



Testimony on HB 3

By: James Slattery, Senior Staff Attorney, Texas Civil Rights Project

Texas House Select Committee on Constitutional Rights & Remedies, July 10, 2021

Chair Ashby, Vice Chair Thompson, and Members of the House Select Committee,

Thank you for the opportunity to testify today regarding HB 3. During my testimony, I will highlight four of the gravest threats that this bill poses to Texas voters: the elimination of drive thru and extended hours voting, the granting of expansive new powers to partisan poll watchers while diminishing vital safeguards against the abuse of such powers, an unworkable ID/Social Security Number matching requirement for mail ballot voters that will likely result in mass disenfranchisement, and an insufficient process to allow voters to cure signature problems on their vote by mail ballots.

But as the Committee considers these and other provisions in HB 3, it should bear in mind two important facts. First, during the March 4, 2021 hearing of the House Elections Committee, the Director of the Elections Division of the Texas Secretary of State reported to the Committee the official position of the Government of the State of Texas: that the most recent state elections, in 2020 election, were “a success” and that our elections were “smooth and secure.”

Second, Texas is already the hardest state to vote in the entire country. That is not an opinion. That is an objective fact. According to a landmark study published in 2020 by Northern Illinois University, which measured the burdens imposed on voters when trying to register and cast a ballot via a “Cost of Voting Index,” Texas ranked 50 out of 50 among US states.¹ Among other problems, we have no online voter registration, only a few discrete groups of Texans can vote by mail, and 750 polling places were closed between 2013 and 2019, predominantly in communities of color.² Indeed, TCRP has documented the systemic barriers voters routinely face in Texas in a number of reports in recent years.³

¹ See Scot Schraufnagel et al., *Cost of Voting in the American States: 2020*, 19 Election Law Journal 503, 508 (2020), available at <https://www.liebertpub.com/doi/pdf/10.1089/elj.2020.0666>.

² Leadership Conference Education Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote* at 17 (Sept. 2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf>.

³ See, e.g., Beth Stevens et al., *Texas Election Protection 2016: An Overview of the Challenges Faced by Texas Voters in the Presidential Election* (2017),

<https://texascivilrightsproject.org/wp-content/uploads/2018/09/EP-Report.pdf>; Beth Stevens & Emily Eby, *Texas Election Protection 2018: How Election Administration Issues Impacted Hundreds of Thousands of Voters* (2019), available at

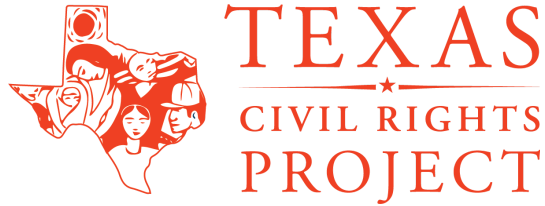
<https://texascivilrightsproject.org/wp-content/uploads/2019/03/2019-Election-Protection-Report.pdf>;

Wajihah Rizvi, *Curbside Voting and Disability Access in the 2020 General Election* (2021), available at

<https://txcivilrights.org/wp-content/uploads/2021/01/Curbside-Voting-Report.pdf>; Judy Bao, *Voter*

Intimidation in Texas During the 2020 General Election (2021), available at

<https://txcivilrights.org/wp-content/uploads/2021/02/Voter-Intimidation-report.pdf>.



HB 3 does nearly nothing to make our elections more secure. But it will advance the Big Lie about the 2020 election, and enshrine the Big Lie further into the laws of the State of Texas.

HB 3 eliminates two forms of voting disproportionately used by voters of color:

Sections 3.04 and 3.12 of HB 3 would prohibit counties from offering what is commonly known as drive thru voting. Drive thru voting was a wildly popular option at some polling places last year, adopted as a vital safety measure during the pandemic, which continues to rage to this very day. It is hard enough to vote in Texas during normal times, but it has been especially difficult to vote safely in Texas during the pandemic, given that the state remained one of just six states refusing to expand mail-in voting during the coronavirus pandemic. It is inexcusable, then, that the state might adopt a bill such as this that would make voting even less safe during the very same pandemic that we are still living through, that may yet flare up again soon due to spreading and dangerous variants, not to mention future crises. It is further ironic that a state known for its love of the Whataburger drive thru would crack down on allowing people to participate in democracy from their car.

