No. 16-393

In the Supreme Court of the United States

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL.,
PETITIONERS

v.

MARC VEASEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

To cast a regular ballot in Texas on Election Day or during early voting, in-person voters must present a statutorily approved form of government-issued photo identification. The questions presented are:

1. Whether the district court clearly erred in determining that Texas, by limiting the forms of acceptable identification and restricting access to such identification, has provided African-American and Hispanic voters "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," in violation of Section 2 of the Voting Rights Act, 52 U.S.C. 10301(a) and (b) (Supp. II 2014).

2. Whether the court of appeals properly remanded for further consideration plaintiffs' claim that Texas's voter identification requirements were motivated at least in part by a racially discriminatory purpose, rather than rejecting the claim outright.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-251a) is reported at 830 F.3d 216. The opinion of the three-judge panel of the court of appeals (Pet. App. 252a-312a) is reported at 796 F.3d 487. The opinion of the district court (Pet. App. 313a-490a) is reported at 71 F. Supp. 3d 627.

JURISDICTION

The judgment of the en banc court of appeals was entered on July 20, 2016. The petition for a writ of certiorari was filed on September 23, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 2 of the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 *et seq.*,[1] imposes a "permanent, nationwide ban on racial discrimination in voting." *Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612, 2631 (2013). It prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. 10301(a). The terms "vote" and "voting" encompass "all action necessary to make a vote effective," including "casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast." 52 U.S.C. 10310(c)(1).

In 1982, Congress amended Section 2 to make clear that a statutory violation can be established by showing discriminatory intent, a discriminatory result, or both. See *Thornburg* v. *Gingles*, 478 U.S. 30, 34-37, 43-45 (1986); 52 U.S.C. 10301(a) and (b); see also S. Rep. No. 417, 97th Cong., 2d Sess. (1982) (Senate Report). Once a violation is established, the court may enter injunctive or other relief, including relief that "block[s] voting laws from going into effect." *Shelby Cnty.*, 133 S. Ct. at 2619; see 52 U.S.C. 10308(d).

2. From 2003 until 2013, in-person voters in Texas could cast a regular ballot by presenting a voter registration certificate, which is mailed to voters free of charge upon registration and is reissued every two years. Pet. App. 256a. Voters appearing without a certificate still could cast a regular ballot by executing an affidavit of eligibility and presenting an alternate

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[1] All references to the VRA are found in the 2014 Supplement of the United States Code.

form of state-specified identification, such as a current or expired driver's license; an employee or student identification card; a utility bill, bank statement, paycheck, or government document showing the voter's name and address; or government mail addressed to the voter. *Ibid.* During the decade in which those practices were in effect, approximately 20 million votes were cast in general elections in Texas. Only two cases of in-person voter impersonation were identified and prosecuted to conviction. *Id.* at 328a.

a. In May 2011, Texas enacted Senate Bill 14 (SB14 or SB 14). 2011 Tex. Gen. Laws 619. SB14 replaced Texas's existing voter identification practices with stricter requirements for in-person voting. SB14 requires in-person voters, whether voting on Election Day or during early voting, to present one of five preexisting forms of government-issued photo identification: (1) a driver's license or personal identification card issued by the Texas Department of Public Safety (DPS); (2) a DPS-issued license to carry a concealed handgun; (3) a United States passport; (4) a United States citizenship certificate; or (5) United States military ID containing a photo.[2] Pet. App. 333a. To qualify, the identification must be unexpired or have expired within 60 days. *Ibid.*

SB14 also created a new form of photo identification —the election identification certificate (EIC)—available to voters who lack qualifying identification. Eligible voters who travel to a DPS office or other EIC-issuing location and present acceptable proof of citizenship and identity can obtain free of charge an EIC that is

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[2] Voters with a qualifying disability who lack acceptable identification may obtain an exemption by providing their local registrar with specified documentation of their disability. Pet. App. 333a.

valid for six years; for most applicants, a certified copy of a birth certificate is necessary. Pet. App. 333a, 392a-393a & n.274. In-person voters who do not present acceptable identification may cast a provisional ballot. But Texas counts the ballot only if the voter, within six days of the election, appears before the county registrar and either presents SB14-compliant identification or executes an affidavit attesting to a religious objection to being photographed or attesting to the loss of SB14 identification in a recent natural disaster. *Id.* at 334a.

b. When SB14 was enacted, Texas was subject to Section 5 of the VRA, 52 U.S.C. 10304, which required preclearance for jurisdictions identified under the formula specified in Section 4(b), 52 U.S.C. 10303(b). In March 2012, the Department of Justice denied preclearance. In August, a three-judge district court denied preclearance after concluding that SB14, if implemented, would have a retrogressive effect on minority voters; it declined to address whether Texas had shown that SB14 lacked discriminatory intent. See *Texas* v. *Holder*, 888 F. Supp. 2d 113, 115, 138 (D.D.C. 2012), vacated and remanded, 133 S. Ct. 2886 (2013). This Court vacated the decision in light of *Shelby County*, *supra*, which held that Section 4(b) could not be used to require preclearance, see 133 S. Ct. at 2631. Hours after this Court's decision in *Shelby County*, Texas announced that SB14 would take effect.

3. The United States and private plaintiffs filed separate challenges to SB14, which were consolidated and expedited prior to the November 2014 general election. Pet. App. 314a-315a & n.3. All plaintiffs, including the United States, alleged that SB14's photo-

identification requirements for in-person voting violate Section 2 of the VRA, both because they are intentionally discriminatory and because they have a prohibited discriminatory result. *Id.* at 447a n.502, 456a n.524.

