No. 14-41127

In the United States Court of Appeals for the Fifth Circuit

MARC VEASEY; JANE HAMILTON; SERGIO DELEON; FLOYD CARRIER; ANNA BURNS; MICHAEL MONTEZ; PENNY POPE; OSCAR ORTIZ; KOBY OZIAS; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; JOHN MELLOR-CRUMMEY; KEN GANDY; GORDON BENJAMIN; EVELYN BRICKNER,
Plaintiffs-Appellees,
TEXAS ASS'N OF HISPANIC CTY. JUDGES & CTY. COMM'RS,
Intervenor Plaintiff-Appellee,
v.
GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, CARLOS CASCOS, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; STATE OF TEXAS; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY,
Defendants-Appellants.

(*caption continued on inside cover*)

On Appeal from the U.S. District Court for the Southern District of Texas, Corpus Christi Division, Nos. 2:13-cv-193, 2:13-cv-263, 2:13-cv-291 & 2:13-cv-348

***EN BANC* BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF DEFENDANTS-APPELLANTS IN SUPPORT OF REVERSAL**

Lawrence J. Joseph
D.C. Bar No. 464777
1250 Connecticut Ave. NW, Ste. 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND; IMANI CLARK,
Intervenor Plaintiffs-Appellees,
v.
STATE OF TEXAS; CARLOS CASCOS, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY,
Defendants-Appellants.

TEXAS STATE CONFERENCE OF NAACP BRANCHES; MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES,
Plaintiff-Appellee,
v.
CARLOS CASCOS, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY,
Defendants-Appellants.

LENARD TAYLOR; EULALIO MENDEZ, JR.; LIONEL ESTRADA; ESTELA GARCIA ESPINOZA; MARGARITO MARTINEZ LARA; MAXIMINA MARTINEZ LARA; LA UNION DEL PUEBLO ENTERO, INCORPORATED,
Plaintiff-Appellee,
v.
STATE OF TEXAS; CARLOS CASCOS, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY,
Defendants-Appellants.

CERTIFICATE OF INTERESTED PERSONS

The case number is 14-41127. The case is styled as *Veasey v. Abbott.* Pursuant to the fourth sentence of Circuit Rule 28.2.1, the undersigned counsel of record certifies that the parties' list of persons and entities having an interest in the outcome of this case is complete, to the best of the undersigned counsel's knowledge. The undersigned counsel also certifies that *amicus curiae* Eagle Forum Education & Legal Defense Fund is a nonprofit corporation with no parent corporation, and that no publicly held corporation owns ten percent or more of its stock. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated: April 22, 2016

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, submits this *amicus* brief in support of the appellants to the *en banc* Court with the accompanying motion for leave to file.[1] In the context of the elections on which the Nation has based its political community, Eagle Forum has supported efforts both to reduce voter fraud and to maximize voter confidence in the electoral process. Eagle Forum supported Texas as an *amicus curiae* both the panel proceedings and in Texas's petition for rehearing *en banc*. For these reasons, Eagle Forum has a direct and vital interest in the issues raised here.

STATEMENT OF THE CASE

In these consolidated cases, various private groups and individuals (collectively, "Plaintiffs") and the United States either filed suit or intervened against the State of Texas and three of its executive officers (collectively, "Texas") to enjoin Texas Senate Bill 14, Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws 619 ("SB14"), which requires – with certain exceptions – that in-person voters present acceptable forms of identification in order to vote in state and federal elections. The panel found SB14 to violate the "effects test" under §2 of the Voting

[1] Consistent with FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus* and its counsel – contributed monetarily to this brief's preparation or submission.

Rights Act ("VRA") and, after vacating the district court's finding of intentional discrimination, remanded for the district court to consider new findings. The *en banc* Court granted Texas's petition for rehearing to reverse the VRA finding and to direct the district court to dismiss the intentional-discrimination claim outright on remand.

