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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INTRODUCTION

The State's opening brief provided a 27-point list with record citations demonstrating that every individual plaintiff and every voter witness in this case can cast a regular, in-person ballot without impediment under the voting procedures currently in effect and codified in SB5. Appellants' Br. 20-23. Plaintiffs offer no response. They fail to identify any record evidence of a voter facing a material burden under those voting procedures. Plaintiffs have thus effectively conceded that they face no threat of a concrete injury-in-fact from Texas's new photo-voter-ID law. This case is therefore moot, and the district court's judgment and opinions should be vacated.

In any event, because SB5's reasonable-impediment procedure eliminates the discriminatory effect that this Court found in SB14, plaintiffs' discriminatory-purpose claim provided no basis to enjoin Texas's new voter-ID law. Plaintiffs did not amend their complaints to challenge SB5, and the record contains no evidence that SB5 was motivated by a discriminatory purpose.

Lastly, if the Court does reach the district court's order finding a discriminatory purpose for SB14, it should reverse and render. The district court's decision is clearly erroneous because it refused to consider substantial record evidence. The State's briefs on remand presented that evidence at length. Rather than consider the purpose claim anew based on the totality of the evidence, the district court rushed out a 10-page order that readopted its vacated opinion without once citing the record or addressing the State's 334 pages of

briefing. Plaintiffs insist that the district court was not only entitled, but required, to ignore substantial amounts of record evidence that undermined plaintiffs' position. That argument is wrong on its own terms, and it requires plaintiffs to ignore the presumption of constitutionality and good faith to which the Legislature is entitled under well-established Supreme Court precedent.

ARGUMENT

I. This Case Is Moot Because Plaintiffs Face No Threat of Injury to Their Voting Rights.

This case is moot because no Texas voter—and more relevantly, no plaintiff in this case—will cast another ballot under the photo-voter-ID law established by SB14. The Texas Legislature has substantially amended Texas election law to provide a safeguard for voters who do not have and cannot reasonably obtain a qualifying photo ID. That substantial amendment alone moots the pending constitutional challenge. Moreover, the passage of SB5 eliminates any threat of concrete injury to any plaintiffs (or any other witnesses) who alleged that SB14 would burden their right to vote. Supreme Court precedent requires this Court to consider Texas's voter-ID law as it now stands, and this law does not burden plaintiffs' voting rights.

Plaintiffs' reference to the prophylactic preclearance regime under VRA § 5 underscores the lack of merit in their position. Mootness is a constitutional question of Article III jurisdiction; whether it conflicts with the "essential jus-

tification" of any given statute (Veasey Br. 101) is irrelevant. Moreover, plaintiffs' attempt to compare passage of SB5 to the practices that led to preclearance is absurd on its face. Congress devised preclearance to thwart the "common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer v. United States*, 425 U.S. 130, 140 (1976); *see also South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966) ("Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration."). The Legislature's actions here bear no resemblance to "the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965." *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2629 (2013).

By passing SB5, the Legislature did not evade this Court's judgment; it attempted to follow it by enacting a reasonable-impediment exception this Court expressly suggested as a suitable remedy. In doing so, the Legislature remedied plaintiffs' alleged injury.

A. Plaintiffs' desire for "prophylactic" relief cannot make up for their lack of a concrete injury-in-fact.

Plaintiffs insist that they can satisfy Article III's requirements by seeking "prophylactic relief" under VRA § 3(c). Veasey Br. 103. This admission that

plaintiffs seek "prophylactic" relief regarding potential future legislation effectively concedes that plaintiffs face no actual threat of concrete injury to their personal rights from Texas's current voting law. Plaintiffs nevertheless maintain that their desire to bail Texas into preclearance under VRA § 3(c) can substitute for an Article III injury-in-fact. *See* Veasey Br. 105-06 & n.42.

That is mistaken. A generalized interest in a prophylactic remedy against a hypothetical future injury is, by definition, not the kind of concrete, personalized injury necessary to satisfy Article III. Neither is plaintiffs' interest in subjecting Texas to "judicial opprobrium" or building "a clear record of past discrimination adjudications" for future cases. *See* Veasey Br. 102, 103. Courts cannot adjudicate moot claims merely because an advisory opinion may give the plaintiff an advantage in future litigation. *See, e.g.*, *Commodity Futures Trading Comm'n v. Bd. of Trade of City of Chi.*, 701 F.2d 653, 656 (7th Cir. 1983) ("[O]ne can never be certain that findings made in a decision concluding one lawsuit will not some day (if allowed to do so) control the outcome of another suit. But if that were enough to avoid mootness, no case would ever be moot."), *quoted in Camreta v. Greene*, 563 U.S. 692, 712 (2011).

The argument that "[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party," *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012), does not prove plaintiffs' point. It only begs the question, as a court can grant relief only if the case is not moot. *Cf. Commodity Futures Trading Comm'n*, 701 F.2d at 656 ("[I]t is circular to

argue that a judgment is not moot because it may have preclusive effect, when it can have preclusive effect only if it is not moot.").

Plaintiffs' reliance on *Knox* is misplaced for at least three additional reasons. First, *Knox* concerned voluntary cessation by a private actor, not substantial amendment to a state statute. *See* 567 U.S. at 307 ("[I]t is not clear why the union would necessarily refrain from collecting similar fees in the future."). Voluntary-cessation principles apply differently to government actors. Appellants' Br. 32. Second, the Legislature enacted SB5 before final judgment in this case, whereas the respondent in *Knox* did not change its behavior until after the Supreme Court granted certiorari. *See* 567 U.S. at 307 (noting that "postcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye"). Third, the *Knox* plaintiffs continued to seek redress of a personal injury—namely, the wrongful collection of union dues. The question before the Court—whether the union provided members with sufficient notice to opt out of funding political activities—remained live because the answer affected "how many employees who object to the union's special assessment will be able to get their money back." *Id.* at 308.

Subjective interest in a remedy, however genuine, cannot satisfy Article III unless it is necessary to redress an actual injury to the plaintiff. The State has explained why a plaintiff's interest in a benefit "that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S.

765, 773 (2000); *see* Appellants' Br. 33-35. Like a *qui tam* relator's interest in recovering a monetary bounty for bringing suit, plaintiffs' mere interest in obtaining a preclearance bail-in remedy does not create Article III standing because it does not relate to a personalized, concrete injury-in-fact. *See* 529 U.S. at 772-73. Plaintiffs do not even acknowledge *Vermont Agency*, and they cannot avoid its clear implication.[1]

The only personal injury that plaintiffs have alleged is the inability, under SB14, to vote without a qualifying photo ID. That claimed injury formed the basis of this Court's holding that SB14 violated VRA § 2 because it imposed a disparate 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 v. Abbott*, 830 F.3d 216, 264 (5th Cir. 2016) (en banc); *id.* at 271 (finding a "discriminatory effect on those voters who do not have SB 14 ID or are unable to reasonably obtain such identification").

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[1] Ignoring this controlling Supreme Court case, plaintiffs rely on district court cases that are irrelevant, distinguishable, or plainly incorrect. The decision in *Perez v. Abbott*, 253 F. Supp. 3d 864 (W.D. Tex. 2017), is plainly incorrect because it contradicts *Vermont Agency* and this Court's decision in *Davis v. Abbott*, 781 F.3d 207 (5th Cir. 2015). *Blackmoon v. Charles Mix County*, 505 F. Supp. 2d 585, 593 (D.S.D. 2007), involved the appointment of federal observers under VRA § 3(a), and the district court cited no authority for its statement that it was "not persuaded . . . that Plaintiffs' remaining claims are moot." *Mississippi State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1247-48 (N.D. Miss. 1987), held that a statutory amendment did not moot a class action because it did not eliminate the challenged elements of Mississippi's voter-registration law.

SB5 eliminates that alleged injury because it allows plaintiffs to cast a regular, in-person ballot even if they cannot reasonably obtain a qualifying photo ID. Plaintiffs cannot avoid that fact by irrelevantly complaining that SB5 failed to expand the categories of qualifying photo ID or improve Texas's educational efforts, *see* Veasey Br. 106-07, as SB5's reasonable-impediment procedure *completely excuses* the photo-ID requirement. The State's opening brief demonstrated, with record citations, how all individual plaintiffs and their voter witnesses can cast a regular ballot at the polls under Texas's voter-ID law as amended by SB5, even if they cannot reasonably obtain a qualifying photo ID. Appellants' Br. 20-23. Plaintiffs offer no response to that dispositive point.