After a bench trial with more than 40 live witnesses, 17 experts, and thousands of pages of documentary evidence, the district court issued detailed findings of fact and conclusions of law. Pet. App. 313a-490a. The court described Texas's voter ID law as "the strictest law in the country." *Id.* at 335a (capitalization altered). The court found that more than 608,000 registered Texas voters lack the identification necessary to cast a regular, in-person ballot under SB14 and that a sharply disproportionate number of those voters are African American or Hispanic. *Id.* at 372a-382a. Among affected voters, African Americans and Hispanics face greater difficulties securing qualifying identification, including an EIC. *Id.* at 382a-390a, 449a-450a. The court determined that SB14 interacts with social and historical conditions tied to race discrimination in Texas to provide minority voters less opportunity relative to Anglo voters to participate in the political process and elect their candidates of choice, thereby violating Section 2. *Id.* at 449a-456a.

The district court also found in plaintiffs' favor on their discriminatory-intent claim, finding that the Texas Legislature had enacted SB14 at least in part because of its detrimental effect on minority voters. Pet. App. 456a-466a. The court further determined that Texas did not show that the Legislature would have enacted SB14 absent that discriminatory purpose. *Id.* at 464a-466a.

To redress those Section 2 violations, the district court enjoined SB14's voter identification provisions and reinstated Texas's preexisting law. Pet. App. 475a-476a.

Texas sought an emergency stay pending appeal. Six days before the start of early voting for the November 2014 election, the court of appeals granted the stay based "primarily on the extremely fast-approaching election." *Veasey* v. *Perry*, 769 F.3d 890, 892 (5th Cir. 2014). Plaintiffs filed emergency applications seeking to vacate the stay, which this Court denied. See 135 S. Ct. 9 (2014).

4. On August 5, 2015, a panel of the court of appeals affirmed the district court's finding that SB14 violates Section 2 of the VRA based on its discriminatory result. Pet. App. 255a, 277a-297a. The panel vacated the finding that SB14 was enacted at least in part for a discriminatory purpose, concluding that the court had relied too heavily on certain evidence. *Id.* at 265a-277a. The panel remanded to the district court for further proceedings on the purpose claim and for consideration of the proper remedy. *Id.* at 311a-312a.

On March 9, 2016, the court of appeals granted Texas's petition for rehearing en banc. Pet. App. 491a-493a. After being unable to secure interim relief from the Fifth Circuit, certain private plaintiffs applied to this Court in light of the upcoming November 2016 presidential election to vacate or modify the 2014 stay of the district court's injunction. This Court denied the application but invited the parties to file an appropriate application seeking interim relief if the en banc court failed to act by July 20, 2016. 136 S. Ct. 1823.

5. On July 20, 2016, the en banc court of appeals vacated and remanded for further consideration plaintiffs' discriminatory-intent claim, and it affirmed the district court's finding that SB14 has a prohibited discriminatory result under Section 2 of the VRA. Pet. App. 1a-113a.

a. The court of appeals determined that the district court, in finding SB14 was adopted for a discriminatory purpose, had committed a number of errors. Pet. App. 15a-45a. Among other things, the Fifth Circuit determined that the district court had placed disproportionate reliance on long-ago history; relied on speculation by SB14's opponents about the bill's purpose; and relied inappropriately on post-enactment testimony. *Id.* at 16a-26a. Despite those errors, the court of appeals noted, "the record also contained evidence that could support a finding of discriminatory intent." *Id.* at 26a. Such evidence included legislators' "aware[ness] of the likely disproportionate effect of the law on minorities"; statements made by the law's proponents; "evidence that SB14 is only tenuously related to the legislature's stated purpose of preventing voter fraud"; evidence that race-neutral justifications were "pretextual"; "numerous and radical procedural departures" used to pass SB14; "contemporary examples of State-sponsored discrimination"; and the State's "shift[ing]" rationales for the law. *Id.* at 26a-42a. Concluding that "the record does not 'permit only one resolution of the factual issue,'" the court remanded for a reweighing of the evidence. *Id.* at 15a-16a (brackets omitted) (quoting *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982)).

b. The court of appeals affirmed the district court's finding that SB14 had a discriminatory result on African-

American and Hispanic voters. In reaching that conclusion, the court adopted a two-part test, based on this Court's guidance in *Thornburg* v. *Gingles*, 478 U.S. 30 (1984), for evaluating such claims:

> [1] The challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice, and
>
> [2] That burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.

Pet. App. 48a-49a (brackets and citation omitted). The court of appeals explained that the first step "inquires about the nature of the burden" imposed, while the second step "provides the requisite causal link between the burden on voting rights and the fact that this burden affects minorities disparately." *Id.* at 49a (citing *Gingles*, 478 U.S. at 47). The second step, the court explained, draws on the non-exhaustive list of factors that Congress identified when amending Section 2, which this Court endorsed in *Gingles* as a means for determining causality. *Id.* at 50a-52a; see Senate Report 28-29 (identifying what have become known as "Senate Factors").