Amicus Eagle Forum adopts the facts as stated in Texas's brief (at 3-9). In summary, all of the affiants and named plaintiffs can vote in Texas's elections, notwithstanding SB14. ROA.27110, 27104-05, 10543-44, 99375. Moreover, notwithstanding Plaintiffs' unprecedented discovery of the Texas Legislature, no evidence of intentional race-based discrimination exists. Slip Op. 19 ("extensive discovery of legislators' private materials … yielded no discriminatory evidence").

SUMMARY OF ARGUMENT

As the Supreme Court recognized in *Crawford v. Marion Cty. Election Bd.,* 553 U.S. 181, 189 (2008), voter-identification protections not only help detect and deter voter fraud but also inspire voter confidence in the integrity of our elections. For that reason, Plaintiffs' constitutional claims – the same claims rejected in *Crawford* – are foreclosed by binding Supreme Court precedent that the courts of this Circuit must follow. Similarly, although race correlates with income and SB14's nominal costs fall disproportionately on low-income voters, a disparate race-correlated effect on the part of SB14's nominal economic burdens is by no means "race-based discrimination" under VRA §2. Instead, with respect to VRA §2, bare

statistical disparities such as those shown by Plaintiffs here are insufficient to violate the VRA without a causal connection between SB14 and the alleged discrimination.

With respect to Plaintiffs' constitutional claims, this Court cannot cure the district court's error in allowing unprecedented discovery of Texas's Legislature, but it can eliminate any ongoing injury by directing the district court to dismiss those claims on remand. Violations of the Equal Protection Clause require purposeful discrimination, which mere correlation – even strong correlation – cannot establish. Moreover, without an ongoing or threatened violation of federal law, there is neither an Article III basis for jurisdiction nor an officer-suit exception to Texas's sovereign immunity from suit in federal court.

ARGUMENT

I. TEXAS HAS VALID INTERESTS THAT JUSTIFY REQUIRING VOTER IDENTIFICATION.

Voting without proper identification enables voter fraud. *Crawford* cites to numerous instances of voter fraud, with not only examples such as the 19th century Tammany Hall political machine but also examples in recent years. *Crawford,* 553 U.S. at 195. Even more recently, City investigators in New York were able to vote successfully 61 times out of 63 attempts when identifying themselves as an ineligible voter on the rolls. ROSE GILL HEARN, COMMISSIONER, NEW YORK CITY DEP'T OF INVESTIGATION, REPORT ON THE NEW YORK CITY BOARD OF ELECTIONS' EMPLOYMENT PRACTICES, OPERATIONS, AND ELECTION ADMINISTRATION, at 13

(December 2013).[2] In short, voter fraud remains an issue against which governments must protect our elections.

Accordingly, Texas has obvious and indisputable interests not only in preventing voter fraud, but also in ensuring voter confidence in the integrity of the ballot. *Crawford*, 553 U.S. at 189. "Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006). For good reason then, *Crawford* recognized the merit in states' requiring voter identification: "even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the relief they seek in this litigation" of "enjoining [the law's] enforcement." *Crawford,* 553 U.S. at 199-200 (footnote omitted). *Amicus* Eagle Forum respectfully submits that the courts of this Circuit must leave it to the Supreme Court to find the interests that SB14 protects to be "tenuous" as a matter of law: "[I]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case

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[2] To avoid biasing elections, the investigators wrote in the fictitious candidate John Test. *Id.* This Court need not notice the New York report or even consult it to hold that this type of legislative facts – already upheld by the U.S. Supreme Court – is not subject to courtroom factfinding. *Voting for Am., Inc. v. Steen,* 732 F.3d 382, 394 (5th Cir. 2013) ("as in *Crawford,* Texas need not show specific local evidence of fraud in order to justify preventative measures"). The report is available at http://www.nyc.gov/html/doi/downloads/pdf/2013/dec_13/BOE_Unit_Report12-30-2013.pdf (last visited Apr. 22, 2016).

