No. 16-393

IN THE

Supreme Court of the United States

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS, *ET AL.*,
Petitioners,
v.

MARC VEASEY, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether—in light of the evidentiary record supporting a finding that Texas's voter ID law was enacted with discriminatory intent—the court of appeals correctly remanded to the district court for further fact-finding the claim that the law was enacted with a racially discriminatory purpose in violation of the Equal Protection Clause and Section 2 of the Voting Rights Act.

2. Whether this Court should now review the court of appeals' decision that Texas's voter ID law has a discriminatory result in violation of Section 2 of the Voting Rights Act when remand proceedings are still ongoing with respect to the claim that the law was enacted with a racially discriminatory purpose and where the court of appeals' decision on the discriminatory result claim ultimately may be mooted or superseded by these remand proceedings.

PARTIES TO THE PROCEEDING

Petitioners, who were the appellants in the court of appeals, are Greg Abbott, in his official capacity as Governor of Texas; Carlos Cascos, in his official capacity as Texas Secretary of State; the State of Texas; and Steve McCraw, in his official capacity as Director of the Texas Department of Public Safety.

Respondents, who were the appellees in the court of appeals, are Marc Veasey; Jane Hamilton; Sergio DeLeon; Floyd J. Carrier; Anna Burns; Michael Montez; Penny Pope; Oscar Ortiz; Koby Ozias; Peggy Herman; Evelyn Brickner; Gordon Benjamin; Ken Gandy; John Mellor-Crummey; League of United Latin American Citizens; and League of United Latin American Citizens, Texas (collectively, "Respondents Marc Veasey, *et al.*"); Texas Association of Hispanic County Judges and County Commissioners; Texas League of Young Voters Education Fund; Imani Clark; Texas State Conference of NAACP Branches; Mexican American Legislative Caucus; Texas House of Representatives; Lenard Taylor; Eulalio Mendez, Jr.; Lionel Estrada; Estela Garcia Espinoza; Margarito Martinez Lara; La Union Del Pueblo Entero, Inc.; and the United States of America.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondents Marc Veasey, *et al.*, state that no parent or publicly held company owns 10% or more of their stock or interest.

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STATEMENT OF THE CASE

Texas petitions this Court for certiorari review of the *en banc* decision of the United States Court of Appeals for the Fifth Circuit holding that Senate Bill 14 ("SB 14")—Texas's strict photo ID requirement for voters—has a discriminatory result in violation of Section 2 of the Voting Rights Act ("VRA") and cannot be enforced. But Texas's petition arrives at this Court midstream. The case is still in active litigation and the district court has not yet finally adjudicated the plaintiffs' claim that SB 14 was enacted with discriminatory intent. The discriminatory intent claim, after it is finally decided, will necessarily inform the questions raised in Texas's petition and may indeed render the Section 2 results claim superfluous, obviating any need for further review of that issue. Thus, Texas's petition is premature. The Court's acceptance of the case in this posture will only serve to delay a final remedy for plaintiffs in these already drawn out proceedings, in which no fewer than four courts and thirteen federal judges have found SB 14 discriminatory.

Contrary to Texas's portrayal in its petition, SB 14 is not a generic photo ID law. Rather, the facts of this case demonstrate that SB 14 is an unusually and unnecessarily harsh law, affecting over 600,000 registered voters, and taking aim specifically at minority voters. Texas's petition largely ignores these facts and instead raises hyperbolic arguments that the Fifth Circuit's decision sounds the death knell for election laws and procedures across the country. But SB 14's abrogation by the Fifth Circuit in no way affects

ordinary election procedures. It simply, and correctly, prevents a discriminatory law from being enforced.

I. SB 14's Requirements.

In 2011, the Texas Legislature passed SB 14, the nation's strictest photo voter ID on record. ROA.27045–ROA.27048.[1] SB 14 requires voters appearing at the polls to present one of the following seven specified types of photo ID:

- Four types of photo ID issued by the Texas Department of Public Safety (DPS): driver's license, DPS personal ID, concealed handgun permit, or Election Identification Certificate (EIC);
- Three types of photo ID issued by the United States: U.S. passport, U.S. citizenship certificate, or U.S. military ID.

ROA.27042–ROA.27043. Only two narrow categories of eligible voters are permitted to vote without photo ID: (1) voters who are over 65 (or who satisfy various other restrictive criteria) and who vote absentee by mail; and (2) voters who have a religious objection to being photographed or certified proof of disability and who complete the extensive documentary procedure to obtain a waiver of the photo ID requirement. ROA.27043–ROA.27044; ROA.27105–ROA.27106; ROA.27132; ROA.27136.

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[1] References to "ROA" are to the record on appeal before the United States Court of Appeals for the Fifth Circuit.

Every form of SB 14 ID available to the general public—that is, every form other than military IDs—requires payment of an application fee, ROA.27047–ROA.27048, except for the so-called "free" EIC, which cannot not be used for any purpose other than voting (and is so labeled), ROA.38297–ROA.38304. Moreover, while the EIC is described as "free," under DPS regulations, EIC applicants must present either an original or a certified copy of their birth certificate, which is not free. 37 Tex. Admin. Code 15.182; ROA.27047. The normal cost for a certified Texas birth certificate is at least $22. ROA.27047. While Texas created a new form of certified birth certificate usable only for voting (and so labeled), ROA.27095; ROA.40320, Texas continued to charge a $2 fee to obtain this new form of birth certificate, ROA.27047. However, EIC applicants who appear in person to request a birth certificate are still automatically charged the full $22 unless they know to ask for the "EIC birth certificate." ROA.100743:390:2–ROA.100744:391:20. The Legislature did not remove these fees until after the district court in this case held that the fee constituted an unconstitutional poll tax. ROA.27159–27166.