Relatedly, Sections 3.08 and 3.09 would sharply restrict the flexibility that counties currently have to set early voting hours that fit the unique needs of their communities. By providing for early voting beyond 10pm on one or more days of the early voting period, counties can ensure that Texans such as shift workers, first responders, folks with irregular work schedules, and voters with substantial family responsibilities among others have an option to vote that works for them. Indeed, when Texas Monthly interviewed voters in Harris County who were participating in its 24 hour voting program, they found a number of voters overjoyed to have this option because they would've found it nearly impossible to vote otherwise, including: an engineer who works in the Houston Ship Channel for an oil field services company; an employee of Metro, Harris County's public transportation agency; a construction project manager; "[a]n overworked Amazon delivery driver"; "[a] middle-aged teacher, still wearing her business-casual work attire"; and an H-E-B employee.⁴

We know that banning drive thru and extended hours voting would not harm all voters equally. In partnership with Targetsmart, TCRP conducted an analysis of the voters who used extended hours and drive-through voting. Attached to my written testimony are three charts showing, by large and substantial margins, that the voters who used extended hours and drive thru voting in Harris County were more likely to be people of color than early voters as a whole. Chart 1 shows that the demographic profile of the Harris County early voting population as a whole is 38% people of color and 62% white. But Chart 2 shows that the proportion of people of color using extended hours voting is 56% (and only 44% white), and Chart 3 shows that the proportion of

⁴ Peter Holley, *Meet the Harris County Voters Who Showed Up After Midnight to Cast a Ballot*, Texas Monthly (Oct. 30, 2020), available at <https://www.texasmonthly.com/news-politics/harris-county-24-hour-voting/>.



people of color who used drive thru voting was 53 % (and only 47% white). These results should not be surprising: people of color disproportionately have less flexible work schedules, and people of color have been disproportionately more likely to be infected with the coronavirus and die from it than white Texans, making a safe voting option that much more vital for them.

TCRP and other organizations have repeatedly pointed out the disparate impact of both of these provisions when testifying on them during the recent regular session. If the Legislature still chooses to enact these provisions after having received such data from multiple sources on a number of different occasions, the only reasonable conclusion is that these provisions in fact reflect a discriminatory intent by the Legislature to eliminate forms of voting because they are used by voters of color. That this disparate impact is not merely an unfortunate side effect of HB 3, but is in fact the primary and intended purpose by the Legislature of these provisions.

For these reasons, we therefore urge the Committee to remove the bans on drive thru and extended hours voting.

HB 3 will empower partisan poll watchers to wreak havoc in polling places and intimidate voters

Next, I wish to raise serious concerns with Sections 4.01, 4.03, 4.04, 4.05, 4.06, 4.07, 5.09, and 5.11, which would remove vital safeguards that prevent partisan poll watchers from wreaking havoc in polling places.

Partisan poll watchers are appointed by political campaigns to be their agents inside the polling place. That is not just me saying that: the Election Code is very explicit in Section 33.001 that watchers are appointed “on behalf of a candidate, a political party, or the proponents or opponents of a measure.” Partisan poll watchers serve at the pleasure of the campaigns that have appointed them and represent the interests of those campaigns, not the public at large.

To be a partisan poll watcher, you are not required under Texas law to complete any kind of training or examination in election law or procedures. To the extent that political parties voluntarily train poll watchers in Texas’s election laws, the content and accuracy of such training is entirely at their discretion, and may vary highly in quality from one county to the next. They don’t take an oath to observe Texas’s election laws, swearing only that they either do not have a recording device or have disabled one.