which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton,* 521 U.S. 203, 237 (1997) (interior quotation omitted). The panel's failure to do so here (Slip Op. 33-35) is reason enough for this Court to convene *en banc.*

II. SB14 DOES NOT VIOLATE VRA §2.

In holding that SB14 violates VRA §2, the panel failed to find the required causal nexus between the challenged law and the perceived disparate result. Instead, the panel incorporated inapposite methods of analysis to require finding VRA §2 violations to underlie any disparate race-correlated impacts in any part of the country – and it is probably *all* of the country – with a long-ago history of societal and education-based discrimination that has ongoing, generational carry-over effects today (*e.g.,* the compounding effects of jobs or degrees that grandparents or parents did not receive 50 years ago). Whether that is a law that Congress *could* enact is doubtful, but it is clear that that is not the law that Congress *did* enact.

A. The "Senate Factors" should not apply to voting-qualification cases under VRA §2.

As Texas explains (Texas Br. at 41-42), the panel reached its VRA result by importing the "Senate Factors" for vote-dilution claims under *Thornburg v. Gingles*, 478 U.S. 30 (1986), into this voter-qualification litigation, notwithstanding that the Seventh and Ninth Circuits found the Senate Factors unhelpful in voter-qualification cases. Texas Br. at 41-44. *Amicus* Eagle Forum respectfully submits that the *en banc*

Court should reject the use of vote-dilution analysis in challenging voter-qualification issues.

First, vote-dilution claims concern society and districts as a whole and ask whether a group can *elect* candidates of its collective choice. By contrast, voter-qualification claims concern whether a person can participate by voting. To ensure each person's vote, courts certainly can look at the traditional race-discrimination analysis, but *amicus* Eagle Forum respectfully submits that using the broad Senate Factors would go too far in finding race-discrimination violations out of mere disparate impacts. *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.,* 135 S.Ct. 2507, 2522-24 (2015). To the contrary, mere statistical disparities – standing alone – are insufficient to establish this type of VRA §2 violation: "there must be some causal connection between the challenged electoral practice and the alleged discrimination that results in a denial or abridgement of the right to vote." *Ortiz v. City of Philadelphia Office of City Comm'rs Voter Registration Div.,* 28 F.3d 306, 310 (3d Cir. 1994); *Wesley v. Collins,* 791 F.2d 1255, 1260-61 (6th Cir. 1986) ("a showing of disproportionate racial impact alone does not establish a *per se* violation of the Voting Rights Act" in a voter-qualification case). Instead, "section 2 plaintiffs must show a causal connection between the challenged voting practice and [a] prohibited discriminatory result." *Ortiz,* 28 F.3d at 312. The panel relied on the broad Senate Factors, not the required causal

connection.

Second, there is the question not only of what Circuit law *is* but also of what it *should be.* As Texas points out, the *en banc* Court already has held that "§2's results test requires 'proof that participation in the political process is in fact depressed among minority citizens.'" Texas Br. at 34 (*quoting League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 867 (5th Cir. 1993) (*en banc*)). For its part, the panel relies on the pre-*Clements* panel decision in *Mississippi State Chapter, Operation PUSH v. Mabus*, 932 F.2d 400 (5th Cir. 1991), as a VRA §2 case that applied the Senate Factors. *See* Slip Op. 22-23. Of course, the subsequent *en banc* decision in *Clements* would clearly abrogate an inconsistent panel decision, and three-judge panels have no authority to depart from Circuit precedent *prospectively* in any event. *Southwestern Bell Tel. Co. v. City of El Paso,* 243 F.3d 936, 940 (5th Cir. 2001). Three-judge panels simply cannot decline to follow this Court's *en banc* decisions.

B. This Circuit should not follow what the panel decision describes as holdings from the Fourth and Sixth Circuits.

The panel's novel VRA §2 analysis relies on two recent decisions, one from the Fourth Circuit and one from the Sixth Circuit. Slip Op. 21. Neither is reliable.

