethal motion on committee action deadline day.<sup>34</sup> His motion was supported by votes from Senators Billy Hewes, Joey Fillingane

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<sup>28</sup> H.B. 1533, 2009 Leg., 2009 Reg. Sess. (Miss. 2009).

<sup>29</sup> Staff included Legislative Liaisons Lindell Floyd and Martin Hegwood, Assistant Secretary of State of Elections John Helmert, and Senior Attorney of Elections Elizabeth Bolin.

<sup>30</sup> *House Bill 1533*, MISS. LEG. 2009 REG. SESS. (Aug. 20, 2016), <http://billstatus.ls.state.ms.us/2009/pdf/history/HB/HB1533.xml> [<https://perma.cc/UVW8-LJYF>].

<sup>31</sup> Interview with Lindell Floyd, Legislative Liaison, Miss. Sec'y of State, in Jackson, Miss. (Apr. 13, 2016).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

and Chris McDaniel.<sup>35</sup> Senator Cindy Hyde-Smith voted against the motion. The Senators supporting the motion claimed opposition to the early voting provisions, which had been revised by Senator Burton.<sup>36</sup> After drawing withering criticism for killing a bill with voter identification on the path to passage, the Senators attempted to revive the bill by proposing a Senate rules suspension resolution, which failed by one vote.<sup>37</sup> This would be the last opportunity for Mississippi to enact a voter identification law by Legislative action alone.

### III. CONSTITUTIONAL INITIATIVE 27

In 2010, a petition with over 90,000 signatures from qualified electors across Mississippi's congressional districts was submitted to the Secretary of State's Elections Division by Senator Fillingane (one of the Senators who voted to kill House Bill 1533) requesting a Voter Identification Initiative be placed on the November 8, 2011 General Election ballot.<sup>38</sup> The initiative measure became known as Initiative 27 and required voters voting in a "primary or general election, either in person at the polls or in person in the office of the Circuit Clerk" to present a government issued photo identification before being allowed to vote.<sup>39</sup> Initiative 27 further provided if an individual did not possess government issued photo identification, such identification could be obtained free of charge.<sup>40</sup> Voters living and voting in a state-licensed care facility and voters with a religious objection to being photographed were exempt from the identification requirement.<sup>41</sup> Voters claiming a religious exemption would cast an affidavit ballot and within five days after the election, execute an affidavit in their Circuit Clerk's

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<sup>35</sup> Joe Rutherford, *Voter ID Proponents Missed Ripest Opportunity To Pass It*, DJOURNAL.COM (Mar. 11, 2008) <http://djournal.com/opinion/voter-id-proponents-missed-ripest-opportunity-to-pass-it/> [<https://perma.cc/N84J-5AK9>].

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Voter Identification Petition Received by the Secretary of State (Feb. 11, 2010) (on file with Miss. Sec'y of State).

<sup>39</sup> *Initiative #27-Voter Identification*, MISS. SEC'Y OF STATE (Aug. 20, 2016), <http://www.sos.ms.gov/elections/initiatives/InitiativeInfo.aspx?IIId=27> [<https://perma.cc/N649-EAGX>].

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

office affirming the exemption applied.<sup>42</sup> Additionally, voters failing to present identification when voting would also cast an affidavit ballot and return to their Circuit Clerk's office within five days after the election to present their government issued photo identification.<sup>43</sup> Initiative 27 mandated the Mississippi Legislature to enact legislation to implement the provisions it contained.<sup>44</sup>

The Office of the Secretary of State was required to hold five public hearings throughout the State giving the public the opportunity to weigh in on the Initiative.<sup>45</sup> The Secretary of State opted to hold nine hearings to ensure every Mississippian had the opportunity to voice his or her opinion on the Initiative.<sup>46</sup> Attendees expressed concerns over voter impersonation, inaccurate and inflated voter rolls, and the integrity of the election process.<sup>47</sup> After months of debate and consideration, Initiative 27 was overwhelmingly approved in the November 8, 2011 General Election with 538,656 votes, garnering approximately 62% of the vote.<sup>48</sup>

The Secretary of State<sup>49</sup> traveled to Washington, D.C., in December 2011 to inform the Department of Justice of the adoption of Mississippi's constitutional voter identification requirement and to establish a working relationship with the Department to ensure Mississippi met the requirements of Section 5 of the Voting Rights Act.<sup>50</sup> At this point, South Carolina and Texas had their own voter identification-related administrative

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> MISS. CODE ANN. § 23-17-45(2) (2016).

<sup>46</sup> Press Release, Miss. Sec'y of State, Constitutional Initiative Public Hearing Dates Released (June 30, 2011) (on file with Miss. Sec'y of State).

<sup>47</sup> Transcript, Southaven, Miss. Constitutional Initiatives Public Hearing 40-49 (July 7, 2011) (on file with Miss. Sec'y of State).

<sup>48</sup> *Official Tabulation of Vote for Statewide Initiative Measure No. 27*, MISS. SEC'Y OF STATE (Aug. 20, 2016) <http://www.sos.ms.gov/links/elections/results/statewide/Statewide%20Initiative%20Measure%2027%20-%20General%20Election%202011%20Results.pdf> [<https://perma.cc/4ME9-8KP7>].

<sup>49</sup> Also attending the meeting were Secretary of State Representatives Assistant Secretary of State of Elections Heath Hillman, Senior Attorney of Elections Elizabeth Bolin, and Legislative Liaison Lindell Floyd.

<sup>50</sup> Interview with Lindell Floyd, *supra* note 30.

submissions pending before the Department.<sup>51</sup> During the meeting Christian Herren, Chief of the Department's Voting Rights Section, and his Deputy Chief Robert Berman, were presented with a draft of the enabling legislation for Initiative 27 slated for introduction in the 2012 Mississippi Legislative Session.<sup>52</sup> Herren and Berman were asked to review the draft legislation and to voice any comments or concerns they had, but none were provided at this initial meeting.<sup>53</sup> This meeting and future meetings, typically at the request of the Secretary, were held in conjunction with the Department of Justice requests for information and for discussion purposes. The Department of Justice offered little comment pending final adoption and implementation of administrative rules. At the end of the initial meeting, the Secretary asked if any other state had requested a similar consultation with the Department and Herren indicated no other state had done so. The Department of Justice did acknowledge the meetings were a first for any state proposing implementation of voter identification. The Secretary stated his intent was to show Mississippi could follow the United States Constitution and the newly adopted Mississippi Constitutional Amendment. Particularly, he expressed that he did not want the Department of Justice to sue him and the State. The Department of Justice attendees remained stoic and found no humor in this statement. After all, Mississippi had a history, was one of the original six states captured by the Voting Rights Act's coverage formula, and was often a prime target for the Department of Justice.

#### IV. ENABLING LEGISLATION HOUSE BILL 921

The 2012 Regular Session of the Mississippi Legislature saw the introduction of House Bill 921 by Representative Bill Denny to fulfill the mandate of Initiative 27.<sup>54</sup> House Bill 921 was signed

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<sup>51</sup> Letter from Alan Wilson, S.C. Att'y Gen., to U.S. Dep't. of Justice, Civil Rights Div. (June 28, 2011) (on file with the Brennan Ctr. for Justice); Letter from Hope Andrade, Tex. Att'y Gen., to T. Christian Herren, Jr., U.S. Dep't. of Justice (July 25, 2011) (on file with the Brennan Ctr. for Justice).

<sup>52</sup> Interview with Lindell Floyd, *supra* note 30.

