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-CRUMLEY; 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.

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.

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

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The Taylor Appellees join the Texas State Conference of NAACP Branches and The Mexican American Legislative Caucus of The Texas House of Representatives in this brief pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure

Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 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.

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INTRODUCTION

At stake on this appeal is whether Texas law SB14 denies or abridges the right to vote of Black and Latino citizens, by imposing needlessly strict photo ID requirements that make it significantly more difficult for them to vote as compared to white citizens. Seven federal judges across three different courts have ruled that it does. Their rulings reflect indisputable facts: Black and Latino voters are less likely than white voters to possess the narrow classes of identification permitted by SB14 and more likely to face significant burdens if they attempt to obtain those documents.

It did not have to be this way. Texas already had an effective voter ID law before SB14 was enacted. The legislature that enacted SB14 was well aware that there was virtually no evidence of the sort of in-person voter impersonation that a photo ID law might guard against: two possible instances out of tens of millions of votes cast. The legislature was also well aware that hundreds of thousands of Texans did not possess SB14 ID, and that many of them, disproportionately Black and Latino, would have difficulties obtaining it because of their

economic circumstances which were the direct result of centuries of discrimination.

Yet the legislature chose to enact what a three-judge panel in the District of Columbia called "the strictest" voter ID law in the nation. Where other states accept government employment IDs, SB14 does not. Where other states accept college and university issued IDs, SB14 does not. Where other states allow the use of driver's licenses from other states, SB14 accepts only Texas driver's licenses. Where other states allow the use of driver's licenses that have expired for several years, SB14 limits them to only those current or expired within 60 days. Where other states direct the issuance of photo IDs without requiring voters to present any document that must be paid for, SB14 does not. Where other states allow voters to produce non-photo IDs to substitute for the required photo ID, SB14 does not. And where other states allow a voter's vote to count upon execution of affidavits of "reasonable impediments" to obtaining an ID—a safe harbor that has saved at least two states' voter ID provisions from being declared unlawful—SB14 does not.

The legislature rejected every chance it had to make its photo ID law less burdensome and less discriminatory. It is these choices, the knowledge the legislature had when it made these choices, the racially-charged atmosphere when the choices were made, the aberrational way the legislature made these choices, and the effect of these choices in the context of Texas's past and present history of racial and ethnic discrimination that informed the district court's detailed findings that SB14 violates Blacks' and Latinos' rights under the Voting Rights Act, as well as the Fourteenth and the Fifteenth Amendments, and the First and Fourteenth Amendment right to vote of all Texans for whom SB14 imposes a needless burden. Because these findings are amply supported by the evidence, Federal Rule of Civil Procedure 52 mandates that they should not be disturbed on appeal.

Texas attempts to escape the weight of this overwhelming evidence with three "legal" arguments. First, it mischaracterizes the district court's weighing of evidence on discriminatory intent as "errors of law." Discriminatory intent is unequivocally a question of fact, subject to the "clearly erroneous" standard of appellate review. The district court analyzed the precise categories of evidence that the

Supreme Court deemed relevant to the issue of discriminatory intent in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). And it viewed those facts and the inferences they support in their totality, as precedent requires, rather than in isolation, as Texas does.

Second, Texas claims that *Crawford v. Marion County*, 553 U.S. 181 (2008), immunizes all photo ID laws against constitutional attack. But *Crawford* did nothing more than reject a facial challenge to Indiana's very different voter ID law. Nowhere does *Crawford* hold, much less suggest, that all voter ID laws, no matter how needlessly burdensome or racially discriminatory, are constitutional. No matter how superficially legitimate a state's interests supporting election laws are, courts still must balance them against the burdens they impose and determine whether and to what extent it is necessary to do so. Here, the district court properly found that the State's interest was far outweighed by the burdens SB14 needlessly imposed on hundreds of thousands of voters, disproportionately Blacks and Latinos.

Texas's final argument is an exercise in extreme hyperbole. It argues that the district court's results decision would open the

floodgates to claims that Tuesday voting or voter registration are unlawful because they may be easier for Anglos than for Blacks and Latinos, and that the district court's reading of Section 2's results provision must be rejected to avoid rendering it unconstitutional. These arguments distort the district court's results decision, which was not, as Texas claims, based solely on SB14's disparate impact on minorities, but on the law's interaction with the "totality of circumstances" required to be considered by Section 2, and the Supreme Court's and this Court's precedent. That analysis established that the disparate effect of SB14 occurred within the context of pronounced historical and contemporaneous racial discrimination, and fully justified the conclusion that SB14 denies and abridges the right to vote on account of race.

ISSUES PRESENTED

1. Did the district court correctly determine that SB14 violates the "results" test under Section 2 of the Voting Rights Act?

2. Did the district court correctly determine that SB14 was enacted with a discriminatory purpose in violation of Section 2 of the Voting Rights Act, and the Fourteenth and Fifteenth Amendments?

3. Did the district court correctly determine that SB14 places an unconstitutional burden on the right to vote in violation of the First and Fourteenth Amendments?

STATEMENT OF THE CASE

This appeal concerns Texas Senate Bill 14 (2011) ("SB14"), which repealed the state's pre-existing voter identification law and replaced it with the strictest photo ID law in the country.

A. The Challenged Law: SB14

On May 27, 2011, Texas passed SB14. It requires registered voters to present one of the following forms of photo ID when voting in person: a driver's license or a personal ID card issued by the Department of Public Safety ("DPS"), an Election Identification Certificate ("EIC"), a concealed handgun permit, a U.S. military photo ID card, a U.S. citizenship certificate containing a photo, or a U.S. passport. TEX. ELEC. CODE § 63.0101. Each must be current or expired no more than 60 days. *Id.* Otherwise, the voter can submit a provisional ballot, which will be counted only if the voter presents valid photo ID within six days. *Id.* §§ 63.011, 65.0541. SB14 contains a provisional ballot procedure for voters with religious objections to being photographed and voters whose photo IDs were recently lost in natural disasters. *Id.* § 65.054. Individuals who establish disability through Social Security Administration or Veterans Administration

documentation can obtain an exemption from the photo ID requirement. *Id.* §§ 13.002, 63.001.

The EIC is a form of ID established by SB14 for voting purposes only. ROA.101104. SB14 mandates that DPS must issue EICs without collecting a fee, but DPS requires documentary proof of identity and citizenship to obtain one, and they can be obtained only in person at limited locations. ROA.101116-17. From June 2013 to September 2014, only 279 people obtained an EIC. ROA.100615-16.

While SB14 does not apply to absentee voting, Texas tightly limits who can vote absentee. Absentee voters must be 65 or older, absent from their county of residence during early voting and on Election Day, unable to appear at the polls without physical assistance due to sickness or disability, or confined to jail. TEX. ELEC. CODE §§ 82.001-.004. Only 3.5% and 6.5% of Texans voted absentee in 2012 and 2014, respectively. *See* U.S. Election Assistance Commission, *2012 and 2014 Election Administration and Voting Surveys*, Table 28.

B. SB14 Is The Strictest Voter ID Law In The Country

No state has a voter ID law that is as strict as Texas's. Photographic state and federal employment IDs are accepted in

Georgia, Indiana, Mississippi, New Hampshire, Virginia, and Wisconsin. ROA.27046. Photographic college and university-issued IDs are accepted in Georgia, Kansas, Mississippi, New Hampshire, Virginia and Wisconsin. *Id.* Driver's licenses from other states are accepted in Kansas, Mississippi, North Carolina, and New Hampshire. *Id.* Driver's licenses that have been expired for a year or longer are accepted in Georgia, Indiana, North Carolina, and Wisconsin. GA. CODE ANN. § 21-2-417; IN. CODE ANN. § 3-5-2-40.5(A)(3); N.C. GEN. STAT. ANN. § 163-166.13; WIS. STAT. ANN. § 5.02. Arizona and Ohio allow voters to show non-photo IDs in lieu of photo IDs. ARIZ. REV. STAT. § 16-579(A); OH. REV. STAT. § 3505.18(A)(1). Wisconsin directs that underlying documents to obtain free photo ID must also be available for free.[1] WIS. ADMIN. CODE TRANS. § 102.15(3)(b). North Carolina and South Carolina allow voters to attest to a reasonable impediment to obtaining photo ID in lieu of showing photo ID, N.C. GEN. STAT. ANN. § 163-166.13; S.C.

[1] Nor does the amendment to SB14 directing that underlying documents must be provided for free, passed on the eve of oral argument in this case, help the 32% of Texans born out of state, ROA.38508, or alleviate transportation, lost income, or other costs imposed by SB14. *See* TEX. HEALTH & SAFETY CODE ANN. § 191.0046 (2015).

CODE. ANN. § 7-13-710, and to indigency in Indiana. IN. CODE ANN. §§ 3-11.7-5-1, 3-11.7-5-2.5(c)1.

C. SB14 Burdens Hundreds Of Thousands Of Voters, Disproportionately Blacks And Latinos

As the district court found, 608,470 registered voters—approximately 4.5%—in Texas lack SB14 ID. ROA.27116-17 (crediting testimony of Plaintiffs' expert, Dr. Ansolabehere, who cross-checked Texas's voter registration rolls against state and federal databases of SB14 ID possession). Applying accepted methods, Dr. Ansolabehere estimated the race/ethnicity of registered voters lacking SB14 ID, and found that Blacks were approximately three times and Latinos two times more likely to lack SB14 ID than were Anglos. Separately, a survey conducted by Drs. Barreto and Sanchez concluded that Blacks and Latinos possess SB14 ID at statistically significant lower rates than Anglos. ROA.27082-83. These racial disparities persist when controlling for income. According to the Barreto-Sanchez survey, low-income voters who lack SB14 ID are 265% more likely to be Black and 221% more likely to be Latino than Anglo. ROA.43590. Other experts confirmed racially disparate rates of ID possession among eligible voters. *See* ROA.44580 (Dr. Herron), ROA.43681 (Dr. Bazelon).

