No. 14-41127

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

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

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS; CARLOS CASCOS, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; STATE OF TEXAS; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY,
Defendants-Appellants.
(caption continued on inside cover)

On Appeal From The United States District Court
For The Southern District Of Texas, Corpus Christi Division,

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

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(caption continued)

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND; IMANI CLARK, *Intervenor Plaintiffs-Appellees*,

v.

STATE OF TEXAS; CARLOS CASCOS, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, *Defendants-Appellants*.

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

v.

CARLOS CASCOS, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, *Defendants-Appellants*.

Lenard Taylor; Eulalio Mendez, Jr.; Lionel Estrada; Estela Garcia Espinoza; Margarito Martinez Lara; Maximina Martinez Lara; La Union Del Pueblo Entero, Incorporated, *Plaintiffs-Appellees*,

v.

STATE OF TEXAS; CARLOS CASCOS, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, *Defendants-Appellants*.

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1, in addition to those disclosed in the parties' certificates of interested persons, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Mountain States Legal Foundation.
2. Counsel for Amicus Curiae Mountain States Legal Foundation:

   Steven J. Lechner.

Pursuant to Fed. R. App. P. 26.1 and Fed. R. App. P. 29(c), the undersigned certifies that amicus curiae Mountain States Legal Foundation ("MSLF") is a non-profit organization that has no parent corporation(s) and no publicly held corporation owns 10% or more of its stock. A supplemental disclosure statement will be filed upon any change in the information provided herein.

DATED this 22nd day of April 2016.

Respectfully submitted,

s/ Steven J. Lechner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside and work in every State. MSLF and its members strongly believe that the Founders created a federal republic, in which the federal government is one of limited, enumerated powers, and that separation of powers and federalism are at the heart of the U.S. Constitution. Since its creation in 1977, MSLF has been active in litigation opposing legislation in which the federal government acts beyond its constitutionally delegated powers, or in derogation of the principles of federalism and separation of powers.

Especially relevant to this case, MSLF attorneys have represented clients who have challenged Congress's authority to enact legislation, including Section 2 of the Voting Rights Act ("VRA"), 42 U.S.C § 1973(a), under the Enforcement Clause of the Fifteenth Amendment. *United States v. Blaine County, Mont.*, 363 F.3d 897 (9th Cir. 2004), *cert. denied*, 544 U.S. 992 (2005); *United States v.*

[1] Pursuant to Fed. R. App. P. 29(a), no party opposes the filing of this amicus brief. Pursuant to Fed. R. App. P. 29(c)(5), the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

Alamosa County, Colo., 306 F. Supp. 2d 1016 (D. Colo. 2004); *Large v. Fremont County, Wyo.*, 709 F. Supp. 2d 1176 (D. Wyo. 2010). MSLF has also filed amicus briefs with the United States Supreme Court demonstrating the limited nature of Congress's Fifteenth Amendment enforcement power. *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013). Finally, MSLF has filed amicus curiae briefs supporting a state's authority to regulate elections to ensure electoral integrity. *Crawford v. Marion County*, 553 U.S. 181 (2008); *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012), *aff'd sub nom. Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013).

INTRODUCTION

In 2011, the Texas Legislature passed SB14, which requires voters to present identification ("ID") in order to vote. Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws 619. Specifically, SB14 requires a person to present one of seven forms of photo ID to prove his or her identity, with several exceptions. Tex. Elec. Code § 63.0101.

Texas residents filed this suit against Texas officials (collectively "Texas"), alleging that SB14 violated, *inter alia*, the First and Fourteenth Amendments to the U.S. Constitution, by unduly burdening the right to vote, and Section 2 of the VRA, because SB14 allegedly abridges the right to vote based on race. The suit was consolidated with a separate lawsuit filed by the United States, which alleged

that SB14 had the purpose and effect of denying or abridging the right to vote on account of race. After a bench trial, the district court held in favor of the plaintiffs on all of their claims. *Veasey v. Perry,* 71 F. Supp. 3d 627, 633 (S.D. Tex. 2014), *aff'd in part, vacated in part, remanded sub nom. Veasey v. Abbott,* 796 F.3d 487 (5th Cir. 2015), *reh'g en banc granted,* No. 14-41127, 2016 WL 929405 (5th Cir. Mar. 9, 2016). Texas appealed and a panel of this Court vacated the district court's judgment that SB14 unduly burdened the right to vote, 796 F.3d at 514, but held that SB14 violates Section 2 of the VRA because it has a discriminatory effect. *Id.* at 513.