<sup>53</sup> *Id.*

<sup>54</sup> H.B. 921, 2012 Leg., 2012 Reg. Sess. (Miss. 2012).

into law, pending preclearance under Section 5, on May 17, 2012, by Governor Phil Bryant.<sup>55</sup> In accordance with Initiative 27, the bill required each person appearing to vote in person at a polling place or Circuit Clerk's office to identify himself or herself with current and valid photo identification before being allowed to vote by regular ballot.<sup>56</sup> Qualifying photo identification included eight broad categories of state and federally issued identification.<sup>57</sup> For electors who lacked the aforementioned identification, House Bill 921 created a new form of state-issued photo identification which could be used for voting purposes. The new Mississippi Voter Identification Card would be available by completing an application at a Circuit Clerk's office.<sup>58</sup> The legislation expanded on the Mississippi Voter Identification Card application process by outlining what information was to be included on the card<sup>59</sup> and what identity-verifying documentation ("underlying documentation") an applicant was required to present to the Circuit Clerk before issuance of a Mississippi Voter Identification Card.<sup>60</sup>

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Qualifying identification included the following: (1) a current and valid Mississippi driver's license; (2) a current and valid identification card issued by a branch, department, agency or entity of the State of Mississippi; (3) a current and valid United States passport; (4) a current and valid employee identification card containing a photograph of the elector and issued by any branch, department, agency or entity of the United States government, the State of Mississippi, or any county, municipality, board, authority or other entity of this State; (5) a current and valid Mississippi license to carry a pistol or revolver; (6) a valid tribal identification card containing a photograph of the elector; (7) a current and valid United States military identification card; and (8) a current and valid student identification card, containing a photograph of the elector, issued by any accredited college, university or community or junior college in the State of Mississippi. *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *See id.* § 2 (which requires the Mississippi Voter Identification Card to include the applicant's full legal name, legal residence address; mailing address (if different), voting information, the date the card was issued, the county in which the applicant was registered to vote, and other such information as required by the Secretary of State). The Secretary of State's office did require a unique identifying number to each card be included on the back of the card to assist in keeping track of cards issued in the Statewide Elections Management System. *Id.*

<sup>60</sup> *Id.* Underlying documentation included a photo identity document; documentation showing the person's date and place of birth; a social security card; a Medicare card; a Medicaid card; and such other acceptable evidence of verification of residence in the county as determined by the Secretary of State. *Id.*

The Secretary of State and his staff were heavily involved in crafting the provisions of House Bill 921, working with legislators as the bill progressed through the legislative process during the 2012 General Session.<sup>61</sup> The bill drew hours of heated floor debate in both chambers when it was presented. One legislator went as far as to refer to the bill as “Jim Crow coming back in, dressed up pretty.”<sup>62</sup> There were failed attempts to tack on other election changes, including same day voter registration,<sup>63</sup> but the bill was passed out of the Senate by a vote of thirty-four to fourteen. After surviving conference weekend, the bill was approved by the House of Representatives by a vote of seventy-nine to thirty-nine maintaining only the voter identification-related provisions.<sup>64</sup> After Governor Bryant signed House Bill 921 into law, the Mississippi State Conference of the National Association for the Advancement of Colored People released a statement the bill was “a step back to 1890 with this modern-day poll tax” and it “costs more to vote today than it did 122 years ago.”<sup>65</sup> Conversely, the State’s objective was to implement a voter identification requirement which was neither costly nor burdensome to voters.

#### V. LESSONS LEARNED FROM OTHER STATES

Throughout its voter identification preparation efforts for implementation, the Secretary of State’s Office was committed to ensuring its actions were consistent with state and federal voting laws. Voter identification laws had been challenged in courts throughout the country. The Secretary of State’s Policy and Research Division, at the time under the leadership of Assistant Secretary of State Drew Snyder, monitored voter identification litigation in other states—including attending the trials in Washington, D.C., related to voter identification laws implemented by South Carolina and Texas.

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<sup>61</sup> Interview with Lindell Floyd, *supra* note 30.

<sup>62</sup> Jeff Amy, *Miss. Senate Approves Voter ID Bill*, DESERET NEWS (April 10, 2012, 12:00 AM), <http://m.deseretnews.com/article/765567579/Miss-Senate-approves-Voter-ID-bill.html> [<https://perma.cc/3VPF-J9UE>].

<sup>63</sup> Interview with Lindell Floyd, *supra* note 30.

<sup>64</sup> H.B. 921.

<sup>65</sup> Press Release, Nat’l Ass’n for the Advancement of Colored People, MS NAACP Reaffirms Position Against Voter ID (May 17, 2012) (on file with author).

South Carolina revised its voter identification law in May 2011<sup>66</sup> and began the administrative submission process in June 2011.<sup>67</sup> South Carolina already had a voter identification law in effect since 1988 which required voters to present a South Carolina driver's license, Department of Motor Vehicles-issued photo identification card, or non-photo voter registration card in order to vote.<sup>68</sup> Under the pre-existing law, South Carolina voters with the non-photo voter registration card did not have to show a photo identification in order to vote.<sup>69</sup> Likewise, the newly revised voter identification law did not require photo identification to vote. Instead, under the "reasonable impediment" provision of the law voters presenting the non-photo voter registration card (which sufficed to vote under pre-existing law) could still vote without photo identification.<sup>70</sup> Those voters simply signed an affidavit at the polling place on Election Day and listed the reason why they had not obtained photo identification.<sup>71</sup> Additionally, the revised requirement expanded the list of photo identification which could be used to vote by adding passports, military identification, and the newly-created free photo voter registration card available at each county's elections office.<sup>72</sup> The revision also provided the Department of Motor Vehicles-issued photo identification card could be obtained at each county's office free-of-charge to individuals seventeen years of age and older; the cards cost \$5.00 under the pre-existing law.<sup>73</sup>

South Carolina's new voter identification law also required the State Election Commission to implement an "aggressive" voter education program to educate voters and election officials about the revised law.<sup>74</sup> The Commission was required to post information at county election offices, train poll managers and poll workers, coordinate with local and service organizations, advertise

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<sup>66</sup> H.B. 3003, 2011 Leg., 119th Sess. (S.C. 2011).

<sup>67</sup> Letter from Alan Wilson, *supra* note 50.

<sup>68</sup> S.C. CODE ANN. § 7-13-710 (1993) (2016).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> H.B. 3003.

<sup>72</sup> *Id.*

<sup>73</sup> S.C. CODE ANN. § 56-1-3350 (2016).

<sup>74</sup> H.B. 3003.

the changes in South Carolina newspapers, and disseminate information through local media outlets.<sup>75</sup>

The Department of Justice denied preclearance on December 23, 2011, starting with the position South Carolina's new law required voters to present one of five forms of photo identification and this new requirement would have significant racial disparities.<sup>76</sup> The Department cited to data supplied by South Carolina showing of the total 2,701,843 registered voters in the state, 8.9% did not possess Department of Motor Vehicles-issued photo identification.<sup>77</sup> The Department of Justice continued down this path noting when disaggregated by race, South Carolina's data showed 8.4% of white registered voters lacked any form of Department of Motor Vehicles-issued identification, as compared to 10.0% of non-white registered voters.<sup>78</sup> The Department said minority voters were nearly 20% more likely to be disenfranchised by South Carolina's law than white voters and the state had "failed entirely to address the disparity between the proportions of white and non-white registered voters who lack DMV-issued identification."<sup>79</sup> South Carolina's mitigating "reasonable impediment" exemption was interpreted as too ambiguous to conclude it would alleviate the law's discriminatory effects.<sup>80</sup> The Department of Justice argued the exemption's vagueness lent itself to being applied differently from one polling place to another, risking exacerbating the retrogressive effect of the new law on minority voters rather than mitigating it.<sup>81</sup> The preclearance denial to South Carolina marked the first time since 1994 the Department of Justice had exercised its power under the Voting Rights Act to block a voter identification law.<sup>82</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> Letter from Thomas E. Perez, Assistant Att'y Gen., United States Dep't of Justice, to C. Havird Jones, Jr., Assistant Deputy Att'y Gen., Office of the Att'y Gen. of S.C. (December 23, 2011) (on file with U.S. Dep't of Justice).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> This marked the third time the Justice Department weighed in on a voter identification law; officials previously blocked a voter ID law in Louisiana in 1994. *Justice Department Rejects South Carolina Voter ID Law*, FOX NEWS (Dec. 23, 2011),

Following the Department of Justice's denial of administrative preclearance, South Carolina filed suit seeking judicial preclearance on February 8, 2012.<sup>83</sup> The District of Columbia's District Court three-judge panel ruled on October 10, 2012, there was not enough time left to implement South Carolina's voter identification law and its education program requirements for the upcoming 2012 General Election (occurring just four weeks from the date of the decision), but the law would be in effect for 2013 elections.<sup>84</sup> The court determined the new law should be precleared because, as the court interpreted it, a voter with the non-photo voter registration card could still vote without photo identification so long as the voter stated the reason for not having obtained one. The list of qualifying photo identification which could be used to vote was expanded and the new law made it far easier to obtain a qualifying photo identification than it was under the pre-existing law.<sup>85</sup> Based on these facts, the district court concluded the revised voter identification law did "not have a discriminatory retrogressive effect, as compared to the benchmark of South Carolina's pre-existing law" and was not enacted for a discriminatory purpose.<sup>86</sup> The court also clarified the "reasonable impediment" exemption was not subject to review by county officials. Instead, the reasonableness of the listed impediment was to be determined by the voter and not by a poll manager or county board.<sup>87</sup>

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<http://www.foxnews.com/politics/2011/12/23/justice-department-rejects-south-carolina-voter-id-law.html> [<https://perma.cc/R9Y4-D9JQ>].