The court of appeals rejected Texas's arguments that evaluating SB14 under this two-part test would threaten all neutral election laws. Pet. App. 52a-57a. The court explained that the test requires a "multi-factor, totality-of-the-circumstances analys[i]s" that is

necessarily "fact dependent." *Id.* at 53a. The court declined to adopt Texas's proposed test, under which a challenged practice must be upheld "so long as the State can articulate a legitimate justification for its election law and some voters are able to meet the requirements." *Id.* at 55a. That approach, the court explained, would be inconsistent with Section 2's purpose of preventing both subtle and overt forms of race discrimination in voting. *Id.* at 54a-57a & n.37. The court also rejected Texas's reliance on *Frank* v. *Walker*, 768 F.3d 744 (7th Cir. 2014), cert. denied, 135 S. Ct. 1551 (2015), stating that "the Seventh Circuit's approach in *Frank* is not inconsistent with our own." Pet. App. 57a; see *id.* at 57a-60a. Finally, the court rejected Texas's argument based on this Court's decision in *Crawford* v. *Marion County Election Board*, 553 U.S. 181 (2008), which upheld Indiana's voter identification law against a facial challenge under the First and Fourteenth Amendments. *Crawford* made "no mention of Section 2 or the [VRA]"; involved "a different analytical framework" than that used for Section 2 claims; examined "only a facial challenge" adjudicated on summary judgment; and lacked the "multitude of factual findings" made by the district court in this case on a fully developed record. Pet. App. 58a-59a & n.39.

Next, applying the two-part framework identified above, the court of appeals reviewed for clear error the largely undisputed record and the district court's ultimate finding of a discriminatory result. The court of appeals found no clear error. Pet. App. 60a-95a.

First, as to SB14's impact, the evidence supported the district court's finding that African Americans and Hispanics are disproportionately represented among

more than 608,000 registered Texas voters who lack SB14-compliant identification. Pet. App. 61a-63a. The law also imposes "excessive and disparate burdens" on minority voters who must obtain a form of SB14 identification, including an EIC, to cast a regular ballot. *Id.* at 62a. The court of appeals explained that those burdens result from minorities' disproportionately lower incomes, lower vehicle access, and higher reliance on public transit; the disproportionate degree to which they lack underlying documents needed to obtain an EIC; and long distances that must be traveled to Texas's relatively scarce EIC-issuing locations. *Id.* at 63a-65a.

The court of appeals rejected Texas's assertion that the findings below rested on mere statistical disparities in possession of SB14-compliant identification. Rather, the record included "concrete evidence regarding the excessive burdens faced by Plaintiffs," who "personified the expert analysis credited by the district court regarding SB 14's discriminatory effect." Pet. App. 70a. The court also identified a "few examples" of the "many specific burdens" that the individual plaintiffs faced in attempting to obtain SB14-compliant identification and to vote. *Id.* at 70a; see *id.* at 70a-76a. And the court rejected, as being inconsistent with the record, Texas's assertion that plaintiffs had "failed to identify a single individual who faces a substantial obstacle to voting because of SB 14," as well as Texas's "demonstrably false" claim that plaintiffs had "failed to show that SB 14 prevented a single person from voting." *Id.* at 72a & n.49.

Second, the court of appeals examined the Senate Factors. Among other things, the court looked at: Texas's history of official discrimination in voting,

which acts in concert with SB14 to depress electoral opportunities for participation by minorities; the statewide prevalence of racially polarized voting; racial disparities in education, employment, health, housing, and transportation attributable to current and past discrimination, which hinder minority political participation and make it harder for minority voters to overcome the burdens imposed by SB14; the lack of minority elected officials and the lack of responsiveness to minority voters' needs; and the tenuous relationship between SB14 and the Legislature's stated purposes for adopting the law. Pet. App. 77a-93a.

The court of appeals rejected Texas's assertion that the only relevant question was whether SB14 has caused a reduction in minority voter turnout. That argument, the court explained, ignored Section 2's prohibition not only on the "denial" but also the "*abridgement*" of the right to vote. Pet. App. 83a (quoting 52 U.S.C. 10301(a)). Texas's argument also disregards the numerous factors affecting overall turnout, and it would eliminate pre-election challenges to discriminatory practices. *Id.* at 83a-87a; see *id.* at 86a ("We decline to cripple the Voting Rights Act by using the State's proposed analysis.").

Having disposed of Texas's arguments, the court of appeals concluded that the district court correctly applied Section 2's "intensely local," "totality of the circumstances" analysis; the district court did not clearly err in finding that SB14 has a prohibited discriminatory result. Pet. App. 93a; see *id.* at 93a-95a. Given the impending presidential election, the court of appeals ordered the district court to enter interim relief addressed to SB14's discriminatory effect, and it

ordered further proceedings related to the law's allegedly discriminatory intent. *Id.* at 113a.

c. A number of judges wrote opinions concurring or dissenting, in part or in whole. See Pet. App. 114a-130a (Higginson, J., concurring); *id.* at 131a-211a (Jones, J., concurring in part and dissenting in part); *id.* at 212a-214a (Smith, J., dissenting); *id.* at 215a-220a (Dennis, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 221a-229a (Clement, J., dissenting in part); *id.* at 230a-234a (Elrod, J., concurring in part and dissenting in part); *id.* at 235a-251a (Costa, J., dissenting in part). In total, nine judges voted to affirm and six voted to reverse the district court's finding that SB14 has a prohibited discriminatory result. As to discriminatory intent, two judges voted to affirm, seven voted to vacate and remand, and six voted to reverse.

6. On remand, consistent with the court of appeals' instructions, the district court entered interim relief. See 13-cv-193 Docket entry (Dkt.) No. 895 (Aug. 10, 2016); Dkt. No. 943 (Sept. 20, 2016). The parties are currently briefing the discriminatory-purpose claim, with a hearing scheduled for January 24, 2017. See Dkt. No. 922 (Aug. 25, 2016). Absent an earlier special session, the Texas Legislature could consider nondiscriminatory alternatives to SB14 during its next biennial regular session, which begins January 10, 2017.