B. SB5 is a substantial amendment, which alone suffices to moot plaintiffs' claims against pre-SB5 law.

Even without the State's unrebutted demonstration of plaintiffs' lack of ongoing injury, SB5's amendment of Texas's voter-ID law is alone sufficient to moot the case. That substantial amendment means that the preexisting law's validity is no longer a live question. Plaintiffs' vague argument that "mootness is always determined by reference to the injuries alleged and the remedies sought," Veasey Br. 107-08, does not engage the State's arguments or the controlling authorities.

In their attempt to avoid *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972) (per curiam), plaintiffs deny the Supreme Court's holding. In

Diffenderfer, the plaintiffs challenged a state law that granted a full tax exemption for a church parking lot that was used for commercial purposes six days a week. *Id.* at 413-14. They sought a declaratory judgment that the statute violated the First Amendment and an injunction requiring the property to be taxed. *Id.* The district court upheld the statute, but, after the Supreme Court noted probable jurisdiction, the Florida Legislature repealed the statute and replaced it with a statute that narrowed the exemption to cover only church property used "predominantly for religious purposes." *Id.* at 414. The Court held that the case no longer presented a live controversy because the property in question was no longer fully exempt from taxation. *Id.* The Court explained: "We must review the judgment of the District Court in light of Florida law *as it now stands*, not as it stood when the judgment below was entered." *Id.* (emphasis added).

That principle applies whether a statute is repealed and replaced or substantially amended. Plaintiffs even acknowledge some of the numerous cases that apply *Diffenderfer*'s rule to find cases moot when they involve the amendment, without repeal, of challenged statutes and regulations. Veasey Br. 108 n.43 (citing *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472 (1990); *Massachusetts v. Oakes*, 491 U.S. 576 (1989); *Princeton Univ. v. Schmid*, 455 U.S. 100 (1982) (per curiam) (challenge to university's restrictions on distributing literature on campus rendered moot where, after final judgment, the university "substantially amended its regulations governing solicitation, distribution of literature, and similar activities")).

Cases in which insignificant amendments were not sufficient to moot pending claims illustrate the point. In *Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville*, 508 U.S. 656 (1993), for example, the plaintiffs challenged a municipal ordinance that created a facially race-based set-aside program for city contracts. *Id.* at 659-60. After the Supreme Court granted certiorari, the city passed a new ordinance that replaced the "set-aside" with a "Sheltered Market Plan," which was "virtually identical to the prior ordinance's 'set aside.'" *Id.* at 661. The Court held that "repealing the challenged statute and replacing it with one that differs only in some insignificant respect" did not moot the plaintiffs' claims. *Id.* at 662. The amendment was not substantial because it maintained the facially suspect race-based classification—the "'Sheltered Market Plan' [wa]s a 'set aside' by another name." *Id.*[2]

The Court in *Northeastern Florida* held that the case was not moot because the ordinance had not been "changed substantially," but the Court reaffirmed the governing principle that, when a statute is changed substantially, the challenge to the preexisting statute is moot. *See id.* at 662 n.3 (citing *Diffenderfer*, 404 U.S. at 413-14; *Fusari v. Steinberg*, 419 U.S. 379, 380, 385 (1975)).

The circuits have consistently held that a substantial statutory amendment moots a case. The D.C. Circuit articulated that rule's rationale when it refused

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[2] *United States v. Virginia*, 518 U.S. 515 (1996), *cited in* Veasey Br. 85-86, is not on point—there was no statutory amendment and no resulting question of mootness.

to address arguments directed to an amended statute that was not challenged in the complaint. It explained that the question of the amended statute's application

> was not raised in the ABA's complaint, nor could it have been. The complaint focused on the FTC's Extended Enforcement Policy, which purported to amplify a rule that was promulgated pursuant to a statute that has since been amended. In these circumstances, there is no "live" case or controversy before this court. Why? Because the policy, rule, and statute that gave rise to this suit are no longer in the same posture.

Am. Bar Ass'n v. F.T.C., 636 F.3d 641, 647 (D.C. Cir. 2011); *accord, e.g.*, *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1116 (10th Cir. 2010) ("[E]ven when a legislative body has the power to re-enact an ordinance or statute, ordinarily an amendment or repeal of it moots a case challenging the ordinance or statute."); *Zessar v. Keith*, 536 F.3d 788, 795 (7th Cir. 2008) (holding that substantial amendment mooted case where no evidence indicated that the State planned to reenact prior law); *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006) (noting "a near categorical rule of mootness [in] cases of statutory amendment"); *accord Seay Outdoor Advert., Inc. v. City of Mary Esther, Fla.*, 397 F.3d 943, 947 (11th Cir. 2005); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 61 (2d Cir. 1992); *cf. Nextel Partners Inc. v. Kingston Twp.*, 286 F.3d 687, 693 (3d Cir. 2002) (holding that the burden is on the *plaintiff* to "adduce[] evidence that the prohibitive effect of the [law] had not been substantially altered" by the amendment).

This Court applied the same settled rule in *Davis v. Abbott*, 781 F.3d 207, holding that the Legislature's repeal and replacement of a challenged state legislative redistricting plan mooted pending claims. Rather than engaging this Court's reasoning, plaintiffs merely cite the incorrect statement, by the district-court majority in *Perez*, that *Davis* "was not a decision about mootness." Veasey Br. 109 (quoting *Perez*, 253 F. Supp. 3d at 874). But as Judge Smith explained at length in his *Perez* dissent, the majority's argument does not withstand scrutiny:

> [I]n *Davis*, mootness comprised a vital—indeed irreplaceable—portion of the reasoning of the decision on the plaintiffs' Section 2, Section 5, and malapportionment claims and the defendant's request for vacatur. None of those statements regarding mootness "could have been deleted without seriously impairing the analytical foundations of the holding." They are thus part of the holding, not *dicta*, and must be followed in all legally indistinguishable cases.

253 F. Supp. 3d at 979 (Smith, J., dissenting) (internal citation omitted). Plaintiffs also make the puzzling claim that Judge Smith's dissent in *Perez* "makes clear why this case is not moot." Veasey Br. 109. Judge Smith was undoubtedly correct that claims against Texas's 2011 redistricting plans were moot. 253 F. Supp. 3d at 981 (Smith, J., dissenting). But the fact that the claims in *Davis* and *Perez* were so obviously moot does not imply that plaintiffs' claims here are not.

Plaintiffs' attempt to support their argument with an unexplained list of factual distinctions between this case and *Davis* also falls flat. *See* Veasey Br.

109-10. Their claims do not remain live merely because plaintiffs seek pre-clearance bail-in under VRA § 3(c); that argument does not identify a concrete injury-in-fact, and it ignores *Vermont Agency*. Plaintiffs cannot avoid mootness merely because the Legislature amended Texas's voter-ID law rather than repealing it entirely; that argument would contradict *Diffenderfer* and its progeny. Nor do plaintiffs' claims remain live because they asserted discriminatory-purpose claims against SB14 or because the district court ruled on those claims while the Legislature was in the process of amending Texas's voter-ID law; those points do not engage the lack of a concrete injury-in-fact. And plaintiffs' bare assertion that this Court should "follow the approach" of *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), Veasey Br. 110, is entirely nonresponsive to the State's arguments—not only regarding mootness, but also regarding the myriad distinctions between this case and *McCrory*.[3] *See* Appellants' Br. 67-68 & n.20.

[3] Plaintiffs' reliance on *McCrory* is particularly odd because that case did not involve mootness, and the Fourth Circuit declined to order preclearance bail-in under VRA § 3(c), 831 F.3d at 241, thus refusing to issue the remedy on which plaintiffs here rely to keep their moot claims alive.

C. Voluntary-cessation doctrine does not keep plaintiffs' claims alive.

Plaintiffs' reliance on voluntary-cessation doctrine fails for at least two reasons. First, plaintiffs misstate the standard for determining the risk of reversion to unlawful conduct—a risk that does not exist here. Second, plaintiffs confuse defendants' litigation position with the purpose of the Legislature and continue to ignore the presumption of constitutionality and good faith that attaches to legislative acts.