<sup>83</sup> South Carolina v. United States, 898 F. Supp. 2d 30 (D.D.C. 2012).

<sup>84</sup> *Id.* at 52.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 36 (citing Op. S.C. Att'y Gen., Aug. 16, 2011, 2011 WL 3918168, at \*4) ("As the South Carolina Attorney General determined, a voter may assert, for example, that he or she lacks a birth certificate, or has a disability, or does not have a car. (The example of voters who don't have a car is especially important because one of the main concerns during the legislative debates was whether citizens without cars would be required to obtain photo IDs. They are not.) So too, a voter may assert any of the myriad other reasons for not procuring one of the required photo IDs, such as: I had to work, I was unemployed and looking for work, I didn't have transportation to the county office, I didn't have enough money to make the trip, I was taking care of my children, I was helping my family, I was busy with my charitable work, and so on. Any reason that the voter subjectively deems reasonable will suffice, so long as it is not false.").

Like South Carolina, the Texas Legislature passed its own revised voter identification legislation in May 2011.<sup>88</sup> The Texas law encompassed a more stringent voter identification requirement than existing law. Prior to enactment of the 2011 legislation, an elector was required to present a voter registration certificate or an alternate acceptable form of identification in order to vote in-person.<sup>89</sup> The new legislation required electors voting in-person to present one of five forms of government-issued photographic identification.<sup>90</sup> The legislation also prohibited the use of identification which expired more than sixty days before the date of presentation at the polls.<sup>91</sup> Voters lacking one of the prescribed forms of photographic identification could obtain an election identification certificate (EIC).<sup>92</sup>

Texas submitted its preclearance application to the Department of Justice on July 25, 2011.<sup>93</sup> The Department responded by requesting additional information concerning (1) the number of voters lacking a Department of Public Safety-issued driver's license or personal identification card, and (2) the percentage of those voters who are minorities.<sup>94</sup> In response, Texas provided a list of almost 800,000 registered voters it was unable to match with corresponding entries in the Texas Department of Public Safety driver's license and personal ID

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<sup>88</sup> S.B. 14, 82d Leg. (Tex. 2011).

<sup>89</sup> TEX. ELEC. CODE §§ 63.008, 63.0101 (2015). Texas recognized eight broad categories of documents as alternative acceptable forms of identification, including birth certificates, expired and non-expired driver's licenses, U.S. passports, U.S. citizenship papers, utility bills, official mail addressed to the person . . . from a governmental entity, any form of identification containing the person's photograph establishing the person's identity, and any other form of identification prescribed by the secretary of state. *Id.* § 63.008.

<sup>90</sup> The five types of identification included (1) a driver's license or personal ID card issued by the Texas Department of Public Safety; (2) a license to carry a concealed handgun issued by Texas DPS; (3) a U.S. military ID card; (4) a U.S. citizenship certificate with photograph; and (5) a U.S. passport. *Id.* § 63.0101.

<sup>91</sup> *Id.*

<sup>92</sup> S.B. 14.

<sup>93</sup> Letter from Hope Andre, Tex. Sec'y of State, to T. Christian Herren, Jr., Chief Voting Section, U.S. Dep't of Justice (July 25, 2011) (on file with the Brennan Ctr. for Justice).

<sup>94</sup> Letter from T. Christian Herren, Jr., Chief Voting Section, U.S. Dep't of Justice, to Ann McGeehan, Director of Elections, Tex. Sec'y of State (Sept. 23, 2011) (on file with the Brennan Ctr. for Justice).

database.<sup>95</sup> The Department of Justice denied preclearance on March 12, 2012, concluding Texas failed to show the new law would not have a retrogressive effect of denying or abridging the right to vote on account of race.<sup>96</sup> The denial concluded Texas's no-match data showed "Hispanic registered voters [were] more than twice as likely as non-Hispanic registered voters to lack [a Department of Public Safety-issued driver's license or identification card]" because the Department's analysis of data provided by Texas showed 6.3% of Hispanic registered voters did not have Department of Public Safety-issued identification compared to 4.3% of non-Hispanic registered voters similarly situated.<sup>97</sup> Further, the Department denied preclearance because Texas failed to show the availability of the free EIC would mitigate the law's impact on Hispanic registered voters.<sup>98</sup> The Department of Justice found if a prospective voter lacked the documentation needed to obtain an EIC, the least expensive option would be obtaining a copy of the voter's birth certificate for \$22.00.<sup>99</sup>

Texas preemptively filed a declaratory action on January 24, 2012, in the District Court for the District of Columbia seeking judicial preclearance after the Department denied South Carolina's request for administrative preclearance.<sup>100</sup> The district court also declined to grant preclearance, finding the implicit costs of obtaining qualifying identification would "fall most heavily on the poor and that a disproportionately high percentage of African Americans and Hispanics in Texas live in poverty."<sup>101</sup> The district court concluded Texas's voter identification requirement would lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral process.<sup>102</sup>

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<sup>95</sup> Letter from Ann McGeehan, Director of Elections, Tex. Sec'y of State, to T. Christian Herren, Jr., Chief Voting Section, U.S. Dep't of Justice (Oct. 4, 2011) (on file with the Brennan Ctr. for Justice).

<sup>96</sup> Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, to Keith Ingram, Director of Elections, Tex. Sec'y of State (Mar. 12, 2012) (on file with the Brennan Center for Justice).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012).

<sup>101</sup> *Id.* at 144.

<sup>102</sup> *Id.*

Within hours of the *Shelby County* decision, discussed in more detail below, Texas announced its voter identification requirement would take effect immediately.<sup>103</sup> The Texas State Conference of the NAACP and the Mexican American Legislative Caucus of the Texas House of Representatives filed suit on September 17, 2013, to block the voter identification requirement in the United States District Court for the Southern District of Texas. The suit argued the requirement (1) had a discriminatory result in violation of Section 2 of the Voting Rights Act, (2) was enacted with a racially discriminatory purpose also in violation of Section 2 of the Voting Rights Act in addition to the Fourteenth and Fifteenth Amendments to the United States Constitution, and (3) imposed substantial and unjustified burdens on the right to vote in violation of the Fourteenth Amendment.<sup>104</sup> During an eight day trial, plaintiffs' experts testified 1.2 million eligible Texas voters lacked a form of identification which would have been accepted under Texas's requirements, and minorities would be hit the hardest: African-American voters were 305% more likely and Hispanic registered voters were 195% more likely than white voters to lack identification acceptable for voting.<sup>105</sup> On October 9, 2014, the district court found the requirement did violate Section 2, imposed unconstitutional burdens on the right to vote, was enacted with a discriminatory intent, and constituted an unconstitutional poll tax.<sup>106</sup> Just days later on October 14, the Fifth Circuit Court of Appeals temporarily stayed the District Court's order in light of the upcoming November 2014 General Election.<sup>107</sup> The plaintiffs in the district court action filed an emergency appeal to the United States Supreme Court, which

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<sup>103</sup> Press Release, Statement by Texas Attorney General Greg Abbott (June 25, 2013) (on file with Tex. Att'y Gen.), <https://texasattorneygeneral.gov/oagnews/release.php?id=4435> [<https://perma.cc/SL53-AFSG>].

<sup>104</sup> See *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014) (consolidated case comprising the original lawsuit by the Texas State Conference of the NAACP and the Mexican American Legislative Caucus of the Texas House of Representatives).

<sup>105</sup> *Victory for Texas Voters: Appeals Court Upholds Ruling Blocking Photo ID Law*, BRENNAN CTR. FOR JUSTICE (Aug. 5, 2015), <http://www.brennancenter.org/press-release/victory-texas-voters-appeals-court-upholds-ruling-blocking-photo-id-law> [<https://perma.cc/395B-LGXW>].

<sup>106</sup> *Veasey v. Perry*, 29 F. Supp. 3d 896 (S.D. Tex. 2014).