ARGUMENT

The court of appeals correctly held that a plaintiff who proves that a State has imposed a racially discriminatory obstacle to voting need not additionally show that minority registration or turnout has decreased. Texas's proposed requirement of showing decreased registration/turnout is both atextual and ar-

bitrary, and no court of appeals has adopted it. Review of that issue is therefore not warranted.

The court of appeals also correctly followed established precedent in remanding the question of discriminatory intent to the district court. That fact-bound application of settled legal principles does not merit this Court's interlocutory review.

1. Texas contends (Pet. 10, 12-16) that Section 2 plaintiffs must show that a challenged practice has resulted in a decrease in registration or turnout. The court of appeals correctly rejected that contention. Texas's other challenges to the court of appeals' results finding are similarly without merit.

a. Section 2 prohibits any voting qualification or prerequisite to voting that "results in a denial or abridgement" of the right to vote. 52 U.S.C. 10301(a). A Section 2 violation can be established by showing, "based on the totality of circumstances," that minority voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b). As this Court has explained, "[t]he need for such 'totality' review springs from the demonstrated ingenuity of state and local governments in hobbling minority voting power" as "jurisdictions have substantially moved from direct, overt impediments to the right to vote to more sophisticated devices" that nonetheless impair minority participation. *Johnson* v. *De Grandy*, 512 U.S. 997, 1018 (1994) (brackets and citations omitted). To ferret out less-blatant forms of discriminatory barriers, a court's "ultimate conclusions about equality or inequality of opportunity" must be grounded in a "comprehensive, not limited, canvassing of relevant facts." *Id.* at 1011.

The court of appeals properly applied those principles in affirming, as not clearly erroneous, the district court's finding of a prohibited discriminatory result. Among other things, the court of appeals looked at:

- expert testimony showing a large number of registered voters who lack SB14-compliant identification (more than 608,000), of whom "Hispanic registered voters and Black registered voters were respectively 195% and 305% more likely than their Anglo peers" to be represented, Pet. App. 63a; see *ibid.* (survey data showing "Blacks were 1.78 times more likely than Whites, and Latinos 2.42 times more likely");
- evidence of "specific burdens" faced by voters "in attempting to obtain SB 14 ID or vote," such as:

  (1) the difficulty of obtaining an EIC and voting with the proper ID because of Texas's poor implementation of this program;

  (2) the cost of underlying documents necessary to obtain an EIC or other SB 14 ID;

  (3) difficulties with delayed, nonexistent, out-of-state, or amended birth certificates due to nontraditional births and errors on birth certificates;

  (4) long distances and other travel issues that made getting to a registrar and DPS office problematic * * * ;

  (5) a strict disability exemption; and

  (6) a burdensome alternative of voting absentee

id. at 70a-71a (formatting altered; footnote omitted); see *id.* at 71a-75a;

- "contemporary examples of state-sponsored discrimination," *id.* at 78a; see *id.* at 78a-79a;
- evidence of "racially polarized voting," *id.* at 79a; see *id.* at 79a-80a;
- evidence of significant "disparit[ies] in education, employment, and health outcomes between Anglos, African Americans, and Hispanics" that are tied to "the history of State-sponsored discrimination," *id.* at 80a-81a; see *id.* at 81a-83a;
- Texas's lack of minority public officials and unresponsiveness to minority needs, see *id.* at 87a-89a; and
- a "tenuous[]" relationship between SB14 and the stated objectives behind it, *id.* at 89a; see *id.* at 89a-93a.

Based on those findings, which largely went unchallenged by Texas, see *id.* at 94a, the court of appeals found "that the district court did not clearly err in determining that SB 14 has a discriminatory effect on minorities' voting rights in violation of Section 2." *Id.* at 95a.

b. Texas nonetheless argues (Pet. 20) that none of this evidence matters unless plaintiffs can "demonstrate a disparity among racial groups in actual voter turnout or registration." For multiple reasons, that argument is without merit.

First, a Section 2 violation is established when, as here, a legislature erects obstacles to voting that disproportionately give some citizens "less opportunity" to vote, if it can be shown that the effect occurred "on

account of race." 52 U.S.C. 10301(a) and (b). There is no additional requirement that the plaintiff further establish that turnout or registration in the next election was depressed in comparison to the previous election. As the court of appeals explained, imposing a discriminatory obstacle to voting constitutes an "abridgement" of the opportunity to vote. Pet. App. 68a-69a.

Under Texas's contrary view, a State could close every polling place near a minority area, and then successfully defend that egregious violation of Section 2 as long as minority turnout at the next election did not decrease. That is not the law. When a state makes it disproportionately more difficult for members of a minority group to vote, a violation of Section 2 is established. As Justice Scalia has explained, "[i]f, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity '*to participate* in the political process' than whites, and § 2 would therefore be violated." *Chisom* v. *Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting).

Second, as the court of appeals recognized, "[a]n election law may keep some voters from going to the polls, but in the same election, turnout by different voters might increase for some other reason." Pet. App. 84a. Or minority voters might, through extraordinary effort, overcome discriminatory obstacles, leaving aggregate turnout unchanged. Indeed, turnout in any particular election is driven by many factors, including the offices and candidates on the ballot, the competitiveness of the election, the issues involved, campaign spending, and get-out-the-vote efforts. Minority turnout may thus increase even if,

absent the challenged practice, such turnout would have been even higher. See *id.* at 85a n.58; C.A. ROA 43,656 (expert illustration). To be sure, minority participation rates can certainly be *relevant* to determining whether a law has a discriminatory result. See Senate Report 29 & n.114. But the "inflexible rule" that Texas proposes "would run counter to the textual command of § 2, that the presence or absence of a violation be assessed 'based on the totality of circumstances.'" *Johnson*, 512 U.S. at 1018 (quoting statutory predecessor); but see Pet. App. 85a & n.57 (Texas's counsel argued that, to challenge a state-mandated literacy test, a plaintiff would be required "to show a voter turnout disparity.").

Third, Texas's proposed approach would also create "problems for pre-election challenges to voting laws, when no [relevant turnout] data is yet available." Pet. App. 84a. The VRA does not require voters to endure discriminatory practices for multiple elections before gathering evidence sufficient to prove an unlawful effect. To the contrary, the statute authorizes the Attorney General to seek "preventive relief," including a permanent injunction, where there are "reasonable grounds to believe" a practice will violate Section 2. 52 U.S.C. 10308(d); see *Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612, 2619 (2013). And giving dispositive weight to past turnout data makes especially little sense in this case, given that "the district court credited testimony that SB 14 would decrease voter turnout" in the future. Pet. App. 92a; see *ibid.* (discussing expert testimony).

c. Texas next claims (Pet. 22) that "plaintiffs failed to identify a single individual who faces a substantial obstacle to vote because of SB14." But as the court of

appeals found, "the record disproves" that fact-bound assertion. Pet. App. 72a. Among other things, the record shows that "multiple Plaintiffs were turned away" because of SB14, and several "were not offered provisional ballots to attempt to resolve the issue." *Ibid.* One elderly plaintiff, though aided by his son, "faced an almost impossible bureaucratic morass when [he] tried to get the required underlying documentation," with the result that he "was completely prevented from voting." *Ibid.* Other voters "could not afford to purchase" the documentation necessary to obtain SB14-compliant identification; or, lacking a current driver's license and access to an automobile, some voters faced "hour-long, one-way trip[s] to reach the nearest DPS office." *Id.* at 73a; see *ibid.* ("60-mile roundtrip ride to the nearest DPS station") (citation omitted). The record is also "replete with evidence * * * that the State's lackluster educational efforts resulted in additional burdens." *Id.* at 75a. In sum, Texas's argument is "demonstrably false." *Id.* at 72a n.49.

d. Texas also contends (Pet. 26-29) that the Fifth Circuit's interpretation of Section 2 would jeopardize many legitimate election laws. The premise of that argument (Pet. 26) is that the decision below rests on a theory that any "marginal" burden on poorer voters establishes a violation of Section 2. But the decision below rests on no such theory. Instead, its decision rests on a finding that the burdens imposed by Texas's ID law were both "significant" and racially "discriminatory." Pet. App. 70a, 76a.

The evidence fully supports the district court's finding, which was upheld by the court of appeals, that the burdens of SB14 were excessive and not minor

"along several axes." Pet. App. 70a. In particular, the evidence shows:

> (1) the difficulty of obtaining an EIC and voting with the proper ID because of Texas's poor implementation of th[e] program;
>
> (2) the cost of underlying documents necessary to obtain an EIC or other SB 14 ID;
>
> (3) difficulties with delayed, nonexistent, out-of-state, or amended birth certificates due to nontraditional births and errors on birth certificates;
>
> (4) long distances and other travel issues that made getting to a registrar and DPS office problematic * * * ;
>
> (5) a strict disability exemption; and
>
> (6) a burdensome alternative of voting absentee.

Id. at 70a-71a (footnote omitted; format altered). Each of those findings was supported by "record evidence disprov[ing] the State's claim that" no one was prevented from voting by SB14. *Id.* at 72a; see, *e.g.*, *ibid.* ("multiple Plaintiffs were turned away"); *ibid.* ("they faced an almost impossible bureaucratic morass"); *ibid.* ("she was not able to obtain SB 14 ID in time"); *id.* at 73a ("he was unable to get his Louisiana birth certificate for the hefty $81 fee"); *ibid.* ("Many more stories like these proliferate in the pages of the district court's opinion."); *ibid.* ("an hour-long, one-way trip to reach the nearest DPS office"); *ibid.* ("they each face 'a 60-mile roundtrip ride'"); *id.* at 74a ("Mail-in voting involves a complex procedure that cannot be done at the last minute."); *ibid.* ("Elderly plaintiffs may also face difficulties getting to their mailboxes."); *id.* at 75a ("[T]he record is replete with

evidence that the State devoted little funding or attention to educating voters about the new voter ID requirements, resulting in many Plaintiffs lacking information about these supposed accommodations.").

Nor was the decision below "based on the general correlation between poverty and race." Pet. 26. To the contrary, the court of appeals stated that "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity." Pet. App. 94a (quoting *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015)). And the court "tethered its holding," not only to proof of a "racial disparity between those who possess or have access to SB 14 ID, and those who do not," but also to evidence "that SB 14 worked in concert with Texas's legacy of state-sponsored discrimination to bring about this disproportionate result." *Id.* at 95a; see *id.* at 94a n.61 ("[T]he district court's conclusion that SB 14 created racial disparities in the possession of IDs required to vote is supported by the record."); see also *id.* at 61a-95a, 333a-341a, 372a-411a, 447a-456a.

