No. 14-41127
In the United States Court of Appeals for the Fifth Circuit

MARC VEASEY; JANE HAMILTON; SERGIO DELEON; FLOYD CARRIER; ANNA BURNS; MICHAEL MONTEZ; PENNY POPE; OSCAR ORTIZ; KOBY OZIAS; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; JOHN MELLOR-CRUMMEY; KEN GANDY; GORDON BENJAMIN; EVELYN BRICKNER,
Plaintiffs-Appellees
TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS, *Intervenor Plaintiffs-Appellees*
v.
GREG ABBOTT, in his Official Capacity as Governor of Texas; CARLOS CASCOS, in his Official Capacity as Texas Secretary of State; STATE OF TEXAS; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety, *Defendants-Appellants*
(*caption continued on inside cover*)

On Appeal from the U.S. District Court for the Southern District of Texas,
Corpus Christi Division

SUPPLEMENTAL EN BANC BRIEF FOR VEASEY-LULAC APPELLEES

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,
TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND; IMANI CLARK,
Intervenor Plaintiffs-Appellees
v.
STATE OF TEXAS; CARLOS CASCOS, in his Official Capacity as Texas Secretary of State ; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety, *Defendants-Appellants*

TEXAS STATE CONFERENCE OF NAACP BRANCHES; MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES,
Plaintiffs-Appellees
v.
CARLOS CASCOS, in his Official Capacity as Texas Secretary of State; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety,
Defendants-Appellants

LENARD TAYLOR; EULALIO MENDEZ, JR.; LIONEL ESTRADA; ESTELA GARCIA ESPINOSA; MARGARITO MARTINEZ LARA; MAXIMINA MARTINEZ LARA; LA UNION DEL PUEBLO ENTERO, INCORPORATED,
Plaintiffs-Appellees
v.
STATE OF TEXAS; CARLOS CASCOS, in his Official Capacity as Texas Secretary of State; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety,
Defendants-Appellants

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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- Sergio DeLeon
- Floyd Carrier
- Anna Burns
- Michael Montez
- Penny Pope
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- Hidalgo County
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Respectfully submitted,

/s/ Chad W. Dunn
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INTRODUCTION

This case is not about voter ID laws as such, nor about some voter ID law that Texas might have enacted (such as bills it considered before 2011), it is about *this* voter ID law, Senate Bill 14 of 2011 ("SB 14"). After a two-week trial, and on the basis of a voluminous record, the District Court rendered findings of fact specific to SB 14's design and impact on Texas voters. The District Court held, *inter alia*, that SB 14 is the strictest voter ID law in the country; SB 14 would disenfranchise over 600,000 registered voters who, in order to vote, would have to acquire qualifying ID; minorities disproportionately do not have qualifying IDs; the burdens of acquiring SB 14 ID can be significant; for some voters, SB 14 imposed a statutory fee for voting; the burdens of acquiring SB 14 fall disproportionately on minorities as a result of state-sponsored discrimination; the State's proffered interests cannot justify SB 14's strict terms; the Legislature was fully aware that SB 14's strict terms would disproportionately harm minorities; the Legislature picked and chose qualifying IDs that are disproportionately held by Anglo voters; and the Legislature rejected numerous ameliorative amendments but could not explain why. In sum, SB 14 is no ordinary voter ID law.

In an attempt to avoid these well-supported findings—which inexorably lead to the conclusion that SB 14 violates the Voting Rights Act and the First, Fourteenth, and Fifteenth Amendments—Texas's briefing repeatedly asks this

Court to evaluate this case as if it were a case about voter ID laws in the abstract rather than SB 14 in particular. Where that fails, Texas asks this Court to step in as trier of fact and reweigh the evidence. Neither of these arguments is persuasive.

The District Court's holdings applied well-established precedent to well-supported findings of fact. Having failed to convince three federal courts and seven federal judges that SB 14 is not discriminatory, Texas asks this Court to find that SB 14 nonetheless passes muster. This Court should affirm the District Court in all respects.

STATEMENT OF ISSUES

1. Did the District Court err in applying a balancing test and holding that the burdens SB 14 imposes on voters are not justified by the State's legitimate interests (1st and 14th Amendments)?

2. Did the District Court err in finding as fact that SB 14 was adopted with a racially and ethnically discriminatory purpose (14th and 15th Amendments, and Section 2 of the Voting Rights Act)?

3. Did the District Court err in finding as fact that SB 14 "results" in racial and ethnic discrimination (Section 2 of the Voting Rights Act)?

4. Does SB 983 render Texas's appeal of the poll tax finding moot?

5. If not, did the District Court err in holding that because SB 14 provided no free way to vote in person, it constituted a tax on voting (14th and 24th Amendments)?

STATEMENT OF THE CASE

The factual record in this case, including a two-week trial before the District Court, is extensive and pivotal to this appeal. The necessary factual background prior to this appeal is detailed in the Veasey-LULAC Appellees' Brief on the Merits ("Veasey-LULAC Br.") and incorporated herein. Veasey-LULAC Br. at 4-27.

After the District Court rendered judgment, and while this appeal was pending before the three-judge panel, the Texas Legislature—in response to the District Court's unassailable finding that SB 14 was operating as a poll tax—passed Senate Bill 983 ("SB 983"), which eliminated the minimum $2 fee for certified birth certificates requested for the purpose of obtaining an election identification certificate. Act of May 25, 2015, 84th Leg., R.S., ch. 130 (codified in TEX. HEALTH & SAFETY CODE § 191.0046). Thus, SB 983 eliminated, at least for the time being, the fee at issue in the Veasey-LULAC Appellees' poll tax claim.

On August 5, 2015, the three-judge panel of this Court issued an opinion unanimously affirming the District Court's finding that SB 14 violates Section 2 of the Voting Rights Act. *Veasey v. Abbott*, 796 F.3d 487, 520 (5th Cir. 2015), *reh'g en banc granted*, 815 F.3d 958 (5th Cir. 2016). Since the panel affirmed the Section 2 violation, it relied on the canon of constitutional avoidance and dismissed the First and Fourteenth Amendment burden on the right to vote claims.

Id. at 493. The panel took issue with some of the District Court's analysis with respect to the discriminatory intent finding. *Id.* at 499-504. Therefore, it vacated that finding and remanded with instructions for the District Court to consider the issue again in light of its opinion. *Id.* at 520. The panel also held that, notwithstanding enactment of SB 983, it was still required to decide the poll tax issue, and that SB 14 as originally enacted did not constitute a poll tax; the panel therefore vacated and rendered judgment for the State on this issue. *Id.* at 514-17, 520.

On August 28, 2015, Texas filed a petition for rehearing en banc. On March 9, 2016, this Court granted rehearing en banc.

SUMMARY OF ARGUMENT

SB 14 imposes unacceptable burdens on Texas voters, is infected with invidious racially discriminatory purpose, and has an undeniable discriminatory result. Prior to SB 983, SB 14 also imposed an unconstitutional tax on voting. This Court should affirm.

Burden on the right to vote. SB 14 unnecessarily limits the types of qualifying ID and, as a result, impacts an extraordinary number of Texas voters. For those without a qualifying ID, the District Court held that the burdens of obtaining qualifying ID are not always mere inconveniences. Rather, obtaining a qualifying ID can impose serious burdens on eligible Texas voters, especially poor, elderly, and rural voters. The testimony of numerous plaintiffs and witnesses, as well as experts, bears this out. Texas does not challenge these findings of fact but relies on its blanket assertion that *Crawford* immunizes all voter ID laws from constitutional scrutiny. Texas's argument is untenable, would afford voters with no constitutional protection, and misrepresents *Crawford*'s limited holding.

Intentional racial discrimination. The District Court carefully applied the *Arlington Heights* factors to SB 14. There is no dispute that the District Court considered the right categories of evidence, and that evidence in every category pointed in the direction of an invidious purpose. Ultimately, the District Court determined that the Texas Legislature was motivated "at the very least in part,

because of and not merely *in spite of* the voter ID law's detrimental effects on the African-American and Hispanic electorate." ROA.27159. This finding was not clearly erroneous. Texas seeks to upend this careful finding by fabricating a "clearest proof" standard and quarreling with specific pieces of evidence. Texas's arguments amount to nothing more than an attempt to reweigh the evidence and, in any event, most of its quarrels with the evidence (especially its assertion that Texas is free from recent state-sponsored discrimination) are inaccurate.

Results test of Section 2. The District Court, once again, carefully applied Section 2 precedent, and correctly found that SB 14's unnecessarily and foreseeably lopsided effects on minority voters result in discrimination in violation of Section 2 of the Voting Rights Act. Texas's arguments that disproportionate impact can only be proven through turnout or registration numbers are belied by precedent and common sense, and Texas's parade of horribles about the fate of basic election administration procedures is nothing more than a red herring.