<sup>107</sup> *Veasey v. Perry*, 769 F.3d 890 (5th Cir. 2014).

upheld the Fifth Circuit's ruling and granted Texas permission to implement the law for the November election.<sup>108</sup>

In August 2015, the law was found unconstitutional for a third time by a Fifth Circuit three-judge panel.<sup>109</sup> The panel agreed with the plaintiffs' assertion the law had a racially discriminatory effect in violation of the Voting Rights Act.<sup>110</sup> The panel also ruled the district court should hear more evidence on the intentional discrimination claim, and vacated the district court's finding the law violated the Constitution.<sup>111</sup> Texas appealed, requesting the full Fifth Circuit fifteen-judge bench rehear the case and allow the law to remain in effect while Texas requested Supreme Court review. The Fifth Circuit granted the en banc review request.<sup>112</sup> The Fifth Circuit found the Texas voter identification requirement disproportionately diminished African Americans' and Latinos' ability to vote, therefore having a racially discriminatory effect in violation of Section 2 of the Voting Rights Act.<sup>113</sup> It sent the case back to the district court to craft a rule for the November 2016 election to remedy the law's discriminatory effect.<sup>114</sup> On September 20, 2016, that lower district court issued an order requiring Texas to issue new voter education materials in response to accusations that state officials were misleading voters about newly relaxed identification requirements for the November election.<sup>115</sup> The Fifth Circuit also reversed and remanded the lower district court's finding of discriminatory intent for further review.<sup>116</sup> Oral arguments on the discriminatory intent claim will occur in early 2017.<sup>117</sup> The Supreme Court had previously denied

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<sup>108</sup> *Veasey v. Perry*, 135 S. Ct. 9 (2014).

<sup>109</sup> *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *reh'g en banc granted*, 815 F.3d 958 (5th Cir. 2016), *and on reh'g en banc*, 830 F.3d 216 (5th Cir. 2016), *cert. denied*, 2016 WL 5394945 (U.S. Jan. 23, 2017) (No. 16-393).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 503-04 (“[W]e conclude that the proper procedure is to vacate this portion of the district court’s judgment (and its accompanying remedies) and remand to the district court for a reexamination of the probative evidence underlying Plaintiffs’ discriminatory purpose claims weighed against the contrary evidence . . .”).

<sup>112</sup> *Veasey v. Abbott*, 815 F.3d 958 (5th Cir. 2016).

<sup>113</sup> *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc).

<sup>114</sup> *Id.* at 272.

<sup>115</sup> *Veasey v. Abbott*, No. 2:13-CV-00193 (S.D. Tex. Sept. 20, 2016).

<sup>116</sup> *Veasey*, 830 F.3d at 272.

<sup>117</sup> *Veasey v. Abbott*, No. 2:13-CV-00193 (S.D. Tex. Aug. 25, 2016).

plaintiffs' Application to Vacate the Fifth Circuit's October 2014 stay, leaving Texas's voter identification requirement in effect for the November 2016 election.<sup>118</sup> Texas filed a petition for a writ of certiorari with the Supreme Court, asking it to review (1) whether the Texas law was enacted with a discriminatory purpose and (2) whether the law resulted in a denial or abridgement of the right to vote under Section 2.<sup>119</sup> The Supreme Court denied the request, noting the discriminatory purpose claim was remanded to the district court for further consideration and also that the district court has yet to enter a final remedial order concerning the Section 2 claim.<sup>120</sup> The Supreme Court pointed out these issues could be raised again after entry of final judgment from the district court, as they would be better suited for certiorari review at that time.<sup>121</sup>

#### VI. SEEKING PRECLEARANCE FOR MISSISSIPPI

Because Mississippi was a covered jurisdiction under Section 5 at the time Initiative 27 was passed, the State had to prepare its own administrative submission for preclearance before implementing its voter identification law. To obtain preclearance, Mississippi bore the burden of showing the proposed voting change lacked both (1) a racially discriminatory purpose and (2) a retrogressive effect on the position of racial minorities.<sup>122</sup>

The Office of the Mississippi Attorney General had submitted the constitutional amendment to the Department of Justice on January 4, 2012, after the official declaration of the vote for Initiative 27.<sup>123</sup> The Department responded it would review all supplemental submissions simultaneously once the enabling legislation and any additional implementation procedures were

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<sup>118</sup> *Veasey v. Abbott*, 136 S. Ct. 1823 (2016).

<sup>119</sup> *Petition for Writ of Certiorari, Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (No. 16-393).

<sup>120</sup> *Abbott v. Veasey*, 2016 WL 5394945 (U.S. Jan. 23, 2017) (No. 16-393).

<sup>121</sup> *Id.*

<sup>122</sup> *Georgia v. United States*, 411 U.S. 526, 529-30 (1973), *abrogated by* *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

<sup>123</sup> Letter from Jim Hood, Miss. Att'y Gen., to U.S. Att'y Gen. (Jan. 4, 2012) (on file with U.S. Dep't of Justice).

submitted.<sup>124</sup> Because of Mississippi's pending submission, it was particularly troubling when reports surfaced alleging a Department of Justice Voting Rights Section employee made degrading comments about Mississippi in May 2012.<sup>125</sup> The Secretary feared the comments, while a submission was pending for Mississippi, were indicative of a culture within the Department's Voting Rights Section against Mississippi's submission. The Secretary immediately made a request for the employee to be removed from all reviews of state election laws under Section 5 of the Voting Rights Act.<sup>126</sup> Congressmen Alan Nunnelee, Gregg Harper, and Steven Palazzo also contacted the Department of Justice demanding the same.<sup>127</sup> The employee was ultimately removed from handling Mississippi's administrative submissions.

One of the most important tasks for the State in requesting preclearance was to determine how much of Mississippi's voting age population lacked the qualifying photo identification outlined in House Bill 921 and how much of the population also lacked House Bill 921's underlying documentation. The State initially attempted to conduct its own data match between voter registration records in the Statewide Elections Management System and Mississippi Department of Public Safety-issued identification data. The Statewide Elections Management system showed statewide voter registration numbers of 1,854,295. When comparing that data to Department of Public Safety data, the State could only determine somewhere between 5% and 9% of registered voters did not have an active Mississippi driver's license or Department of Public Safety-issued photo identification.

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<sup>124</sup> Letter from T. Christian Herren, Jr., U.S. Dep't. of Justice, to Margarette L. Meeks, Miss. Special Assistant Att'y Gen. (Mar. 5, 2012) (on file with U.S. Dep't of Justice).

<sup>125</sup> J. Christian Adams, *DOJ Employee Contempt for Mississippi Citizens on Facebook*, PJ MEDIA (Apr. 29, 2012) <https://pjmedia.com/jchristianadams/2012/04/29/doj-employee-contempt-for-mississippi-citizens-on-facebook/> [https://perma.cc/269A-Q3RT].

<sup>126</sup> Press Release, Miss. Sec'y of State, Secretary Hosemann Addresses Derogatory Comments Allegedly Made by DOJ Employee (May 8, 2012) (on file with Miss. Sec'y of State).

<sup>127</sup> Letter from Gregg Harper, Alan Nunnelee, Steven Palazzo, U.S. Congressmen, U.S. House of Representatives, to Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice (May 8, 2012) (on file with Y'all Politics).

The results, however, proved to be unreliable, as bloated voter rolls and use of nicknames on voter registration records prevented an accurate match. The results of the data match could not be disaggregated by race because voter registration records do not capture the race of voters.

Because of the concerns surrounding the Department of Public Safety-Voter Registration data match, the Secretary of State hired Edison Research to conduct an exit survey during the November 6, 2012 General Election to assist in determining the number of Mississippi voters who possess any form of House Bill 921's qualifying identification. Edison is a premier research company in the United States, and the sole provider of exit poll information to the Associated Press, ABC News, CBS News, MSNBC, Fox News, CNN, and USA Today.

To ensure the results of the survey would be beyond reproach only two individuals in the Secretary of State's Office, and no other official or citizen, had knowledge of the exit survey leading up to the election. Edison was given strict instructions not to disclose which polling locations were selected, not even to the Secretary. The results of the survey were deposited into a locked ballot box at each precinct and shipped back to Edison headquarters in New Jersey via United Parcel Service. The boxes remained locked until opened at Edison headquarters. When opening and reviewing the results, Edison was required to do so with at least two individuals in the room and with all activity being video recorded. It was critical to the State's administrative submission the Edison exit poll numbers would stand scrutiny of the Department of Justice.

Edison personally surveyed nearly 6,000 Mississippi voters as they exited thirty polling locations selected randomly by Edison to reflect the demographics of Mississippi.<sup>128</sup> In the survey, voters were asked whether they possessed one of the forms of photo identification acceptable under House Bill 921. More than 98% of voters responded they currently possessed one of the forms of qualifying identification.<sup>129</sup> According to the exit poll, only 0.8% of the voters polled (which included both white and African

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<sup>128</sup> MISSISSIPPI VOTER EXIT RESEARCH, FINAL REPORT, EDISON RESEARCH (2012) (on file with Miss. Sec'y of State).