As the court of appeals observed, there is also no reason to believe that application of "the same analysis" to "differing fact patterns" will spell doom for various election laws nationwide. Pet. App. 56a. To the contrary, application by other courts of the same approach followed in this case "has resulted in the approval of laws less burdensome and less discriminatory in effect than SB 14, while [in this case] it holds the State of Texas accountable for the strictest and perhaps most poorly implemented voter ID law in the country." *Id.* at 76a n.52.

e. Finally, Texas asserts that the court of appeals' interpretation of Section 2 raises serious constitutional questions. But that argument is based on the same mischaracterization of the court's decision discussed above. The totality of the circumstances approach for determining when an election practice results in discrimination on account of race fits comfortably within Congress's authority under the Fourteenth and Fifteenth Amendments. See, *e.g.*, *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 736 (2003); *City of Boerne* v. *Flores*, 521 U.S. 507, 517-518 (1997); *City of Rome* v. *United States*, 446 U.S. 156, 179-180 (1980); *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880).

2. Texas asserts (Pet. 13-16) that the decision below conflicts with decisions in the Sixth, Seventh, and Ninth Circuits. Contrary to Texas's contention, none of those circuits has dispensed with Section 2's fact-bound, jurisdiction-specific analysis in favor of an approach that arbitrarily looks only to whether minority voter registration or turnout has decreased under the challenged law.

The decision below is fully consistent with *Ohio Democratic Party* v. *Husted*, 834 F.3d 620 (6th Cir. 2016), in which plaintiffs challenged an Ohio law that reduced the State's early voting period from 35 to 29 days. *Id.* at 623-624. In rejecting the plaintiffs' Section 2 claim, the court of appeals relied on "statistical evidence * * * clearly show[ing] that [the law] did not result in any cognizable, racially disparate impact" on minority voters, *id.* at 639, as well as on its determination that the record indicated "at most, [a] minimally burdensome" effect beyond turnout, *id.* at 630. The court reviewed evidence regarding the operation of Ohio's registration, early voting, and Election Day

procedures, *id.* at 629-630, 640, as well as registration and participation figures for four consecutive election cycles, which showed that registration rates for African-American and white voters were "statistically indistinguishable in every federal election since 2006," *id.* at 639; see *ibid.* ("[T]he statistical evidence shows that African Americans' participation was at least equal to that of white voters in 2014 under a version of [the law] that afforded even less convenience than the current version."). In response, the court stated, the plaintiffs "offer[ed] no contrary statistical evidence showing a disparate impact" on turnout, and they offered insufficient evidence of a material disparate burden on racial minorities distinct from any turnout effect. *Ibid.* Instead, the plaintiffs merely argued that the statistical "margin of error for black registration rates * * * render[ed] the probative value of this evidence limited." *Ibid.* (citation and internal quotation marks omitted). Under those circumstances, the court concluded that "plaintiffs' otherwise unsubstantiated criticism of the reliability of the record evidence is insufficient to meet their burden of establishing that [the law] results in a racially disparate impact actionable as a violation of Section 2." *Id.* at 639-640.

Ohio Democratic Party did not hold, as Texas asserts (Pet. 15-16), that a lack of evidence regarding registration or turnout is necessarily fatal to a Section 2 claim. Instead, that decision stands for a far more modest proposition: Because a Section 2 plaintiff bears the burden of proof, where a state offers "statistical evidence" that "clearly establishes" a lack of disparate impact, the plaintiff cannot prevail by offering "no contrary statistical evidence" but only "unsubstantiated

criticism." 834 F.3d at 639-640. In this case, by contrast, Texas has offered no evidence akin to that provided by Ohio. And plaintiffs here presented substantial statistical evidence "that SB 14 disparately impacts African-American and Hispanic registered voters." Pet. App. 63a; see *ibid.* ("The district court thus credited the testimony and analyses of Plaintiffs' three experts."). Indeed, "the State d[id] not dispute" those findings on appeal. *Id.* at 65a. Thus, the difference in outcome in *Ohio Democratic Party* resulted from different state laws and different facts, not from a different legal analysis.

Texas is also incorrect when it asserts that the plaintiffs' Section 2 claim failed in *Frank* v. *Walker*, 768 F.3d 744 (7th Cir. 2014), cert. denied, 135 S. Ct. 1551 (2015), because the "district court 'did not make findings about what happened to voter turnout.'" Pet. 14 (quoting 768 F.3d at 747). That quotation, like the block quotation above it (see *ibid.*), are taken from the Seventh Circuit's discussion of the plaintiffs' *constitutional* claims, and are taken out of context even with respect to those claims. See 768 F.3d at 747.[3] Insofar as the court of appeals discussed turnout rates in relation to the plaintiffs' Section 2 claim, the court made clear that turnout figures alone *are not* dispositive: It stated that a discriminatory state law would be illegal *even if*, despite the law's impact, "blacks register and vote more frequently than whites." *Id.* at 754; see *ibid.* ("[T]hat would clearly violate § 2."). Far from making turnout evidence dispositive, *Frank* confirms

[3] The Seventh Circuit did not state that a lack of turnout evidence was dispositive on the constitutional claims—only that "[a]ctual results are more significant than litigants' predictions" about a law's anticipated effects. 768 F.3d at 747.

that, when a court evaluates a Section 2 claim, "it is essential to look at everything." *Ibid.* Indeed, the Fifth Circuit itself stated that "the Seventh Circuit's approach in *Frank* is not inconsistent with our own." Pet. App. 57a.[4]