The abstract "risk that the defendant will repeat its unlawful conduct," Veasey Br. 110, is not enough to keep a claim alive, and there is no such concern here in any event. This Court has instructed that this exception, established in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), applies only where the defendant expressly announces its intention to reinstate the same policy. In contrast, *Brazos Valley Coalition for Life, Inc. v. City of Bryan, Texas*, 421 F.3d 314, 321-22 (5th Cir. 2005), found a challenge to a city ordinance moot where the City amended the ordinance "*prior to* the underlying district court judgment" and "there [was] nothing whatever to suggest that the City intend[ed] to repeal [the amendment] when [the] case [was] over." *Accord, e.g.*, *Camfield v. Okla. City*, 248 F.3d 1214, 1223-24 (10th Cir. 2001) ("*Aladdin's Castle* is inapposite . . . where there is no evidence in the record to indicate that the legislature intends to reenact the prior version of the disputed statute."); *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000) (holding that *Aladdin's Castle* is "generally limited to the circumstance

. . . in which a defendant openly announces its intention to reenact 'precisely the same provision' held unconstitutional below"); *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 645 (6th Cir. 1997) (holding that *Aladdin's Castle* "applies only when a recalcitrant legislature clearly intends to reenact the challenged regulation").

Here, the Legislature started to amend Texas's voter-ID law before the district court ruled on plaintiffs' discriminatory-purpose claim, and it would have enacted SB5 before that ruling had the district court not rushed to issue an order before the legislative session ended. Plaintiffs offer nothing more than pure speculation that the Legislature will revert to pre-SB5 voter-ID law when this litigation ends.

Plaintiffs' reliance on *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), *see* Veasey Br. 111, ignores a controlling distinction: *Trinity Lutheran* did not involve an amendment to the governing statute.[4] There, a church challenged the Missouri Department of Natural Resources' policy of "denying grants to religiously affiliated applicants" as a violation of the Free Exercise Clause. 137 S. Ct. at 2018. The Department argued that the policy was compelled by the Missouri Constitution's command "[t]hat no

[4] Neither did *Hall v. Board of School Commissioners*, 656 F.2d 999, 1000 (5th Cir. Unit B 1981), *see* Veasey Br. 112. There, a challenge to daily school prayers was not mooted by the superintendent's testimony that "he was aware the activity was unconstitutional and had so advised the various school principals" where "no further attempt had been made to ensure the practice had been discontinued." *Id.* at 1000.

money shall ever be taken from the public treasury, directly or indirectly, in aid of any church." *Id.* at 2017 (quoting Mo. Const., art. I, § 7). The extent to which the Department's policy changed on appeal is unclear—the Court noted only that "the Governor of Missouri announced that he had directed the Department to begin allowing religious organizations to compete for and receive Department grants on the same terms as secular organizations." *Id.* at 2019 n.1.[5] But it was clear—and the State of Missouri conceded—that the change in policy did not change the underlying state-law prohibition on funding for religious organizations. *See id. Trinity Lutheran* therefore provides no guidance here.

Plaintiffs try to short-circuit the presumption of constitutionality and good faith through a misleading account of SB5's legislative history. The Legislature took up SB5 in the first regular session after this Court affirmed the finding of a discriminatory effect under VRA § 2. *Cf.* Veasey Br. 110-11. And that was entirely proper. As this Court instructed, "Neither 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." 830 F.3d at 271. It is not accurate to suggest that the Legislature failed to do anything until "after the district court ruled that SB14 was enacted with a discriminatory intent."

[5] The Governor's announcement came more than a year after the Supreme Court granted certiorari. *Compare* 137 S. Ct. at 2019 n.1 (noting that the announcement was made in April 2017), *with Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 136 S. Ct. 891 (2016) (mem.) (granting certiorari on January 15, 2016).

Veasey Br. 111. As the district court was well aware, the Legislature's effort to amend the voter-ID law began when SB5 was filed in February 2017, ROA.69316-22, and the Texas Senate passed SB5 in March 2017. ROA.69753-55. The district court flatly rejected the request of the State, ROA.69660-65, and the United States, ROA.69682-84, to allow the Legislature to complete its consideration of SB5. Announcing its intention to rule "at its earliest convenience," ROA.69762, the district court rushed out an order on April 10, 2017, readopting its previous finding of a discriminatory purpose behind SB14. ROA.69764-73. The Legislature passed SB5 on May 28, 2017, and the Governor signed it into law on May 31, 2017. ROA.69820. Because the district court refused to wait less than two months and allow the legislative process to proceed, plaintiffs now make the disingenuous claim that the Legislature failed to act until the district court on remand entered its discriminatory-purpose ruling.

Plaintiffs drastically overreach when they suggest that defendants' conduct in opposing plaintiffs' lawsuit should deprive the Legislature of the presumption of constitutionality and good faith in adopting SB5. *See* Veasey Br. 112. To begin with, the legal position taken by the Attorney General on behalf of other executive-branch officials is no evidence of the Legislature's purpose in passing SB5. In any event, plaintiffs' argument that defending against legal claims should count as evidence of discriminatory intent is absurd. Plaintiffs' argument implies that the only nondiscriminatory option is to confess error, regardless of any reasonable dispute about the merits. That cannot possibly be

the law, and it would raise severe due-process concerns if it were. The Legislature cannot be penalized for the Attorney General's correct effort to litigate all good-faith defenses.[6]

D. The district court's orders should be vacated.

Plaintiffs attempt to avoid the established practice of vacating decisions when mootness prevents appellate review, *see, e.g.*, *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), by invoking the exception to vacatur that applies when "the party seeking relief from the judgment below caused the mootness by voluntary action." Veasey Br. 114 (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994)). That argument misunderstands the relevant actors and the holding in *Bancorp*. In fact, failing to vacate the district court's opinions here would conflict with *Bancorp*, the Supreme Court's settled practice, and the opinions of at least six circuits.

Bancorp does not support plaintiffs' argument that a statutory amendment prevents vacatur. In *Bancorp*, private parties settled after the Supreme Court granted certiorari, which presented the question "whether appellate courts . . . should vacate civil judgments of subordinate courts in cases that are settled after appeal is filed or certiorari sought." 513 U.S at 19. The Court held that

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[6] The district court's discriminatory-purpose finding has already been vacated once, and the plaintiffs' theory of discriminatory effects under VRA § 2 has been rejected by multiple circuits. *See, e.g.*, *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016); *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014); *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc), *aff'd on other grounds sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013).

"mootness by reason of settlement does not justify vacatur of a judgment under review." *Id.* at 29. *Bancorp* does not apply here because this case has not been mooted by settlement.

Mootness by reason of statutory amendment does not raise the same concerns that animated *Bancorp*, as the D.C. Circuit explained in *American Library Association v. Barr*, 956 F.2d 1178, 1185 (D.C. Cir. 1992). There, the district court held that recordkeeping provisions in the Child Pornography and Obscenity Enforcement Act violated the First Amendment. After the court of appeals heard oral argument, Congress enacted a law expressly designed to correct the recordkeeping provisions and conform to the district court's judgment. *See id.* at 1186. The D.C. Circuit held that the amendment mooted the question whether the recordkeeping provisions were constitutional and that the government's appeal must be dismissed. *Id.* It also vacated the district court's judgment on the recordkeeping provisions over the plaintiffs' objection. *Id.* at 1186-87. The court recognized that it had created exceptions to the *Munsingwear* rule "when the party who lost below deliberately aborted appellate review," and "when the parties have settled the case while a petition for a writ of certiorari was pending"—that is, what later became the *Bancorp* rule regarding settlement. *Id.* at 1187. But it refused to create a similar exception in cases of statutory amendment, explaining:

> The situation here is far different. Congress rendered the case moot by passing legislation designed to repair what may have been a constitutionally defective statute. Congress' action represents responsible lawmaking, not manipulation of the judicial

> process. In these circumstances, our appellate duty under the rule of *Munsingwear* is certain.

Id. at 1187 (citing *Bowen v. Kizer*, 485 U.S. 386 (1988) (per curiam)). The D.C. Circuit has repeatedly reaffirmed that holding after *Bancorp*. *See, e.g.*, *Am. Bar Ass'n*, 636 F.3d at 649 (holding that *Bancorp* did not apply when an act of Congress mooted the case "because the FTC—the party who would get relief from the judgment below—did nothing to render this case moot"); *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 351-52 (D.C. Cir. 1997) (vacating the district court's judgment when the District of Columbia's appeal was mooted by the District of Columbia's legislative action).