Poll Tax. In response to the District Court's correct holding that the statutory fee for EIC birth certificates (which could only be used for voter ID) constituted a poll tax, the Texas Legislature passed SB 983, eliminating the fee. The issue is not moot because Texas could reinstate the fee. Therefore, this Court should affirm. If the issue is moot, it is only moot because Texas, the losing party, voluntarily

rendered it so. Therefore, if the Court finds that the issue is moot, this Court should dismiss the appeal as moot and leave the District Court holding intact.

ARGUMENT

I. SB 14 Undeniably Harms Plaintiffs and Texas Voters.

A. The Trial Record Contains Voluminous Evidence that SB 14 Prevented Plaintiffs and Other Witnesses from Voting.

Across the numerous issues on appeal, Texas's defense of SB 14 is shot through with its claims that "none of the fourteen named individual plaintiffs face any substantial obstacle to voting," the trial revealed no evidence of anyone "facing a substantial obstacle to voting," and Appellees failed to "prove that SB 14 will prevent any person from casting a ballot." Supplemental En Banc Brief for Appellants ("Appellants' Supp. Br.") at 2, 9, 39. But Texas's repeated claims that SB 14 imposes no harm on Appellees—or Texas voters more broadly—cannot make it true.

At the time of the District Court opinion, several individual Plaintiffs had already been rejected from voting as a result of SB 14. ROA.27093 (*e.g.*, Bates, Bingham & Carrier). The trial record includes evidence from numerous plaintiffs, and other Texas voters, that continue to face substantial obstacles to obtaining SB 14 ID and voting on Election Day:

- Gordon Benjamin, who is African-American, testified that he surrendered his Texas license to Arizona upon moving there, but voted in Texas after returning and prior to the implementation of SB 14. ROA.99221:6-99222:1. 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.999222:13-5, 999224:17-99226:10. 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.99223:25-99224:16 ("I don't really trust voting by mail because mail ballots have a tendency to disappear.").

- 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.99827:14-99828:21. His license expired in 1990 and he now relies on the bus for transportation. ROA.99824:23-99825:4, 99825:15:17. 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.99825:23-99826:3, 99828:22-99830:1.

- Floyd Carrier is an African-American veteran who is wheel-chair bound due to a stroke from many years ago. ROA.98642:18, 98645:10, 98674:5-10. In his trial testimony, he explained that his license expired in 2006 and he has been unable to obtain a Texas ID card, since he has been unable to obtain a valid birth certificate. ROA.98674:11-13, 98685:14-21. He was delivered by a midwife 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.98646:17-20, 98686:11-14, 98691:4-21. 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 the Texas photo ID law. ROA.98645:25-98646:2, 98656:2-3, 98702:12-16, 98657:14-98659:8. Voting by mail is not a realistic option for him because mail service in his rural area is inconsistent and unreliable. ROA.98661:17-25.

- 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 Prairie View A&M University student ID card to vote in the 2010 municipal and 2012 presidential elections. ROA.100537:1-9, 100537:14-16, 100539:19-25, 100541:4-12. She possesses a valid student ID, Social Security card, birth certificate, and California license. ROA.100544:16-23. However, she lacks SB 14-required ID and is therefore unable to vote in Texas, the only place she has ever registered to vote. ROA.100540:6-24, 100541:1-3.

Because of SB 14, none of these eligible Texas voters have been able to cast a ballot on any Election Day for the past two (nearly three) years.

In addition to the named Plaintiffs, several other minority voters testified to voting provisionally during the November 2013 election, and having their provisional ballot rejected, because they lacked SB 14 ID.[1] The record further indicates that other voters without SB 14 IDs were turned away from the polls in 2013 without even being given an opportunity to vote a provisional ballot.[2] These voters likely represent only a small fraction of the total number of voters SB 14 disenfranchised during that and other subsequent elections.

B. Voting by Mail Is an Insufficient Alternative.

Texas repeats its twice-failed argument that SB 14 does not create a substantial barrier to voting because it offers a subset of affected voters (and named Plaintiffs) the subpar option of voting by mail. Appellants' Supp. Br. at 2, 7, 9, 33, 34, 38, 49, 55. But voting by mail is an insufficient alternative. As the District Court explained, "[t]he mechanics of voting by mail create a different set

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[1] *See, e.g.*, Sammie Louise Bates, ROA.110817:12:18-110818:13:16 (sealed), 110819:14:2-8 (sealed), 55277; Gordon Benjamin, ROA.110970:28:1-110971:33:15 (sealed), 110974:42:17-22 (sealed); Naomi Eagleton, ROA.111520:32:5-111521:33:11 (sealed), 111523:42:9-111523:43:8 (sealed), 55282; Marvin Holmes, ROA.113942:17:10-113942:20:11 (sealed), 114942:20:21-114943:23:1 (sealed), 114943:23:15-114943:24:1 (sealed), 55281; Phyllis Washington, ROA.113114:22:1-113116:25:25 (sealed), 55280.

[2] *See, e.g.*, Daniel Guzman, ROA.99600:368:1-3, 99607:375:5-8; Ramona Bingham, ROA.111077:33:4-7 (sealed), 111077:33:22-111079:38:20 (sealed), 55278; Floyd Carrier, ROA.113689:95:3-113690:98:2 (sealed).

of procedural hurdles" and may deny elderly or disabled voters "the opportunity to receive assistance with their ballots." ROA.27132-33. The record demonstrates that absentee ballots are subject to a much higher risk of fraud than in-person voting and thus are understandably not trusted by many voters. ROA.27109. The District Court correctly noted the irony that while Texas proclaims an interest in eliminating voter fraud and increasing public confidence, it defends SB 14 by arguing that affected Texas voters, disproportionately minorities, should be forced to "vote by a method that has an increased incidence of fraud and a lower level of public confidence." ROA.27111.

Moreover, in-person voting, in addition to being more effective and trustworthy, is a political act that carries with it important expressive values protected by the First Amendment. As the District Court correctly explained: "For some African–Americans, it is a strong tradition—a celebration—related to overcoming obstacles to the right to vote. Reverend Johnson considers appearing at the polls part of his freedom of expression, freedom of association, and freedom of speech." ROA.27110. Relegating affected minority voters to casting absentee ballots is an unacceptable remedy for SB 14's burdensome and discriminatory effects. *See, e.g.*, *John Doe No. 1 v. Reed*, 561 U.S. 186, 194-95 (2010) ("An individual expresses a view on a political matter when he signs a petition under Washington's referendum procedure . . . [T]he expression of a political view

implicates a First Amendment right. The State, having 'cho[sen] to tap the energy and the legitimizing power of the democratic process, . . . must accord the participants in that process the First Amendment rights that attach to their roles.'" (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002))).

Appellees should not be relegated to an unequal forum. *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.").

C. SB 14 Burdens Hundreds of Thousands Voters' Access to the Franchise.

In addition to the named voter Plaintiffs, Congressman Marc Veasey and other elected officials showed the serious hardships created by SB 14 on their constituents, and the consequent adverse effects on their campaigns. ROA.27111-12.

Texas repeatedly, and incorrectly, argues that no individual voter has been unequivocally denied the right to vote. Not only is this assertion false, *see supra* Section I.A, it is also not the relevant standard for either the statutory or constitutional claims in this case. The Voting Rights Act prohibits electoral practices that result "in a denial *or abridgement* of the right of any citizen of the United States to vote on account of race." 52 U.S.C. § 10301; *see infra* Part IV. And the Supreme Court has held that, under the Fourteenth Amendment,

unreasonable burdens, short of outright disenfranchisement, cannot be placed on voters' access to the ballot. *See, e.g., Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190 (2008); *see infra* Part II. Such burdens will inevitably lead to realistic disenfranchisement, as SB 14 has in Texas.

In asserting that there is no harm to Texas voters, the State ignores hundreds of ID-related provisional ballots cast (but not counted) by voters who lack SB 14 ID. These provisional ballots confirm that voters have been denied the right to vote as a result of SB 14. Nonetheless, the State's own Director of Elections testified that he had no need for information concerning the number of ID-related provisional ballots cast to date. ROA.101153:19-21. In addition to ID-related provisional ballots, Texas ignores the inevitable group of voters who have not tried to vote because they lack an SB 14 compliant ID. Since over a half million registered voters lack SB 14 ID, that number is unquestionably considerable. Those voters, acting entirely rationally in light of SB 14's continued enforcement, are entitled to be equally protected.[3]

[3] Although some of the 600,000 registered voters who lacked an SB 14 ID as of the trial have likely obtained one since then, their ranks are constantly replenished by registration of new voters who lack the necessary ID. Moreover, there are undoubtedly eligible voters who are deterred from registering because they lack the necessary ID to vote even if they register to vote.

II. The District Court Correctly Held that SB 14 Exceeds the Constitutional Limit on Burdens on the Right To Vote.

A. SB 14, as Designed and Implemented, Imposes Unconstitutional Burdens, Far Exceeding Those at Issue in *Crawford*, on Texas Voters.