<sup>129</sup> *Id.*

American voters) reported lacking qualifying identification to vote and 0.9% did not answer the question.<sup>130</sup>

Once the Secretary of State filed proposed administrative rules pursuant to House Bill 921's directive, discussed in more detail below, the Secretary of State and his staff<sup>131</sup> assumed responsibility for the State's administrative submission and prepared its own submission for the Department of Justice. The submission, dated January 18, 2013, contained the proposed rules, the Edison Research survey results, video recordings of the Mississippi Legislature's floor debates concerning HB 921, transcripts from the Initiative 27 public hearings, and other information to assist the Department in its review of Mississippi's submission.<sup>132</sup>

Following the administrative submission, the Secretary of State again traveled to meet with the Department of Justice on January 25, 2013.<sup>133</sup> The Secretary noted to the Department of Justice representatives the State's representatives were required to present photo identification as they entered the building. The Secretary went over the administrative rules and Edison exit survey results in detail and asked for questions or comments.<sup>134</sup> The Department's main concern was whether a voter registration card would be sufficient as underlying documentation to obtain a Mississippi Voter Identification Card.<sup>135</sup> The State responded it would review the Department's question and consider adding the card as a form of underlying documentation in the administrative rules. Ultimately the card was added.<sup>136</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> Assistant Secretary of State of Policy and Research Drew Snyder and attorneys John Sullivan and Leann Thompson.

<sup>132</sup> Letter from Delbert Hosemann, Sec'y of State, Miss. Sec'y of State, to T. Christian Herren, Jr., Chief Voting Rights Section, U.S. Dep't of Justice (Jan. 18, 2013) (on file with Miss. Sec'y of State).

<sup>133</sup> State representatives were Secretary of State Hosemann and Assistant Secretary of State Snyder. Department of Justice representatives were Voting Section Chief Christian Herren, two senior attorneys and two voting rights analysts.

<sup>134</sup> Interview with Drew Snyder, Assistant Sec'y of State for Pol'y and Res., Miss. Sec'y of State, in Jackson, Miss. (Apr. 22, 2016).

<sup>135</sup> *Id.*

<sup>136</sup> 1-16 MISS. CODE R. § 3.6 (LexisNexis 2016).

Between January and June 2013, the Department of Justice and the Secretary of State traded correspondence as the Department requested more information regarding Mississippi's implementation plans and intent. The Secretary of State provided the Department with almost 5,000 pages of emails and correspondence related to the intent behind Mississippi's voter identification requirement from the Offices of the Governor, Secretary of State, and both chambers of the Mississippi Legislature; the State's Outreach and Education Plan; and statistical data showing the Mississippi population's proximity to Circuit Clerk offices. Clearly, Mississippi's application was under close scrutiny.

Whatever may be said of voter identification requirements passed by other states, Mississippi's law was designed to comply with Section 5 of the Voting Rights Act. A mere cursory review of the facts reveal the requirement was adopted through a constitutional amendment by popular vote, augmented by House Bill 921, was passed by the Mississippi Legislature, and signed into law by the Governor. The Secretary of State proposed thought-out administrative rules designed to pass constitutional and administrative muster.

#### VII. THE SUPREME COURT SPEAKS: COVERAGE FORMULA UNCONSTITUTIONAL

After indicating Section 5 presented difficult constitutional questions but falling short of declaring the requirement unconstitutional in 2009,<sup>137</sup> the United States Supreme Court struck down the coverage formula in Section 4 of the Voting Rights Act on June 25, 2013, in the landmark decision *Shelby County v. Holder*.

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<sup>137</sup> In *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009), the 2006 extension of Section 5 was challenged before the United States Supreme Court by a municipal water district in Texas that elected members to a water board. The district wished to move a voting location from a private home to a public school, but the change was subject to preclearance because Texas was a covered jurisdiction. The district did not register voters, and thus it did not appear to qualify as a "political subdivision" eligible to bail out of coverage. The Supreme Court interpreted Section 5 to allow any covered local government, including one that does not register voters, to obtain an exemption from preclearance if it meets the bailout requirements.

Shelby County, a covered jurisdiction in Alabama, sued the Attorney General in Federal District Court in 2010.<sup>138</sup> Shelby County sought a declaratory judgment that Sections 4(b) and 5 of the Voting Rights Act were facially unconstitutional, as well as a permanent injunction against their enforcement. The district court ruled against Shelby County, upholding the Act and finding the evidence before Congress, when during reauthorization of the Act in 2006, was sufficient to justify the reauthorization of Section 5 and continuing the coverage formula in Section 4(b).<sup>139</sup> The Court of Appeals for the District Court affirmed, accepting Congress's conclusion Section 2 litigation remained inadequate in covered jurisdictions to protect the rights of minority voters, and therefore Section 5 was still necessary.<sup>140</sup> The District of Columbia Circuit Court did note the evidence identifying the covered jurisdictions was "less robust" while reviewing Section 4.<sup>141</sup> After considering data comparing the number of successful Section 2 lawsuits around the country and the deterrent effect of Section 5, the court held the Voting Rights Act continued "to single out the jurisdictions in which discrimination is concentrated," and the coverage formula passed constitutional muster.<sup>142</sup> On November 9, 2012, the United States Supreme Court granted certiorari limited to whether Congress's decision in 2006 to reauthorize Section 5 under the pre-existing coverage formula in Section 4 exceeded its authority under the Fourteenth and Fifteenth Amendments, thus violating the Tenth Amendment and Article IV of the Constitution.<sup>143</sup>

Shelby County argued the Supreme Court had previously acknowledged an obligation to require Congress to document evidence of widespread patterns of voting discrimination to

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<sup>138</sup> *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2621 (2013).

<sup>139</sup> *Shelby Cty. v. Holder*, 811 F. Supp. 2d 424, 508 (D.D.C. 2011).

<sup>140</sup> In assessing Section 5, the district court considered six primary categories of evidence: Attorney General objections to voting changes, Attorney General requests for more information regarding voting changes, successful Section 2 suits in covered jurisdictions, the dispatching of federal observers to monitor elections in covered jurisdictions, Section 5 preclearance suits involving covered jurisdictions, and the deterrent effect of Section 5. *See Shelby Cty. v. Holder*, 679 F.3d 848, 862-63 (D.C. Cir. 2012).

<sup>141</sup> *Id.* at 879.

<sup>142</sup> *Id.* at 883.

<sup>143</sup> *Shelby Cty. v. Holder*, 133 S. Ct. 594 (2012).

continue treating states differently, asserting Congress failed to do so during its reauthorization of Section 5 in 2006.<sup>144</sup> Therefore the lack of current evidence of intentional discrimination meant Section 5 was no longer appropriate.<sup>145</sup> Shelby County also took the stance Section 2 was a suitable remedy to address voting discrimination and Section 5 was over-inclusive because the Shelby County research showed more findings of voting discrimination in non-covered jurisdictions than in covered jurisdictions.<sup>146</sup>

Noting significant positive changes in the nearly fifty years since enactment of the Voting Rights Act, the Supreme Court struck down Section 4's coverage formula as unconstitutional.<sup>147</sup> The Supreme Court held the coverage formula violated the constitutional principles of equal sovereignty of the states and federalism due to its disparate treatment of the states based upon forty-year-old facts having no logical relationship to the present day.<sup>148</sup>

The *Shelby County* decision meant jurisdictions identified by the coverage formula in Section 4(b) no longer needed to seek preclearance for new voting changes, unless they are covered by a separate court order entered under Section 3(c) of the Act. As the Supreme Court's decision described, Section 2, which prohibits discrimination in voting based on race or language minority status and applies permanently on a nationwide basis, is unaffected by the decision.<sup>149</sup> Likewise, other provisions of the Act prohibiting discrimination in voting remain in full force and effect, as do other federal laws protecting voting rights, including the Uniformed and

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<sup>144</sup> *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2625-26 (2013).

<sup>145</sup> *Id.* at 2626.

<sup>146</sup> *See id.* at 2622.

<sup>147</sup> *Id.* at 2631 ("Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.").

<sup>148</sup> *Id.* at 2630-31 ("It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story.").

<sup>149</sup> *Id.* at 2619 ("Section 2 is permanent, applies nationwide, and is not at issue in this case.").