Other circuits have consistently applied the same rule and vacated decisions in light of mootness caused by statutory amendments, recognizing both that statutory amendment is not analogous to settlement and that legislative acts are not attributable to executive-branch officials. *See, e.g.*, *Catawba Riverkeeper Found. v. N.C. Dep't of Transp.*, 843 F.3d 583, 591 & n.7 (4th Cir. 2016) (following "sister circuits" and "distinguish[ing] the actions of an executive entity from those of the legislature for purposes of the 'voluntary action' presumption against vacatur"); *Rio Grande Silvery Minnow*, 601 F.3d at 1131-32; *Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 452 (1st Cir. 2009); *Helliker*, 463 F.3d at 879-80; *Khodara Envtl., Inc. ex rel. Eagle Envtl., L.P. v. Beckman*, 237 F.3d 186, 194-95 (3rd Cir. 2001) (Alito, J.); *see also Bancorp*, 513 U.S. at 25 n.3 (noting *Munsingwear*'s "implicit conclusion that repeal of administrative regulations cannot fairly be attributed to the Executive Branch when it litigates

in the name of the United States"); *U.S. Dep't of Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986) (vacating lower court's judgment as moot based on statutory amendment because "Congress came to the conclusion, as a matter of legislative policy, that the firearms statutes should be redrafted"). Plaintiffs are therefore wrong to assume that the Legislature's amendment of Texas's voter-ID law is voluntary action by defendants.

Yet, even if mootness could be attributed to defendants, *Bancorp* does not prohibit vacatur when the case is mooted by voluntary conduct of the party seeking review. The Supreme Court has vacated a district court's judgment—summarily reversing this court of appeals' refusal to do so—when the University of Texas mooted claims on appeal by voluntarily amending the challenged rules. *See* Appellants' Br. 36-37 (citing *Bd. of Regents of Univ. of Texas Sys. v. New Left Educ. Project*, 414 U.S. 807 (1973) (mem.), *vacating as moot* 472 F.2d 218 (5th Cir. 1973)). Plaintiffs fail to address that precedent.

Recent cases confirm that even voluntary action does not prevent vacatur for mootness in the absence of settlement. In *Ivy v. Morath*, 137 S. Ct. 414 (2016) (mem.), for instance, the Supreme Court vacated this Court's opinion and remanded with instructions to dismiss as moot under *Munsingwear* where the controversy was mooted by the petitioners' voluntary acquisition of the certification and licensure they alleged had been wrongfully denied by the State. *See* Brief for Petitioners at 18-19, *Ivy v. Morath*, 137 S. Ct. 414 (2016) (No. 15-486), 2016 WL 4473464, at *18-19 (arguing that the case should not be dismissed as moot despite plaintiffs obtaining driver licenses). Similarly,

the Supreme Court has vacated opinions addressing the constitutionality of an executive order regarding the entry of foreign nationals where the executive order expired by its own terms after the grant of certiorari. *See Trump v. Hawaii*, No. 16-1540, 2017 WL 4782860 (U.S. Oct. 24, 2017); *Trump v. Int'l Refugee Assistance Project*, No. 16-1436, 2017 WL 4518553 (U.S. Oct. 10, 2017).

Vacatur is likewise appropriate here because plaintiffs' claim has become moot as a result of the Legislature's decision, as a matter of policy, to amend Texas's voter-ID law. The Legislature's decision does not constitute voluntary action of the party seeking review; the defendants are executive-branch officials defending claims on behalf of the State. Nor does it suggest an improper motive, as plaintiffs wrongly suggest. Veasey Br. 115-16. The presumption of good faith should make courts "wary of impugning the motivations that underlie a legislature's actions." *Nat'l Black Police Ass'n*, 108 F.3d at 352 (noting "the respect that courts owe other organs of government" and the "belief that legislative actions are presumptively legitimate"). The implication of plaintiffs' argument—that the Legislature should have deferred to the district court—gets it backwards. The district court had a duty to defer to the Legislature as explained in defendants' opening brief; it should not have ruled on any pending claims until the Legislature had a chance to act. Appellants' Br. 9-10, 30. But the Legislature has now acted, and the substantially amended statute renders plaintiffs' claims against SB14 moot. The district court's orders should be vacated.

II. Plaintiffs Were Not Entitled to a Permanent Injunction.

One would expect plaintiffs, in defending the district court's permanent injunction, to begin by explaining why equitable relief is necessary to protect their voting rights. But plaintiffs offer no such explanation. This omission is telling; it confirms that an injunction is not necessary to protect plaintiffs, for Texas's voter-ID law poses no future threat of harm to their voting rights. Plaintiffs' effective concession of this point is alone a sufficient basis to vacate the injunction.

Plaintiffs' attempt to defend the district court's injunction only proves that it never should have issued. They confirm that the district court's unnecessary discriminatory-purpose finding against SB14 was a necessary predicate to the district court's later refusal to consider anything less than a wholesale injunction against Texas's voter-ID law—as amended by SB5—even though plaintiffs refused to amend their complaints to challenge SB5. But SB5 completely remedies the disparate effect found by this Court: "the discriminatory effect on those voters who do not have SB 14 ID or are unable to reasonably obtain such identification." 830 F.3d at 271.

"An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). And "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 703 (5th Cir. 2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). The district court's decision to

grant a permanent injunction reflects legal errors and clearly erroneous findings of fact and is therefore an abuse of discretion.

A. The district court's injunction rests on improper interference with the Legislature.

The district court unnecessarily interfered with the Legislature's effort to address the defects adjudicated by this Court regarding Texas's voter-ID law. The district court rushed to rule on the discriminatory-purpose claim against SB14 before the Legislature could enact SB5. Whether the district court was expressly ordered to wait for the Legislature, Veasey Br. 24, is beside the point. The district court's obligation to defer to the Legislature existed independent of this Court's order. *See Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1124 (5th Cir. 1991). Regardless, this Court expressly cautioned, "Neither 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." 830 F.3d at 271. And it advised that any ruling on discriminatory purpose should account for legislative action: "The district court will need 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." *Id.* at 272.

The district court's rush to judgment was obviously unnecessary to provide any relief to plaintiffs—otherwise, the court would not have delayed remedial proceedings for several months—but plaintiffs make clear that it was

an essential step in enjoining the State's new voter-ID law. Plaintiffs' argument that delayed remedial proceedings gave the Legislature an opportunity to provide a remedy, Veasey Br. 67, is undermined by their own brief. According to plaintiffs, the die was cast as soon as the district court found discriminatory purpose behind SB14: "given the district court's finding of intentional racial discrimination, the court could not have crafted narrower relief." Veasey Br. 86. Plaintiffs are wrong, in any case, and the district court's wholesale injunction is improper.

The district court had no basis to enjoin SB5. To begin with, although plaintiffs had the opportunity, they did not even attempt to amend their complaints to challenge the new law as enacted with a discriminatory purpose. *See, e.g.*, *Am. Bar Ass'n*, 636 F.3d at 647 (noting that disputes about an amended statute were not before the court because they were not raised in the complaint). But even if they had, plaintiffs' argument that the district court "cited extensive record evidence to support its conclusion that SB5 was infected by and perpetuated the same intentional racial discrimination that plagued SB14," Veasey Br. 91, is baseless. Plaintiffs do not even cite the district court's order, and the district court cited no such evidence because it does not exist in the record. The district court's own remedial order disproves plaintiffs' incredible claim that "the district court engaged in a more detailed and record-based analysis" than the Fourth Circuit in *McCrory*. Veasey Br. at 83. The district court expressly stated that there was nothing in the record: "the record holds no evidence regarding the impact of [the reasonable-impediment

declaration] either in theory or as applied." ROA.70439. With no evidence to rely on, the court engaged in "prospective conceptualization of the impact of SB5's requirements." ROA.70439.

