No. 14-41127

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARC VEASEY; JANE HAMILTON; SERGIO DELEON; FLOYD CARRIER; ANNA BURNS; MICHAEL MONTEZ; PENNY POPE; OSCAR ORTIZ; KOBY OZIAS; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; JOHN MELLOR-CRUMLEY,

Plaintiffs-Appellees

TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS,

Intervenor Plaintiffs-Appellees

v.

GREG ABBOTT, in his Official Capacity as Governor of Texas; TEXAS SECRETARY OF STATE; STATE OF TEXAS; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety,

Defendants-Appellants

(*See inside cover for continuation of caption*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS APPELLEE

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND; IMANI CLARK,

Intervenor Plaintiffs-Appellees

v.

STATE OF TEXAS; 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.

TEXAS SECRETARY OF STATE; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety,

Defendants-Appellants

LENARD TAYLOR; EULALIO MENDEZ, JR.; LIONEL ESTRADA; ESTELA GARCIA ESPINOSA; MARGARITO MARTINEZ LARA; MAXIMINA MARTINEZ LARA; LA UNION DEL PUEBLO ENTERO, INCORPORATED,

Plaintiffs-Appellees

v.

STATE OF TEXAS; TEXAS SECRETARY OF STATE; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety,

Defendants-Appellants

STATEMENT REGARDING ORAL ARGUMENT

The United States respectfully requests that, in accordance with this Court's order dated December 10, 2014, this case be placed on the first available oral argument calendar.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

LEGISLATIVE HISTORY:

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-41127

MARC VEASEY; *et al.*,

Plaintiffs-Appellees

v.

GREG ABBOTT, in his Official Capacity as Governor of Texas; *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

Texas Senate Bill 14 (SB14) imposes restrictive photographic-identification (photo-ID) requirements for in-person voting. This appeal involves challenges to SB14 under Section 2 of the Voting Rights Act (VRA), 52 U.S.C. 10301,[1] and the United States Constitution. The district court exercised jurisdiction under 28 U.S.C. 1331, 1345, and 52 U.S.C. 10308(f).

[1] All U.S. Code provisions relating to voting and elections recently were transferred to a new Title 52. The Addendum includes a table of the reclassified provisions cited in this brief.

On October 9, 2014, the district court resolved all liability determinations in plaintiffs' favor, stating that it would enjoin Texas from enforcing SB14's photo-ID provisions and require it to reinstate its preexisting voter-ID law. ROA.27026-27172. Two days later, after Texas sought emergency relief in this Court, the district court issued a judgment entering the injunction. ROA.27192. Texas appealed. ROA.27193. Plaintiffs' requests for relief under Section 3 of the VRA, 52 U.S.C. 10302, remain pending in the district court. The parties agreed to postpone consideration of those claims pending this Court's review. ROA.27426. This Court has jurisdiction under 28 U.S.C. 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the district court clearly erred in finding that SB14's photo-ID requirements violate Section 2 of the VRA.

2. Whether the district court abused its discretion in permanently enjoining Texas from enforcing SB14's photo-ID requirements and in restoring Texas's preexisting voter-ID law.

STATEMENT OF THE CASE

1. Section 2 Of The VRA

Section 2 of the VRA imposes a "permanent, nationwide ban on racial discrimination in voting." *Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612, 2631 (2013). It prohibits any "voting qualification or prerequisite to voting or standard, practice,

or procedure" that "results in a denial or abridgement" of the right to vote "on account of race or color." 52 U.S.C. 10301(a). The VRA defines the terms "vote" and "voting" to encompass "all action necessary to make a vote effective," including "casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast." 52 U.S.C. 10310(c)(1).

In 1982, Congress amended the VRA to clarify that a law that has either a discriminatory purpose or a discriminatory result violates Section 2. See *Thornburg* v. *Gingles*, 478 U.S. 30, 43-45 (1986); 52 U.S.C. 10301; S. Rep. No. 417, 97th Cong., 2d Sess. (1982) (Senate Report). The VRA authorizes courts redressing a Section 2 violation to enter preventive relief, including a permanent injunction. See 52 U.S.C. 10308(d); *Shelby Cnty.*, 133 S. Ct. at 2619.

2. Factual Background

a. Texas has required some form of identification for in-person voting for more than a decade. From 2003 until 2013, a voter could cast a regular ballot by presenting a registration certificate—a document mailed to voters upon their successful registration. ROA.27038. Voters appearing at the polls without that certificate still could cast a regular ballot by executing an eligibility affidavit and presenting some form of ID, including: a current or expired driver's license; a photo ID such as an employee or student ID; a utility bill, bank statement, paycheck, or government document showing their name and address; or mail to

them from a government agency. ROA.27038. When this law was in effect—a period during which approximately 20 million votes were cast in general elections (ROA.100268)—only two cases of in-person voter impersonation were prosecuted to conviction in Texas. ROA.27038.

b. During this same period, Texas experienced explosive growth in its minority population. Between 2000 and 2010, African Americans and Hispanics accounted for 78.7% of Texas's overall growth; by 2010, Texas had become a majority-minority state. ROA.27153. In the midst of this "seismic demographic shift" (ROA.27153), Republican legislators repeatedly proposed photo-ID requirements for in-person voting. ROA.27049-27051. Voting in Texas remains sharply racially polarized, with African Americans and Hispanics voting "overwhelmingly" for Democratic candidates. ROA.27153. In 2005, 2007, and 2009, photo-ID proponents introduced increasingly restrictive bills, ostensibly to prevent in-person voter impersonation and non-citizen voting. ROA.27049-27051, 27064-27075. Opponents argued that these proposals would disenfranchise minority constituents and blocked the legislation. ROA.27070-27071.

After Republicans gained sizeable majorities in the Texas House and Senate in 2010, the 2011 Legislature adopted photo-ID requirements stricter than those previously rejected. ROA.30607-30623. Though knowing that hundreds of thousands of voters might lack the photo ID it sought to require, and that African

Americans and Hispanics would be most affected, the Legislature accepted amendments that broadened opportunities for Anglo voters while rejecting those that assisted minority voters. ROA.27072-27075.

The Legislature did so despite available data showing that African Americans and Hispanics in Texas are more likely than Anglos to live in poverty, to lack access to a vehicle, and to have lower incomes, less education, and poorer health and would therefore face greater difficulty complying with the photo-ID requirements. ROA.27088-27091, 27101-27102, 27148-27149. Texas also has significant racial gaps in voter registration and turnout, notwithstanding Census data apparently indicating that African-American and Anglo voter registration and turnout rates are roughly equal. ROA.27149; see ROA.43278-43283; ROA.43931-43933.

c. The new law, SB14, requires in-person voters to present one of five preexisting types of government-issued photo ID for their ballot to be counted: (1) a driver's license or personal ID card issued by the Texas Department of Public Safety (DPS); (2) a DPS-issued license to carry a concealed handgun; (3) a U.S. passport; (4) a U.S. citizenship certificate; or (5) U.S. military ID. ROA.27043. The ID must be unexpired or have expired within the prior 60 days. ROA.27043.

SB14 also created a new form of photo ID—the election identification certificate (EIC)—available to voters who lack qualifying ID. ROA.27043. An

eligible voter who travels to a DPS office (or other EIC-issuing location) and presents DPS-designated proof of citizenship and identity can obtain a free EIC that generally is valid for six years. ROA.27094 & n.275. Because EIC applicants by definition lack a U.S. passport or citizenship certificate, a certified copy of the applicant's birth certificate is usually necessary. ROA.27094-27095.

Among voters lacking qualifying ID, acquiring an EIC or other SB14-compliant ID disproportionately burdens African Americans and Hispanics. This disproportionate burden flows from, *inter alia*, the documentation requirements, eligibility limitations, and underlying fees attendant to obtaining even an EIC; socioeconomic disparities that make assembling the necessary underlying documents and traveling to an ID-issuing location more difficult; and a lack of voter education surrounding SB14's requirements. ROA.27095-27099, 27101-27103, 27047.

Under SB14, in-person voters who fail to present qualifying ID may cast a provisional ballot. ROA.27044. Texas counts the ballot only if the voter either presents qualifying ID to the county registrar within six days after the election, or executes an affidavit attesting (a) a religious objection to being photographed, or (b) loss of a photo ID in a recently declared natural disaster. ROA.27044. Eligible voters who arrive at the polls without qualifying ID are not always informed that provisional ballots are available, that they must be cured within six days after the

election, or that DPS-issued EICs are a potential option. ROA.27057, 27093 & n.269, 27131-27132, 27141 n.498.

d. When SB14 was enacted, Texas was subject to Section 5 of the VRA, 52 U.S.C. 10304(a); thus, Texas could not implement SB14 unless and until it showed that SB14 had neither a racially discriminatory purpose nor a racially discriminatory effect. In August 2012, a three-judge court denied judicial preclearance for SB14 after concluding it would have a prohibited discriminatory effect. See *Texas* v. *Holder*, 888 F. Supp. 2d 113, 115, 138 (D.D.C. 2012), vacated and remanded on other grounds, 133 S. Ct. 2886 (2013). The court did not reach the question whether SB14 also had a discriminatory purpose. *Id.* at 115.

Texas appealed the three-judge court's decision to the Supreme Court. The Court vacated the decision in light of *Shelby County* v. *Holder*, *supra*, which held that Section 4(b) of the VRA could no longer be used to determine which jurisdictions were subject to Section 5 preclearance. See *Texas* v. *Holder*, 133 S. Ct. at 2886.

3. Proceedings Below

a. Within hours of the *Shelby County* decision, Texas announced that it would begin enforcing SB14. Shortly thereafter, plaintiffs—including the United States—filed four challenges to SB14, which were consolidated before the same judge. ROA.27026-27027 & n.3. Plaintiffs alleged, *inter alia*, that SB14's photo-

ID requirements violate Section 2 of the VRA, both because they have a racially discriminatory purpose and because they have a prohibited discriminatory result. ROA.27143 & n.502, 27151 & n.524. The United States brought only Section 2 claims.

The district court expedited the case and scheduled trial for September 2014 to enable a final decision in time for the November 2014 election. ROA.97550-97564. Meanwhile, Texas enforced SB14 statewide in three low-participation elections in November 2013, March 2014, and May 2014. See Texas Secretary of State, *Turnout and Voter Registration Figures* (1970-current), http://tinyurl.com/68pz4x.

b. The district court held a nine-day bench trial, during which it heard live testimony from over 40 witnesses, including 17 experts, and considered deposition excerpts from more than two dozen additional witnesses. See Addendum (table of trial witnesses with ROA citations). The court also received tens of thousands of pages of exhibits and additional deposition designations. Post-trial, the parties filed corrected expert reports and updated factual findings and conclusions of law. See, *e.g.*, ROA.26451-26803 (plaintiffs' joint post-trial filing).

On October 9, 2014, in an exhaustive 147-page opinion, the court issued detailed findings of fact and conclusions of law. ROA.27026-27172. The court found that SB14 is the "strictest" voter ID law in the country and provides the

"fewest opportunities" to cast a regular ballot. ROA.27045. The court credited expert testimony that over 600,000 registered voters lack qualifying ID, and that a sharply disproportionate number of them are African American or Hispanic. ROA.27075-27084. The court found that, among voters who lack qualifying ID, social and historical conditions linked to race mean that minority voters would find it more difficult than Anglo voters to obtain ID. ROA.27084-27091. The court concluded that SB14 interacts with those conditions to provide African-American and Hispanic voters less opportunity than Anglo voters to participate in the political process and to elect their candidates of choice, thereby producing a discriminatory result within the meaning of Section 2. ROA.27144.