Texas filed a timely petition for rehearing en banc, which this Court granted, vacating the panel decision. This Court should reverse the judgment of the district court and hold that SB14 does not unduly burden voting rights in violation of the Constitution or Section 2 of the VRA. Furthermore, affirming the district court's holding that SB14 violates Section 2 of the VRA would render Section 2 unconstitutional as applied in this case.

SUMMARY OF ARGUMENT

The district court erred in holding that SB14 unconstitutionally burdens the right to vote. In *Crawford v. Marion County*, 553 U.S. 181 (2008), six justices of the Supreme Court held that an Indiana photo ID law, nearly identical to the requirements of SB14, did not unduly burden the right to vote. The Court ruled

that the photo ID law creates only a minimal burden, not significantly greater than the burden of voting itself. *Crawford*, 553 U.S. at 198 (opinion of Stevens, J.); *id.* at 209 (Scalia, J., concurring). Significantly, the Court recognized the important state interest in preventing voter fraud, even though there was little evidence before the Court that voting fraud in Indiana was a significant problem. *Id.* at 194 (opinion of Stevens, J.). Here, the district court ignored these important aspects of the *Crawford* decision and, accordingly, this Court should reverse the judgment of the district court and hold that SB14 does not unconstitutionally burden the right to vote.

The district court also erred by ruling that SB14 violates Section 2 of the VRA. In reaching this conclusion, the district court erroneously expanded the scope of Section 2 beyond what is authorized by the Enforcement Clause of the Fifteenth Amendment. Congress's enforcement power under the Fifteenth Amendment is not unlimited and this Court should refuse to adopt the district court's interpretation. If this Court adopts the district court's interpretation, it will have to consider whether Section 2 of the VRA can be constitutionally applied in this case.

Instead, this Court should give Section 2 of the VRA its natural interpretation and hold that SB14 is lawful. SB14 treats all potential voters equally, regardless of race or color, and its minimal requirements do not interfere

with one's right to vote. Therefore, SB14 does not "deny" or "abridge" the right to vote based on race. Accordingly, the district court erred by ruling that SB14 violated Section 2 of the VRA.

ARGUMENT

I. SB14 DOES NOT UNCONSTITUTIONALLY BURDEN THE RIGHT TO VOTE.

This Court should reverse the judgment of the district court because SB14 does not place an undue burden on Texas voters. In short, the district court exaggerated SB14's burdens on Texas voters and incorrectly ignored the Texas Legislature's determination that SB14 would promote public confidence in elections. As a result, the district court improperly concluded that SB14 creates an unjustified burden on Texas voters. *Veasey,* 71 F. Supp. 3d at 693.

A. The District Court Exaggerated SB14's Burdens On Texas Voters.

Although the right to vote is a fundamental right, the Supreme Court has recognized that "as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."); *Griffin*

v. Roupas, 385 F.3d 1128, 1130 (7th Cir. 2004) (The Constitution "confers on the states broad authority to regulate the conduct of elections, including federal ones."). When a court reviews a voting regulation, it must weigh "the character and magnitude of the asserted injury" to the right to vote against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983); *accord Burdick v. Takushi,* 504 U.S. 428, 434 (1992) (same). The burdens imposed by a regulation "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford,* 553 U.S. at 191 (opinion of Stevens, J.) (quoting *Norman v. Reed,* 502 U.S. 279, 288–89 (1992)).

In *Crawford*, six justices of the Supreme Court agreed that the inconveniences associated with obtaining photo ID are no greater than the usual burdens of voting. In announcing the judgment of the Court, Justice Stevens stated that:

> [T]he inconvenience of making a trip to the [motor vehicle office], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.

Crawford, 553 U.S.at 198 (opinion of Stevens, J.); *id.* at 209 (Scalia, J., concurring) ("The burden of acquiring, possessing, and showing a free photo

identification is simply not severe, because it does not even represent a significant increase over the usual burdens of voting. And the State's interests are sufficient to sustain that minimal burden.") (internal quotations omitted).[2] Because the Court has recognized that the burden of obtaining an ID to vote is minimal, nearly any legitimate state interest can justify a photo ID requirement. *Id.* at 204 (opinion of Stevens, J.) ("The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting the integrity and reliability of the electoral process." (internal quotation omitted)); *id.* at 209 (Scalia, J., concurring) ("And the State's interests [in protecting the integrity of the electoral process] are sufficient to sustain that minimal burden.").