These are not just theoretical dangers to voting posed by partisan watchers. As TCRP has documented in a report I have attached to this testimony,⁵ from which I am drawing the following material, partisan watchers have been deployed throughout American history -- from Reconstruction

⁵ Emily Eby and Joaquin Gonzalez, Texas Civil Rights Project, *Opening the Floodgates for Racial Intimidation, Disenfranchisement, and Violence by Expanding Poll Worker Authority*, available at <https://txcivilrights.org/wp-content/uploads/2021/05/TCRP-Poll-Watcher-Report.pdf>.



to the present day -- to harass, intimidate, and violently attack voters of color and voters of the opposing partisan affiliation. For instance, in the lead-up up to the 1964 presidential election, the Republican National Committee launched the so-called “anti-fraud” campaign known as Operation Eagle Eye. They recruited tens of thousands of volunteers to show up at polling places in communities of color and challenge voters’ eligibility, take unwelcome photographs, loudly describe voters on two-way radios, and summon Republican-friendly police officers. Operation Eagle Eye deployed 10,000 volunteers in Texas alone.

Such efforts didn’t end then. In 1981, the RNC organized a partisan poll watching group called the National Ballot Security Task Force. This group included armed off-duty police officers who patrolled polling places, occasionally removing voters in Latinx and Black neighborhoods. Evidence in litigation that followed included the party’s plans to discourage voting by placing intimidating poll watchers in communities of color in Harris County, Texas. Party representatives made overt racial remarks across the country, such as “If it’s a close race . . . which I’m assuming it is, this could keep the black vote down considerably.” The parties signed a consent decree allowing a federal court to review any proposed “ballot security” activities of the RNC, particularly in minority areas--a consent decree that lapsed only in recent years.

Poll watchers in Texas have also been known to call Border Patrol in an attempt to curtail Latinx turnout. In the 1980s in the Rio Grande Valley, poll watchers were known for intimidating non-English speaking voters by trying to kick them out of the polls and photographing them.

This is not ancient history. In 2018, Dallas poll watchers had to be escorted out for looking over voters’ shoulders. In 2010 and in 2020, Houston poll watchers were reported for being too close to voters. The latter was especially intimidating to voters who were susceptible to COVID-19 and forced to vote in person by Texas’s draconian vote-by-mail requirements.

And Common Cause Texas recently obtained video footage of a Harris County Republican Party presentation recruiting and training poll watchers for the 2020 General Election. Throughout the video, the presenter uses dog whistles to target exclusively minority neighborhoods and rile up potential volunteers to form an aggressive poll watching “brigade.” The presenter states that the predominantly white suburban areas of Harris County are “safe,” therefore “courageous” watchers from the suburbs need to venture into Harris County’s predominantly Black and Brown urban core, highlighting particular areas on a map. Wheeler Baptist Church, a historic Black church with storied ties to the civil rights movement, is singled out as a particularly problematic example, despite the fact that no evidence is cited or exists indicating that fraud has occurred at this polling place.

These provisions would give these partisan campaign volunteers a de facto license to run roughshod over election workers trying to conduct voting. First, Section 4.01 grants partisan poll watchers a “get out of jail free card”: election workers can only give a partisan poll watcher a warning the first time they violate the Election Code, and can only make them leave the polling place beginning with the second time they break the law. While Subsection (h) does allow a presiding



judge to call law enforcement to remove a poll watcher upon “a breach of the peace or a violation of law,” that is such an extreme escalation that it is unlikely to be used against poll watchers for nearly any first offense. The State of Texas is effectively telling partisan poll watchers: your first election crime at the polls is free of charge.

Further, a set of provisions collectively grant new expansive rights to partisan watchers to roam freely throughout the polling place without constraint, and impose criminal penalties on efforts by poll workers to keep partisan watchers from interfering with voting. Section 4.04 requires that partisan watchers “may not be denied free movement where election activity is occurring within the location at which the watcher is serving” and Section 4.05 grants partisan watchers the power to observe “all election activities relating to closing the polling place.”

At the same time that HB 3 grants partisan watchers such expansive new rights in polling places, Sections 4.03 and 4.06 create an incentive structure for election workers to refrain from regulating the use of these new powers. If a pollworker believes that a partisan watcher has become too disruptive and should therefore leave the polling place, that partisan watcher can now threaten poll workers with a new Class B misdemeanor of refusing to accept their service. And if a poll worker asks a partisan watcher to move a few steps in any one direction, the watcher can now threaten poll workers with a new Class A misdemeanor for “taking any action to obstruct the view of a watcher or distance the watcher from the activity or procedure to be observed in a manner that would make observation not reasonably effective.”

