No. 17-40884

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; DALLAS COUNTY, TEXAS; GORDON BENJAMIN; KEN GANDY, EVELYN BRICKNER, Plaintiffs-Appellees,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS; ROLANDO PABLOS, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; STATE OF TEXAS; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, Defendants-Appellants.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND; IMANI CLARK, Intervenor Plaintiffs-Appellees,

v.

STATE OF TEXAS; ROLANDO PABLOS, 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.

ROLANDO PABLOS, 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; MAXIMINA MARTINEZ LARA; LA UNION DEL PUEBLO ENTERO, INCORPORATED, Plaintiffs-Appellees,

v.

STATE OF TEXAS; ROLANDO PABLOS, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, Defendants-Appellants.

On Appeal from the 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, and 2:13-cv-348

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CERTIFICATE OF INTERESTED PERSONS

Under the fourth sentence of Fifth Circuit Rule 28.2.1, because appellants are governmental parties, they need not furnish a certificate of interested parties.

/s/ Scott A. Keller
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Statement Regarding Oral Argument

The Court's order of September 5, 2017, provides for this case to be placed on the first available oral-argument calendar. Appellants agree that this case warrants oral argument.

TABLE OF CONTENTS

Page(s)

Table of Authorities

Page(s)

Cases

Constitutional Provisions and Statutes

Other Authorities

INTRODUCTION

The district court's injunction blocking any form of photo-ID voting law is profoundly erroneous. The district court enjoined the State from implementing even a photo-ID voting requirement qualified by a "reasonable impediment" exception, which this Court expressly suggested to fix the discriminatory effect it found under Texas's prior law, Senate Bill 14 (SB14).[1] *Veasey v. Abbott*, 830 F.3d 216, 270 (5th Cir. 2016) (en banc). Just days after this Court's *Veasey* opinion in 2016, all parties agreed to an interim remedy for the 2016 elections that included a reasonable-impediment exception. Texas again committed to use that procedure for 2017 elections. And Texas substantially modified its voting laws in 2017 by enacting such a reasonable-impediment exception into law, through Senate Bill 5 (SB5).[2] Yet plaintiffs obtained an injunction of SB5 without ever pleading a challenge to that law, much less showing that it has a discriminatory effect or purpose.

This case should be over. Any potential injunction of SB5 must await a new case. As this Court has said, a new law requires a new challenge by plaintiffs. *Veasey*, 830 F.3d at 271. And the claims against SB14 cannot continue, as they are now moot. Plaintiffs' claims turn on alleged disparate impediments to getting the photo ID required by SB14 to vote in person. But SB5—like the

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[1] Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws 619 (SB14).

[2] Act of May 27, 2017, 85th Leg., R.S., ch. 410, 2017 Tex. Sess. Law Serv. 1111 (SB5).

agreed interim remedy—excuses that requirement when a voter has a reasonable impediment to getting such ID. Plaintiffs cannot identify a single person who faces a substantial burden to voting under this reasonable-impediment exception. As the stay panel noted, each of the 27 voters identified in the record—whose testimony underlies plaintiffs' claims—can now vote without photo ID. *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam).

Plaintiffs filed this suit to block SB14's photo-ID requirement, criticizing the lack of an exception for poorer voters to vote without photo ID. The State has now enacted precisely such an exception, remedying plaintiffs' claimed voting harm. Plaintiffs' challenges to SB14 can be resolved on that basis alone.

Regardless, the district court's underlying discriminatory-purpose finding regarding SB14 cannot stand. On remand, the district court entered a cursory, 9.5-page decision finding yet again that SB14 was enacted with a racially discriminatory purpose. The district court violated this Court's mandate to reconsider *anew* the *totality* of the evidence on that purpose claim. The district court's terse opinion never once cites the record and essentially readopts that court's prior opinion, including reasoning that this Court vacated. The district court never cited or grappled with any of the arguments in the State's 334 pages of purpose briefing on remand, and its purpose finding rests on myriad legal errors and clearly erroneous fact-findings.

The Court should vacate the injunction and related rulings below and direct that this lawsuit be dismissed as moot. Alternatively, the Court should reverse and render judgment for the State.

Statement of Jurisdiction

Because plaintiffs' claims arise under the U.S. Constitution and statutes, subject-matter jurisdiction rests on 28 U.S.C. § 1331. But plaintiffs' claims do not present a live case or controversy any longer, as required for Article III jurisdiction. The case became moot when Texas enacted SB5 and agreed to use a reasonable-impediment exception until that new law becomes effective on January 1, 2018.

This Court has appellate jurisdiction under 28 U.S.C. §§ 1291-1292. The district court entered a final injunction on August 23, 2017, ROA.70430-56, and the State timely filed its notice of appeal that day, ROA.70457-58.

Statement of the Issues

1. Whether plaintiffs' claims against Texas's 2011 photo-voter-ID law (SB14) are moot in light of Texas's 2017 enactment of a substantial amendment to that law creating a reasonable-impediment exception (SB5) and Texas's agreement to operate under the interim remedy's reasonable-impediment exception until SB5's effective date.

2. Whether plaintiffs' claims against Texas's old photo-voter-ID law (SB14) allowed the district court to enjoin Texas's new photo-voter-ID rules under SB5 or, instead, whether any injunction of the voting rules under SB5 requires a new case.

3. Whether, if plaintiffs' discriminatory-purpose claim is not moot, the district court clearly erred in ruling that SB14 was enacted with a racially invidious purpose.

4. Whether, if plaintiffs' discriminatory-effects claim is not moot, the district court erred in holding that SB14 had the effect of denying or abridging the right to vote on account of race.

STATEMENT

A. The Legislature Enacted Senate Bill 14 (SB14) in 2011.

The Texas Legislature enacted SB14 at the end of the 2011 legislative session, after the Legislature had debated voter-ID bills for six years. *See infra* pp. 58-61. At the time, sections 4(b) and 5 of the Voting Rights Act (VRA) required that Texas's election laws gain federal preclearance before taking effect. Texas first began enforcing SB14 in 2013, after the Supreme Court invalidated the VRA's preclearance formula. ROA.74087.

SB14 generally required voters to identify themselves at the polls by certain forms of government-issued photo ID. Acceptable forms of ID included a Texas driver's license, Texas personal-identification card, Texas license to carry a handgun, U.S. military-identification card, U.S. citizenship certificate, and U.S. passport. SB14 § 14. SB14 also provided for free election-identification certificates (EICs) that satisfied its photo-ID requirement. *Id.* § 20.

B. Plaintiffs sued to block SB14 from taking effect, and this Court remanded after appeal.

Individual and organizational plaintiffs sued to block SB14 from taking effect. They alleged that SB14 (1) was a poll tax; (2) purposefully abridged the right to vote on account of race; (3) resulted in abridgement of the right to vote on account of race, in violation of VRA § 2; and (4) unconstitutionally burdened the right to vote. ROA.952-58, 1440-44. DOJ filed a separate lawsuit, later consolidated with the private plaintiffs' action, likewise alleging that SB14 had the purpose and result of abridging the right to vote on account of

race. ROA.118846-47. DOJ has since voluntarily dismissed its purpose claim in light of the Texas Legislature's enactment of SB5. ROA.69341-48, 69181-87, 69763.

After a bench trial in 2014, the district court entered a judgment adopting every one of plaintiffs' legal theories and permanently enjoining defendants ("the State") from enforcing SB14's voter-ID provisions. *Veasey v. Perry*, 71 F. Supp. 3d 627, 702-03 (S.D. Tex. 2014), *aff'd in part, vacated in part, and remanded*, 830 F.3d 216.

The State appealed, and a three-judge panel of this Court overturned several aspects of the district court's judgment. It reversed and rendered for the State on the poll-tax claim. *Veasey v. Abbott*, 796 F.3d 487, 514-17 (5th Cir. 2015). It also vacated the district court's determinations that SB14 was enacted with a discriminatory purpose, and that SB14 substantially burdened voting rights. *Id.* at 498-504. The panel noted that it is "unlikely that [a discriminatory] motive would permeate a legislative body and not yield any private memos or emails." *Id.* at 503 n.16. The panel did, however, sustain the district court's conclusion that SB14 resulted in an unlawful disparate impact under VRA § 2. *Id.* at 504-14.

The State sought and obtained rehearing en banc. 815 F.3d 958 (5th Cir. 2016). The en banc Court essentially adopted the panel's holdings. It rendered judgment for the State on the poll-tax claim and dismissed the substantial-burden claim, but affirmed the district court's holding that SB14 has an unlawful disparate impact under VRA § 2. *Veasey*, 830 F.3d at 243-68. The

Court also vacated the district court's judgment that SB14 was passed with a racially discriminatory purpose, holding that the district court relied on a series of "infirm," "unreliable," and "speculati[ve]" categories of evidence. *Id.* at 229-34. While recognizing that the record "does not contain *direct* evidence" that SB14 was passed with a racially invidious purpose, *id.* at 235, the Court remanded for the district court to reconsider the claim in light of circumstantial "evidence" that "could support" such a finding, *id.* at 236. This Court expressly directed the district court to "*reevaluate* the evidence"—the "circumstantial *totality* of evidence"—to "*determine anew* whether the Legislature acted with discriminatory intent in enacting SB 14." *Id.* at 237, 243, 272 (emphases added). Finally, the Court declared that "[n]either our ruling here nor any ruling of the district court on remand should prevent the Legislature from acting to ameliorate the issues raised in this opinion." *Id.* at 271. Accordingly, the Court ordered the district court "to reexamine the discriminatory purpose claim . . . *bearing in mind the effect any interim legislative action taken* with respect to SB14 may have." *Id.* at 272 (emphasis added).

The Supreme Court denied certiorari from that interlocutory decision. *Abbott v. Veasey*, 137 S. Ct. 612 (2017). The Chief Justice noted that the case was "in an interlocutory posture" and advised that the State "may raise either or both [discriminatory purpose and effect] issues again after the entry of final judgment" when "[t]he issues will be better suited for certiorari review." *Id.* at 613 (Roberts, C.J., respecting the denial of certiorari).

C. On remand, the district court entered an agreed interim remedy, but then rushed to issue a discriminatory-purpose finding before the Legislature could act.

On remand, the district court instructed the parties to submit new proposed findings of fact and conclusions of law. ROA.67988. Meanwhile, the district court entered an interim remedy agreed to by the parties. ROA.67876-82.

The interim remedy followed this Court's suggestion, *Veasey*, 830 F.3d at 270, by retaining SB14's photo-ID requirement generally but providing an exception from that requirement for voters with reasonable impediments to obtaining the needed ID. ROA.67876-77. Voters claiming such a reasonable impediment could vote—by regular ballot—if they completed two steps. First, the voter had to complete a sworn declaration, which listed seven possible impediments: lack of transportation, lack of documents necessary to obtain acceptable ID, work schedule, lost or stolen ID, disability or illness, family responsibility, or ID applied for but not yet received. ROA.67880-81. The declaration also included an "[o]ther" box, which allowed the voter to write *anything* in a blank space and be able to vote. ROA.67881. No one could challenge a voter's claimed impediment or its reasonableness. ROA.67881. But anyone who intentionally lied on the declaration would be guilty of perjury, ROA.67881; Tex. Penal Code § 37.02(a), and tampering with a governmental record, *id.* § 37.10. Second, the voter had to provide one of the following documents: a valid voter-registration certificate, a certified birth certificate, a copy or original of a current utility bill, bank statement, government check,

paycheck, or other government document that shows the voter's name and an address. ROA.67880, 67882. Those are the documents required to identify a voter under pre-SB14 Texas law. *See Veasey*, 830 F.3d at 225.

Shortly after the district court entered the interim-remedy order, the district court was informed in August 2016 that Governor Abbott would "support legislation during the 2017 legislative session to adjust SB14 to comply with the Fifth Circuit's decision." ROA.67982. The State alerted the district court when this legislation was filed in February 2017, ROA.69316-22, and when it passed the Senate in March 2017, ROA.69753-55. The express purpose of this legislation was "to follow all constitutional direction that we receive from the Federal Courts to achieve a bill that is fair to all who want to vote, yet retains the integrity of the vote." Video: Sen. Floor Debate on S.B. 5, 85th Leg., R.S. (Mar. 27, 2017), at 1:42:15-1:42:23, http://tlcsenate.granicus.com/MediaPlayer.php?view_id=42&clip_id=12003; *see also id.* at 2:07:47-2:07:52 (voter-ID opponent conceding that SB5 "does a pretty good job of implementing the interim [remedy] on voter ID").

In accordance with Supreme Court and circuit precedent (*see infra* pp. 40, 43), both the State and DOJ repeatedly asked the district court to give the Legislature an opportunity to fix any problems with Texas's SB14 photo-voter-ID law before the district court addressed remaining claims against SB14. ROA.69311-12, 69342-44, 69660-65, 69682-84.

Instead, on April 3, 2017, the district court responded by announcing its intent "to issue its new opinion" on whether SB14 was enacted with a discriminatory purpose "at its earliest convenience." ROA.69762.

One week later, on April 10, 2017—and well before the end of the 2017 legislative session—the district court entered a 9.5-page order, again finding that SB14 was enacted with a discriminatory purpose. ROA.69764-73. Despite receiving hundreds of pages of briefing (334 pages from the State alone, ROA.68784-951, 69003-60, 69113-246) addressing thousands of pages of evidence—much of it not analyzed in the court's original, vacated ruling—the district court simply adopted its prior findings, failing to even refer to the parties' briefs on remand except to note their existence.

D. The Legislature enacted Senate Bill 5 (SB5) in 2017.

The Legislature passed SB5 before the end of the 2017 regular legislative session, and the Governor signed it into law on May 31, 2017. ROA.69820. SB5 is set to take effect on January 1, 2018. SB5 § 9.