B. The district court's injunction fails to account for the substantial revision of Texas's voter-ID law.

Plaintiffs' position depends on a stubborn refusal to acknowledge that Texas's voter-ID law, as amended by SB5, is drastically different from the law created by SB14. They complain that "voters who lack compliant ID will continue to be disproportionately Black and Latino." Veasey Br. 77. This complaint ignores the obvious and substantial change in the law: SB5's reasonable-impediment exception totally excuses voters from the photo-ID requirement—the very provision that produced a discriminatory effect according to plaintiffs.[7] They do not even mention the reasonable-impediment declaration until nine pages into their discussion of the district court's remedy, where they disparage the change as "the one ameliorative measure SB5 does provide" and speculate that it "will go under-utilized." Veasey Br. 77. But given the Legislature's creation of a reasonable-impediment-declaration procedure that

[7] For this reason, *Virginia*, 518 U.S. 515, does not help plaintiffs. There, "the categorical exclusion of women" from the all-male Virginia Military Institute was held to violate the Constitution. *Id.* at 547. But the State's proposed remedy "chose not to eliminate, but to leave untouched, VMI's exclusionary policy" and create a separate all-female military institute. *Id.* The Supreme Court held that the proposed remedy did not cure the constitutional violation because the critical feature was unchanged: women were still excluded from VMI. *See id.* at 553.

waives the photo-ID requirement entirely for voters who cannot reasonably obtain a qualifying photo ID, plaintiffs' claim that "SB5 [will] not remedy the disparate impact of SB14's required IDs," *id.*, is baseless.

Only by willfully ignoring SB5's fundamental revision of Texas's voter-ID law can plaintiffs claim that "SB5 'partakes too much of the infirmity of' SB14 'to be able to survive.'" *Id.* at 74 (quoting *Lane v. Wilson*, 307 U.S. 268, 275, 277 (1939)). Their reliance on *Lane* shows a staggering lack of perspective. *Lane* considered the constitutionality of Oklahoma's successor to the "grandfather clause," *id.* at 269, struck down in *Guinn v. United States*, 238 U.S. 347 (1915). The purpose and effect of the statute in *Guinn* was undeniable—it imposed a literacy test that exempted any "lineal descendant" of a person who was entitled to vote before the enactment of the Fifteenth Amendment, with the result that the literacy test applied only to black citizens. *Id.* at 364-65. The statute at issue in *Lane* was a textbook example not only of a thinly veiled racial classification, but also of a State's effort to replace one blatantly discriminatory measure with another.[8] The statute in *Lane* did not respond to the Su-

[8] *Lane* considered a statute that required "all citizens who were qualified to vote in 1916 but had not voted in 1914" to register "between April 30 and May 11, 1916" or be "perpetually disenfranchised." 307 U.S. at 275-76. The statute drew a clear "dividing line between white citizens who had voted under the 'grandfather clause' immunity prior to *Guinn v. United States*," *id.* at 271, imposing a new burden exclusively on black citizens "who had been discriminated against in the outlawed registration system of 1914" to register within a twelve-day period or forever lose the right to vote. *Id.* at 276.

preme Court's decision in *Guinn* by removing the barrier to voting; it responded by erecting a new one that was tailored to achieve the same result. Here, SB5 did precisely the opposite by ameliorating the burdens alleged by plaintiffs from the photo-ID requirement. *See supra* pp. 6-7.

Plaintiffs' complaint that SB5's reasonable-impediment declaration is "unnecessary" and unduly burdensome, Veasey Br. 78-79, is similarly strained. The penalty of perjury for a willfully false statement serves the goal of preventing fraudulent conduct, and it furthers what this Court held are the valid goals of Texas's voter-ID law: ensuring that voters who have a qualifying ID show it when they vote. *See* 830 F.3d at 271 (holding that voters who possess a qualifying ID should be required to show it). That is entirely consistent with the legitimate goals of preventing fraud and securing election integrity. *See, e.g.*, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196-97 (2008) (plurality op.). The Court does not have to take the State's word for it. The bipartisan Carter–Baker Commission expressly recommended that jurisdictions require voters without photo ID to sign declarations under penalty of perjury. ROA.43081, 43140 (recommending that "states allow voters without a valid photo ID card . . . to vote, using a provisional ballot by signing an affidavit under penalty of perjury").

The district court's conclusion that the penalty-of-perjury requirement would impose a burden on minority voters (or any voters) rests on unfounded speculation and clear factual errors. First, the district court failed to consider

that perjury requires an *intentionally* false statement. Voters who make a mistake because they are "untrained in the law," Veasey Br. 79, or because of "misinformation or a lack of information," Veasey Br. 81, are not subject to penalty. Second, the Legislature did not increase the penalty for a false statement in SB5. *See* ROA.69814-15; *contra* Veasey Br. 80. Tampering with an official document was a state jail felony under the interim remedy. *See* Tex. Penal Code § 37.10(c)(1). There is absolutely no evidence that the penalty of perjury imposed a burden on minority voters in 2016, when it was part of the court-ordered interim remedy.

Nor is there any evidence that the lack of an "other" option on the declaration will impose a burden on any voter, let alone evidence that the imagined burden would fall disproportionately on minority voters. Plaintiffs do not even attempt to contest that, as the State has already pointed out, the district court's reference to 12 impediments written in by voters prove that the "other" category was not necessary; all of the write-in impediments were covered by the seven enumerated categories. Appellants' Br. 45-46. Nor do plaintiffs even suggest that SB5's reasonable-impediment declaration would deny or abridge the rights of the 27 identified voters involved in this case.

Plaintiffs' reliance on *McCrory* ignores a critical distinction between SB5 and North Carolina's reasonable-impediment exception: SB5 allows voters to cast a *regular* ballot after executing the declaration, whereas North Carolina only allowed them to cast a *provisional* ballot. That distinction is significant because provisional ballots in North Carolina are "subject to challenge by any

registered voter in the county." 831 F.3d at 241. North Carolina law also gave local election boards discretion to determine whether a particular impediment was reasonable or not, and there were indications that "poll workers gave reasonable-impediment voters incorrect ballots and County Boards of Elections were inconsistent about what they deemed a 'reasonable' impediment." *Id.* at 243 (Motz, J., dissenting). SB5 creates no such opportunity for interference by other voters or poll workers.

Plaintiffs' claim that intentional discrimination must be eliminated "root and branch" cannot overcome that lack of evidence, and it is misplaced in any event. Plaintiffs borrow the phrase "root and branch" from *Green v. County School Board of New Kent County*, 391 U.S. 430, 438 (1968), which was a school-desegregation case. This Court has refused to extend desegregation precedent to other contexts because of "desegregation's unique legal history." *Frew v. Janek*, 780 F.3d 320, 329 & n.37 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1159 (2016); *Anderson v. Sch. Bd. of Madison Cty.*, 517 F.3d 292, 297 (5th Cir. 2008) (recognizing the "the unique nature of desegregation litigation"); *accord Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1226 (11th Cir. 2005) (en banc) ("[S]chool desegregation jurisprudence is unique and difficult to apply in other contexts.").

Plaintiffs disregard the unique context of school-desegregation cases—and the Supreme Court's opinion—when they argue that "an intentionally discriminatory law must be 'eliminated root and branch.'" Veasey Br. 94 (citing *Green*). The Supreme Court did not announce such a simplistic rule. On

the contrary, it recognized that the specific historical context of longstanding "state-imposed segregated pattern[s]" presented unique remedial challenges in school-desegregation cases:

> *Brown* [*v. Board of Education*, 349 U.S. 294 (1955),] was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.

Green, 391 U.S. at 437-38. The failure to achieve that result did not require an injunction permanently dismantling the school district—the only permissible remedy under plaintiffs' interpretation of "root and branch." Rather, the Court required the school districts to "effectively to eliminate 'root and branch' the *effects* of state-imposed and supported segregation," *Milliken v. Bradley*, 418 U.S. 717, 788 (1974) (emphasis added), while "tak[ing] into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution," *Milliken v. Bradley*, 433 U.S. 267, 281 (1977).

Even in the school-desegregation context, court-imposed remedies that went beyond remedying the effects of discrimination were rejected. *See, e.g.*, *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 417-20 (1977) (rejecting system-wide remedy based on "fruit of the poisonous tree" theory; "only if there has been a systemwide impact may there be a systemwide remedy"); *Pasadena*

City Bd. of Educ. v. Spangler, 427 U.S. 424, 434-37 (1976) (reversing imposition of "annual readjustment of attendance zones so that there would not be a majority of any minority in any Pasadena public school" because it went beyond curing the effects caused by discrimination).

The long history of state-mandated racial segregation in schools produced entrenched, intractable harms that could not be avoided by a mere statutory amendment. The same is not even arguably true of Texas's voter-ID law, as SB5's ameliorative impact on plaintiffs demonstrates. Read in context, the phrase "root and branch" means that the harm must be eliminated. It does not mean that federal courts have permission, much less a duty, to punish a defendant for alleged past discrimination that has no present discriminatory effect. *Cf., e.g.*, 11A Charles A. Wright et al., Federal Practice and Procedure § 2942, at 47 (3d ed. 2013) ("[I]njunctive relief looks to the future, and is designed to deter rather than punish.").