The right to vote is fundamental. *E.g. Dunn v. Blumstein*, 405 U.S. 330, 333, 336 (1972). Meanwhile, the state also has a strong interest in regulating elections to ensure that they are fair, honest, and orderly, and such regulation will "inevitably affect[]—at least to some degree—the individual's right to vote[.]" *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *see Storer v. Brown*, 415 U.S. 724, 730 (1974). Thus, the Supreme Court has adopted a balancing test to weigh the burdens of a voting restriction against the state interests the restriction furthers. Any burden "[h]owever slight . . . must be justified by *relevant* and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford*, 553 U.S. at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)) (emphasis added). This test is far more rigorous than rational basis review, which would afford citizens no constitutional protection for their right to vote, a right that the Supreme Court has repeatedly acknowledged is "preservative of all [other] rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

The District Court properly applied this balancing test and held that the significant burdens created by SB 14, cannot be justified by the State's valid, but ill-fitting, interests in preventing voter fraud, maintaining voter confidence, and

promoting voter turnout. *See* ROA.27127-27141 (holding that "SB 14's restrictions go too far and do not line up with the proffered State interests").

This is not a case about any voter ID law but this voter ID law. The District Court held that, compared to other strict voter ID laws, SB 14 "provides the fewest opportunities to cast a regular ballot." ROA.27045. As discussed above, over 600,000 registered voters did not have SB 14 ID. ROA.27075. Moreover, the District Court held, on the basis of dozens of detailed pages of findings of fact, that obtaining SB 14 compliant ID requires "significant time, expense, and travel . . . even if a person has the necessary documents, time, and transportation available to do so," which many Texas voters do not. ROA.27130; ROA.27093-27109. For example, some Texas voters could face a commute of up to three hours or more to access an SB 14 ID issuing office, an uphill battle for those voters without access to a vehicle. ROA.27101-102. Therefore, the burdens created by SB 14, well-documented in the record, differ drastically from the lack of evidence of burdens before the Supreme Court in *Crawford*. 533 U.S. at 200-01 ("[T]he evidence in the record does not provide us with the number of registered voters without photo identification.") ("[T]he deposition evidence presented in the District Court does not provide any concrete evidence of the burden imposed on voters who currently lack photo identification.") ("The record says virtually nothing about the difficulties faced by . . . indigent voters."). The substantial trial evidence presented

regarding the burden placed on Texas voters by SB14 exists, in part, because SB 14 is materially different from the Indiana voter ID law, which accepted any Indiana state-issued or federal ID, accepted expired IDs, and, importantly, included an indigency exemption. ROA.27115.[4]

Weighed against these significant burdens, the District Court found the State's purported interests in SB 14 wanting. Many of the State's proffered interests in SB 14 are undeniably valid and important. ROA.27138. But SB 14 overall does relatively little to advance these interests and SB 14's most severe restrictions certainly do not advance these interests. ROA.27137-27141 (noting, *inter alia*, that in-person impersonation voter fraud is rare, and finding that SB 14's

[4] Similarly, SB 14's requirements are far afield from North Carolina's voter ID requirement, as amended. On May 3, 2016, Texas filed a Rule 28(j) letter advising the Court of the District Court of the Middle District of North Carolina's recent decision in *N.C. State Conf. of the NAACP v. McCrory*, No. 1:13CV658, 2016 WL 1650774 (M.D. N.C. Apr. 25, 2016). Among other differences, the North Carolina voter ID law includes a "reasonable impediment" exception that "permits in-person voters who do not have an acceptable photo ID to cast a provisional ballot so long as they complete a declaration stating a reasonable impediment prevented them from acquiring qualifying ID." *Id.*, slip op. at 35. Those voters can present non-photo ID such as a utility bill or a bank statement. *Id.*, slip op. at 36. The provisional ballot must be counted except under limited circumstances. *Id.* The District Court relied heavily on the "reasonable impediment" exception in both its Section 2 and *Crawford* analysis of the voter ID requirement. *Id.*, slip op. at 331-339 (concluding that "North Carolina's voter ID law *with the reasonable impediment exception* does not impose a 'material burden' on the right to vote of any group 'for purposes of the Voting Rights Act'" (quoting *South Carolina v. United States*, 898 F. Supp. 2d 30, 41 (D. D.C. 2012)) (emphasis added)); *see also id.*, slip op. at 432-33 (noting that the *Crawford* claim "may have been a reasonable claim prior to SL 2015-103, but with the enactment of the reasonable impediment exception, it is simply not true today"). SB 14 does not provide any safeguard for voters who are unable to acquire qualifying ID. Therefore, *McCrory* (regardless of its probative value) is entirely inapposite and provides Texas with no support.

strict terms are not justified by the State's legitimate interests).[5] While these ill-fitting interests might justify a generous voter ID law, where the record demonstrates almost no discernible burdens on voters, *see Crawford*, 533 U.S. at 200-01, the interests served by SB 14's strict terms are not "sufficiently weighty" to justify its significant burdens. *Id.* at 191.[6]

In its supplemental brief, Texas does nothing more than restate its claim that *Crawford* stands for the proposition that all voter ID laws, no matter how onerous or restrictive, are constitutional. This simply cannot be the rule. Every voting restriction, regardless of its category, must be evaluated on its own merits. To hold otherwise would eliminate the balancing test in favor of a blank check for states to pick and choose their voters, as Texas did here. The rule Texas promotes is dangerous and dilutes constitutional protection for the right to vote to mere rational basis review. The Constitution does not grant Texas the same leniency to

[5] Texas presented essentially no evidence of in-person impersonation at trial and cites none here. Appellants' Supp. Br. 9. An *Amicus* brief, seeking to create evidence of in-person impersonation fraud that does not exist, describes a 1992 election when people who were not registered voted in two counties, but fails to explain that these people (mostly with expired registrations or new addresses) voted under a peculiar state procedure that allowed them to cast a regular ballot (not provisional) by simply signing a sworn statement that they believed they were registered. Brief of Lawrence Crews as *Amicus Curiae* Supporting Appellants at 10-11. There was obviously no impersonation fraud involved and the problem did not require—and could not have been cured by—a photo ID or any ID. These important points were spelled out in the source on which *Amicus* seeks to rely, LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS at 294 (1996), but were not revealed in the *Amicus* brief.

[6] The Veasey-LULAC Appellees addressed the proper *Crawford* balancing analysis in greater detail in their initial merits briefing and incorporate it fully herein. Veasey-LULAC Br. at 53-62.

discriminate between voters as it does when a constitutionally protected right is not implicated.

Texas argues that "*Crawford* already performed the *Anderson-Burdick* balancing and that "Texas need not relitigate these holdings." Appellants Supp. Br. at 52. But, of course, Texas never litigated *Crawford* because *Crawford* was a case about a materially different Indiana law (including an indigency exemption), in a different context (including 12 to 15 times fewer affected voters), with a very different record. Notably, despite Appellees' extensive briefing on the particular burdens Texas voters face in accessing the necessary SB 14 ID, Texas fails to address these burdens whatsoever. Instead, it argues that *Crawford* stands for the proposition "that the usual burdens in obtaining such ID are minimal." Appellants' Supp. Br. at 53. But there are neither "usual burdens" nor any generic "ID" at issue in this case. The question is whether the specific burdens Texas voters face in obtaining SB 14 ID pass constitutional muster. For the multitude of reasons stated above, in the Veasey-LULAC Appellees' initial merits brief, and in the District Court's opinion, they do not.

B. Plaintiffs Properly Alleged an As-Applied Challenge to SB 14 ID.

Both Texas and some of the *Amici* supporting Texas argue that the Veasey-LULAC Appellees' burden on the right to vote challenge constitutes an "operational" facial challenge rather than an as-applied challenge. Brief of the

States of Indiana, et al. as *Amici Curiae* in Support of Appellants at 17; *see also* Appellants Supp. Br. at 54. That assertion is incorrect.

Amici begin with the premise that the essence of an as-applied challenge is in the limited relief sought. The Veasey-LULAC Appellees agree, and that is precisely the type of relief sought *for this claim.* Contrary to *Amici*'s suggestion, *id.* at 20, Appellees do not seek wholesale invalidation of the statute as a remedy for this claim. The paragraph in the complaint that *Amici* cites was an omnibus request for relief covering all claims. Plaintiffs sought, and the District Court granted, wholesale invalidation of SB 14 on the basis of its impermissible racially discriminatory purpose, not on the basis of the as-applied *Crawford* challenge. ROA.27172; Veasey-LULAC Br. at 62-63.[7]

The issue involves the nature of a voter ID law. Unlike a requirement that all persons must meet, like registering to vote, a voter ID law (at least until all registration cards carry photos) separates eligible voters into two classes of people: those who have been selected as qualified without any further action, and those who must take action in order to become qualified. Analyzing whether such a classification is constitutionally permissible (as-applied to those eligible voters

[7] *Amici* also claim that relief in an as-applied claim can only benefit those actually before the court, Brief of the States of Indiana, et al. as *Amici Curiae* in Support of Appellants at 18, but that is plainly wrong. When the Supreme Court ruled (in the case cited by *Amici*) that grassroots radio ads could not constitutionally be regulated as "electioneering communications," that ruling plainly applied to anyone else engaged in such activity, not simply the plaintiff Wisconsin Right-to-Life, Inc. *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449 (2007).

who must act) depends on various factors, such as the nature of the right involved, the location of the dividing line between favored and disfavored persons, and the degree of burden for a disfavored person to join the favored class.