Plaintiffs conceded that SB5 is "remedial legislation." ROA.69982. The law tracks the interim remedy ordered by the district court and agreed to by the parties: among other things, it provides a reasonable-impediment exception waiving SB14's photo-ID requirement, expands the list of acceptable forms of identification, and extends the period within which an expired form of identification may still be accepted for voting. SB5 §§ 2, 4-5. Like the interim remedy, SB5 requires voters to swear or affirm under penalty of perjury

that they have a reasonable impediment preventing them from obtaining compliant photo ID. SB5 § 3.[3] The State has also agreed to implement the reasonable-impediment exception in the district court's interim remedy until January 1, 2018. ROA.69857-904, 70276 & n.1. In other words, the law challenged by plaintiffs—one lacking any reasonable-impediment exception—will never govern another election.

SB5's reasonable-impediment exception turns on the same seven reasonable impediments listed in the interim remedy. *Compare* SB5 § 2, *with* ROA.67881. These enumerated impediments cover every burden alleged by the 27 voters identified by plaintiffs (14 plaintiffs and 13 witnesses), whose testimony plaintiffs' claims rest upon. *See* ROA.69966; *see infra* pp. 20-23.

In contrast to the interim remedy, SB5 does not permit a person to vote without qualifying photo ID after merely checking "other" and filling in a blank space with any reason whatsoever. SB5 excluded this open-ended "other" option because it was abused during the November 2016 election.[4] For example, the following explanations were given on reasonable-impediment declarations, and these votes counted under the interim remedy:

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[3] SB5 also requires implementing mobile locations for obtaining free EICs. SB5 § 1.

[4] *See, e.g.*, Video: Sen. Floor Debate on S.B. 5, *supra* at 1:53:38-1:53:42 (noting that the "other" box "was abused . . . in many situations"); Video: House of Representatives Floor Debate on S.B. 5, 85th Leg., R.S. (May 24, 2017), at 3:38:49-3:39:10, http://tlchouse.granicus.com/MediaPlayer.php?view_id=39&clip_id=14100.

- "Have procrastinated."
- "Protest of Voter ID Law."
- "do not agree with law"
- "It's unconstitutional."
- "not required by law"
- "Don't believe I have to show picture ID."
- "court declared photo ID requirement unconstitutional"
- "Did not want to 'pander' to government requirement."
- "Lack of trust that this law is valid."
- "because I didn't bring it"
- "I do not agree with the law."

ROA.69946-64; *see also* DallasNews.com, *Hundreds of Texans May Have Voted Improperly, AP Reports*, https://perma.cc/EAP4-69SH (Feb. 18, 2017).

After SB5 passed, the State moved for reconsideration of the district court's discriminatory-purpose finding in light of this substantial amendment to the State's voter-ID law. ROA.69967-71.

E. The district court enjoined SB5.

The district court denied the State's reconsideration motion when it enjoined SB5 based on SB14's alleged discriminatory purpose. The district court permanently enjoined the State from enforcing any form of its photo-voter-ID law, even as amended by SB5 to include a reasonable-impediment exception. ROA.70456. The district court further ordered the commencement of a "VRA §3(c)" preclearance bail-in hearing. ROA.70456.

The district court held that the State bore the burden to disprove Article III jurisdiction—that plaintiffs did not have a live case or controversy after SB5, ROA.70437—and found that the State failed to show that SB5 would remedy SB14's alleged discriminatory effect. ROA.70438-51. But evidence in the record showed that SB5's reasonable-impediment exception would allow all burdened voters identified by plaintiffs to cast regular, in-person ballots even if they could not obtain a qualifying photo ID. *See infra* pp. 20-23. Ignoring this evidence, the district court relied on its own "prospective conceptualization of the impact of SB5's requirements" to conclude that Texas's new voter-ID law would disparately abridge minorities' right to vote. ROA.70439-48.

The district court went on to characterize the State's effort to ameliorate the impact of SB14's photo-ID requirement—through SB5's reasonable-impediment exception—as an illegitimate effort to intimidate voters. It criticized the enumerated reasonable impediments as unnecessary, commenting that "[n]othing in the record explains why the state needs to know that a person suffers a particular impediment to obtaining one of the qualified IDs," ignoring that the State has an interest in preventing abuse of this government form, as occurred in the 2016 election. ROA.70448. And the district court found that "[t]here is no legitimate reason in the record to require voters to state such impediments under penalty of perjury," ROA.70448—in direct tension with the agreed interim remedy, under which voters made such statements

under penalty of perjury, *see supra* p. 8. In short, the district court again adopted the private plaintiffs' arguments wholesale.

Because the district court viewed the reasonable-impediment declaration as unnecessary and illegitimate, and because historical evidence from decades ago reflected "threats and intimidation against minorities at the polls," the court inferred that the Legislature's attempt in SB5 to prevent discriminatory effects was actually voter intimidation. ROA.70448 ("Requiring a voter to address more issues than necessary under penalty of perjury and enhancing that threat by making the crime a state jail felony appear to be efforts at voter intimidation."). Finally, the district court refused to accept SB5 as a remedy for its finding of discriminatory purpose because "the Court's finding of discriminatory intent strongly favors a wholesale injunction against the enforcement of any vestige of the voter photo ID law" and SB5 "is built upon the 'architecture' of SB 14." ROA.70439 n.10, 70452.

F. This Court stayed the injunction pending appeal.

This Court stayed the district court's injunction pending appeal. *Veasey*, 870 F.3d at 392. The stay panel recognized that the State "has made a strong showing that th[e] reasonable-impediment procedure remedies plaintiffs' alleged harm and thus forecloses plaintiffs' injunctive relief." *Id.* at 391. In particular, the panel noted that "each of the 27 voters identified—whose testimony the plaintiffs used to support their discriminatory-effect claim—can vote without impediment under SB 5." *Id.*

Judge Graves dissented, stating that the Court should "preserv[e] the status quo" of "the continued use of the parties' agreed-upon interim remedy." *Id.* at 392.

SUMMARY OF ARGUMENT

I. This case is moot both because plaintiffs' alleged voting injuries are fully redressed by Texas's intervening adoption of a reasonable-impediment exception, and because SB5's substantial amendment to SB14 alone moots plaintiffs' challenges to SB14. SB5 codifies a reasonable-impediment procedure effective January 1, 2018, and Texas has committed to maintain the interim remedy's reasonable-impediment procedure until then. The reasonable-impediment procedure allows voters without photo ID to cast a regular, in-person ballot by asserting one of seven enumerated reasonable impediments to obtaining a qualifying photo ID. The seven reasonable impediments enumerated in SB5 cover each and every burden alleged by the voters in this case. *See infra* pp. 20-23. The district court completely ignored this dispositive point.

This case should be over. Plaintiffs filed this suit to block the photo-voter-ID requirement enacted in SB14, arguing that SB14 contained no exception for poorer voters to vote without ID. But the reasonable-impediment procedure in the agreed interim remedy and in SB5 rectifies the alleged disparate impact of SB14. That procedure is now in effect through 2017, and SB5 codifies a reasonable-impediment exception into Texas law starting in 2018. Thus,

plaintiffs' pleaded claims—which challenge only SB14's photo-voter-ID law that lacked any reasonable-impediment exception—are moot.

No exception to mootness applies. Any defects with SB14 have been remedied by the good-faith effort of the State—through SB5 and the interim remedy—to eliminate the discriminatory effect found by this Court. Under accepted practice, the district court's injunction and its results and purpose rulings should be vacated, and the case remanded to be dismissed as moot.

II. Even if plaintiffs' discriminatory-purpose claim were still viable, the district court's injunction of the State's amended voter-ID law is unsupportable. Plaintiffs filed no claim against SB5, and there is no evidence that it was enacted with discriminatory intent or has a discriminatory effect. As this Court has already directed, any challenge to SB5 is an issue for a new case.

III. This Court need not reach the merits of plaintiffs' discriminatory-purpose challenge to SB14, because it is moot and cannot support the district court's remedy. In all events, the district court's purpose finding is infirm and cannot be sustained. It rests on myriad legal errors and clearly erroneous fact-findings.

IV. For potential further appellate review, the State preserves its challenge to the district court's effects ruling, although the panel is bound by circuit precedent to reject that challenge.

ARGUMENT

I. Plaintiffs' Claims Challenging SB14 Are Moot.

This case is moot in light of the State's adoption of a reasonable-impediment exception to its photo-voter-ID law—which is currently in effect for 2017 elections under the State's commitment, and which will be in effect for elections in 2018 and beyond under SB5. Absent unusual circumstances not present here, legislative amendments like SB5 moot claims against an amended or repealed statute. *See, e.g.*, *Fantasy Ranch Inc. v. City of Arlington*, 459 F.3d 546, 564 (5th Cir. 2006); *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 876-78 (9th Cir. 2006) (citing *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972) (per curiam)).

Any potential injunction of SB5 must await a new case; as this Court has said, a new law requires a new challenge by plaintiffs. *Veasey*, 830 F.3d at 271. *See infra* Part II. But plaintiffs have not pleaded any claims against SB5. And their claims seeking only prospective relief against Texas's old photo-voter-ID system (SB14) cannot support an injunction against the State's new remedial law (SB5). The seven enumerated reasonable impediments in both SB5 and the interim remedy resolve each burden alleged by the 27 voters identified by plaintiffs. *See infra* pp. 20-23. Texas's use of a reasonable-impediment exception thus fully "ameliorate[s]" "SB 14's discriminatory effect." *Veasey*, 830 F.3d at 242. Because plaintiffs' claims are now moot, the Court should vacate the district court's orders and opinions and direct that the suit be dismissed. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

A. Standard of review

"Jurisdictional issues such as mootness and ripeness are legal questions for which review is *de novo*." *Lopez v. City of Hous.*, 617 F.3d 336, 339 (5th Cir. 2010).

B. Plaintiffs' alleged voting injuries from SB14 are fully remedied by the reasonable-impediment exception that now governs Texas elections.

1. The existence of a live case or controversy is a constitutional prerequisite to federal-court jurisdiction: "[t]o invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). "Mootness is 'the doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)." *Moore v. Hosemann*, 591 F.3d 741, 744 (5th Cir. 2009) (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)). And each plaintiff "bears the burden of showing that he has standing for each type of relief sought." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)).

Plaintiffs' theory of injury is that a photo-ID voting requirement without an accommodation for poorer voters, such as a reasonable-impediment exception, imposes an unlawful burden on "Texans living in poverty, who are less

likely to possess qualified photo ID, are less able to get it, and may not otherwise need it." *Veasey*, 830 F.3d at 264. Accordingly, a development that eliminates the alleged injury—being unable to vote because of an impediment to obtaining sufficient ID—moots this case.

A reasonable-impediment exception to SB14's photo-ID requirement is just such a development, "eradicat[ing]" plaintiffs' claimed injury from SB14. *Kremens v. Bartley*, 431 U.S. 119, 129 (1977) (finding plaintiffs' claims mooted by an amendment to a challenged law). Plaintiffs' injury theory was based on testimony from 27 identified voters, who claimed that they would be unable to vote under SB14 because of an impediment to obtaining qualifying photo-ID. These voters were not chosen at random. They were the best examples that plaintiffs could find for their theory after crisscrossing the State, looking for anyone possibly affected by SB14. *See* ROA.24519-23, 24533-36, 33764, 72072-74, 72196.

The reasonable-impediment exception now governing Texas elections under the State's stipulation, and soon to govern under SB5, eliminates any alleged injury to plaintiffs from SB14. The exception *wholly waives* SB14's photo-ID requirement, allowing voters to cast regular ballots by showing proof of name and address (as required before SB14) and executing a declaration that they face a reasonable impediment to obtaining qualifying photo-ID. ROA.67876-77; SB5 § 2. All 27 voters identified by plaintiffs either could have already voted under SB14 or can now vote without photo ID by claiming

one of the seven impediments listed in the reasonable-impediment declaration used both under the interim remedy and under SB5,[5] as explained below:

1. Rudy Barber may claim the listed impediment of a lack of transportation, lack of birth certificate or related documents. ROA.114637-38, 114644.

2. Sammie Bates may claim the listed impediment of a lack of transportation or lack of birth certificate or related documents. ROA.114702, 114706-07.

3. Julia Benavidez, at the time of trial, had SB14-compliant ID, so she may vote without impediment. ROA.114825.

4. Gordon Benjamin may claim a lack of birth certificate or related documents. *Veasey*, 830 F.3d at 254-55.

5. Michelle Bessiake—an Indiana resident who votes in Indiana—testified that she did not face a reasonable impediment to acquiring necessary ID. *See* ROA.114927 ("Q: [I]s there any other reason . . . why obtaining one of those forms of identification is unduly burdensome? A. Because I don't want any of those identification."). Following this testimony, Bessiake's claims were voluntarily dismissed with prejudice. ROA.8908-09.

[5] In fact, although only five of the declaration's seven listed impediments would cover every burden alleged by any voter identified in the record, the declaration lists two additional potential impediments out of an abundance of caution. *See* SB5 § 2; *cf.* ROA.67881.

6. Ramona Bingham, at the time of trial, had SB14-compliant ID, so she may vote without impediment. ROA.67019.

7. Evelyn Brickner, at the time of trial, had SB14-compliant ID, so she may vote without impediment. ROA.115017-18.

8. Anna Burns, at the time of trial, had SB14-compliant ID, so she may vote without impediment. ROA.118290.

9. Floyd Carrier may claim the listed impediment of a lack of birth certificate or related documents or a disability/illness. *Veasey*, 830 F.3d at 254-55.

10. Imani Clark may claim the listed impediment of a lack of transportation or her work schedule. ROA.73537, 73539.

11. Naomi Eagleton may claim the listed impediment of a lack of transportation or a lack of birth certificate or related documents. ROA.115406, 115409.

12. Estela Espinoza possesses an expired driver's license. ROA.115458. Because she is over 70 years of age, ROA.115456, she may use an expired ID to vote under SB5, regardless of how long it has been expired. In any event, she may claim the listed impediment of a lack of birth certificate or related documents. ROA.115452.

13. Lionel Estrada may claim the listed impediment of a lack of transportation or a lack of birth certificate or related documents. ROA.72359, 72365.