The Texas Legislature consciously excluded from its narrow list of acceptable IDs numerous forms of government identification included in many other state photo voter ID laws, such as public university student photo IDs and government employee photo IDs. ROA.27046. Latino and African-American Texans disproportionately hold these excluded forms of ID. ROA.27073–ROA.27074; ROA.45116–ROA.45117; ROA.45128. At the same time, the Texas Legislature's

choices to include concealed weapon permits as acceptable forms of photo ID and to exempt mail-in ballots from voters 65 or older from any photo ID requirement disproportionately benefit white voters. ROA.27073–ROA.27074. The Legislature repeatedly rejected numerous ameliorative amendments that would have expanded the forms of ID accepted under SB 14 to include those forms of government photo ID disproportionately held by minority voters, and it did so without any justification stated on the record. ROA.27060-ROA.27061; ROA.27169–27172.

Indeed, the inclusions and exclusions of particular forms of photo ID were essentially unexplained by legislators who sponsored or supported SB 14. ROA.27057. There was little or no explanation in the legislative debates or at trial for differentiating between federal military IDs (acceptable) and federal civilian IDs (not acceptable), nor any explanation for why the bill excluded state employee IDs (which—for at least 90 state agencies—are produced by DPS). ROA.27169. Nor was there any real explanation, on the floor or in testimony, for exempting mail-in ballots from a photo ID requirement when all legislators and witnesses agreed that mail-in ballots were and remain the primary source of any voter fraud that actually exists. ROA.27155; ROA.45144.

II. SB 14's Procedural and Substantive Departures.

The Legislature passed SB 14 during a session in which the Legislature was focused on Texas's rapid minority growth and shifting demography, particularly with respect to the statewide redistricting plans enacted in the same session. ROA.27157. The articulated

purposes for SB 14 shifted over time, but all hinged on SB 14's goal of detecting and deterring in-person voter impersonation fraud, the only kind of voter fraud SB 14 could possibly address. ROA.27064; ROA.27137. Yet the record is almost entirely devoid of any proof of in-person impersonation voter fraud. ROA.27138 (four possible instances, only two in reasonable proximity to SB 14). Moreover, SB 14's proponents were entirely unable to explain why the strict measures employed in SB 14 that specifically excluded photo IDs disproportionately held by minority voters would further the asserted goal of addressing in-person voter fraud more so than other comparable measures that would impose far fewer burdens on minority voters. *Id.*

The Legislature succeeded in passing SB 14 by utilizing numerous extreme procedural departures that cut off meaningful debate, including designating the bill as an "emergency matter," ROA.27053, and abrogating the traditional two-thirds rule in the Senate, a "highly unusual" maneuver, ROA.27059. Despite curtailed debate, the Legislature significantly heightened SB 14's restrictions as compared to prior failed voter ID bills proposed in earlier sessions. ROA.27154. Bryan Hebert, the Texas lieutenant governor's general counsel and an architect of SB 14, could not identify any reason for the tightened restrictions or explain why a prior bill permitted the use of all state and federal government photo IDs, as well as employee IDs, but SB 14 did not. ROA.26635–ROA.26636.

The Legislature was aware that SB 14 would affect hundreds of thousands of voters and would have a disproportionate impact on minority voters.

ROA.27155–ROA.27156. An election official testified before the House that approximately 800,000 registered voters lacked DPS-issued photo ID. ROA.27057; ROA.100282:288:6–ROA.100283:289:22. Lieutenant Governor David Dewhurst testified that at the time SB 14 was under consideration, he estimated that between three and seven percent of all registered voters lacked SB 14 IDs. ROA.100831:69:21–ROA.100832:70:16. Representative Todd Smith, who chaired the House Committee on Elections, admitted that he knew it was "a matter of common sense" that SB 14 would disproportionately impact minorities and he did not need a "study" to confirm it. ROA.27072; ROA.100339:345:14–ROA.100340:346:6. Indeed, Senate staff was advised in a memo from the lieutenant governor's general counsel, Bryan Hebert, that SB 14 was unlikely to receive Section 5 preclearance because of its racially discriminatory impact. ROA.39225–ROA.39226. His suggestion to expand the forms of ID under SB 14 to alleviate that impact went unheeded. ROA.27158; ROA.39225–ROA.39226.

As Mr. Hebert predicted, SB 14 was initially blocked because it failed to gain preclearance under Section 5 of the VRA. A three-judge court in the District Court for the District of Columbia unanimously held that SB 14 would have a retrogressive impact on minority voting rights in Texas and denied preclearance. *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012), *summarily vacated by* 133 S. Ct. 2886 (2013). However, in light of this Court's holding in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), that decision was subsequently vacated. Thus, on the very day that

Shelby County was decided, then Texas Attorney General Greg Abbott announced that Texas would begin enforcing SB 14. Pet. App. 9a-10a.

III. SB 14's Impact on Minority Voters.

As predicted, SB 14 had a stark and disproportionate impact on minority voters across Texas. Based on expert analysis, the undisputed testimony demonstrates that the number of registered Texas voters without SB 14 ID as of the time of the trial in this matter was approximately 608,470—which is equivalent to approximately five percent of the 13 million registered voters in Texas.[2] ROA.27075. Based on several experts' independent analyses, it was demonstrated that SB 14 disproportionately affects minority voters at a statistically significant rate. ROA.27078–ROA.27082; ROA.43260–ROA.43268; ROA.44599–ROA.44610.