Here, the Legislature's amendment of Texas's voter-ID law precludes an injunction because it completely eliminates any alleged voting injury to plaintiffs. Plaintiffs' intentional-discrimination claim against the previous voter-ID law does not change the analysis. Without a discriminatory effect, there is no constitutional violation. *See, e.g.*, *Palmer v. Thompson*, 403 U.S. 217, 224 (1971) ("[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.") (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810)); *Johnson v. DeSoto Cty. Bd. of Comm'rs*, 204 F.3d 1335, 1344 n.18 (11th Cir. 2000)

("[T]he government's discriminatory intent alone, without a causal connection between the intent and some cognizable injury to Plaintiffs, cannot entitle Plaintiffs to relief in this case: a facially neutral law 'is unconstitutional under the Equal Protection Clause only if [a discriminatory] impact can be traced to a discriminatory purpose.'") (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979)).

III. The District Court's Finding of Discriminatory Purpose Is Clearly Erroneous and Legally Infirm.

A. This Court's decision required a reexamination of the totality of the evidence, not a rubber stamp on the district court's prior, vacated opinion.

Recognizing that the district court ignored vast swaths of the evidentiary record, plaintiffs try to excuse this by arguing that the district court was just following this Court's command, which was supposedly limited to "assess[ing] 'how much the evidence found infirm weighed in the district court's calculus.'" Veasey Br. 18 (quoting *Veasey*, 830 F.3d at 241); *accord id.* at 13-15. Plaintiffs badly misread this Court's decision.

In the language plaintiffs quote, this Court did not limit the district court's review on remand. Just the opposite. *See* Appellants' Br. 51-52. This Court explained that "[b]ecause [it did] not know how much the evidence found infirm weighed in the district court's calculus," it would "remand this claim to the district court to '*reexamin[e]* . . . the probative evidence underlying Plaintiffs' discriminatory purpose claims *weighed against the contrary evidence*, in accord with' the appropriate legal standards we have described." *Veasey*, 830

F.3d at 241-42 (quoting *Veasey v. Abbott*, 796 F.3d 487, 503-04 (5th Cir. 2015)) (emphases added). The Court went on to justify its remand because it needed to "be confident of the evidentiary record and the *adequacy of the lower court's consideration of it*." *Id.* at 242 (emphasis added).

This was not a limited remand, but a general one. *See United States v. Flanagan*, 80 F.3d 143, 147 (5th Cir. 1996) (explaining that a general remand wipes out "any findings previously made"). Thus, because this Court instructed, without limitation, that the district court "take the requisite time to *reevaluate* the evidence and determine *anew* whether the Legislature acted with a discriminatory intent in enacting SB 14," *Veasey*, 830 F.3d at 243 (emphases added), the district court was, in fact, required "to reassess the intentional discrimination claim from scratch." Veasey Br. 18.

The district court itself understood the scope of its obligation, instructing the parties "to submit extensive findings of fact and conclusions of law and briefs on remand." Veasey Br. 19. It is inconceivable that the district court would have directed this substantial expenditure of resources if it only needed to certify its prior opinion's continued viability.

Plaintiffs also note that this Court's prior rulings are law of the case. Veasey Br. 16 n.3. This is true, but the only relevant rulings are (1) vacatur of the district court's discriminatory-purpose finding and (2) remand for a reexamination of the evidence of purpose, which was necessary because "the record . . . contained *evidence* that *could* support a finding of discriminatory intent." *Veasey*, 830 F.3d at 234-35 (emphases added). This Court did not "affirm[] as

not being clearly erroneous," *Chapman v. NASA*, 736 F.2d 238, 242 n.2 (5th Cir. 1984) (per curiam), or otherwise endorse, any of the district court's "subsidiary findings," which necessarily fell away when this Court vacated the district court's ultimate finding of fact, *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 948 F.2d 1573, 1577 (Fed. Cir. 1991). This Court's opinion did not permit the district court to rubber-stamp its prior order. Appellants' Br. 51-52.

B. The parties were not limited on remand to the precise arguments made in the prior appeal.

Trying to excuse categories of errors committed by the district court, plaintiffs argue (Br. 54, 60-61) that the State has forfeited two arguments by supposedly making them for the first time on remand: (1) that too many whites were impacted by SB14 to permit the inference that it was a pretext for discrimination, Appellants' Br. 55-57 (citing *Feeney*, 442 U.S. 256); and (2) that the two primary motivations for enacting SB14, combating fraud and promoting confidence, were consistent with Texas's decade-long effort to modernize its electoral system, Appellants' Br. 73-75. Not so.

As an initial matter, parties can forfeit only *claims*, not arguments. *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). The State has always resisted plaintiffs' claim of a discriminatory purpose. So the State is "not limited to the precise arguments" it made in the first appeal. *Id.* Second, "there is no prejudice" to plaintiffs, "because [they have] had an opportunity to respond to [these] argument[s]" in the district court and "on appeal." *Lampton v.*

Diaz, 639 F.3d 223, 227 n.14 (5th Cir. 2011). Thus, there is no basis to preclude these arguments. *Id.*; *see Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 307 (5th Cir. 1999). Third, plaintiffs made no claim in the district court that the State had forfeited its *Feeney* argument. Thus, plaintiffs may not rely on forfeiture in this Court. *See, e.g.*, *Waganfeald v. Gusman*, 674 F.3d 475, 481 & n.15 (5th Cir. 2012).

Even if plaintiffs could overcome these hurdles, their case for forfeiture remains meritless. This Court instructed the district court to examine the totality of the evidence and "determine anew whether the Legislature acted with a discriminatory intent in enacting SB 14," 830 F.3d at 243, allowing full review of that claim on remand. *See Flanagan*, 80 F.3d at 147. This was a "general remand" of the discriminatory-purpose claim, which permitted addressing "all matters as long as remaining consistent with the remand." *United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999); *see also Field v. Mans*, 157 F.3d 35, 42 (1st Cir. 1998) (reversing lower court for refusing to consider new argument on general remand). It did not freeze in place all arguments made up to that point. Indeed, the very act of vacating and remanding for a new review of the evidence "in accord with the appropriate legal standards we have described," *Veasey*, 830 F.3d at 241-42, necessarily required new arguments. If the parties could only regurgitate their prior arguments, the district court would not have instructed the parties "to submit extensive findings of fact and conclusions of law and briefs on remand." Veasey Br. 19.

The cases cited by plaintiffs only undermine their arguments. In *Brooks v. United States*, 757 F.2d 734 (5th Cir. 1985), the Court limited its remand "to reapportion[ing] the comparative negligence of the parties." *Id.* at 737. The defendant's new argument that its negligence was not the proximate cause of the plaintiff's injury was therefore outside the scope of the mandate. *Id.* at 739. Similarly, in *United States v. Osamor*, 271 F. App'x 409 (5th Cir. 2008) (per curiam), the defendant attempted to undermine his conviction after a remand limited to resentencing. *Id.* at 410. Here, by contrast, the State's arguments implicate the district court's reevaluation of plaintiffs' discriminatory-purpose claim—the precise issue remanded by this Court.[9]

C. Plaintiffs cannot rehabilitate the district court's clearly erroneous finding.

The State identified several legal errors and clearly erroneous fact findings underlying the district court's conclusion that the enactment of SB14 was "unexplainable on grounds other than race." ROA.69768; Appellants' Br. 50-57. Nothing in plaintiffs' response saves the district court's opinion.

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

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*

[9] Plaintiffs wrongly assert that the State has not challenged the district court's effects ruling. Veasey Br. 31. The State expressly challenged the district court's effects ruling in its opening brief. Appellants' Br. 82.

to SB 14 may have." *Veasey*, 830 F.3d at 272 (emphases added); *see* Appellants' Br. 37-38. Plaintiffs do not dispute that the district court failed to do so. Veasey Br. 24-25.