The evidence also showed that Blacks and Latinos are more likely than Anglos to face difficulties in obtaining SB14 ID, for multiple compounding reasons, including the actual cost of obtaining photo ID, the cost of underlying documentation, the cost of transport, the cost of taking time off of work to stand in line at a DPS office, and many other financial and logistical hurdles. ROA.99048-57 (Mora), ROA.99213-14 (White), ROA.99033-41 (Mendez), ROA.99838-42 (Lara), ROA.113916-18 (Gholar), ROA.98645-55 (Carrier).

The Barreto/Sanchez survey found that Blacks are 30.4% and Latinos 23.4% more likely than Anglos to lack documents, such as a birth certificate, needed to obtain SB14 ID. ROA.43589. The expense of obtaining the underlying documents (unless one is able to get the EIC-birth certificate created after the district court ruling) and the huge hassle is a burden that falls disproportionally on Blacks and Latinos. ROA.100719, ROA.27087 (Testimony of Sammie Bates, who needed an out-of-state birth certificate costing $42 to obtain SB14 ID, but decided her family could not afford it: "We couldn't eat the birth certificate . . . and we couldn't pay rent with the birth certificate.").

Blacks and Latinos also face significant, disproportionate travel burdens in obtaining SB14 ID because of the time and cost involved in getting to relevant public offices, as testified to by three different experts. ROA.44163-64 (Dr. Chatman), ROA.44467-73 (Dr. Henrici), ROA.45575 (Dr. Webster). At the outset, they are more likely to lack access to a vehicle, *see* ROA.43939, and it is generally very burdensome to get to a DPS location without a car. ROA.44161. Seventy-eight out of 254 Texas counties lack a DPS office, ROA.100501-02, and DPS offices are almost uniformly open only on weekdays and are never open later than five p.m. ROA.39345-52. Blacks and Latinos are more likely than Anglos to have jobs that will not permit them to leave during business hours without foregoing income. ROA.44464-65. Several individual voters vividly corroborated the expert testimony. ROA.99964-68 (Estrada), ROA.99379-81 (Taylor), ROA.100519-22 (Espinosa), ROA.100540-42 (Clark). Numerous other logistical hurdles faced by Blacks and Latinos in Texas beyond economics and transportation were confirmed by dozen of witnesses—individual voters and social workers.

D. Pre-SB14 Law

Prior to SB14, a registered Texas voter could vote simply by presenting a voter registration card sent directly to the voter's address, free-of-charge. Alternately, they could vote by presenting one of multiple commonly-held forms of photo and non-photo identification. ROA.27038. Virtually no in-person voter impersonation—the only form of fraud addressed by SB14—occurred in Texas pre-SB14, as confirmed by Texas's own chief fraud investigator Mr. Mitchell and Plaintiffs' voter fraud expert Professor Minnite. ROA.100128-29, ROA.100165. Indeed from 2002 until 2011, out of 62.1 million votes cast, there was only one conviction and one guilty plea that involved in-person voter impersonation in any election in Texas. ROA.100165; *Turnout and Voter Registration Figures (1970-current*), http://www.sos.itizen state.tx.us/ elections/historical/70-92.shtml.

E. Circumstances Leading To The Passage Of SB14

SB14 was passed during a seismic demographic shift toward minority voting power in Texas due to the dramatic growth of the Latino population. ROA.27153, ROA.45101-02. In the preceding decade, the Anglo share of the citizens of voting age population in Texas sharply decreased from 64.5% to 56.4%. ROA.45101-02. Legislators

knew this as they considered photo ID legislation. ROA.45236, ROA.45285. The district court credited Dr. Burton's expert testimony that voter restrictions tend to arise when those in power perceive a threat of an increase in minority voting. ROA.27065.

The same legislature that passed SB14 considered and at times passed other laws evincing an anti-Latino sentiment: it considered an "English-only" bill and laws against sanctuary cities, and enacted a redistricting bill that was declared racially discriminatory in 2012. ROA.27065; *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated and remanded on other grounds*, 133 S. Ct. 2885 (2013). There was ample testimony that these proposals were part of a larger climate to "work against the growing demographic." ROA.98731.

1. SB14's Proponents Were Well Aware of Its Discriminatory Impact

Voter ID bills were introduced and debated in the 2005, 2007, and 2009 legislative sessions. ROA.45103-10. By the time SB14 was introduced in the 2011 legislative session, lawmakers had known for years that requiring photo ID would most seriously burden minority voters, who were more likely than whites to lack photo ID, and that for many obtaining photo ID would be costly and burdensome. ROA.45104-

09. The proposed photo ID requirements nonetheless grew increasingly strict over time.

All of the main legislative champions of SB14 testified that they and others understood that the proposed voter ID bills would impose a disproportionate burden on minority voters. The chief of staff for Senator Fraser, the Senate sponsor of SB14, testified that she assumed Republicans would vote for a 2007 ID bill because it would "reduce voter turnout among those individuals who typically vote democratic." ROA.64258. In 2009, the office of Lieutenant Governor Dewhurst—instrumental in the passage of SB14 in his role as president of the Senate—compiled information on the expense of obtaining photo ID and birth certificates in Texas, which it shared with Fraser and other select legislators. ROA.100822, ROA.101378-80. Also in 2009, Representative Smith, a sponsor of photo ID legislation, publicly estimated that roughly 700,000 voters in Texas lack a driver's license, a number he discussed privately with House Speaker Straus and likely other SB14 proponents, ROA.68624, ROA.100321-22, and later testified that it was "common sense" that most of these 700,000 voters were likely to be minorities. ROA.100339-40

For years, legislators representing minority districts warned that requiring photo ID would burden their constituents. ROA.45104-09. On the Senate floor in 2011, Senator Uresti stated that some voters in his heavily-Latino district would have to travel 175-200 miles roundtrip to reach a DPS office and two other senators stated that their inner-city Houston constituents could not effectively access DPS services. ROA.27572-77.

Despite these warnings, SB14 became markedly stricter than any of the previous voter ID bills: it eliminated all non-photo IDs, accepted far fewer forms of ID, and gutted exceptions and provisional balloting measures. ROA.45112-14. The Lieutenant Governor's chief of staff confirmed to multiple legislative staffers that, unless additional IDs were accepted, SB14 would be blocked under the then-applicable law as racially and ethnically discriminatory. ROA.38985, ROA.101388-89. The Lieutenant Governor and Senator Estes, another SB14 proponent, discussed how SB14 might violate the Voting Rights Act ("VRA"). ROA.38976, ROA.44395.

2. Proponents Offered Shifting and Unsubstantiated Justifications for SB14

Justifications offered for passing voter ID legislation were moving targets. At various points, preventing fraud, preventing non-citizens from voting, public support of voter ID, and restoring the public's confidence in elections were each cited as the reason for changing Texas's ID law. ROA.99935-38. As the district court found, SB14 addressed none of these concerns. It did nothing to combat the only sources of voter fraud identified in Texas—mail-in ballot fraud and fraud by election campaigns and officials. *See* ROA.99134. And while it was supposedly intended to address non-citizen voting, there was little evidence of non-citizen voting and SB14 could not address it because non-citizens can legally obtain SB14 ID. ROA.44028-29, ROA.44402, ROA.99551-52. Finally, Texas election officials confirmed that there were no complaints lodged by voters because of the lack of a photo ID law, and instead testified that voters might lose confidence as a result of SB14's provisional balloting system. ROA.100274, ROA.100277. The district court credited Dr. Burden's testimony that SB14 would decrease voter turnout by increasing the cost of voting, ROA.27068, a conclusion supported by Texas's own expert, Dr. Hood. ROA.27068-69.

3. Proponents Were Non-Responsive to Concerns of Minorities

The evidence credited by the district court showed that the Texas legislature was non-responsive, and even hostile, to the concerns of minority voters. When Representative Veasey, a Black lawmaker, raised questions about the bill's impact on Black voters during a 2007 voter ID hearing, the white committee chairman cut short Veasey's questioning and removed him from the room. ROA.98867-69. When Senator Uresti, a Latino, raised concerns over obstacles to obtaining SB14 ID faced by his constituents, Senator Fraser publicly dismissed his concerns summarily. ROA.99443-44.

Whenever the legislature had a choice between a burdensome option and an ameliorating option, the burdensome prevailed. The legislature rejected multiple amendments to prohibit state agencies from charging a fee for issuance of documents used to obtain SB14 ID. ROA.99637-44. SB14 proponent Senator Patrick admitted that he voted to table one such amendment because he wanted voters to bear the cost of getting documents. ROA.101052.

Notwithstanding publicly-available evidence that Black and Latino voters are overrepresented among federal employees in Texas

and students in Texas as compared to Anglos, the legislature rejected amendments to accept federal employee IDs and state-issued student IDs. ROA.27169, ROA.45122-26. Nevertheless, the legislature exempted absentee ballots from SB14 despite evidence that absentee ballot fraud was a problem in Texas. This favored Anglos who are more likely to vote absentee than Blacks or Latinos. ROA.43946-47. The district court credited Dr. Lichtman's analysis that the legislature generally made choices that broadened Anglo voting. ROA.27073-74.