14. Ken Gandy may claim the listed impediment of a lack of birth certificate or related documents. ROA.72826-27.

15. Elizabeth Gholar may claim the listed impediment of a lack of birth certificate or related documents. ROA.115651.

16. Marvin Holmes, Jr. may claim the listed impediment of a lack of transportation. ROA.115859-60.

17. Virginia Jackson, at the time of trial, had SB14-compliant ID, so she may vote without impediment. ROA.115925-27.

18. Margarito Lara has passed away. ROA.67810-12. He could have claimed the listed impediment of a lack of birth certificate or related documents. ROA.72836-37.

19. Maximina Lara may claim the listed impediment of a lack of birth certificate or related documents. ROA.72852.

20. Emilio Martinez, Jr. may claim the listed impediment of a lack of birth certificate or related documents. ROA.116128;

21. John Mellor-Crummey, at the time of trial, had SB14-compliant ID, so she may vote without impediment. ROA.116232.

22. Eulalio Mendez, Jr. may claim the listed impediment of a disability/illness. ROA.72028.

23. Koby Ozias, at the time of trial, had SB14-compliant ID, so he may vote without impediment. ROA.116463.

24. Hector Sanchez, at the time of trial, had SB14-compliant ID, so he may vote without impediment. ROA.116590.

25. Lenard Taylor may claim the listed impediment of a lack of birth certificate or related documents or a lost or stolen ID. ROA.72376-77, 72379.

26. Vera Trotter possesses an expired driver's license. ROA.116811. Because she is over 70 years of age, ROA.116804, she may use an expired ID to vote, regardless of how long it has been expired, under SB5. She can also claim the listed impediment of a lack of transportation. ROA.116805.

27. Phyllis Washington, at the time of trial, had SB14-compliant ID, so she may vote without impediment. ROA.117013. Before the time of trial, Washington could also have claimed the listed impediment of a lost or stolen ID. ROA.116993. *See generally* ROA.69966.

Voters can easily understand the nature of the seven impediments listed on the declaration, which include justifications like "[l]ack of transportation" and "[d]isability or illness." ROA.67881; SB5 § 2. This reasonable-impediment exception thus cures any "discriminatory effect on those voters who do not have SB 14 ID or are unable to reasonably obtain such identification"—the class of voters to which plaintiffs allege an injury creating standing. *Veasey*, 830 F.3d at 271; *see supra* pp. 20-23.

It is for this basic reason that South Carolina's similar photo-ID law with a reasonable-impediment exception gained VRA § 5 preclearance. *South Carolina v. United States*, 898 F. Supp. 2d 30, 35-43 (D.D.C. 2012) (mem. op.). And Texas's reasonable-impediment exception goes beyond South Carolina's (and North Carolina's) by enabling voters to cast *regular* ballots—not provisional ballots. This feature eliminates any possible "lingering burden" of the now-excused SB14 photo-ID requirement, which might be caused when

boards adjudicating whether to count provisional ballots make inconsistent decisions about what impediments are "reasonable." *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 240 (4th Cir. 2016); *see id.* at 243 (Motz, J., dissenting). Not only does Texas avoid any such lingering burden by using nonprovisional ballots, but Texas's reasonable-impediment exception does not require voters to make a second trip to the circuit-court clerk's office to execute an indigency affidavit—unlike the Indiana law *upheld* by the Supreme Court in *Crawford v. Marion County Election Board*, 553 U.S. 181, 186 (2008) (plurality op.).

Because this reasonable-impediment exception governs 2017 Texas elections by agreement and will govern Texas elections in 2018 and beyond under SB5, this case is now moot. Texas's reasonable-impediment exception has eliminated any injury alleged by plaintiffs from SB14. Because this reasonable-impediment exception "mooted the entire lawsuit," "the district court no longer had jurisdiction to entertain" a claim for prospective injunctive relief against SB14. *Davis v. Abbott*, 781 F.3d 207, 215 (5th Cir. 2015) (adoption of modified redistricting plan mooted claims against old plan even though many districts remained the same).

2. The reasonable-impediment exception under SB5 is set to take effect on January 1, 2018. *See supra* p. 10. And plaintiffs' claims were mooted even before then on June 28, 2017 (at the latest), when the State committed to operating Texas elections in 2017 under the reasonable-impediment exception ordered by the district court as the "interim plan by which the November 8,

2016 election shall be conducted." ROA.67876-82 (interim plan); ROA.69857 (State's stipulation to use that plan for 2017 elections); *see also* ROA.69914, 69916.[6]

When a State declares that it will not enforce a particular statute, any pending challenge against that statute becomes moot. *McKinley v. Abbott*, 643 F.3d 403, 406-07 (5th Cir. 2011); *accord* 13C Charles A. Wright et al., *Federal Practice and Procedure* § 3533.7 at 326 (3d ed. 2008) ("[Government] self-correction . . . provides a secure foundation for mootness so long as it seems genuine."). In *McKinley*, plaintiff brought a First Amendment challenge against certain applications of Texas's barratry statute. 643 F.3d at 405. Subsequently, then-Attorney General Abbott "declared that neither he nor any county or district attorney in Harris and its bordering counties [where plaintiff operated] will attempt to enforce" the portions of the law alleged to be unconstitutional. *Id.* at 407. Finding "no reason to doubt" the Attorney General's statement, this Court "dismissed" plaintiff's claim "as moot." *Id.*; *accord, e.g.*, *AT&T Commc'ns of Sw., Inc. v. City of Austin*, 235 F.3d 241, 243 (5th Cir.

[6] Plaintiffs' claims were likely mooted earlier, upon SB5's enactment. This Court's *Veasey* decision prevented the State from enforcing SB14 as enacted. So upon SB5's enactment, it was clear that the law as enacted by SB14 would never govern another election. For this same reason, there has never been a prospect that the State would attempt to enforce the law as enacted by SB14 before SB5's effective date. *Cf. Envtl. Conservation Org. v. City of Dall.*, 529 F.3d 519, 527 (5th Cir. 2008) (government's commitment to act in a manner required by a court order does not implicate voluntary-cessation analysis).

2000) (following change in law, city's agreement not to seek fees incurred under prior law mooted plaintiff's challenge to prior law).

In agreeing to operate under the interim remedy's reasonable-impediment exception until SB5 takes effect, the State committed itself to prevent any of the burdens to voting alleged by plaintiffs as injury from SB14. Because plaintiffs seek only prospective relief, "[p]ast exposure to illegal conduct" is insufficient to "show a present case or controversy" unless "[]accompanied by . . . continuing, present adverse effects." *Carter v. Orleans Par. Pub. Sch.*, 725 F.2d 261, 263 (5th Cir. 1984) (per curiam) (quotation marks omitted). This case is therefore squarely controlled by *McKinley*. Plaintiffs' claims are mooted not only by SB5's amendments to Texas's voting laws, effective January 1, 2018, but by Texas's current commitment to use the reasonable-impediment exception of the agreed interim-remedy order for 2017 elections.

C. SB5's substantial amendment of SB14 was alone sufficient to moot the case.

Regardless of whether SB5 completely cures all of plaintiffs' alleged injuries (and it does), SB5's substantial amendment to SB14 was itself sufficient to moot the existing controversy. *See, e.g.*, *Diffenderfer*, 404 U.S. at 415 (holding that a new law requires a new claim); *accord, e.g.*, *Md. Highways Contractors Ass'n, Inc. v. State of Md.*, 933 F.2d 1246, 1250 (4th Cir. 1991) (finding "present case . . . moot," notwithstanding likelihood that amendments made in effort to conform to judicial opinion "will . . . be the subject of a challenge to the new statute"); 13C *Federal Practice & Procedure*, *supra* § 3533.6, at 277-80

("[A] new statute . . . may moot the attack despite so much similarity that the court anticipates renewed attack in a new action.").

In *Diffenderfer*, the Supreme Court established the general rule that repeal or substantial amendment moots a challenge to a statute. 404 U.S. at 414-15; *accord McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004) ("Suits regarding the constitutionality of statutes become moot once the statute is repealed."). Since *Diffenderfer*, the Supreme Court has repeatedly held that significant statutory amendments moot challenges to previous versions of statutes. *E.g.*, *Lewis*, 494 U.S. at 474 (amendments to banking statutes rendered moot a Commerce Clause challenge); *Massachusetts v. Oakes*, 491 U.S. 576, 582-83 (1989) (overbreadth challenge to child-pornography statute rendered moot by statutory amendment); *Kremens*, 431 U.S. at 128-29 (constitutional challenge moot following change to statutory involuntary-commitment scheme); *see also Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam) (challenge to university regulation moot following substantial amendment).

Here, plaintiffs have not claimed that photo-voter-ID laws are inherently invalid—nor could they, as that would contradict *Crawford*. Rather, their theory has been that photo-voter-ID laws are invalid if they fail to accommodate voters who cannot reasonably comply with photo-ID requirements. *See, e.g.*, ROA.1425-28, 1431-32, 1749-53. Accordingly, plaintiffs have argued that the Legislature had a discriminatory purpose because it did not enact a safeguard, such as a reasonable-impediment declaration. *See Veasey*, 830 F.3d at 264. The

Legislature has now done so with SB5. This is a substantial amendment to the State's voter-ID law, and it alone moots plaintiffs' suit.

When the State informed the district court of SB5's imminent enactment, ROA.69753-55, the district court brushed aside the State's suggestion of mootness because the State supposedly had not carried its alleged burden to show that SB5 remedies the discriminatory effect of SB14, ROA.69760. The State did make such a showing. *See supra* pp. 20-23. But it did not have to. The district court's reasoning wrongly assumes that mootness depends on such a showing. To the contrary, the substantial amendment to a challenged law moots a challenge to the old law even if the new law may not completely remedy a plaintiff's claimed injury. *See supra* pp. 26-27. A plaintiff may challenge the amended law if it so chooses. But it may not continue to challenge the prior law as it previously existed. When the challenged statute is amended on appeal—and *a fortiori* when it is amended before entry of judgment in the district court—courts must consider the statute "as it now stands." *Diffenderfer*, 404 U.S. at 414 (reviewing the district court's judgment "in light of Florida law as it now stands, not as it stood when the judgment below was entered").

The district court's belief that a substantial amendment cannot moot claims about the purpose of the old law, *see* ROA.69758, is foreclosed by this Court's decision in *Davis*. In *Davis*, "[p]laintiffs . . . [sought] a declaratory judgment finding that" Texas's 2011 redistricting plan for the Texas Senate "was enacted with a racially discriminatory purpose in violation of § 2 of the VRA and the Fourteenth and Fifteenth Amendments." *Davis v. Perry*, 991 F.

Supp. 2d 809, 816 (W.D. Tex. 2014), *rev'd sub nom.*, 781 F.3d 207. *Davis* held that the adoption of an amended redistricting plan for the Texas Senate in 2013 rendered claims against the 2011 redistricting plan—including the purpose claim—moot. *Davis v. Abbott*, 781 F.3d at 215, 217, 218-19, 220. *Davis* controls and confirms that plaintiffs' claims are moot.

The district court relied on *Hunter v. Underwood*, 471 U.S. 222, 232-33 (1985), *see* ROA.69758, but *Hunter* did not involve mootness or a remedial legislative amendment.[7] *Hunter*, instead, involved a challenge to a 1901 Alabama constitutional amendment that disenfranchised felons; this 1901 amendment had been "part of a movement that swept the post-Reconstruction South to disenfranchise blacks." 471 U.S. at 229. The case was far from moot, as the challenged 1901 law without any remedial amendments remained in effect. In contrast, where felon-disenfranchisement laws have been amended decades after that period of systemic discrimination, courts have recognized that these laws are valid. *See, e.g.*, *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998) (1968 and 1950 amendments to Mississippi's 1890 felon-disenfranchisement law "superseded the previous provision and removed the

[7] Similarly, other cases dealing with the remedy for discriminatory purpose when a government has *not* made an ameliorative change curing any discriminatory effect do not apply here. *Cf. Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 465-66 (1982); *City of Richmond v. United States*, 422 U.S. 358, 378 (1975); *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 437-39 (1968); *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

discriminatory taint associated with the original version"); *Hayden v. Paterson*, 594 F.3d 150, 159 (2d Cir. 2010).

Here, the Texas Legislature substantially amended the State's voter-ID law by passing SB5. The district court improperly rushed to rule on the soon-to-be-amended SB14 law before the Legislature could act, despite the court's knowledge of pending ameliorative legislation that had already passed the Senate. Under Supreme Court and circuit precedent, the district court should have waited to evaluate the amended voter-ID law on its merits rather than working to stymie the Legislature by (erroneously) finding a discriminatory "taint" from the preexisting law. *See infra* pp. 40, 43. Regardless, the Legislature's substantial revision of the voter-ID law through SB5 "superseded the previous [law] and removed the [alleged] discriminatory taint associated with the original version." *Cotton*, 157 F.3d at 391. With no claim challenging the State's law "as it now stands" as of January 1, 2018, plaintiffs' case is moot. *Diffenderfer*, 404 U.S. at 414 (finding case moot based on a statutory amendment that passed after the Supreme Court noted probable jurisdiction and became effective after oral argument).

D. No exceptions to mootness apply.

The Supreme Court has recognized a mootness exception in two limited circumstances involving legislative amendment: (1) when there is evidence that the legislature will reenact "precisely the same provision" once litigation ends, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982), and (2) when there is evidence that replacement legislation has not "changed substantially" or "significantly revised" the challenged provisions, thereby disadvantaging the plaintiffs in the same "fundamental way," *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 & n.3 (1993). Neither exception applies here.

Aladdin's Castle recognized an exception to the general rule of mootness where the defendant *openly announced* its intention to reenact "*precisely the same provision*" held unconstitutional below. 455 U.S. at 289 & n.11 (emphasis added).[8] Because "there is no evidence in the record to indicate that the legislature intends to reenact" the original SB14 system without a reasonable-impediment exception, *Camfield v. City of Okla. City*, 248 F.3d 1214, 1223-24 (10th Cir. 2001), this exception does not apply.

Nor does the exception for insubstantial or insignificant statutory revisions apply. SB5 "significantly revised" the State's voter-ID law, *Ne. Fla.*,

[8] *Accord, e.g.*, *Chem. Producers & Distrib. Ass'n*, 463 F.3d at 878; *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000); *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 645 (6th Cir. 1997).