Instead, plaintiffs argue that this Court did not mean what it said. Plaintiffs contend that this clear statement, when read in "context," was telling the district court to bear in mind subsequent legislative action only "at the remedy phase." *Id.* at 24 & n.8. But no "context" could possibly alter the command to "reexamine the discriminatory purpose claim" to mean "do not reexamine the merits, only the remedy." In any case, the proper "context" is this Court's precedent, which instructs that since intervening legislation "with meaningful alterations may render the current law valid" despite any "discriminatory intent of the original drafter," "the state of mind of the [subsequent legislative] body must also be considered." *Chen v. City of Hous.*, 206 F.3d 502, 521 (5th Cir. 2000) (citing *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998)).[10]

The brief order on remand belies plaintiffs' contention, Veasey Br. 18-19, that the district court followed this Court's instruction to "determine anew" the question of discriminatory purpose, *Veasey*, 830 F.3d at 272, and "reweighed the evidence, as a whole, exclusive of the infirm evidence," Veasey

[10] Plaintiffs not only relied on subsequent action by the Legislature in the district court, ROA.68697-98, they assert that the State's arguments in this case are further evidence of pretext, Veasey Br. 48-51. The latter argument barely merits a response; it suffices to say that the Legislature is not a party to this case.

Br. 18. The district court did not cite the record a single time; it ignored the parties' substantial briefing; and it admitted to relying exclusively on "*Plaintiffs' probative evidence*—that which was left intact after the Fifth Circuit's review." ROA.69773 (emphasis added). The district court's cursory review on remand flies in the face of this Court's mandate.

Plaintiffs also fail to rebut the State's showing, Appellants' Br. 53, that the district court continued to rely on infirm evidence. Plaintiffs do not dispute that the district court relied heavily on Dr. Lichtman's expert report, *see, e.g.*, *Veasey v. Perry*, 71 F. Supp. 3d 627, 658 (S.D. Tex. 2014) (adopted at ROA.69767-70), or that the report is infected with the same infirmities as the district court's vacated decision. *See* Appellants' Br. 53. Just as this Court could not know how much the infirm evidence affected the district court's prior decision, it is impossible to know how much weight Lichtman gave the same evidence in judging the Legislature's actions. Thus, it makes no difference that the district court disclaimed direct reliance on infirm evidence, Veasey Br. 20-21, when, at the same time, the district court was bringing that evidence in through the back door. Moreover, while the district court disclaimed reliance on opponents' statements regarding the supposedly discriminatory purpose of SB14, ROA.69772; Veasey Br. 20-21, it continued to improperly rely on such evidence for other purposes, such as undermining proponents' stated rationale for SB14. *See* 71 F. Supp. 3d at 646-59 (adopted at ROA.69767-70).

2. The presumption of constitutionality and good faith applies to all challenges to facially neutral statutes.

As the State showed, Appellants' Br. 53-54, when a court must make a "factual" judgment necessary to determining the constitutionality of a facially neutral 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). Plaintiffs' do not dispute that the district court failed to give "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). Instead, plaintiffs assert that the presumption is inapplicable. Veasey Br. 22-23. They are wrong.

First, plaintiffs wrongly assert that the presumption "is merely a reformulation of [the] 'clearest proof' standard." Veasey Br. 22. This Court rejected the "clearest proof" formulation because it came from Ex Post Facto Clause cases. 830 F.3d at 230 n.12. But the State has cited multiple cases showing that the presumption of constitutionality and good faith is established by Supreme Court precedent in various contexts that have nothing to do with ex-post-facto doctrine, including election law and voting-rights cases. *See* Appellants' Br. 54.

Second, plaintiffs contend that no presumption applies here because SB14 was enacted with a discriminatory purpose. Veasey Br. 22-23. This circular argument goes nowhere. It is in judging *whether* SB14 was enacted with a discriminatory purpose, and thus unconstitutional, that the presumption does its

work. *See, e.g.*, *Triplett*, 494 U.S. at 723-24. On this point, Chief Justice Marshall's opinion in *Fletcher* is dispositive. That case, like this one, turned on the motives of those who enacted the challenged law. 10 U.S. at 131. The Chief Justice made clear that such an inquiry was "a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case." *Id.* at 128; *accord Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977) (citing *Fletcher*).

Finally, plaintiffs try to distinguish the facts of various cases. Veasey Br. 23 n.7. But as the variety of cases cited by the State shows, Appellants' Br. 54, the presumption applies to *all* legislation. The presumption is particularly appropriate when judging a Legislature's collective purpose—perhaps the most "sensitive inquiry" courts undertake. *Arlington Heights*, 429 U.S. at 266.

3. Plaintiffs do not dispute that the district court failed to consider SB14's impact on white voters.

The district court concluded that both the Legislature's passage of SB14 and SB14's effect were "unexplainable on grounds other than race." ROA.69768. In reaching this conclusion, the district court was required to consider the effect of SB14 on white voters. Appellants' Br. 55-57.

Plaintiffs call this reasoning frivolous, Veasey Br. 26-27, but it is compelled by the Supreme Court's decision in *Feeney*, which held that a law's disparate impact on one class could not "rationally be explained" as purposefully targeting that class when "significant numbers" of others were also affected.

442 U.S. at 275. At the very least, the district court was not entitled to ignore this contrary evidence in reaching its conclusion.

Plaintiffs ignore *Feeney*, and they offer no response to the various cases cited by the State that consider the impact on other classes when judging purpose. *See* Veasey Br. 27 n.10. Instead, plaintiffs argue that a disparate impact cannot be excused just because others are impacted. Veasey Br. 27. But the question is not whether a disparate impact is *excused*; it is whether a law was *intended* as a burden on account of race. *Feeney*, 442 U.S. at 275. Here, as in *Feeney*, "the number of" whites "disadvantaged by" SB14 "is sufficiently large—and sufficiently close to the number of disadvantaged" minorities to "refute the claim that" SB14 "was intended to benefit [whites] as a class over [minorities] as a class." *Id.* at 281 (Stevens, J., concurring).[11]

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

As the State demonstrated in detail, the district court's factual findings are fatally undermined by its failure to consider significant, often overwhelming, contrary evidence. Appellants' Br. 57-81. Plaintiffs do not, and cannot,

[11] Contrary to plaintiffs' suggestion, Veasey Br. 27, the Supreme Court did not overrule *Feeney* in *Hunter v. Underwood*, 471 U.S. 222, 230-31 (1985). *Hunter* said that targeting poor whites would not excuse admittedly targeting blacks. *Id.* It says nothing about the proposition that if just as many of one class are affected by a law as another class, it is unlikely that the law was intended to advantage the former over the latter.

defend the district court's cherry-picking of evidence. Instead, plaintiffs rehash the same selected bits of evidence relied on by the district court while likewise refusing to engage the "totality of evidence." *Veasey*, 830 F.3d at 237.

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

The State showed that the district court fundamentally misunderstood the purpose of analyzing procedural departures while judging a legislature's purpose. Appellants' Br. 58-64. Although the district court treated any procedural departure as necessarily indicative of invidious intent, the proper inquiry is whether such departures suggest that the body has something to hide. *Id.* at 58 (citing cases). Plaintiffs completely ignore this point, *see* Veasey Br. 45-52, and instead choose to merely repeat the district court's mistake.

Most egregiously, plaintiffs assert that procedural departures "precluded debate and prevented the dissemination of information," Veasey Br. 46, and they complain that there was no meaningful debate over SB14, Veasey Br. 51. But plaintiffs completely ignore that SB14 was debated for a total of nearly 36 hours, producing more than 1,500 transcript pages. Appellants' Br. 61-62. The district court, like plaintiffs, erred by failing to account for this contrary evidence.

Plaintiffs also have no response to the State's conclusive showing that it was opponents' obstruction—not proponents' response—that stifled debate and consideration. By blocking bills in the Senate and "chubbing" in the

House in previous legislative sessions, opponents prevented *any* debate or consideration of voter ID, not to mention the myriad other bills that died in the process. Appellants' Br. 58-61; *see also* ROA.106360 (Senate Democrats sent a letter to Lieutenant Governor Dewhurst informing him "that they would vote against any procedural motion to" even "debate voter ID legislation.").[12] By contrast, proponents' use of the Committee of the Whole in the Senate and a select committee in the House—vice-chaired by then-Representative Marc Veasey, a plaintiff in this case—allowed opponents to actively participate in debate. Appellants' Br. 63; ROA.68862.

Plaintiffs' attempt to defend the district court's conclusion that SB14 was enacted with "unnatural speed," 71 F. Supp. 3d at 700 (adopted at ROA.69770); Veasey Br. 51, also falls flat. Plaintiffs assert that the prior five years of debate on voter ID should be ignored but provide no reason why. In any case, plaintiffs have no answer for the State's showing that consideration of SB14 in 2011 lasted the entire legislative session (from January to May 2011). Appellants' Br. 61-62.