1. The Sixth Circuit's *Husted* decision is void.

As the panel acknowledges, the Sixth Circuit decision on which the panel relies was "vacated on other grounds" (*id.*); a more accurate description would have

been vacated as *moot:*

> The district court's preliminary injunction that is the subject of this appeal was limited to the 2014 election. In light of the Supreme Court's stay order dated September 29, 2014, the district court's preliminary injunction no longer has any effect. Therefore, the district court's preliminary injunction is vacated, and our opinion dated September 24, 2014 is vacated. We remand the case to the district court for further proceedings.

Ohio State Conf. of the NAACP v. Husted, 2014 U.S. App. LEXIS 24472, *2 (6th Cir. Oct. 1, 2014). The *vacatur* order short-circuited Ohio's petition for rehearing, which in turn would "stay[] the mandate on the court's judgment until the petition [was] determined." *Veasey v. Abbott,* No. 14-41127, at 3 (5th Cir. Sept. 2, 2015).

Mootness, of course, goes to the presence of an Article III case or controversy, *Goldin v. Bartholow,* 166 F.3d 710, 717 (5th Cir. 1999), so the *vacatur* order rendered the *Husted* decision outside the judiciary's subject-matter jurisdiction and thus void, even in the Sixth Circuit. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). A "lack of subject matter jurisdiction goes to the very power of a court to hear a controversy; ... [the] earlier case can be accorded no weight either as precedent or as law of the case." *U.S. v. Troup,* 821 F.2d 194, 197 (3d Cir. 1987) (*quoting Ala. Hosp. Ass'n v. U.S.,* 228 Ct.Cl. 176, 656 F.2d 606 (1981)) (alterations in original); *Orff v. U.S.*, 358 F.3d 1137, 1149-50 (9th Cir. 2004) (same). There is no *Husted* decision on which to rely. Should this Court wish to follow the Sixth Circuit, it should recognize that "a showing of disproportionate racial impact alone

does not establish a *per se* violation of the Voting Rights Act." *Wesley v. Collins,* 791 F.2d 1255, 1260-61 (6th Cir. 1986). That is the opposite of what the panel held.

2. The Fourth Circuit's *North Carolina* litigation represents an impermissible collateral attack on *Shelby County*.

As infirm as the panel's Sixth Circuit precedent is, the panel's reliance on the Fourth Circuit's decision in *League of Women Voters of N.C. v. North Carolina,* 769 F.3d 224, 240 (4th Cir. 2014), is even worse. In that decision, the court imported the VRA §5 retrogression analysis negated by the Supreme Court's decision in *Shelby Cty. v. Holder,* 133 S.Ct. 2612 (2013), in a transparent effort to expand federal authority over states that neither the Constitution nor Congress has ever sanctioned.

In *League of Women Voters,* the plaintiffs challenged a new state law that lessened some non-required election features such as same-day registration and out-of-district voting, which had race-correlated effects but no race-based discrimination. Prior to *Shelby County,* a state law making superior voting laws less superior, but still superior to the minimum requirements, would not have been actionable under VRA §2. Instead, such claims were formerly actionable under the retrogression provisions of VRA §5, for "covered jurisdictions," but *Shelby County* made §5 inapplicable. *League of Women Voters* thus represents an end run around *Shelby County* to reestablish federal control over state election systems that Congress never enacted.

Unlike the retrogression (*i.e.,* "no backsliding") provisions of VRA §5, the

VRA §2 effects test compares the status quo to what the law *ought* to be:

> In § 5 preclearance proceedings – which uniquely deal only and specifically with *changes* in voting procedures – the baseline is the status quo that is proposed to be changed: If the change "abridges the right to vote" relative to the status quo, preclearance is denied, and the status quo (however discriminatory *it* may be) remains in effect. In § 2 or Fifteenth Amendment proceedings, by contrast, which involve not only changes but (much more commonly) the status quo itself, the comparison must be made with a hypothetical alternative: If the *status quo* "results in [an] abridgement of the right to vote" or "abridges [the right to vote]" relative to what the right to vote *ought to be*, the status quo itself must be changed. Our reading of "abridging" as referring only to retrogression in § 5, but to discrimination more generally in § 2 and the Fifteenth Amendment is faithful to the differing contexts in which the term is used.

Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 334 (2000) (alterations and emphasis in original), *superseded in part on other grounds,* Pub. L. No. 109-246, §5, 120 Stat. 577, 580-81 (2006). Thus, the Fourth Circuit's finding that current North Carolina law violates VRA §2 compels the conclusion that *any* state that fails to allow same-day registration and out-of-precinct voting also violates the VRA.

There is, of course, absolutely no evidence that Congress intended that result: "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *U.S. v. Bass*, 404 U.S. 336, 349 (1971); *accord Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (same). Moreover, this canon of statutory interpretation applies in the Elections Clause context, even if

the presumption against preemption does not. *U.S. v. Bathgate,* 246 U.S. 220, 225-26 (1918) (Courts require Congress to "have expressed a clear purpose to establish some further or definite regulation" before supplanting State authority over elections and "consider the policy of Congress not to interfere with elections within a state except by clear and specific provisions"); *accord Ex parte Siebold,* 100 U.S. 371, 384, 393 (1880). Even without resorting to a presumption against preemption, this Court can rely – as the Supreme Court did in *Bossier Parish, supra* – on a reading that distinguishes VRA's strong remedial medicine in Section 5 from the anti-abridgment protections in Section 2. There is no evidence that Congress in enacting VRA §2 intended that result, and no evidence in the record of either the VRA or its reauthorizations that – under *Shelby County* – would support supplanting state sovereignty in that manner *today*. For that reason, the *en banc* Court should interpret VRA §2 consistently with the Seventh and Ninth Circuits, as Texas argues.

III. BECAUSE PLAINTIFFS HAVE NOT ESTABLISHED THAT SB14 VIOLATES THE CONSTITUTION – AFTER UNPRECEDENTED DISCOVERY – THIS COURT SHOULD INSTRUCT THE DISTRICT COURT TO DISMISS THE CONSTITUTIONAL CLAIMS.

Although it rejected the district court's theory of liability for intentional discrimination, the panel nonetheless remanded for further consideration by the district court, including – in the district court's discretion – more fact-finding. The *en banc* Court should direct the district court to dismiss the constitutional claims.

A. SB14 does not violate the Constitution.

By way of background, the district court's finding of racial discrimination rests on the nominal costs that SB14 imposes on all Texas voters. As with any imposed cost, those costs are more significant to low-income Texans, who are disproportionately African-American and Latino for reasons having nothing to do with SB14. Any suggestion that SB14 is responsible for discrimination confuses correlation with causation. Insofar as the Supreme Court's *Crawford* decision already has approved voter-identification laws that necessarily impose nominal burdens disproportionately on low-income citizens, *Crawford* forecloses the conclusion that SB14 violates the Equal Protection Clause.

The Equal Protection Clause does not prohibit disparate impacts. *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979). Simply put, it prohibits discrimination *because of* race or other protected status through purposeful discrimination and disparate treatment, not disparate impacts. In other words, it prohibits actions taken *because* of the protected status, not those taken merely *in spite of* that status. *Alexander v. Sandoval*, 532 U.S. 275, 282-83 & n.2 (2001); *Feeney*, 442 U.S. at 279. Here, SB14 imposes race-neutral requirements that are defensible legislative choices in their own right. When action based on neutral criteria disparately impacts a protected group, without being "actually motivated by bias against [the] protected group," that action "is never disparate treatment," "even where there is a strong correlation between the

protected classification and the neutral criteria used to grant or deny the benefit." *Univ. of Texas Southwestern Med. Ctr v. Nassar,* 133 S.Ct. 2517, 2529 (2013) (interior quotations omitted). At worst, Plaintiffs perhaps could accuse Texas of willful indifference to SB14's disparate impact on African-Americans and Latinos, due to their elevated presence among low-income Texans.