Overseas Citizens Absentee Voting Act, the National Voter Registration Act, and the Help America Vote Act.<sup>150</sup>

The *Shelby County* decision was handed down at 9:00 a.m. By 10:30 a.m. the Attorney General of Texas issued a press release stating Texas would proceed with implementation without Justice Department approval.<sup>151</sup> Two months later the Department of Justice filed suit against Texas to halt enforcement of its voter identification requirement, litigation which continues today.<sup>152</sup>

Upon seeing the Texas Attorney General's press release, Secretary Hosemann telephoned Voting Section Chief Herren personally. He conveyed Mississippi would continue to solicit input from the Department of Justice regardless of the Supreme Court's decision. This telephone call cemented previous discussions between the Secretary of State and the Department of Justice concerning the determination and commitment of Mississippi's efforts to meet all constitutional requirements. Texas and Mississippi took totally different paths at this fork in the road to implementation of their voter identification requirements. Mississippi's proved to be the much better decision and path.

In the wake of the *Shelby County* decision, the Department of Justice advised with respect to administrative submissions under Section 5 which were pending as of June 25, 2013, no determination would be made by the Department of Justice on the proposed changes.<sup>153</sup> The Department further noted this was not a determination on the merits and, therefore, should not be construed as a finding regarding whether the specified change complied with any federal voting rights law.<sup>154</sup>

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<sup>150</sup> See Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986); National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77; Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666.

<sup>151</sup> Press Release, Ken Paxton, Tex. Att'y Gen., Statement by Texas Attorney General Greg Abbott (June 25, 2013) (on file with Tex. Att'y Gen.), <https://texasattorneygeneral.gov/oagnews/release.php?id=4435> [<https://perma.cc/CY68-N6Z8>].

<sup>152</sup> Press Release, U.S. Dep't of Justice, Justice Department to File New Lawsuit Against State of Texas Over Voter I.D. Law (Aug. 22, 2013), <https://www.justice.gov/opa/pr/justice-department-file-new-lawsuit-against-state-texas-over-voter-id-law> [<https://perma.cc/XF24-9R7H>].

<sup>153</sup> See *Voting Section*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/voting-section> [<https://perma.cc/AH5E-H3FG>].

<sup>154</sup> *Id.*

## VIII. IMPLEMENTATION AND MOVING FORWARD

After careful review and consideration of the *Shelby County* decision, Mississippi decided its voter identification requirement would be enforced for the June 3, 2014 Congressional Primary Election, giving adequate time to (1) educate voters, (2) finalize the administrative rules, (3) equip and train all eighty-two Circuit Clerks and their staff to use voter identification equipment provided to them by the State, (4) conduct a comprehensive outreach and education campaign to inform Mississippians about the requirement going into effect and how to obtain the Mississippi Voter Identification Card, and (5) implement a free transportation program to and from every Circuit Clerk's office for individuals in need of the Mississippi Voter Identification Card.

*A. Administrative Rules*

House Bill 921 authorized the Secretary of State to adopt rules and regulations for the administration of the Mississippi Voter Identification Card program.<sup>155</sup> In the summer of 2012, the Secretary of State and his staff, led by Assistant Secretary of State of Elections Kim Turner, embarked on an effort to draft a set of efficient administrative rules to administer and ensure each and every eligible voter needing a Mississippi Voter Identification Card to vote could obtain one without material burden or cost. The drafting process included careful and deliberate review of the rules and regulations of other states with voter identification laws, including Indiana and Wisconsin.

The Office of the Secretary of State also held several meetings in November 2012 with various interested parties—including those who had previously voiced objection to the voter identification requirement—seeking their input and recommendations in drafting the rules. The meetings were attended by various members of the Mississippi Legislature, including several members of the Legislative Black Caucus, political party representatives, Circuit Clerks, Election Commissioners, state and local officials, and various advocacy groups.

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<sup>155</sup> H.B. 921, 2012 Leg., 2012 Reg. Sess. (Miss. 2012).

After numerous revisions and rewrites, the Secretary of State filed proposed administrative rules on December 12, 2012. The rules were the product of countless hours of review and study designed to comply with House Bill 921, to mitigate the time and effort needed to comply with the law, and to ensure no Mississippian was denied the right to vote. Once filed as proposed, the rules were open for public review and comment. The Department of Justice was asked for input and comment on multiple occasions. After the *Shelby County* decision was issued and a few additional revisions at the suggestion of the Department of Justice and the public, the administrative rules were filed as final and went into effect on December 27, 2013—a year after the proposed rules were filed.

The first issue to address in drafting the administrative rules was determining which types of identification would be accepted as qualifying identification to vote. Initiative 27 required the photo identification to be government-issued. House Bill 921 provided eight categories of qualifying identification but also stated the list was not exclusive. The administrative rules added an additional category of qualifying identification, “[p]hoto identification issued by any branch, department, agency or entity of the United States government or any state government including, but not limited to, a driver’s license issued by a state other than Mississippi,” in response to interested parties’ inquiries about whether out-of-state licenses would be allowed as qualifying identification.<sup>156</sup>

The rules also defined House Bill 921’s requirement that qualifying identification be “current and valid.” A question in drafting the rules and a concern repeatedly expressed by various stakeholder groups was how to treat expired identification in relation to House Bill 921’s requirement. The rules defined “current” to mean the identification “has no expiration date or has an issuance date not more than ten (10) years prior to the date the document is presented” for voting.<sup>157</sup> This definition allows voters to use documentation which may be “expired” by several years but is nonetheless sufficiently current to adequately depict the voter

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<sup>156</sup> 1-16 MISS. CODE R. § 1.1(A)(10) (LexisNexis 2016).

<sup>157</sup> *Id.* § 1.1(D).

for verification purposes. The ten year standard mirrors the federal government's ten year standard for United States passport validity issued to individuals over the age of sixteen.<sup>158</sup> The "valid" requirement was defined to mean the "document is what it purports to be, and is not a fake or forgery."<sup>159</sup>

The administrative rules allow several forms of underlying documentation to be presented by an applicant in need of a Mississippi Voter Identification Card in addition to the documentation in House Bill 921.<sup>160</sup> In the unlikely event an applicant did not have any of House Bill's 921 underlying documentation, Circuit Clerks were authorized to verify the applicant's birth certificate information through the Electronic Verification of Vital Events System (EVVE), operated by the National Association for Public Health Statistics and Information Systems (NAPHSIS).<sup>161</sup> The Secretary of State's Office and the Mississippi State Department of Health's Office of Vital Records partnered together with NAPHSIS, so each Circuit Clerk's office had access to EVVE. An applicant simply provides his or her name, date of birth, state of birth, and his or her mother's maiden name to the Circuit Clerk to have his or her identify verified. Any costs incurred in verifying an applicant's birth information are covered by the State, in accordance with Initiative 27 and House Bill 921. The Mississippi Voter Registration Card was also added as a form of underlying documentation at the suggestion of the Department of Justice.<sup>162</sup> By adding the registration card as a form of underlying documentation and allowing an applicant to have his or her birth information verified, every eligible Mississippian could obtain a Mississippi Voter Identification Card without incurring a material cost or burden.

The administrative rules provide when an applicant is issued a Mississippi Voter Identification Card, the applicant is given a Receipt for the Mississippi Voter Identification Card if an election is to be held within forty-five days of the date the application is

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.* § 1.1(N).

<sup>160</sup> *Id.* § 3.5.

<sup>161</sup> *Id.* § 3.5(C).

<sup>162</sup> *Id.* § 3.5(B)(7).

made.<sup>163</sup> This is a document issued by the State of Mississippi solely for the purpose of providing temporary qualifying identification to the applicant for voting because Mississippi Voter Identification Cards are produced by a third-party vendor and may take up to fourteen calendar days to be received by the applicant from the vendor. The receipt is a stop-gap measure to ensure a person has qualifying identification to vote. The rules also allow applicants to go to any Circuit Clerk's office to apply for a Mississippi Voter Identification Card. If an applicant was issued a card by a Clerk other than the Circuit Clerk of the applicant's county of residence, then the card-issuing Clerk must provide notice of the issuance of the card to the Circuit Clerk of the applicant's county of residence.<sup>164</sup> The State had determined 99.47% of Mississippians lived within twenty miles of a Circuit Clerk's office.<sup>165</sup> However, many voters lived closer to the Circuit Clerk's office in a neighboring county than in their county of residence. The State sought to mitigate any travel burdens by not limiting a potential applicant's access to the Mississippi Voter Identification Card to only the Circuit Clerk's office in his or her home county.