Not only are minority voters less likely to possess SB 14 ID in the first place—at least in part because of Texas's unexplained exclusion of IDs minority voters disproportionately possess—but minority voters are also disproportionately impacted by the burdens to obtaining SB 14 ID. ROA.27074; ROA.27084-27085. Due to a long history of discrimination that persists to this day, minorities in Texas are disproportionately poor, undereducated, and lack access to a vehicle, all of which amplify the burdens of SB 14. ROA.27084-27091. Those

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[2] This figure excludes entirely eligible unregistered voters and newly eligible voters that may have sought to register absent this additional barrier to the franchise.

burdens are unnecessarily high: the IDs and their underlying documentation ordinarily require fees; 78 out of 254 counties in Texas do not have a permanent DPS office; the nearest office for many voters can be up to 125 miles away; and up to 737,000 eligible citizens could face a round trip of 90 minutes or more to reach an issuing office. ROA.27047-27048; ROA.27101. Moreover, minority voters, particularly elderly minority voters, often do not have the necessary underlying documentation to obtain such ID, such as a birth certificate. ROA.27085-27088, ROA.27095.

All of the foregoing predictably led to the undeniable disenfranchisement of voters in Texas, especially minority voters. The individual plaintiffs in this case demonstrate SB 14's impact:

- Gordon Benjamin, who is African-American, testified that he voted in Texas prior to the implementation of SB 14. ROA.99221-22. After SB 14 was implemented, he travelled to DPS on three occasions to obtain valid identification, but was unable to obtain a driver's license or Texas ID card because he lacked a birth certificate. ROA.99222; ROA.99224. Although Mr. Benjamin is now 65, and therefore able to vote by mail, he prefers to vote in person as he has historically done. ROA.99223-24.

- Kenneth Gandy, who is Anglo, has lived in Texas for over 40 years, been registered to vote in Texas for the same amount of time, and serves on the Ballot Board for Nueces County. ROA.99824; ROA.99827-28. His license expired in 1990 and he

now relies on the bus for transportation. ROA.99824-25. He tried to obtain an EIC from DPS, but was unable to do so since he does not have a valid form of his New Jersey birth certificate, which would cost more money than he is able to spend as someone living on a fixed income. ROA.99825-26; ROA.99828-99830.

- Floyd Carrier is an African-American veteran who is wheelchair bound due to a stroke many years ago. ROA.98642; ROA.98645; ROA.98674. His license expired in 2006 and he has been unable to obtain an SB 14 compliant ID card, since he was unable to obtain a valid birth certificate. ROA.98674; ROA.98685. Mr. Carrier was born in a rural area bordering three counties and his prior attempts to obtain a valid birth certificate from the state have yielded birth certificates with numerous errors (including the misspelling of his name and wrongful date of birth) that prevented him from obtaining an SB 14 compliant ID. ROA.98646; ROA.98685, ROA.98691. He relies on his son and neighbors to drive him places and votes when he can get to the polls, but testified that he was unable to vote in person due to SB 14. ROA.98645-46; ROA.98656-59; ROA.98702.

- Imani Clark, who is African-American, is a student at Prairie View A&M University who registered to vote in Texas in 2010 and used her student ID card to vote in the 2010 municipal and 2012 presidential elections. ROA.100537; ROA.100539; ROA.100542. She possesses a valid student ID, Social Security card, birth certificate,

> and California license. ROA.100544. However, she lacks SB 14-required ID and therefore was unable to vote in Texas, the only place she has ever registered to vote. ROA.100540-41.

These are just a few of the hundreds of thousands of individuals negatively impacted by SB 14.

IV. The Opinions of the District Court and Fifth Circuit.

Immediately after Texas announced that it would begin to enforce SB 14, despite its proven harmful impact on minority voters as had been documented in the preclearance suit in the District of Columbia, Congressman Marc Veasey and others filed this action. ROA.119-21, ROA.221. Other plaintiffs, including the United States, joined shortly thereafter. ROA.237. Congressman Veasey alleged that (1) SB 14 was enacted with discriminatory purpose in violation of the 14th and 15th Amendments and Section 2 of the VRA; (2) SB 14 resulted in discrimination against minority voters in violation of Section 2 of the VRA; (3) SB 14, as it was then enforced, constituted a poll tax in violation of the 14th and 24th Amendments; and (4) SB 14 unduly burdened the right to vote in violation of the 1st and 14th Amendments. ROA.217-20.

After a nine-day bench trial, on October 9, 2014, the District Court for the Southern District of Texas issued an extremely detailed 147-page opinion finding in favor of the plaintiffs on all claims and holding that SB 14 was enacted with discriminatory purpose and had a discriminatory impact on minority voters. ROA.27026-168. The district court also found that SB 14 constituted

a poll tax and created an undue burden on the right to vote. *Id.* The court therefore enjoined the implementation of SB 14 in its entirety. *Id.* However, because of the proximity to the upcoming 2014 election and the potential for voter confusion, the Fifth Circuit stayed the district court's injunction. ROA.27375-85. The Fifth Circuit did not opine on the merits of the district court's decision. *Id.* Texas then appealed the merits of the district court's decision. ROA.27362.