508 U.S. at 662 n.3—most importantly by "includ[ing] a reasonable impediment . . . exception," *Veasey*, 830 F.3d at 270; *see id.* at 279 (Higginson, J., concurring), that wholly waives the photo-ID requirement for voters who could not reasonably comply with the previous law. An amendment that eliminates every burden to voting alleged by the plaintiffs, *see supra* pp. 20-23, is unquestionably a fundamental change to Texas's voter-ID law.

The separate voluntary-cessation exception to mootness cannot preserve plaintiffs' claims. The voluntary-cessation doctrine makes a crucial distinction between private parties and governmental actors. Cessation maneuvers by private parties are "viewed with a critical eye." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012). But governmental bodies act with more permanence and are presumed to act in good faith, such that courts will not presume that they will reenact a replaced law once litigation ends. *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009); *accord, e.g.*, *Chi. United Indus., Ltd. v. City of Chi.*, 445 F.3d 940, 947 (7th Cir. 2006); *United States v. Georgia*, 778 F.3d 1202, 1205 (11th Cir. 2015); *see generally U.S.P.S. v. Gregory*, 534 U.S. 1, 10 (2001) (noting "that a presumption of regularity attaches to the actions of Government agencies" (citing *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926))). Thus, as explained above, the Supreme Court has repeatedly held cases moot when a government has substantially changed its law. *See supra* p. 27.

Even when the change is less momentous than a legislature's enactment of a statute, the "presumption of good faith" translates to a "lighter burden"

that is satisfied by the government's cessation, absent "evidence" that the change is mere litigation posturing and that the replaced law will be reenacted after litigation ends. *Sossamon*, 560 F.3d at 325. Plaintiffs offered no such evidence, and none exists.

E. Plaintiffs' request for a VRA § 3(c) preclearance bail-in remedy cannot avoid mootness, which turns on whether plaintiffs still have a concrete injury.

Plaintiffs' request for the *remedy* of preclearance bail-in under VRA § 3(c) cannot sustain a live case or controversy, because this does not show the concrete *injury*-in-fact necessary for ongoing Article III jurisdiction. As *Diffenderfer* held, it makes no difference to the mootness inquiry that plaintiffs requested a remedy that would have been broader in scope than the amended law—what matters is whether the cognizable injury no longer exists. 404 U.S. at 413-14; *accord, e.g.*, *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000). And it would be particularly absurd for a request for preclearance bail-in to keep this case alive, as the Legislature in SB5 *cured* any defects in SB14. Thus, there are no "pervasive," "widespread," "flagrant" constitutional violations justifying preclearance. *Shelby County v. Holder*, 133 S. Ct. 2612, 2629 (2013).

Like any plaintiff in federal court, a plaintiff seeking the remedy of VRA § 3(c) preclearance bail-in must, at an absolute minimum, present a claim that satisfies Article III's case-or-controversy requirement. *See, e.g.*, *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 175-78 (2011). The power of federal

courts "to pass upon the constitutionality" of a state or federal statute "arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference." *Golden v. Zwickler*, 394 U.S. 103, 110 (1969) (quoting *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 89-90 (1947)). Plaintiffs' request that the district court reimpose pre-clearance on the State, under VRA § 3(c), cannot keep this case alive. The question whether to retain jurisdiction under VRA § 3(c) cannot arise unless the plaintiffs prevail on the merits of their constitutional claim, which can only be reached by a federal court if the plaintiffs continue to possess a cognizable Article III *injury*. Here, the threat of injury from SB14 disappeared for good when the Legislature amended the State's voter-ID law through SB5.

The Supreme Court in *Vermont Agency* made clear that a plaintiff's requested remedy has no bearing on whether an Article III injury persists. The Court held that "an interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." 529 U.S. at 773. In *Vermont Agency*, the Court rejected the argument that a *qui tam* relator's interest in recovering a monetary remedy can provide Article III standing, explaining that a requested remedy does not establish a concrete injury-in-fact. In order to provide standing, "[t]he interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right." *Id.* at 772. A *qui tam* relator's potential remedial bounty alone cannot provide standing because it does not remedy an ongoing concrete injury—

"the 'right' he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails." *Id.* at 772-73.

The same goes for a VRA plaintiff's request to bail a State into VRA § 3(c) preclearance. For this remedy to even be available, the plaintiff must first prevail on the merits of a constitutional claim. That requires Article III jurisdiction based on a live, concrete injury-in-fact independent of a VRA § 3(c) remedy, which is, at most, a desired byproduct of the claim that does not arise until after the judgment is entered. Here, plaintiffs face no threat of injury from SB14 because SB5 removes any alleged burden on their voting rights. The request for preclearance bail-in cannot make up for the lack of a concrete injury-in-fact.

F. The Court should vacate the district court's prior orders and dismiss plaintiffs' case.

Plaintiffs' challenges to SB14 became moot no later than when the State committed to operate under the interim remedy's reasonable-impediment exception until SB5's effective date. *Davis*, 781 F.3d at 215; *see supra* pp. 25-26. By that time, the district court lost subject-matter jurisdiction, and its subsequent injunction of SB5 is therefore void. *Id.*; *Lower Colo. River Auth. v. Papalote Creek II, L.L.C.*, 858 F.3d 916, 926-27 (5th Cir. 2017).

"[T]he entire case [has] to be dismissed if the court lack[s] subject matter jurisdiction to award prospective relief at the time of judgment." *Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1218 n.8 (11th Cir. 2000); *accord, e.g.*, *In re Scruggs*, 392 F.3d 124, 129

(5th Cir. 2004) (per curiam); *Laplante v. Hall*, 70 F.3d 1269, 1269 n.4 (5th Cir. 1995) ("To the extent that the judgment of dismissal below alternatively ruled on the merits, it is modified to be solely on the basis of mootness; when a case becomes moot dismissal generally should be on that basis alone."). Yet even if plaintiffs argue that the case could not become moot until SB5's effective date of January 1, 2018, that would mean only that the Court should on that date vacate the district court's orders and direct that this case be dismissed as moot.

The "established practice," *Munsingwear*, 340 U.S. at 39, when a case "becomes moot in its journey through the federal courts," *Karcher v. May*, 484 U.S. 72, 82 (1987), is to vacate the decision below—in this case the permanent injunction and related purpose and effects holdings (district court docket entries 628, 1023, and 1071). There is no indication that the Texas Legislature enacted SB5, or that the Governor signed it, out of "a desire to avoid review in this case." *Alvarez v Smith*, 558 U.S. 87, 97 (2009). To the contrary, the State had repeatedly told the district court for months that legislation like SB5 was going to be enacted, long before the district court on remand found a discriminatory purpose behind SB14. Thus, this Court should do what it "normally" does: "vacate the lower court judgment." *Id.* at 94.

The Supreme Court's decision in *Board of Regents of the University of Texas System v. New Left Education Project*, 414 U.S. 807 (1973) (per curiam), is instructive. In *New Left*, various rules promulgated by the University of Texas were found to be unconstitutional. 472 F.2d 218, 219 (5th Cir. 1973), *vacated*,

414 U.S. 807. The University then promulgated new rules superseding the prior rules and eliminating their unconstitutional effect. *Id.* This Court concluded that the actions were moot but declined to vacate the district court's judgment because it was appellants, not a third party, that repealed and replaced the rules. *Id.* at 221-22. The Supreme Court, however, summarily reversed and directed vacatur of the district court's judgment. 414 U.S. at 807.

That same result is required here. The State has replaced SB14 with SB5, which wholly waives the photo-ID requirement for voters who cannot reasonably obtain a qualifying ID. No claim has been made against SB5, which will take effect on January 1, 2018. After that date, the preexisting photo-ID system will cease to exist not only in practice but in law. Plaintiffs' claims are therefore moot and must be dismissed. The Legislature "rendered the case moot by passing legislation designed to repair what may have been a constitutionally defective statute. [Its] action represents responsible lawmaking, not manipulation of the judicial process. In these circumstances, [the] appellate duty under the rule of *Munsingwear* is certain." *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1187 (D.C. Cir. 1992).[9]

[9] In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, the Supreme Court declined the petitioner's request for *Munsingwear* vacatur—but that case was mooted by the private parties' agreement to settle the case. 513 U.S. 18, 29 (1994) ("[M]ootness by reason of settlement does not justify vacatur of a judgment under review."). Like *New Left*, this case does not fit into that narrow exception to the "established practice" of vacatur.

Other equitable considerations confirm that vacatur is particularly appropriate in this case. First, as this case shows, the district court's effectively unreviewable—and clearly erroneous, *see infra* pp. 48-82—discriminatory-purpose finding could be wrongly used by future plaintiffs to impugn the motives of the Texas Legislature regarding future legislation. *See, e.g.*, ROA.68580-81; *Veasey*, 830 F.3d at 240. Some future plaintiff could even try to use the district court's clearly erroneous purpose finding as a predicate to argue for VRA § 3(c) preclearance bail-in. Vacatur is thus necessary, as the whole "point of vacatur is to prevent an unreviewable decision 'from spawning any legal consequences.'" *Camreta v. Greene*, 563 U.S. 692, 713 (2011) (quoting *Munsingwear*, 340 U.S. at 41).

Second, the only reason that this case has become moot on appeal rather than moot before the district court's discriminatory-purpose finding is because the district court rushed to avoid the latter prospect, contrary to this Court's mandate and binding precedent. *See Veasey*, 830 F.3d at 272 (instructing the district court to "reexamine the discriminatory purpose claim . . . bearing in mind the effect any interim legislative action taken with respect to SB 14 may have"); *Miss. State Ch., Operation Push, Inc. v. Mabus*, 932 F.2d 400, 406 & n.5 (5th Cir. 1991) ("[C]ourts clearly defer to the legislature in the first instance to undertake remedies for violations of [Section 2]."). Just days after this Court's en banc opinion, the State informed the district court that Governor Abbott would "support legislation during the 2017 legislative session to adjust SB14 to comply with the Fifth Circuit's decision." ROA.67982. The

State alerted the district court when this legislation was filed in February 2017, ROA.69310-15, and when it passed the Senate in March 2017, ROA.69753-55. Both the State and DOJ asked the district court to stay proceedings on the discriminatory-purpose claim against SB14 until after the Legislature had an opportunity to enact SB5. ROA.69310-15. The district court not only refused, but it rushed to beat the Legislature. On April 3, 2017, it announced its intent "to issue its new opinion" on discriminatory purpose "at its earliest convenience." ROA.69762. The resulting opinion should not have issued in the first place. Vacatur is the only equitable outcome in these circumstances.

II. The District Court Abused Its Discretion by Enjoining SB5.

SB5's enactment eliminated the need for any remedial action by the district court, as the State has committed to extend the interim remedy's voting procedure through SB5's effective date. Even assuming the case is not moot, the district court's injunction, and its refusal to accept the Legislature's chosen remedy without any evidence of its effect or purpose, was an abuse of its judicial power and must be reversed.

A. Standard of review

A district court's imposition of an equitable remedy is reviewed for an abuse of discretion. *United States v. Texas*, 457 F.3d 472, 481 (5th Cir. 2006). "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Highmark Inc. v. All-care Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744,

1748 n.2 (2014) (quotation marks omitted). Imposition of an "overbroad remedy" is also "an abuse of discretion." *Texas*, 457 F.3d at 481.

The remedy imposed by a court upon a finding that a duly enacted law is invalid should be as narrow as possible, "for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality op.)). This is no less the case when fashioning a remedy for a statute found to have an illicit purpose. *See Salazar v. Buono*, 559 U.S. 700, 714 (2010) (plurality op.). And "whenever practicable," courts should "afford a reasonable opportunity for the legislature to" remedy an invalid law "by adopting a substitute measure." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (principal op.). "The new legislat[ion], if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution." *Id.*; *accord Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1124 (5th Cir. 1991); *Operation Push*, 932 F.2d at 406.[10]

[10] The district court looked to other circuits' law in adopting a standard for reviewing SB5. ROA.70438 ("SB 5—as a proposed remedy—is 'in part measured by the historical record, in part measured by difference from the old system, and in part measured by prediction.'" (quoting *Dillard v. Crenshaw Cty., Ala.*, 831 F.2d 246, 250 (11th Cir. 1987)). Yet even *Dillard* instructs that a remedy "must be narrowly tailored." 831 F.2d at 248.

B. Plaintiffs' challenges to SB14 provide no basis to enjoin SB5.

The district court not only refused to accept SB5 as a complete remedy, it erroneously enjoined SB5 in the absence of any claim against it. *See* ROA.70439, 70438 n.9 (conceding that "[i]t would be premature to try to evaluate SB 5 as the existing voter ID law in Texas because there is no pending claim to that effect before the Court"); *Veasey*, 830 F.3d at 271 ("Any concerns about a new bill would be the subject of a new appeal for another day."); *Veasey*, 870 F.3d at 390 n.2 (stay panel: "whether SB 5 should be enjoined—as opposed to whether it remedies SB 14's ills [i.e., moots the case]—was not an issue before the district court on remand").

And the district court enjoined SB5 without any evidence that SB5 had a discriminatory purpose or effect. The district court speculated that SB5 would disparately impact minorities and said that SB5 was infected with the taint of the invidious purpose that supposedly infected SB14. *See* ROA.70439 (relying on its own "prospective conceptualization of the impact of SB 5's requirements"). The district court had no authority to consider the validity of SB5 without any claims raised against this new statute, and all the evidence before the district court showed that SB5 would not disparately impact minorities.

The district court acknowledged that "the record holds no evidence regarding the impact of" SB5's central feature—its reasonable-impediment exception—"either in theory or as applied." ROA.70439. That alone should have ended the analysis, as it precludes any injunctive relief. Plus, without an

ongoing discriminatory effect from SB14, there can be no ongoing discriminatory purpose or any basis to inquire into the legislative motivation behind SB14. *See, e.g.*, *Green v. Mansour*, 474 U.S. 64, 67 (1985) (injunction cannot issue where "there is no ongoing violation of federal law"); *Crawford v. Bd. of Educ. of City of L.A.*, 458 U.S. 527, 544 n.31 (1982); *Cotton*, 157 F.3d at 392 n.9 (injunction "requires unconstitutional effects as well as motive"); *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 523 (9th Cir. 2011).