### *B. Training Election Officials*

In Mississippi, primary elections are solely the responsibility of the political parties.<sup>166</sup> County Party Executive Committees and Circuit Clerks each have specific statutory responsibilities with regard to preparing for and conducting the Primary Elections and Primary Runoff Elections.<sup>167</sup> However, the Mississippi Code authorizes County Party Executive Committees to enter into written agreements with a Circuit Clerk and/or County Election Commission to perform the certain statutory duties, such as the appointment and training of poll workers.<sup>168</sup> With the implementation of the voter identification requirement, the

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<sup>163</sup> *Id.* § 3.6(E)(2).

<sup>164</sup> *Id.* § 3.2(E).

<sup>165</sup> Letter from Delbert Hosemann, Sec'y of State, State of Miss., to Chris Herren, U.S. Dep't of Justice (Mar. 15, 2013) (on file with Miss. Sec'y of State).

<sup>166</sup> MISS. CODE ANN. § 23-15-263 (2016).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* §§ 23-15-239, -265.

Secretary of State's Office offered to attend poll worker training sessions to offer assistance with specific regard to the new law and was invited to do so by fifteen counties. In January 2014, the Secretary was informed by Rickey Cole, Chairman of the Mississippi Democratic Party, his party would support the new rules and voter identification requirement. Chairman Cole requested the Secretary of State's staff attend Democratic Party County Executive Committee meetings to train and explain the new requirement. Chairman Cole attended all of the input meetings on the administrative rules and his input was valued and utilized. He also determined the law and the rules were most likely constitutional, and he desired his party voters to be fully informed. This decision reversed decades of opposition and fostered cooperation in the implementation of the voter identification requirement between the Office of the Secretary of State and the Mississippi Democratic Party.

In December 2013, the Secretary of State's Office installed equipment in every Circuit Clerk's office in the State, and provided education and training to each on issuing the Mississippi Voter Identification Card. In January 2014, the Elections Division of the Secretary of State's Office took part in the Circuit Clerks Association's Annual Winter Conference in Jackson, training on the technical aspects of the Mississippi Voter Identification Card issuance process. In addition, ten in-house training sessions were offered to County Circuit and Deputy Clerks in mid-January to provide further education and "hands-on" experience in issuing the card. Also in January 2014, the Elections Division held statutorily-required certification training for all County Election Commissioners at their annual meeting in Philadelphia. All 410 County Election Commissioners completed the required three-day training course for the 2014 County General and Special Elections. Five certification sessions were held across the State to train members of each county's Republican and/or Democratic Executive Committee for the conduct of the June Primary Election. In total, 265 County Party Executive Committee members were successfully certified to conduct the County Primary Elections. Certification training programs addressed substantive legal requirements as well as procedural aspects of

the voter identification requirement was added to all training programs. The Secretary of State's Office also implemented a new online comprehensive Poll Manager training program, ahead of the June 2014 Primary Election, to provide county election officials with additional resources in training their poll managers effectively.

### *C. Transportation Program*

For individuals in need of assistance traveling to a Circuit Clerk's office to obtain a Mississippi Voter Identification Card, the State provided free transportation to and from the Circuit Clerk's office. The Mississippi Secretary of State and the Mississippi Department of Transportation (MDOT) entered into a Memorandum of Understanding where public and private transit providers under contract with MDOT throughout the State would provide free transportation for Mississippians in need of a free Mississippi Voter Identification Card but lacked the means to travel.<sup>169</sup>

In the State's outreach and education campaign, discussed in more detail below, Mississippians were encouraged to call a toll free number manned by Secretary of State staff to schedule transportation with a transit provider in their area to the Circuit Clerk's office. After answering a short questionnaire to ensure eligibility for a Mississippi Voter Identification Card, an individual was connected with the appropriate transit provider. The individual and the transit provider then scheduled the time the individual would be picked up from their home, transported to the Circuit Clerk's office, and then transported back home after applying for their card. Transit providers were typically able to incorporate the pickups and drop-offs into their daily routes and invoiced the State directly for services provided.

### *D. Outreach and Education Campaign*

The Edison Research study confirmed an exceedingly small number of Mississippians lacked acceptable photo identification.

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<sup>169</sup> Secretary of State attorneys John Sullivan and Leann Thompson worked closely with Mississippi Department of Transportation staff Shirley Wilson and Pamela West in developing the workflow and processes for the transportation program.

However, the Secretary of State was devoted to reaching those individuals and educating voters on obtaining a free Mississippi Voter Identification Card.

The State began a proactive outreach and education campaign in January 2014 led by Communications Director Pamela Weaver, attorney Leann Thompson, and Assistant Secretary of State of Education and Publication Lea Anne Brandon so all Mississippi citizens would be well-informed about the new voter identification requirement. The goals of the State's campaign were two-fold. The first goal was to identify the individuals who did not possess qualifying photo identification and provide voters with information regarding the free Mississippi Voter ID Card and the free transportation program. The second goal was to educate all voters about the most relevant aspects of the voter identification requirement. Outreach from the Secretary's Office could not be intimidating or threatening. The outreach had to be informative and convey a memorable message.

Nineteen regional coordinators led by Statewide Regional Coordinator Shirley Hall and attorney Leann Thompson were sent out in January to convey the voter identification message to the general public across the State.<sup>170</sup> The coordinators worked with city and county officials, high schools, churches, and food pantries to inform the public about the new requirement for the June 2014 Congressional Primary Election. The group of coordinators was comprised of retired election officials, small business owners, and other engaged community members. The regional coordinators contributed greatly to the success of voter identification implementation because they were able to communicate the State's message in a personal manner. Coordinators often walked the streets of their assigned counties informing and educating citizens on the voter identification requirement. One of the first meetings Statewide Regional Coordinator Hall attended was a gathering of the Pike County Democratic Executive Committee. Tensions were high as some attendees voiced their approval of

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<sup>170</sup> Regional Coordinators were Sherri Bevis, James Burgess, Frank Corder, Barbara Harris, Mary Phillips Neyman, Jeremy Martin, Pamela Martin, Dale Persons, Wanda Vowell, Angie McGinnis, Glenda Johnson, Marilyn Avery, Sandy Nichols, Katie Alexander, Ann Watts, Laura Goodman, Deborah Stover, David Holland, and Leroy White.

Mississippi's voter identification law while others strongly opposed it. Hall attempted to keep the group on message and enlist their help in spreading information about the new law. Finally the Executive Committee Chairman spoke. He told the group he did not like the new requirement any more than they did, but the fact remained it was now the law and the Committee should respect the fact the State reached out to the Committee to ensure they were well informed about all aspects of the law. The Agency had requested the Committee's help to inform their members. At the conclusion of the meeting, Hall was asked to provide outreach and educational materials for the Committee to distribute throughout Pike County. This is just one example of many when those opposed to voter identification banded together with the State to achieve a mutual goal: for every eligible Mississippi voter to have the opportunity to cast a ballot.

The Secretary of State established strategic partnerships with local churches, community organizations, advocacy groups, as well as state, county, and local officials to assist in identifying individuals lacking qualifying photo identification, those who might have difficulty understanding the requirements of the new law, and individuals needing assistance in obtaining a Mississippi Voter Identification Card, such as the elderly, disabled, and indigent voters. State strategy also included widespread general distribution of informational pamphlets, posters and postcards to places and locales Mississippians frequented in their daily lives: libraries, community centers, courthouses, pharmacies, grocery stores, churches, as well as festivals and statewide events such as the Mississippi State Fair. Partnerships with municipalities, banks, and utility companies allowed the State to distribute voter identification informational materials in monthly billing and bank statements. Local cellular providers agreed to allow voter identification inserts to accompany cellular bills.

In preparation for the first election with the voter identification requirement in effect, the State distributed more than twenty thousand posters and more than fifty thousand "Need a Voter ID?" postcards to all eighty-two counties via personal delivery by regional coordinators and direct mail. The State also widely publicized the [www.MSVoterID.ms.gov](http://www.MSVoterID.ms.gov) website, which provides voters with information about the voter identification

requirement and collects information from individuals in need of assistance in obtaining a Mississippi Voter Identification Card. The information received from voters via the website or other means of outreach was used to contact those individuals once the requirement went into effect. Pamela Weaver, Secretary of State Communications Director, also developed two television commercials with The Cirlot Agency of Jackson, Mississippi which were awarded two national awards: the Bronze Telly in the Political Issues/Campaign Advertising Category and the Bronze Telly in the Public Service Category.<sup>171</sup> Winning the awards was a feat considering the commercials' subject matter was such a source of contention. The commercials delivered the voter identification message in a funny, relatable, catchy, and lighthearted manner while emphasizing the requirements of the new law.