The court also found that this result was not accidental. Rather, the court concluded that the Texas Legislature enacted SB14's requirements at least in part because of their detrimental effect on African-American and Hispanic voters. ROA.27158-27159. Among other evidence, the court found that the combination of Texas's "demographic trends and polarized voting patterns" show that "Republicans in Texas are inevitably facing a declining voter base and can gain partisan advantage by suppressing the overwhelmingly Democratic votes of African-Americans and Latinos." ROA.27153 (quoting Dr. Lichtman's expert report). The court further concluded that Texas had not shown that the Legislature would have enacted SB14 absent this discriminatory purpose. ROA.27158-27159.

Accordingly, it held that SB14 violates Section 2 based on both its discriminatory purpose and its discriminatory result. ROA.27143-27159.

To redress the Section 2 violations, the court enjoined Texas from enforcing SB14's photo-ID provisions (Sections 1 through 15 and 17 through 22) and reinstated Texas's preexisting voter-ID law. ROA.27192.

c. After the court's liability determinations but before its issuance of the permanent injunction, Texas sought mandamus review. ROA.27377. Upon the entry of injunctive relief, Texas immediately appealed and this Court converted the mandamus petition into an emergency application for a stay pending appeal. ROA.27377-27378.

On October 14, 2014, this Court granted Texas's request based "primarily on the extremely fast-approaching election date." ROA.27377. This Court did not identify any legal errors or clearly erroneous factual findings in the district court's decision. Rather, it conceded that the merits issues were "significantly harder to decide," given the "voluminous record," the "lengthy district court opinion," and the "necessarily expedited review." ROA.27383. Judge Costa agreed to grant the stay based on the imminence of the November election, but stated that this Court "should be extremely reluctant to have an election take place under a law that a district court has found, and that our court may find, is discriminatory." ROA.27386 (Costa, J., concurring).

Plaintiffs filed emergency applications requesting that the Supreme Court vacate this Court's order. The Court denied those requests, with three justices dissenting. See Nos. 14A393, 14A402, 14A404 (S. Ct. Oct. 18, 2014). Texas thus enforced SB14 for the November 2014 election, and continues to enforce SB14 pending this Court's merits review.

SUMMARY OF ARGUMENT

After an extensive trial, the district court concluded that SB14 violates Section 2 of the VRA for two independent reasons: (1) its enactment was motivated at least in part by discriminatory intent; and (2) it has a prohibited discriminatory result. On appeal, Texas has not shown that the district court clearly erred in those findings. Nor, on this well-developed record, could it. Instead, Texas simply substitutes its views for the court's factual findings and credibility determinations and seeks to have this Court reweigh the evidence. Texas also claims the court committed legal error, even though the court applied established precedent to plaintiffs' claims. Because no basis exists to disturb the court's amply supported findings, this Court should affirm.

In an exercise of its equitable discretion under Section 2, the district court permanently enjoined Texas from enforcing SB14's photo-ID provisions and restored the voter-ID practices in force from 2003 until 2013. Texas has not shown that the district court abused its discretion in doing so. Accordingly, this Court

should affirm the permanent injunction and vacate this Court's October 14, 2014, stay order.

ARGUMENT

I

THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S FINDING THAT SB14 HAS A PROHIBITED DISCRIMINATORY RESULT

A. Standard Of Review

A district court's finding of a Section 2 violation is a question of fact reviewed for clear error. *Thornburg* v. *Gingles*, 478 U.S. 30, 79 (1986); *Rogers* v. *Lodge*, 458 U.S. 613, 622-623 (1982). "The credibility determination of witnesses, including experts, is peculiarly within the province of the district court," and this Court "defer[s] to the findings and credibility choices trial courts make with respect to expert testimony." *LULAC #4552* v. *Roscoe Indep. Sch. Dist.*, 123 F.3d 843, 846 (5th Cir. 1997) (citations omitted). Legal issues are reviewed *de novo*. *Trinity Indus., Inc.* v. *United States*, 757 F.3d 400, 407 (5th Cir. 2014).

B. Section 2 Requires A Fact-Based, Totality-Of-Circumstances Analysis

Section 2(b)'s text frames the relevant inquiry: whether, "based on the totality of circumstances," SB14 results in "less opportunity" for African-American and Hispanic voters relative to other members of the electorate "to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b). Ignoring Section 2(b), Texas argues that the district court erred

in not asking whether SB14 completely disenfranchises minority voters. Br. 31-32. But Texas's formulation subverts the statutory test, conflicts with this Court's holdings, and permits discrimination.

Section 2 does not require that a challenged practice deprive minority voters completely of the ability to vote. Rather, it requires only that plaintiffs establish they have "less opportunity" to participate relative to other voters. "Less" opportunity is not a synonym for "no" opportunity. In amending Section 2 to prohibit voting practices that have a discriminatory result, Congress directed that a plaintiff need demonstrate only that the challenged practice "result[s] in the denial of equal access to any phase of the electoral process for minority group members." Senate Report 30. Shortly thereafter, the Supreme Court explained that the "essence" of a results claim is that a challenged practice "interacts with social and historical conditions" attributable to racial discrimination "to cause an inequality in the opportunities enjoyed by [minority] and white voters." *Gingles*, 478 U.S. at 47.

Section 2(b)'s focus on "*less*" opportunity to participate, and not a complete inability to vote, is consistent with Section 2(a)'s prohibition of those practices that result in a "denial *or abridgement*" of the right to vote. 52 U.S.C. 10301(a) and (b) (emphasis added); see *Black's Law Dictionary* (9th ed. 2009) ("abridge" means to "reduce or diminish"). After all, in a vote-dilution case, minority voters experience

no outright disenfranchisement; their votes simply have less effective weight than other voters'. Indeed, *Gingles* held that the plaintiffs had proved a Section 2 violation by showing that multimember districts precluded black voters from electing candidates of their choice, see 478 U.S. at 42-48—which presupposed that they had been able to cast ballots in the first place.

If voting practices that dilute minority voting strength can constitute a denial or abridgment within the meaning of Section 2, then *a fortiori* barriers to casting a ballot in the first place can do so. The Supreme Court long ago recognized that the "accessibility, prominence, facilities, and prior notice of" a polling place's location "all have an effect on a person's ability to exercise his franchise." *Perkins* v. *Matthews*, 400 U.S. 379, 387 (1971). Thus, as Justice Scalia explained in *Chisom* v. *Roemer*, 501 U.S. 380 (1991), Section 2 would be violated if "a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites." *Id.* at 408 (dissenting opinion).

In *Mississippi State Chapter, Operation PUSH, Inc.* v. *Mabus*, this Court recognized that a practice need not completely foreclose minority voters' ability to register or cast a ballot to violate Section 2. 932 F.2d 400, 402-405 (5th Cir. 1991). There, black voters challenged Mississippi's dual registration requirement and prohibition on satellite registration. *Id.* at 402. Significantly for Texas's argument here, all eligible voters in Mississippi in theory could have satisfied the

challenged requirements by registering to vote with both the county registrar and the municipal clerk. Yet the district court found a Section 2 violation based on plaintiffs' showing that historical and social conditions—including lower participation rates among black voters, and racial disparities in education, income, employment, housing, work schedules, and vehicle access—made it more difficult (though not impossible) for black voters to comply with Mississippi's voter-registration scheme. *Mississippi State Chapter, Operation PUSH, Inc.* v. *Allain*, 674 F. Supp. 1245, 1248-1268 (N.D. Miss. 1987). This Court affirmed "in all respects." *Operation PUSH*, 932 F.2d at 409-413.

This Court's holding confirms, consistent with Supreme Court precedent and Section 2's text, that Section 2 requires a fact-based, totality-of-circumstances analysis. Where a restrictive photo-ID law is challenged, a court must ask whether the law bears more heavily on minority voters, and whether social and historical circumstances tied to racial discrimination help explain disparities in the possession of qualifying ID and the difficulty in obtaining it. Other courts of appeals that have examined restrictive voting practices likewise have recognized that Section 2 requires a "peculiarly" fact-based inquiry into the "design and

impact of the contested electoral mechanisms" in light of a jurisdiction's "past and present reality." *Gingles*, 478 U.S. at 79 (citations omitted).[2]

When Congress amended Section 2 in 1982, the Senate Judiciary Committee identified factors generally relevant to a court's totality-of-circumstances analysis. Senate Report 28-29 (listing factors). The Committee explained that those factors were not exhaustive, that no particular factor or number of factors need be proven to sustain a Section 2 claim, and that the factors' relevance will vary with "the kind of rule, practice, or procedure called into question." Senate Report 28. For decades, the Supreme Court has recognized the "Senate Factors" as "typically relevant" to a Section 2 claim. *LULAC* v. *Perry*, 548 U.S. 399, 426 (2006); see *Gingles*, 478 U.S. at 44-45.

Yet, Texas argues here that the Senate Factors are relevant to vote-dilution claims only. Br. 31-32. Not so. To be sure, Section 2 was amended in response to *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980)— a vote dilution case—and the list of factors was derived primarily from two prior vote-dilution cases. Senate Report

[2] See, *e.g.*, *Ortiz* v. *City of Phila. Office of the City Comm'rs*, 28 F.3d 306, 308-310, 317 (3d Cir. 1994); *League of Women Voters of N.C.* v. *North Carolina*, 769 F.3d 224, 238-241, 245-246 (4th Cir.), mandate stayed pending the filing of a cert. petition, 135 S. Ct. 6 (2014), cert. pending, No. 14-780 (filed Dec. 30, 2014); *Ohio State Conf.* v. *Husted*, 768 F.3d 524, 552 (6th Cir.), vacated on other grounds, No. 14-3877 (6th Cir. Oct. 1, 2014); *Stewart* v. *Blackwell*, 444 F.3d 843, 877-879 (6th Cir. 2006), superseded as moot, 473 F.3d 692 (6th Cir. 2007); *Gonzalez* v. *Arizona*, 677 F.3d 383, 405-407 (9th Cir. 2012) (en banc), aff'd on other grounds, *sub nom. Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013). But see *Frank* v. *Walker*, 768 F.3d 744, 751-755 (7th Cir. 2014), cert. pending, No. 14-803 (filed Jan. 7, 2015).

21-23, 27-30 & n.113. But no authority has confined the Senate Factors to the vote-dilution context. To the contrary, *Operation PUSH* affirmed a Section 2 violation in a voter-registration case based on the district court's examination of relevant Senate Factors. See 932 F.2d at 404-405, 413. Indeed, courts examining all types of Section 2 claims rely on the Senate Factors to conduct the totality-of-circumstances analysis. See *LULAC*, 548 U.S. at 425-426.[3]

Texas further argues that the district court erred by failing to distinguish between SB14's statutory requirements and DPS's implementation of them. Br. 4-5 & n.2, 32-33. Because Texas did not assert this argument below, it is waived. See *Conley* v. *Board of Trs.*, 707 F.2d 175, 178 (5th Cir. 1983).

The argument also fails on the merits. The plain language of Section 2 prohibits voting practices "imposed or applied" in a manner that produces a discriminatory result. 52 U.S.C. 10301(a). How a State implements a law is obviously relevant to its validity. This Court recognized as much in *Operation PUSH* when it examined how discretionary aspects of Mississippi's voter registration system contributed to its discriminatory result. See 932 F.2d at 403-

[3] See, *e.g.*, *Gonzalez*, 677 F.3d at 405-406 (finding factors relevant in a voter-ID challenge); *Ortiz*, 28 F.3d at 308-310 (same regarding voter-purge statute); *League of Women Voters*, 769 F.3d at 240-241 (same regarding same-day registration and out-of-precinct voting); *Ohio State Conf.*, 768 F.3d at 554-555 (same regarding early voting); *Johnson* v. *Governor of Fla.*, 405 F.3d 1214, 1227 n.26 (11th Cir. 2005) (stating courts in "vote denial" cases examine relevant factors); *Smith* v. *Salt River Agric. Improvement & Power Dist.*, 109 F.3d 586, 596 n.8 (9th Cir. 1997) (same).