The legislature also chose to make SB14 markedly stricter than the Indiana and Georgia laws it was supposedly modeled after. Indiana and Georgia allow for more IDs and more exceptions than SB14 does. ROA.43946, ROA.27155-56. Amendments were offered to, for example, accept expired IDs (as Georgia does) and create an indigency exception (as Indiana offers), but they were rejected. ROA.99644-45.

4. Proponents Flouted the Regular Legislative Process

SB14 was pushed through the legislature in a manner that deviated from standard legislative procedure. First, the Governor, without explanation, declared voter ID legislation an emergency matter, ensuring its consideration in the first 60 days of the session. Director of

Elections McGeehan was unaware of any election legislation that had previously been designated an emergency nor any emergency requiring this declaration. ROA.100270-71. As he had for the 2009 voter ID bill, Lieutenant Governor Dewhurst suspended the Senate's standard two-thirds rule (in place since the 1950s) for voter ID legislation only, a rule change that was "highly unusual" and contrary to "tradition," allowing SB14 to proceed on a simple majority vote. ROA.99454, ROA.99970-71. SB14 received special "fast track" consideration by committees specially convened for SB14. ROA.41253. While SB14 was being rammed through the legislature, the Secretary of State's office produced a report in response to legislative inquiries that identified between 678,560 and 844,713 registered voters without DPS ID. ROA.40280-82. The Lieutenant Governor was advised of these numbers, but withheld them from the legislature and the public, unprecedented treatment for a Secretary of State report. ROA.40280-82, ROA.100296-98, ROA.100831-32.

F. The Political And Historical Context For The Law

1. Texas's History of Discrimination

Texas has a significant history of voting discrimination continuing through the year SB14 was enacted. Historically, Texas employed all-white primaries, literacy tests, and poll taxes in order to deny minorities the right to vote. ROA.27029-32. Rev. Peter Johnson, sent by Martin Luther King Jr. to Texas to help fight voting discrimination, testified without cross-examination that intimidation tactics are still used against voters in predominantly Black precincts in Houston, Dallas, and parts of East Texas. ROA.99249-50. These tactics are likewise used against Latinos: as recently as 2013, a judge credited testimony that poll workers at a Texas polling site were openly hostile to Latino voters, requiring them to show a photo ID before SB14 demanded it. ROA.44006. Throughout the last decade, officials in Waller County, Texas, the home of Prairie View A&M University, an historically Black institution, have moved around polling places, switched voting hours, and restricted access to voter registration. ROA.44002-05.

Notably, a year after SB14 was passed but before the Supreme Court struck down the coverage formula for Section 5 of the VRA in *Shelby County. v. Holder*, 133 S. Ct. 2612 (2013), a three-judge panel found that Texas could not meet its burden to show that its Congressional and state Senate redistricting plans were not enacted with a discriminatory purpose. *Texas*, 887 F. Supp. 2d at 178 (vacated in light of *Shelby*). When *Shelby County* was announced, Texas disregarded the judgment still pending against it and announced that it would immediately begin to enforce SB14, and multiple jurisdictions in Texas took immediate steps to implement election changes that had been blocked as racially discriminatory before *Shelby County*. ROA.44682.

In other litigation, Texas conceded that voting is racially polarized in 252 out of 254 counties. *Veasey v. Abbott*, 796 F.3d 487, 510 (5th Cir. 2013). Racial campaign appeals continue to be used in the state, such as an Anglo candidate's political advertisement showing his minority opponent with darkened skin color and another which pictured an Anglo opponent alongside other minority officeholders, captioned, "Bad Company Corrupts Good Character." ROA.27036-38, ROA.44022-24.

Blacks and Latinos remain underrepresented in the Texas Legislature and at lower levels of government. ROA.27036. Latinos and Blacks make up approximately 30.3% and 13.3% of Texas's population, respectively, but hold only 7.1% and 1.7% of the elected offices in Texas, respectively. ROA.27036, ROA.43940.

2. The Effects of Discrimination on Minorities

The district court found that the effects of past discrimination permeate aspects of life that often determine political participation: education, income, and employment.

As chronicled by Dr. Burton, Texas has a long history of racial segregation and discrimination in its education system. A decade after the Civil War ended, the Texas Constitution mandated segregated schools, ROA.44007. Even after *Brown v. Board of Education*, "'the State of Texas adopted a policy of official resistance to integration of its public schools,'" for the next several decades. ROA.44009 (quoting *Hopwood v. Texas*, 861 F. Supp. 551, 554 (W.D. Tex. 1994), *rev'd on other grounds*, 78 F.3d 932 (5th Cir. 1996)).

The pernicious effects of segregation remain in Texas schools today. As of 2010, over 39% of Black students were in schools that had

minority student populations of 90-100%, and 11.9% of Black students were in schools that are 99-100% minority. ROA.44012. Black students in Texas are three times more likely to be removed from school for lower-level offenses than whites. ROA.44010-11. In part because students suspended or expelled have a higher drop out rate, the high school completion rate in Texas among 25 year olds is 91.7% for Anglos, 85.4% for Blacks, and 58.6% for Latinos. ROA.27090, ROA.43938; *Veasey*, 796 F.3d at 510.

According to Dr. Ansolabehere, 84-88% of Anglo voting age citizens in Texas are registered to vote, compared to 75-80% of Blacks and 75-80% of Latinos. Similarly, in 2010, 41.8% of registered Anglos voted, compared to 31.3% of Blacks and 22% of Latinos; and, in 2012, 64.3% of registered Anglos voted, compared to 45% of Blacks and 59.8% of Latinos. ROA.43330.

Blacks and Latinos are more than twice as likely to live below the poverty line: 29% of Blacks and 33% of Hispanics, as compared to 12% of Anglos. ROA.43938-39. The unemployment rate for Anglos is about half that of Blacks and a third that of Latinos. ROA.27089, ROA.43938-39. Jobs of low-income minorities are more likely to be hourly wage or

service jobs, without paid leave and regular hours. ROA.44031; ROA.44465.

SUMMARY OF ARGUMENT

This Court should affirm the district court's case-specific and fact-driven determinations that Texas's photo ID requirement violates the Section 2 results test, was enacted with a discriminatory purpose, and violates the constitutional right to vote. The district court applied the well-established legal frameworks governing such claims, and its extensive findings of fact amply support its legal conclusions. These findings may be overturned by this Court only if clearly erroneous under Rule 52 and Texas does not explain how the findings fail this standard of review.

At the outset, the district court properly found that hundreds of thousands of Texans lack SB14 ID, that these citizens are disproportionately Black and Latino, that obtaining SB14 ID can be a complicated and onerous process, and that the burdens imposed on obtaining ID disproportionately fall upon Texas's minority citizens. These findings provide the foundation for the district court's holdings regarding discriminatory result, discriminatory purpose, and the constitutional right to vote and are not clearly erroneous.

The district court also properly undertook the totality of the circumstances analysis of SB14 required by the Section 2 results standard. *Thornburg v. Gingles*, 478 U.S. 30 (1986). The court found that SB14 operates to deprive minority voters of an equal opportunity to participate in the electoral process, based upon objective factors identified by *Gingles*, including Texas's long history of discrimination in voting, the connection between the effects of past socioeconomic discrimination and the burdens imposed by SB14, a statewide pattern of racially polarized voting, and the tenuousness of SB14's purported justifications. These findings are not clearly erroneous. Texas asserts that SB14 imposes a legally cognizable, discriminatory burden only if it makes voting impossible, but that is contrary to the express terms of the Fifteenth Amendment and the Voting Rights Act.

The district court conducted the required, detailed inquiry into discriminatory purpose, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and found abundant evidence (direct and circumstantial) that SB14 had a discriminatory purpose. The district court also faithfully applied the long-established *Anderson/Burdick* balancing test to resolve whether SB14 violates the

First and Fourteenth Amendment right to vote. The district court properly found that the balance tips decidedly against the state because SB14 substantially burdens voting for hundreds of thousands of Texans, and its purported justifications lack substance and do not merit the law's strict provisions and the burdens imposed. These findings are not clearly erroneous. *Crawford v. Marion County* does not insulate all voter ID laws from constitutional challenges, but rather supports the proposition that needless burdens cannot be visited on voters.

ARGUMENT

I. PROPER APPLICATION OF RULE 52 AND DEFERENCE TO THE TRIAL COURT'S CREDIBILITY DETERMINATIONS MANDATE AFFIRMANCE

Under Federal Rule of Civil Procedure 52(a), "[f]indings of fact . . . must not be set aside unless clearly erroneous" and "due regard" must be given "to the trial court's opportunity to judge the witnesses' credibility." The rule is strictly applied in this Court, even if "it is convinced that it would have decided the case differently." *Matter of Complaint of Luhr Bros., Inc.*, 157 F.3d 333, 337-38 (5th Cir. 1998) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985)). Additionally, this Court pays strong deference to a district court's weighing of expert testimony, *Bursztajn v. United States*, 367 F.3d 333, 337-39 (5th Cir. 1998), and reviews the trial court's decision to credit one expert over another for abuse of discretion. *See Cleveland ex rel. Cleveland v. United States*, 457 F.3d 397, 407 (5th Cir. 2006).

These standards apply with particular force here. First, the specific issues before the district court were intensively fact-bound: Section 2 cases are particularly dependent on a fact-driven analysis of the totality of circumstances, *Gingles*, 478 U.S. at 79; discriminatory intent is a pure question of fact, *Pullman-Standard v. Swint*, 456 U.S.