#### IX. JUNE 2014 CONGRESSIONAL PRIMARY ELECTION

Rumors abounded and the press had reported the Department of Justice was being pressured to bring litigation against Mississippi. Military and overseas voting had begun for the election, but no word had been received as to action by the Department of Justice. Members of the Mississippi Legislative Black Caucus convened in the State Capitol while the Legislature was in session. Upon learning of the meeting, the Secretary of State asked for an opportunity to speak with them. The meeting took place on the first floor of the Capitol in a room which contains a life-size statue of Governor Theodore Bilbo, a white supremacist. The Secretary informed the group all reasonable steps had been taken and Mississippi was at a historical point in its citizens' relationships with one another. After that meeting neither the Legislative Black Caucus nor the NAACP took legal action. The Caucus Chairman, Senator Kenny Wayne Jones, wrote to the Department of Justice asking them to monitor and protect Mississippi's African-American voters and take whatever legal action the Department of Justice felt appropriate.

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<sup>171</sup> Press Release, Miss. Sec'y of State, Voter ID Wins Prestigious National Award (Apr. 24, 2014) (on file with Miss. Sec'y of State).

In the first week of May, the Secretary of State called Voting Section Chief Herren, stating the administrative rules were implemented and voting had begun. The Secretary informed Voting Section Chief Herren he would personally appreciate being informed if the Department of Justice was about to take any action so as not to interrupt the electoral process. Chief Herren replied, “I see no reason for the Department of Justice to be in Mississippi before the June 3 election.” The Secretary replied “Me either.” With that brief conversation, Mississippi was free to determine its own constitutional fate—without outside influence.

By June 2014, the State had issued 1,540 Mississippi Voter Identification Cards. Typically, the Elections Division only sends observers to counties which regularly experience problems on Election Day and in response to requests for poll watchers. The State needed eyes and ears on the ground observing Election Day activity and the new voter identification requirement. Director of Elections Compliance Amanda Frusha enlisted and dispatched poll watchers to all eighty-two counties on June 3.<sup>172</sup> By three o’clock that afternoon, the State had received positive reports from the majority of the poll watchers. The Secretary of State placed a personal call to Voting Section Chief Herren. The Secretary had information Chief Herren had been subject to internal and external pressure to reach an opposite conclusion and file litigation opposing Mississippi’s implementation. In the conversation, the Secretary thanked Herren for giving Mississippi a chance to turn a page in history and acknowledged Herren could have easily reached a different conclusion had he based his decision solely on a historical precedent. Ninety-nine percent of Mississippians voting in the primary presented photo identification.<sup>173</sup> Only 305 voters out of over 400,000 total votes cast did not return to the Circuit Clerk’s office within five business days to present their photo identification in order to have their affidavit ballot counted.<sup>174</sup>

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<sup>172</sup> 2014 MISS. SEC. OF STATE ELECTION ACTIVITIES REP. 7.

<sup>173</sup> *Id.* at 11.

<sup>174</sup> *Id.* at 12.

## X. POSTSCRIPT

The Secretary of State's Office organized two study groups in the summers of 2014 and 2015 composed of legislators, election officials and other individuals across the State familiar with elections in Mississippi to draft a complete revision of the State's Election Code for introduction in the 2016 Legislative Session. House Bill 797 proposed technical updates to the Election Code but also included substantive revisions such as itemization of credit card payments, 48-hour filing requirements for political committees, implementation of a certified poll manager training program, and reduction in the number of paper ballots required to be printed and voting machines to be used by counties.<sup>175</sup> The bill died in a conference committee on April 21, 2016, after certain additional campaign finance language was added by the Senate and removed by the House of Representatives.<sup>176</sup> Further positive election reform is inevitable and will be supported by the Office of the Secretary of State during the 2017 Legislative Session.

House Bill 796 provided for a Pre-Election Day voting period beginning fourteen days before and continuing until 12:00 p.m. on the Saturday immediately preceding Election Day.<sup>177</sup> Pre-Election Day voting would be limited to the Circuit Clerk's office where the elector is registered to vote. This legislation died in the Senate Elections Committee on March 22, 2016.<sup>178</sup> House Bill 809 allows any qualified Mississippi elector to change his or her existing voter registration record through a secure website established by the Office of the Secretary of State and was signed into law on April 14, 2016.<sup>179</sup> Finally, the Election Code currently contains sections related to criminal penalties for various violations of state election laws. House Bill 866 revised and codified these sections in Title 97 of the Mississippi Code along with other criminal provisions and was signed into law on April 18, 2016.<sup>180</sup>

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<sup>175</sup> H.B. 797, 2016 Leg., 2016 Reg. Sess. (Miss. 2016).

<sup>176</sup> *Id.*

<sup>177</sup> H.B. 796, 2016 Leg., 2016 Reg. Sess. (Miss. 2016).

<sup>178</sup> *Id.*

<sup>179</sup> H.B. 809, 2016 Leg., 2016 Reg. Sess. (Miss. 2016).

<sup>180</sup> H.B. 866, 2016 Leg., 2016 Reg. Sess. (Miss. 2016).

## CONCLUSION

The State has issued 5,737 Mississippi Voter Identification Cards as of the end of 2016 and has held numerous elections, including for statewide offices, without incident since the law's implementation in June 2014. The Department of Justice deployed more than 500 personnel to sixty-seven jurisdictions in twenty-eight states for the November 8, 2016 presidential election.<sup>181</sup> Election Day activity was monitored by the Department of Justice personnel in Georgia, Louisiana, and Virginia, states captured under the original Section 4 coverage formula.<sup>182</sup> The Department did not send election monitors to Mississippi. It did not need to.

Mississippians should be extremely proud of the fact the State was able to implement an effective and fair voter identification requirement without federal government interference or litigation, ultimately saving the State millions of taxpayer dollars. Voter identification laws continue to be challenged and struck down by courts around the country. North Carolina's law was struck down by the Fourth Circuit Court of Appeals in July 2016 after finding the law was passed with racially discriminatory intent.<sup>183</sup> North Carolina requested emergency relief staying the Fourth Circuit's decision from the United States Supreme Court in advance of the election.<sup>184</sup> The Supreme Court issued a split decision, with four justices voting to deny the stay and four voting to grant it.<sup>185</sup> The tie left the Fourth Circuit's ruling in place. North Carolina's voter identification requirement was not in effect for the November 8, 2016 presidential election. North Carolina also recently faced attacks

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<sup>181</sup> Press Release, Dept. of Justice, Justice Department to Monitor Polls in 28 States on Election Day (Nov. 7, 2016) (on file with author).

<sup>182</sup> *Id.*

<sup>183</sup> NAACP v. McCrory, 831 F.3d 204, 241-42 (4th Cir. 2016).

<sup>184</sup> Amy Howe, *North Carolina Asks the Justices to Step in on Voter ID Law (UPDATED)*, SCOTUSBLOG (Aug. 16, 2016, 11:31 AM), <http://www.scotusblog.com/2016/08/north-carolina-asks-the-justices-to-step-in-on-voter-id-law/> [<https://perma.cc/UV25-AYG5>].

<sup>185</sup> Order Denying Motion to Stay Mandate, NAACP v. McCrory, 137 S. Ct. 27 (2016) (No. 16A168).

on its early voting provisions<sup>186</sup> and methods of canceling voter registrations.<sup>187</sup>

Mississippians proved to the country and to themselves our State is able to overcome political and racial barriers and conduct our elections without federal oversight. By inclusion, open debate, political discourse, countless hours of hard work, and careful, well-executed planning, Mississippians were able to not only implement a constitutional voter identification requirement, but do so in a fair and open manner—without disenfranchising any voter. Mississippi is not the State of our grandfathers, but it is the State for the future of our grandchildren.

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<sup>186</sup> Emily Bazelon, *The Supreme Court Ruled that Voting Restrictions Were A Bygone Problem. Early Voting Results Suggest Otherwise*, N.Y. TIMES (Nov. 7, 2016), <http://www.nytimes.com/2016/11/07/magazine/the-supreme-court-ruled-that-voting-restrictions-were-a-bygone-problem-early-voting-results-suggest-otherwise.html> [https://perma.cc/DS3P-R3YS].

<sup>187</sup> Ariane de Vogue, *NAACP Files Suit in North Carolina on Voting Registration Purge*, CNN (Oct. 31, 2016, 3:10 PM), <http://www.cnn.com/2016/10/31/politics/naacp-north-carolina-voting-registration-purge/> [https://perma.cc/7FPP-RXUH].





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