SB14 is nearly identical to the Indiana photo ID law challenged in *Crawford*. The Indiana law upheld in *Crawford* applies to in-person voting and not to absentee ballots submitted by mail.[3] *Crawford*, 553 U.S.at 185; Ind. Code § 3–11–8–25.1. It provides an exception for persons living and voting in a state-licensed facility, such as a nursing home. *Crawford,* 553 U.S. at 186; Ind. Code § 3–11–8–25.1. A voter who is indigent or has a religious objection to being photographed

[2] Justice Stevens announced the decision of the Court and was joined by Chief Justice Roberts and Justice Kennedy. Justice Scalia's concurrence was joined by Justices Thomas and Alito.

[3]Generally, Indiana does not allow absentee votes by mail. A voter voting by absentee ballot must vote in the office of the circuit court clerk or at a satellite office unless a county election board or the state election commission unanimously vote that circumstances prevent a voter from voting at a polling place. Ind. Code § 3-11-4-1.

may cast a provisional ballot that will be counted if he or she executes an appropriate affidavit before the circuit court clerk within 10 days following the election. *Id.*; Ind. Code §§ 3–11.7–5–1, 3–11.7–5–2.5(c). A voter who has photo ID but is unable to present that identification on election day may file a provisional ballot that will be counted if she brings her photo ID to the circuit court clerk's office within 10 days. *Id.*; Ind. Code § 3–11.7–5–2.5(b). Finally, Indiana offers free photo IDs to qualified voters able to establish their residence and identity. *Id.*; Ind. Code § 9–24–16–10(b)

Similarly, SB14 provides exceptions to the ID requirement for: religious objectors, people lacking sufficient ID due to natural disaster, and the disabled. Tex. Elec. Code §§ 63.001(h), 65.054(b)(2)(B)-(C). Those over 65 or older are authorized to vote by mail without a photo ID. *Id.* at §§ 82.002, 82.003. In-person voters who do not present required photo ID can cast a provisional ballot that will count if they present acceptable ID within six days of the election. *Id.* at §§ 63.001(g), 63.011(a), 65.0541.

Individuals who lack a qualifying ID can apply for a free Texas election identification certificate ("EIC"). Tex. Transp. Code. §521A.001(a)-(b). An EIC requires the applicant to submit a copy of a birth certificate but, similar to the act upheld in *Crawford*, the Texas legislature has passed a law allowing the state registrar, local registrars, and county clerks to offer birth certificates for free,

which allows anyone to receive an EIC for no cost. Tex. Health & Safety Code § 191.0045. Therefore SB14, like the Indiana law in *Crawford*, mitigates any inconveniences by offering election identification certificates free of charge to registered voters who lack photo ID and allowing voters to cast provisional ballots if they appear at the polls without photo ID.

Despite these similarities, the district court inappropriately focused on a few, minor differences between SB14 and the Indiana law at issue in *Crawford*. *Veasey*, 71 F. Supp. 3d at 679. The district court believed that the Indiana law was more generous because it permitted any Indiana state-issued or federal ID; contained a nursing home resident exemption; was more generous in its acceptance of certain expired ID; and, most significantly for the district court, the Indiana law was more accommodating of indigents by not requiring an indigent to actually pay any fees associated with obtaining a qualified ID. *Id.* As demonstrated above, the Texas legislature addressed the latter issue, by waiving payment of any fees associated with obtaining an ID. Tex. Health & Safety Code §191.0045. The cost of acceptable IDs is irrelevant, as both Texas and Indiana offer free IDs to those that do not have a qualifying ID. Although the Texas law did not contain an explicit nursing home exemption, it does allow anyone over 65 to vote by mail and exempts those that are disabled from the photo ID requirement. Finally, Texas allows for IDs that have been expired for up to 60 days. Tex. Elec. Code §§

63.101. While the 60-day limit may not be as generous as Indiana, it is unreasonable to suggest that allowing someone two months to obtain an ID is an undue burden that abridges the right to vote.