Expanding watchers’ authority would allow the candidates and parties they represent to intimidate voters up until the last moment of the process, even as they cast their ballots, building on a racist history of vigilante poll watchers dating back to Reconstruction. These provisions open the flood gates for voter intimidation by granting actors with a well documented history of political vigilantism expansive new powers and rights while also diminishing the ability of poll workers to protect voters from them.

HB 3 would impose a new ID/SSN matching requirement for vote by mail that will result in mass disenfranchisement

When applying to vote by mail or submitting their vote by mail ballot, Article 5 would require voters to supply their Texas driver’s license/personal ID card number with their application or ballot. If they do not have such a number, then they would have to supply the last four digits of their Social Security number. And if they have neither, a statement to that effect. The number supplied must match the number that the voter supplied on their voter registration application, or else their vote by mail application/ballot will be rejected.

It is easy to see the needless chaos and mass disenfranchisement this irrational new process will create. First, vote by mail applications and carrier envelopes are already complicated enough for voters to navigate, with a bewildering array of fields they must fill out after reading instructions in



small and dense type. Adding another required field makes it all too likely that voters will miss this or another required field, and have their right to vote needlessly taken away from them.

Further, voters must handwrite those numbers on the form. The quality of people's handwriting varies wildly, as does the ability to interpret others' handwriting. If a voter driver's license number ends in a "9," they should not lose their right to vote because an election worker mistakenly interprets it as a "4" and therefore concludes that numbers don't match.

Other practical problems abound. For instance, when I myself moved to Texas I registered to vote before I got a Texas driver's license, and so I would have put my Social Security Number on my voter registration application. Three years later, if I were to vote by mail now, I would have to use my Texas driver's license number to vote by mail under this provision, which obviously wouldn't match the Social Security Number I put on my voter registration application. But my vote would needlessly be taken away from me with no benefit to election security.

The opportunity to cure vote by mail ballots provisions should include an option to cure other than just in-person

Every major election, Texas counties reject thousands of mail-in ballots solely on the basis of mismatched signatures — including at least 1,873 mail-in ballots rejected during the 2018 General Election. The current process for signature verification under Texas law authorizes untrained local election officials to arbitrarily and subjectively reject mail-in ballots if officials believe, based on their own layman analysis, that the signature on a ballot is not the voter's signature. No advance notice is given to voters before their vote is rejected, and the decision to reject a mail-in ballot is final.

To make matters worse, once a ballot is rejected, there is no way for a voter to save themselves from disenfranchisement even if they somehow find out about the rejection before Election Day and can vote in-person. According to the SOS, they are not allowed to cancel that rejected ballot and cast a ballot that counts at the polls. My organization is currently engaged in litigation challenging this arbitrary process as a violation of the Equal Protection and Due Process Clauses of the U.S. Constitution, as well as the Americans with Disabilities Act and the Rehabilitation Act of 1973.

This bill would improve the situation these voters face by providing some mechanism for voters to be informed of a problem with the signature on their mail-in ballot and correct it. It however doesn't go far enough to truly solve this problem. The current version of HB 3 allows voters to cure for the most part only in person, since most mail-in ballots are reviewed close to, on, or even after Election Day. All mail-in voters should be able to choose whether to cure their ballot by mail, phone, email, fax, or in person, regardless of when their mail-in ballot is reviewed. A large subset of mail-in voters are away from home and can't return in person to correct the error. Also, many voters can't cure in-person because of age, disability, or confinement in jail.

Also, the wording in Sections 5.09(c) and 5.11(c) makes the mandatory process sound discretionary. We recommend removing provision (c) from both sections.