404, 412-413. Here, SB14 authorizes DPS to demand proof of identity and citizenship (including presentation of a birth certificate) from EIC applicants, and DPS has imposed such requirements. See Tex. Transp. Code Ann. § 521A.001(f) (West 2013). Plaintiffs therefore alleged that SB14 *and its implementation* violate Section 2. Accordingly, the district court correctly considered DPS's rules, and the obstacles minority voters face in satisfying them, in determining whether SB14 has a discriminatory result.

Finally, contrary to Texas's assertion, the district court did not interpret Section 2 to require that "voters of various races possess photo ID in exactly equal proportion." Br. 34. Thus, there is no "constitutional question" to "avoid." In any event, "constitutional avoidance has no role to play" where, as here, a statute's text and history are clear, *Warger* v. *Shauers*, 135 S. Ct. 521, 529 (2014), and this Court has long held that the results test is constitutional, see, *e.g.*, *Jones* v. *City of Lubbock*, 727 F.2d 364, 373-375 (5th Cir. 1984).

C. The District Court Did Not Clearly Err In Finding That SB14 Has A Prohibited Discriminatory Result

The district court undertook the fact-intensive analysis that Section 2 requires. Based on extensive evidence, it found that SB14 disproportionately affects African-American and Hispanic voters. ROA.27075-27084. It further found that SB14 bears more heavily on minority voters who must obtain qualifying ID, and that the availability of EICs or other methods of voting do not offset

SB14's racial impact. ROA.27084-27111. Finally, it determined that SB14 interacts with the effects of past and present racial discrimination to result in less opportunity for minority voters relative to Anglo voters to participate in the political process and to elect candidates of their choice. ROA.27143-27151. The record amply supports those findings, as well as the court's ultimate finding that SB14 produces a discriminatory result.

1. Minority Voters Disproportionately Lack Qualifying ID

On the basis of reliable expert evidence that compared Texas's database of registered voters to relevant federal and state databases containing records of those individuals who possessed qualifying ID, the court found that over 600,000 registered voters (or 4.5% of all registered voters) lacked qualifying ID. ROA.27075-27078. Texas has not challenged that finding, and for good reason. The court credited the testimony and reinforcing analyses of plaintiffs' experts, stating that they were "impressively credentialed" and had "explained their data, methodologies, and other facts upon which they relied in clear terms according to generally accepted and reliable scientific methods for their respective fields." ROA.27084.

The court also credited numerous expert studies that confirmed African-American and Hispanic voters lack qualifying ID at statistically significant higher

rates than Anglo voters. ROA.27078-27084, 27145.[4] The evidence also showed that, among registered voters who voted in pre-SB14 elections in 2010 and 2012, African Americans and Hispanics lacked qualifying ID at statistically significant higher rates than Anglos. ROA.43267-43268. Texas's expert, Dr. Hood, admitted the racial disparity in ID-possession rates. ROA.27145 n.510.[5] The court thus found SB14's racial impact "essentially unrebutted." ROA.27145.

Despite those detailed findings, Texas argues that the court clearly erred in finding a racial disparity. Br. 34-36. Texas asserts that the court could not know voters' race or ethnicity because its Secretary of State does not collect such information. Thus, according to Texas, plaintiffs relied on guesswork to estimate the race of affected voters. Br. 35. Texas also argues that Dr. Ansolabehere's Catalist-based results are unreliable because they incorrectly estimated the race of some plaintiffs and because he did not check them against DPS's self-reported race and ethnicity data for some individuals on the no-match list. Br. 36. Far from establishing clear error, Texas's arguments are meritless.

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[4] See, *e.g.*, ROA.98762-98768, 98780-98794; ROA.98944-98946, 98961-98962, 98997-98999; ROA.99261-99316; ROA.100434-100450; ROA.43228-43229, 43274-43283, 43312; ROA.44599-44610; ROA.43586-43594; ROA.43859-43866 (expert testimony and reports by Drs. Ansolabehere, Herron, Barreto, and Bazelon).

[5] Dr. Hood responded to Dr. Ansolabehere's expert analyses and to the expert survey conducted by Drs. Barreto and Sanchez. Texas's only other expert, Dr. Milyo, responded to plaintiffs' 15 remaining experts, as well as to Drs. Ansolabehere, Barreto, and Sanchez. Dr. Milyo did not testify at trial.

First, the court credited multiple analyses by a variety of plaintiffs' experts, all of which showed statistically significant racial disparities in ID-possession rates. ROA.27078-27084. Texas challenges only the Catalist-based analysis. But as explained below, this was only one of four separate and complementary methods that Dr. Ansolabehere used to analyze and confirm the racial makeup of the no-match list. Also, Drs. Herron and Bazelon completed expert studies, and Drs. Barreto and Sanchez conducted an expert telephone survey—*none* of which relied on Catalist data—that yielded substantially similar results to Dr. Ansolabehere's. ROA.27081-27084.

Second, although DPS collects self-reported race and ethnicity data from applicants for DPS-issued ID, neither plaintiffs' experts nor the court relied on this data because DPS did not offer applicants the choice of "Hispanic" until May 2010. ROA.27078 & n.213; ROA.98855-98856. Indeed, in 2012, before this litigation commenced, the State's Director of Elections conceded that matching Texas's voter registration list to DPS's database to ascertain a voter's race "produces anomalous and highly misleading results," largely because "the number of Hispanic ID-holders in Texas is exponentially higher than the DPS's raw data indicates." ROA.54345-54348. The court therefore found that the inability of applicants to self-identify as Hispanic prior to 2010 made DPS's self-reported data for all racial and ethnic groups unreliable. ROA.27078.

Despite the lack of self-reported data, plaintiffs' experts reliably estimated the racial makeup of the no-match list. At trial, Dr. Ansolabehere detailed the established scientific methods he used. They included:

(1) conducting an *ecological regression analysis*, in which the geographical distribution of the addresses of all voters on the match and no-match lists is related to Census data on the geographical distribution of Anglo, Hispanic, and African-American citizens of voting age throughout Texas to estimate the percentage of each racial group that lacks ID;

(2) performing a *homogeneous block group analysis*, in which the rates at which voters who reside in racially homogeneous or nearly homogeneous Census block groups appear on the match and no-match lists are used to infer broader patterns regarding each racial group's possession of ID;

(3) consulting *Catalist LLC*, a data-utility company that maintains election-related data and applies a validated statistical model that assigns race estimates to individuals by reference to the person's name and the Census demography related to each individual's address (ROA.99078-99099); and

(4) as a separate means of validating each of those methods, using the *Spanish Surname Voter Registration List (SSVR)*—the Texas Secretary of State's own indicator of which registered voters, based on a list provided by the Census Bureau, have surnames likely to indicate a Hispanic ethnicity (ROA.42402)—and comparing the prevalence of SSVR-registered voters to non-SSVR registered voters on the match and no-match lists.

ROA.98780-98790. Each method that separately measured Anglo, Hispanic, and African-American ID possession rates showed that registered minority voters were

at least 1.5 to 2.5 times as likely to lack qualifying ID than registered Anglo voters. ROA.43261-43264, 43277.[6]

The court found that these four methodologies were widely used and considered highly reliable. ROA.27078-27081, 27084. Indeed, Dr. Hood, Texas's expert, did not criticize the ecological regression, homogeneous block group, or SSVR analyses. ROA.100937-100939. Texas emphasizes that the Catalist data misclassified some plaintiffs' race (Br. 36), but the court found that such classification errors would actually *strengthen* the conclusion that there were racial disparities by making any racial disparities appear smaller than they actually are. ROA.27081; see ROA.98785-98789, 98852-98853, 98858-98861; ROA.99095-99097; ROA.43275-43277. This evidence was undisputed at trial, and Texas has not challenged it here.

The court also credited the analyses of Drs. Herron and Bazelon, who independently estimated the racial composition of the no-match list and likewise found statistically significant racial disparities in ID-possession rates. ROA.27081-27082, 27084. Finally, the court credited Drs. Barreto and Sanchez's expert telephone survey of eligible Texas voters, after finding Texas's expert "unconvincing." ROA.27082-27084. Their results showed that approximately 1.2

[6] Three tables from Dr. Ansolabehere's expert report summarizing the results of his analyses (ROA.43319-43320, 43328) are included in the Addendum.

million citizens of voting age lacked qualifying ID, and that that group is disproportionately African-American and Hispanic. ROA.43586-43588. Among registered voters, the survey disparities were even more pronounced. ROA.43588-43589.

Based on this abundant evidence, most of which Texas does not even mention let alone challenge, the court did not clearly err in finding a statistically significant racial disparity in ID possession.

2. The Burdens Of Obtaining Qualifying ID Bear More Heavily On Minority Voters And Are Not Offset By Mitigating Measures

As Section 2 requires, the court's analysis went beyond simply finding a numerical disparity in the rates at which different racial groups possess qualifying ID. It also found that those voters who lack qualifying ID face significant burdens in obtaining it, that those burdens fall disproportionately on African Americans and Hispanics, and that purported mitigating measures do not offset SB14's racial impact. ROA.27084-27111. Indeed, plaintiffs' evidence confirmed that, because of Texas's long history of intentional racial discrimination, socioeconomic status in Texas has "very deep racial and ethnic connections" (ROA.99298) affecting different groups' relative access to information, their understanding of voting requirements, and their ability to navigate processes necessary to obtain qualifying ID or to cast an absentee or provisional ballot that will be counted. ROA.27088-27091; ROA.99297-99300; ROA.43588-43599; ROA.44463-44482.

a. The Burdens Of Obtaining An EIC Are Significant And Bear More Heavily On African Americans And Hispanics

The court found that minority voters disproportionately face significant hurdles to obtaining even a free EIC. African Americans and Hispanics, the court explained, are more likely than Anglos to live in poverty, to lack access to a vehicle, and to rely on public transportation, making them "less likely to own and need" qualifying ID already, "less likely to have the means to get that ID," and less likely to have a choice over "how they spend their resources." ROA.27087-27088; see ROA.99411-99425 (Henrici testimony). The court credited expert evidence to find that the reason African Americans and Hispanics disproportionately live in poverty is that they continue to bear the effects of "more than a century of discrimination" in employment, income, education, health, and housing. ROA.27088-27091. Texas did not dispute this evidence below, nor does it here.

The court also found Texas's SB14 voter education to be "woefully lacking" (ROA.27045) and "grossly" underfunded (ROA.27056), and its implementation of the EIC program to be "insufficient" (ROA.27093). It found that Texas has made "[n]o real effort" to "educate the public about the availability of an EIC to vote, where to get it, or what is required to obtain it." ROA.27094. Indeed, some plaintiffs—including those "who had shown up at the polls and were turned away for not having the necessary photo ID and those who made multiple attempts to obtain DPS-issued photo IDs"—first heard of an EIC at their depositions.

ROA.27093. For minority voters who have been subjected to discrimination in education, the already complex processes of obtaining an EIC and satisfying SB14 are all the more complex. ROA.27085-27091.

And, as the court explained, the underlying documents needed to obtain an EIC are neither free nor easy to obtain. ROA.27095-27109. In Texas, a certified copy of a birth certificate typically costs $22, but can be as expensive as $47. ROA.27047. Texas thus touts the availability of reduced-fee EIC birth certificates for voters who lack the certified copy of their birth certificate necessary to obtain an EIC. See Br. 5-6 & n.3, 10, 15, 17, 20, 61-62. But the court found that, beyond being a creation of the Department of State Health Services (DSHS) and not statutorily required, reduced-fee birth certificates have "not been publicized." ROA.27095; see ROA.27108. Indeed, at trial, the State's witness from DSHS confirmed that little, if any, public information exists regarding EIC birth certificates. ROA.100734-100746. Just 60 EIC birth certificates had been issued statewide as of May 2014 (ROA.100746), and, contrary to Texas's suggestion on appeal (Br. 6 n.3), no such birth certificates ever had been issued free of charge at the Austin office (ROA.100726).

Where a voter does not specifically request a reduced-fee birth certificate, or the voter needs to apply for a birth certificate by mail, amend a birth certificate to correct any errors, seek a "delayed" birth certificate for an unregistered birth, or

request an out-of-state birth certificate, the typical fee of $22 to $47 applies. ROA.27095-27099. The court found that many minority voters cannot benefit from EIC birth certificates because (1) their births were never registered or they were born out-of-State, rendering them ineligible for an EIC birth certificate, or (2) they have errors on their birth certificate, requiring them to pay additional fees to amend it before they can obtain an EIC. ROA.27095-27099. Some plaintiffs recounted paying significant fees to obtain a valid birth certificate, either because they were not informed that EIC birth certificates existed or because their births had never been registered or were recorded inaccurately; others, despite repeated efforts and assistance from family members, could not obtain a copy of their birth certificate at all. ROA.27095-27101.

The court found that, even where voters do manage to assemble the underlying documents, low-income Texans face "particular" burdens in reaching an office that can issue an EIC. ROA.27101-27103. These burdens fall most heavily on African Americans and Hispanics, who are significantly more likely to live in poverty and to lack vehicle access. ROA.14063-14070. In contrast to the more than 8000 polling places that Texas provides for a Federal general election (ROA.101084), it has only 225 DPS offices, 61 county offices that have agreed to issues EICs, and mobile units in sporadic use. ROA.38297-38299; ROA.38313-38338; ROA.39345-39354. The court credited expert evidence showing that

hundreds of thousands of eligible voters face round-trip travel times of 90 minutes or more to their nearest EIC-issuing location; of eligible voters who do not have access to a household vehicle, 54% would face a round trip of three hours or more. ROA.27101-27102.

Moreover, until the Secretary of State requested that DPS cease doing so, DPS actually fingerprinted EIC applicants; this practice, in addition to law enforcement's presence at DPS offices, deterred some voters from seeking EICs. ROA.27108. Based on testimony from elected officials and social service providers, the district court found that the fear of DPS and law enforcement among the homeless and working poor, a disproportionate number of whom are African American and Hispanic, was "widespread and justified." ROA.27106-27108. The court found that "DPS has done nothing to allay public perception that DPS can fingerprint, conduct a warrant check, and arrest EIC applicants." ROA.27108.

Finally, the court credited extensive testimony from social service providers who work with African-American and Hispanic clients and who "painted a compelling picture" of the "plight" indigent individuals generally face in obtaining photo ID. ROA.27106-27109; ROA.99045-99077 (Mora testimony); ROA.99200-99219 (White testimony).

As of September 2014, Texas had issued only 279 EICs. ROA.27131. Texas suggests that the low number of EICs shows that the "demand for EICs is

low," not that "EICs are hard to obtain," citing evidence that approximately 22,000 voters on the no-match list were able to vote in November 2013 and spring 2014. Br. 23 & n.8. But the court found that some of these voters had obtained qualifying ID during the pendency of this case and that others had voted absentee. ROA.27078. Moreover, plaintiffs' experts testified that such voters accounted for only about 3% of the no-match list; that some of them may not have been asked for qualifying ID or may have been allowed to vote despite lacking it; that the no-match list could be expected to undergo minor changes as some voters obtained qualifying ID and other voters' ID expired; and that this type of classification error would not systematically bias the results. ROA.98809-98810; ROA.99007-99009; ROA.43305. This evidence was undisputed. Texas has not shown that the court clearly erred in finding significant and disproportionate burdens attendant to obtaining qualifying ID.

b. Purported Mitigating Measures Such As SB14's Disability-Based Exemption And Alternatives To Casting A Regular, In-Person Ballot Do Not Offset SB14's Racial Impact

Texas further asserts that, regardless of their inability to obtain an EIC, at least some voters who lack qualifying ID are unaffected by SB14 because they can obtain a disability-based exemption to presenting photo ID or rely on alternatives to casting a regular, in-person ballot. Br. 21-22. But the court found such alternatives inadequate, in part because they require both notice to the voter of

their availability and the voter's understanding and timely satisfaction of additional requirements. Those findings, which Texas has not shown to be clearly erroneous, contradict Texas's assertion that such alternatives mitigate SB14's racial impact.

i. Disability-Based Exemption. Approximately 74,000 registered voters on the no-match list (or about 12% of affected voters) potentially are eligible for a disability-based exemption from SB14's photo-ID requirements. ROA.27043, 27075-27076. But the availability of this exemption does not mitigate SB14's racial impact. As of January 2014, only 18 individuals had satisfied SB14's "strict" requirement to submit written documentation from the U.S. Social Security Administration or Department of Veterans Affairs to qualify for the exemption. ROA.27105-27106. Regardless, even assuming all voters eligible for the exemption sought and received one, statistically significant racial disparities would persist among affected voters ineligible for the exemption. ROA.43264-43267.

ii. Absentee Voting. Texas also asserts that voters who are 65 and older or who have a disability simply can vote by mail. But the evidence showed that, even once voters 65 and over are removed from the no-match list (leaving a no-match population of 429,769), and voters with a qualifying disability are also removed (further reducing the no-match list to 376,985 voters), statistically significant racial disparities persisted. ROA.98791-98794; ROA.43321-43322. Indeed, absentee voting exacerbates SB14's racial impact because Anglo voters are significantly

more likely than minority voters to be over the age of 65 (ROA.43979) and to vote absentee (ROA.43946-43947).

Moreover, the court found that absentee voting was not a viable alternative to in-person voting, in part because of the varied "procedural hurdles" and "advance planning" associated with it. ROA.27132-27136. Indeed, where absentee-eligible voters show up to the polls either unaware of SB14's requirements or with the mistaken belief that they possess qualifying ID, they often will already have missed the deadline for requesting an absentee ballot. ROA.27132-27133. Moreover, many elderly voters and voters with disabilities require voting assistance, which may be available only at polling places. ROA.27133-27134.

The court further found that many voters "highly distrust[]" mail-in ballots because of the risk of fraud and their potential to get lost. ROA.27109-27110, 27134; see ROA.43952. The court also credited testimony that African Americans in particular prefer to vote in person on Election Day, both to ensure their vote is cast and to embrace fully the exercise of the franchise. ROA.27110-27111, 27135-27136.

iii. Provisional Voting. Texas further argues that SB14 allows voters who appear at the polls without qualifying ID to cast a provisional ballot. But even for

those voters who are given a provisional ballot,[7] that ballot is counted only if they travel to the county registrar within six days after the election and either present qualifying ID or attest that they are unable to comply with SB14 because of religious beliefs or a recent natural disaster. ROA.27044, 27131-27132. Thus, SB14 is unlike other States' voter-ID laws that count provisional ballots if, for example, an election official vouches for the voter's identity; the voter completes an affidavit of identity or claims a reasonable impediment to presenting photo ID; or the voter submits an affidavit of indigence within ten days after the election. ROA.27046, 27115-27125; see National Conference of State Legislatures, *Voter ID Requirements/Voter ID Laws*, State-by-State Details of In-Effect Voter ID Requirements (Oct. 31, 2014), http://tinyurl.com/ohtqwxc. The court found that the individual plaintiffs, "who fall squarely within the demographic expectations" of registered voters on the no-match list, demonstrated that many provisional ballots cannot be timely cured and will go uncounted. ROA.27132. Thus, provisional ballots provide little, if any, relief to voters who appear at the polls without qualifying ID.

[7] The court found that some registered voters who arrived to the polls in November 2013 and spring 2014 without qualifying ID were not offered a provisional ballot or provided any instructions on how they could "resolve the identification issue after election day." ROA.27093; see ROA.27131-27132. Thus, despite both their desire to vote and the fact that they were well-known to election workers, some plaintiffs were turned away from the polls without an opportunity to cast any type of ballot.

3. SB14 Interacts With Social And Historical Conditions To Cause A Discriminatory Result

The court found that SB14's racial impact is "clear," but correctly recognized that "disproportionate impact is not enough." ROA.27144-27145. Thus, in addition to its detailed analysis of how SB14 hinders minority voters from participating effectively in the political process, the court also examined Senate Factors evidence that showed how SB14 interacts with social, political, and historical conditions tied to racial discrimination to result in unequal participation opportunities for African-American and Hispanic voters. The court considered:

- Texas's history of discrimination in voting and SB14's continuation of a "clear and disturbing pattern of discrimination in the name of combating voter fraud" and its perpetuation of unequal access to the political process (ROA.27028-27034);
- the statewide existence of racially polarized voting and its importance in understanding how SB14 may affect minority political participation and election outcomes (ROA.27034-27035);
- the effects of discrimination in education, employment, and health on minority political participation and the additional burdens SB14 imposes on minority voters who continue to bear the effects of racial discrimination (ROA.27084-27091);
- the use of overtly racial political campaigns (ROA.27036-27038);
- the disproportionate lack of minority elected officials (ROA.27036);
- the failure of elected officials to respond to minority needs, including during SB14's consideration (ROA.27149-27150, 27169-27172); and
- the tenuousness of the policies underlying SB14 (ROA.27062-27075).

ROA.27147-27151; see also, *e.g.*, ROA.99534-99558; ROA.43927-43953 (Burden testimony and report discussing the Senate Factors).

The court found much of this evidence undisputed (ROA.27034-27038, 27091), and Texas does not contest that finding here. The court concluded that each of the factors weighed in favor of finding a discriminatory result, with several factors weighing "strongly" or "heavily" toward that finding. ROA.27148-27150.

As explained, pp. 16-17 *supra*, Texas' argument that, apart from tenuousness, these factors that "had nothing to do with SB14" (Br. 31-32) contradicts well-established law. Through its consideration of Senate Factors evidence as part of its totality-of-circumstances analysis, the district court took a "functional view of the political process" and conducted the "searching practical evaluation of the 'past and present'" reality that Section 2 demands. *Gingles*, 478 U.S. at 45 (citations omitted). Also contrary to Texas's assertion (Br. 30-31), this examination of SB14's interaction with social and historical conditions tied to race discrimination enabled the district court to find, as it must, that SB14's specific requirements, and the disproportionate and substantial burdens minority voters face in satisfying them, *cause* a *discriminatory* result.

The district court found that the "tenuousness" factor weighed "heavily" toward Section 2 liability. ROA.27150. The court recognized the "important legislative purposes" of "combating voter fraud," "prohibiting non-citizens from

voting," and "improving election integrity and voter turnout." ROA.27064. But it found a "significant factual disconnect" between those goals and SB14's specific restrictions (ROA.27064), especially in light of the "negligible" amount of in-person voter impersonation relative to fraud that occurs "in connection with absentee balloting" (ROA.27042). The court found no evidence of non-citizen voting and stated that SB14's role in preventing any such voting was "illusory" given that non-citizens who are legal residents of Texas may obtain DPS-issued ID. ROA.27065-27067.

The court further found "no credible evidence" that voter turnout was depressed by a lack of electoral confidence stemming from supposed in-person voter impersonation, that SB14 would increase electoral confidence, or that increased confidence would translate to increased turnout. ROA.27067-27068. Indeed, Texas's own expert testified that Georgia's voter ID law—a law more forgiving than SB14—nonetheless resulted in "across-the-board suppression of turnout" (with Hispanic voters impacted most severely), and he agreed with plaintiffs' experts that "increased costs of voting are related to decreased turnout." ROA.27068-27069; see ROA.100883-100900. The court concluded that the evidence does "not support the proponents' assertions that SB 14 was intended to increase public confidence or increase voter turnout," and that SB14's "justifications do not line up with" its content. ROA.27070; see ROA.27150.

Texas argues that papers published by plaintiffs' experts contradict a finding that restrictive photo-ID laws have an effect on turnout. Br. 24-25. But those papers addressed more inclusionary voter-ID practices that preceded States' more recent enactment of restrictive photo-ID laws. ROA.43288-43289; ROA.43980-43981. Texas further asserts, contrary to its own expert's testimony (ROA.100906, 100916), that turnout increased in Indiana and Georgia after those States implemented their voter-ID laws. Br. 25. But the evidence showed, and the district court found, both that increased voter turnout in 2008 was linked to President Obama's unprecedented campaign and that restrictive photo-ID laws increase the "costs of voting," thereby depressing turnout. ROA.27068-27069; see ROA.99532-99534, 99559-99564; ROA.100906-100924; ROA.43594-43597; ROA.43981-43983. Texas has not shown—and cannot show—that the court clearly erred in crediting plaintiffs' expert testimony and holding that SB14 produces a discriminatory result.

4. Crawford *Does Not Preclude Section 2 Liability*

Texas attempts to avoid the court's factual findings by arguing that *Crawford* v. *Marion County Election Board*, 553 U.S. 181 (2008), insulates SB14 from Section 2 liability. Br. 32. Not so. *Crawford* applied a different legal standard to a materially different law.

Crawford involved a facial challenge to Indiana's photo-ID law under the Fourteenth Amendment. It involved no statutory claims under Section 2. Nor were there allegations that Indiana's law had a racially discriminatory purpose. The law addressed in *Crawford* also differs in material respects from SB14 and Indiana has different demographics, geography, history, and political circumstances than Texas. ROA.27046, 27115-27117, 27155-27156 (identifying "material" differences between Indiana and Texas's laws). Section 2 demands "an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Gingles*, 478 U.S. at 79 (citation and internal quotation marks omitted). Thus, a law's requirements, its implementation, and the social and historical circumstances surrounding its imposition are critical to a Section 2 analysis. *Crawford* cannot dictate the outcome of plaintiffs' Section 2 claims.

Texas argues that, under *Crawford*, the district court could not find the policies underlying SB14 tenuous. Br. 32. But *Crawford*'s acceptance of Indiana's asserted justifications for its photo-ID law came in the context of a facial challenge, as well as the absence of a strong evidentiary record. See 553 U.S. at 187-188, 199-203. By contrast, here the district court had before it an extensive and well-developed record showing SB14's impermissible discriminatory effect on minority voters. *Crawford* does not bar a judicial finding that the ostensible justifications for a voter-ID law are tenuous in light of the substantial and

disproportionate burdens it places on minorities who bear the effects of past and present racial discrimination.

The United States does not question the legitimate interest in fraud prevention and electoral integrity. But States may not insulate racially discriminatory laws merely by invoking that interest. Rather, when presented with evidence of a law's disproportionate and discriminatory effect on minority voters, a court evaluating a Section 2 claim must assess, as part of the totality-of-circumstances analysis, whether the means justifies the end. Here, the court found they did not.

II

THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S FINDING THAT SB14 WAS ENACTED WITH DISCRIMINATORY INTENT

A. Standard Of Review

A discriminatory purpose finding is a "pure question of fact" reversible only for clear error. *Lodge*, 458 U.S. at 622-623 (quoting *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287-288 (1982)); see *United States* v. *Brown*, 561 F.3d 420, 432 (5th Cir. 2009). Legal issues are reviewed *de novo*. *Trinity Indus., Inc.*, 757 F.3d at 407.

B. The District Court Did Not Clearly Err In Finding That SB14 Was Enacted For A Discriminatory Purpose

To establish racially discriminatory purpose under Section 2, plaintiffs must show that such purpose was a "motivating factor" behind the law's enactment. *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-266 (1977). Discriminatory purpose "need only be one purpose, and not even a primary purpose" of a law, and can be shown by direct or circumstantial evidence, "including the normal inferences to be drawn from the foreseeability of defendant's actions." *Brown*, 561 F.3d at 433 (citations omitted); see *Lodge*, 458 U.S. at 617-618; *Arlington Heights*, 429 U.S. at 265-268.

In *Arlington Heights*, the Supreme Court identified several factors relevant to whether a law has a discriminatory purpose. They include: its discriminatory impact; its historical background; the sequence of events preceding its enactment; procedural and substantive departures from normal legislative processes; and contemporaneous statements by decisionmakers. See 429 U.S. at 265-268. The Senate Factors also "supply a source of circumstantial evidence regarding discriminatory intent." *Brown*, 561 F.3d at 433.

"[I]ntent as awareness of consequences" is not enough, however. *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979). Rather, discriminatory purpose implies that the legislature acted "at least in part 'because of,' not merely

'in spite of,'" a law's "adverse effects upon an identifiable group." *Ibid.*[8] Once discriminatory purpose is shown to be a motivating factor, "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter* v. *Underwood*, 471 U.S. 222, 228 (1985).

The district court correctly applied these standards in assessing plaintiffs' claim. It articulated the governing legal framework and then analyzed the evidence consistent with *Arlington Heights* and *Brown*, rendering detailed factual findings and drawing careful inferences from the record. ROA.27151-27159. It found, consistent with *Feeney*, that SB14's enactors "were motivated, at the very least in part, *because of* and not merely *in spite of*" SB14's "detrimental effects on the African-American and Hispanic electorate." ROA.27159. And it concluded that Texas failed to show that SB14 "would have been enacted" absent this discriminatory motive. ROA.27158 (quoting *Hunter*, 471 U.S. at 228). Because the district court applied the proper legal standards, its discriminatory intent finding can be reversed only if it is clearly erroneous. It is not.[9]

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[8] Texas suggests that this requires that the decisionmakers harbored racial animus. Br. 1, 12, 36, 39. Not so. Plaintiffs must show only that the Legislature enacted SB14 in part "because of" its "adverse effects upon an identifiable group," regardless of what drove that intent. *Feeney*, 442 U.S. at 279. See *Garza* v. *County of L.A.*, 918 F.2d 763, 778-779 (9th Cir. 1990) (Kozinski, J., concurring).

[9] This Court should review and affirm both the discriminatory result and discriminatory intent findings. Plaintiffs' pending requests for relief under Section 3 of the VRA, 52 U.S.C. 10302, depend on the district court having found intentional discrimination. Reaching both

(continued…)

1. The Record Amply Supports The District Court's Findings

The district court had before it testimony from lay and expert witnesses about the process and background of SB14's enactment, expert reports analyzing factors relevant to legislative intent, primary documents from SB14's legislative history, and SB14's proponents' explanations for their support. Applying the *Arlington Heights* framework, the court concluded "from the totality of the relevant facts," *Washington* v. *Davis*, 426 U.S. 229, 242 (1976), both (1) that SB14 was motivated at least in part by a discriminatory purpose (namely, to suppress the votes of a growing African-American and Hispanic electorate to maintain partisan advantage), and (2) that Texas failed to demonstrate that the Legislature would have enacted SB14 absent that purpose. ROA.27158-27159. That conclusion was based on the court's credibility determinations and the rational inferences it drew from the largely undisputed record.

The court's finding that SB14 disproportionately affects minority voters provides "an important starting point." *Arlington Heights*, 429 U.S. at 266. As already explained, the court found SB14's racial impact "virtually unchallenged." ROA.27158; see ROA.27145. The court further found that SB14's proponents knew of this disproportionate impact: Representative Todd Smith, the primary

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(…continued)
grounds for a Section 2 violation also conserves judicial resources and avoids piecemeal review, especially where a petition for certiorari is probable in any event.

sponsor of an earlier photo-ID bill, stated that it was "common sense" that "the people that do not have photo IDs [are] more likely to be minority" and that he did not "need a study to tell [him] that." ROA.27072; see also ROA.27157. Similarly, Bryan Hebert, Deputy General Counsel to Lieutenant Governor Dewhurst who assisted Dewhurst in "shepherding SB 14 through the legislature" (ROA.27157), assumed "that the poor, who would be most affected by the law, would be minorities" (ROA.27072). Indeed, Mr. Hebert "warned" legislative staffers that SB14 "would likely fail" preclearance without "additional methods of proving identity" (ROA.27074), and recommended that "the list of acceptable photo IDs" at least be expanded "to include federal, state, and municipal government-issued IDs" (ROA.27157). SB14's "obvious" impact (ROA.27073) gave rise to a "strong inference" that its "adverse effects were desired," *Feeney*, 442 U.S. at 279 n.25.

The court also examined SB14's historical background. It found that, when the Legislature began pushing for a photo-ID law, Texas was undergoing a "seismic demographic shift." ROA.27153. The unprecedented increase in minority voters relative to Anglos threatened Republican power because voting is highly racially polarized in Texas. The court gave "great weight" to expert findings that this threat provided Republicans a strong incentive to "suppress[] the overwhelmingly Democratic votes of African-Americans and Latinos." ROA.27153; see ROA.27073, 27065 & n.152. As expert historian Dr. Lichtman

testified, "You can't change the demography of Texas, but you can pass laws that place disparate burdens for voting on African Americans and Latinos." ROA.99738. That the push for a restrictive photo-ID bill arose during this demographic shift supported an inference that emerging minority voting power drove the bill, not any real concern about "voter fraud."

The fact that in-person voter impersonation—the only type of fraud that SB14 targets—is "extremely rare" (ROA.27155) if not "almost non-existent" (ROA.27071) reinforced that inference. The court found only two cases of criminal in-person voter impersonation in Texas in the decade preceding SB14's enactment. ROA.27038. Given the "relative scarcity" of such fraud under Texas's preexisting voter-ID law (ROA.27075), the court questioned "whether a change in the law was required" and found that SB14's proponents "were unable to articulate a reason" for "additional measures" (ROA.27138). The absence of any real need for a restrictive photo-ID law, much less "the strictest photo ID law in the country" (ROA.27156), further supported the conclusion that the Legislature acted to suppress a growing African-American and Hispanic electorate.

The court also found that SB14's drafting history undermined proponents' claims that it had no discriminatory purpose. ROA.27155-27157. SB14's enactors consistently chose options that "made the voting requirements much more restrictive for African-Americans and Hispanics while making it less so for

Anglos." ROA.27156. Although proponents claimed that they modeled SB14 after Indiana and Georgia's voter-ID laws (ROA.27155), they eliminated forms of ID those States accepted "that are disproportionately held by African-Americans and Hispanics," such as government-employee and student ID (ROA.27074). See ROA.27156. They also eliminated several options designed to safeguard poorer voters, including presentation of an affidavit of indigence, two forms of non-photo ID, or ID more than 60 days expired; these decisions likewise disproportionately affect minorities. ROA.27156, 27158. At the same time, they retained options "favor[ing] Anglos," such as concealed carry licenses and military ID. ROA.27073-27074. And SB14 requires no photo ID for mail-in ballots, a decision that also benefits Anglos, who disproportionally vote absentee. ROA.27074, 27141 n.498. The court found that SB14's proponents were unable to justify these choices or "articulate any reason that a more expansive list of photo IDs" would undermine their efforts at detecting and deterring voter fraud. ROA.27138.

Moreover, the court found that the Legislature rejected a "litany of ameliorative amendments" that would have reduced SB14's adverse impact on minority voters without interfering with its stated purpose. ROA.27157. Among other things, those amendments expanded the forms of acceptable ID, eliminated fees, authorized affidavits of indigence, increased voter education and funding, and required reports from the Secretary of State to address SB14's impact and

implementation. ROA.27060-27063, 27169-27172. Critically, the court found that SB14's proponents "did not know or could not remember why they rejected so many ameliorative amendments," even when those same provisions had appeared in the Legislature's prior photo-ID proposals and other States' laws that were the supposed models for SB14. ROA.27158-27159.

The court further found that the sequence of events leading to SB14's passage, including the Legislature's three failed attempts to pass a photo-ID bill, suggested discriminatory intent. ROA.27154. The court found that, "despite opposing legislators' very vocal concerns" that a strict photo-ID requirement would disproportionately burden minority voters, photo-ID proponents never conducted any "impact study or analysis" to quantify the bill's likely effects (ROA.27154), nor did they "really try to determine if photo ID was necessary" (ROA.27064). Instead, they proposed "increasingly harsh" bills that "increasingly threatened" minority voting rights. ROA.27154. And rather than using "negotiation and compromise," they employed increasingly aggressive "procedural mechanisms" (ROA.27154), including suspending the two-thirds vote requirement "solely for voter ID legislation"—an "extraordinary" rule change that even Lieutenant Governor Dewhurst "admitted" he had not heard of for any other legislation (ROA.27053-27054). The court credited expert evidence that, since 1981, "the Senate has only made an exception to its two-thirds rule for two

categories of legislation: redistricting and voter ID bills." ROA.27073. The court found that the 2011 Legislature likewise employed "extraordinary" and "unorthodox" procedural deviations to bypass any meaningful debate and enact SB14 "relatively unscathed" and with "unnatural speed" over the objection of legislators representing predominantly minority districts. ROA.27154; see ROA.27051-27063.

The court also found that "the stated policies behind SB 14 are only tenuously related to its provisions." ROA.27150; see ROA.27064. It noted, for example, that although in-person fraud is "negligible," absentee-voter fraud is more common. ROA.27042. Yet, SB14 "does nothing to combat" absentee fraud (ROA.27042); instead, it has the "odd[]" result of relegating many voters from the "relatively secure in-person polls" to what is "openly acknowledged" to be an unsecure mail-in ballot system. ROA.27155. The court further stated that, although some proponents justified SB14 as a means to prevent non-citizens from voting, non-citizens legally present in the United States can obtain a valid Texas driver's license or concealed carry license, both of which are accepted under SB14 and both of which Anglos disproportionately possess. ROA.27066, 27074-27075, 27100, 27155. The court also found it strange that, in a supposed effort to increase voter turnout, the Legislature "chose legislation that will cause many qualified, registered voters to be turned away at the polls." ROA.27155. In short, the court

found that SB14 "was pushed through in the name of goals that were not being served by its provisions." ROA.27157.

Finally, the court examined Texas's "long history" of official discrimination in voting (ROA.27153) and found a "clear and disturbing pattern" of enacting purposefully discriminatory laws "in the name of combating voter fraud" (ROA.27033). Indeed, Texas's "stated rationale" for every prior purposefully discriminatory election practice—white primaries, secret ballot provisions, the poll tax, re-registration requirements, and voter purges—was to "reduce voter fraud," the same "primary justification" provided for SB14. ROA.27033 & n.24; see ROA.43991-44006; ROA.100375-100389. The court found, moreover, that these discriminatory restrictions "tend to arise in a predictable pattern when the party in power perceives a threat of minority voter increases." ROA.27065 & n.152. The court also found that the 2011 legislative session was "racially charged" and permeated by "anti-Hispanic sentiment" (ROA.27157), and that a three-judge district court found that the "same legislature" that enacted SB14 "enacted at least two redistricting plans" with an intent to weaken minority voting power (ROA.27154).

The court concluded from the totality of this evidence that SB14's "detrimental effects on the African-American and Hispanic electorate" were a "motivating" factor behind its enactment, and that Texas failed to show that the

Legislature would have enacted SB14 absent this discriminatory motive. ROA.27158-27159. Those were reasonable, if not inevitable, conclusions from the wealth of evidence presented.

2. Texas Has Provided No Basis For Disturbing The District Court's Discriminatory Intent Finding

Texas does not dispute any of the court's underlying factual findings, which were based largely on uncontested evidence. Instead, it attempts to bypass the clearly erroneous standard by asserting legal errors in the district court's analysis.[10] These purported errors fall into two categories: (1) assertions about the permissible scope of a court's purpose inquiry; and (2) challenges to the propriety of the district court's inferences. At bottom, these arguments represent little more than an effort to have this Court reweigh the facts in Texas's favor—something it cannot do.

a. Arlington Heights *Required The District Court To Consider Plaintiffs' Circumstantial Evidence*

Unable to contest plaintiffs' extensive and damning circumstantial evidence of discriminatory intent, Texas seeks to remove it from the case entirely, asserting

[10] To that end, Texas repeatedly states that this Court should review the district court's purpose finding *de novo*. Br. 38-39, 50. That is incorrect. Even if the court had applied the wrong legal standards, which it did not, that would not permit this Court to reexamine the evidentiary record and make "its own determination" as to the Legislature's motives. *Swint*, 456 U.S. at 291-292; see *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) ("[A]ppellate courts must constantly have in mind that their function is not to decide factual issues de novo."). Rather, the appropriate action would be to remand to the district court for it to evaluate the evidence "under the correct legal standard." *Swint*, 456 U.S. at 287 n.17.

that the district court was barred "as a matter of law" from even considering that evidence. Br. 42. Its arguments have no basis in law.

Texas first claims that *Arlington Heights* requires lower courts to make a threshold determination of discriminatory impact before they can examine other circumstantial evidence of discriminatory intent. Br. 40-42. That is incorrect. *Arlington Heights* identifies disparate impact as merely one of several "evidentiary source[s]" from which courts might infer discriminatory intent. 429 U.S. at 266-267; see *ibid.* (stating only that impact "may provide an important starting point"); *Washington*, 426 U.S. at 242 ("[D]iscriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if true, that the law bears more heavily on one race than another."). This Court has likewise identified a law's impact as only one of several sources of circumstantial evidence that informs whether a discriminatory purpose exists. *Brown*, 561 F.3d at 433.

In any event, here the court *did* find that SB14 "imposes a disparate impact on African-Americans and Latinos" (ROA.27144) before discussing plaintiffs' additional circumstantial evidence (ROA.27151-27159). Thus, Texas's claim (Br. 42) fails even its own legally incorrect test.

Texas also argues, for the first time, that because plaintiffs uncovered no direct evidence of discriminatory intent despite having been able to question and seek documents from SB14's proponents, the district court was barred "as a matter

of law" from considering any circumstantial evidence of discriminatory intent—or, at the very least, had to give it "diminished weight." Br. 42-46. These arguments are waived, see *Conley*, 707 F.2d at 178, and in any event are meritless.

"[D]iscriminatory intent need not be proved by direct evidence." *Lodge*, 458 U.S. at 618. Rather, courts must consider all available evidence of intent, whether direct or circumstantial. See *ibid.*; *Arlington Heights*, 429 U.S. at 266; *Brown*, 561 F.3d at 433. As this Court has stated, "the right to relief cannot depend on whether or not public officials have created inculpatory documents." *Lodge* v. *Buxton*, 639 F.2d 1358, 1373 (5th Cir. 1981), aff'd *sub nom. Rogers* v. *Lodge*, 458 U.S. 613 (1982). After all, in most cases there will be no "smoking gun." *Id.* at 1363 n.8; see also, *e.g.*, *Smith* v. *Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982); ROA.99690-99691. That is particularly true in a case where, as here, the Legislature knew that the law would be subject to scrutiny in the Section 5 preclearance process. See, *e.g.*, ROA.101180 (Sen. Fraser, the principal author of SB14, acknowledging the care he took in making any sort of statements).

Although Texas complains that plaintiffs were permitted discovery of legislators' files and allowed to depose SB14's proponents (Br. 1-2, 42-46), it does not actually challenge any of the district court's evidentiary rulings. In any event, granting plaintiffs such discovery did not make it more likely that a "smoking gun" existed or that SB14's proponents would admit to discriminatory intent. Thus, it is

hardly surprising that plaintiffs' discovery did not produce such evidence, and that the district court assigned little significance to this fact (ROA.27157).

This Court's decision in *Price* v. *Austin Independent School District*, 945 F.2d 1307 (5th Cir. 1991), does not advance Texas's argument. *Price* did not hold that a district court must "discount" circumstantial evidence of discriminatory intent where plaintiffs were permitted to question decisionmakers or examine some of their files but failed to uncover a "smoking gun." Br. 45-46. Rather, the plaintiffs in *Price* claimed that the district court gave "too much weight" to school board members' testimony. *Id.* at 1317-1318. This Court held that the district court did not clearly err in crediting that testimony. *Ibid.* Thus, *Price* actually reaffirms that credibility determinations and decisions about how to weigh the evidence are the district court's prerogative.

Nor did plaintiffs suggest that "their entire case on illicit purpose" turned on finding direct evidence. Br. 44. They simply emphasized, in arguing for discovery, that legislators' contemporaneous, candid communications were more likely to contain evidence of discriminatory intent than their public statements. ROA.1806-1814. That proved to be true. While plaintiffs' discovery uncovered no "smoking gun," it did uncover powerful *circumstantial* evidence of discriminatory intent not available in the public record—evidence upon which the court relied. For example, it revealed the email from Bryan Hebert "expressly

warn[ing]" legislative staffers that SB14 "would likely fail" Section 5 preclearance (ROA.27074), and recommending, "at a minimum," that the list of acceptable ID be expanded (ROA.27157). One expert testified that this email "comes as close as one can come in this day and age to a smoking gun." ROA.99691. It also uncovered Mr. Hebert's email describing SB14 as "the strictest photo ID law in the country," an admission that the district court found undercut proponents' claims that they modeled SB14 after Georgia and Indiana's laws. ROA.27155-27156. And it was only through deposing SB14's proponents that plaintiffs could expose those legislators' inability to "articulate" (ROA.27138) why they had eliminated IDs "that are disproportionately held by African-Americans and Hispanics" (ROA.27074) or to explain "why they rejected so many ameliorative amendments"—evidence that the district court found highly probative of their motives (ROA.27158-27159). In short, plaintiffs' discovery uncovered significant circumstantial evidence suggesting a discriminatory motive. The district court did not have to "discount" that evidence—or any of the other compelling circumstantial evidence of discriminatory intent—just because SB14's enactors did not confess their goal to suppress minority voters.

b. This Court Must Reject Texas's Invitation To Reweigh The Evidence

The remainder of Texas's claimed errors merely quibble with the weight the court gave to, and the inferences it drew from, the largely undisputed facts. But

this Court "is not free to reweigh the evidence," to "re-evaluate the credibility of witnesses," or to "substitute" other inferences for the district court's "reasonable factual inferences." *Glass* v. *Petro-Tex Chem. Corp.*, 757 F.2d 1554, 1559 (5th Cir. 1985). Clear-error review requires affirmance if "the district court's account of the evidence is plausible in light of the record viewed in its entirety," even if this Court is "convinced" that "it would have weighed the evidence differently." *Brown*, 561 F.3d at 432 (citations omitted). Texas may disagree with the court's inferences, but it cannot establish any error, much less clear error.

For example, Texas does not dispute the finding that the Legislature rejected a "litany of ameliorative amendments" (ROA.27157), but argues that this fact is not necessarily evidence of discriminatory intent, as the legislators "could easily have viewed the amendments as unnecessary, unduly complicating, or bad policy." Br. 51. But the district court rejected that benign interpretation of their actions, citing the evidence that SB14's proponents "did not know or could not remember why they rejected so many ameliorative amendments," that the rejected amendments "would not have detracted from the legislation's stated purpose," and that "some of [the rejected amendments] had appeared in prior bills or in the laws of other states." ROA.27157-27159. Texas may disagree with that rational conclusion, but that does not make it clearly erroneous.

Texas likewise does not dispute the finding that the Republican majority adopted "extraordinary" and "unorthodox" procedural measures to ensure SB14's passage. ROA.27154. It contends, however, that these procedural deviations merely reflected the proponents' "desire for the bill to pass" after opponents blocked three prior voter-ID bills. Br. 49. But, again, the court viewed this evidence differently, concluding—as did plaintiffs' experts—that these procedural departures reflected an effort "to force SB 14 through the legislature without regard for its substantive merit." ROA.27154; see ROA.44423-44424, 44427; ROA.45114-45116. *Arlington Heights* instructs courts to consider "[d]epartures from the normal procedural sequence" as possible "evidence that improper purposes are playing a role." 429 U.S. at 267. Texas does not and cannot contend the court clearly erred in doing so.

Texas also disagrees with the court's view of the uncontested historical evidence, complaining that it should not have used Texas's long history of voting discrimination to "impugn" the motivations of SB14's enactors. Br. 51-52. But *Arlington Heights* directs courts to consider "historical background" as one "evidentiary source" from which discriminatory purpose might be inferred. 429 U.S. at 267; see also *Lodge*, 458 U.S. at 625; *United States* v. *Marengo Cnty. Comm'n*, 731 F.2d 1546, 1567 (11th Cir. 1984). The district court did not "h[o]ld the SB14 Legislature responsible for others' acts that occurred decades ago." Br.

12. It simply concluded that Texas's "clear and disturbing pattern" of invoking "voter fraud" to justify "discriminatory measures" rendered the 2011 Legislature's "primary justification" for SB14—combating voter fraud—suspect, particularly when the "only voter fraud" SB14 addresses is "very rare." ROA.27033; see ROA.27153. That rational conclusion, which mirrored that of expert witnesses—see, *e.g.*, ROA.44408; ROA.100375-100389—was not clearly erroneous.

Moreover, Texas's legacy of voting discrimination hardly is a historical relic, as Texas implies (Br. 12, 51-52). Rather, as Dr. Lichtman testified, "the current history" shows "evidence of racial discrimination." See ROA.99734. The district court found that Texas has violated the VRA in every redistricting cycle since it became a covered jurisdiction in 1970. ROA.27032; see ROA.100242-100243. Indeed, as recently as 2006, the Supreme Court held that the Texas Legislature engaged in a "troubling blend of politics and race" to dilute the voting power of Latinos just as they were "becoming increasingly politically active and cohesive." *LULAC*, 548 U.S. at 442, 439. The district court reached a similar conclusion here. And the "same legislature" that enacted SB14 also passed two statewide redistricting plans that a three-judge district court found intentionally discriminatory.[11] ROA.27154 & n.539. That the legislators who enacted SB14

[11] Texas protests (Br. 53 n.26) that that decision was vacated after *Shelby County*, but that does not change the *fact* that the three-judge court found that the 2011 Legislature acted with (continued…)

drew electoral districts with discriminatory intent "provides a strong indicator that the same decision-makers" acted with the same purpose in adopting SB14. ROA.44418, 44426-44427 (Davidson Report); see ROA.45111-45112 (Lichtman Report); ROA.44002, 44038-44039 (Burton Report). As election law expert George Korbel testified, those redistricting plans and SB14 passed only "a couple days apart" and were part of the "same effort to make it more difficult for Hispanics and African-Americans to participate in the political process." ROA.100196.

Texas also complains that the court "disregarded" the testimony of SB14's proponents "in favor of testimony from" its opponents. Br. 46. But credibility determinations are "peculiarly" within the district court's "province." *LULAC #4552*, 123 F.3d at 846. The court did not clearly err in rejecting proponents' self-serving assertions that SB14 had nothing to do with minority voter suppression. Nor did it clearly err in crediting opponents' description of the legislative process that led to SB14's enactment—a description that, for the most part, bill proponents did not dispute and even corroborated (see, *e.g.*, ROA.27051-27052 & n.80)—and the "racially charged" and "anti-Hispanic" atmosphere that characterized the 2011

(…continued)
discriminatory intent. Moreover, the district court also cited the Western District of Texas's comparable finding, in a Section 2 and constitutional challenge to the 2011 redistricting plans, that the Legislature "may have focused on race to an impermissible degree" in drawing the Texas House plan. ROA.27154 n.539 (quoting *Perez* v. *Texas*, No. 5:11-cv-360, slip op. 6 (W.D. Tex. Mar. 19, 2012)).

session (ROA.27157). *Arlington Heights* instructs courts to consider a bill's legislative history, any substantive or procedural departures from normal processes, and contemporaneous statements by decisionmakers. 429 U.S. at 267-268. The court did not blindly adopt opponents' views that SB14 was racially motivated, as Texas suggests (Br. 46-47). Rather, it examined the totality of the evidence and determined, based on its own assessment of that evidence, that suppressing minority votes was a driving factor behind SB14.

The court was not required, as Texas argues, to accept uncritically the proponents' "stated purpose" for enacting SB14. Br. 37. A legislature will always assert a nondiscriminatory purpose. The very function of a purpose inquiry is to scrutinize relevant circumstantial and direct evidence to determine whether a discriminatory purpose exists despite enactors' assertions to the contrary. See, *e.g.*, *City of Pleasant Grove* v. *United States*, 479 U.S. 462, 470 (1987). The cases Texas cites are inapposite, as neither involved a discriminatory purpose claim. See *Kansas* v. *Hendricks*, 521 U.S. 346, 360-361 (1997) (stating that the Court "ordinarily defer[s] to the legislature's stated intent" in determining whether a statute establishes criminal or civil proceedings for Double Jeopardy and Ex Post Facto purposes); *Fleming* v. *Nestor*, 363 U.S. 603, 612-614, 617 (1960) (holding that statute terminating benefits upon deportation was not "punishment" for Due Process, Bill of Attainder, or Ex Post Facto purposes).

Texas argues that the court's findings at most support an inference that the Legislature enacted SB14 "with awareness" that it would adversely affect minorities, not "*because of* its alleged impact." Br. 40. But Texas misrepresents what those findings were. The court's discriminatory purpose conclusion did not rest solely on "four findings" (Br. 39-40). Rather, it rested on the extensive findings outlined above, including that SB14 came in response to explosive minority population growth, that its proponents consistently chose drafting options that would disproportionately burden minorities, and that they rejected any attempt to ameliorate SB14's disparate effects despite the fact that those ameliorative provisions existed in other States' laws and in the face of express warnings that SB14 "would likely fail" preclearance as drafted. ROA.27074. The court rationally could infer from those findings that the Legislature was not only aware of SB14's "obvious" impact on minority voters (ROA.27073), but that it enacted SB14 at least in part "*because of*" that adverse impact (ROA. 27159).

Texas also argues that the court clearly erred in finding that the State failed to show SB14 "would have been enacted without" discriminatory intent. Br. 54-56.[12] Texas asserts that the Legislature "was going to pass" SB14 no matter what

[12] Texas incorrectly asserts that the court "failed to apply" *Hunter*. Br. 54. The court recognized that Texas bore the burden of showing that SB14 "would have been enacted" even absent discriminatory intent (ROA.27158 (quoting *Hunter*, 471 U.S. at 228)), and concluded that Texas failed to satisfy that burden because it did not "provide any evidence" that SB14's numerous "discriminatory features" served any purpose other than to suppress minority voters.

(continued…)

because of the "political imperative to pass a voter-ID bill," citing opinion polls showing "overwhelming[]" support for a "voter-ID law." Br. 54-55. But the court heard this evidence and was unpersuaded that polls showing public support for the general idea of a "photo ID requirement" (ROA.27069) drove the Legislature to enact the "strictest photo ID law in the country" (ROA.27156)—one with a significant and "obvious" discriminatory impact (ROA.27073). See ROA.27139-27140, 27158-27159. This was certainly a reasonable conclusion. The relevant issue is not "generic photo ID [laws]" but the particular law the Legislature passed. ROA.99665, 99694-99695.

Indeed, the court reasoned that a Legislature responsive to polls showing general support for photo-ID legislation could have enacted a law akin to those in Georgia and Indiana. ROA.27155-27156. Yet, the Legislature departed substantially from those laws, enacting the "most restrictive" photo-ID law "of any state." ROA.27158. The court found that Texas failed to "provide any evidence" that SB14's "discriminatory features"—including those "material departure[s]" (ROA.27155-27156)—served any purpose other than to make it harder for minorities to vote. ROA.27158. On the basis of the entire record, it was

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(…continued)
ROA.27158. Regardless, even had the court failed to make the required finding under *Hunter*, this Court could not do so itself but would have to remand to allow the district court to make it in the first instance. See *Swint*, 456 U.S. at 291-293.

reasonable for the court to conclude that the Legislature would not have enacted *this* photo-ID bill, with *these* discriminatory provisions, but for its "detrimental effects on the African-American and Hispanic electorate." ROA.27159.

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN PERMANENTLY ENJOINING TEXAS FROM ENFORCING SB14'S PHOTO-ID PROVISIONS

A. Standard Of Review

A court's grant of equitable relief to redress a Section 2 violation is reviewed for an abuse of discretion. See *Brown*, 561 F.3d at 435.

B. The Court's Permanent And Final Injunction Is Not An Abuse Of Discretion

Permanent injunctive relief should be calculated to correct the Section 2 violation and sufficiently tailored to the circumstances giving rise to the violation. See *Brown*, 561 F.3d at 435. Here, based on its Section 2 findings, the district court permanently enjoined Texas from enforcing Sections 1 through 15 and 17 through 22 of SB14, thereby restoring voter-ID requirements that had been in effect in Texas from 2003 until 2013.[13] ROA.27192. The court did not abuse its discretion in fashioning this relief.

[13] Giving effect to SB14's severability clause, the court left in place Sections 16 and 23 through 26, which increase criminal penalties for certain election-related offenses, authorize the use of state voter registration funds for additional purposes, and set forth SB14's severability clause and effective date. ROA.27167 n.583; see ROA.30607-30623 (bill text).

Texas takes issue with the court's remedy, arguing that it "impose[d] a preclearance requirement." Br. 56-60. It did not. In fact, the court's opinion makes clear that it has yet to reach plaintiffs' requests for relief under Sections 3(a) and (c) of the VRA.[14] ROA.27167-27168. Texas knows this, because the parties agreed to have the court postpone its consideration of those requests until after this Court's merits review. ROA.27426. To the extent the district court retained jurisdiction to review any acts enacted by the Legislature or rules promulgated by Texas's administrative agencies purporting to remedy the violations that it found (ROA.27168), that action is neither an abuse of discretion nor an order imposing preclearance.[15] Indeed, courts regularly defer to state policy choices regarding how to remedy Section 2 violations while retaining jurisdiction to ensure those violations actually are redressed. See, *e.g.*, *Brown*, 561 F.3d at 435; *Westwego Citizens for Better Gov't* v. *Westwego*, 946 F.2d 1109, 1123-1124 (5th Cir. 1991); *Operation PUSH*, 932 F.2d at 405-406.

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[14] Section 3(a) of the VRA authorizes a court to appoint federal observers where it finds that violations of the Fourteenth or Fifteenth Amendments justifying equitable relief have occurred. 52 U.S.C. 10302(a). Where such violations have occurred, Section 3(c) of the VRA allows a court to retain jurisdiction "for such period as it may deem appropriate" to ensure that the jurisdiction does not implement changes to any voting practice without first showing that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority group. 52 U.S.C. 10302(c).

[15] Thus, Texas's arguments about the required showing for Section 3(c) relief are beyond the scope of this appeal.

Texas also argues that the court should have limited its remedy to affected voters, even to redress the Section 2 violations. Br. 60-62. But it is well-established that a law enacted or maintained for racially discriminatory reasons cannot survive. See, *e.g.*, *Hunter*, 471 U.S. at 233. Texas conceded as much in its stay papers to this Court. See, *e.g.*, Tex. Mot. 36 (Oct. 11, 2014).

Even solely as to SB14's discriminatory result, the district court acted well within its discretion in barring enforcement of SB14's photo-ID provisions. Texas suggests that waiving the statutory fee for EIC birth certificates cures the Section 2 violation (Br. 61-62), but the court's detailed findings regarding SB14's disproportionate racial impact undercut that suggestion. Nor can Texas credibly claim that relief in a Section 2 case must be limited to the named plaintiffs; such relief ignores the presence of the United States as a plaintiff here. See *United States* v. *East Baton Rouge Parish Sch. Bd.*, 594 F.2d 56, 58 (5th Cir. 1979). Finally, a remedial order permitting Texas to continue requiring Anglo voters to provide qualifying ID while prohibiting it from demanding that minority voters present such ID would raise a host of problems that the district court's injunction sensibly avoids.

CONCLUSION

This Court should affirm the district court's Section 2 determinations, vacate this Court's October 14, 2014, stay order, and give force to the district court's permanent injunction pending any further review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 3, 2015, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that on March 3, 2015, I served a copy of the foregoing brief on the following counsel by certified U.S. mail, postage prepaid:

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,957 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font, with the exception of footnotes, which are in 12-point Times New Roman font (5th Cir. R. 32.1).

s/ Erin H. Flynn
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Date: March 3, 2015

ADDENDUM

TABLE OF CONTENTS

PAGE

Section 2 of the Voting Rights Act (52 U.S.C. 10301). Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Reclassified United States Code Provisions for the Voting Rights Act of 1965

On September 1, 2014, the Office of Law Revision Counsel of the U.S. House of Representatives implemented a reclassification of all U.S. Code provisions relating to voting and elections. These code provisions, including the VRA provisions previously contained in Title 42, have been transferred into a new Title 52, entitled "Voting and Elections."

For this Court's convenience, included below is a table showing the old and new citations for the provisions referred to in the United States' brief as appellee.

Statutory Provision	Old Classification	New Classification
VRA Section 2	42 U.S.C. 1973	52 U.S.C. 10301
VRA Section 3	42 U.S.C. 1973a	52 U.S.C. 10302
VRA Section 5	42 U.S.C. 1973c	52 U.S.C. 10304
VRA Section 12	42 U.S.C. 1973j	52 U.S.C. 10308
VRA Section 14	42 U.S.C. 1973*l*	52 U.S.C. 10310

Comprehensive charts showing the old and new U.S. Code citations for all transferred provisions, including all provisions of the VRA, are available online at http://uscode.house.gov/editorialreclassification/t52/index.html.

Table of Trial Witnesses with ROA Citations

(In order of appearance)

Plaintiffs' Trial Witnesses

Expert Witnesses

Name	Trial Testimony	Expert Report(s)
Stephen D. Ansolabehere	ROA.98758-98863	ROA.43224-43565
Michael C. Herron	ROA.98940-99028	ROA.44572-44655
Yair Ghitza	ROA.99077-99123	ROA.44429-44443
Randall Buck Wood	ROA.99124-99178	ROA.45819-45825
Matthew A. Barreto	ROA.99254-99360	ROA.43566-43653; ROA.43654-43664 *Co-authored with Gabriel R. Sanchez*
Jane Henrici	ROA.99411-99431	ROA.44444-44495
T. Ransom Cornish	ROA.99483-99524	ROA.44199-44344
Barry C. Burden	ROA.99525-99588	ROA.43921-43969; ROA.43970-43983
Allan J. Lichtman	ROA.99658-99769	ROA.45093-45190
Gerald R. Webster	ROA.99866-99930	ROA.45572-45818
Chandler Davidson*	(ROA.100001-100002)	ROA.44345-44428
Kevin Jewell	ROA.100025-100069	ROA.104170-104228 (sealed)
Daniel G. Chatman	ROA.100071-100112	ROA.44120-44172; ROA.44187-44194
Lorraine C. Minnite	ROA.100113-100161	ROA.45191-45230
George Korbel	ROA.100171-100246	ROA.44657-45092
Orville Vernon Burton	ROA.100369-100427	ROA.43984-44119
Coleman D. Bazelon	ROA.100429-100489	ROA.43757-43776; ROA.43849-43920

Affected Voters and Social Service Providers

Name	Trial Testimony	Name	Trial Testimony
Calvin Carrier	ROA.98640-98707	Maximina Lara	ROA.99852-99865
Floyd Carrier	ROA.98707-98723	Estela Garcia Espinoza**	ROA.100518-100536
Eulalio Mendez, Jr.	ROA.99029-99043	Imani Clark**	ROA.100537-100548
Kristina Mora	ROA.99045-99077	Sammi Bates***	ROA.98638-98639
Dawn White	ROA.99200-99219	Elizabeth Gholar***	ROA.98896-98898
Gordon Benjamin	ROA.99220-99230	Ramona Bingham***	ROA.99043-99044
Rev. Peter Johnson	ROA.99238-99254	Phyllis Washington***	ROA.99231
Lionel Estrada	ROA.99361-99377	Naomi Eagleton***	ROA.99992
Lenard Taylor	ROA.99377-99384	Ruby Barber***	ROA.100313-100314
Ken Gandy	ROA.99824-99835	Vera Trotter***	ROA.100351
Margarito Lara	ROA.99836-99851		

Elected Officials

Name	Trial Testimony	Name	Trial Testimony
Rep. Trey Martinez Fischer	ROA.98724-98758	Sen. Rodney Ellis	ROA.99772-99823
Rep. Marc Veasey	ROA.98863-98895	Rep. Rafael Anchia	ROA.99931-99983
Sen. Carlos Uresti	ROA.99432-99483	Rep. Ana Hernandez	ROA.99983-99991
Daniel Guzman, Council Member, City of Ed Couch	ROA.99589-99615	Oscar Ortiz, Comm'r, Nueces Cnty.	ROA.100003-100024
Sen. Wendy Davis**	ROA.99623-99658	Rep. Todd Smith**	ROA.100314-100342

State Employees

Name	Trial Testimony	Name	Trial Testimony
Maj. Forrest Mitchell** OAG Law Enf. Div.	ROA.100162-100171	Joe Peters** DPS Driver's Lic. Div.	ROA.100490-100518
Ann McGeehan** Sec'y of State Elec. Div.	ROA.100247-100313		

Other

Name	Trial Testimony	Name	Trial Testimony
Linda Lydia**	ROA.98899-98906	Juanita Cox**	ROA.99384-99410
Martin Golando**	ROA.98907-98931	Yannis Banks**	ROA.100342-100350
Blake Green	ROA.99179-99199		

* Indicates declaration submitted to the district court
** Indicates deposition excerpts and/or D.D.C. trial excerpts read into the record
*** Indicates video-deposition excerpts played in court

Defendants' Trial Witnesses

Expert Witnesses

Name	Trial Testimony	Expert Report(s)
Jeffrey Milyo*	(ROA.100001-100002)	ROA.78048-78095
M.V. Hood, III	ROA.100841-101006	ROA.77975-78047; ROA.26807-26818

Elected Officials

Name	Trial Testimony	Name	Trial Testimony
Lt. Gov. David Dewhurst**	ROA.100774-100841	Sen. Tommy Williams**	ROA.101270-101318
Sen. Dan Patrick**	ROA.101007-101069	Carolyn Guidry** Clerk, Jefferson Cnty.	ROA.101323-101363
Sen. Troy Fraser**	ROA.101159-101184		

State Employees

Name	Trial Testimony	Name	Trial Testimony
Manuel Rodriguez DPS Driver's Lic. Div.	ROA.100550-100665	John Crawford DPS IT Div.	ROA.101192-101247
Victor Farinelli DSHS Vital Statistics Unit	ROA.100665-100760	Maj. Forrest Mitchell** OAG Law Enf. Div.	ROA.101248-101269
Brian Keith Ingram Sec'y of State Elec. Div.	ROA.101069-101158	Bryan Hebert** Counsel to Lt. Gov. Dewhurst	ROA.101363-101401

Other

Name	Trial Testimony	Name	Trial Testimony
Kenneth Smith** U.S. Dep't of Veterans Affairs	ROA.101411-101416	Michelle Rudolph** U.S. Dep't of Defense	ROA.101416-101418

* Indicates declaration submitted to the district court

** Indicates deposition excerpts and/or D.D.C. trial excerpts read into the record

Tables from Dr. Stephen Ansolabehere's Corrected Expert Report
(ROA.43319-43320, 43328)

Table VI.1. Estimated Percent No Match By Racial Group Using Census Racial Data: Ecological Regression Analyses of ACS CVAP and No Match Percent at Block-Group Level		
	Ecological Regression*	Homogeneous Block Groups***
Racial Group	Estimated % No Match (Margin of Error)	Estimated % No Match (Margin of Error)
Anglo	2.0% (± 0.1%)	3.1% (± 0.2%) [N of Block Groups = 4,224]
Black	8.1% (± .2%)	11.5% (± 0.4%) [N of Block Groups = 465]
Hispanic	5.9% (± .2%)	8.6% (± 0.4%) [N of Block Groups = 1,554]
	Gross Percentage Point Disparity in Rate of NO MATCH	
Black % - Anglo %	6.1%	8.4%
Hispanic % – Anglo %	3.9%	5.5%
	Percent Difference in Rate of NO MATCH	
(Black %-Anglo %)/ Anglo %	305%	271%
(Hispanic %-Anglo %)/ Anglo %	195%	177%

* Number of Cases = 15,673 R-square = .354
** Level of analysis: Block Group;
Dependent variable: Number NO MATCH in Block Group divided by ACS CVAP Estimate in Block Group;
Multiple Regression of Percent CVAP Registered on HCVAP Percent and BCVAP Percent;
Weighted by CVAP.
*** Homogeneous block groups are areas in which at least 80 percent of the CVAP is of a given population.

Table VI.2. NO-MATCH and MATCH Percent By Racial Group, Using Catalist Racial Classification*			
Race	NO-MATCH	MATCH	ALL
Anglo	296,156 (3.6%)	7,949,860 (96.4%)	8,246,016
Black	127,908 (7.5%)	1,579,861 (92.5%)	1,707,769
Hispanic	174,715 (5.7%)	2,867,782 (94.2%)	3,042,497
Other	9,691 (2.0%)	481,621 (98.0%)	491,312
All	608,470 (4.5%)	12,879,124 (95.5%)	13,487,594
	Gross Percentage Point Disparity		
Black% – Anglo%	3.9		
Hispanic% – Anglo%	2.1		
	Percent Difference in Rate of NO MATCH		
(Black%-Anglo%) /Anglo%	108%		
(Hispanic% - Anglo %) /Anglo%	58%		

* Baseline Universe: All Registration Records in TEAM less records indicated as Deceased by State of Texas Database

Table VII.3. Validation of Results With Alternative Racial Classification Using Spanish Surname Voter Registrations: Comparison of No-Match rates of Spanish Surname Registered Voters and Others*		
Race	NO MATCH	MATCH
SSVR	177,292 (5.8%)	2,896,334 (95.9%)
Non-SSVR	431,170 (4.1%)	9,982,789 (95.9%)
All	608,462 (4.5%)	12,879,123 (95.5%)
	Gross Percentage Point Disparity	
SSVR – Non-SSVR	1.7%	
	Percent Difference in Rate of NO MATCH	
(SSVR – Non-SSVR)/Non-SSVR	41%	

* Universe: All Registration Records in TEAM less records indicated as Deceased by State of Texas Database.