The district court, however, enjoined the law because *the State* purportedly had not affirmatively shown that SB5 would *not* have a disparate impact. ROA.70438. As a threshold matter, the district court erred by shifting the burden to the State. Settled law provides that "the *moving party*"—in this case, plaintiffs—"must satisfy the court that relief is needed." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) (emphasis added); *accord Crawford*, 553 U.S. at 203 (noting that *plaintiffs* had "not demonstrated that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute"); *Salazar*, 559 U.S. at 714-15 (plurality op.) (rejecting injunction of statute intended to remedy a law enacted for an alleged illicit purpose absent a showing that the remedial statute was itself unconstitutional); 13C Federal Practice & Procedure, *supra*, § 3533.1, at 744 ("The party seeking relief, rather than the defendant, remains obliged to satisfy the court that relief is needed.").

This Court's *Operation Push* decision is directly on point. There, a district court held that a Mississippi voter registration law disparately impacted minorities. Recognizing "that a legislative session was about to begin, the district court denied [plaintiff's] request for injunctive relief, deciding instead to give the state legislature an opportunity to remedy the violations." 932 F.2d at 404. The state legislature enacted a remedy, which the district court accepted. *Id.* The plaintiffs appealed, contending "that the relief was not sufficient to remedy the racially discriminatory effects of Mississippi's past restrictions." *Id.*

This Court affirmed, commending the district court for "deferr[ing] to the Mississippi Legislature in the first instance to remedy the existing violations," as "'one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions.'" *Id.* at 405, 406 n.5 (quoting *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990)). Rejecting the plaintiffs' challenge, this Court explained that a district court "*must accept*" the remedy enacted by the state unless the remedial legislation is itself shown to "violate statutory provisions or the Constitution." *Id.* at 407 (emphasis added; quotation marks omitted). "[T]he fact that broader relief was possible did not authorize the court to invalidate the proffered solution." *Id.* Because *the plaintiffs* failed to offer anything more than "testimony [that] was purely speculative as to the effect of the" remedial legislation, and failed to show that the legislature enacted the

new law with a discriminatory purpose, there was no basis to reject it as a complete remedy. *Id.* at 407-08. The only option left to plaintiffs was "bringing a future challenge to" the new law. *Id.* at 407.

Regardless of which party had the burden of proof, the State *did* prove that SB5 fully remedied SB14's alleged discriminatory effect for every voter identified to the court. The State provided the district court with record citations showing that the seven reasonable impediments enumerated in SB5 alleviate every single burden alleged by the 14 named voter-plaintiffs and their 13 testifying voter-witnesses. *See* ROA.69966; *supra* pp. 20-23.

The district court's order did not even acknowledge this evidence or the State's argument. Instead, the district court engaged in a "purely speculative" analysis, *Operation Push*, 932 F.2d at 407, to conclude that SB5's exclusion of an "other" box for completing the reasonable-impediment declaration—allowing a person to cast a regular ballot by writing anything in a blank space, even if just to protest the law—somehow perpetuated SB14's discriminatory effect. ROA.70445-48. But nothing in the record supports a finding that the "other" option was needed to remedy any discriminatory effect, let alone that the elimination of the "other" option would impose a disparate burden on minority voters. And the district court acknowledged what the Legislature knew when it passed SB5: this "other" box had been abused in the November 2016 election. ROA.70447 n.15; *see supra* pp. 11-12 (quoting examples of abuse).

The district court based its speculative conclusion solely on outside-the-record hearsay evidence: 12 reasonable-impediment declarations used under the interim remedy in the November 2016 election. ROA.70446 & n.14. Plaintiffs have since conceded that this evidence does not establish the truth of the matter asserted—that is, it is not competent evidence of voters facing actual burdens to voting. *See* Appellees' Opp. to Appellants' Request for a Stay 19 n.11, *Veasey v. Abbott*, No. 17-40884 (Aug. 31, 2017). The State had no opportunity to cross-examine any of these voters. And these 12 declarations do not even establish that the voters in question actually faced a reasonable impediment or, if they did, that their impediments would not be covered by SB5:

- Three reasons expressly correspond to one of SB5's seven enumerated impediments.[11]
- Three invoke financial hardship to obtaining an ID or free EIC,[12] which are covered by SB5's enumerated impediments of "Lack of transportation," "Lack of birth certificate or other documents needed

[11] "[A]ttempted to get Texas EIC but they wanted a long-form birth certificate." ROA.70263 (covered by "Lack of birth certificate" enumerated impediment, which the person appears to have also checked). "[M]other passed away & I cannot locate my SS card & other personal info that she possessed." ROA.70272 (covered by "Lack of birth certificate or other documents needed to obtain acceptable photo ID" enumerated impediment). And "daughter doesn't want him driving at age 85." ROA.70273 (covered by "Lack of transportation" enumerated impediment).

[12] "Financial hardship," "Unable to afford TX DL," and "Lack of funds." ROA.70259-61.

to obtain acceptable photo ID," "Work schedule," or "Family responsibilities."

- Another three say that the voter just moved to Texas, but do not specify any impediment to getting photo-ID (and SB5's enumerated impediments include several reasons that might apply to a new state resident, such as "Photo ID applied for but not received," "Family responsibilities," or "Lack of transportation").[13]
- One said "99 years old no ID," ROA.70274—which does not assert an impediment, but could well implicate "Lack of transportation," "Disability or illness," or "Lack of birth certificate or other documents need to obtain acceptable photo ID."
- The remaining two—"student ID Drivers license," ROA.70271, and "Out of State College Student," ROA.70262—state no impediment at all, and nonresidents are not permitted to vote in Texas elections. Tex. Elec. Code §§ 1.015, 11.001-.002.

The district court also raised a newfound concern with the State's ability to prosecute individuals for intentionally lying on the reasonable-impediment declaration. ROA.70449. But the State could have done so already under the interim remedy. *See* Tex. Penal Code §§ 37.10(a)(1), (c)(1); ROA.67881 (declaration used under interim remedy threatened "penalty of perjury").

[13] "Just moved here," "Just became resident – don't drive in TX," "Just moved to TX, haven't gotten TX license yet." ROA.70256-58.

And if the mere possibility of prosecution for perjury is sufficient to prove discriminatory intent or effect, then a reasonable-impediment exception can *never* mitigate the alleged burdens of a photo-voter-ID law. No other court has ever made such a sweeping holding. *Cf. South Carolina*, 898 F. Supp. 2d at 35-43 (granting VRA § 5 preclearance to reasonable-impediment exception allowing for perjury prosecutions). Nor could such a holding be proper, particularly when federal law imposes a greater penalty for perjury in connection with registering or voting in a federal election. *See* 52 U.S.C. §§ 10307(c), 20507(a)(5)(B).

In the district court's startling view, a government lacks a "legitimate reason" to safeguard its voting procedures through perjury penalties. According to the district court, this basic safeguard constitutes an "effort[] at voter intimidation." ROA.70448. Under that rationale, a multitude of election laws—both federal and state, throughout the Nation—are invalid. In any event, the district court had *no* evidence that the Legislature intended to intimidate voters or that the perjury penalty would have a disparate impact on minorities. The injunction rests on unsupported—and therefore clearly erroneous—findings of fact and plain legal errors. The district court's injunction is an abuse of discretion.

III. SB14 Was Not Enacted with a Racially Discriminatory Purpose.

The district court enjoined SB5 as a remedy for SB14's purportedly illicit purpose. For the reasons set forth above, the district court lacked jurisdiction over the case before entering that injunction, and its injunction of SB5 was improper as a remedy for plaintiffs' claims in any event. Accordingly, the Court can vacate or reverse without reaching the merits of the district court's underlying SB14 discriminatory-purpose finding. But if the Court does reach that issue, the Court will find that the district court's conclusion is rife with legal errors and clearly erroneous fact-findings.

A. Standard of review

Plaintiffs have the "demanding" burden, *Easley v. Cromartie*, 532 U.S. 234, 257 (2001), to show that some desire by the Texas Legislature to harm individuals because of their race "was a 'but-for' motivation for the enactment of" the SB14 voter-ID law, *Hunter*, 471 U.S. at 232. While intentional discrimination by a legislature is a "question of fact," *Operation Push*, 932 F.2d at 408, a discriminatory-purpose claim is reviewed de novo when the district court's "factual findings [are] made under an erroneous view of controlling legal principles," *Hous. Expl. Co. v. Halliburton Energy Servs., Inc.*, 359 F.3d 777, 779 (5th Cir. 2004).

Even without errors of law, "a reviewing court must ask whether, 'on the entire evidence,' it is 'left with the definite and firm conviction that a mistake has been committed.'" *Easley*, 532 U.S. at 242 (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). In making factual determinations, a

district court may not cherry-pick evidence supporting its conclusion: "[a] court commits clear error when it makes findings without properly taking into account substantial evidence to the contrary." *United States v. Francis*, 686 F.3d 265, 273 (4th Cir. 2012) (quotation marks omitted); *see Veasey*, 830 F.3d at 237 (holding that the district court must consider "the circumstantial totality of evidence"); *United States v. Gregory-Portland Indep. Sch. Dist.*, 654 F.2d 989, 999-1005 (5th Cir. Unit A 1981). And in a case like this, where "the key evidence consisted primarily of documents and expert testimony"—as opposed to credibility determinations based on live testimony[14]—"an extensive review of the District Court's findings, for clear error, is warranted." *Cromartie*, 532 U.S. at 243; *accord Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985).

Furthermore, a heavy presumption of constitutionality and good faith applies to the Legislature's enactments. *See infra* pp. 53-55. "[T]he good faith of a state legislature must be presumed." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). And courts must exercise "extraordinary caution" when considering claims that a Legislature enacted a statute with an unlawful purpose. *Id.* at 916.

[14] Much of the "live testimony" in this case consisted of lawyers reading deposition transcripts aloud. *See* ROA.71902-28, 72382-406, 72620-55, 73159-68, 73245-347, 73487-545, 73771-838, 74004-66, 74156-81, 74245-415. No witness-credibility determinations could be made based on such live testimony.

B. Several legal errors permeate the district court's finding.

1. The district court ignored this Court's mandate.

The district court's discriminatory-purpose finding violated this Court's mandate in at least three ways.

First, this Court instructed the district court "to *reexamine* the discriminatory purpose claim in accordance with the proper legal standards we have described, *bearing in mind the effect any interim legislative action taken with respect to SB 14 may have*." *Veasey*, 830 F.3d at 272 (emphases added). The reason for this instruction is self-evident: subsequent acts, no less than prior acts, by one accused of discrimination "may still be relevant to intent" if the acts are not "remote in time." *Ansell v. Green Acres Contracting Co.*, 347 F.3d 515, 524 (3d Cir. 2003). Plaintiffs themselves recognized the importance of subsequent legislative action; before SB5 was passed, they repeatedly cited the lack of legislative action to remedy SB14's impact as evidence that SB14 was intended to have that impact. ROA.68697-98.

Ignoring the mandate, the district court refused to take account of the subsequent legislative action by the Texas Legislature—the introduction, progression, and ultimate enactment of SB5, which adopted a reasonable-impediment exception virtually identical to the district court's agreed interim remedy. The Legislature's enactment of SB5 is additional, significant evidence that it never intended its photo-voter-ID law to have an unlawful disparate impact. And the district court knew that the Texas Legislature was in the pro-

cess of adopting a reasonable-impediment exception. *See supra* p. 9. The district court responded by rushing to issue a cursory 9.5-page opinion readopting its previous analysis made more than two years earlier.

Second, the district court ignored this Court's instruction to "*reevaluate* the evidence relevant to discriminatory intent and determine *anew* whether the Legislature acted with a discriminatory intent in enacting SB 14." *Veasey*, 830 F.3d at 272 (emphases added). Despite receiving hundreds of pages of briefing applying "the proper legal standards" as described by this Court, *id.*, to thousands of pages of evidence—much of it not analyzed in the district court's original, vacated ruling—the district court's cursory opinion does not so much as reference the parties' new briefing (except to note its existence) or the record.

Instead, the district court largely readopted its prior opinion. It expressly adopted its prior findings that the Legislature's passage of SB14 "revealed a pattern of conduct unexplainable on non-racial grounds, to suppress minority voting," ROA.69768 ("this Court adopts its prior findings and conclusions with respect to the pattern of conduct unexplainable on grounds other than race factor"); that historical evidence supported a finding of discriminatory purpose, ROA.69769 ("[T]his Court adopts these findings anew."); that procedural departures demonstrated invidious purpose, ROA.69770 ("[T]his Court adopts its prior findings and conclusions with respect to the factor addressing departures from normal practices."); and that the legislative drafting history indicated intentional racial discrimination, ROA.69772 ("[T]he Court

thus adopts its previous findings and conclusions with respect to the legislative drafting history."). The district court's decision was not a "reevaluation," and nothing was determined "anew." *Veasey*, 830 F.3d at 272.

The district court erroneously read this Court's opinion to hold that "there was sufficient evidence to sustain a conclusion that . . . SB 14[] was passed with a discriminatory purpose." ROA.69764. The district court provided no citation to this supposed holding because it does not exist. The only "fact" the Court reviewed was the ultimate fact "that SB 14 was passed with a racially discriminatory purpose," *Veasey*, 830 F.3d at 272, and it vacated that finding. No other fact was "affirmed as not being clearly erroneous." *Chapman v. NASA*, 736 F.2d 238, 242 n.2 (5th Cir. 1984); *see also State Indus., Inc. v. Mor-Flo Indus., Inc.*, 948 F.2d 1573, 1577 (Fed. Cir. 1991) ("The trial court's subsidiary findings can hardly be the law of the case when the judgment based on those findings was 'vacated' and the court was explicitly directed to 'reconsider' its decision."). *Veasey* referred to "*evidence* that *could* support a finding of discriminatory intent." 830 F.3d at 235 (emphases added). This did not license the district court to rubber-stamp its previous finding while ignoring the remaining "totality of evidence," much of it not previously analyzed. *Id.* at 237; *accord, e.g.*, *Francis*, 686 F.3d at 273 ("A court commits clear error when it makes findings without properly taking into account substantial evidence to the contrary."); *Texas*, 457 F.3d at 479-81 (sim-

ilar). But that is exactly what the district court did: it looked solely to "Plaintiffs' probative evidence—that which was left intact after the Fifth Circuit's review." ROA.69773.