273, 275 (1982); and right-to-vote determinations call for a fact-intensive balancing of voting burdens and justifications, *Voting for America, Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013).

Second, the trial judge's fact-findings were based, at crucial junctures, on her weighing of credibility, specifically on her acceptance of the live testimony of 16 expert witnesses and 30 fact witnesses presented by Plaintiffs and her rejection as "unconvincing" and entitled to "little weight" of the single expert presented live by Texas. ROA.27803. On that basis, the trial judge issued a detailed, fact-laden, record-supported 147-page opinion. Proper application of Rule 52 mandates acceptance of the trial court's findings, and, necessarily, affirmance of its judgment.

In this context, Texas's failure to cite Rule 52 even once speaks volumes. Worse, particularly in its discussion of discriminatory intent, Texas mischaracterizes issues going purely to the weight of the evidence as supposed legal errors in an effort to escape the strictures of Rule 52 *sub silentio*. But arguments that a trial court gave too much weight to certain categories of evidence go either to the relevancy of evidence, as to which objections on the record must have been made in

order to preserve the issue for appeal,[2] or are challenges to the findings of fact reached on that evidence, which is subject to Rule 52's "clearly erroneous" standard. As will be demonstrated below, the District Court's findings on each of the claims easily meet the "clearly erroneous" standard, and must be affirmed.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT, BASED ON THE TOTALITY OF THE CIRCUMSTANCES, SB14 VIOLATES THE RESULTS STANDARD OF SECTION 2

Section 2 of the VRA prohibits states from imposing or applying any "standard, practice, or procedure . . . in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race." 52 U.S.C. § 10301(a). A violation of the "results" standard of Section 2 is established if the "totality of circumstances" shows that members of a particular racial group "have less opportunity than other members of the electorate to participate in the political process." *Id.* § 10301(b). "The essence of a § 2 claim is that a certain electoral law, practice or structure interacts with social and

[2] There is not a single category of evidence which Texas challenges on this appeal, to which Texas objected at trial.

historical conditions to cause an inequality in the opportunities enjoyed" by voters based by race. *Gingles*, 478 U.S. at 47.

Here, after determining that SB14 disparately burdened Black and Latino voters, the district court properly applied the totality of the circumstances standard to conclude that SB14 results in a denial or abridgment of these minorities' right to vote.

A. The District Court Correctly Found That Blacks And Latinos Are Disproportionately Burdened By SB14

The district court's findings that Blacks and Latinos lack SB14 at higher rates than Anglos and are subject to greater burdens than Anglos in obtaining SB14 ID are supported by substantial record evidence. Multiple experts using independent social science methodologies demonstrated that Black and Latino Texans lack SB14 ID at higher rates than Anglo Texans. Specifically, the four experts who analyzed the registered voter database against databases relating to SB14 IDs found that over 600,000 Texans do not have SB14 ID ("the No Match List"). These experts analyzed the No Match List to estimate the possession rates by Anglo, Black, and Latino voters and found that Anglos are between two and three times more likely to have SB14 ID.

This analysis was corroborated by the Barreto/Sanchez survey of 2300 Texas voters. The district court found this expert testimony persuasive, and that of Texas's only testifying expert on the issues suffering from "significant methodological oversights" and "unconvincing," and entitled to "little weight." ROA.27083. Texas bears the burden of demonstrating that the district court abused its discretion in this regard, and has failed utterly to do so.

Similarly, the record evidence was overwhelming that Blacks and Latinos are subject to greater obstacles in obtaining SB14 ID than are Anglos. The costs of obtaining SB14 ID include traveling, in many cases, hours to distantly located DPS facilities open only on weekdays and not available in a third of Texas's counties; taking time off from work to make the trips; and paying for out-of-state birth certificates. Several expert witnesses testified that these burdens fall more heavily on Blacks and Latinos in Texas, as they are disproportionately poor, more apt to be in low-paying hourly jobs, less apt to have access to a car, and more apt to be dependent on scarce public transportation. Again, Texas produced no evidence contrary to this at trial, and the

district court's determination of the disparate impact of SB14 on Blacks and Latinos should be affirmed by this Court.

B. The District Court Correctly Applied The Senate Factors In Finding That SB14 Violates Section 2

To determine whether, under the "totality of the circumstances," a voting prerequisite results in racial discrimination, the Supreme Court has directed courts to consider, in addition to disparate impact, a series of factors known as the "Senate Factors" derived largely from the case law of this Court and approved in the legislative history of Section 2. *Gingles*, 478 U.S. at 44-45, 79.[3] The Senate Factors are neither exclusive in scope nor mathematical in operation: courts must weigh all the evidence and base judgments "on comprehensive, not limited, canvassing of relevant facts." *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994). "Congress intended the listed factors only to illustrate some of the variables a court should consider in determining whether a state had violated [Section] 2." *Mississippi State Chapter, Operation PUSH, Inc. v. Mabus*, 932 F.2d 400, 405 (5th Cir. 1991).

[3] Congress specifically codified this Circuit's standards for voting rights claims when it amended Section 2 in 1982. *See* S. Rep. No. 97-417, at 2 (1982). "Congress amended [Section 2] to reach cases in which discriminatory intent is not identified, adding new language designed to codify *White v. Regester*." *Johnson v. De Grandy*, 512 U.S. 997, 1009 n.8 (1994) (citations omitted).

Texas's suggestion that the Senate Factors apply only to vote dilution claims (i.e., that election district lines dilute minorities' voting power) and not to "vote denial" claims (i.e., that minorities are denied equal opportunity to vote) is directly refuted by this Circuit's precedent, *Operation PUSH,* 932 F. 2d at 495, and that of other circuits. *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015) (unequal opportunity to register); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554-55 (6th Cir. 2014) (unequal voting wait time).

The district court carefully weighed the full range of evidence in light of the Senate Factors and other relevant considerations. Because "the district court's account of the evidence is plausible in light of the record . . . , the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Operation PUSH*, 932 F.2d at 410 (quoting *Anderson*, 470 U.S. at 573-74).

1. Senate Factor 1: Texas's History of Official Discrimination

The district court correctly found that Texas's long history of official discrimination "weighs strongly in favor of finding that SB14

produced a discriminatory result." ROA.27148. Texas dismisses this history as too old. However, as this Court has held, "*any history* of official discrimination" is relevant to the totality of the circumstances test. *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1121 (5th Cir. 1991) (emphasis added).

Moreover, Texas's history of discrimination has not ended. As recently as 2006, the Supreme Court considered Texas's "long, well-documented history of discrimination" against Blacks and Latinos, including the "poll tax, an all-white primary system, and restrictive voter registration time periods" as highly relevant in finding a violation of Section 2, and another federal court concluded that the State's redistricting plans were enacted with a discriminatory purpose in 2012. *LULAC v. Perry*, 548 U.S. 399, 439-40 (2006); *Texas*, 887 F. Supp. 2d at 159-62, 164-65.

Moreover, Texas's claim ignores numerous other examples of recent racial discrimination in Texas, with respect to voting, including the uncontroverted testimony of Rev. Johnson, who spent the last 40 years in Texas, combating voting discrimination; intimidation of Latinos at polling places; and discriminatory voting acts affecting

students at a predominately Black college in Waller County. The trial court's analysis of Senate Factor One is entitled to deference in accordance with Rule 52.

2. Senate Factor 5: Effects of Past Discrimination

The district court correctly found, in accordance with Senate Factor Five, that minority groups in Texas suffer the effects of past discrimination in the context of education, employment, health, and otherwise, all of which impede their access to and effective participation in the political process.

Senate Factor Five is particularly relevant to vote denial claims, because, as recognized repeatedly by this Court, past discrimination still impacts the present day ability of minorities to participate in the political process. *See, e.g., LULAC v. Perry*, 548 U.S. at 440; *Westwego*, 946 F.2d at 1115, 1122; *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2515 (2015). For example, educational attainment is the "single best predictor of whether an individual votes." ROA.43938. The record evidence was ample that (1) decades of *de jure* segregation, followed by decades of *de facto* segregation had resulted in Black and Latino students with

significantly higher school drop-out rates, and (2) Blacks and Latinos had lower voter registration rates and lower voter turnout rates in Texas than Anglos.

The history of racial and ethnic discrimination in education, employment, housing, and transportation in Texas plays a particularly strong role in this case, because of the direct connection between that history, and the ability of Blacks and Latinos to obtain SB14 ID and vote.

Discrimination in education and employment necessarily leads to income disparity between minorities and Anglos in Texas, ROA.43938-39, exacerbating the disparate racial and ethnic impacts of SB14. Poorer people are less likely to have access to cars, and, in Texas, 12.9% of Black and 7% of Latino households are without access to a vehicle, compared to only 3.9% of Anglo households. ROA.43939. The situation persists when comparing Black and Latinos living below the poverty line to Anglos living below the poverty line. ROA.44168-70.

Blacks are seven times more likely to both live below the poverty line and lack vehicle access than Anglos (7.1% vs. 1.0%), and Latinos are almost four times more likely (3.6% vs. 1.0%). ROA.44168. This

disparity in access to cars has a number of consequences relevant to SB14. First, it means that minorities are less likely to hold valid driver's licenses, which is the most commonly held form of SB14 ID. ROA.43939. Second, it makes it more burdensome to obtain an EIC. Texas ranks as one of the last states in terms of per capita investment in public transportation. ROA.44018-19. And Texas is a large state. Blacks and Latinos are 3.3 and 1.5 times, respectively, more likely than Anglos to travel more than 90 minutes to obtain an EIC. ROA.44166.