In an attempt to demonstrate the purported burdens of SB14, the district court speculated about individual cases where a resident might be unable to obtain a qualifying ID. *Veasey*, 71 F. Supp. 3d at 688–90.[4] *Id.* at 680. In *Crawford*, however, Justice Scalia expressly stated that, when evaluating the burdens of a voting regulation, a court should only look at the reasonably foreseeable effects on voters generally, not the effects on a certain class of voters. 553 U.S. at 206 (Scalia, J., concurring). Justice Stevens, on the other hand, did not expressly answer the question of whether a disproportionate burden on a certain class of voters could affect a court's analysis of a voting regulation, and instead ruled that "on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified." *Id.* at 200.

Therefore, the district court's decision failed to accurately assess the burden on Texas residents who do not have a qualifying ID and instead, at best, focused on

[4] As demonstrated by Texas, there is no evidence in the record that supports the district court's conclusion that any individual's right to vote was abridged as a result of SB14. Supplemental En Banc Brief For Appellants ("Texas Br.") at 53–54. Furthermore, as stated by Justice Stevens in *Crawford*, statements by individual voters did not provide "any concrete evidence of the burden imposed on voters who currently lack photo identification." 553 U.S. at 201.

a narrow class of hypothetical voters who purportedly could not obtain an ID. Although the burden on those unable to obtain an ID may be different from those who already have an ID, the burden is still insignificant. In *Crawford*, Justice Stevens recognized that "the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." 553 U.S. at 198. As a result, even if the district court was correct that a court should look at the purported burdens on a subset of voters, its ruling that the burden of getting an ID to vote is significant essentially defies the judgment of six justices of the Supreme Court.

B. The District Court Underestimated Texas's Interests In Ensuring Public Confidence In Elections.

The district court also contradicted *Crawford* regarding the state's interests in requiring photo IDs in order to deter fraud and ensure the public's confidence in elections. Although the district court recognized that Texas's interests were legitimate, it stated that the interests could not justify the voter ID requirement because they "are so rarely implicated." *Veasey*, 71 F. Supp. 3d. at 693.

In *Crawford*, however, the Court did not require Indiana to prove that voter impersonation was an issue in order for the government to have an interest in preventing voter fraud. *Crawford*, 553 U.S. at 194–96 (opinion of Stevens, J.). In

fact, Justice Stevens found that "[t]he record contains no evidence of any such fraud actually occurring in Indiana at any time in its history." *Id.* at 194. Despite the lack of evidence that voter fraud was an issue in Indiana, Justice Stevens stated that:

> There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process.

Id. at 196 (opinion of Stevens, J.); *id.* at 209 (Scalia, J., concurring) ("the State's interests . . . are sufficient to sustain that minimal burden" of requiring ID). Furthermore, Justice Stevens also stated that the State's interest in promoting public confidence in the integrity of the electoral process is closely related to the State's interest in preventing voter fraud but "has independent significance, because it encourages citizen participation in the democratic process." *Id.* at 197 (opinion of Stevens, J.).

Therefore, despite the district court's assertions to the contrary, the Court's decision in *Crawford* did not rely on facts specific to Indiana. The record before the Court was not unique to the statute at issue in that case and, in fact, the Court relied on a Report from the Commission on Federal Election Reform applicable to elections across the country. *Id.* at 193; *id.* at 195 ("[i]t remains true, however, that flagrant examples of such fraud in other parts of the country have been

documented throughout this Nation's history by respected historians and journalists"). As a result, the district court contradicted the Court's ruling in *Crawford*, and minimized the importance of Texas's interest in ensuring public confidence in elections.

Other courts have recognized that a state does not need to prove actual voter fraud in that state in order to justify a photo ID law. In *Am. Civil Liberties Union of New Mexico v. Santillanes*, the Tenth Circuit ruled that the district court "imposed too high a burden on the City" by requiring it to prove that actual voter fraud occurred within the city. 546 F.3d 1313, 1323 (10th Cir. 2008). In so doing, the court recognized that "[p]revention of voter fraud and voting impersonation as urged by the City are sufficient justifications for a photo identification requirement for local elections." *Id.* As a result, the Tenth Circuit upheld the photo ID law in that case. *Id.* at 1525 ("*Crawford* clearly guides this court in concluding that the Albuquerque photo identification law is a valid method of preventing voter fraud."). In *Common Cause/Georgia v. Billups*, the Eleventh Circuit also correctly recognized that Georgia did not have the burden of proving, as the plaintiffs alleged, "that in-person voter fraud existed and that requiring photo identification is an effective remedy . . . ." 554 F.3d 1340, 1353 (11th Cir. 2009). Similarly, in *Frank v. Walker*, the Seventh Circuit stated that *Crawford* "concluded that photo ID requirements promote confidence" and "a single district judge cannot say as a

'fact' that they do not . . . ." 768 F.3d 744, 750 (7th Cir. 2014). As a result, the Seventh Circuit upheld Wisconsin's voter ID law, which was very similar to the requirements of SB14, as constitutional. *Id.* at 751.