Third, although disclaiming reliance on evidence that this Court declared infirm, the district court incorporated that evidence into its analysis. In its new opinion, the district court adopted its reasoning from part IV(A) of its original ruling. ROA.69767-70. Yet in part IV(A) of that original ruling, the district court relied heavily on the expert report of Dr. Lichtman. *See* 71 F. Supp. 3d at 654, 658-59 (relying on Dr. Lichtman's report to establish "that past discrimination has become present in SB 14"); *see also id.* at 700. Lichtman, in turn, relied on the very same evidence this Court declared infirm. *Compare Veasey*, 830 F.3d at 229-34 & n.16, *with* ROA.105961-62, 105975, 106021-26. Part IV(A) of the previous opinion also erroneously relied extensively on statements by SB14's opponents regarding the purpose of the bill. *See* 71 F. Supp. 3d at 646-59; *contra Veasey*, 830 F.3d at 233-34.

2. The district court failed to apply the presumptions of constitutionality and good faith, which require "extraordinary caution" in assessing invidious-purpose claims against government actions.

"[T]he good faith of a state legislature must be presumed." *Miller*, 515 U.S. at 915. Thus, the Supreme Court's established precedent makes clear that any claim of unlawful purpose by government actors requires "extraordinary caution": it requires significant proof of invidious purpose to overcome

the heavy presumptions of constitutionality and good faith accorded to government actions. *See, e.g.*, *id.* at 916 (recognizing a "presumption of good faith that must be accorded legislative enactments, requir[ing] courts to exercise extraordinary caution in adjudicating claims that a State has [engaged in invidiously-motivated action]"). Consequently, when a court must make a "factual" judgment necessary to determining the constitutionality of a statute, it must rely on a "heavy presumption" that the statute is constitutional and valid. *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990). And where there are "legitimate reasons" for government action, courts "will not infer a discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987).

This is just one application of the Supreme Court's general recognition that government action is presumed valid, *e.g., Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918), and that a "presumption of regularity" attaches to official government action, *Chem. Found.*, 272 U.S. at 14-15. The presumption applies just as strongly to voting and election laws as to other legislative enactments. *See, e.g.*, *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 76-77 (1980) (plurality op.); *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 809 (1969); *cf. Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 n.6 (1969) (noting an exception that proves the rule: the presumption does not apply to enactments that facially deny the right to vote).

The district court reversed the burden of proof and turned the presumption of constitutionality on its head. Rather than "[g]iv[e] the full weight to the presumption, and resolv[e] all doubts in favor of" SB14's validity, *Davis*

v. Dep't of Labor & Indus., 317 U.S. 249, 258 (1942), the district court, at every turn, worked to find reasons to invalidate the law. This error infected virtually all of the district court's findings, as discussed in detail below. *See infra* pp. 57-81. When the presumptions of constitutionality and good faith are properly applied, it is clear that the district court's "conclusion of unconstitutionality . . . can not be rested on so hazardous a factual foundation." *Davis*, 317 U.S. at 258.

3. The district court failed to consider SB14's impact on white voters.

The district court's discriminatory-purpose finding is built upon (improper) inferences from circumstantial evidence. *See infra* pp. 57-81. But the court failed to even consider evidence regarding SB14's effect on white voters, and that evidence forecloses any permissible inference of discriminatory intent.

This conclusion necessarily follows from *Personnel Administrator of Massachusetts v. Feeney*, where the Supreme Court concluded that "[t]oo many men are affected by [the challenged statute] to permit the inference that the statute is but a pretext for preferring men over women."[15] 442 U.S. 256, 275

[15] *Veasey* declined to definitively address the argument that no discriminatory *effect* exists where "the gross number of affected minority voters" does not "exceed the gross number of affected Anglo voters" because it was raised for the first time on appeal. 830 F.3d at 252 n.45. The State did raise this *purpose*-based argument below. ROA.68915-16. And *Feeney* itself was a discriminatory *purpose* case, so its holding controls here.

(1979). Justice Stevens's concurrence put it succinctly: "the fact that the number of males disadvantaged by [the statute] (1,867,000) is sufficiently large—and sufficiently close to the number of disadvantaged females (2,954,000)—refute[s] the claim that the rule was intended to benefit males as a class over females as a class." *Id.* at 281; *see also Texas*, 457 F.3d at 483-84 (district court erred, in evaluating intent of school district, by failing to analyze the total class of students accepted for transfer); *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 552 (3d Cir. 2011) (rejecting claim of discriminatory purpose where minorities and whites were both adversely affected by the policy at issue); *Gregory-Portland Indep. Sch. Dist.*, 654 F.2d at 1004-05 (discounting value of evidence suggesting that school board targeted a school based on race because "21 percent of the students . . . were Anglo"); *Richardson v. Honolulu*, 802 F. Supp. 326, 343 (D. Haw. 1992), *aff'd*, 124 F.3d 1150 (9th Cir. 1997).

Even on plaintiffs' evidence, SB14 impacted too many white voters to support an inference that SB14's classification was a pretext for purposeful discrimination against minority voters. Under the evidence accepted below, the number of white voters allegedly burdened by SB14 (296,000) is approximately the same as the *combined* number of similarly situated African-American voters (128,000) and Hispanic voters (175,000). ROA.24773; *see* ROA.118619-20, 118655-56. In *Feeney*, discriminatory purpose was rebutted because men comprised nearly 40% of the affected class. Here, nearly 50% of those allegedly affected by SB14's photo-ID requirement are not minorities.

The district court never addressed this outcome-determinative argument, which demonstrates the district court's clear error in finding that "the effect of the state action" reveals "a pattern, unexplainable on grounds other than race." ROA.69768.

C. Numerous clearly erroneous fact-findings also underlie the district court's discriminatory-purpose ruling.

The district court gave plaintiffs unprecedented discovery of (privileged) legislative materials—thousands of internal legislative documents and hours of legislator depositions—that revealed no invidious purpose. *See Veasey*, 830 F.3d at 231 n.13, 235. Even SB14 *opponents* said that they believed proponents did not have an invidious motive. ROA.68856 (citing ROA.38511, 38996). And while circumstantial evidence is also relevant, using it to "[d]iscern[] the intent of a decisionmaking body is difficult and problematic." *Veasey*, 830 F.3d at 233. Adding to this difficulty is the need to "exercise extraordinary caution" in adjudicating claims that a State has enacted a facially neutral law "on the basis of race." *Easley*, 532 U.S. at 242 (quoting *Miller*, 515 U.S. at 916).

Here, the "totality of evidence," *Veasey*, 830 F.3d at 237, admits of only one conclusion: SB14 was intended to be one piece of a considered response to a decade-long and nationwide push to improve election integrity and increase public confidence in elections. It was not the product of invidious intent. The district court's contrary conclusion is not "plausible in light of the entire record." *Moore v. M/V Angela*, 353 F.3d 376, 382 (5th Cir. 2003).

1. The district court clearly erred in concluding that the procedure used to enact SB14 suggested discriminatory purpose.

Procedural departures from the ordinary legislative process might signal invidious purpose when they are effected to conceal or avoid "full and open debate"—potentially suggesting that the lawmaker has something to hide. *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 604 (4th Cir. 2016); *accord, e.g.*, *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 636 (6th Cir. 2016); *Spurlock v. Fox*, 716 F.3d 383, 397-98 (6th Cir. 2013); *cf. McCrory*, 831 F.3d at 229 (procedural departures were evidence of invidious purpose when they suggested an "eagerness" to "rush" legislation through, which "bespeaks a certain purpose"). The procedural maneuvers undertaken by voter-ID proponents, on the other hand, "enabled public debate on the [bill] to take place." *City of Cuyahoga Falls v. Buckey Cmty. Hope Found.*, 538 U.S. 188, 196 (2003). This "demonstrate[s] devotion to democracy, not to bias, discrimination, or prejudice." *Id.* (quotation marks omitted). As the district court recognized, the steps taken by voter-ID proponents were to "ensure passage" of a bill with deep support. 71 F. Supp. 3d at 645.

Indeed, SB14 was the product of more than six years of legislative development and debate on photo-voter-ID laws, which produced more than 4,500 transcript pages of open debate and hundreds of pages of exhibits and written testimony. ROA.38501-45759, 45784-47388. The Texas Legislature is a part-time legislature that meets in a general session from January to May every other year. While the first modern Texas voter-ID bill was introduced by a

Democrat in 2001, the first such bill to approach passage was considered in 2005. ROA.68834, 68837-41.[16] This bill, which provided for various forms of photo and non-photo ID, was considered, debated, and passed by the Texas House but blocked by a handful of opponents in the Texas Senate using the (since repealed) rule generally requiring two-thirds support to bring legislation up for debate. ROA.68838-41. Although this "two-thirds rule" was routinely waived by majorities in the Texas Legislature when faced with minority intransigence, ROA.68839-41, voter-ID proponents did not waive the two-thirds rule in 2005, and the bill died, ROA.68841.

A similar fate befell the voter-ID bill debated and passed by the Texas House in 2007: a minority of Senators used the two-thirds rule to prevent an up-or-down vote on the bill in the Texas Senate, and the legislation died. ROA.68842-45. They were able to do so only because Lieutenant Governor Dewhurst gave voter-ID opponents an extraordinary do-over after two-thirds of the Senators present voted to suspend the regular order of business and take a vote on the pending voter-ID bill. *See* ROA.68843-45 (citing, *e.g.*, ROA.29927-28, 46750-58, 74039-40). Opponents took advantage of that unheard-of courtesy by killing the bill. ROA.68843-45. The district court ignored that the single truly radical departure from the ordinary procedural sequence in the entire record *helped* opponents.

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[16] The State's proposed findings of fact in the district court include cites to the Record on Appeal in the previous *Veasey* appeal (No. 14-41127). All record cites in this brief are to the current Record on Appeal.

In response, voter-ID proponents in 2009 successfully waived the Senate's two-thirds rule for a similar voter-ID bill. ROA.68847. So the Texas Senate was finally able to debate and vote on a voter-ID bill. After nearly 24 hours of public testimony and debate, the Senate passed its bill. ROA.68847-48. But this time, opponents in the Texas House used a procedural maneuver called "chubbing" (which is similar to a filibuster in the U.S. Senate) to block debate and consideration of the voter-ID bill. Because voter-ID proponents in the Texas House spent months unsuccessfully trying to reach a compromise with opponents, ROA.68848-49, the Senate's bill was not considered until near the end of the 2009 session. This allowed opponents to consume remaining debate time on mundane topics to run out the clock on the legislative session. ROA.68849. Numerous other important bills failed to receive consideration because voter-ID opponents shut down the legislative process to block voter-ID debate. ROA.68849-50.

By 2011, voter-ID proponents had won overwhelming majorities in both the Texas House and Senate. ROA.68850-51. This landslide created "enormous" pressure to pass a photo-only voter-ID bill. ROA.68829-31. Having learned from the past three legislative sessions that voter-ID opponents were determined to block any voter-ID measure, proponents gave up on compromise; so they sought passage of a law accepting only photo ID (SB14), and focused on countering opponents' procedural maneuvers. ROA.68832-33, 68851-54. To allow open debate and an up-or-down vote in the Senate, proponents again waived the two-thirds rule for the voter-ID bill. ROA.68851.

To prevent a repeat of House opponents' efforts to block debate and kill the bill by running out the clock at the end of the legislative session, proponents ensured early consideration of voter-ID in the House in two ways. First, the Governor designated the voter-ID bill as an "emergency," ROA.68851-52, an established tool to allow for earlier-than-usual consideration of a bill in the Legislature. ROA.68851-52.[17] Second, the Senate worked to pass a voter-ID bill early in the session. ROA.68855-56. Before the Senate passed SB14 in January, the Senate debated SB14 for over 17 hours, ROA.38500-630, 39710-812, and an opponent conceded that "[a]ll 31 Senators . . . had ample opportunity to review the bill," ROA.39710; *accord* ROA.68855. Because of the early consideration in the Senate, the House was able to fully debate SB14 and pass the bill—but not until the end of the session in May 2011, nearly five months after SB14 was introduced. ROA.68862-70. The assigned House committee debated SB14 for nearly 7 hours. ROA.39887-89, 39895-40051, 40104-306. The entire House then debated SB14 for a full day. ROA.40426-88, 40644-741, 40775-970, 41019-159.

In light of these facts, the district court's conclusion that SB14 was enacted with "unnatural speed," 71 F. Supp. 3d at 700 (adopted at

[17] This gubernatorial designation does not require a literal emergency, and it has been used dozens of times in the past decade to set priorities. *See* Legislative Reference Library of Texas, Emergency Matters Submitted to the Legislature, https://perma.cc/7RNH-FNSL; ROA.68852-53. The district court clearly erred by drawing a negative inference from the Governor's designation. *See* 71 F. Supp. 3d at 647 (adopted at ROA.69770).

ROA.69770), is clearly wrong. SB14 was introduced at the very beginning of the session in January 2011 and was not enacted until the end of the session in May 2011. *See* ROA.68851-53; S.J. of Tex., 82d Leg., R.S. 54, 2385 (2011). And the district court ignored that a voter-ID bill had been under active consideration by the Texas Legislature for *more than six years*. The legislative history of SB14 *alone* is more than 1,500 transcript pages. *See* ROA.38815-9355, 39710-812, 39895-40051, 40104-40306, 40426-88, 40644-741, 40775-970, 41019-159, 41217-18, 41339-54, 41570-655. Moreover, voter-ID opponents testified that in 2011 they were picking up the discussion from 2009 and were prepared to debate and offer amendments. ROA.68855 (citing ROA.71731, 72625, 72785-86). The district court improperly ignored this substantial contrary evidence.