On August 5, 2015, a unanimous Fifth Circuit panel upheld the district court's finding that SB 14 had a discriminatory impact on minority voters in violation of Section 2 of the VRA and remanded the district court's finding that SB 14 had been enacted with discriminatory intent for further fact-finding. Pet. App. 265a-297a. The panel also reversed the poll tax claim (in part relying on Texas's subsequent remedial amendment) and, relying on constitutional avoidance, did not reach the undue burden claim. Pet. App. 297a-306a. Texas sought rehearing *en banc* and that petition remained pending for over six months. Pet. App. 491a-493a. It was granted on March 9, 2016. Pet. App. 493a. As these proceedings continued, the Fifth Circuit's stay remained in effect and allowed the law to be enforced despite its illegality. Pet. App. 14a.

To avoid facing yet another general election with unlawful disenfranchisement, Respondents Marc Veasey, *et al.*, filed an emergency application with this Court to lift the stay. Veasey-LULAC Plaintiffs' Application to Vacate Fifth Circuit Stay, *Veasey v. Abbott*, No. 15-A999 (U.S. Mar. 25, 2016). Although the application was denied, this Court indicated that

plaintiffs were invited to reapply if there were no *en banc* decision by July 20, 2016. *Veasey v. Abbott*, 136 S. Ct. 1823 (2016).

The *en banc* Fifth Circuit issued its opinion on July 20, 2016. Pet. App. 1a-251a. In a 9-6 decision, the *en banc* court issued an opinion mirroring the panel opinion's ultimate findings. The court affirmed the finding that SB 14 had a discriminatory result in violation of Section 2 of the VRA based on the specific and nearly undisputed findings of fact of the district court. Pet. App. 34a-95a. The *en banc* court also remanded the finding that SB 14 was enacted with discriminatory intent for a reweighing of the evidence. Pet. App. 15a-45a. Although it recognized that "SB 14 fail[s] to correspond in any meaningful way to the legitimate interests the State claims to have been advancing through SB 14," Pet. App. 91a, the *en banc* court held that the district court weighed certain evidence too heavily in its intent finding, Pet. App. 25a-26a. The court stressed that remand was appropriate because there was significant credible evidence of discriminatory intent in the record. *Id.* It identified no fewer than a dozen separate, substantial pieces of evidence—including, *inter alia*, evidence of the Legislature's prior knowledge of SB 14's effects on minority voters, Texas's history of using "fraud" as a pretext in voting-related matters, the Legislature's use of radical procedural departures to cut off debate and prioritize a bill addressing a problem with little to no evidentiary support, as well as contemporary evidence of State-sponsored discrimination—that would support a finding of discriminatory intent. *Id.* at 234-243.

After the *en banc* Fifth Circuit directed the district court to fashion an interim remedy for SB 14's violation of Section 2 of the VRA, the parties agreed to allow voters who face a reasonable impediment to or have difficulty obtaining SB 14 ID to submit a sworn declaration in lieu of the ID, and that interim remedy was then entered as an order by the district court. *Veasey v. Abbott*, No. 2:13-cv-193, Order Regarding Agreed Interim Plan for Elections (S.D. Tex. Aug. 10, 2016), ECF No. 895. The interim order was in place for the 2016 election and remains in place.

Pursuant to the *en banc* Fifth Circuit's remand of the discriminatory purpose finding, the district court is now reweighing the intent evidence on an expedited schedule. *Veasey v. Abbott*, No. 2:13-cv-193, Order Setting Deadlines for Briefing at 1 (S.D. Tex. Aug. 25, 2016), ECF No. 922. Initial briefing on the matter was filed on November 18, 2016, and oral argument will be heard in January 2017. *Id.* at 2. Once the intent issue is resolved, the district court will determine a permanent remedy, which may differ substantially from the interim remedy currently in place.

REASONS TO DENY THE PETITION

Texas's petition for a writ of certiorari ignores the evidence in the record, misapplies this Court's precedent, misrepresents the Fifth Circuit's opinion, and engages in baseless speculation about the opinion's potential consequences. Moreover, the petition is premature because important aspects of this case are still being decided by the district court. The petition is meritless and should be denied.

I. The *En Banc* Fifth Circuit's Remand for Reconsideration of the Discriminatory Purpose Finding Does Not Warrant This Court's Review.

Texas argues that this Court's review is needed because the Fifth Circuit erred in remanding the discriminatory purpose claim to the district court for further fact-finding on the question of discriminatory intent. *See* Pet. 30-36. Texas's argument relies on a misreading of this Court's precedent, a misconstruction of the Fifth Circuit's decision, and the omission and misrepresentation of crucial record evidence. Contrary to Texas's assertion that this case presents an "exceptional scenario," Pet. 30, the Fifth Circuit's decision to remand was based on a faithful application of this Court's cases and a careful reading of the record and is therefore unremarkable.

A. The Fifth Circuit Correctly Remanded the Discriminatory Purpose Claim Because the Evidentiary Record Permits a Finding of Discriminatory Intent.

Texas argues that the Fifth Circuit's decision to remand the discriminatory purpose claim is worthy of this Court's review because it contravened *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), which held that remand is inappropriate if "the record permits only one resolution of the factual issue." 456 U.S. at 292; *see* Pet. 30. Texas argues that "the record only permits a finding that the Texas Legislature did not act with a discriminatory purpose in passing SB14," and it was therefore error for the Fifth Circuit to remand the claim. Pet. 30. But Texas misrepresents the law governing discriminatory intent and ignores the myriad pieces of

record evidence that the Fifth Circuit concluded would in fact permit a finding that the Texas Legislature acted with discriminatory intent when it passed SB 14. The Fifth Circuit faithfully applied the *Pullman-Standard* test and its routine decision to remand the discriminatory purpose claim does not present grounds for granting Texas's petition.

There is no dispute that this Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), provides the framework for assessing discriminatory purpose claims. In *Arlington Heights*, the Court held that a racially discriminatory purpose need not be "the 'dominant' or 'primary' one" and counseled courts to engage in a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 264-68. The Court established various evidentiary sources lower courts should consider in making that inquiry, including (1) the historical background of the decision; (2) the sequence of events leading up to the decision; (3) departures from normal procedural practices; (4) substantive departures from the norm; and (5) contemporaneous actions and statements. *Id.*

And yet, contrary to the express directive of *Arlington Heights* that courts should consider "circumstantial *and* direct evidence of intent," 429 U.S. at 266 (emphasis added), Texas asks this Court to carve out an exception for this case and these petitioners. Texas argues that while "discriminatory intent may be proved by circumstantial evidence in certain cases . . . this was no ordinary case." Pet. 33. According to Texas, because the trial court allowed plaintiffs to obtain

legislative materials and testimony during discovery, the Fifth Circuit was precluded from considering circumstantial evidence of discriminatory intent and should only have assessed whether the record contained any direct evidence of such intent. Pet. 33-34. Essentially, Texas argues that a so-called "smoking gun" in terms of actual expressions of discriminatory intent by members of the Legislature was required.

Texas's novel theory is plainly not the law. Texas was certainly entitled to argue to the fact-finder that the absence of a "smoking gun" supported its view of the evidence, but—unsatisfied with the fact-finder's decision—Texas cannot now impose a non-existent rule of evidence and law in this Court. It is clear that "discriminatory intent need not be proved by direct evidence." *Rogers v. Lodge*, 458 U.S. 613, 618 (1982); *see also* Pet. App. 28a ("To find discriminatory intent, direct *or* indirect evidence . . . may be considered" (quoting *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009) (emphasis added)). Indeed, it would be a "rare instance where a state artlessly discloses an avowed purpose to discriminate," *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 350 (1977), making circumstantial evidence particularly crucial when challenging legislative action on the grounds that it discriminates against racial minorities. In fact, "in this case, there is evidence that the proponents of SB 14 were careful about what they said and wrote about the purposes of SB 14, knowing it would be challenged during the preclearance process under the Voting Rights Act." Pet. App. 28a n.19.

Texas also suggests that the Fifth Circuit should have imposed a "clearest proof" standard for proving intent, citing *Smith v. Doe*, 538 U.S. 84, 92 (2003), for the proposition that "'only the clearest proof will suffice to override' the legislature's stated intent." Pet. 32. Yet *Smith* had nothing to do with a claim for discriminatory purpose; instead, it addressed statutory interpretation, a context in which courts naturally defer to legislators' stated purpose. Unlike the highly deferential statutory interpretation standard, the discriminatory purpose inquiry requires courts to carefully review circumstantial evidence because, as the Fifth Circuit noted, "discriminatory motives are often cleverly cloaked in the guise of propriety." Pet. App. 17a n.12 (internal quotation marks omitted). Texas's unsupported attempt to heighten the standard for proving intent must be rejected.

The Fifth Circuit therefore did not err in determining that circumstantial evidence in the record could permit a finding that the Texas Legislature acted with discriminatory intent in passing SB 14. Texas's argument to the contrary is unavailing. And while the Fifth Circuit found that certain evidence the district court relied upon in conducting the *Arlington Heights* analysis was "infirm," Pet. App. 26a, its non-exhaustive inquiry identified at least a dozen separate and substantial pieces of evidence in the record that "could support a finding of discriminatory intent," Pet. App. 15a-16a, 26a-27a—evidence that Texas largely ignores in its petition. As the Fifth Circuit recounted, there is record evidence that:

- The "seismic demographic shift" in Texas toward an increase in Latino and African-American populations caused a decline in the voter base of the party in power, motivating it to change the law. Pet. App. 41a & n.30.
- "[M]any rationales were given for a voter identification law, which shifted as they were challenged or disproven by opponents." Pet. App. 40a.
- The drafters and proponents of SB 14 were "aware of the likely disproportionate effect of the law on minorities," and that it "would likely fail the (then extant) preclearance requirement." Pet. App. 30a.
- One of the authors of SB 14 stated "I am not advised" when other legislators questioned him about SB 14's possible disparate impact. Pet. App. 31a.
- The Texas Legislature passed SB 14 "without adopting a number of proposed ameliorative measures that might have lessened" its disproportionate effect on minorities. Pet. App. 30a.
- SB 14's proponents "refused to answer why they would not allow amendments to ameliorate the expected disparate impact of SB 14." Pet. App. 40a.
- SB 14's proponents professed to be following Indiana's voter ID law, but removed all of the

ameliorative provisions of that law. Pet. App. 36a.

- SB 14 is "only tenuously related to the legislature's stated purpose of preventing voter fraud," an "almost nonexistent problem." Pet. App. 31a, 36a.
- The stated rationale for SB 14—of preventing voter fraud—was the same rationale stated for "devices Texas has used to deny minorities the vote," including the poll tax, all-white primary, and purging. Pet. App. 31a.
- SB 14 "was subject to numerous and radical procedural departures" that were "virtually unprecedented." Pet. App. 33a-34a.
- There are contemporary examples of state-sponsored discrimination in the record, including that the same legislature that passed SB 14 also passed two other laws that courts held were enacted with discriminatory purpose. Pet. App. 38a-42a & nn.28-30.
- One of the authors of SB 14 "testified that he 'believe[s] today the Voting Rights Act has outlived its useful life.'" Pet. App. 31a.