Therefore, the district court below incorrectly held that SB14 unconstitutionally burdens the right to vote. The minimal inconvenience imposed by the law, which is nearly identical to the law challenged in *Crawford*, are justified by Texas's legitimate and important interests in promoting confidence in elections. Accordingly, this Court should reverse the judgment of the district court and hold that SB14 is constitutional under the First and Fourteenth Amendments.

II. SB14 DOES NOT VIOLATE SECTION 2 OF THE VRA BECAUSE IT DOES NOT DENY OR ABRIDGE THE RIGHT TO VOTE BASED ON RACE OR COLOR.

SB14 does not violate Section 2 of the Voting Rights Act because its minimal burdens apply equally to all voters in Texas, and SB14 does not deny or abridge the right to vote of any Texas resident. Section 2 of the VRA prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C § 1973(a). Section 2 further provides that a plaintiff can establish a violation if "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by

members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C § 1973(b). Thus, the plain language of Section 2 shows that it is a simple equal-treatment statute. *Frank*, 768 F.3d at 754. Moreover, when Section 2 is interpreted within the context of the Fifteenth Amendment, it is clear that SB14 does not violate Section 2 of the VRA.

A. In Order To Maintain Separation of Powers, This Court Must Interpret Section 2 Of The VRA Within The Context Of The Fifteenth Amendment And Congress's Limited Power To Enforce That Amendment.

In deciding whether SB14 violates Section 2 of the VRA, this Court must interpret Section 2 of the VRA within the context of the Fifteenth Amendment and ensure that it does not expand the scope of Section 2 beyond the authority granted to Congress by the Fifteenth Amendment. The VRA was passed pursuant to the Enforcement Clause of the Fifteenth Amendment and, thus, is limited by the rights protected by that Amendment. *Johnson v. Governor of State of Florida*, 405 F.3d 1214, 1230 (11th Cir. 2005) (Congress's power under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments "is not absolute"); *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2629 (2013) ("The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command."); *United States v. Uvalde*

Consol. Indep. Sch. Dist., 625 F.2d 547, 553 (5th Cir. 1980) ("Congress's [F]ifteenth [A]mendment enforcement authority reaches only legislation directed against racial or color discrimination"). The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude" and it authorizes Congress "to enforce this article by appropriate legislation." U.S. Const. amend. XV §§ 1, 2.

The Enforcement Clause of Fifteenth Amendment is similar to the language of the Enforcement Clauses of the Thirteenth and Fourteenth Amendments, which give Congress the limited "power to enforce," each amendment "by appropriate legislation." U.S. Const. Amend. XIII, § 2; U.S. Const. Amend. XIV, § 5; U.S. Const. Amend. XV, § 2. These three amendments were ratified between 1865 and 1870 following the end of the Civil War and were meant to address unequal treatment of United States citizens by the States. United States Senate, *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, http://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm (last visited April 22, 2016). Because these three amendments were ratified contemporaneously, and the enforcement clauses use the same language, the clauses must be interpreted as having the same meaning. *See City of Boerne v. Flores*, 521 U.S. 507, 518–19 (1997) ("In assessing the breadth of [the Fourteenth

Amendment's] enforcement power, we begin with its text. Congress has been given the power 'to enforce' the 'provisions of this article.'"); *id.* at 518 (describing the enforcement power under the Fourteenth Amendment as a "parallel power" to the enforcement power under the Fifteenth Amendment); *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) ("Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.").

The Supreme Court has described Congress's enforcement power under both the Fourteenth and Fifteenth Amendments as "'remedial.'" *Boerne*, 521 U.S. at 519 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) ("*South Carolina*")). Congress "has been given the power 'to enforce' a constitutional right, not the power to determine what constitutes a constitutional violation." *Id.*; *see also id.* at 525 (The Enforcement Clause, does not authorize Congress to pass "'general legislation upon the rights of the citizen . . . .'" (quoting *Civil Rights Cases*, 109 U.S. 3, 13–14 (1883))). In the context of the Fourteenth Amendment, the Court recognized that "if Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be the superior paramount law, unchangeable by ordinary means." *Id*. at 529. The same is true of the enforcement power under the Fifteenth Amendment. *Katzenbach v.*

Morgan, 384 U.S. 641, 651 (1966) ("*Morgan*") (comparing "similar power" to enforce provisions of the Fourteenth and Fifteenth Amendments).

Accordingly, an expansive interpretation of the Enforcement Clause would grant Congress nearly limitless power. *Boerne*, 521 U.S. at 529 ("If Congress could define its own powers by altering the Fourteenth Amendment's meaning . . . it is difficult to conceive of a principle that would limit congressional power. . . . Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."). Instead, a correct interpretation of Congress's limited enforcement powers recognizes that the design of the Thirteenth, Fourteenth, and Fifteenth Amendments "has proved significant . . . in maintaining the traditional separation of powers between Congress and the Judiciary." *Boerne*, 521 U.S. at 523–24.

"[T]he principle of separation of powers . . . underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). "The ultimate purpose of . . . separation of powers is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 272 (1991). In short, the "essence of the separation of powers concept . . . is that each branch, in different ways, within the sphere of its defined powers and subject to the distinct institutional responsibilities of the others, is essential to the liberty and security of the people." *Id.* (internal quotations

omitted); *Public Citizens v. U.S. Dept. of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring) ("Framers of our Government knew that the most precious liberties could remain secure only if they created a structure of Government based on a permanent separation of powers"); *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) ("[T]he dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well.*"*). Therefore, to protect individual liberty, this Court must ensure that it does not expand the meaning of Section 2 of the VRA beyond Congress's constitutionally defined powers. *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."); *Mistretta*, 488 U.S. 380 ("the central judgment of the Framers of the Constitution" was that "the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."); The Federalist No. 51, at 318 (James Madison) (C. Rossiter ed., First Signet Classics Printing 2003) (the "separate and distinct exercise of the different powers of government . . . is . . . essential to the preservation of liberty").

Assuming Section 2 of the VRA is constitutional, a law can only violate that statute if it "denie[s] or abridge[s]" the right to vote "on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV, § 1. As demonstrated

above, Congress did not have the power to expand the scope of the rights protected by the Fifteenth Amendment when it passed the VRA. *Shelby Cnty*, 133 S. Ct. at 2631 (holding the reauthorization of Section 4(b) of the VRA unconstitutional because it was not an appropriate application of Congress's Fifteenth Amendment enforcement power). Any broader interpretation of the VRA expands congressional power and alters the balance and separation of powers between the three co-equal branches of government. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

In order to ensure that Congress's enforcement powers under the Civil Rights Amendments remains properly limited, the Supreme Court in *Boerne* established the congruency and proportionality standard of review. 521 U.S. at 520. When passing legislation seeking to enforce the rights protected by the Thirteenth, Fourteenth, and Fifteenth Amendments:

> There must be a congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end. Lacking such a connection, legislation may become substantive in operation and effect.

Id. at 519–20. In other words:

> While preventive rules are sometimes appropriate remedial measures, there must be congruence between the means used and the ends to be achieved. The *appropriateness of remedial measures must be considered in light of the [degree of] evil presented*. Strong measures

> appropriate to address one harm may be an unwarranted response to another, lesser one.

Id. at 530 (emphasis added).

This congruent and proportionality standard restrains Congress from unconstitutionally defining the substance of the Fourteenth and Fifteenth Amendments instead of enforcing them.[5] *Id.* at 529. The district court, however, failed to recognize these limits and expanded the protections granted by Section 2