The district court drew an additional negative inference from the suspension of the Senate's (now formally repealed) two-thirds rule for SB14. 71 F. Supp. 3d at 647-48 (adopted at ROA.69770). But this ignored that suspension of the two-thirds rule was a common tactic to overcome legislative opposition—including later that *same legislative session* in 2011 to secure passage of a budget. *See* ROA.68840-41 (citing ROA.29942-43; S.J. of Tex., 82d Leg., 1st C.S. 1563 (2011)). And the former two-thirds rule did not even apply in special sessions. ROA.68840-41, 68854. Thus, the district court's crediting

of opponent testimony to the effect that avoiding the two-thirds rule was unusual, 71 F. Supp. 3d at 648, is untenable.[18] Given the clear, non-racial reasons for suspending the two-thirds rule in the context of SB14, the district court's inference of intentional racial discrimination turns the presumption of good faith on its head and is clearly erroneous.

The district court went on to conclude that the Senate's use of the Committee of the Whole had "no useful purpose" other than to eliminate delays. 71 F. Supp. 3d at 647-48 (adopted at ROA.69770). This conclusion is also untenable—and was based on a *House* member's testimony that did not touch upon the purpose of that procedure. *Id.* at 647 (citing ROA.71736-37). The Senate Committee of the Whole has the benefit of allowing large amounts of information to be disseminated to the entire Senate. ROA.68847. It also allows any Senator to question witnesses and introduce evidence. ROA.68847. Such a procedure was particularly appropriate for an issue that had been under consideration for three legislative sessions. The district court had no basis to make a subjective determination that a well-established Senate procedure had "no useful purpose."

[18] According to the district court, Lieutenant Governor Dewhurst testified that he was not aware of any similar rule change for any other bill. 71 F. Supp. 3d at 648. In fact, Dewhurst later clarified that there were "numerous cases" over the "last 30 or 40 years" in which the two-thirds rule has been maneuvered around. ROA.29956. The district court cherry-picked the former and ignored the latter.

The district court also drew a negative inference from the fact that many amendments were voted down without explanation. 71 F. Supp. 3d at 650 (adopted at ROA.69770). This conclusion, however, rests on a false premise: voter-ID proponents *did* explain why they were rejecting amendments. ROA.68858-59 (citing, *e.g.*, 39759-61, 39764-65, 39769, 73784); ROA.40864-68. Moreover, the district court ignored the fact that many ameliorative amendments by opponents were adopted. The enacted version of SB14 differed from the version introduced at the beginning of the 2011 session because of proponents' acceptance of several amendments offered by opponents, including amendments expanding the categories of acceptable IDs and allowing the use of expired IDs in some situations. ROA.68857-58. In all, the Senate adopted 9 (out of 37) amendments, and the House adopted 15 (out of 63) amendments. *See* ROA.39677-704, 40528-99, 68856.[19]

Demonstrating the lengths to which the district court went to turn innocuous facts into evidence of invidious purpose, it also drew a negative inference from an incident in which Senator Fraser responded to a question from an opponent by saying, "I'm not advised, ask the Secretary of State." 71 F. Supp. 3d at 647 & n.80 (adopted at ROA.69770). The record shows that Senator Fraser responded this way because the Secretary of State *was going to be testifying*—and did, in fact, testify—before the Committee of the Whole. *See* ROA.38604-18. It is not a procedural aberration to direct questions to experts.

[19] Other proposed amendments were withdrawn.

2. The district court clearly erred in concluding that contemporaneous statements made by legislators suggested discriminatory purpose.

Contemporaneous statements of legislators are "highly relevant," *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977), to determining the purpose of a law. Yet the district court refused to give weight to the fact that, despite invasive discovery into years' worth of private legislator documents and communications, plaintiffs failed to find a single statement indicating invidious intent. As the original three-judge panel recognized, it is highly "unlikely that such a motive would permeate a legislative body and not yield any private memos or emails." *Veasey*, 796 F.3d at 503 n.16.

And to make matters worse, the district court ignored proponent legislators' public contemporaneous statements, which demonstrated a valid purpose underlying SB14. The expressed rationale for the bills passed out of the Houses of the Texas Legislature between 2005 and 2011 was consistent: to deter voter fraud and safeguard voter confidence. *See, e.g.*, ROA.46953 (Chairwoman Denny: "[I]t is so important that we safeguard the integrity of the vote and that—that people are assured that their vote will be counted and that no one usurped their authority to cast their own vote."); ROA.46070, 46098 ("Representative Brown: The integrity of the process. As people are more and more disillusioned with the integrity of the process, we have less participation. And in a number of states, as they have tightened up on their requirements to be able to vote, they have had greater participation. And that's what we hope for. . . . The intent of our bill is to increase the integrity

of the voting process and thereby to increase confidence that every persons' vote will count. One man, one vote is what we've stood behind for a long time and we need to make it effective."); ROA.41782-83 (Senator Fraser explaining that S.B. 362 "goes a long ways" towards preventing fraud and increasing voter confidence); ROA.40418 (Representative Harless: "Only a true photo ID bill can deter and detect fraud at the polls and can protect the public's confidence in the election."). This includes statements by voter-ID opponents who did not believe that voter-ID proponents were acting with an invidious motive. *See* ROA.68856, 68872-73 (citing ROA.38511, 38996, 46416).

Courts must presume that these statements were made in good faith, but the district court ignored them entirely. This is clear error, as it is impossible to "say with confidence that the District Court considered the evidence proffered." *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 486 (1997).

In another telling display, the district court dismissed the Texas Legislature's reliance on contemporaneous "[p]olls show[ing] approval ratings [for a photo ID requirement] as high as 86% for Anglos, 83% for Hispanics, and 82% for African Americans"; in the district court's view, these independent polls relied on by the Legislature "were not formulated to obtain informed opinions from constituents," making them irrelevant to determining SB14's "effect." 71 F. Supp. 3d at 656 (adopted at ROA.69767-68). But those polls are directly relevant to assessing *the subjective purpose* of SB14 proponents, who relied on those polls and feared that their constituents would vote them out of office if they did not pass a voter-ID law. ROA.68827-31.

The district court selectively relied on just two "contemporaneous statements," but one is not a statement, and the other is not contemporaneous. First, the district court relied on the purported "fact that the legislature failed to adopt ameliorative measures without explanation." ROA.69772. This is not a statement, and it is incorrect. *See supra* p. 64. Second, the district court relied on Senator Fraser's deposition testimony that VRA § 5 preclearance, as it existed in 2012, had outlived its useful life. ROA.69772; *see* ROA.28033 (showing that statement was referencing VRA § 5). But this statement was not contemporaneous with the consideration of SB14. *See* ROA.28033. Regardless, the belief was confirmed by *Shelby County*, 133 S. Ct. 2612. So here again, rather than give the Texas Legislature the benefit of any possible doubt, the district court drew a negative inference against SB14.

In short, the district court's conclusion that contemporaneous statements made by Texas legislators evinced a discriminatory purpose, ROA.69772, was legally erroneous and factually unsupportable.

3. The district court clearly erred in concluding that the Texas Legislature knew that SB14 would disparately impact minorities.

All of the probative evidence before the Texas Legislature suggested that SB14 would *not* have a disparate impact on minority voters, and *none* of the contrary evidence cited by the district court was actually before the Legislature when it considered SB14. Most importantly, "the legislature did not call

for, nor did it have, the racial data used in the North Carolina process described in *McCrory*."[20] *Lee*, 843 F.3d at 604.

This Court previously concluded that SB14 had a disparate impact. *Veasey*, 830 F.3d at 243-65. But that holding in 2016 has no bearing on what the Legislature was aware of—or what its purpose was—when it enacted SB14 in 2011. "Equal protection analysis turns on the intended consequences of government classifications. Unless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race neutrality." *Hernandez v. New York*, 500 U.S. 352, 362 (1991). And if a government actor did not believe that a law would "caus[e]

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[20] This case is distinguishable from *McCrory* in a number of ways: Texas did not propose a photo-voter-ID law "on the day after . . . *Shelby County*," 831 F.3d at 214; SB14 was not an "omnibus" election law restricting voting "in five different ways," *id.*; the Texas Legislature did not "request[] data on the use, by race, of a number of voting practices," *id.*; SB14 did not "target African Americans with almost surgical precision," *id.*, by enacting voting restrictions that the requested data showed were disproportionately used by minorities while "exempt[ing] absentee voting" based on data showing absentee voting was disproportionately used by whites, *id.* at 230; SB14 was the culmination of six years of debate that took the entire 2011 legislative session from January to May, whereas North Carolina's law was "released" publicly on "July 23[, 2013,]" *id.* at 227, and signed into law less than three weeks later to "avoid in-depth scrutiny," *id.* at 228; the Texas House and Senate did have an "opportunity to offer [their] own amendments," *id.*; and the record here contains an enormous amount of "testimony as to the purpose of [the] challenged legislation" even though it was subject to "[legislative] privilege," *id.* at 229.

the impact asserted," it could not have "the intent of causing the impact asserted." *Id.*; *accord, e.g.*, *Raytheon Co. v. Hernandez*, 540 U.S. 44, 54 n.7 (2003). Even if the Legislature was wrong in its prediction that SB14 would not have a disparate impact, that prediction nonetheless precludes a finding that the alleged impact was intended.

The district court adopted its prior conclusion that the disparate impact of SB14 would have been "obvious" to legislators. 71 F. Supp. 3d at 658 (adopted at ROA.69767-68, 69771). But plaintiffs' own expert testified that there is no "consensus regarding the effects of voter ID laws." ROA.72557. Another of plaintiffs' experts authored a study—which the Legislature relied on—concluding that the effect of voter ID laws, even strict ones, was "too small to be of practical concern." ROA.68809 (citing ROA.42980). And yet another of plaintiffs' experts conceded that although her "sympathies lie with the plaintiffs in the voter ID cases," she admitted that "the existing science regarding vote suppression is incomplete and inconclusive." ROA.47795; *see also* ROA.73152-53.

To the extent that the Texas Legislature had evidence of SB14's likely impact, the Legislature had good reason to believe that it would *not* prevent any person from voting. The evidence shows that the Texas Legislature relied on multiple studies and the experiences of other States to conclude that SB14 would not disparately impact minorities. *See* ROA.68874-77 (citing, *e.g.*, ROA.30743-44, 31120, 41849, 42932-43020, 43228-34, 43242-47, 43266-67,

44538-40, 73783). And voter-ID opponents conceded that they had no evidence on the other side. ROA.39778 ("I can no more prove, without this bill being in effect, that it has the disparate impact that folks on my side are afraid of."). Even if the Legislature was mistaken about any potential disparate impact, having a mistaken belief about how a law will operate is not evidence of discriminatory purpose.

Based on all this, the Senate sponsor announced that he was "confident" that SB14 "would *not* have a disparate impact . . . on racial ethnic minorities." ROA.38545 (emphasis added). And the House sponsor announced that she "believe[d] with all [her] heart" that "Latinos and African Americans in Texas" would not be "put in a worse position . . . as a result of SB14." ROA.40418-19; *see* ROA.38546 (voter-ID opponent to Senate sponsor: "I know . . . you are confident your bill will not have a disproportionate impact on certain groups.").

The district court never mentioned this highly relevant evidence. Meanwhile, the evidence that the district court cherry-picked to support its conclusion "that the legislature knew that minorities would be most affected by" SB14, 71 F. Supp. 3d at 657-58 (adopted at ROA.69767-68, 69771), is exceptionally weak. The district court relied on the views of SB14 opponents. 71 F. Supp. 3d at 657. This Court already held that the adverse "speculation" of SB14 opponents is irrelevant to determining the Legislature's purpose. *Veasey*, 830 F.3d at 234; *see* ROA.39778 (voter-ID opponent conceding that opponents had no evidence to back up their speculation).

The district court also relied on the post-enactment testimony of a single legislator—Representative Todd Smith—that at some point between 2005 and 2011, he had publicly estimated that 700,000 Texans lacked a driver's license. 71 F. Supp. 3d at 657. But the district court refused to consider the State's showing that, in fact, Representative Smith never made this estimate public before the passage of SB14. ROA.68917, 69171. At most, this is an isolated statement made by a single legislator years after the enactment of a law—"the type of . . . testimony which courts routinely disregard as unreliable." *Veasey*, 830 F.3d at 234. Moreover, this estimate gives no indication of the racial makeup of the group of voters supposedly lacking driver's licenses or other SB14-compliant ID. Although Representative Smith years later suggested that it was "common sense" that minorities would be more likely to be in this group than whites, 71 F. Supp. 3d at 657, there is no indication that this view was shared by (or with) other proponents of SB14.[21]

Next, the district court relied on the testimony of an aide to the Lieutenant Governor, who is not a legislator. 71 F. Supp. 3d at 657 (characterizing aide's testimony as "assum[ing] that the poor, who would be most affected by the

[21] In a footnote, the district court noted that the Lieutenant Governor, not the Legislature, was given a study that estimated that 3%-7% of registered voters lacked a driver license or personal ID. 71 F. Supp. 3d at 657 n.187. As plaintiffs concede, these numbers were not broken down by race. ROA.68605. Moreover, the Secretary of State's office warned that its matching data were unreliable. ROA.73831-82.

law, would be minorities"). But in the portion of the record cited by the district court, the aide merely testified that, in 2014, he believed "[i]t's possible" that an indigency exception "would . . . have reduced" the alleged "burden on poor voters" and that he "suspect[ed]" that poor voters were more likely to be minorities. ROA.74379-80. Vague post-enactment testimony years after SB14 by a single aide outside the Legislature—evidence which "courts routinely disregard as unreliable," *Veasey*, 830 F.3d at 234—says nothing about whether the Legislature believed that SB14 would disparately impact minority voters. And it is surely insufficient to overcome the contrary contemporaneous statements by legislators. In fact, that same aide testified that *legislators* had consulted and relied on studies showing that requiring photo-voter-ID does *not* reduce turnout. ROA.30978-79.