Thus, as the Fifth Circuit meticulously demonstrated in its non-exhaustive exploration, the record contains extensive evidence that will allow the district court to find that in passing SB 14, the Texas Legislature was motivated at least in part by the law's detrimental impact on the African-American and Hispanic electorate.

The comparison Texas draws to *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), and similar cases, Pet. 31-32, is inapt. The Fifth Circuit applied the correct standard under *Feeney* (as did the district court): "Legislators' awareness of a disparate impact on a protected group is not enough: the law must be passed *because* of that disparate impact." Pet. App. 18a (emphasis in original) (citing *Feeney*, 442 U.S. at 279). Texas's unhappiness with the outcome under that inquiry does not dictate that the standard should change. Indeed, the Texas Legislature's picking and choosing of acceptable IDs and its rejection of ameliorative amendments that would not have harmed its supposedly racially neutral "goals"—goals that shifted over time—demonstrate an ulterior motive. For example, if in *Feeney*, the policy at issue gave employment preference to certain military statuses and not to others without any neutral reason for doing so, and those statuses overwhelmingly favored men, the outcome may well have been different.

Similarly, Texas also cites *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987), for the proposition that the Court "will not infer a discriminatory purpose" where there were "legitimate reasons" to enact a law. Pet. 32. But the plaintiff in *McCleskey* "introduced no evidence," circumstantial or otherwise, to support his claim that the Georgia Legislature "maintains its capital punishment statute because of [its] racially disproportionate impact." 481 U.S. at 299 n.21. Absent any such evidence, the Court relied on the "legitimate reasons for the Georgia Legislature to adopt and maintain capital punishment" in rejecting the plaintiff's discriminatory

purpose claim. *Id.* at 299. Unlike in *McCleskey*, the Fifth Circuit specifically held that here, there was evidence in the record to support a finding that the Texas Legislature's stated purpose of "ballot integrity" could be a "cloak" that was "hiding a more invidious purpose." Pet. App. 42a.

In sum, Texas's attempt to raise a question worthy of this Court's review by recasting the standard for judging discriminatory intent and by eliding key portions of the Fifth Circuit's opinion cannot withstand scrutiny. The Fifth Circuit was entirely faithful to this Court's precedents in remanding the discriminatory purpose claim and its decision does not warrant this Court's review.

B. Texas Ignores or Misrepresents the State of the Record.

Texas attempts to recast not only the law, but also the facts in discussing the Fifth Circuit's discriminatory purpose holding. Rather than grapple with much of the evidence in the record that does not support its desired outcome, Texas chooses to either ignore that evidence or misrepresent it. As a result, the petition paints this Court a picture of an evidentiary record that is very different from the one that actually exists. In short, Texas's argument that *Pullman-Standard* required dismissal rather than remand is not credible because it depends on the assertion that the record lacks evidence of discrimination—an assertion that cannot withstand scrutiny.

Indeed, completely absent from Texas's petition is any discussion of the legislative history of SB 14 that is

discussed above. Nor does the petition contain any discussion of the record evidence of the extreme procedural maneuvers the Texas Legislature employed when considering and passing SB 14. When it does actually discuss the evidence, Texas misrepresents the record in numerous ways. While Texas states that "SB14 was enacted to prevent voting fraud and to preserve voter confidence in the integrity of elections," Pet. 5, Texas fails to explain that the articulated purposes for SB 14 shifted over time; that Texas has a long history of using fraud as a pretext for racial discrimination in voting measures; and that the record is almost entirely devoid of proof of in-person impersonation voter fraud. ROA.27064; ROA.27137; ROA.27033; ROA.27138. Indeed, while Texas claims that "the record in this case . . . contain[s] evidence of in-person voter fraud," Pet. 2 n.1, Texas does not cite to any proven instances of in-person impersonation voter fraud. Rather, Texas refers the Court to a list of Election Code Referrals to the Office of the Attorney General, *see* Pet. 2 n.1, almost none of which are for in-person impersonation fraud and all of which are simply unproven allegations, *see* R.21841-63, as well as testimony in front of the Texas House of Representatives by a partisan layperson who made an unverified, uncorroborated allegation of fraud, *see* R.29184-85.

Texas also persists in a claim that the *en banc* Fifth Circuit already found to be "demonstrably false," Pet. App. 72a n.49, insisting that "plaintiffs' experts could not identify any person who would be unable to vote because of SB14," Pet. 5. As the Fifth Circuit explained, the

district court "found that multiple Plaintiffs were turned away when they attempted to vote, and some of those Plaintiffs were not offered provisional ballots to attempt to resolve the issue." Pet. App. 72a. Texas ignores this finding by the court, and cites instead testimony by plaintiffs' experts that they were not asked to perform the task of identifying individuals who could not vote because of SB 14. This, of course, is not testimony establishing that those individuals did not, in fact, exist. As the examples of actual people in this very brief demonstrate, Texas's repeated claim that "plaintiffs' experts could not identify any person who would be unable to vote because of SB 14," Pet. 5, is "demonstrably false," Pet. App. 72a n.49.

Texas also engages in revisionist history when discussing the fees required to obtain an EIC. Texas notes that while the government initially charged a fee to obtain a copy of a birth certificate, which is a prerequisite to obtaining an EIC, the Texas Legislature in 2015 passed legislation removing that fee. Pet. 3; *see* 37 Tex. Health & Safety Code § 191.0046(e). However, Texas fails to explain that it only removed the fee after the district court held that the fee amounted to an unconstitutional poll tax. Pet. App. 466a-474a. This fee-removal legislation is hardly demonstrative of an "intent to provide free voter IDs," as Texas claims. Pet. 3.

Thus, rather than confront the evidence in the record, Texas either ignores it or misrepresents it to suit its needs. In light of the applicable law and the evidentiary record, the Fifth Circuit would have erred under *Pullman-Standard* if it had *not* remanded the discriminatory purpose claim. Texas disagrees with the

outcome, but that is not a basis for this Court to grant Texas's petition. Whether the Texas Legislature had a discriminatory purpose in enacting SB 14 is a factual issue to be resolved by the district court. The Fifth Circuit's remand was entirely proper.[3]

II. The Procedural Posture of this Case Makes It Unsuitable for this Court's Review.

This Court only grants certiorari for "compelling reasons," *see* Sup. Ct. R. 10, that are not present here. This case is in an interlocutory posture, and the ongoing proceedings before the district court would necessarily inform this Court's review of the questions presented in the petition, counseling strongly against this Court's review at this time. Further, Texas's speculation about the purported parade of horribles that will result from letting the Fifth Circuit's opinion on the Section 2 claim stand is entirely unfounded.

A. This Case's Interlocutory Posture Should Result in Denial of Certiorari.

As established above, the Fifth Circuit appropriately remanded, for further fact-finding, the discriminatory purpose claim, and specifically, the issue of whether the Texas Legislature acted with discriminatory intent in passing SB 14. Pet. App. 111a-112a. Briefing on that issue is ongoing before the district court, with oral argument set for January 24, 2017. ECF No. 922 at 2. If the district court enters judgment for

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[3] Even if the Fifth Circuit erred in remanding the claim—which it did not—error correction is not a basis for granting a petition for a writ of certiorari. *See* Sup. Ct. R. 10.

plaintiffs on that claim, the court will then address the appropriate remedy. *See id.* Further, after affirming the district court's finding that SB 14 violates Section 2 of the VRA through its discriminatory result, the Fifth Circuit remanded to the district court for consideration of the appropriate remedy. Pet. App. 112a. Thus, pending before the district court are three separate but interdependent issues: fact-finding and a determination of liability on the discriminatory purpose claim; the appropriate remedy if the court finds that SB 14 was enacted with a discriminatory purpose; and the appropriate remedy to ameliorate SB 14's discriminatory result.

It is not the ordinary practice of this Court to exercise its discretion to review a case that is in an interlocutory posture such as this. In fact, this Court routinely denies certiorari when a court of appeals has remanded a case to a district court either to fashion a remedy or for further fact-finding. *See, e.g.*, *Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (statement of Alito, J.) (where court of appeals remanded case to district court "to fashion an appropriate remedy," case was "in an interlocutory posture" and it was appropriate to deny certiorari); *Wrotten v. New York*, 560 U.S. 959, 959-60 (2010) (statement of Sotomayor, J.) (where state court of last resort remanded to lower court for further review, including fact-finding, case was in an interlocutory posture and denial of certiorari was warranted); *Bhd. of Locomotive Firemen & Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) (*per curiam*) (where court of appeals "rule[s] on various legal issues presented to

it" but remands to district court for further fact-finding, case is "not yet ripe for review" by the Supreme Court); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("The decree that was sought to be reviewed by certiorari . . . was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application[.]").

Despite the pending status of this case, Texas urges this Court to grant certiorari. But there is no compelling reason for this Court to depart from its customary practice here. Interlocutory appeals are disfavored because they often result in a piecemeal review by this Court and prevent this Court from "hav[ing] the benefit of the . . . full consideration" of the courts below. *Wrotten*, 560 U.S. at 960. This case is no exception. Indeed, the district court's fact-finding on the discriminatory purpose claim is intertwined with the evidence relevant to the Section 2 inquiry Texas urges this Court to undertake. At a minimum, the evidence supporting a finding of discriminatory purpose also supports several of the elements, especially the "Senate Factors," that inform the "totality of the circumstances" inquiry established by *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986) ("*Gingles*"): the history of official discrimination in Texas (Senate Factor 1); the lack of legislative responsiveness to the minority community (Senate Factor 8); and the tenuousness of the justification for SB 14 (Senate Factor 9). In order to benefit from the full consideration of the lower courts and avoid piecemeal review, this Court should deny certiorari and allow the district court to issue its findings

of fact to occur before considering how the law applies to those facts.

Further, Texas will not be prejudiced by a denial of certiorari. Texas argues that if the Court were to overturn the Fifth Circuit's finding that SB 14 has a discriminatory result, "that would avoid unnecessary proceedings on the discriminatory-purpose claim" because "without a showing of discriminatory effect, circumstantial evidence cannot establish discriminatory purpose." Pet. 36-37. But that is an incorrect statement of this Court's precedent. To the extent that constitutional discriminatory intent inquiry is premised upon "disproportionate impact," *Arlington Heights*, 429 U.S. at 264-66, the required showing is modest. *See Hunter v. Underwood*, 471 U.S. 222, 223 (1985). Discriminatory intent certainly does not hinge on a Section 2 discriminatory result finding (which requires more than mere disparate impact). The two claims require separate inquiries and the outcome of the Section 2 claim does not dictate the outcome of the discriminatory purpose claim. Thus, even if this Court were to grant certiorari and enter judgment for Texas on the discriminatory result claim, the proceedings related to the discriminatory intent claim would still need to go forward in the district court.

However, the flip side of Texas's argument weighs against granting certiorari. While it is not true that this Court's review of the Section 2 results claim could moot the discriminatory purpose claim, it is the case that the district court's discriminatory purpose remedy could entirely moot the discriminatory result claim. As the Fifth Circuit noted, the remedy the district court might

impose if it finds that SB 14 was enacted with a discriminatory purpose is "potentially broader than the one to which Plaintiffs would be entitled if only the discriminatory result claim were considered." Pet. App. 103a. For example, the district court might permanently enjoin SB 14's implementation if it finds the statute was enacted with a discriminatory purpose, but the remedy the district court imposes for the discriminatory result claim could be something less than a full injunction. *See id.* Thus, the remedy for the discriminatory purpose claim will almost certainly either equal or subsume any remedy the district court imposes for the discriminatory result claim, rendering that claim superfluous. This Court's certiorari jurisdiction is exercised very sparingly, and it would be a waste of this Court's resources to deliberate and decide the discriminatory result claim only to have it mooted by the district court.

Thus, it is premature for this Court to undertake an analysis of the discriminatory result claim when the discriminatory purpose claim and remedy is unresolved by the district court. Doing so would contravene the precedent of this Court that counsels against weighing in on cases in an interlocutory posture.

B. Texas Greatly Exaggerates the Impact of the Fifth Circuit's Decision.

This case is not about photo ID laws in general. It is about this particular statute with these particular provisions enacted against this particular background and in these particular circumstances. Throughout this case, Texas has sought to frame this as a case about all photo ID laws or, now, all election administration procedures, but that ploy was repeatedly rebuffed by

both the district court and Fifth Circuit. The Fifth Circuit's decision upholding the district court's finding that SB 14 violates Section 2 of the VRA is unremarkable, in keeping with this Court's case law, and entirely consistent with *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). It is not, as Texas would have the Court believe, an aberration in need of this Court's premature intervention. Nor will it result in the parade of horribles that Texas invents to create a compelling reason for this Court to grant certiorari.

Texas argues that the Fifth Circuit's Section 2 holding "jeopardize[es] countless election laws." Pet. 26. Specifically, according to Texas, voter registration, residency, and vote-timing requirements supposedly would be struck down under the Fifth Circuit's decision because they "impose a marginally greater burden on poorer voters than on more affluent voters." Pet. 26. But the crisis scenario Texas imagines is pure fiction.

To begin, challenges to ordinary election administration laws under Section 2 would be analyzed under the same two-part framework that the Fifth Circuit properly applied in its *Gingles* analysis. The second part of that test requires the court to analyze the challenged practice in context using the well-established Senate factors. By their nature, those factors require a fact-intensive and location-dependent analysis. *See Gingles*, 478 U.S. at 79 (explaining that Section 2 findings are "peculiarly" dependent upon the trial court's "intensely local appraisal of the design and impact of the contested electoral mechanisms" (internal quotation marks omitted)). The district court's specific, meticulous findings of fact with respect to SB 14—

findings of fact Texas conveniently ignores as described above—will allow other courts to appropriately distinguish the Fifth Circuit's holding if confronted with Section 2 challenges to commonplace election regulations that are not discriminatory.

Indeed, even accepting Texas's premise that routine election administration laws impose marginal burdens, *marginal* burdens are not at issue with respect to SB 14. Rather, as the district court found, SB 14 creates a "substantial," "extraordinary," and "perhaps insurmountable" burden on minorities' exercise of the franchise. Pet. App. 383a, 400a-401a, 419a. And it does so without addressing any real problem, unlike the types of election laws Texas highlights, which are often necessary to ensure the fair and efficient conduct of elections. In light of the evidence of those substantial, unjustified burdens, SB 14 is easily distinguishable from any marginal burden imposed by routine election administration laws. The Fifth Circuit's decision that SB 14 violates the VRA will not result in the "drastic consequences" Texas imagines. Pet. 11.

Texas's penchant for hyperbole continues with its warning of a supposedly "exceptionally important circuit split" on the proper test for analyzing "vote denial" cases under Section 2 of the VRA. *See* Pet. 12-18. But the Seventh Circuit case Texas highlights is still pending before that court, and given the history of that case, it is likely that any decision by the panel will also go before the Seventh Circuit sitting *en banc*. *See generally Frank. v. Walker*, No. 16-3003 (7th Cir.). And of course, the instant case is still pending as well. *See supra* Section II.A. Thus, Texas's warning of a circuit split is

premature, and this Court would be better off waiting to address the application of Section 2 to "vote denial" and "vote abridgement" cases until the lower courts have fully considered the issue. Indeed, this Court has "in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsberg, J., dissenting); *see also California v. Carney*, 471 U.S. 386, 400–01 (1985) (Stevens, J., dissenting) ("To identify rules that will endure, we must rely on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law.").

Thus, Texas's alarmism is entirely baseless, and its unsupported speculation about the demise of routine election laws does not provide any reason for this Court to prematurely second guess the well-reasoned judgment of both the district court and Fifth Circuit that SB 14 violates Section 2 of the VRA, particularly before this case is even fully adjudicated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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