Finally, it is more difficult for those suffering from poverty as a result of racial and ethnic discrimination to vote: it is costly to make time to obtain SB 14 ID. ROA.43939. Minorities are more likely to have hourly wage or service jobs, which do not provide for paid leave, and therefore taking time off of work during business hours to make a 90 minute trip to obtain identification is likely to result in lost income. ROA.44031; ROA.44465.

Texas did not dispute any of this evidence, and the district court correctly found that Senate Factor 5 "weighs strongly in favor of finding SB14 produces a dscriminatory result." ROA.27149; *Veasey*, 796 F.3d at 511.

3. Senate Factor 9: Tenuousness of Policies Underlying the Law

The district court correctly found that Texas lacked any consistent rationale for its voter ID law, suggesting there was no real legitimate purpose for SB14, and that even the contrived and shifting goals of SB14's proponents were not addressed by the bill. ROA.27064, ROA.27150. The initial rationale that the law was necessary to stop fraud was patently false, because the only fraud SB14 could stop was in-person voter impersonation, a virtually non-existent phenomenon in Texas, or indeed elsewhere. ROA.100123, ROA.100165. The next rationale that SB14 was necessary to stop non-citizens from voting fell of its own weight, because non-citizens can legally possess SB14 ID and common sense dictates that the last thing a non-citizen might try is to impersonate someone else at a polling place, which partially explains a previous report of a Texas legislative subcommittee that found virtually no incidents of non-citizens voting. ROA.99939-42. And the trial court properly found unpersuasive Texas's last rationale, that surveys showed public support for a photo ID law to increase public confidence in voting. ROA.27069. As the district court correctly pointed out, the individuals polled were provided with no information about the content of SB14,

such as what forms of ID would be accepted, or its effects on minority voters. *Id.* Moreover, election officials testified that they had no information that impersonation fraud was undermining voter confidence.

Texas argues that under *Crawford v. Marion County*, preventing voter fraud and increasing voter confidence in the ballot are always sufficiently valid interests to support the constitutionality of voter ID laws. *Crawford* was not a Section 2 case, and has no bearing on the issues relating to discrimination claims. Moreover, that a state interest may be legitimate in the abstract does not translate into justification for every means used to further it. SB14 imposes inordinate and disparate burdens, which could have been ameliorated, on thousands of Black and Latino voters, purportedly to guard against fraud that is virtually nonexistent. The tenuous justifications offered for imposing unnecessarily substantial burdens on minorities provide all the more reason to conclude that SB14 will operate in a racially discriminatory fashion.

4. Additional Senate Factors Support the District Court's Finding

The district court correctly concluded that four other factors were relevant to its determination that SB14 has a discriminatory effect: racially polarized voting (Senate Factor Two), racial appeals in political campaigns (Senate Factor Six), underrepresentation by minority elected officials (Senate Factor Seven), and the lack of responsiveness of public officials to minorities' needs. ROA.27148-50. There was substantial, undisputed,[4] evidence supporting each of these factors, ROA.27036-38; ROA.27148, ROA.43936-37, ROA.43940-41, which are strongly connected to the enactment and effect of SB14. Racially polarized voting, for example, shows that race matters in the electoral process, and incentivizes legislators to pass suppressive measures such as SB14. Taken together with SB14, these factors combine to make it harder for minorities to vote and negatively impact the degree of political participation of Blacks and Latinos in Texas.

[4] To the extent Texas is challenging the district court's decision on the basis that there is insufficient evidence to demonstrate polarized voting and race, this Court must, as the panel did, *Veasey*, 796 F.3d at 510, reject that argument because Texas failed to preserve this issue for review. *See Miller v. Texas Tech Univ. Health Scis. Ctr.*, 421 F.3d 342, 348-49 (5th Cir. 2005).

C. Section 2 Does Not Require Proof Of A Decreased Minority Voting Turnout

Texas's argument that proof of decreased minority voter turnout or registration is a prerequisite to a Section 2 violation is illogical, impractical, and in many cases, would be nearly impossible.

First, the text of Section 2 contains no such requirement. Section 2 bars prerequisites to voting and voting practices which "result in a denial or abridgment of the right to vote on account of race," and asks whether members of a particular group have an unequal opportunity to participate in the political process, not whether it is impossible for them to vote. 52 U.S.C. § 10301.

The Fifteenth Amendment, which together with the Fourteenth Amendment forms the principal constitutional basis for Section 2, "hits onerous procedural requirements which effectively handicap exercise of the franchise" by minority populations, even though "the abstract right to vote may remain unrestricted as to race." *Lane v. Wilson*, 307 U.S. 268, 275 (1939). The voting process is not equally open to all eligible voters when minorities do not have the demanded ID and face significant burdens to obtain it, and when these facts interact with

social and historical conditions to handicap further minorities' opportunities to participate in the political process.

Contrary to Texas's argument, *LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993), establishes no rule demanding proof that the challenged practice decreases minority participation as a prerequisite to a Section 2 claim. *Clements'* discussion of the relevancy of voter registration and turnout was solely in connection with Senate Factor Five, i.e., the interplay of the effects of ***past*** socio-economic discrimination and current participation in the political process. In that context, this Court found that the plaintiffs "have offered no evidence of reduced levels of Black voter registration, lower turnout among Black voters, or any other factor tending to show that ***past*** discrimination," *not* the challenged practice, "has affected their ability to participate in the political process." *Id.* (emphasis added). Here, of course, Plaintiffs showed not only that there were lower minority registration and voter rates connected to ***past*** socio-economic discrimination, but also that "other factors," i.e., by making it harder for minorities to vote, SB14 "affected their ability to participate in the political process."

No case in this Circuit has ever required proof in a vote denial case that the challenged discriminatory practice depressed registration or turnout.[5] Indeed, in *Operation PUSH*, 932 F.2d 400, the Fifth Circuit case most analogous to the instant litigation, this Court held that a Mississippi restriction on voter registration violated the Section 2 results standard even though the challenged law did not absolutely bar any citizen from registering to vote and even though it was possible, with a sufficient expenditure of effort, for citizens to overcome obstacles to registration that the restriction imposed.[6]

Texas's construction of Section 2 is illogical. Were Texas's standard the law, there could never be a pre-enforcement challenge to any discriminatory act of vote denial, because it would never be possible

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[5] *Clements* did not opine on the proof required in vote denial cases because *Clements* was not a vote denial case. Similarly, Texas's reliance on *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012), on the issue, is puzzling. There, the Ninth Circuit's affirmance of the district court's judgment that a state voter ID law did not violate Section 2 was based on Rule 52 grounds, specifically that the district court did not "clearly err" when plaintiffs "produced no evidence supporting" its allegation of disparate impact and discriminatory result. *Id.* at 407. Here, there was abundant evidence of SB14's racially disparate impact and the history of discrimination in Texas leading to current socioeconomic conditions directly connected to the inability of these groups to participate equally in the political process because of SB14.

[6] Unlike here, the effect of the challenged laws on registration rates was relevant in *Operation PUSH*, because the laws had been in place since 1892 (dual registration system) and 1955 (no satellite offices). 932 F.2d at 402.

for a plaintiff to show a decline in voter registration or turnout prior to implementation of the new practice. This would require minority populations to suffer irreparable harm and to be denied an equal opportunity to vote before proving a Section 2 violation in a vote denial case.

Moreover, the rule proposed by Texas would be unduly difficult if not impossible to satisfy because of the practical difficulties of proving the causes of voter turnout. As this Court noted in *Clements*:

> Certainly, the allocation of proof in § 2 cases must reflect the central purpose of the Voting Rights Act and its intended liberality as well as the practical difficulties of proof in the real world of trial.

999 F. 2d at 860. Voter turnout is the result of a myriad of factors, including the competitiveness of elections, the number of candidates and/or issues on the ballot, and weather. ROA.33357, ROA.43982-83.

Here, the trial occurred after only two statewide elections were held subject to SB14: one general election, with no statewide or federal offices on the ballot, and one primary election. One cannot gauge the impact of any new voting requirement on turnout simply by comparing

the first election in which the requirement is implemented to the prior election in which it was not used.[7]

In any event, the available record evidence supports the conclusion that SB14 depresses minority turnout. The district court credited expert evidence (including that of Texas's expert Dr. Hood) that election procedures that increase voting costs (financial and non-financial), such as a strict photo ID law, typically discourage participation. ROA.27068. Dr. Hood also testified that Georgia's voter ID law resulted in across-the-board depressed turnout in 2008 for those lacking ID and a recent study by the U.S. Government Accountability Office concluded that ID laws in Kansas and Tennessee reduced turnout by 2 to 3 percent. ROA.27068; U.S. Government Accountability Office, *Issues Related to State Voter Identification Laws* at 48 (Sep. 2014), http://www.gao.gov/assets/670/665966.pdf. That some substantial number of minority voters would be discouraged from voting in the face of the burdens SB14 imposes is common sense.

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[7] Under Texas's logic, the nearly five percentage point drop in turnout in the 2014 gubernatorial election, as compared to the 2010 gubernatorial election, would indicate that SB14 depressed turnout statewide. *Turnout and Voter Registration Figures* (1970-current), Texas Secretary of State, http://www.sos.state.tx.us/elections/historical/70-92.shtml.