Plaintiffs' other points follow the district court's lead by ignoring contrary evidence. Plaintiffs note that voter ID was designated an "emergency" item without any literal imminent threat to life or safety, Veasey Br. 47, while ignoring that such "emergency" items are almost never literal emergencies, Appellants' Br. 61 & n.17. Plaintiffs complain that the free-EIC provision was

[12] Plaintiffs do not attempt to support the district court's untenable conclusion that suspending the two-thirds rule was unusual. *See* Appellants' Br. 62-63.

crafted in the conference committee, Veasey Br. 47, while ignoring that this provision provided *free IDs*, making it easier to voter, not harder.

Curiously, plaintiffs also rely on the Secretary of State's failure to provide the Legislature with data on ID possession. Veasey Br. 48-49. Obviously, this says nothing about the *Legislature*'s procedures. It only confirms that the Legislature could not possibly have been targeting any particular group with "surgical precision." Veasey Br. 1; *see Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 604 (4th Cir. 2016).

Finally, plaintiffs' reference to the growing power of voter-ID proponents, Veasey Br. 50-51, shows nothing. Even with ever-growing support for voter ID in the Legislature, without the responsive procedural maneuvers taken in the 2011 session, a small group of opponents could have continued to block debate and prevent a vote. There was no other course to allow "full and open debate" of SB14. *Lee*, 843 F.3d at 604.

2. Plaintiffs do not dispute that the district court ignored contemporaneous-statement evidence.

The State showed that the district court, in analyzing contemporaneous statements of legislators, ignored crucial evidence and selectively relied on just two supposed contemporaneous statements—one of which is not a statement, and one of which is not contemporaneous. Appellants' Br. 65-67. Plaintiffs, in turn, offer no defense of the district court's failure to account for contemporaneous legislator statements supporting the State's position.

Rather than defend the indefensible, plaintiffs resort to misdirection. First, plaintiffs argue that the failure to find a "smoking gun" in contemporaneous-statement evidence is not dispositive. Veasey Br. 57-58. Even if that were true, it would not excuse the district court's failure to account for this absence of evidence *at all*. Appellants' Br. 64. Second, plaintiffs point to various pieces of contemporaneous-statement evidence that they believe support their cause. Veasey Br. 58-59. But the *district court* did not rely on this evidence in drawing a negative inference against the State on this point, ROA.69772, so it cannot cure the district court's error.

3. The Texas Legislature did not believe that SB14 would disparately impact minorities.

The State showed that all of the probative evidence before the Legislature suggested that SB14 would not have a disparate impact on minority voters. Appellants' Br. 67-72. In response, plaintiffs rely on a variety on non-probative evidence, Veasey Br. 36-39, but this does nothing to undermine the State's argument.

First, plaintiffs point to the speculation of opponents, Veasey Br. 36, but these same opponents conceded that they had no proof to back up their claims. ROA.39778.[13] And the Legislature was not required to credit that speculation

[13] Plaintiffs claim that unidentified witnesses testified that "Black voters are three times as likely as Anglos to lack the required photo ID." Veasey Br. 36 (citing ROA.68634-36). The cited portion of the record says no such thing.

over academic studies and the experiences of other States.[14] Second, plaintiffs repeat the flawed evidence relied on by the district court, Veasey Br. 36-39, but make no effort to rebut the State's conclusive showing that this evidence is not probative. Appellants' Br. 71-72.

One additional point by plaintiffs deserves special mention. Conceding that the Legislature had no evidence of the rates that individuals of different races possessed various IDs, plaintiffs argue that the Legislature should be *presumed* to know this information. Veasey Br. 38. This argument is meritless. At the very least, "[p]resumptions must bear a reasonable relationship to the facts from which they are made to arise in order to pass constitutional—even logical—muster." *United States v. Gregory-Portland Indep. Sch. Dist.*, 654 F.2d 989, 998 (5th Cir. 1981). While legislators may "be familiar with the demographics and socioeconomics of their state," Veasey Br. 38, there is no reason to think that they would inherently know the minutiae that it took an expert to tease out in this case. And if plaintiffs are correct, then the crucial evidence in *McCrory*—that legislators sought out and obtained this information, *see Lee*, 843 F.3d at 604—would have been totally unnecessary.

[14] Plaintiffs try to separate impact on voters from turnout by citing this Court's ruling on how to measure effect under § 2 of the VRA. Veasey Br. 37 n.11. This is a red herring. The Legislature was not adjudicating a VRA claim; it was considering the effect of a voter-ID requirement. Just as academics can extrapolate from turnout data, *see* ROA.47782-95, so can legislators.

4. Plaintiffs do not dispute that the district court ignored contrary evidence while speculating on the Legislature's motive.

As the State has shown, the district court relied on nothing but speculation in concluding that SB14 was a response to demographic changes. Appellants' Br. 73. Plaintiffs' primary response is to point to the Legislature's knowledge of the shift. Veasey Br. 33-34. But, like the district court, plaintiffs offer no connection to SB14. Moreover, plaintiffs, like the district court, ignore the substantial contrary evidence—voter ID was a major issue all over the country with consistently high voter support, and Republicans had no reason to worry about demographic shifts while they were winning historic majorities in the Legislature. Appellants' Br. 73-75.[15] Unlike the demographic shift, its takes no speculation to connect these facts to the passage of SB14.

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

The State demonstrated that SB14's purpose tracked the same substantive concerns—the need to ensure "orderly administration" of elections, to "prevent[] voter fraud," and to "inspire public confidence" in "the electoral process," *Crawford*, 553 U.S. at 196-97—that animated all of the nearly 1,000

[15] As this briefing shows, plaintiffs are wrong to assert that the State did not challenge the district court's findings on the historical background of SB14. Veasey 61-62 (citing ROA.69769-70). In any event, the evidence that plaintiffs rely on—non-final cases and preclearance decisions by DOJ, *id.*—was "not outcome-determinative" in this case, ROA.69770.

voter-ID bills introduced across the country between 2001 and 2011. Appellants' Br. 75.[16]

In response, plaintiffs focus on two facts, neither of which can rehabilitate the district court's decision. First, plaintiffs assert that Texas's voter-ID law was stricter than other such laws in some respects. Veasey Br. 52-53. But plaintiffs, like the district court, ignore the demonstrated reasons why the Texas law differed as it did from other laws. Appellants' Br. 76-79. Second, plaintiffs point out that SB14 did not address mail-in ballot fraud. Veasey Br. 53-54. Plaintiffs' only response to the State's showing that the Legislature did, in fact, address mail-in ballot fraud before SB14 is that "absentee ballot fraud remained a top security concern of election officials." *Id.* at 54. But it cannot be the case that the Legislature had to *eliminate* mail-in ballot fraud before it could address in-person fraud. In any event, "there is no indication from the" district court's "findings or conclusions that [it] gave any attention to [this] contrary evidence." *City of Rich. v. United States*, 422 U.S. 358, 377 (1975).

[16] Plaintiffs contend that the State was not permitted to rely on judicially noticeable evidence on remand. Veasey Br. 60. Plaintiffs made this argument below, and the district court did not accept it. The reason is clear. Courts may judicially notice facts "at any stage of the proceeding," including on appeal, Fed. R. Evid. 201(d), precisely because it does not require "tak[ing] additional evidence," Veasey Br. 60 (quoting *Veasey*, 830 F.3d at 242). Thus, the Supreme Court in *Crawford* took judicial notice of facts while evaluating Indiana's voter ID law. 553 U.S. at 199 (plurality op.).

E. SB14 would have been enacted regardless of any alleged impermissible purpose.

As the State showed, the district court cited nothing to support its conclusion that the State "ha[d] not met its burden" "to demonstrate that [SB14] would have been enacted without its [alleged] discriminatory purpose." ROA.69773. Appellants' Br. 81-82. Plaintiffs say nothing in response. This is yet another independent reason requiring reversal.

CONCLUSION

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

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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3. This brief does not comply with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because it contains 12,462 words, excluding the parts of the brief exempted by Rule 32(f). However, the Court granted Appellants' motion to file a brief not exceeding 12,500 words.

4. This brief complies with the typeface and style requirements of Rule 32(a)(5) and (a)(6) because it was prepared in Microsoft Word using 14-point Equity typeface.

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