In this case, Appellees challenged both the Texas Legislature's inexplicable selection process when it decided which voters should be favored, as well as the degree of burden the disfavored voters face. This was a challenge *as-applied to* the categories of voters selected by the Texas legislature to burden with additional tasks in order to vote. Appellees sought relief only as-applied to the disfavored class. *See* ROA.26796 (Plaintiff's Proposed Findings of Fact and Conclusions of Law at ¶ 177) (noting that plaintiffs "mount an as-applied challenge as to those citizens who lack SB 14 ID and who have not obtained a SB 14 disability exemption" and acknowledging that "[t]he appropriate relief as to this claim, therefore, should be tailored to these individuals"). The District Court repeatedly acknowledged that Plaintiffs' challenge was as-applied and analyzed it as such, ROA.27060, 27115, 27121, 27129, 27167, but deferred deciding on precise relief because of its wholesale injunction based on the discriminatory purpose holding. ROA.27167-68 (noting that the injunction entered on the basis of the discriminatory purpose holding was "sufficient to remedy the Plaintiffs' as-applied challenge to the unconstitutional burden that SB 14 places on the right to vote" and

thus "[n]o further delineation of relief as to those claims is required at this time"). The class of those affected was not defined by Appellees but by the statute itself.

For these reasons, Texas and *Amici* are simply wrong in their view that this is not a proper as-applied claim.

III. The District Court's Factual Finding that SB 14 Is Infected with Racially Discriminatory Purpose Should Be Affirmed.

Texas emphasizes the deference that courts pay to actions of legislatures, but that deference does not eliminate a court's obligation, at least as sacred, to root out and bar racial discrimination. "When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977). The District Court here recognized, as the Supreme Court did in *Arlington Heights*, that the legislative process typically has to balance "competing considerations." *Id.* at 265. "But racial discrimination is not just another competing consideration." *Id.* Rather, an official act done for purposes of racial discrimination "has no credentials whatsoever." *City of Richmond v. United States*, 422 U.S. 358, 378 (1975).

Whether discrimination is one of the motivating purposes behind a legislative act is a question of fact. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573–74 (1985); *United States v. Brown*, 561 F.3d 420, 432 (5th Cir. 2009) ("We review a finding of intentional discrimination in a § 2 vote dilution

case for clear error."). As such, the task of a reviewing court is limited by Rule 52 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 52. "This standard dictates that '[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" *Brown*, 561 F.3d at 432 (quoting *Anderson*, 470 U.S. at 573-74).

Texas, however, presents several meritless arguments for why this Court should abandon Rule 52 and review the District Court's finding *de novo*, inviting this Court to set aside the District Court's findings as if this Court were the initial fact-finder.

Appellees set forth the voluminous facts related to the District Court's finding of discriminatory purpose in their original merits brief and incorporate them here. *See* Veasey-LULAC Br. at 6-16, 31-37. This Part of the Brief will first briefly dispose of Texas's formulaic legal objections to the District Court's fact-finding process and then address Texas's quarrels with the District Court's treatment of particular evidence.

A. Texas's Preliminary Objections.

Texas couches several of its arguments as legal issues in an attempt to change the standard of review from clear error to de novo review. Each of these is meritless, as set forth briefly below.

First, Texas argues that a finding of discriminatory purpose in state legislation requires a heightened standard of proof, which it calls the "clearest-proof" standard. *See, e.g.*, Appellants' Supp. Br. at 14. But there simply is not any "clearest-proof" standard for discriminatory purpose findings and the statutory interpretation cases Texas cites for this standard are inapposite to the discriminatory purpose context. This meritless argument is addressed in full in Appellees' merits brief in Sections I.B.1 and I.B.2. Veasey-LULAC Br. at 39-41.

Next, Texas argues that the extensive discovery in this case somehow precluded the District Court's consideration of circumstantial evidence. Appellants' Supp. Br. at 18-21. The argument is, once again, unsupported and meritless. *See* Veasey-LULAC Br. at 42. Texas also asserts that *Crawford* immunizes SB 14 from a discriminatory purpose claim. Appellants' Supp. Br. at 21-22. That is a frivolous argument, since *Crawford* neither involved nor decided any discriminatory purpose claim. The fact that a voter ID bill *can* be motivated by legitimate purposes does not mean that SB 14 *was* free from illegitimate purposes.

Finally, Texas argues that the District Court "erred by finding a discriminatory purpose when there is no discriminatory effect." Appellants' Supp. Br. at 23. Not only is this argument premised on a misreading of the case law, *see* Veasey-LULAC Br. at 41, but also there is plainly discriminatory effect here. *See infra* Part IV. Texas's unsupported argument about the relevance of voter turnout is refuted below, *see infra* at Section IV.C.1, and also ignores the fact that rights are personal. As the Supreme Court said over 100 years ago: "[The argument] makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one." *McCabe v. Atchison, T&S.F.R.Co.*, 235 U.S. 151, 161 (1914); *see also Hunter v. Underwood*, 471 U.S. 222, 225 (1985) (discriminatory effect is shown where those affected are disproportionately of a minority race).

B. The District Court's Careful Evaluation of the Evidence Was Proper.

This case is marked by a massive trial record, comprising two weeks of long trial days with over 40 live witnesses, 25 deposition witnesses (many on video), and over 3,500 exhibits. The District Court's opinion is 147 pages and includes 588 footnotes. The number of discrete, detailed facts is very large.

As in any case of this sort and magnitude, the District Court did not single out any particular fact or facts as decisive but instead wove a tapestry of facts depicting SB 14's context, its consideration in the Legislature, its passage, and its

effects. That is precisely what trial courts are asked to do again and again, and the judicial system credits them with the ability to separate the wheat from the chaff. That is why judicial review of findings of fact is narrowly limited.

Texas seizes upon a minute fraction of the evidence before the District Court, and asks this Court to substitute different findings more to Texas's liking. Apart from the obvious fact that the State is asking this Court to re-find and reweigh evidence in disregard of Rule 52, Texas's argument is misplaced for two principal reasons. First, the isolated examples of evidence claimed to be less-probative or non-probative do not undermine the District Court's discriminatory purpose finding, which was amply supported by a massive array of evidence. Second, in some instances, Texas is mistaken in its description of the factual record.[8]

1. The District Court's Discriminatory Purpose Finding Is Built on a Strong Foundation of Probative Evidence.

The District Court considered precisely the types of evidence that *Arlington Heights* listed as probative of discriminatory intent, including historical background, discriminatory effect, legislative history including any departures

[8] The three-judge panel of this Court found that there was indeed evidence of discriminatory purpose. *Veasey*, 796 F.3d at 503. The panel did not find any errors of fact. Rather, it found that some evidence that Texas contests had questionable probative value, and therefore vacated the discriminatory purpose finding and instructed the District Court to consider the finding again in light of its opinion. *Id.* at 520. As described below, Appellees believe the panel was mistaken for the same reasons Texas is mistaken.

from the substantive or procedural norms, and contemporary statements by decision-makers. *Arlington Heights*, 429 U.S. at 266-68. There is no disagreement that these are the categories of evidence that courts should consider in evaluating discriminatory purpose.

Contrary to Texas's arguments, a finding of fact, even an ultimate finding of fact, is not like a balloon, where a single pinprick causes deflation. A better analogy is a brick building, where removal of some bricks does not necessarily harm the structure unless the bricks removed are so numerous or strategically located as to cause instability of the structure. This is the crux of clear error review. Although appellants, as here, often engage in nitpicking disagreements with particular pieces of evidence, an appellate court must accept a finding of fact if it is "plausible in light of the record viewed in its entirety." *Brown*, 561 F.3d at 432 (quoting *Anderson*, 470 U.S. at 573-74).

2. Appellants' Quarrels with the Evidence Cannot Withstand Scrutiny.

Against this background, this Section addresses the categories of evidence challenged by Texas (and questioned by this Court's three-judge panel). They are chiefly four: (1) evidence of the history of discrimination; (2) statements of SB 14 opponents; (3) post-enactment statements of supporters; and (4) the procedural history of SB. 14.

The District Court's consideration of historical discrimination. Texas argues that the District Court relied too heavily on long-ago discrimination (through the 1960s). The State claims that examples of recent discrimination are "woefully insufficient" and too limited geographically. Appellants' Supp. Br. at 25. These arguments amount to little more than a request for this Court to reweigh the evidence before the District Court.