D. Absentee Voting Is Not An Adequate Alternative To In-Person Voting

The ability to vote absentee without showing photo ID does not save SB14. As a legal matter, courts have recognized the right to vote in person on Election Day, and not be forced to vote absentee. *See ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1320 (10th Cir. 2008); *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 830-31 (S.D. Ind. 2006); *Walgren v. Howes*, 482 F.2d 95, 100, 102 (1st Cir. 1973). As a factual matter, absentee voting in Texas is limited to those (i) over 65 years old, (ii) disabled, (iii) out of the county on election day and during the early in-person voting period, or (iv) in jail but eligible to vote, providing little help to the large number of Texas citizens who lack SB14 ID. ROA.101099-100.

Even for those Texas voters who are eligible to vote absentee, the process is complicated, requiring completion of multiple steps within limited time periods. ROA.27132-33. For many elderly or disabled voters, these hurdles may prove insurmountable. Many voters are unaware that they can vote by absentee ballot. ROA.27132.

Most important, many minority voters believe that casting a ballot in-person at the polls is the only way they can trust that their vote is

counted. *See, e.g.*, ROA.113545 (Bates); ROA.99224 (Benjamin); ROA.99032-33 (Mendez); ROA.99382 (Taylor); ROA.98883-84 (Veasey). Erecting discriminatory obstacles that permits them to vote only by a mail-in ballot, and away from the polling place, treats them as second-class citizens.

E. The District Court Applied The Correct Legal Standards In Determining That SB14 Had A Discriminatory Result On "Account Of Race"

Texas argues that the district court finding that the discriminatory results of SB14 were "on account of race" was improperly based solely on general socioeconomic conditions and past discrimination. Texas is wrong.

The district court delved into the very issue that Texas claims it did not: why the disparate impact is on account of race. The district court found that (1) Blacks and Latinos in Texas are more likely to be impoverished than Anglos; (2) the impoverishment of these groups is caused by decades of racial discrimination, and (3) "SB14 specifically burdens Texans living in poverty, who are less likely to possess qualified photo ID, are less able to get it, and may not otherwise need it." ROA.27084.

Texas nonetheless insists that the district court had the obligation to "link current socioeconomic conditions to proximate state-sponsored discrimination." Tex. Supp. Br. at 41. This argument misunderstands Section 2 jurisprudence. There is no requirement under the Section 2 results analysis that the "social and historical conditions" that "cause an inequality in the opportunities enjoyed" by voters based on race, *Gingles*, 478 U.S. at 47, must have been created by the state. A state is held accountable for any resulting electoral inequality because it was the one that enacted the challenged practice, not because it caused all of the electoral circumstances that led to that result. *Id.* at 44-45.

In any event, as the panel found, the district court's results determination passes even the "heightened standard" of the need to show the effects of state-sponsored discrimination suggested in *Frank v. Walker*, 768 F. 3d 744, 750 (7th Cir. 2014). *Veasey*, 796 F. 3d at 504 n. 17. The current socioeconomic situation of minority voters that is the cause of the burdens SB14 imposes on them is the product of centuries of government and private racism that plainly has not been eradicated. Therefore, SB14's disparate impact is certainly on account of race.

F. Affirmance Will Not Lead To The Horrors Predicted By Texas

Texas's argument that affirmance of the district court's ruling would open the floodgates to challenges to the most basic of voting rules—a classic "parade of horribles"—is unfounded. The carefully-crafted "totality of the circumstances" standard has stood for over three decades as sufficient and constitutional guidance for the courts in Section 2 cases. It ensures that only state voting procedures, like SB14, that disparately, substantially, and unnecessarily burden minority voters are unlawful. The only issue before this Court is whether Texas's photo ID statute—the most stringent of its kind in the country—discriminates on account of race, and that is quite unlike challenges to Tuesday voting or requiring voter registration or any of the other straw men erected by Texas.

Federal courts are well-equipped to apply the totality of the circumstances standard to distinguish normal election procedures, which are no more burdensome than necessary to protect the integrity and effectiveness of elections, from practices like SB14, which impose significant and unnecessary burdens on racial minorities. *See Growe v.*

Emison, 507 U.S. 25 (1993); *Voinovich v. Quilter*, 507 U.S. 146 (1993). That is what the totality of circumstances standard is all about.

G. Affirmance Raises No Constitutional Issues

Texas erroneously claims that the district court's Section 2 results determination was based solely on the basis of racially disparate rates of ID possession and no other factor and results in race-based decision-making that would be unconstitutional.

As explained in detail above, the district court's decision was not based on disparate impact alone. Far from it. The district court concluded that under the *totality of the circumstances*, the racial disparities in ID possession interacted with historical, social, and other factual circumstances in Texas to deny minority voters an equal opportunity to participate in the political process. In reaching this conclusion, the district court found that *in addition to* racially disparate ID possession (the scope of which is particularly suggestive of a Section 2 violation), seven of the nine Senate factors were both relevant and weighed in favor of a finding that SB14 produces a discriminatory result. The same results test has been employed in dozens of Section 2

cases since 1982 and cannot seriously be now said to pose constitutional issues.

This Court is bound by Supreme Court precedent to uphold the constitutionality of the results standard, as applied by the district court here and by a multitude of other courts. *Jordan v. Winter*, 604 F. Supp. 807, 811 (N.D. Miss. 1984), *sum. aff'd sub. nom.*, *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984) ("We reject the contention of the Republican Defendants that Section 2, if construed to reach discriminatory results, exceeds Congress's enforcement power under the fifteenth amendment."). Whether the results standard is within Congress' Fifteenth Amendment authority was specifically raised on appeal in that case, and the Supreme Court's summary affirmance is binding on this Court as to that question. *See Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975). The Fifth Circuit, as well as other Circuits, also have affirmed the constitutionality of the Section 2 results standard. *United States v. Blaine County*, 363 F.3d 897, 903-09 (9th Cir. 2004); *Jones v. City of Lubbock*, 727 F.2d 364, 373-75 (5th Cir. 1984); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1556-63 (11th Cir. 1984), *cert. denied*, 469 U.S. 976 (1984).

Texas also incorrectly argues that the district court's findings raise constitutional issues under the congruence and proportionality standard of *City of Boerne v. Flores*, 521 U.S. 507 (1997). Assuming *arguendo* that the congruence and proportionality standard applies to Congress' Fifteenth Amendment enforcement authority,[8] the results test is plainly congruent and proportional to the remedial purposes of the Fifteenth Amendment.[9] It was enacted in recognition of the difficulties of proving intent that could render the Fifteenth Amendment a dead letter. *See* S. Rep. No. 97-417, at 16 (the "intent test places an unacceptably difficult burden on plaintiffs").

The one case to consider the issue held that the results test met the *Boerne* standard. *Blaine*, 363 F.3d at 904 (9th Cir. 2004) (holding that the *Boerne* line of cases "strengthens the case for section 2's constitutionality"). Moreover, the results standard was patterned on

[8] *Cf. South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) ("Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.")

[9] The Fifteenth Amendment reads: "Section 1. The 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. Section 2. The Congress shall have power to enforce this article by appropriate legislation."

the constitutional standard enunciated by the Supreme Court in *White v. Regester*, 412 U.S. 755 (1973). *Gingles*, 478 U.S. at 36 n.4.

III. THE DISTRICT COURT CORRECTLY FOUND VIOLATIONS OF THE CONSTITUTION AND THE VOTING RIGHTS ACT ON THE GROUNDS THAT SB14 WAS ADOPTED, AT LEAST IN PART, WITH A RACIALLY DISCRIMINATORY PURPOSE

Laws "conceived or operated as purposeful devices to further racial discrimination" violate the Fourteenth and Fifteenth Amendments and Section 2 of the VRA. *Rogers v. Lodge*, 458 U.S. 613, 617 (1982). The Fifteenth Amendment prohibits a state from denying or abridging the right to vote on account of race, while the Equal Protection Clause of the Fourteenth Amendment prohibits denying equal protection of the laws on account of race. A discriminatory purpose has always constituted a violation of both the Fourteenth and Fifteenth Amendments and Section 2. *See Gingles*, 478 U.S. at 43-45.

Following a two-week trial the district court weighed the extensive testimony and documentary evidence before it and concluded that the Texas legislature enacted SB14 at least in part for a racially discriminatory purpose. The district court faithfully applied the guiding factors in *Arlington Heights*, 429 U.S. 252. Intent to

discriminate is "a finding of fact to be made by the trial court; it is not a question of law and not a mixed question of law and fact," and therefore may be upset only for clear error. *Pullman-Standard*, 456 U.S. at 289.

Texas attempts to salvage its case by labeling its quibbles with the court's findings of fact as errors of law, inventing a new standard for intentional discrimination claims, and attacking bits of evidence in isolation while ignoring the fuller picture presented by the totality of the evidence. This strategy violates the dictates of Rule 52 and controlling precedent, and cannot overcome the district court's finding that SB14 was adopted, at least in part, to discriminate against Blacks and Latinos.

A. The District Court Properly Applied The *Arlington Heights* Factors

Arlington Heights controls the inquiry into whether SB14 was enacted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon [Blacks and Latinos]." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Showing intentional discrimination "does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes," but only that such intent was at least one purpose. *Arlington Heights*, 429 U.S. at 265.

Recognizing that discriminatory motive may hide behind legislation that "appears neutral on its face," *Arlington Heights* "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. The Court provided guidance on what evidence to consider, including: whether the impact "bears more heavily on one race"; "the historical background of the decision"; "the specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; "[s]ubstantive departures" from the normal decision-making process; and the relevant legislative history. *Id.* at 266-68.