Finally, in *Gonzalez* v. *Arizona*, 677 F.3d 383 (2012) (en banc), aff'd *sub nom. Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013), the Ninth Circuit considered a Section 2 challenge to Arizona's in-person voter identification requirement, which was significantly less strict than SB14. See *id.* at 404 n.31 (challenged law permits voters to use a wide range of photo identification or two forms of non-photo identification). Consistent with Section 2's text and this Court's guidance, the Ninth Circuit examined the "totality of the circumstances," including relevant Senate Factors, to "assess the impact of [the law] on minority electoral opportunities 'on the basis of objective factors.'" *Id.* at 405 (quoting *Thornburg* v. *Gingles*, 478 U.S. 30, 44 (1986); Senate Report 27). In affirming the district court's finding of no disparate impact, the court of appeals relied on a variety of record evidence, including evidence that the challenged law "does not have a statistically significant disparate impact on Latino voters." *Id.* at 406. The court of appeals also pointed to the absence of "proof

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[4] In *Frank*, the Seventh Circuit stated that any disparate effect, to be cognizable under Section 2, must be "attributable to discrimination by Wisconsin." 768 F.3d at 753. The United States disagrees with that argument. In this case, however, the court of appeals declined to "decide whether proof of such *state-sponsored* discrimination is required," because "[t]he evidence in this record suffices to meet even this higher standard as enunciated in *Frank*." Pet. App. 95a. That issue is therefore not presented in this case.

of a causal relationship between [the challenged law] and any allegedly discriminatory impact," a lack of expert testimony establishing "a causal connection between [the law's] requirements and the observed difference in the voting rates of Latinos," and the plaintiffs' "failu[re] to explain how [the law's] requirements interact with the social and historical climate of discrimination to impact Latino voting in Arizona." *Ibid.* Under those circumstances, "[t]he district court did not clearly err" in finding no Section 2 violation. *Id.* at 407.

Gonzalez is consistent with the decision below, because it applied a "totality of circumstances" approach to determine whether the plaintiffs had proved a "causal connection between the challenged voting practice and a prohibited discriminatory result." 677 F.3d at 405 (citation omitted). That is the same analysis applied below. See Pet. App. 94a ("[A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity.") (citation omitted).

Nor did *Gonzalez* hold, as Texas argues (Pet. 12), that a Section 2 claim must necessarily fail absent proof of "an actual effect on voter turnout or registration." To the contrary, the Ninth Circuit looked at a number of different factors in addition to turnout—which would have been unnecessary if, as Texas claims, a lack of evidence regarding turnout were dispositive. Indeed, crucial to the Ninth Circuit's decision was that the plaintiff "produced no evidence supporting [his] allegation * * * that Latinos, among other ethnic groups, are less likely to possess the forms of identification required under [the law]." 677 F.3d at 407 (internal quotation marks omitted). That contrasts sharp-

ly with the evidence in this case of a stark racial disparity, including in—but not limited to—access to photo identification. See Pet. App. 63a ("Hispanic registered voters and Black registered voters were respectively 195% and 305% more likely than their Anglo peers to lack SB 14 ID."). In sum, the different outcome in *Gonzalez* merely shows that the same standard can produce different results when applied to different laws and a different record.

3. Texas also asks (Pet. 30-36) for this Court to overturn the Fifth Circuit's remand of plaintiffs' discriminatory-purpose claim, arguing that judgment should have been rendered in its favor instead. But the decision to remand was consistent with this Court's settled precedent and does not conflict with any decision of a court of appeals.

a. In *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982), this Court explained that "discriminatory intent is a finding of fact to be made by the trial court." *Id.* at 289. Thus, when an appellate court concludes that a district court's findings "are infirm because of an erroneous view of the law," *id.* at 292, the normal course is to remand to allow the district court—the "tribunal charged with the task of factfinding in the first instance," *id.* at 293—to reweigh the evidence "unless the record permits only one resolution of the factual issue," *id.* at 292.

The court of appeals followed that command faithfully. It concluded that the district court's discriminatory intent analysis contained "legal infirmities," Pet. App. 26a, by placing too much weight on past discrimination, speculation by SB14's opponents, and post-enactment testimony, see *id.* at 16a-26a. At the same time, the court of appeals determined that the record

"contained evidence that could support a finding of discriminatory intent." *Id.* at 26a. Among other things, the court pointed to evidence that:

- SB14 was enacted in the wake of an unprecedented increase in Texas's minority voting population, which, due to highly racially polarized voting, threatened the incumbent party's political power and gave it an incentive to depress minority participation to "gain partisan advantage," *id.* at 41a (citation omitted);
- SB14's drafters chose to "cloak[] themselves in the mantle of following Indiana's voter ID law," yet excluded key provisions of that law that would have substantially avoided a racially disproportionate impact, *id.* at 36a-37a & n.26, see *id.* at 371a (noting that SB14's drafters similarly departed from Georgia's voter identification law);
- SB14's proponents were aware "of the likely disproportionate effect of the law on minorities," *id.* at 30a;
- key legislative staffers warned that SB14 would likely fail preclearance because of its adverse effect on minority voters, *id.* at 30a, 36a;
- SB14's proponents rejected amendments that would have lessened its discriminatory impact without undermining its stated goals, *id.* at 36a;
- SB14's proponents refused even to explain why they would not allow ameliorative amendments, *id.* at 30a-31a, 40a;
- SB14's purported target—in-person voter impersonation—was an "almost nonexistent pro-

blem," yet it was treated as an emergency requiring "an extraordinary degree of procedural irregularities," despite more-pressing "complex and controversial issues" that received no similar treatment, *id.* at 33a-36a;

- combating voter fraud had similarly been the "stated rationale" for every discriminatory device enacted throughout Texas's long history of official discrimination in voting, including "contemporary examples of State-sponsored discrimination," *id.* at 32a, 38a;
- "the same Legislature that passed SB 14 also passed two laws found to be passed with discriminatory purpose," *id.* at 39a-40a; and
- the State's "many rationales" for the law "shifted as they were challenged or disproven by opponents," *id.* at 40a.