More fundamentally, the actual record defies this alleged paucity of recent examples of discrimination. While the District Court necessarily had to summarize massive collections of facts in order to issue an opinion of manageable size, the record in this case includes evidence of almost countless recent instances of discrimination in every corner of the state. Many of these examples were contained in the testimony and report of expert witness George Korbel, which were repeatedly referred to by the District Court. ROA.27029, 27031, 27034-35, 27037, 27073.

Korbel's report included at least a dozen examples of voting discrimination in just the five years preceding trial, including cases, ROA.9988-9990, 10004,[9] and Section 5 objections, ROA.44765-44766. Going back somewhat further, but still obviously in the "recent" category, Korbel listed dozens of additional cases since

[9] The specific cases referred to are: *Hubbard v. Lonestar Community College District*; *Fabela v. City of Farmers Branch*; *Hernandez v. Nueces County; Vasquez-Lopez v. Medina County*; *Petteway v. Galveston County*; and *Benavidez v. City of Irving.*

1970, ROA.10003-10004, 44717-44721, 44724, 44741-44752, and approximately 200 Section 5 objections since 1975, ROA.44766-44781, including seven from 2000-2008, 65 from the 1990's, 53 from the 1980s, and 73 from the 1970s.[10] The objections alone covered laws and official actions emanating from the State (more than 20) and from county and other local governments in more than 100 of Texas's 254 counties. Plainly, the District Court's finding that Texas has a continuing history of racial discrimination in voting was an extreme understatement, and Texas's attempt to claim otherwise is an embarrassment.[11]

Statements of SB 14 opponents. The District Court's review of the facts relating to the procedural history of SB 14, beginning with its antecedents in 2005, occupied 25 pages and 135 footnotes, citing many legislative documents, statements by legislators during the course of the process, personal conversations, and, in some cases, personal inferences drawn from events directly involving the testifying witness. From this exhaustive description, Texas has plucked out a single 28-word sentence wherein the District Court noted that SB 14 opponents "testified that SB 14 had nothing to do with voter fraud but instead had to do with racial discrimination." ROA.27070; Appellants' Supp. Br. at 26 (arguing that

[10] These Section 5 objection figures were confirmed by Texas's own exhibits. ROA.100215.

[11] This Court's panel faulted what it called the District Court's "heavy reliance" on long-ago and geographically narrow evidence, *Veasey*, 796 F.3d at 499-501, but this view was apparently based on the same limited (and incorrect) view of the numerous examples of recent discrimination the record actually contained.

"[s]peculation by a legislator who *opposed* a law cannot prove that legislators who voted *for* the law acted with improper motives"). But, regardless of this testimony's probative value, there is no reason to believe that the District Court's finding of discriminatory intent rested on this one piece of evidence. Notably, the District Court's summary of the most probative evidence informing the intent finding does not mention this testimony whatsoever. ROA.27075.

This type of reweighing of the evidence—picking out a sliver of evidence amongst a voluminous record and assuming the District Court relied heavily upon that sliver—is entirely improper under clear error review. *See also* Veasey-LULAC Br. at 43.[12]

Post-enactment statements of bill supporters. Courts deal every day with legislative intent and are well able to sort out the probative from the valueless. Under *Arlington Heights*, post-enactment statements are often likely to be the only significant direct evidence of discriminatory purpose. Indeed, the Supreme Court's acknowledgment that in some cases legislators may be called to testify concerning the purpose of an official action of course means they would be testifying *after* enactment of the legislation. *Arlington Heights*, 429 U.S. at 268.

[12] This Court's panel assumed that the District Court "relied to a large extent" on these pieces of testimony, and held that the District Court's "heavy reliance" on this speculation by opponents of SB 14 was "misplaced." *Veasey*, 796 F.3d at 501. Apart from the lack of a basis for believing the District Court relied heavily on this testimony for its finding, this view of the panel was a forbidden reweighing of the evidence.

Nonetheless, Texas assigns error to the District Court's alleged reliance on "isolated" statements of officials. Appellants' Supp. Br. at 27. But when the State complains about the remarks at issue, it is not targeting backbenchers, but a former chair of the election committee that reported out a predecessor of SB 14 (Representative Todd Smith) and the counsel to Senate President Dewhurst (Bryan Hebert), a man who was at the very center of the legislation as it moved through the Legislature. Moreover, this Court's panel inaccurately characterized Bryan Hebert's statements as post-enactment remarks. *Veasey*, 796 F.3d at 502. In fact, the relevant statements were made in January 2011, prior to the passage of SB 14. ROA.39225-39226.

In any event, both these men made statements demonstrating that there was general knowledge at the time that SB 14 was enacted that SB 14 would negatively impact minority voters—*see* ROA.39225-39226 (statements by Hebert to legislators, prior to passage, expressing doubt that SB 14 could receive preclearance because of its racially discriminatory impact and urging the legislature to expand the list of accepted IDs) and ROA.100339-40 (statement by Todd Smith that it was "common sense" that SB 14 would disproportionately affect minorities).

This knowledge, established through Hebert pre-enactment warnings and Representative Smith's testimony about his knowledge at the time of SB 14's

passage, as well as other evidence, constitutes one of many building blocks in the District Court's ultimate finding of discriminatory purpose.[13]

The District Court also considered other contemporaneous statements of several of the legislative leaders of the bill, particularly their refusal or inability to explain the bill during its consideration. ROA.27052. When asked about SB 14's purpose and effect while on the legislative floor, Senator Fraser (and SB 14 co-sponsor) responded: "I am not advised." ROA.27052. These highly revealing contemporaneous professions of ignorance were matched by sponsors' post-enactment amnesia. ROA 27158-27159.

No evidence could be more supportive of the District Court's finding.[14]

The legislative process. Texas's final quarrel presents nothing more nor less than a plea to this Court to make a *finding* of *all* the facts in line with their view of what the procedural history of the legislation shows. The State views that history of the succession of shortcuts as motivated solely by the need to overcome determined opposition and a desire to comply with constituent sentiment.

[13] Another building block was Texas's picking and choosing of permissible IDs, including types more often held by white voters. The evidence showed that these facts were known by publicly available statistics. ROA.27156. This public knowledge distinguishes this case from the North Carolina case, *N.C. State Conf. of the NAACP v. McCrory*, No. 1:13CV658, 2016 WL 1650774 (M.D. N.C. Apr. 25, 2016), where that court found no evidence that legislators knew of the racial composition of the chosen and rejected categories of ID. *Id.*, slip op. at 397-98.

[14] The panel acknowledged that Hebert and Smith's statements were "probative in theory," but held that the District Court placed "inappropriate reliance" on this evidence because it "may not be the best indicia of the Texas Legislature's intent." *Veasey*, 796 F.3d at 502. This constitutes an impermissible reweighing of the evidence.

Appellants' Supp. Br. at 29-31. But the District Court took this view into account, and, based on the mass of evidence, found it insufficient.

A need to overcome determined opposition may often produce heavy-handed tactics that do not necessarily amount to discrimination. Here, however, the District Court noted tactics that went far beyond the norm and, importantly, stifled and rejected inquiry in a manner not explainable by the mere need to pass a bill that had previously been bottled up. Indeed, the District Court specifically observed that the procedurally unusual fast track of SB 14 was implemented in a way that not only ensured passage but also avoided debate, even though some of the provisions were radical departures from the previous bills.[15]

The District Court likewise had ample evidence tending to show that reliance on public opinion polls to support SB 14 was a sham. Such polls, which asked participants if they supported a general ID requirement, might have supported one of the earlier Texas bills but say nothing about the public's support for the specific, and unduly harsh, provisions of SB 14. This case centers on SB 14, not any generic voter ID law or any previous Texas bill. SB 14 was drafted to go

[15] It is unclear whether prior drafts of the voter ID law would have passed constitutional muster. However, the Legislature's choice to adopt increasingly strict provisions, culminating in SB 14, is at the heart of this case. Texas's lawyers' erroneous belief that *Crawford* immunizes any voter ID bill may have been the same thinking that animated legislators in 2011. If so, they should have remembered the rule of *Western Union Telegraph Co. v. Foster*, that "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end." 247 U.S. 105, 114 (1918).

far beyond the earlier bills, without any indication of support from public opinion polls. It was also drafted to be far harsher than the Indiana law, even while supporters were selling SB 14 by assurances that it was just like the Indiana law. Given the foregoing, despite Texas's disagreement, the District Court's interpretation of the evidence regarding the procedural departures was plausible and valid. *Brown*, 561 F.3d at 432 ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse." (quoting *Anderson*, 470 U.S. at 573-74)).[16]

3. The District Court's Finding of Discriminatory Purpose Should Be Affirmed.

Overall, the State's arguments are the same ones that it presented to the District Court. The District Court considered all viewpoints, weighed the evidence, and, with great care, made very specific findings of fact. The State's argument is nothing more than a quarrel with how the District Court viewed or weighed that

[16] This Court's panel, while saying it was not reweighing the evidence, expressed concern about "undue reliance" on procedural departures. *Veasey*, 796 F.3d at 503. In so doing, it took an unusually narrow view of what constitutes a procedural departure. *Id.* ("The rejection of purportedly ameliorative amendments does not itself constitute a procedural departure; rather, the court must evaluate whether opponents of the legislation were deprived of process."). For that proposition, it cited only a case that simply affirmed a factual finding of no discrimination by a District Court. *All-State Ins. Co. v. Abbott*, 495 F.3d 151, 161 (5th Cir. 2007). Appellees are not aware of any such rule narrowing a district court's realistic view of evidence. The panel directed the District Court to reconsider the procedural history in light of Texas's view of the context—namely that these tactics were employed after "repeated attempts to pass voter identification bills were blocked," *Veasey*, 796 F.3d at 503—which was something the District Court had already done. ROA.27049 ("SB 14 was the Texas Legislature's fourth attempt to enact a voter photo ID law.").

evidence. An appellate court cannot accept Texas's arguments on this issue except by invading the province of the trier of fact.