In undertaking this inquiry, the district court viewed "the totality of legislative actions" before it. *Feeney*, 442 U.S. at 280. This complies with the longstanding principle that evidence which may be inconclusive standing alone can be more than sufficient when viewed as part of the totality of the evidence, including when sniffing out impermissible discriminatory purpose. *See Coggeshall v. United States*, 69 U.S. 383, 401 (1864) ("Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to

constitute conclusive proof."); *United States v. Vargas-Ocampo*, 747 F.3d 299, 303 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 170 (2014); *United States v. Rodriguez-Mireles*, 896 F.2d 890, 892 (5th Cir. 1990); *United States v. Ayala*, 887 F.2d 62, 67 (5th Cir. 1989); *see also Makowski v. SmithAmundsen*, 662 F.3d 818, 824 (7th Cir. 2011) (factfinder may consider a "mosaic of circumstantial evidence . . . to infer intentional discrimination" in employment discrimination claims).

Here, a single-minded group of legislators that had known for years that SB14 would impose disparate burdens on minorities' access to the vote, strong-armed the bill through using unprecedented procedural tactics while ignoring proposed ameliorative measures. This happened in a legislative session infused with anti-Latino measures and against the backdrop of a major demographic shift in which minority voters were gaining political power.

1. SB14 Bears More Heavily on Black and Latino Voters and the Legislature Knew It Would

"[A]n important starting point" in the discrimination inquiry is whether SB14 "bears more heavily" on minority voters than Anglo voters. *Arlington Heights*, 429 U.S. at 266. The district court correctly

found ample evidence of disparate impact on minorities, attributable to both lack of SB14 ID and the overwhelming burdens to obtaining it.

In assessing impact, courts also consider anticipated impact, or the "normal inferences to be drawn from the foreseeability" of policymakers' actions. *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009); *see also Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464-65 (1979) ("[A]ctions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose.").

Lawmakers knew for years that SB14 was discriminatory. Since at least 2005, legislators had heard from colleagues, the Lieutenant Governor's office, and members of the public that photo ID would make it harder for minorities to vote. ROA.45104-09. They had discussed publicly and privately how many hundreds of thousands of people would be disenfranchised and how costly it was to obtain photo ID and underlying documents. Opponents of SB14 repeatedly warned proponents that photo ID would disenfranchise Black and Latino constituents. ROA.45104-09, ROA.99454. Yet, in 2011, Senator Fraser, Lieutenant Governor Dewhurst, Representative Smith, and others

succeeded in enacting SB14. ROA 45112-14. SB14 was so strict that the Lieutenant Governor's own general counsel warned legislative staffers that it would be legally unsound unless more forms of IDs were accepted. ROA44395-96. The Lieutenant Governor himself had access to a study, requested by the legislature, identifying hundreds of thousands of registered Texans without a DPS-issued ID, which he withheld from fellow legislators and the public. ROA.100831-32, ROA.100298.

2. SB14's Legislative History Provides Further Indicia of Discriminatory Intent

The "legislative . . . history [is] highly relevant" to determining purpose, *Arlington Heights,* 429 U.S. at 268. Notwithstanding evidence that SB14 would make it harder for minorities to vote, proponents doggedly rejected numerous proposed ameliorative amendments. ROA.27060-62, ROA.27169-72, ROA.43945-46. These amendments would have: accepted IDs disproportionately held by minorities; prohibited state agencies from charging for underlying documents, ROA.99637-44; ensured public transit accessibility for DPS offices, given racially disparate vehicle access, ROA.28753; and required the Secretary of State to produce an annual report on the impact of SB14 on

minority voters, ROA.28756-57. However, SB14 carved out an exception for absentee ballots—used disproportionately by white voters and a known source of ballot fraud.

Other evidence included the legislature's failure to include ameliorative measures in other states' laws that Texas claims were a model for SB14,[10] including allowing voters without ID to sign an affidavit and vote a regular ballot, similar to a provision key to a recent district court opinion upholding North Carolina's law. *North Carolina State Conf. of the NAACP v. McCrory*, No. 13-cv-658, 2016 WL 1650774, at *14 (M.D. N.C. Apr. 25, 2016). An amendment to allow voters without ID to sign an indigency affidavit was removed from the bill. Notably, the indigency affidavit option in Indiana's statute was a mitigating factor in *Crawford*, 553 U.S. at 186 & n.2, 199, and described by the Seventh Circuit as a "safety net," that might be necessary to protect the rights of voters who cannot obtain IDs with "reasonable

[10] *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007), cited by the panel,does not stand for the proposition that evidence of rejection of ameliorative amendments is not relevant to discerning discriminatory intent. Rather, in *Allstate*, this Court affirmed a trial court's finding that opponents of the legislation had not been deprived of legislative process in connection with legislative hearings. *Id.* at 161. Here, this Court is faced with the other side of the coin: did the trial court commit "clear error" when it found that the opponents of SB14 *had* been deprived of regularity of legislative process in connection with the passage of SB14.

effort." *Frank v. Walker*, No. 15-cv-3582, 2016 WL 1426486, at *2 (Apr. 12, 2016) ("*Frank II*").

3. The Sequence of Events Leading Up to SB14 Provides Evidence of Racial Discrimination

The "specific sequence of events leading up to the challenged decision" "shed[s] . . . light" on the purpose behind legislation. *Arlington Heights*, 429 U.S. at 267. SB14 passed during a dramatic demographic shift toward minority voting power in Texas. As the Supreme Court has noted, the political heft of this "increasingly powerful Latino population" caused Texas to draw a 2003 redistricting plan ultimately found to violate Section 2. *LULAC v. Perry*, 548 U.S. at 423. As the political power of minorities grew throughout the decade, proposed ID laws grew stricter, despite the admitted lack of impersonation fraud occurring under Texas's preexisting voter ID law. The legislature that passed SB14 was plagued by anti-Hispanic sentiment and considered numerous bills to counteract the demographic shift. Adding to the indicia of intent were the ever-shifting, but always ultimately unsubstantiated, justifications offered for photo ID laws. The district court credited expert testimony that these pretextual justifications were part of a long history of racially discriminatory

legislation passed under the guise of securing the ballot. ROA.27073-75.

4. The Legislature Departed From the Normal Procedural Sequence in Passing SB14

"Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." *Arlington Heights*, 429 U.S. at 267. A mountain of evidence shows the legislature departed radically from normal procedures in passing SB14: the law was pushed through as an emergency where there was none, and despite leadership's admonition that no bill with a fiscal note (SB14 had a $2 million one) would move during the budget crisis. ROA.27055-57, ROA.100270-71. The bill bypassed standard committee procedures in both houses. The Senate suspended its longstanding "two-thirds rule" to allow SB14 to proceed on a simple majority vote. These departures were not, as the panel suggested, "typical aspects of the legislative process," citing *Operation PUSH*, 932 F.2d at 409, but, as multiple legislators testified, "highly unusual" and contrary to practice and "tradition." ROA.99454, ROA.99970-71.

5. The Legislature Substantively Departed From the Normal Decision-making Process in Enacting SB14

Another line of evidence supporting an inference of discriminatory purpose is whether the law's passage was marked by "[s]ubstantive departures" in which lawmakers reached conclusions unjustified by the evidence. *Arlington Heights*, 429 U.S. at 267. This legislature made baffling decisions that make sense only when viewed through the lens of discriminatory motive. It purportedly modeled its law after Indiana's and Georgia's, but SB14 is actually far stricter. Despite evidence that in-person fraud in Texas is demonstrably rare, SB14 targets that kind of fraud exclusively, and does not apply to absentee ballots (where fraud can and does occur). SB14 was supposedly aimed at non-citizen voting, yet non-citizens may obtain driver's licenses and other personal identification accepted under the law. SB14 was allegedly designed to foster confidence in elections, yet Elections Director Ann McGeehan could not identify any complaints from voters who lacked confidence in Texas's prior law, and Senator Fraser, SB14's Senate sponsor, could not provide any evidence that Texas voters were not voting because of lack of confidence in elections.

6. Texas's History of Discrimination in Voting, Which Persists Today, Indicates a Discriminatory Purpose

Finally, the "historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes," *Arlington Heights*, 429 U.S. at 267. Here, the district court rightfully considered Texas's centuries-long history of discrimination in voting that continues today.

Texas argues that this history of racial discrimination is too out-dated to be relevant. However, as recently as 2012 the state's State House redistricting plan was found to violate the Voting Rights Act and the State Senate redistricting plan was found to be intentionally discriminatory. *Texas,* 887 F. Supp. 2d 133.[11] In 2006, the Supreme Court cited Texas's "long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process", including poll taxes, all-white primaries, restrictive voter registration

[11] Texas's argument that discrimination in redistricting is irrelevant because it is geographically isolated is unavailing, as redistricting lines are drawn by the legislature as a whole.

regimes, and multiple Section 5 DOJ objection letters.[12] *LULAC*, 548 U.S. at 439-40. Although the Twenty-Fourth Amendment, banning poll taxes in federal elections, was ratified and enacted in 1964, Texas did not ratify it until 2009. ROA.100181-83. This can scarcely be considered ancient history.

B. Texas's Attempts To Undercut The District Court's Findings Must Fail

Texas's attempts to undercut the district court's findings of fact ignore the dictates of Rule 52.