There are many proposals the Committee should adopt instead that would make elections more secure and accessible

If the Committee wants to use HB 3 to make Texas's elections more secure while making the ballot more accessible to voters, there are a number of policies that it could consider instead. Most urgently, the state could enact online voter registration -- used today by 40 other states. OVR would make our voter rolls far more accurate by allowing for real time updates from voters and avoiding mistakes that happen when election officials misinterpret voters' handwriting. Texas could also allow voters to register closer in time than 30 days before the election. It could make all Texas voters eligible to vote by mail, as 34 other states do, so that Texas voters could choose the voting option that works best for them. It could allow Texans to vote with a student or tribal ID. It could codify Governor Abbott's Covid order allowing early voting to start three weeks before election day.

During the interim charge process in advance of the 87th Legislative Session, TCRP submitted a number of these positive election reform proposals that would bolster election security while making it easier for people in Texas to vote.⁶

In our country, the government belongs to the people. Elections are the most important mechanism by which the government holds itself accountable and makes itself responsive to the people. It is the most basic duty of government to ensure that its citizens can vote in free and fair elections. And the most important component of that duty is to clear away any and all unnecessary obstacles standing between the voter and the ballot box. Every Texas voter should be able to cast a ballot that is fairly and accurately counted, but HB 3 would be a giant step backward from that vision of full democracy in Texas.

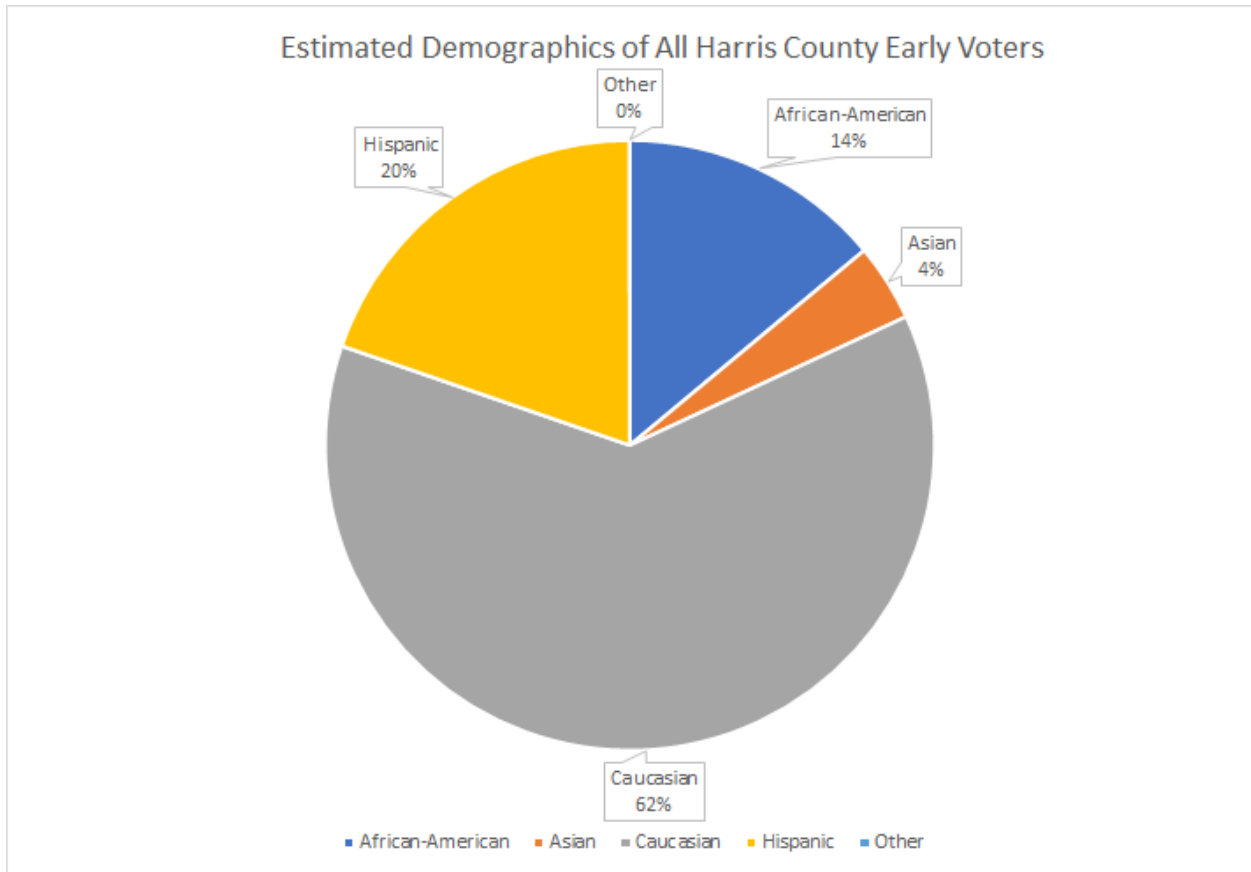
Thank you for your time, and I would be happy to answer any questions you may have.

⁶ See Written Testimony of Alesandra (Ali) Lozano, MSW on Interim Charge #1, Sept. 18, 2020, available at https://drive.google.com/file/d/18qWb4eWPC_rFNLmfniZZLTkdNKJhzdWK/view; Written Testimony of Joaquin Gonzalez on Interim Charge #2, Sept. 18, 2020, available at <https://drive.google.com/file/d/1nqYV9P1UbZomGDPQSSNwL2GsTU8aAwz3/view>; Written Testimony of James Slattery on Interim Charge #3, Sept. 18, 2020, available at https://drive.google.com/file/d/18KTrpTrDLTdsq_50AZAlm9JBVE2RkM4L/view.



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Chart 1 of 3

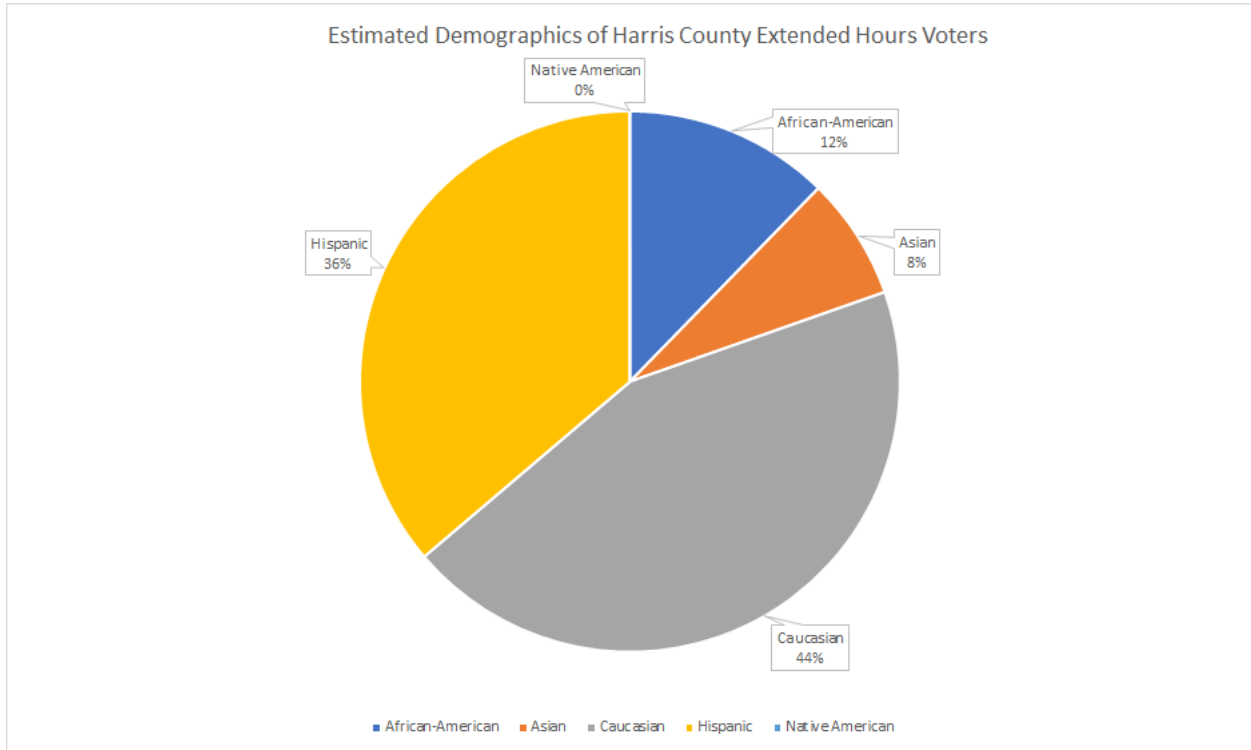


Source: Harris County Early Voting Rosters; Targetsmart for race/ethnicity modeling



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Chart 2 of 3

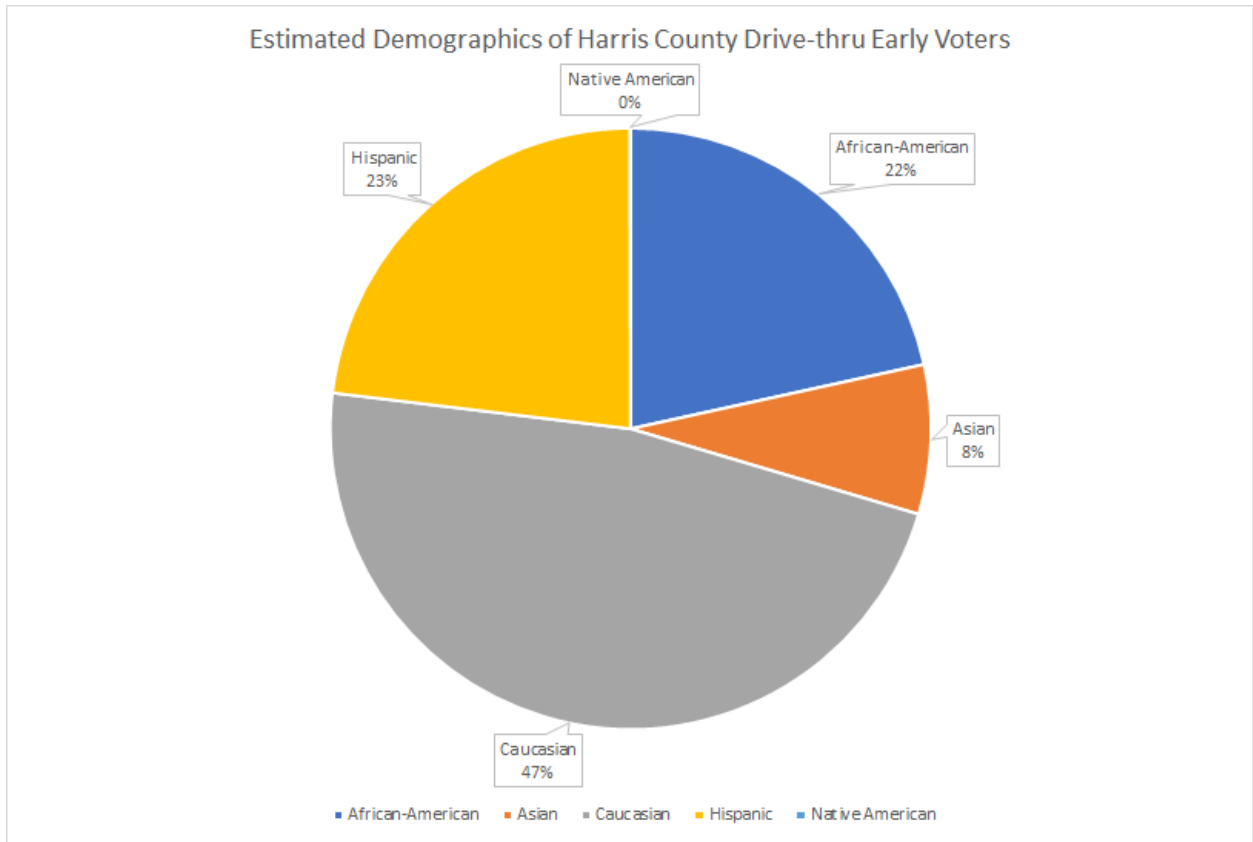


Source: Harris County Early Voting Rosters; Targetsmart for race/ethnicity modeling



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Chart 3 of 3



Source: Harris County Early Voting Rosters; Targetsmart for race/ethnicity modeling