Texas also contends that this fact or that fact does not add up to discrimination, but that is not how the District Court proceeded. It elevated no single fact but instead took all the evidence into account and weighed it to make an ultimate finding. The factual finding of intent here is not "infirm" but amply supported, not infected by any legal error, and manifestly far from clearly erroneous. It should be affirmed.

IV. SB 14 Has a Discriminatory Result in Violation of Section 2 of the VRA.[17]

A. The Section 2 Standard.

Section 2 of the Voting Rights Act prohibits a state from imposing any voting qualification, prerequisite, standard, practice or procedure "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race." 52 U.S.C. § 10301. A voting practice violates this prohibition if, "based on the totality of circumstances, it is shown that the political processes . . . are not equally open to participation by members of a [protected class] in that its

[17] The Veasey-LULAC Appellees continue to subscribe and refer to the arguments stated in other Appellees' briefs regarding the Section 2 results claim. *See* Veasey-LULAC Br. at 46. This Part serves to clarify the standard, muddied by Texas's flawed portrayal, and respond to some of the newly asserted or expanded arguments in Texas's supplemental briefing.

members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id*.

"The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities by black and white voters" to participate in the political process. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Thus, in order to demonstrate that a voting prerequisite, such as a photo identification requirement, violates the results test of Section 2, plaintiffs must demonstrate (1) that the law has a disparate impact on minority voters and (2) the disparate impact is caused by its interaction with the ongoing effects of racial discrimination. ROA.27144; *Veasey*, 796 F.3d at 504; *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated on other grounds by* 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

While many Section 2 cases address vote dilution, the same underlying assessment of a law's impact in conjunction with social and historical conditions of discrimination applies here. Ultimately, the Section 2 totality of the circumstances analysis requires a "searching practical evaluation of the past and present reality" and a "functional view of the political process." *Gingles*, 478 U.S. at 45 (internal quotation marks omitted). The determination is "peculiarly dependent upon the facts of each case, and requires an intensely local appraisal of the design and

impact of the contested electoral mechanisms." *Id.* at 79 (internal quotation marks and citations omitted). Given the intensely fact-specific nature of the inquiry, Section 2 results determinations are reviewed for clear error. *Id.*

B. The District Court's Section 2 Finding and the Panel's Affirmance.

The District Court held that SB 14 violates Section 2 of the Voting Rights Act because, *inter alia*,

- SB 14's specific requirements significantly and disproportionately impact minority voters;
- Texas's history of official discrimination and the ongoing effects of that discrimination interact with SB 14 such that its requirements fall predictably and "significantly more heavily" on minority voters;
- the discriminatory access to voting caused by SB 14, *supra*, is especially harmful to minority voters given Texas's racially fractured political system characterized by racially polarized voting, racially charged campaigns, and the systemic underrepresentation of minority elected officials;
- and, perhaps most importantly, the overall process reflected the Texas legislature's decision to restrict the acceptable forms of identification to those disproportionately held by Anglo voters, exclude forms of identification often held by minority citizens, and reject ameliorative

> amendments that would have eased SB 14's discriminatory effects without undermining legitimate state interests.

In other words, the disparate impact is not a coincidence or happenstance but rather a foreseeable and avoidable result of the Legislature's choices in light of Texas's history of official discrimination and its lingering effects. The District Court engaged in precisely the functional and searching evaluation of a law's interaction with social and historical conditions that Section 2 requires.

Carefully reviewing the District Court's view of the legal standard and its findings, the panel of this Court correctly observed:

> [W]e conclude that the District Court performed the 'intensely local appraisal' required by *Gingles*. . . . The District Court thoroughly evaluated the 'totality of the circumstances,' each finding was well-supported and the State has failed to contest many of the underlying factual findings. . . The District Court . . . tethered its holding to two findings. First, the court found a stark, racial disparity between those who possess or have access to SB 14 ID, and those who do not. Second, it applied the Senate Factors to assess how SB 14 worked in concert with Texas's legacy of state-sponsored discrimination to bring about this disproportionate result.

Veasey, 796 F.3d at 512-13(citations omitted).

C. Appellants' Objections.

Texas fails even to allege that the District Court's underlying findings constitute clear error. Instead, Texas attempts to assign legal error to the District Court even though what it seeks to do is to substitute its own preferred findings for those of the District Court.

1. Rates of ID Possession Are a Proper Measure of Disparate Impact.

The District Court relied on extensive statistical evidence and expert testimony, which was largely uncontradicted,[18] to conclude that SB 14's requirements disproportionately impact minority voters in Texas:

> It is clear from the evidence—whether treated as a matter of statistical methods, quantitative analysis, anthropology, political geography, regional planning, field study, common sense, or educated observation—that SB 14 disproportionately impacts African-American and Hispanic registered voters relative to Anglos in Texas. The various studies of highly credentialed experts compel this conclusion. And while Defendants criticized Plaintiffs' experts' methods on cross-examination and with proffered experts of their own, they failed to raise a substantial question regarding this fact.
>
> To call SB 14's disproportionate impact on minorities statistically significant would be an understatement. Dr. Ansolabehere's ecological regression analysis found that African-American registered voters were 305% more likely and Hispanic registered voters 195% more likely than Anglo registered voters to lack SB 14-qualified ID. Drs. Barreto and Sanchez's weighted field survey, a different but complementary statistical method, found that Hispanic voting age citizens were 242% more likely and African- American voting age citizens were 179% more likely than Anglos to lack adequate SB 14 ID. This evidence was essentially unrebutted and the Court found the experts' methodology and testing reliable.

ROA.27145. Thus, the District Court correctly held that SB 14 causes a disproportionate impact on minority voters.

[18] ROA.27145 ("Even Dr. Hood, Defendants' expert witness, admitted that his findings demonstrated a disproportionate impact with respect to the rate of qualified SB 14 ID possession for African-Americans and Hispanics compared to those of Anglos.").

Texas does not quarrel with these factual findings. Instead, Texas seeks to avoid them by arguing that as a matter of law a Section 2 violation categorically "requires proof of a disparity in voter *turnout* or *registration*." Appellants' Supp. Br. at 34 (emphasis added). According to Texas, this "rule" means racially disparate ID possession rates cannot be used to show discriminatory effect. This strikingly novel evidentiary rule is contradicted by both this Court's precedent[19] and common sense.

For this wooden proposed rule, Texas cites *LULAC Council No. 4344 v. Clements*, 999 F.2d 831(5th Cir. 1993) (en banc). But that is assuredly not what this Court said in that case, and it is a disservice to Judge Higginbotham to misquote him in this way. What this Court actually said was that in order to satisfy certain Senate factors—those relating to the state's history of official discrimination and the extent to which that discrimination "hinder[s minority voters'] ability to participate effectively in the political process"—plaintiffs had to prove minority participation was in fact depressed. *Id.* at 863, 867. These factors are not required for a Section 2 violation, *see Gingles*, 478 U.S. at 48 n.15, and relate to the societal background of a voting law rather than the impact of the law

[19] Texas's proposed rule clearly contradicts this Court's decision in *Mississippi State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400 (5th Cir. 1991). Voter registration, just like possession of SB 14 ID, is merely a prerequisite to voting and yet this Court has clearly held that a disparate effect on registration rates can give rise to a Section 2 violation. *Id.*

itself. The District Court properly applied this factor, ROA.27149, and the panel correctly agreed with this finding. *Veasey*, 796 F.3d at 510-11.