[5] Although *Boerne* involved Congress's enforcement power under the Fourteenth Amendment, its reasoning is applicable to Congress's enforcement power under the Fifteenth Amendment. In support of the congruent and proportionality test, the *Boerne* Court relied on the "suspension of literacy tests and similar voting requirements [such as Section 5]" enacted pursuant to "Congress' *parallel power* to enforce the provisions of the *Fifteenth Amendment*[.]" *Id*. at 518 (citing *South Carolina*, 383 U.S. at 308) (all emphasis added). *Boerne* also relied on the fact that the Court had "also concluded that the other measures protecting voting rights are within Congress' power to enforce the Fourteenth *and* Fifteenth Amendments[.]" *Id*. (citing *South Carolina*, 383 U.S. at 326) (Fifteenth Amendment) (emphasis added); *see also Morgan*, 384 U.S. 641 at 651 (Thirteenth and Fourteenth Amendments); *Oregon v. Mitchell*, 400 U.S. 112, 131–34 (1970) ("*Mitchell*") (Fourteenth *and* Fifteenth Amendments) (Black, J., announcing the judgment of the Court); *City of Rome v. United States*, 400 U.S. 156, 161 (1980) (Fifteenth Amendment). Thus, *Boerne*, clearly viewed the powers conferred on Congress by any of the Enforcement Clauses to be identical and reviewable only under the congruency and proportionality standard. *See, e.g.*, *Morgan*, 384 U.S. at 651 ("Section 2 of the Fifteenth Amendment grants Congress a similar power to [that of Section 5 of the Fourteenth Amendment]."); *Lopez v. Monterey County*, 525 U.S. 266, 294 n.6 (1999) ("[W]e have always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments as co-extensive."); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 n.8 (2001) ("*Garrett*") ("Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment."); *see also*, *City of Rome*, 44 U.S. at 207 n.1 (Rehnquist, J., dissenting) ("[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as co-extensive.").

of the VRA beyond the scope of the Fifteenth Amendment. This Court should refuse to adopt the district court's interpretation of Section 2 of the VRA in order to avoid having to rule on the constitutionality of the VRA.

B. SB14 Does Not Have The Effect Of Denying Or Abridging The Right To Vote On Account Of Race Or Color.

This Court should reverse the judgment of the district court because the district court incorrectly interpreted Section 2 of the VRA. SB14 does not "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," 42 U.S.C § 1973(a), because SB14 applies equally to all voters and, as demonstrated above, voter ID requirements do not abridge anyone's right to vote. Assuming that Section 2 of the VRA is constitutional, "[i]t is better to understand § 2(b) as an equal-treatment requirement (which is how it reads) than as an equal-outcome command (which is how the district court took it)." *Frank*, 768 F.3d at 754.

SB14 does not violate the Fifteenth Amendment because it does not deny or abridge the right to vote on account of race, color, or previous condition of servitude. U.S. Const. Amend. XV. Accordingly, SB14 does not violate Section 2 of the VRA, which can only "enforce" the provision of the Fifteenth Amendment. *Id.* SB14's photo ID requirement applies equally to people of all races and colors. Tex. Elec. Code § 63.0101. All citizens, regardless of race or color, must present a photo ID when voting. *Id.* Any purported difficulties with obtaining an ID are the

same for anyone who lacks an ID, regardless of race or color. *See Crawford*, 553 U.S. at 198 (opinion of Stevens, J.). As a result, SB14 does not "den[y]" the right to vote based on race or color because SB14 does not apply different voting regulations to voters of different races or colors.

Furthermore, SB14's minimal burdens do not rise to the level of denying or abridging the right to vote for any Texas resident of voting age. According to *Crawford*, a photo ID requirement "does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." 553 U.S. at 198 (opinion of Stevens, J.); *Id.* at 209 (Scalia, J. concurring) ("The universally applicable requirements of Indiana's voter-identification law are eminently reasonable."). If SB14 does not deny or abridge the right to vote of any individual citizen, then SB14, which applies equally to every citizen, does not deny or abridge the right to vote based on race or color. Even if Plaintiffs had demonstrated a disparate impact, that would not demonstrate a denial of the right to vote. *Frank*, 768 F.3d at 758 ("[U]nless Wisconsin makes it *needlessly* hard to get photo ID, it has not denied anything to any voter.") (emphasis in original). As demonstrated above, the burdens imposed by SB14 are minimal and, thus, no one's right to vote has been denied nor abridged, much less denied or abridged as a result of one's race. Accordingly, this Court should reverse the judgment of the district court and hold that SB14 does not violate Section 2 of the VRA.

C. If This Court Affirms The District Court's Ruling That SB14 Violates Section 2 of the VRA Because SB14 Results In A Disparate Impact, Then Section 2 of the VRA Is Unconstitutional As Applied In This Case.

This Court should also reverse the judgment of the district court because its ruling that a purported disparate impact violates Section 2 of the VRA renders Section 2 unconstitutional as applied in this case. In holding that SB14 violated Section 2 of the VRA, the district court treated Section 2 as prohibiting a law that does not abridge the right to vote and treats everyone of all races equally. *Veasey*, 71 F. Supp. 3d at 694–98. As demonstrated above, the plain language of Section 2 does not outlaw such a law. *Frank*, 768 F.3d at 754. Instead, Section 2 is best understood as requiring equal treatment among voters.

Instead of following the plain language of Section 2 of the VRA, the district court interpreted Section 2 as outlawing any law that might make it minimally harder for some minority residents to gain a photo ID. *Veasey*, 71 F. Supp. 3d at 695. In an attempt to justify its decision, the district court treated SB14, and Texas's justifications for the bill, with extreme skepticism. *Id.* at 695–98; *cf. Kansas v. Hendricks,* 521 U.S. 346, 361 (1997) ("[W]e ordinarily defer to the legislature's stated intent."). Yet there is nothing in the record to indicate that the district court's skepticism of SB14 was justified. Plaintiffs were unable to demonstrate that SB14 affected voting behavior or that anyone was unable to vote because of the voter ID requirement. Texas Br. at 53–55. Furthermore, as

demonstrated by Texas, there is not one iota of evidence that SB14 was passed for a discriminatory purpose. *Id.* at 11–33. In fact, the district court found no evidence of current or recent state-sponsored discrimination, and instead had to rely on speculation based on decades-old historical discrimination. *Veasey*, 71 F. Supp. 3d at 667.

Therefore, the district court expanded the scope of Section 2 based on its findings of past discrimination. *Id.* at 697–98. A court, however, cannot interpret the requirements of the VRA based on past circumstances. *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612, 2619 (2013) (The VRA "'imposes current burdens and must be justified by current needs.'" (quoting *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009))). Similarly, a court cannot require the present-day Texas Legislature to remedy the effects of other persons' past discrimination. *Frank*, 768 F.3d at 753 ("[U]nits of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination." (citing *Milliken v. Bradley*, 418 U.S. 717 (1974)).

Based on the facts of this case, the potential for discrimination against minority voters in Texas is de minimis. Thus, the VRA, as an enforcement act of the Fifteenth Amendment, cannot be applied—as the district court did—to strike down a facially neutral, minimally burdensome voter ID law that applies equally to everyone regardless of race. *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 62 (1980)

(opinion of Stewart, J.) ("Our decisions, moreover, have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose."). The district court's interpretation of Section 2 of the VRA imposes an extraordinary and impossible burden on Texas. *Cf. Frank*, 768 F.3d at 754 ("[I]t would be implausible to read § 2 as sweeping away almost all registration and voting rules."). Such extraordinary burdens are neither congruent nor proportional to the harms sought to be remedied by the Fifteenth Amendment, i.e., the denial or abridgment of the right to vote based on race.[6] *Boerne,* 521 U.S. at 519–20, 530. Accordingly, either the district court's interpretation of Section 2 of the VRA is incorrect, or Section 2 of the VRA unconstitutionally expands the scope of the rights protected by the Fifteenth Amendment.

[6] It is doubtful whether Congress has the authority under the Enforcement Clause of the Fifteenth Amendment to prohibit a voter ID requirement that applies equally to everyone and does not abridge the right to vote based on race. *Bolden*, 446 U.S. at 62 (opinion of Stewart, J.); *Frank*, 768 F.3d at 754. Assuming, *arguendo*, that Congress has the authority to strike down such a law, then Congress's action could only be justified under the most egregious circumstances. *See Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 228–229 (2009) (Thomas, J., concurring in judgment in part, dissenting in part) ("extraordinary requirements" cannot be justified by "discrete and isolated incidents of interference with the right to vote"). Those egregious circumstances are clearly not present here, as there is no evidence of even isolated incidents of discrimination, much less systemic discrimination that might justify extraordinary remedial measures. Texas Br. at 11–33, 53–55.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court.

DATED this 22nd day of April 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 29(d), Fed. R. App. P. 32(a)(7), and Fifth Circuit Rule 32.1, this brief is proportionately spaced, has a typeface of 14 points or more (12 points or more for footnotes), and is 6,811 words, exclusive of the caption, supplemental certificate of interested persons, table of contents, table of authorities, signature blocks, and certificates of compliance and service.

In accordance with this Court's CM/ECF filing guidelines and Fifth Circuit Rules 25.2.13 and 25.2.1, I certify that all required privacy redactions have been made, the electronic submission is an exact copy of the paper document, and the electronic version of this document has been scanned for viruses with the most recent version of Windows Defender and is free of viruses according to that program.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on this 22nd day of April 2016, which caused all counsel of record to be served electronically.

DATED this 22nd day of April 2016.

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