Finally, the district court relied on an expert's calculation of the possession rates of various forms of ID that were listed by race. 71 F. Supp. 3d at 658. There is no suggestion, let alone evidence, that this information was before the Legislature when it considered SB14.[22]

[22] Dr. Lichtman also opined that the Legislature knew that a disproportionate amount of minorities had their drivers' licenses suspended. *See Veasey*, 71 F. Supp. 3d at 658. This opinion is completely unfounded. *See* ROA.69209 (citing ROA.38545, 72705-06).

4. The district court clearly erred in concluding that the Texas Legislature was motivated to enact SB14 by the increase in Texas's minority population.

In adopting its previous analysis, the district court concluded that SB14 was motivated by demographic changes—the increasing population of minorities and the announcement that Texas had become a majority-minority state. 71 F. Supp. 3d at 700 (adopted at ROA.69768-70).[23] Given this purported concern, one would expect some hint of worry expressed by voter-ID proponents in the Texas Legislature, whether in public or in private. Yet despite the invasive discovery plaintiffs received, they could not produce a shred of evidence suggesting that voter-ID proponents were concerned about this demographic shift, let alone that they sought to combat it through legislation. This theory of motive is pure speculation.

Again turning the presumption of good faith on its head, the district court adopted this theory of motive while disregarding substantial contrary evidence. The first modern voter-ID bill in Texas was introduced by a Democrat in 2001. ROA.68834. And as the minority population grew in Texas, Republicans were achieving more electoral success. ROA.68850-51. In 2001, Republicans were in the minority in the Texas House. ROA.68850-51. By 2011, Republicans had achieved historic majorities in both Houses of the Texas Legislature and controlled every statewide office. ROA.68850-51.

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[23] This narrative was first developed in 2009 by J. Gerald Hebert, *see* ROA.42184-87, who is now plaintiffs' counsel.

The evidence shows that the Texas Legislature took up the issue of voter-ID in 2005 during a broader effort to modernize its election laws, ROA.68817-37, because the issue of voter-ID was percolating in States around the country and in voters' minds. Concern about in-person voter fraud was a natural outgrowth of the nationwide effort, following *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam), to improve election integrity and increase public confidence in elections. *See* ROA73122 (plaintiffs' expert testifying that concerns about voter fraud "really c[a]me to the fore" following the 2000 election). Before the Texas Legislature enacted SB14, two bipartisan commissions and two decisions by the Supreme Court had recognized the threat of voting fraud and the importance of confirming voter identity. ROA.68818-19, 68821-22 (citing ROA.47389-500); *Crawford*, 553 U.S. 181; *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). Meanwhile, between 2001 and 2011, nearly 1,000 voter-ID bills were introduced across the country, and numerous legislatures passed such laws. ROA.68824-27 (citing ROA.48230-48, 53237-39). At the same time, public support for photo-voter-ID requirements was consistently high across partisan and racial lines. ROA.68827-28 (citing ROA.38822, 42079, 42539, 42941, 44496, 47503, 56949-51, 74036, 74160-61).

So, following the lead of other States, the support of the public, and endorsement of a photo-voter-ID requirement by bipartisan expert commissions, Texas enacted SB14. As plaintiffs' own expert recounted, the pressure on legislators in Texas to pass a photo-only voter-ID law at that time was

"enormous"; legislators knew their jobs were at stake if they failed to do so. ROA.72136. The district court refused to consider this evidence.

5. The district court clearly erred in concluding that SB14 reflected substantive departures from the Legislature's priorities.

After *Bush v. Gore*, Texas launched a decade-long effort to modernize and secure its election system. *See* ROA.68817-31, 68834-37, 68841-42, 68845, 68850, 68866-67; *see also Bush*, 531 U.S. at 104 (urging "legislative bodies nationwide" to "examine ways to improve the mechanisms and machinery for voting"). In doing so, Texas demonstrated that "the factors usually considered important by the" Texas Legislature, *Arlington Heights*, 429 U.S. at 267, were those identified by the Supreme Court in *Crawford*—the need to ensure "orderly administration" of elections, to "prevent[] voter fraud," and to "inspire public confidence" in "the electoral system." 553 U.S. at 196-97 (internal quotation marks omitted). SB14 was consistent with each of these factors, and the district court's contrary conclusion was clear error.

First, rather than presume the Legislature was making a good-faith effort to combat fraud, the district court questioned whether SB14 would be effective against voter fraud. ROA.69767-68, 69770-71 (adopting 71 F. Supp. 3d at 653-54). But the Legislature had heard substantial evidence that requiring a photo ID to vote would prevent in-person voter fraud, which was a serious problem in Texas, ROA.69416-19, 118623-35, while also impeding other

forms of voter fraud as well. *See* ROA.68821-24, 68867-72, 68884-87, 68891-95, 69417-19.

Second, the district court pointed to the lack of an indigency exception,[24] 71 F. Supp. 3d at 701 (adopted at ROA.69767-68, 69770), but ignored that a proposed indigency exception was added to SB14 in the Senate and excised in the House at the behest of *Democratic opponents of the bill*. In the Senate, voter-ID proponents adopted an amendment to allow indigent persons without photo ID to cast a ballot upon swearing in an affidavit that they could not afford SB14-compliant ID. ROA.68858 (citing ROA.39701-03). This was like Indiana's accommodation, in *Crawford*, for voters who could not afford ID. *See* 553 U.S. at 186. In the House, however, a prominent voter-ID opponent and plaintiffs' witness—Representative Anchia—argued that an indigency affidavit would allow voter fraud:

> people can come in and never show anything and not be on the list and the ballot board shall accept their [ballot] . . . . But they don't have to prove who they are. They just say they have a religious objection or are indigent . . . and ultimately vote without ever having shown ID.

[24] Under the reasoning of its remedial order, the district court would have concluded that an indigency affidavit is not sufficient to save a voter-ID law: Because an indigency affidavit also would have created "separate voting obstacles and procedures"—and, if subject to penalty of perjury, would have amounted to "voter intimidation"—including an indigency-affidavit procedure in SB14 would also have counted against the State. ROA.70441, 70448.

ROA.40697-99; *see also* ROA.68864-65. Accepting this criticism, the House excised the indigency-affidavit provision on the stated basis that it would make it easier to commit voter fraud—with some SB14 opponents, including Representative Anchia, voting to excise this indigency-affidavit provision. *See* ROA.68864-65 (citing ROA.40553, 40875-78).[25]

Upon passage in the House, SB14's conferees were faced with the prospect of no provision to ameliorate possible effects on the poor on the one hand, and bipartisan opposition to the indigency exception on the other. To bridge the divide, the conferees added a provision to provide free voter-IDs (EICs). ROA.68869 (citing ROA.41307-08, 41319-21). This followed Georgia's law, which had been precleared under the then-applicable VRA § 5. *See Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1347 (11th Cir. 2009); ROA.68825. Thus, the legislators replaced an Indiana-inspired provision with a Georgia-inspired provision. This series of events shows that the provision of EICs and the lack of an indigency exception were in line with the consistent purpose of voter-ID proponents to prevent fraud while not substantially impeding the right to vote.

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[25] After the vote, a handful of these opponents, including Representative Anchia, inserted into the House Journal statements to the effect that they had actually intended to vote against eliminating the indigency exception. ROA.40553-54. These after-the-fact statements have no official effect. *Cf.* Tex. H.R. Rule 5, § 53, Tex. H.R. 4, 82d Leg., R.S., 2011 H.J. of Tex. 83, 132 (permission to change a vote must receive unanimous consent). And they are contrary to Representative Anchia's statement on the floor.

Third, the district court drew a negative inference from the fact that "the bill did nothing to address mail-in balloting, which is much more vulnerable to fraud." ROA.69771 (citing *Veasey*, 71 F. Supp. at 641, 653-55). This is yet another instance in which the plaintiffs, not the State, were given the benefit of the doubt. While SB14 was limited to in-person voting, the evidence showed the Texas Legislature had actually prioritized mail-in ballot fraud, addressing that issue in 2003 *before* it addressed in-person voter fraud. *See* ROA.68835-36. The Texas Legislature went on to address this issue twice more before the end of the 2011 session. *See* ROA.68845, 68866 (citing ROA.41134). The district court never mentioned this evidence, let alone analyzed it. The Legislature's choice to address mail-in ballot fraud in other bills does not suggest that SB14 departed from the Legislature's ongoing, multifaceted concern with election integrity.

Fourth, the district court drew a negative inference from the fact that SB14 was not like other photo-voter-ID laws. ROA.69770-71 (citing 71 F. Supp. 3d at 642-45, 651-52). But no two voter-ID bills are identical. *See* ROA.68824-26. Nothing in the way SB14 differs from other laws suggests an invidious, substantive departure from the policy factors important to the Texas Legislature. The limited number of allowable IDs, for example, comports with the Texas Legislature's interest in the "orderly administration" of elections. *Crawford*, 553 U.S. at 196. These IDs were chosen because they were the most "readily available" and "easiest" to acquire and use.

ROA.69174, 69208 (citing ROA.38963).[26] And the universe of IDs was limited to avoid confusion at the polls—that is, to ensure orderly administration. *See* ROA.68860 (citing, *e.g.*, ROA.39759-61); ROA.40867-68.

Fifth, the district court stated that proponents offered "constantly shifting rationales," ROA.69771 (citing *Veasey*, 71 F. Supp. 3d at 653-59)—in particular, that proponents supposedly cited the need to prevent non-citizen voting early in their efforts to enact voter-ID, but then shifted away from that rationale later, *Veasey*, 71 F. Supp. 3d at 654-55. But the evidence showed that that legislators were consistently concerned with preventing voter fraud and safeguarding voter confidence. *See* ROA.68856, 68871-72. Moreover, the district court was wrong that legislators shifted away from concerns of non-citizen voting, which SB14 would help address. *See* ROA.68633-34 (plaintiffs observing that concerns regarding non-citizen voting were expressed during and immediately after the consideration of SB14); *see also* ROA.68894-95 (showing while SB14 may not stop all voter fraud by non-citizens, it limits the opportunities to do so). In any event, the district court's observation, even if accurate, would only highlight the consistently stated goals of the Legislature to improve election integrity and public confidence. *See supra* pp. 65-67.

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[26] The district court in its original opinion drew a negative inference from the fact that SB14 allowed voters to use "concealed handgun permits" as ID. 71 F. Supp. 3d at 701. The district court ignored that this provision was proffered by an SB14 *opponent* and adopted *unanimously*. ROA.68857 (citing ROA.39688).

Sixth, the district court pointed to additional spending in SB14, which the court took to be a substantive departure because of concerns regarding the budget. ROA.69771 (citing 71 F. Supp. 3d at 649). But the district court ignored crucial evidence in order draw a negative inference against the Legislature: The $2 million that SB14 directed the Secretary of State to spend on voter education *was already in the possession of the agency*; no state expenditure was necessary, so the budget shortfall did not come into play. *See* ROA.69142 (citing ROA.38507, 38605-06). This was explained during SB14's debate both by Senator Fraser, the bill's sponsor, and by the Secretary of State. *See* ROA.69142.[27]

[27] Taking the opposite tack, the district court drew a negative inference from the fact the Legislature directed *only* $2 million to be spent. 71 F. Supp. 3d at 649. But the district court ignored that the record before the Texas Legislature indicated that the funding was adequate. *See* ROA.69189-90. A witness from the Secretary of State's office testified in the Senate and explained that the agency engages in voter outreach and election-worker training every election cycle, and each cycle it spends, on average, $3 million doing so. ROA.38605. The witness further testified that training and outreach related to SB14 would be folded into that regular effort. ROA.38605-06. Because there would be training and education anyway, the Secretary of State's office indicated that the agency likely would not even "need 2 million just for the voter ID" education. ROA.38606. Further, the Secretary of State's office informed the Legislature that beyond the $2 million that SB14 directed it to spend on voter education, there was an additional $3 to $5 million in federal funds that Texas had to educate voters and train election workers. ROA.38605. Nothing in the record suggests that the Texas Legislature knew or intended funding to be inadequate.

Seventh, the district court drew a negative inference from the fact that "other pressing problems facing the legislature did not get the procedural push that SB 14 received." ROA.69771-72. The district court again ignored substantial explanatory evidence. *See supra* pp. 58-61. No other pending legislation had been subject to the obstruction faced by voter-ID laws. *See* ROA.68838, 68841, 68844, 68849. This obstruction had prevented other important legislation from being enacted. *See* ROA.68849-50. "[T]he procedural push," ROA.69771-72, was necessary to get an up-or-down vote and allow all the important pending legislation to be considered (which it eventually was), *see* ROA.68852-54.

D. SB14 would have been enacted without any alleged impermissible purpose.

"Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the [challenged] law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter*, 471 U.S. at 228. The State explained that the nationwide push for voter ID, combined with the overwhelming public polling support for such a law and the threat of a constituent backlash if a photo-only voter ID law with minimal exceptions were not enacted, made it inevitable that the Legislature was going to enact SB14. ROA.68948-49.

In response, the district court said nothing. It failed to find any facts, provide any reasoning, or adopt anything from its previous opinion in concluding that the State "ha[d] not met its burden" "to demonstrate that [SB14] would

have been enacted without its [alleged] discriminatory purpose." ROA.69773. Thus, there is nothing for this Court to defer to. The State has shown that SB14 was inevitably going to be enacted, with or without any alleged secret purpose.

IV. SB14 Did Not Have a Racially Discriminatory Effect.

This Court has affirmed the finding that SB14 had a discriminatory effect in violation of VRA § 2. *Veasey*, 830 F.3d at 265. The district court relied on this finding in entering the permanent injunction. *See, e.g.*, ROA.70433, 70438-39, 70453. For possible certiorari or en banc review, the State preserves this issue and its arguments that SB14 did not have a discriminatory effect. *See* Pet. for a Writ of Certiorari, *Abbott v. Veasey*, No. 16-393 (U.S. Sep. 23, 2016). If SB14 did not have a discriminatory effect, then SB14 could not possibly have had a discriminatory purpose. *See supra* pp. 67-72.

CONCLUSION

Because this case is moot, the district court's permanent injunction and orders on the purpose and effect claims should be vacated, and the case should be dismissed. Alternatively, the judgment below should be reversed, and judgment should be rendered for defendants.

Respectfully submitted.

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I certify that this document has been served by ECF on all counsel of record.

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