Even within this more limited context, *Clements* did not create the rigid rule Texas suggests. This Court found that plaintiffs had failed to meet the standard because they "offered no evidence of reduced levels of black voter registration, lower turnout among black voters, *or any other factor tending to show that past discrimination has affected their ability to participate in the political process.*" *Clements*, 999 F.2d at 867 (emphasis added).[20] Thus, to the extent this Court's *Clements* language applies beyond the Senate factors, it actually supports the District Court, not Texas.[21]

[20] In their most recent Rule 28(j) letter, Texas asserts that the District Court in *N. C. Conf. of the NAACP v. McCrory* cited *Clements* for the proposition that disparate impact can only be proven through voter turnout or registration. This, once again, is simply not true. Rather, the Court cited *Clements* as additional authority for the entirely separate proposition that Section 2 plaintiffs "bear[] the burden of demonstrating that the inequality of opportunity is caused by or linked to social and historical conditions that have [produced] or currently produce discrimination against members of the protected class" and therefore plaintiffs "cannot establish a Section 2 violation merely by showing a disproportionate impact or burden." *N. C. Conf. of the NAACP v. McCrory*, No. 1:13CV658, 2016 WL 1650774, slip op. at 203-04 (M.D. N.C. Apr. 25, 2016) (internal quotation marks and citations omitted) (second alteration in the original).

[21] Texas also cites *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012), for the proposition that plaintiffs must "establish a disparity in voter turnout or registration." Appellants' Supp. Br. at 35. But the opposite is true. In *Gonzalez*, the plaintiffs did establish lower turnout. *Gonzalez*, 677 F.3d at 406. However, the Ninth Circuit held that the plaintiffs failed to establish that the voter identification provision had a discriminatory result because they produced no evidence demonstrating that Latinos were less likely to possess or less able to acquire the forms of identification required. *Id.* at 407. In other words, the plaintiffs' claim in *Gonzalez* failed because they did not have precisely the evidence of disproportionate impact that was adduced in this case.

Just as this Court, in *Operation Push*, found it "difficult to conceive a more appropriate measure of the discriminatory effect of [registration] laws than figures representing disparity in registration rates between all black and white eligible voters in the state," it is difficult to conceive of a more appropriate measure of the discriminatory effect of a voter identification law than figures representing disparity in identification possession between minority and white eligible voters. *Mississippi State Chapter, Operation Push, Inc. v. Mabus,* 932 F.2d 400, 409 (5th Cir. 1991).

Meanwhile, Texas's theory is unworkable as applied to this case. Voter registration is irrelevant because SB 14 makes registration insufficient to vote. Voter turnout is likewise of dubious value because it is so volatile, affected by countless factors. ROA.26632, 43976-43978. Therefore, an increase or decrease in turnout tells the court little about SB 14's effect.

For these reasons, this Court's panel correctly rejected Texas's novel rule and agreed with the District Court's finding of disparate impact:

> Section 2 asks whether a standard, practice, or procedure results in "a denial or *abridgement* of the right . . . to vote." Abridgement is defined as "[t]he reduction or diminution of something," while the Voting Rights Act defines "vote" to include "all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted." The district court's finding that SB 14 abridges the right to vote by causing a racial disparity in voter ID possession falls comfortably within this definition.

Veasey, 796 F.3d at 506 n.21 (citations omitted) (emphasis in original).[22]

2. The District Court Properly Found that SB 14 Results in an Abridgment of the Right To Vote on Account of Race.

Texas correctly asserts that Section 2 does not and cannot "invalidate laws based on the predicted effect of poverty, age, or some other characteristic hat happens to correlate with race." Appellants' Supp. Br. at 40. The Section 2 totality of the circumstances analysis indeed requires more in order to determine that a "certain electoral law . . . interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters." *Gingles*, 478 U.S. at 47. In making this determination, a court must consider the connections between historical discrimination, current social conditions, and the particular electoral law as well as the neutral policy reasons for the challenged electoral law. The District Court properly considered all of these factors and found that "SB 14 does not disproportionately impact African-Americans and Hispanics by mere chance. Rather, it does so by its interaction with the vestiges of past and current racial discrimination." ROA.27150-51.

[22] Texas also argues that the District Court's Section 2 results finding was flawed because it "does not account for the ability to get an ID such as a driver's license for a free EIC, and it does not account for the fact that seniors and disabled citizens can vote by mail without ID." Appellants' Supp. Br. at 33. But this, of course, is not true. The District Court devoted over twenty pages of factual findings to the burdens Texas voters face in obtaining the limited forms of ID required by SB 14. ROA.27093-27111.

After establishing disparate impact, the District Court did not simply "catalogue historical discrimination and background socioeconomic conditions." Appellants' Supp. Br. at 41. Rather, the District Court found that the burdens of SB 14 fall disproportionately on minorities (1) by the choices made in SB 14, and (2) because "African-Americans and Hispanics are substantially more likely than Anglos to live in poverty throughout Texas because they continue to bear the socioeconomic effects caused by discrimination." ROA.27088.

This Court's panel concurred with the District Court's analysis. The panel noted that the Seventh Circuit has adopted a more stringent Section 2 test (compared to other circuits), which requires plaintiffs to show that a challenged law "combine[s] with the effects of *state-sponsored* discrimination to disparately impact minorities." *Veasey*, 796 F.3d at 504 n. 17 (citing *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014)). The panel held that it did not need to "decide whether the Seventh Circuit's standard is the proper one to apply in this context as the District Court's finding satisfied even that heightened standard." *Id.* Thus, this case does not even present the harder Section 2 question when a voting practice interacts solely with *private* discrimination to create a disproportionate result.

Next, the District Court held that the Texas legislature enacted SB 14 despite its *foreseeable* and *avoidable* effects on minorities. The District Court relied on evidence presented at trial to support its findings that the Texas Legislature was

well aware of the disproportionate impact that a stringent voter ID law would have on minority voters in Texas. ROA.27156. Nonetheless, it crafted a law that exacerbated rather than ameliorated this problem. It accepted amendments that would broaden Anglo voting, such as concealed handgun permits and military IDs, and rejected amendments that would broaden minority voting, such as student IDs, state government employees IDs, and federal civil service IDs. ROA.27073. Ultimately, "[s]ignificant amendments proposed for SB 14, which would have expanded the type of IDs accepted, allowed the use of expired IDs, and provided exemptions for indigents, were summarily rejected despite the fact that bill sponsors knew that the harsh effects of SB 14 would fall on minority voters" and despite the fact that the amendments "would not have detracted from the legislations stated purpose." ROA.27150, 27157.

The three-judge panel of this Court noted that, while these facts alone may not prove intent, they demonstrate a lack of responsiveness to the minority community, "something akin to the difference between negligence and intent." *Veasey*, 796 F.3d at 511 n. 27. This "negligence," as the panel phrased it, toward a law's foreseeable and harmful effects on minority voters' ability to exercise the franchise is precisely the type of subtle discrimination that the Section 2 results test is meant to prevent. *Cf. Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522 (2015) ("Recognition of

disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.").

Finally, the Texas Legislature took these steps, in full knowledge of their effect on minority voters, in order to pass a law that was poorly tailored to its goals and that impose unnecessarily strict requirements. The Texas Legislature undoubtedly has a valid governmental interest in preventing voter fraud and increasing public confidence in elections. But a disparate impact analysis requires a court to consider whether a law that harms minority voters actually *serves* a legitimate purpose. Disparate impact analysis is designed to eliminate laws that "function unfairly to exclude minorities . . . without any sufficient justification." *Inclusive Communities Project, Inc*., 135 S. Ct. at 2522.

As the District Court detailed at length, SB 14 was ill-fitted to its goals. *See, e.g.*, ROA.27139 (noting that requiring voters to produce an SB 14 ID would not stop non-citizens from voting) and ROA.27042 (noting that SB 14 does nothing to address absentee voter fraud, which is well documented).

But more importantly, the District Court held, "Defendants did not provide evidence that the discriminatory features of SB 14 were necessary to accomplish any fraud-prevention effort [or any other stated purpose]." ROA.27158; *see also* ROA.27138 ("SB 14's proponents were unable to articulate any reason that a more

expansive list of photo IDs would sabotage the [state's fraud elimination] effort."). To the contrary, "the proponents who appeared (only by deposition) testified [that] they did not know or could not remember why they rejected so many ameliorative amendments." ROA.27158.

On the basis of *all* the foregoing, the District Court properly held that SB 14 results in unlawful discrimination against minority voters.

3. The District Court's Holding Is Properly Limited and Will Not Invalidate Ordinary Election Administration Procedures.

The District Court's holding will not provoke the parade of horribles Texas suggests because the District Court's analysis was more limited than Texas wishes to recognize. The Texas Legislature's knowing choice to design SB 14 in a manner that unduly burdens minority voters combined with its inability to justify these discriminatory features with any legitimate state purpose are key features of the District Court's Section 2 analysis.

"Suits targeting such practices reside at the heartland of disparate-impact liability." *Inclusive Communities Project, Inc.*, 135 S. Ct. at 2522. As the Supreme Court recently explained in the housing context, "[d]isparate-impact liability mandates the removal of artificial, arbitrary, and unnecessary barriers, not the displacement of valid governmental policies." *Id.* (internal quotation marks omitted). The District Court used the Senate factors related to the tenuousness of

the policy underlying the challenged law and the law's lack of responsiveness to the minority community in order to identify SB 14's barriers as "artificial, arbitrary, and unnecessary," rather than the necessary result of a legitimate state policy. *Id*.; *see* ROA.27149-51.[23] The panel correctly affirmed the District Court's analysis as to these factors.