Thus, even apart from the "infirm" evidence on which the district court relied, "there remains evidence to support a finding that the cloak of ballot integrity could be hiding a more invidious purpose." *Id.* at 42a. The court of appeals accordingly remanded the discriminatory-purpose claim to the district court for it to reweigh the remaining record evidence in the first instance. *Id.* at 43a; see *ibid.* (instructing the district court "not [to] take additional evidence" since "[t]he parties have not asked to offer additional evidence").

b. Texas does not claim that the decision below conflicts with any decision of this Court or any other court of appeals.[5] Instead, Texas notes (Pet. 33) that

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[5] Texas briefly advocates (Pet. 32) a "clearest proof" standard, but that standard is "grafted" from the ex post facto context. Pet.

the Fifth Circuit relied on "circumstantial evidence" of discriminatory intent. And while "discriminatory intent may be proved by circumstantial evidence in certain cases," Texas argues (*ibid.*), it is insufficient where, as here, plaintiffs were given "unprecedented access to legislative materials and testimony." Texas's argument is without merit.

As an initial matter, there is nothing "unprecedented" about affording discovery of legislative materials, subject to a qualified legislative privilege, in voting rights cases. See, *e.g.*, *Bethune-Hill* v. *Virginia State Bd. of Elections*, 114 F. Supp. 3d 323, 334-345 (E.D. Va. 2015); *Page* v. *Virginia Bd. of Elections*, 15 F. Supp. 3d 657, 665-668 (E.D. Va. 2014); *Perez* v. *Perry*, No. 11-cv-360, 2014 WL 106927 (W.D. Tex. Jan. 8, 2014) (three-judge court); *Favors* v. *Cuomo*, 285 F.R.D. 187, 209-210 (E.D.N.Y. 2012); *Baldus* v. *Brennan*, No. 11-cv-562, 2011 WL 6122542, at *2 (E.D. Wis. Dec. 8, 2011) (three-judge court), order clarified, No. 11-cv-562, 2011 WL 6385645 (E.D. Wis. Dec. 20, 2011); *Committee for a Fair & Balanced Map* v. *Illinois State Bd. of Elections*, No. 11-C-5065, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011). Texas has also failed to preserve any challenge to the district court's dis-

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App. 17a n.12. Texas also seems to suggest (Pet. 33) that there can be no finding of discriminatory intent where "nearly half" of SB14-affected voters are white. But a law enacted with a discriminatory purpose is plainly unlawful even if it affects both minorities and whites. See *Hunter* v. *Underwood*, 471 U.S. 222, 232 (1985) (effect of felon-disenfranchisement law on "poor whites would not render nugatory the purpose to discriminate against all blacks"). That is particularly true where, as here, the number of minority voters adversely affected by the challenged law is greater *both* in relative *and* in absolute numbers. See Pet. 6; C.A. ROA 43,320.

covery and privilege rulings and should not be permitted to relitigate them at this late date.

In any event, this Court has repeatedly stated, without qualification, that "discriminatory intent need not be proved by direct evidence." *Rogers* v. *Lodge*, 458 U.S. 613, 618 (1982); see *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); see also Senate Report 27 n.108. Indeed, this Court has cautioned that direct evidence of discriminatory purpose will rarely exist, as "[o]utright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence." *Hunt* v. *Cromartie*, 526 U.S. 541, 553 (1999). Texas cites no authority for the proposition that the type of evidence permitted to prove discriminatory intent should vary according to the extent of discovery permitted.

Moreover, the absence in this case of direct evidence of legislators' impermissible motive is unsurprising, as "the proponents of SB 14 were careful about what they said and wrote about the purposes of SB 14, knowing it would be challenged." Pet. App. 28a n.19; see *id.* at 17a n.13 ("SB 14's proponents knew at the time that SB 14 would be subject to the preclearance requirement, so the lack of a smoking gun is not surprising.") (citation omitted); see also *id.* at 371a (legislators were "expressly warned * * * that SB 14 would likely fail any preclearance standard without the additional methods of proving identity found in Georgia's law"). And even still, key legislators testified that "they did not know or could not remember why they rejected so many ameliorative amendments," which would have lessened the law's harmful impact by making it more similar to other states'

photo identification laws. *Id.* at 465a; see C.A. ROA 99,691 (evidence "comes as close as one can come in this day and age to a smoking gun"). That evidence, along with all the other evidence relied upon by the court of appeals, indicates that "there is more than one way to decide this case, and the right court to make those findings is the district court." Pet. App. 42a.

c. Finally, the interlocutory posture of this case further counsels against granting plenary review at this time. The Fifth Circuit remanded to the district court for further review of plaintiffs' discriminatory-purpose claim, instructing it "to reevaluate the evidence and determine anew whether the Legislature acted with a discriminatory intent in enacting SB 14." Pet. App. 45a. Consistent with those instructions, the district court has ordered supplemental briefing and has scheduled a hearing for January 24, 2017. See Dkt. No. 922. If Texas prevails on remand, then its objections to the court of appeals' ruling on its discriminatory-purpose claim will become moot. By contrast, if the district court again finds in plaintiffs' favor and the court of appeals affirms, then "petitioners could seek certiorari on either question presented" at that time. Pet. 36. There is accordingly no pressing need for this Court's immediate intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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