But mere correlation with race does not establish discrimination *based on race.* One famous statistical study showed that birthrates in seventeen countries correlate heavily with those countries' stork populations. Robert Matthews, *Storks Deliver Babies (ρ = 0.008),* 22:2 TEACHING STATISTICS: AN INT'L JOURNAL FOR TEACHERS, at 36 (2000). The statistical inference that storks deliver babies clearly "mistakes correlation for causation." *Woodford v. Ngo,* 548 U.S. 81, 94 n.4 (2006); Matthews, *Storks Deliver Babies,* 22:2 TEACHING STATISTICS, at 36-37. The same type of mistake underlies the district court's reasoning from disparate impacts by race to intentional racial discrimination. The district court failed "to recognize the limited probative value of disproportionate impact" because it did not sufficiently "acknowledge the heterogeneity of the Nation's population." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 266 n.15 (1977) (internal quotations omitted). Indeed, where race correlates with income status and a law imposes nominal costs on everyone, that law would obviously weigh more heavily on the races correlated with lower incomes, not because of discriminatory intent but

because of low income.

Although Plaintiffs make much of the greater evidentiary record that they have assembled, vis-à-vis the *Crawford* plaintiffs, the Supreme Court in *Crawford* considered not only evidence, but also the "facts of which [courts] may take judicial notice":

> Both evidence in the record and facts of which we may take judicial notice, however, indicate that a somewhat heavier burden may be placed on a limited number of persons. They include elderly persons born out of State, who may have difficulty obtaining a birth certificate; persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed. If we assume, as the evidence suggests, that some members of these classes were registered voters when [the law] was enacted, the new identification requirement may have imposed a special burden on their right to vote.

Crawford, 553 U.S. at 199 (footnote omitted); *see also id.* at 221 n.25 (discussing disparate impacts on racial minorities) (Souter, J., dissenting). As indicated, the disparate impacts here not only are judicially noticeable and obvious, but also are nondiscriminatory.

B. <u>This Court should remand with instructions to dismiss the constitutional claims.</u>

The Plaintiffs have had unprecedented access to the Texas legislature's records, *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268

n.18 (1977), but have failed to prove discrimination on the purposeful-discrimination theory. Slip Op. 19. While it cannot undo that unreasonable imposition on Texas, this Court can provide *prospective* relief by ordering the district court to dismiss the constitutional claims. While these claims never should have come this far, they cannot go on any longer. Simply put, there is no need to detain Texas further in federal court on a fishing expedition.

District courts should not allow pre-trial discovery for fishing expeditions. *U.S. v. Nixon*, 418 U.S. 683, 699-700 (1974). Instead, plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face" at the pleading stage and cannot use discovery to conduct a fishing expedition in hope that some fact supporting an allegation will be uncovered. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *cf. Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) ("*Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike") (citations omitted). Indeed, precisely because unnecessary, broad-ranging discovery is disruptive, insubstantial claims should be resolved by summary judgment. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). Now that the district court has provided that discovery and the fishing expedition found nothing to show intentional discrimination, this Court should direct the entry of summary judgment for Texas on this issue.

This may, however, be one of the situations in which jurisdiction merges – or

"intertwines" – with the merits, thus requiring a federal court to resolve the merits in conjunction with a jurisdictional issue. *Land v. Dollar,* 330 U.S. 731, 735 (1947). As Texas explains, all of the purportedly injured affiants and plaintiffs can meet the voting criteria under Texas law. Texas Br. at 9. That fact raises issues under both Article III and sovereign immunity.