Thus, Section 2 is "not an instrument to force [Texas] to reorder [its] priorities," but rather requires Texas to seek to achieve those priorities "without arbitrarily creating discriminatory effects." *Inclusive Communities Project, Inc*., 135 S. Ct. at 2522. Since the District Court's analysis relied on far more than evidence of socioeconomic disparities linked to race, the parade of horribles raised by Texas is nothing more than a red herring.[24] The District Court's holding—which applied well-established Section 2 law and complies with generally accepted

[23] "An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies." *Inclusive Communities Project, Inc*., 135 S. Ct. at 2522.

[24] In their May 3, 2016 Rule 28(j) letter, Texas cites *McCrory* for the proposition that any Section 2 scrutiny of SB 14 is "inherently standardless" because it lacks a "reasonable alternative benchmark." But, to the extent *McCrory* is probative, it is irrelevant. In that case, the court's concerns about benchmarks did not relate to the voter ID claim and instead related to early-voting, same-day registration, out-of-precinct voting, and pre-registration. *N.C. State Conf. of the NAACP v. McCrory*, No. 1:13CV658, 2016 WL 1650774, slip op. at 421-22 (M.D. N.C. Apr. 25, 2016). Unlike the number of early voting days or the time period for registration, the SB 14 ID is a brand new voting requirement that Texas seeks to layer on top of its prior system and therefore does not need a "benchmark" comparison. SB 14's effects can be evaluated on its own merits. Its disproportionate impact on minorities is not seriously contested.

disparate impact principles—does not endanger basic voter registration requirements, age limits, or Tuesday elections. Appellants' Supp. Br. at 44-46.

For the same reasons discussed above, Texas's "constitutional avoidance" arguments are without merit. *See* Appellants' Supp. Br. at 46-49. Texas's argument that the District Court's decision extends the Voting Rights Act to cases "without evidence of an effect on voter behavior and based instead on mere socioeconomic disparities," *id.* at 47, is simply wrong. Wherever the outer bounds of Congress's enforcement power under the Fourteenth and Fifteenth Amendments are, this case does not approach them.

V. The District Court's Poll Tax Ruling Should Stand Whether the Issue Is Live or Moot.

At the time of the District Court judgment, SB 14 created a regime wherein "a voter without an approved form of SB 14 ID and without a birth certificate, in order to vote, [was required to] pay a fee to receive a certified copy of his or her birth certificate, which is functionally essentially for an EIC." ROA.27164. It was abundantly clear that the EIC and EIC birth certificate, which cost a minimum of $2.00, were nothing more than tickets of admission to the ballot box because they both stated in bold letters: "For Elections Purposes Only. Cannot Be Used For Identification." ROA.38297-ROA.38304. Therefore, the District Court correctly held that this fee constituted an unconstitutional poll tax in violation of the Fourteenth and Twenty-Fourth Amendments. ROA.27166.

Since that time, the Texas Legislature has responded to that judgment by enacting SB 983, which eliminates the birth certificate fee at issue. That enactment should not disrupt the District Court's judgment. If, as Appellees believe, the issue is still live because of the State's ability to reinstate the fee, the judgment of the District Court should be reviewed in this Court and affirmed. If, however, the issue is deemed to be moot because the losing party below enacted SB 983 and thus removed the poll tax, the proper course under precedent is to dismiss Texas's appeal on this issue as moot and leave the District Court judgment as to SB 14 in place.

A. The Poll Tax Issue Is Not Moot Because Texas Can Reinstate the Tax at Any Time.

Only after the District Court rendered judgment against Texas, finding that the $2 minimum fee for a certified birth certificate rendered SB 14 an unconstitutional poll tax, did the Texas Legislature act to remedy this problem. In May 2015, while this appeal was pending and after the merits and reply briefs had already been filed, the Texas Legislature passed SB 983, which removed the offending fee. Act of May 25, 2015, 84th Leg., R.S., ch. 130 (codified in TEX. HEALTH & SAFETY CODE § 191.0046). The Legislature apparently agreed with the District Court insofar as the birth certificate fee amounted to a poll tax.

However, SB 983 does not render Appellees' poll tax claim moot. "It is well settled that a defendant's voluntary cessation of a challenged practice does not

deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *see also Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (denying claim of mootness after certiorari grant based on unilateral attempt at remedial action by losing party below, and noting that "post-certiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye").

Just as in *City of Mesquite*, the Texas Legislature's recent removal of the fee "would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated." *Id; see also Cooper v. McBeath*, 11 F.3d 547, 551 (5th Cir. 1994) ("Texas's decision to supplant the three-year requirements with a one-year version does not prevent the state from later restoring the latter if this Court were to find it constitutional."). Given Texas's continued full-throated defense of SB 14, and the haphazard way Texas counties imposed the fee when it was in place, there is "no certainty" that Texas would not immediately reinstate the fee upon vacatur of the District Court's injunction. *Id.* Therefore, this Court should find that SB 983 does not moot this claim and affirm the District Court's holding that SB 14, prior to SB 983's passage, constituted an unconstitutional poll tax in violation of the Fourteenth and Twenty-Fourth Amendments.

B. The District Court's Poll Tax Ruling Was Correct.

Texas's main arguments—that DPS rules, rather than SB 14, imposed the fee and that *Crawford* forecloses the District Court's holding—are unavailing and fully addressed in the *Veasey-LULAC* appellees merits brief. *See* Veasey-LULAC Br. at 48-52. Simply put, a statutory fee to vote is always unconstitutional regardless of how it is characterized.

C. If the Poll Tax Issue is Deemed Moot, the Appeal Should Be Dismissed But Without Vacating the District Court Judgment.

However, even if this Court finds that SB 983 moots the poll tax claim, the appropriate course of action is to dismiss Texas's appeal on this issue as moot but not to vacate the District Court's judgment. When a case becomes moot on appeal due to "happenstance" or the "unilateral action of the party who prevailed in the lower court," the appellate court should vacate the lower court's judgment. *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994); *see also United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 40 (1950).

However, in determining whether vacatur is appropriate, "[t]he principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Bonner Mall P'ship*, 513 U.S. at 24. Where, as here, the losing party voluntarily caused the mootness, "the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable

remedy of vacatur." *Id.* at 25; *see also Houston Chronicle Pub. Co. v. City of League City, Tex.*, 488 F.3d 613, 619 (5th Cir. 2007) ("Nevertheless, '[v]acatur of the lower court's judgment is warranted only where mootness has occurred through happenstance, *rather than through voluntary action of the losing party*.'" (quoting *Murphy v. Fort Worth Indep. Sch. Dist.*, 334 F.3d 470, 471 (5th Cir.2003) (*per curiam*))); *Sierra Club v. Glickman*, 156 F.3d 606, 620 (5th Cir. 1998) ("Because this issue has been rendered moot by the USDA's voluntary compliance with the district court's judgment, we decline to direct the district court to vacate its judgment.").[25] Therefore, the appropriate course of action is to dismiss the appeal as moot. *Bonner Mall P'ship*, 513 U.S. at 39; *see also Sierra Club*, 156 F.3d at 623.

During the pendency of its appeal of the District Court's poll tax finding, the Texas Legislature voluntarily remedied the poll tax SB 14 imposed. However, SB 983 did not render the Appellees' poll tax claim moot because Texas is free to

[25] The panel opinion held that, in light of SB 983, SB 14 no longer operates as a poll tax. *Veasey*, 796 F.3d at 515 ("[W]e conclude that SB 14, as amended by SB 983, does not impose a poll tax."). Appellees do not contest this limited finding. But, for the reasons above, if the panel believed that SB 983 resolved the poll tax concerns, and there was no danger of repeal, the appropriate course of action was to dismiss the appeal as moot, not vacate the judgment below. If this court finds that the poll tax claim is moot, the doctrine of constitutional avoidance counsels against making any unnecessary decisions on the constitutional poll tax issue. *See Merced v. Kasson*, 577 F.3d 578, 586–87 (5th Cir. 2009); *Jordan v. City of Greenwood*, 711 F.2d 667, 668–70 (5th Cir. 1983) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable." (quoting *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944))).

change course if the District Court's judgment is reversed and there is good reason to believe it would do so. Therefore, this Court should affirm the District Court's judgment that SB 14, prior to SB 983, functioned as an unconstitutional poll tax. If the Court finds that SB 983 moots the poll tax claim, it should dismiss Texas's appeal as moot but not vacate the judgment below because Texas voluntarily chose to moot the issue.

CONCLUSION

For the above reasons, the judgment below should be affirmed in full.

Respectfully submitted,

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