1. Texas Mischaracterizes Factual Disputes as Errors of Law

Texas variously argues that the district court gave a particular statement too much or not enough weight, or drew impermissible inferences from a certain piece of evidence, or credited one witness's testimony when it should have credited another's. These are not legal errors, but rather factual disagreements with the weight the district

[12] The panel questioned some of this evidence as limited to local occurrences, relying on *Operation PUSH*, 932 F.2d 400. *Operation PUSH* did not rule that racially discriminatory actions at the local level are irrelevant to intent inquiries. Rather, the Court simply held that the district court did not err in considering statewide registration rates instead of county registration rates in its Section 2 results analysis of Mississippi's registration laws. *Id.* at 409-10.

court assigned, as fact-finder, to different pieces of evidence and, under Rule 52, cannot prevail.

2. There is No "Clearest Purpose" Standard for Intentional Racial Discrimination

Texas encourages this Court to apply an unprecedented "clearest purpose" test to determine discriminatory intent, but the standard is just the opposite. *Arlington Heights* recognizes that facially neutral laws may conceal a discriminatory purpose and therefore require the district court to undertake a "sensitive inquiry" into all the evidence. Adopting a "clearest purpose" rationale would insulate discriminatory laws from judicial inquiry so long as a legislator declared aloud the law was intended for a race-neutral purpose.

Texas pulls the "clearest proof" standard from a line of inapposite ex post facto statutory construction cases. *See Smith v. Doe*, 538 U.S. 84, 92 (2003) (whether Megan's Law enacted a criminal penalty); *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (whether civil commitment was a criminal punishment); *Flemming v. Nestor*, 363 U.S. 603, 613-14 (1960) (whether termination of benefits was punitive). In urging this Court to accept legislative decision-making at face value, Texas cites a case in which the question was whether a piece of

legislation discriminated against a particular type of milk containers in violation of the Equal Protection Clause. *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 471-72 (1981). The Supreme Court has long recognized, however, vastly different roles for the courts when it comes to economic regulation and laws affecting the voting rights of racial minorities. Because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

3. The District Court Properly Weighed All of the Evidence

Texas launches a piecemeal attack on the district court's findings, to argue that specific pieces, standing alone, are insufficient to support a discriminatory purpose finding. However, the trial court properly considered *all* of the evidence, including as dictated by *Arlington Heights*, circumstantial evidence, in light of the entirety of the record.[13] *See Coggeshall*, 69 U.S. at 401.

[13] Cases dealing with issues of statutory construction and not discriminatory intent are not apposite. *See, e.g., Barber v. Thomas*, 560 U.S. 474 (2010); *United States v. O'Brien*, 391 U.S. 367 (1968); *Mercantile Tex. Corp. v. Bd. of Governors of Fed.*

Texas argues that trial court should not have relied on contemporaneous statements of opponents to SB14, and post-enactment testimony of legislators. But the Supreme Court and this Court have both acknowledged that few decision-makers are likely to make plain their prejudices. *Arlington Heights*, 429 U.S. at 265-66; *Lodge v. Buxton*, 639 F.2d 1358, 1373 (5th Cir. Unit B 1981) ("the right to relief cannot depend on whether or not public officials have created inculpatory documents"), *affirmed sub nom Lodge*, 458 U.S. 613 (1982).[14] Whether standing in isolation, any one of these categories of evidence is decisive on the issue of discriminatory intent is not the question. Rather, the question that *Arlington Heights* poses is whether *all* of the evidence, taken together, paints a picture of discriminatory

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Reserve Sys., 638 F.2d 1255 (5th Cir. Unit A 1981). Even in that context, *Barber*, 560 U.S. at 486, and *Mercantile*, 638 F.2d at 1263, indicated that the issue was one of weight, thus implicating Rule 52's dictates.

[14] For this reason, Texas's repeated, and wholly inaccurate, assertion that Plaintiffs' discovery of legislators' records produced no "smoking gun" is meaningless. *See, e.g.*, *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982) ("[O]fficials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority."). In fact, the discovery produced much material upon which the trial court relied, including key memoranda and statements, as well as documents and testimony relating to what the proponents of SB14 knew and the unprecedented and aberrational legislative process they followed.

intent.[15] The trial judge answered this question unequivocally, and Rule 52 dictates deference to her answer.

IV. THE DISTRICT COURT CORRECTLY FOUND THAT SB14 IS AN UNCONSTITUTIONAL BURDEN ON THE FUNDAMENTAL RIGHT TO VOTE

The test for determining whether a voting practice violates the First and Fourteenth Amendment right to vote is established by the Supreme Court's decisions in *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983): The "'character and magnitude of the asserted injury'" to the right to vote must be weighed against "'the precise interests put forward by the State as justifications' . . . taking into consideration 'the extent to which those interests make it necessary to burden [those] rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*) (internal citations omitted); *see also Crawford*, 553 U.S. at 190 (citing *Anderson* and *Burdick*).

[15] In *Jones v. Lubbock*, 727 F.2d 364 (5th Cir. 1984), *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), and *Dowell v. Dowell,* 890 F.2d 1483 (10th Cir. 1989), the individual legislators' statements were the primary, if not the only evidence, certainly not the situation here.

A. The District Court's Application Of The *Anderson/Burdick* Test Is Fully Supported By The Factual Record

As discussed above, the district court found that the"character and magnitude" of the burden imposed by SB14 was substantial, in that it created difficult obstacles, in time, travel, and money, for those without the required ID to obtain it.[16] The district court then measured the "precise" interests asserted by the State against this burden, and found them lacking because they were relatively small and tenuous when measured against the legislative means chosen to further those interests. Simply put, Texas chose to enact a statute that unnecessarily made it much more difficult for thousands upon thousands of Texans to vote in the name of responding to virtually non-existent conduct, in-person voter impersonation.

Factoring into the district court's decision was the obvious fact that Texas could have furthered its legitimate interests simply by adopting the sort of ameliorative measures some other states have, i.e., broadening the categories of acceptable IDs and allowing for the use of

[16] Texas claims the Plaintiffs did not identify any person who could not ultimately obtain SB14 ID or, if not, vote absentee. Plaintiffs need not show that SB14 makes voting impossible to prevail, only that it substantially burdened the right to vote. And, as discussed above, absentee voting is not a sufficient alternative to voting at the polls on Election Day.

"reasonable impediment" affidavits that would permit its citizens to vote despite the unreasonable obstacles placed by SB14.

B. Crawford Does Not Insulate Texas from Liability

Texas repeatedly invokes *Crawford* as if it were a magical incantation protecting SB14 from challenge notwithstanding the burdens it imposes on the right to vote. This case differs, however, from *Crawford* in two fundamental ways: this is an as-applied challenge, rather than a facial, one, and this case was decided on a record that was both notably more robust and meaningfully different from the one in *Crawford*.

1. Plaintiffs' As-Applied Challenge Is Not Foreclosed by *Crawford*

Appellees' right-to-vote claim is an as-applied challenge. The evidence credited by the district court amply shows that SB14 imposes a substantial burden on the right to vote for voters who lack SB14 ID and face obstacles to obtaining it that far outweigh Texas's justifications for the law.

In *Crawford*, on the other hand, the Supreme Court upheld Indiana's photo ID law against "a facial attack on the validity of the entire statute," considering the law's "broad application to all Indiana

voters." 553 U.S. at 189, 202-03. The Court noted that, while the Indiana law did not impose significant burdens for most voters, "a somewhat heavier burden may be placed on a limited number of persons," including those who have trouble obtaining ID due to age, economic, or other personal limitations. *Id.* at 199. The Court distinguished such a case from the "broad attack" before it. *Id.* at 200.

The Seventh Circuit recently embraced this distinction in *Frank II*, where Judge Easterbrook distinguished plaintiffs' facial challenge dismissed by the lower court and their remaining as-applied claims which were "potentially sound if even a single person eligible to vote is unable to get acceptable photo ID with reasonable effort." Such as-applied claims were therefore remanded for further proceedings. *Frank II*, 2016 WL 1426486, at *2.

2. The *Crawford* Record Differed Meaningfully From This One

The Supreme Court was clear that Indiana's photo ID law survived the challenges in *Crawford* because "the evidence in the record"—which phrase or its equivalent appears no less than seven times in the opinion—was insufficient to meet petitioners' heavy burden to invalidate the Indiana law as it applied to "all voters." *Id.* at 200-03.

Necessarily, as an as-applied challenge, the record in this case is much more robust and specific. Unlike in *Crawford,* here there is evidence as to the specific number of registered voters without ID, the amount of time it would take voters to get the required ID, and firsthand testimony from dozens of voters as to the burdens they would face to get IDs.[17]

[17] In this regard, Texas is not Indiana, and the paucity of available DPS facilities and the enormous time and distance required to reach them would allow a different result here, even if *Crawford* had been an as-applied challenge.

CONCLUSION

For the reasons set forth above and in our opening brief to the panel, this Court should affirm the judgment of the District Court.

May 9, 2016

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 9th day of May, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Ezra D. Rosenberg
Ezra D. Rosenberg
Counsel for Texas State Conference of NAACP Branches & MALC

Certificate of Compliance

1. I certify that, on May 9, 2016, this document was transmitted the Clerk of the United States Court of Appeals for the Fifth Circuit via the Court's CM/ECF document filing system.

2. I certify that this brief complies with the type-volume limitation of FED.R.APP.P. 32(a)(7)(B) because this brief contains 13,757 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3. I certify that this brief complies with the typeface requirements of FED.R.APP.P. 32(a)(5) and the type style requirements of FED.R.APP.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word using 14-point Century Schoolbook typeface.

Date: May 9, 2016

/s/ Lindsey B. Cohan
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