Under Article III, "[a] controversy, to be justiciable, must be such that it can presently be litigated and decided and not hypothetical, conjectural, conditional, or based upon the possibility of a factual situation that may never develop." *Okpalobi v. Foster*, 244 F.3d 405, 435 (5th Cir. 2001) (*en banc*) (interior quotations omitted). "Moreover, if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494-95 (1974). Plaintiffs must – but cannot – show someone who "has sustained or is immediately in danger of sustaining some direct injury" from SB14, and that injury must be "both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (interior quotations omitted). The time has passed for mere allegations – or allegations about future allegations – so that Plaintiffs' failure to establish injury requires dismissal. *Topalian v. Ehrman*, 954 F.2d 1125, 1131-32 (5th Cir. 1992) ("nonmovant must come forward with evidence establishing each of the challenged elements of its case for which the

nonmovant will bear the burden of proof"). The district court erred in allowing discovery to get this far, and this Court should not compound that error on remand.

Under the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. *Ex parte Young*, 209 U.S. 123 (1908), provides a limited exception that applies only to *ongoing violations* of federal law. Thus, for example, the exception was unavailable in *Green v. Mansour,* 474 U.S. 64, 66-67 (1985), where, after "Respondent … brought state policy into compliance," and the plaintiffs sought "a declaratory judgment that state officials violated federal law in the past when there is no ongoing violation of federal law." *Id.,* Here, Texans who face only burdens that *Crawford* deems tolerable cannot use the higher burdens faced by discrete groups of Texans – if indeed any exist – to invalidate SB14 for all purposes: "The statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact." *Brockett v. Spokane Arcades*, 472 U.S. 491, 504 (1985); *Gonzales v. Carhart,* 550 U.S. 124, 168 (2007) ("as-applied challenges are the basic building blocks of constitutional adjudication") (interior and alterations omitted).[3] Thus, Texas's immunity from suit compels this

[3] *See also Mills v. Maine*, 118 F.3d 37, 50-51 (1st Cir. 1997) (fishing expeditions provide no basis to evade sovereign immunity); *Tigrett v. Cooper*, 855 F.Supp.2d 733, 753 (W.D. Tenn. 2012) ("[t]o permit Plaintiffs to go on a fishing

Court to narrow the injunctive relief to those actual violations (if any), as distinct from the "blunderbuss" facial injunction here. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). Plaintiffs' allegations do not support a facial challenge here, and the evidence does not support their allegations. Accordingly, this Court should remand with instructions to dismiss.

CONCLUSION

This Court should reverse the district court and order dismissal of all counts.

Dated: April 22, 2016

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
D.C. Bar #464777
1250 Connecticut Ave. NW, Ste. 200
Washington, DC 20036
Tel: 202-355-9452
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

expedition in search of discriminatory intent, purpose, or animus based on this threadbare implication of discriminatory intent would be impermissible under *Twombly* and *Iqbal*"); *Gooden v. Howard Cty.*, 954 F.2d 960, 969-70 (4th Cir. 1992) (outside of "rare" cases, it would be "anomalous, as well as inimical to the purposes of immunity, to say that the same conduct might be objectively reasonable but subjectively unreasonable, just as it would be inimical to the protection of those constitutional rights safeguarded by the civil rights statutes to suggest that subjective good faith was sufficient to invoke immunity if the objective conduct could not be reasonably justified").

CERTIFICATE OF COMPLIANCE

No. 14-41127, *Veasey v. Abbott.*

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because the brief contains 4,440 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. The foregoing complies with FED. R. APP. P. 32(a)(5)'s type-face requirements and FED. R. APP. P. 32(a)(6)'s type style requirements because the brief has been prepared in a proportionally spaced type-face using Microsoft Word 2013 in Times New Roman 14-point font.

Dated: April 22, 2016

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
D.C. Bar #464777
1250 Connecticut Ave. NW, Ste. 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

CERTIFICATE OF SERVICE

No. 14-41127, *Veasey v. Abbott.*

I hereby certify that, on April 22, 2016, I electronically filed the foregoing brief – together with the accompanying motion for leave to file – with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

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Dated: April 22, 2016

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund