No. 14-41127

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 THE STATE 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*.

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*.

On Appeal from the United States District Court for the Southern District of Texas,
Nos. 2:13-cv-193, 2:13-cv-263, 2:13-cv-291, & 2:13-348
(Hon. Nelva Gonzales Ramos)

ANSWERING BRIEF FOR THE TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND AND IMANI CLARK

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March 3, 2015

CERTIFICATE OF INTERESTED PERSONS

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

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• Mexican American Legislative Caucus • Texas House of Representatives • Texas State Conference of NAACP Branches • Estela Garcia Espinosa • Lionel Estrada • La Union Del Pueblo Entero, Inc. • Margarito Martinez Lara • Maximina Martinez Lara • Eulalio Mendez, Jr. • Sgt. Lenard Taylor	• Vishal Agraharkar • Gery Bledsoe • Jennifer Clark • Brennan Center for Justice • Lindsey Beth Cohan • Covich Law Firm LLC • Dechert LLP • Jose Garza • Daniel Gavin Covich • Robert W. Doggett • Law Office of Jose Garza • Lawyers' Committee of Civil Rights Under Law • Robert A. Kengle • Kathryn Trenholm Newell • Priscilla Noriega • Robert Notzon • Myrna Perez • Mark A. Posner • Ezra D. Rosenberg • Amy Lynne Rudd • Marshall Taylor • Texas Rio Grande Legal Aid Inc. • Marinda Van Dalen • Wendy Weiser • Michelle Yeary • Erandi Zamora

• Texas League of Young Voters Education Fund • Imani Clark	• Leah Aden • Daniel Aguilar • Danielle Conley • Kelly Dunbar

	• Lynn Eisenberg • Tania C. Faransso • Ryan Haygood • Sherrilyn Ifill • Natasha Korgaonkar • Sonya L. Lebsack • NAACP Legal Defense and Educational Fund, Inc. • Janai Nelson • Jonathan E. Paikin • Matthew N. Robinson • Deuel Ross • Richard F. Shordt • Gerard J. Sinzdak • Christina A. Swarns • WilmerHale

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Defendants-appellants	**Former or present counsel**
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• Third party legislators • Texas Health and Human Services Commission	• Arthur C. D'Andrea • Office of the Attorney General • John B. Scott

Third-party movants	**Former or present counsel**
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Interested third parties	**Appearing pro se**
• Robert M. Allensworth • C. Richard Quade	• Robert M. Allensworth, pro se • C. Richard Quade, pro se

/s/ Ryan P. Haygood
RYAN P. HAYGOOD

REQUEST FOR ORAL ARGUMENT

The Court's order of December 10, 2014 provides for this case to be placed on the first available oral-argument calendar. Appellees agree that this case warrants oral argument.

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INTRODUCTION

This case raises fundamental questions about whether Texas can intentionally disfranchise more than 600,000 registered voters—a disproportionate number of whom are Black and Latino—through a racially discriminatory photo identification ("photo ID") requirement enacted by the Texas Legislature for the pretextual reason of addressing a phantom problem: in-person voter fraud. As the district court properly held, the overwhelming evidence in this case establishes that the answer to that question is no. Section 2 of the Voting Rights Act ("VRA") and the Fourteenth and Fifteenth Amendments to the U.S. Constitution unequivocally bar Texas from enforcing SB 14's photo ID requirements.

After extensive discovery and testimony presented over a nine-day bench trial, the district court found that, because of Texas's substantial growth of 4 million people in the last 10 years—nearly 90 percent of whom are people of color—Texas enacted SB 14 to prevent voters of color from exercising their fundamental right to vote. The evidence introduced at trial demonstrates that SB 14 had its intended effect: the law disfranchised Black and Latino voters on account of their race, continuing a tragic history of efforts by Texas to deliberately deny voters of color access to the ballot. Indeed, as the court found, based on multiple independent but reinforcing expert analyses, Black and Latino voters

represent a disproportionate percentage of the more than 600,000 registered voters in Texas who lack an acceptable form of SB 14-required ID.

The court also determined that SB 14's photo ID requirements impose unconstitutional burdens on the right to vote of all registered voters who lacked an SB 14-required ID. Crediting virtually unrebutted expert testimony from such varied disciplines as economics, history, political science, and sociology, as well as the testimony of more than 20 affected voters, the court found that the hardships associated with acquiring a required ID for those voters without one are substantial: such voters must either relinquish the right to vote or expend time and money navigating various bureaucratic mazes to acquire the required underlying documentation and, eventually, an SB 14-required photo ID. These hardships may be difficult to comprehend for those who cannot imagine modern life without a photo ID. But the record developed at trial makes clear that for many vulnerable segments of Texas's population, disproportionately poor and voters of color, photo ID possession is not a given; the burdens associated with acquiring such IDs are real and they are significant.

Texas principally defends SB 14 as a means to protect against in-person voter impersonation. The record reveals that this rationale, which was previously used to justify Texas's use of such unlawful and racially discriminatory voting practices as all-white primaries, is pretextual because instances of such

impersonation are vanishingly rare. Indeed, evidence offered by Texas's own election fraud law-enforcement authorities establishes that although 20 million votes were cast in Texas elections between 2002 and 2011, "only two cases of in-person voter impersonation fraud were prosecuted to a conviction" during that time. ROA.27038. SB 14 is no less pernicious or discriminatory than its poll tax ancestor. The law's actual effect—and what it in large measure seeks to accomplish—is racial exclusion: preventing emerging voters of color from holding the balance of power in elections. *Cf. LULAC v. Perry*, 548 U.S. 399, 440 (2006) ("In essence the State took away the Latinos' opportunity because Latinos were about to exercise it."). Although Texas disclaims any racial motive, the evidence at trial overwhelmingly establishes that the Texas Legislature deliberately imposed these strict ID requirements because it knew the law would disproportionately disfranchise Black and Latino voters.

On appeal, Texas, overwhelmed by the heavy weight of this evidence against the law and hamstrung by its failure to mount a full or credible defense of SB 14 at trial, largely ignores the myriad factual findings that support the district court's decision and instead asks this Court to reverse that decision based on suspect legal arguments. The Court should reject each of Texas's ill-founded legal objections. Without those, Texas cannot meet its weighty burden of proving that

the district court's findings were clearly erroneous, and its appeal fails. The district court's judgment should be affirmed.

STATEMENT OF THE CASE

A. The Enactment Of SB 14

Enacted in 2011, SB 14 was the culmination of a multi-year legislative effort during which, over the course of four legislative sessions, the Texas Legislature attempted to pass increasingly restrictive, racially discriminatory voter ID bills. Voter ID legislation was first introduced in 2005, in the wake of an ongoing demographic shift in which Texas's Black and Latino populations accounted for 78.7 percent of total population growth between 2000 and 2010. ROA.45101; ROA.99668. In 2010, these significant demographic changes led Texas to become a majority-minority state. ROA.45101.

It was against this backdrop and amid the climate of the 2011 legislative session—during which lawmakers also debated English-only initiatives and the abolition of "sanctuary cities"—that SB 14 was considered. ROA.98730-98731; ROA.99986-99988. Indeed, the same Legislature that enacted SB 14 also passed a redistricting bill that a federal three-judge court found to be intentionally discriminatory against Black and Latino Texans. ROA.45101; ROA.99666-99668.

SB 14 was the Legislature's fourth attempt to enact a photo ID law. Over the preceding three legislative sessions, the provisions of proposed voter ID bills

grew increasingly and unnecessarily restrictive. That trend continued unabated until the enactment of SB 14. ROA.58330; ROA.99672-99673. This was not accidental: proponents' overriding objective was to pass the strictest photo ID law in the country. ROA.38743-37844; ROA.100333. In pursuit of this end, the Legislature relied on a rotating case of pretextual justifications for the law, repeatedly shifting from the prevention of noncitizen voting to combating in-person voter impersonation (ROA.98736; ROA.99935-99937; ROA.101170; ROA.101273), even though evidence of either was virtually non-existent and photo ID measures would do little to deter non-citizen voting (ROA.43949-43950; ROA.45205-45211; ROA.99551-99552; ROA.99938-99940; ROA.100123-100124; ROA.100128-100129; ROA.100328). Notably, in the ten years preceding SB 14—a period of time during which Texans cast 20 million votes—in-person voter impersonation had been prosecuted to conviction only twice. ROA.100164-100165; ROA.100167; ROA.100268.

The Legislature nevertheless sharply restricted the forms of photo ID permitted by SB 14 to include only: (1) a Texas driver's license, personal identification card, and license to carry a concealed handgun, all issued by the Department of Public Safety ("DPS"); (2) a U.S. military identification card containing a photo; (3) a U.S. citizenship certificate containing a photo; and (4) a U.S. passport. Tex. Elec. Code §63.0101. With the exception of citizenship

certificates, only unexpired or recently expired forms of ID are acceptable. *Id.* Voters without one of these forms of ID may vote in person using a DPS-issued Election Identification Certificate ("EIC"), Tex. Transp. Code. §521A.001, which can be obtained only by providing documentation of identity at a DPS office or other EIC-issuing facility, 37 Tex. Admin. Code §15.182(2).

Although acceptable in past elections, SB 14 prohibits forms of ID permitted in other states with photo voter ID laws, such as student IDs and state and federal government-issued IDs. ROA.99687-99689. In addition, the Legislature inexplicably rejected numerous amendments that would have expanded the types of ID required by SB 14 and mitigated the foreseeable burdens the photo ID requirement placed on voters of color and the poor. ROA.28747-28750; ROA.44398-44399. None of these amendments would have jeopardized SB 14's purported legislative objectives. ROA.38398; ROA.61021; ROA.61393.

SB 14's proponents secured its expedited passage through a series of unusual procedural deviations, and the bill was signed into law in May 2011. ROA.44393-44395; ROA.44399; ROA.44404. Under Section 5 of the VRA, Texas was required to obtain judicial preclearance for voting changes, including SB 14. Texas's request for administrative preclearance was denied in March 2012. DOJ Objection Letter 2011-2775, at 5 (Mar. 12, 2012). Texas then sought judicial preclearance in *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012), *vacated and*

remanded, 133 S. Ct. 2886 (2013), but a three-judge court denied Section 5 preclearance to SB 14, holding instead that Texas had failed to meet its burden of demonstrating that SB 14 would not have a retrogressive effect on Black and Latino voters. The Supreme Court vacated that decision following *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

On June 25, 2013—the same day that *Shelby County* was decided—Texas began enforcing SB 14, having made no modifications to the previously adjudged racially discriminatory law under Section 5, nor having held a single legislative hearing on potential revisions to the law in light of the preclearance denial. ROA.61049-61050; ROA.61123-61124; ROA.61372; ROA.101090-101091.

B. This Litigation

Plaintiff-Intervenors the Texas League of Young Voters Education Fund ("Texas League")[1] and Imani Clark, along with the other Plaintiffs in this case, brought suit against Texas and other government officials (collectively, "Texas" or "Defendants"), alleging that SB 14 violates the results test of Section 2 of the VRA, intentionally discriminates on the basis of race or color in violation of

[1] Counsel of record has recently learned that, since the district court's decision, the Texas League has ceased operations. This development does not present any justiciability issues for the Court, however, because other appellees (including Ms. Clark) have Article III standing. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 721 (1986). In light of these recent developments, counsel has filed this brief on behalf of the Texas League and Ms. Clark while counsel determines the appropriate steps to take with respect to the Texas League.

Section 2 and the Fourteenth and Fifteenth Amendments, and severely burdens the right to vote in violation of the Fourteenth Amendment.

Imani Clark, a Black student at Prairie View A&M University, has been registered to vote in Texas since 2010. ROA.100537. She does not possess an SB 14-required ID. ROA.100538-100539. Ms. Clark voted in the 2010 municipal elections and 2012 presidential election in Texas using her student ID and other forms of ID that she possessed at those times, which are not accepted under SB 14. She has been unable to vote in any election since SB 14 went into effect. ROA.100539. Ms. Clark does not have access to transportation in rural Waller County, and has limited spare time due to her course load, work schedule, and other school commitments, making it unduly burdensome for her to obtain an SB 14-required ID. ROA.100540; ROA.100542.

After discovery and a nine-day bench trial during which the district court heard live or video-deposition testimony from nearly 50 witnesses and received thousands of pages of deposition excerpts and exhibits, including 28 expert reports, the court issued an exhaustive 147-page opinion cataloguing its findings:

Discriminatory Result. The district court found that SB 14 will prevent more than 608,000 registered Texas voters from voting in person because they lack SB 14-required ID. ROA.27075. The court found, based on the testimony of six experts, that a disproportionate percentage of those voters are Black and Latino.

ROA.27076; ROA.27078-20084. Relying on the testimony of Dr. Vernon Burton, who detailed the racial disparities that "permeate[] all aspects of life in Texas" (ROA.27033; ROA.27088-27090), the court held that this disproportionate impact does not occur "by mere chance" (ROA.27150). Rather, the court found that SB 14's photo ID requirements interact with social and historical conditions in Texas to create an inequality in electoral opportunities enjoyed by Black and Latino voters as compared to Anglo voters. ROA.27144; ROA.27150-27151.

Discriminatory Intent. Applying established precedent, the court further held that the Legislature's passage of SB 14 was motivated at least in part by discriminatory intent. ROA.27151-27159. Emphasizing the "virtually unchallenged" evidence that SB 14 has a disproportionate impact on Black and Latino Texans (ROA.27144-27145; ROA.27158), the court reviewed SB 14's enactment in the context of the "seismic demographic shift" that turned Texas into a majority Black and Latino state (ROA.27153). The court credited expert findings that, given this demographic trend and Texas's racially polarized voting patterns, SB 14's proponents—facing a declining voter base—could "gain partisan advantage by suppressing the overwhelmingly [opposition] votes of African-Americans and Latinos." ROA.27153 (quoting Lichtman report (ROA.45102)).

The district court further found that proponents of photo ID legislation had advanced increasingly restrictive bills, while never responding to opponents'

concerns that such legislation would disfranchise voters of color. ROA.27154. The court found that the Legislature rejected a "litany of ameliorative amendments that would have redressed some of the bill's discriminatory effects" while not detracting from its stated purposes. ROA.27157. Moreover, the Legislature used "extraordinary departures" from normal procedural practice to push SB 14 through, and did so despite the "tenuous nexus" between the bill's purported goals and its provisions. ROA.27154-27155.

Unconstitutional Burden on the Right to Vote. The district court also held that SB 14 substantially burdens the right to vote of the over 608,000 registered voters who lack SB 14 ID. ROA.27141. Based on "abundant evidence" of the "categorical burdens" faced by that population, the court concluded that that "there is significant time, expense, and travel involved in obtaining SB 14-qualified ID." ROA.27129-27130. In so finding, the court relied on the testimony of multiple experts who documented the costs of obtaining SB 14 ID. The court credited, for example, the testimony of Dr. Coleman Bazelon, who estimated that the average travel cost alone of obtaining an EIC in Texas is $36.33—a cost that represents 149% of average hourly earnings. ROA.27102; ROA.27164. In addition to extensive expert testimony, the court heard from more than 20 Texas voters who face significant burdens in obtaining SB 14-required ID. These burdens, the court found, were not alleviated by any mitigating steps taken by the State, such as

issuing EICs (ROA.27130-27136), and were not justified by any countervailing state interest (ROA.27137-27141).

* * *

On October 9, 2014, the district court entered a final judgment holding that SB 14 produces an impermissible discriminatory result, was imposed with an unconstitutional discriminatory purpose, creates an unconstitutional burden on the right to vote, and constitutes an unconstitutional poll tax. This Court stayed that judgment pending appeal without reaching the merits of this appeal.

SUMMARY OF ARGUMENT

I. Under the "results" test of Section 2 of the VRA, the district court properly held, based on the totality of circumstances, that SB 14 "interacts with social and historical conditions to cause an inequality in the opportunity" of Black and Latino voters to participate in the political process on an equal basis. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). The comprehensive findings underlying this intensely fact-bound judgment were supported, and indeed compelled, by the record. The court's conclusion that SB 14's photo ID requirements perpetuate racial inequality in voting was supported by sophisticated and largely unrebutted expert testimony establishing that more than 600,000 registered Texas voters lack an SB 14-required ID; that the universe of affected

voters was disproportionately composed of Black and Latino voters; and that the burdens of acquiring a photo ID fall heaviest on voters of color and the poor.

We do not repeat in full those findings here, which are described comprehensively in the briefs of other Plaintiffs. Instead, we focus on the three legal arguments that Texas advances in this appeal, each of which ignores the substantial record developed in this case. As explained in detail below, Texas's arguments are inconsistent with the text, history, purposes of Section 2, as well as the case law interpreting that core provision of the VRA.

II. Under the Constitution and Section 2 of the VRA, the district court held that SB 14's photo ID requirements were enacted for a racially discriminatory purpose. That finding—which is a paradigmatic factual determination appropriately made by a trial court—was supported by substantial direct and circumstantial evidence. On appeal, Texas argues that the district court erred in considering circumstantial evidence because there was no direct evidence of discriminatory intent. Even if direct evidence were required under *Village of Arlington Heights v. Metropolitan Housing Development*, 429 U.S. 252 (1977)—which it is not—the record contains direct evidence regarding the legislative motivations behind SB 14. Moreover, the circumstantial evidence introduced at trial was clearly sufficient to support a finding of intentional racial discrimination under *Arlington Heights*.

III. Independent of the VRA, the district court also properly held that SB 14's photo ID requirements impose a substantial and unnecessary burden on the right to vote under the balancing test established by the Supreme Court in *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983). The findings underlying the court's determination in this regard are largely uncontested and reflect an eminently common-sense judgment: a state may not substantially burden the right to vote of more than 600,000 registered voters, a disproportionate number of whom are voters of color, absent a compelling justification. No such explanation existed: SB 14's strict photo ID requirements are not necessary to remedy any problem with in-person voter fraud because the State's existing election procedures sufficiently deterred such conduct and instilled confidence in the electoral process.

Once again, Texas does not dispute the key findings of fact underlying the court's holding. Instead, Texas argues that a plurality opinion in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), blessed the constitutionality of all state photo ID laws once and for all. Texas's reading of *Crawford* is erroneous and, as a result, its remaining arguments on appeal fail.

IV. Finally, Texas's objections to the district court's remedy are flawed. The district court fashioned a remedy to redress the constitutional and statutory

violations it found. Texas has identified no error, much less an abuse of discretion, with respect to the scope of that remedy.

ARGUMENT

I. SB 14 VIOLATES THE "RESULTS" TEST OF SECTION 2

A. The Record Clearly Establishes That SB 14's Photo ID Requirements Violate Section 2's Results Test

The record in this case makes clear that SB 14's photo ID requirements are precisely the type of voting practice that Congress intended to proscribe under Section 2 of the VRA. Indeed, the district court made comprehensive factual findings based on record evidence, which Texas largely did not dispute at trial, demonstrating that SB 14 imposes "discriminatory burden[s]" on Black and Latino voters who, as a result, "have less opportunity … to participate in the political process," *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014) (quoting 52 U.S.C. §10301(a)-(b)); and that, under the totality of the circumstances analysis encompassed by the Senate Factors, SB 14's burdens are in part "caused by … 'social and historical conditions' that have or currently produce discrimination" against Black and Latino voters, *id*. (quoting *Gingles*, 478 U.S. at 47). Based on those findings, the district court properly concluded that SB 14 violates Section 2 by "interact[ing] with social and historical conditions in Texas to cause an inequality in the electoral opportunities enjoyed by African-Americans

and Hispanic voters as compared to Anglo voters." ROA.27150; *see Gingles*, 478 U.S. at 47.

The court's well-supported findings were not erroneous, *see Mississippi State Chapter, Operation Push v. Mabus*, 932 F.2d 400, 408 (5th Cir. 1991), as described more fully in the briefs of other parties. Section 2 findings are "peculiarly" dependent upon the trial court's "intensely local appraisal of the design and impact" of SB 14. *Gingles*, 478 U.S. at 79 (citations omitted). And "[i]f the district court's account of the evidence is plausible in light of the record …, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-574 (1985). Texas has failed to question those findings.

B. Texas's Contrary Legal Arguments Are Meritless

Faced with an appellate standard of review it cannot overcome, Texas ignores the record and advances three meritless legal arguments.

First, Texas argues that Plaintiffs cannot prevail on a Section 2 claim as a matter of law because they "did not show that SB 14 prevented a single person from voting." Texas Br. 30-31. That is wrong on both the facts and the law.

With respect to the facts, the record at trial establishes that more than 600,000 registered voters lack SB 14-required ID and thus are immediately

disfranchised by the law. *See infra* Section III.A.1.a. The district court found that a "disproportionate number" of these voters are Black and Latino. ROA.27076; *see also* ROA.27045 (crediting this evidence as "essentially unrebutted and … the experts' methodology and testing [as] reliable"); ROA.27084 (same). While only 2% of registered white voters need to acquire SB 14-required ID in order to vote, the number of people of color who require such ID is proportionally higher: 8% for Black voters and 6% for Latino voters. ROA.43262.

In determining that Black and Latino voters make up a disproportionate number of the registered voters disfranchised by SB 14, the district court reasonably credited the testimony of Plaintiffs' numerous expert witnesses, "all of whom are impressively credentialed and who 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. Texas's challenges (at 34-35) fail: Texas cannot show that any of the methodologies used by Plaintiffs' experts were insufficient, outdated, rejected or in any other way unreliable. For example, the court cited an ecological regression analysis to conclude that Black voters are 3.05 times and Latino voters are 1.95 times more likely than white voters to lack SB 14-required ID: "racial disparities

[that] are statistically significant and 'highly unlikely to have arisen by chance.'"[2] ROA.27079 (quoting Ansolabehere Report (ROA.24945)). *Cf., e.g., Hunter v. Underwood*, 471 U.S. 222, 227 (1985) (holding unconstitutional a facially race neutral law with a disparate impact where Black people were "1.7 times as likely as whites to suffer disfranchisement"). Far more than mere "guess" work (Texas Br. 35), these methodologies—including regression analyses (ROA.27079), *Gingles*, 478 U.S. at 53-54 n.20; *Husted*, 768 F.3d at 534; *Teague v. Attala County*, 92 F.3d 283, 290 (5th Cir. 1996); and surveys (ROA.27082-27083; ROA.27145), *Mabus*, 932 F.2d at 410-412—have long been accepted by this Court and others as a means of determining the race of voters in Section 2 litigation. The racial disparities in the rate of SB 14-required ID possession are substantial, and impair the rights of *hundreds of thousands* of Black and Latino registered voters. The district court, therefore, did not clearly err in crediting the disproportionate effect of SB 14 on voters of color as reported by Drs. Ansolabehere, Bazelon, Ghitza, and Herron and corroborated by Texas's own expert, Dr. Hood. ROA.27079-27084.

[2] Texas's brief (at 35) shows an even starker impact whereby Black voters are 4.05 times and Latino voters are 2.95 times more likely than whites to lack SB 14 ID.

Cf. Mabus, 932 F.2d at 410-412 (no error in the district court's reliance on expert testimony as to a law's disparate impact).[3]

Moreover, the record also establishes that several Plaintiffs and other affected individuals have been excluded from the polls for want of SB 14-required ID. ROA.27093; ROA.27131. Indeed, the district court credited the testimony of multiple voters for whom SB 14 had resulted in, or was very likely to result in, disfranchisement. For example:

> Imani Clark, an undergraduate at Prairie View A&M, can no longer vote with her student ID card (as she has in the past) under SB 14, does not possess SB 14-compliant ID, and faces burdens in traveling to obtain an SB 14 ID because she relies on public transportation. ROA.27092; ROA.27102; ROA.100537-100542.
>
> Eulalio Mendez does not have an SB 14 ID and is unable to vote in person because he does not possess a birth certificate necessary to obtain an EIC. He testified that his family's finances were so dire that they struggled to put food on the table each month and the cost of paying for a birth certificate was a burden. ROA.27092; ROA.27100; ROA.99033; ROA.99035-99041; ROA.99038-27092.
>
> Naomi Eagleton, who is over age 65, does not have an SB 14 ID or a birth certificate, and desires to vote in person because she needs poll workers to assist her with the logistics of casting a ballot. ROA.27133-27134.

[3] The district court also concluded that SB 14 had a disparate impact on voters of color who face more severe burdens in traveling to obtain SB 14-required ID (ROA.27101-27102), are less likely to possess the underlying documents (ROA.27087-27088; ROA.27097 & n.289), and are less able to afford the costs of obtaining SB 14 ID (ROA.27088-27090; ROA.27148).

The court also credited the testimony of Sammie Louise Bates, a Black woman who is retired and living on a $321 a month, finding that Texas offers voters a hollow "choice" that "lacks the voluntary quality of most choices." ROA.27087-27088. Mrs. Bates testified that her limited income meant that she had to put the $42 for a Mississippi birth certificate—a document required to be able to obtain an EIC—where it would "do[ ] the most good. … [W]e couldn't eat the birth certificate." ROA.27087.

As discussed in detail below, *see infra* pp.44-48, at trial, Texas attempted to show that it had acted to mitigate the discriminatory and significant burdens of acquiring SB 14-required ID, but the district court committed no clear error in making specific and detailed factual findings about the insufficiency of this purported "mitigation." The trial record established that Texas's "mitigation steps," including the option of voting by mail for voters over the age of 65 and the disabled, did not relieve the burdens that SB 14 imposes on the right to vote. For example, the district court found that disproportionately requiring Black elderly voters to vote by mail can deny them the opportunity to receive assistance casting their ballots. ROA.27133; *cf. Harris v. Siegelman*, 695 F. Supp. 517, 526 (M.D. Ala. 1988) (state law that limited and burdened opportunities for elderly Black voters to receive assistance from poll workers violated Section 2).

To the extent Texas argues that a Section 2 violation depends on showing that a voting practice makes it *impossible* to vote, such an argument has no basis in the text of Section 2, or the case law interpreting it.[4] The Section 2 inquiry asks whether a particular practice—here, SB 14—results in "less opportunity … to participate in the political process," 52 U.S.C. §10301(b), and the law separately applies to "abridgment[s]" as well as "denial[s]" of the right to vote, *id.* §10301(a). *See Lane v. Wilson*, 307 U.S. 268, 275 (1939) ("onerous procedural requirements which effectively handicap exercise of the franchise" by voters of color constitute abridgements of the right to vote); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 333-334 (2000) (the "core meaning" of "[t]he term 'abridge' … is 'shorten'"). Courts accordingly have found voting practices or procedures that *limit* access to the ballot—including policies that fall short of an outright denial—may violate the VRA. *See, e.g.*, *Morse v. Republican Party of Va.*, 517 U.S. 186, 209-210 (1996) (payment of a fee as a prerequisite to voting may violate the VRA even where one plaintiff had already paid the fee); *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 241 (4th Cir. 2014) (limits on registration and out-of-precinct voting); *Husted*, 768 F.3d at 552 (cuts to early voting); *Mabus*, 932 F.2d at 400 (dual registration); *Gilmore v. Greene County Democratic Party Exec.*

[4] In passing, Texas challenges the results tests' constitutionality (at 33-34), but such arguments are meritless. *Mississippi Republican Exec. Comm. v. Brooks*, 469 U.S. 1002, 1003 (1984); *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984); *see also United States v. Cannon*, 750 F.3d 492, 511 (5th Cir. 2014).

Comm., 435 F.2d 487, 491-492 (5th Cir. 1970) (prohibition on sample ballots); *United States v. Ward*, 349 F.2d 795, 800 (5th Cir. 1965) (voter identification requirements), *modified on rehearing*, 352 F.2d 329 (5th Cir. 1965); *see also, e.g.*, *Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting) ("If … a county permitted voter registration for only three hours one day a week, and that made it more difficult for African Americans to register than whites, … Section 2 would … be violated.").

Second, Texas argues (at 31) the district court erred "because it did not ask whether the *challenged law* … caused a racial voting disparity." This argument is equally unpersuasive. The text of Section 2 requires a contextual inquiry "based on the totality of circumstances," using the flexible, non-exhaustive Senate Factors as a guide.[5] 52 U.S.C. §10301(b); *see Johnson v. DeGrandy*, 512 U.S. 997, 1018

[5] The Senate Factors consider: (1) the history of voting-related discrimination in the State; (2) the extent to which voting is racially polarized; (3) the State's use of voting practices that enhance the opportunity for discrimination; (4) the exclusion of people of color from candidate slating processes; (5) the extent to which voters of color bear the effects of past socioeconomic discrimination; (6) the use of overt or subtle racial appeals; (7) the extent to which people of color have been elected to public office in the jurisdiction; (8) the responsiveness of elected officials to the particularized needs of communities of color; and (9) the tenuousness of the policy underlying the contested law. *Perry*, 548 U.S. at 426. The district court credited the unrebutted proof of Senate Factors 1, 2, 6, and 7. ROA.27148-27149. This evidence, standing alone, establishes a Section 2 violation. *McMillan v. Escambia County*, 748 F.2d 1037, 1043-1046 (5th Cir. 1984). But, as discussed below, *infra* pp.22-23, 35, 48-49, the district court also found the existence of Senate Factors 5, 8, and 9. ROA.27149-27151.

(1994). "The essence of a [Section] 2 claim is that a certain electoral law … interacts with social and historical conditions to cause an inequality." *Gingles*, 478 U.S. at 47. Texas's unsupported causation requirement "would defeat the interactive and contextual totality of the circumstances analysis," which includes evaluation of the Senate Factors. *Farrakhan v. Washington*, 338 F.3d 1009, 1016-1019 (9th Cir. 2003); *see Gingles*, 478 U.S. at 69-70; *League of Women Voters*, 769 F.3d at 245 (causation can be found "by consideration of the 'typical' [Senate] factors"); *Mississippi State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1262 (N.D. Miss. 1987), *aff'd*, 932 F.2d 400, 405 (5th Cir. 1991) (similar).

Although "there is no requirement that any particular number of factors be proved, or that a majority of them point on way or the other," *Gingles*, 478 U.S. at 45 (citation omitted), the district court found the existence of *seven* of the nine Senate Factors. Much of this evidence was uncontested by Texas. *See* ROA.27146-27150.[6] The district court was clear that these Senate Factors established the necessary causal connection between SB 14's racially discriminatory photo ID requirements and inequality of political opportunity for

[6] Texas maintains (at 31) the Senate Factors "do not apply in a case like this concerning vote-qualification claims." Texas cites no case supporting that rule, and courts have not hesitated to apply the Senate Factors in vote denial cases. *See, e.g., Gonzalez v. Arizona*, 677 F.3d 383, 406-407 (9th Cir. 2010) (en banc) (applying Senate Factors 1, 2, and 5 in a voter ID case); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1197-1198 (11th Cir. 1999); *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 596 n.8 (9th Cir. 1997).

voters of color in Texas. The court explained, for example, that Senate Factors 1 and 5 "weigh[ed] strongly in favor of finding that SB 14 produces a discriminatory result." ROA.27149. Relying primarily on testimony from expert historian Dr. Burton (ROA.44007-44019; ROA.100394-100399), the court found that SB 14's burdens do not result from "mere chance" (ROA.27150-27151). Rather, racial disparities *result from* discrimination—including intentional discrimination by Texas—in "all areas of public life," including education, employment, health, housing, and transportation, with the "foreseeable result" of causing severe inequalities. ROA.27088 (quoting Burton report (ROA.44007)); *see also* ROA.27033; ROA.27088-27091; ROA.27148-27149. Based on this pervasive evidence of discrimination, the district court found that Black and Latino Texans consequently tend to "have less access to forms of ID that cost money." ROA.99675; *cf. Gingles*, 478 U.S. at 69-70. That finding was amply supported by the record (ROA.44007-44019; ROA.100394-100399), and is in accord with a long line of judicial findings, *see, e.g.*, *Perry*, 548 U.S. at 440 ("[T]he political, social, and economic legacy of past discrimination for Latinos in Texas may well hinder their ability to participate effectively in the political process" (citations omitted)); *Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir. 1984).

Finally, Texas argues (at 33) that the "district court did not ask whether the challenged law … caused a racial *voting* disparity," apparently because the district

court did not find a decrease in voter turnout. This argument also fails. Proof of discrimination does not *require* evidence of SB 14's negative effect on elections. *See, e.g.*, *Hunter*, 471 U.S. at 227 (striking down a voting law with a disparate impact without considering its effect on turnout); *League of Women Voters*, 769 F.3d at 245 (same); *Bell v. Southwell*, 376 F.2d 659, 664-665 (5th Cir. 1967) (invalidating an election plagued by discrimination even where a new election would not change the outcome); *Brown v. Post*, 279 F. Supp. 60, 64 (W.D. La. 1968). In any event, the district court did find—based on the analysis of Plaintiffs' experts and corroborated by Texas's own expert—that SB 14 "would decrease voter turnout" (ROA.27068-27069; *see also* ROA.43927; ROA.43929; ROA.43978; ROA.100887-100890), as well as potentially impact election outcomes (ROA.27148).

II. SB 14 WAS ENACTED WITH DISCRIMINATORY INTENT

The Constitution and Section 2 prohibit voting laws, like SB 14, that are "conceived or operated as purposeful devices to further racial discrimination." *Rogers v. Lodge*, 458 U.S. 613, 617 (1982); *McMillan v. Escambia County*, 748 F.2d 1037, 1046 (5th Cir. 1984). Under these statutory and constitutional provisions, "[r]acial discrimination need only be one purpose, and not even a primary purpose, of an official act." *Velasquez v. City of Abilene*, 725 F.2d 1017, 1022 (5th Cir. 1984). The district court, applying the familiar legal standard drawn

from Supreme Court precedent, found that SB 14 was both conceived and operated, at least in part, to discriminate against Black and Latino voters. ROA.27151-27159. Those findings were amply supported by the record and were not clearly erroneous.

A. The District Court Correctly Applied *Arlington Heights* And The Senate Factors To Find Intentional Discrimination

The district court did not simply "pay lip service" (Texas Br. 39) to the *Arlington Heights* standard in finding the Legislature designed and enacted SB 14, at least in part, because of and not in spite of the law's detrimental effects on Black and Latino voters. ROA.27159. To the contrary, the court made extensive factual findings, based on credible and often unrebutted testimony, regarding discriminatory intent.[7] These intent findings are reviewed only for clear error. *Rogers*, 458 U.S. at 632 (noting that "issues of intent are commonly treated as factual matters" subject only to clear error review); Fed. R. Civ. P. 52(a)(6). Indeed, the Supreme Court has squarely rejected *de novo* review in voting rights cases even where there are allegedly mixed questions of law and fact at issue. *Gingles*, 478 U.S. at 77-79. "[T]he application of the clearly-erroneous standard … preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law." *Id.* at 79.

[7] In addition, the court properly held that the Senate Factors corroborated this finding of discriminatory purpose. ROA.27152; *see Rogers*, 458 U.S. at 620.

Because a district court's factual findings as to legislative purpose "represent[] … a blend of history and an intensely local appraisal of the design and impact of the [electoral law] in the light of past and present reality, political and otherwise," appellate courts are "not inclined to overturn" them. *Rogers*, 458 U.S. at 622.

1. The district court credited extensive, credible, and largely unrebutted direct evidence of discriminatory purpose

The district court's factual findings on discriminatory purpose are based upon careful application of the types of direct *and* circumstantial evidence identified in *Arlington Heights*, 429 U.S. at 266-268, and the Senate Factors, *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009), to the robust record evidence. ROA.27151-27159. Many of these findings, including direct evidence of intent, were undisputed by Texas at trial.

Texas nonetheless argues (at 36, 45) that "[t]here is no direct evidence whatsoever that SB 14 was enacted with a racially discriminatory purpose" and that Plaintiffs engaged in a "fishing expedition" but turned up "no fish" in the form of direct evidence of intent. Not so. As an initial matter, Plaintiffs are not required to produce "smoking gun" or direct evidence of discriminatory intent. *Arlington Heights*, 429 U.S. at 266 ("discriminatory purpose" inquiry "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available"). But even if such evidence were required, the district court's intent

finding is plainly based on direct evidence in the record that race drove the debate over photo ID laws in the State.

For example, largely uncontroverted evidence showed that the principal SB 14 proponents purposefully crafted a law that they knew would have a disparate impact on Black and Latino voters. ROA.27037-27038; ROA.44025-44027. Representative Todd Smith, a key proponent of SB 14, "admitted that it was 'common sense'—he did not need a study to tell him—that minorities were going to be adversely affected by SB 14." ROA.27157; *see also* ROA.100339-100340. In addition, Bryan Hebert, "who assisted Lieutenant Governor Dewhurst in shepherding SB 14 through the legislature and who drafted the EIC provision, expressed concern to various legislative staffers about preclearance, recommending that, at a minimum, the list of acceptable photo IDs should be expanded to include federal, state, and municipal government-issued IDs." ROA.27157; *see also* ROA.45134-45135. Despite knowing that SB 14, as drafted, would disfranchise people of color at disproportionate rates, the Legislature nevertheless chose not to broaden the accepted forms of ID, zealously reaffirming its intent to pass a racially discriminatory photo ID law. ROA.27157-27158.

Indeed, as the district court found, the Legislature's choices with respect to the forms of ID that would be required by SB 14 demonstrate an exacting precision along racial lines. ROA.27073-27074. For example, the Legislature exempted

absentee ballots, and adopted provisions that expanded the list of IDs to include military photo IDs and concealed handgun licenses, all of which disproportionately benefited white voters. ROA.27073-27074; *see also* ROA.45117-45118; ROA.45145-45147; ROA.99676-99677. At the same time, although the Legislature knew that expanding the list of acceptable photo IDs to include student IDs, state government employee IDs, and federal IDs would largely *benefit* Black and Latino voters, it repeatedly and inexplicably rejected amendments to add these forms of ID. ROA.27073-27074; *see also* ROA.45120-45127; ROA.99677-99681.

Repeatedly, and without allegation that the stated goals of the bill would be compromised, the Legislature rejected even modest amendments to lessen SB 14's discriminatory results, which would have brought the bill closer to Indiana's or Georgia's voter ID laws. ROA.27074; ROA.27157; *see also, e.g.*, ROA.62739-62740; ROA.101051; ROA.101058-101059; ROA.101397. Prominent SB 14 proponents testified that retaining the bill's most discriminatory features—such as the removal of student and federal IDs from the list of permissible photo IDs—were not necessary to achieve SB 14's stated purposes. ROA.38398; ROA.61021; ROA.61393.

Despite Texas's contention to the contrary, this *is* direct evidence and is amply sufficient to sustain the trial court's finding that the Legislature acted with discriminatory purpose in enacting SB 14. Texas criticizes the court (at 45) for not

identifying express statements from SB 14 proponents revealing "a desire to suppress minority voting." But this is not the standard, and for a very good reason: it would legalize manifestly discriminatory violations of the voting rights of Black and Latinos so long as the legislators doing so are smart enough not to verbalize their racially discriminatory motives. Whether or not unambiguously discriminatory language is used, racial discrimination remains a real problem today. Here, the court was right to reject self-serving denials by SB 14 supporters, *cf. Batson v. Kentucky*, 476 U.S. 79, 94 (1986), particularly given that not a single bill proponent was willing to take the stand and repeat those denials under oath.

Bolstering the intent finding, the court properly credited the expert finding of Dr. Burton that "racial appeals—once more explicit—have become increasingly subtle" in Texas. ROA.27036-27037 (quoting Burton report (ROA.44019)). For example, the court found that "immigration" is often a racial code word (ROA.27036-27037), and that "[o]ver time, proponents of the photo ID bill [in the Texas Legislature] began to conflate voter fraud with concern over illegal immigration" (ROA.27065). Further, during the time period when the Legislature was considering increasingly strict voter ID bills, Black voters were being associated with "voter fraud" and a need for narrower ID laws. A 2008 mailer, for example, tried to discourage and intimidate Black voters by linking legitimate turnout efforts to "voter fraud." ROA.27037-27038; ROA.44023. Another mailer

attacked a white candidate for the Texas House by surrounding him with images of prominent Black and Latino politicians and black birds evocative of "Jim Crow" with the caption "Bad Company Corrupts Good Character." ROA.27037; ROA.44022-44023. Tellingly, the same mailer also criticized the candidate's opposition to "voter photo ID." ROA.44419. Such racial appeals are consistent with Texas's historical reliance on "voter fraud" to justify a facially race neutral, but functionally discriminatory, restrictions on the vote. ROA.27033; ROA.100375-100376.

In short, the court properly recognized that the contemporaneous statements of photo ID proponents and racial appeals reveal a "racially charged environment" (ROA.27157), which explains why each choice the Legislature made in steamrolling SB 14 to passage was to the detriment of voters of color, *Arlington Heights*, 429 U.S. at 268, and constitutes "very significant" direct evidence of intent, *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1571 (11th Cir. 1984). *Cf. Velasquez*, 725 F.2d at 1022-1023.

2. The district court properly considered circumstantial evidence

Nor was it improper for the trial court to rely on circumstantial evidence in finding discriminatory purpose, because consideration of such evidence is mandated by precedent, *see Arlington Heights*, 429 U.S. at 266, and, at a minimum, falls within the discretion of the trial court, *Price v. Independent Sch.*

Dist., 945 F.2d 1307, 1312 (5th Cir. 1991) (emphasizing broad deference to district court's intent findings). Here, taking account of *all* available evidence, the court found that the "proponents of SB 14 … were motivated, at the very least in part, *because of* and not merely *in spite of* the voter ID law's detrimental effects on the African-American and Hispanic electorate." ROA.27159.

That finding was not clearly erroneous. Nine years ago, the Supreme Court concluded that Texas's efforts (through redistricting) to take away Latino voters' opportunity to elect a candidate of choice "because Latinos were about to exercise it … *bears the mark of intentional discrimination* that could give rise to an equal protection violation." *Perry*, 548 U.S. at 440 (emphasis added). Consistent with that precedent, the court gave "great weight" to Dr. Lichtman's undisputed testimony that proponents began considering photo ID laws and finally adopted SB 14—a law that disproportionately impacts voters of color—just as Texas was "going through a seismic demographic shift" and going from a majority Anglo state to a majority Black and Latino state. The court found that the Texas Legislature passed SB 14 to diminish Black and Latino voting strength because these communities, as the emerging electoral majority, were now poised to use their voting strength to elect candidates of their choice. ROA.27153.

This evidence of intent is bolstered by the uncontested evidence of racially polarized bloc voting by white Texans in support of the incumbent party and of

Black and Latino bloc voting in favor of the opposition party. ROA.27034-27035. Racially polarized voting can itself be evidence of "racial hostility" in Texas. *See Gingles*, 478 U.S. at 71 n.33. The combination of this demographic shift and racially polarized voting underscore the reality that some members of the Texas Legislature are "facing a declining voter base" and therefore seek to gain an advantage by "suppressing the overwhelmingly [opposition] votes of African-Americans and Latinos." ROA.27153 (quoting Lichtman Report (ROA.45101)).

The uncontroverted findings regarding the history of voting discrimination in Texas through, among other measures, poll taxes, white primaries, restrictions on voter assistance, re-registration requirements, and redistricting lend further support to the court's intent finding. ROA.27028-27032; *see Arlington Heights*, 429 U.S. at 267 ("[H]istorical background of the decision is one evidentiary source."). Although each of these previously enacted voter restrictions was justified by Texas's supposed need "to combat voter fraud," they did little more than exclude Black and Latino voters from the polls. ROA.27033. "Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases such as this one where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were

replaced by laws and practices which, though neutral on their face, serve to maintain the status quo." *Rogers*, 458 U.S. at 625.

These findings make clear that Black and Latino voters "continue to have to overcome fear and intimidation when they vote" in Texas. ROA.27033. Indeed, as explained above, the *same* Legislature that enacted SB 14 enacted redistricting plans that a three-judge court found were intentionally discriminatory. *Texas v. United States*, 887 F. Supp. 2d 133, 159 (D.D.C. 2012), *vacated and remanded*, 133 S. Ct. 2885 (2013). The district court did not err in finding that SB 14 represents a continuation of the "troubling blend of politics and race" in Texas and that this official history of discrimination was circumstantial evidence of intentional discrimination. *Perry*, 548 U.S. at 440-442.[8]

Finally, as the district court found, the series of unusual legislative maneuvers that led to the passage of SB 14 further support an inference of racially discriminatory purpose. ROA.27049-27059; ROA.27154 (discussing in detail these unusual procedures); ROA.44393-44395; ROA.44399; ROA.44423-44424;

[8] In addition, courts should be wary of tenuous justifications for discriminatory laws. *See Jones*, 727 F.2d at 377 (tenuousness is important evidence of intent). As explained, *infra* pp.48-49, the stated justifications for SB 14 are tenuous at best, and SB 14's photo ID requirements are ill-suited to serve their stated goals. *See, e.g.*, *Cotham v. Garza*, 905 F. Supp. 389, 398-401 (S.D. Tex. 1995) (holding unconstitutional Texas election laws that did not serve the state's compelling interest in preventing fraud).

see Arlington Heights, 429 U.S. at 266-268 ("[d]epartures from the normal procedural sequence" are evidence of intentional discrimination).

B. The Record Establishes That SB 14 Would Not Have Been Enacted Without Impermissible Discriminatory Motive

Finally, evidence before the district court made clear that SB 14 would not have been enacted absent its racially discriminatory features. "Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the [challenged] law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter*, 471 U.S. at 228. The court here properly shifted the burden to Texas to prove that SB 14 would have been enacted with the same discriminatory features absent the improper motive, but found Texas failed to carry that burden. ROA.27158. Indeed, not a single proponent of the SB 14 was present at trial to offer such testimony.

On appeal, the State argues (at 55) there was a "political imperative" to pass SB 14 regardless of any discriminatory purpose. That response is without merit. Whether a "political imperative" might explain the impetus for passing a voter ID law *generally* does not explain the decision to enact a strict photo ID law with intentionally racially discriminatory features. ROA.27158-27159. Here, the court found that SB 14 had been intentionally fashioned to limit the list of IDs to those that Black and Latino voters were less likely to possess. *Id.*; ROA.27073-27074.

The Legislature's unwillingness to ease SB 14's burdens, despite its awareness that these burdens fall disproportionately on voters of color, also indicated a lack of responsiveness (ROA.27150), which, in conjunction with racially polarized voting, "suggests that [the Legislature] was willing to discriminate." *Marengo County*, 731 F.2d at 1572 (citing *Rogers*, 458 U.S. at 625 & n.9). The record thus establishes that any supposed "political imperative" cannot be disentangled from questions of racial discrimination in response to "growing" minority electoral participation. *Cf. Perry*, 548 U.S. at 438-442; *Hunter*, 471 U.S. at 230-231 (mixed racial and partisan motives do not insulate laws from constitutional attack).

* * *

In short, the district court took seriously its task as fact-finder to "determine, under all the relevant facts, in whose favor the 'aggregate' of the evidence preponderates." *Rogers*, 458 U.S. at 622. Texas's objections to the intent finding are legally meritless or amount to a request to reconsider the district court's factual findings one by one, and to reject its credibility determinations in whole. *Id*. at 621-622; *Brown*, 561 F.3d at 434-435. Texas has not come close to demonstrating that the district court's finding of intentional discrimination was erroneous, much less clearly so.

III. SB 14 UNCONSTITUTIONALLY BURDENS THE RIGHT TO VOTE

Applying established Supreme Court precedent, the district court held that SB 14's photo ID requirements unconstitutionally burden the right to vote of more than 608,000 registered Texas voters. Texas's challenge to that conclusion relies on the erroneous view that *Crawford* blesses *every* state photo ID law, regardless of the specific features of the state law and regardless of record evidence of the law's heavy burdens and nonexistent benefits. Once that implausible reading of *Crawford* is rejected, Texas is left with a handful of threadbare fact-based objections to the court's findings, which fail to show error, much less clear error.

A. The District Court Properly Applied Established Precedent To A Largely Uncontested Factual Record To Conclude That SB 14 Impermissibly Burdens The Right To Vote

To protect the right to vote—a right that is "at the heart of our democracy," *Burson v. Freeman*, 504 U.S. 191, 198 (1992)—Supreme Court precedent requires application of the "*Anderson*/*Burdick* balancing test" to ensure that a state does not "unnecessarily burden access to the ballot." *Pilcher v. Rains*, 853 F.2d 334, 336 (5th Cir. 1988). Under this precedent, when a state imposes a limitation on voting, there is no "'litmus-paper test'" it may invoke to demonstrate its scheme is constitutional. *Anderson*, 460 U.S. at 789. Instead, a court must make fact-bound determinations—"the hard judgment[s]"—as to whether the limitation is justified by (1) the "character and magnitude" of the burden; (2) the state's "precise

interests" in imposing the burden; and (3) "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.*

Texas cannot dispute that the court was correct to apply the *Anderson/Burdick* test. Applying that standard, the court found that "SB 14 imposes a substantial burden on the right to vote, which is not offset by the state's interest." ROA.27141. That conclusion is amply supported by the record.

1. SB 14 imposes a substantial burden on the right to vote of hundreds of thousands of registered voters

The district court found—based on "abundant evidence of specific … individual burdens as well as evidence of more categorical burdens that apply to the population [that lacks SB 14-required IDs]" (ROA.27129)—that Texas had imposed a "substantial burden" on voters who lack SB 14-required IDs (ROA.27141). That conclusion is well-founded.

a. The universe of affected persons is substantial

The first step in the district court's burden analysis was identifying the number of registered voters without an SB 14-required ID. In contrast with *Crawford*, where the record failed to identify "the number of registered voters without photo identification," 553 U.S. at 200, the court found, based on "sophisticated statistical methods employed by highly qualified experts" (whose admission into evidence Texas does not challenge), that approximately *608,000* registered voters lack SB 14-required ID. ROA.27075-27076; ROA.24910-24911.

The size of the population of affected voters is not only "significant," it is staggering. ROA.27084. That number—608,000 registered voters (or nearly 1 out of every 20 registered voters)—is nearly twice the population of Nueces County, two-thirds of the population of the city of Austin, and half the population of the city of Dallas. ROA.101479 (Mr. Haygood, closing argument). Notably, this number reflects only *registered* voters. The universe of affected individuals is larger, as expert analysis demonstrated that 1.2 million eligible, but currently unregistered voters, lack an SB-14 required ID. ROA.43573.

Students and young voters are disproportionately likely to suffer burdens caused by SB 14. In part, this is because young Texas voters are increasingly Black and Latino (ROA.99297) and because Black and Latino voters are more likely to be current university students than white voters (ROA.45124; ROA.99679-99680). This effect is particularly stark on the campuses of Texas's historically Black colleges and universities: while these colleges have high rates of registered voters (registration rates of approximately 86%), they also have a higher likelihood that their voters will lack an SB 14-required ID (about 17% compared to the state-wide average of 5%). ROA.43816.

The record at trial establishing the broad scope of persons affected by SB 14 was essentially unrebutted. As the district court explained, the impact of SB 14 is "clear" regardless of whether it is "treated as a matter of statistical methods,

quantitative analysis, anthropology, political geography, regional planning, field study, common sense, or educated observation." ROA.27144. "The various studies of highly credentialed experts compel th[e] conclusion [that SB 14 disproportionately impacts African-American and Latino registered voters]. And while [Texas] criticized Plaintiffs' experts' methods … they failed to raise a substantial question regarding this fact." ROA.27145.

b. The burdens imposed by SB 14 are substantial

Based on the testimony of multiple expert witnesses from various disciplines as well as the individual testimony of more than 20 Texas voters, the district court found that the burden imposed by SB 14 on affected voters was substantial: those voters must either effectively give up their right to vote or incur substantial costs in time, money, and travel to navigate various bureaucratic mazes to obtain an SB 14-required ID. For many, this process will also include additional costs associated with obtaining the underlying documents required to secure that ID. ROA.27101-27103. These are burdens that those who possess an SB 14-required ID (because, for example, they drive a car or own a gun) do not bear in order to vote. Those detailed findings find ample support in the record.

To begin with, unlike other state photo ID laws, there is no question that under SB 14 "every form of SB 14-qualified ID available to the general public is issued at a cost." ROA.27165; *see also* ROA.27047-27048. Beyond that direct

cost, there is no question that activities like travelling to a DPS office to obtain an SB 14-required ID can impose significant costs in time and resources well beyond the "usual burdens of voting." *Cf. Crawford*, 553 U.S. at 198. In a geographically sprawling state like Texas, the district court properly found the travel burden to be particularly onerous. Although Texas has more than 8,000 polling places (ROA.101084), there are only 225 DPS offices—over 80% of which are not open after 5:00 p.m. or on the weekends, and many of which are not even open the entire workweek (ROA.39345-39352 (summary of DPS offices)). As Senator Uresti testified, many Texans cannot travel to DPS offices because "they work more than 8:00 to 5:00" and usually are not able to find an open office during their lunch hour. ROA.99477. And while Texas citizens may take reasonable time off of work to vote, Tex. Elec. Code §276.004, there is no similar statutory protection for citizens to leave work to acquire the documents *necessary* to vote. *See also* ROA.99214 (White, Executive Director of Christian Assistance Ministry: "[O]ne of the huge burdens is the time off from work when someone might have to travel on a bus two to four hours in order to make many stops in order to get their ID").

This burden is magnified by the fact that 78 Texas counties have no permanent DPS office and, for Texans living along the Mexican border, the nearest DPS office may be *125 miles away*. ROA.27101; *cf.* Fed. R. Civ. P. 45(c) (subpoena compliance must be within 100 miles of where person resides). For

many Texans, travelling to a DPS office is significantly more burdensome than walking across the neighborhood to the nearest polling station. Dr. Daniel Chatman concluded, in testimony credited by the district court, that more than 737,000 citizens of voting age would have to travel over 90 minutes to reach the nearest DPS office, and over 418,000 would have to travel over 3 hours. ROA.44164; ROA.27101-27102 (noting "[t]hese travel times would be both burdensome and unreasonable to most Texans—regardless of wealth or income"). While such voting burdens would be difficult for any person to shoulder, these burdens disproportionately fall on those who are poor, those who lack access to a car, and those who are more likely to be Black and Latino. ROA.44169 (more than 131,000 poor Black and Hispanic citizens would need to travel over 3 hours).

The costs of travel alone impose real, concrete burdens on voters. Dr. Bazelon, using generally accepted quantitative data principles and sophisticated geocoding techniques, translated these nonmonetary burdens of travel time and lost opportunity into their dollar equivalent. In so doing, he concluded that the average travel cost to obtain an EIC is $36.33. ROA.43852; ROA.43879-43880.[9] When other costs, such as time spent waiting at a DPS or acquiring supporting documentation are included, the total cost of acquiring an EIC could be much

[9] An EIC is the least costly of any SB 14-required ID (ROA.27047-27048), but it is far from the "free" source of ID Texas claims it to be, *see infra* pp.44-45.

higher. ROA.43880-43882. Dr. Bazelon further found that cost is 149% of average hourly earnings; by contrast, when the Supreme Court invalidated the poll tax of $1.75, that cost was only 69% of average hourly earnings. ROA.43767.

The district court found that "[t]he poor … feel the burden" of the costs of obtaining an EIC "most acutely." ROA.27087 (citing expert report of Dr. Bazelon for the proposition that "a $20 bill is worth much more to a person struggling to make ends meet than to a person living in wealth"). Similarly, as economic analysis by Dr. Bazelon demonstrated, because of stark underlying racial disparities in wealth, a Black voter who needed to acquire an EIC to vote would be "required to expend a share of their wealth that is *more than four times higher* than the share" of wealth a white voter would need to expend to acquire an EIC. ROA.43888 (emphasis added); *see also* ROA.100471-100474.

Texas did not refute these economic and statistical analyses and does not challenge them on appeal; these analyses alone support the district court's finding. But the court additionally heard compelling personal testimony from many Texans disfranchised by SB 14. Despite the State's inaccurate contention (at 19) that Plaintiffs did not identify a single person unable to vote because of SB 14, it was the testimony of individuals who lacked an SB 14 required ID that brought into vivid focus SB 14's significant burdens—burdens that might otherwise be invisible to individuals who take possession of a photo ID for granted and who lack contact

with poor and vulnerable members of Texas's population, for whom photo ID is not a necessary feature of everyday life. *See supra* pp.18-19 (discussing testimony of affected voters).

That the burdens of SB 14 fall heaviest on already marginalized populations underscores the gravity of the constitutional issue at stake. As the Supreme Court explained in *Anderson*, it is "especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular … economic status." 460 U.S. at 793. Here, where economic status is inextricably bound up in racial disparity and discrimination, that principle is particularly compelling. As the court stated, "[t]he poor should not be denied the right to vote because they have 'chosen' to spend their money to feed their family, instead of spending it to obtain SB 14 ID." ROA.27109.

In short, the district court's finding that SB14 imposed a "substantial burden on voters without SB 14-qualified ID" is based on an extensive factual record and it is unchallenged by Texas on clear-error review. On far less extensive records, this Court has affirmed a finding of "significant burden." *Pilcher*, 853 F.2d at 335-336 (requiring signatories to provide voter registration number significantly burdened First and Fourteenth Amendment rights); *Texas Indep. Party v. Kirk*, 84 F.3d 178, 187 (5th Cir. 1996) (same). It should do so here as well.

c. SB 14's burdens are not alleviated by EICs, provisional ballots, or mail-in ballots

At trial, Texas's limited presentation of evidence focused on showing that it had taken steps—either in the provisions of SB 14 itself or through DPS's implementation of the law—to alleviate the burdens described above. The district court made specific and detailed factual findings with respect to each of those steps. Although Texas refers (at 22) to those purported "mitigation steps," it makes no effort to show as clearly erroneous the court's findings that none of those steps was sufficient.

EICs. Based on the record developed at trial, the district court found that the EIC was not a "bona fide safe harbor" and did not mitigate the burdens imposed by SB 14. ROA.27130; ROA.27093 ("implementation of the EIC program has been insufficient"). Among other things, the court found that many voters are unaware of the existence of EICs and Texas has made no serious 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.27092-27093. In addition, the court found that the monetary costs of obtaining the documents necessary to secure an EIC, most commonly, a birth certificate, are also prohibitive for many voters. ROA.27095-27097. Finally, based on expert and testimony of affected individuals, the court found that "[t]he cost of traveling to a DPS office" are significant for voters who lack an SB 14-required ID. ROA.27101-27103.

Texas makes little effort to dispute those findings here. Instead, it insists any voter can obtain an EIC for "free." *E.g.*, Texas Br. 3-4, 6, 8, 10-11, 13-17, 20-23. But Texas ignores that underlying documentation needed to acquire an EIC is *not* free, and, to the contrary, can be quite costly. To obtain an EIC, a registered voter must present an expired driver license ($31), an expired personal identification card ($28), a birth certificate (normally $22), or naturalization or citizenship papers with a photograph ($345). ROA.27047-27048. If a voter knows to ask for it, they can obtain a reduced-cost birth certificate—good only for an EIC—after paying a required fee of $2, which a county clerk or local registrar may increase to $3 at his or her discretion. Tex. Health & Safety Code §191.0045(e) & (h); 25 Tex. Admin. Code §181.22(t) (waiving other fees for EIC-birth certificates). And beyond the cost of underlying documents, Texas simply ignores the mountain of expert and individual evidence demonstrating the significant costs associated with acquiring an EIC. *See supra* pp.39-43.

Provisional Ballots. The district court also found that the provision of SB 14 that permits voting by provisional ballot did not meaningfully reduce the burdens imposed by SB 14. Most importantly, "the only way to cure a provisional ballot and have it count is to later produce SB 14-qualified ID." ROA.27131. Thus, the provisional ballot procedure "does nothing" for voters who lack an SB

14-required ID and who would face a substantial burden in acquiring one. ROA.27131-27132. Texas does not dispute that point on appeal.

Voting By Mail. Finally, the district court made substantial findings as to whether "the burden imposed by SB 14 on individual Plaintiffs" is alleviated by the possibility of mail-in balloting—an option available only to voters over the age of 65 and the disabled. ROA.27132. The court concluded, based on witness testimony and documentary evidence, that "voting by mail is not actually a viable 'alternative means of access to the ballot'" for many voters, particularly voters from vulnerable populations that make up a disproportionate share of affected registered voters. ROA.27136. To support its conclusion, the court relied on the following factual findings: some voters are unaware of the mail-in ballot option (ROA.27132); the procedure is complicated and creates procedural hurdles that deter participation (ROA.27132-27133); mail-in ballots deny the elderly and disabled the assistance with filling out their ballot they would otherwise receive at a polling place (ROA.27133-27134); and mail-in ballots are an inferior alternative because materials may go missing (ROA.27134). Although Texas leans heavily on the possibility of mail-in ballots to remedy SB 14's overly burdensome effects, it says nothing about these key factual findings on appeal.

In addition, the district court held that relegating a subset of the State's voters to mail-in ballots imposed an intolerable burden on the right to vote and

implicated fundamental equal protection concerns. ROA.27135. That conclusion follows naturally from the principle that "[t]he right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the *manner of its exercise*." *Bush v. Gore*, 531 U.S. 98, 104 (2000) (emphasis added).

Indeed, the record developed at trial brought into sharp focus the constitutional infirmity of a state law such as SB 14 that disproportionately compels Black elderly residents to vote by mail, rather than in-person. For many Black Americans (particularly those who recall a time before the VRA) voting in person is "a strong tradition—a celebration—related to overcoming obstacles to the right to vote." ROA.27110. As Reverend Johnson testified:

> "[G]oing to vote and standing in line is a big deal. It's much more important for an 80-year-old Black woman to go to the voting poll, stand in line, because she remembers when she couldn't do this."

Id. n.373. The testimony of affected individuals underscores this point. For example, Ms. Gholar testified that voting in person on election day is a "'celebration'" that she has "'earned.'" ROA.27135; ROA.27136 (crediting testimony of Mr. Gandy that voting by mail was akin to being treated as a "'second-class citizen'").

For these voters, then, the right to vote is largely inseparable from the right to vote *in person*—practically, to receive sometimes necessary assistance at the

polls and, symbolically, to stand with dignity among fellow residents in exercising the most important political act in our democracy.

2. The State's asserted interests do not justify the burdens imposed by SB 14

The district court considered and weighed the substantial burdens imposed by SB 14 against each of the justifications for SB 14 that, although "shift[ing]" during the "time period during which photo ID laws were debated," had been suggested "[a]t one time or another." ROA.27137-27138. Those state interests are: (1) detecting and preventing in-person voter fraud; (2) preventing non-citizen voting; (3) improving confidence in elections; (4) increasing voter turnout; and (5) reducing bloated voter rolls. *Id.* The court concluded that each of those interests was legitimate in the abstract—but made several factual findings to support its determination that none of them justified the substantial burdens under the *Anderson/Burdick* balancing test. ROA.27137-27141; ROA.27064-27070.

For example, the primary justification for SB 14's photo ID requirements is to prevent in-person voter fraud. The district court acknowledges that interest was legitimate, but found that the weight of the interest was substantially diminished based on the record developed at trial. That record—based on the testimony of the State's leading election law-enforcement official—demonstrated that "[i]n the ten years preceding SB 14, only two cases of in-person voter impersonation fraud were prosecuted to a conviction—a period of time in which 20 million votes were cast."

ROA.27038; *see also* ROA.27039 (crediting testimony of former-Director of Elections that, "in over 44 years of investigating and litigation issues … he has never found a single instance of successful voter impersonation").

The State's purported interest was further undermined by the fact that SB 14 does not address the only type of voting fraud that *is* common: mail-in ballot fraud. The district court considered testimony from several witnesses who all concurred that voting by mail is subject to fraud that can and does occur. ROA.27042 & n.59; ROA.99134-99135 (mail-in ballot fraud is "a serious problem" because it is "very easy"). But SB 14 does nothing to prevent that type of fraud, and instead erects substantial barriers to the right to vote for hundreds of thousands of voters in order to combat a fraud problem that does not exist. The "validity of [Texas's] asserted interest is undermined by the State's willingness" to let mail-in ballot fraud continue unabated. *Anderson*, 460 U.S. at 798; *see also id.* at 805 (under-inclusiveness of restriction undermines legitimacy of the interest asserted).

In short, the district court appropriately recognized that the State's interest in deterring in-person voter fraud was legitimate in the abstract, but it found, based on the record assembled, that the weight of that interest in this case was "negligible." ROA.27042. It similarly found the other proffered justifications could not, on the instant record, justify the burdens that SB 14 imposes on the right to vote.

B. Texas's Legal Challenges Are Without Merit

Texas does not seriously challenge the core factual findings underlying the district court's decision. Instead, largely based on the plurality opinion in *Crawford*, Texas argues that the massive record and careful factual findings made by the trial court do not matter. At each step, Texas's legal arguments fail.

First, Texas's defense of SB 14 begins (at 21) with the proposition that the right to vote may be constitutionally burdened only where a plaintiff identifies specific "individuals *unable to vote* on account [of the state law]" (emphasis added). That is not the law. Neither *Anderson*, nor *Burdick*, nor *Crawford*—nor any Supreme Court precedent—support the untenable conclusion that a state may impose whatever burden it likes on a citizen's right to vote short of absolutely denying that citizen the right to vote. *See Obama for Am. v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012) ("Plaintiffs did not need to show that they were legally prohibited from voting"). Instead, the established test is whether Texas has *unnecessarily burdened* access to the ballot. *See Burdick*, 504 U.S. at 434; *Pilcher*, 853 F.2d at 337. And under that standard, the district court's burden analysis was compelled by the record before it. *See supra* pp.37-48.

Texas (at 17) purports to derive a contrary "unable to vote" standard from *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009), but the case does not stand for that proposition. In *Common Cause*, the court determined

(affirming the district court's factual findings) that, "[a]s in *Crawford*, 'on the basis of the evidence in the record[,] it is not possible to quantify … the magnitude of the burden' imposed on voters who do not possess an acceptable photo identification." *Id*. The court noted that plaintiffs had failed to identify any person who "would be unable to vote because of the Georgia statute *or* who would face an undue burden to obtain a free voter identification card." *Id*. (emphasis added); *see also id*. (plaintiffs failed to "direct this Court to any admissible and reliable evidence that quantifies the extent and scope of the burden").

Thus, nothing in *Common Cause* supports the strange view that the only laws that can substantially *burden* the right to vote are those that make it *impossible* to vote. Instead, the court was simply noting significant gaps in the record with respect to whether the law at issue actually burdened the right to vote—gaps that are not present here. Indeed, the district court here credited "abundant evidence of specific Plaintiffs' individual burdens as well as evidence of more categorical burdens that apply to [voters without SB 14-required ID]." ROA.27129; *see also supra* pp.18-19, 37-48 (discussing burden findings).

Second, Texas argues that the court "defied" *Crawford* by even considering evidence of SB 14's burdens; that fact-finding, Texas argues (at 17), was beside the point in view of the plurality's "h[olding]" that "any inconvenience of making a trip to the BMV" or "gathering the required documents" to obtain a photo ID is

no more significant than "the usual burdens of voting." That is incorrect. In fact, Texas's position (at 18) that the plurality intended to shield any voter ID law from scrutiny on the ground that the "inconveniences associated with obtaining photo ID" are always "constitutionally permissible" defies reason.

The scattered passages from *Crawford* on which Texas relies must be "taken in connection with the case in which those expressions are used." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). When read as a whole, *Crawford* clearly did not erect a categorical bar to challenges to photo ID laws. In fact, the plurality in *Crawford* was explicit in stating that it was only "on the basis of the record that has been made in this litigation" that it could not "conclude that the statute imposes 'excessively burdensome requirements' on any one class of voters.'" 553 U.S. at 202; *see also id.* at 200 ("[O]n the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on [groups of voters] or the portion of the burden imposed on them that is fully justified."); *id*. at 201 ("[f]rom this limited evidence we do not know the magnitude of the impact [the voter ID law] will have on indigent voters"). The court here faced no such impediment, given the dozens of witnesses and thousands of pages of evidence submitted.

Once Texas's argument that *Crawford* resolved the burden side of the *Anderson/Burdick* balancing test as a matter of law is rejected, the magnitude of the burden on affected voters is a *factual* question. And nowhere does Texas argue

that the district court erred, much less clearly so, in finding that the burden on the right to vote was "substantial." ROA.27141.[10]

Third, with respect to the state interest side of the *Anderson/Burdick* balancing test, Texas contends (at 18) the court again "defied" *Crawford* "when it held that the State's interest in preventing voter fraud was insufficient to justify SB 14 because 'voter impersonation fraud' is 'very rare.'" This argument, once again, misconstrues *Crawford* and mischaracterizes the district court's decision.

The district court here appropriately recognized that a state has a legitimate interest in combatting voter fraud. But where, as here, there is significant evidence of a substantial burden, a reviewing court must review the asserted state interest all the more critically. As the Supreme Court has said, "the rigorousness of [the] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434. Thus, in identifying the weight of the State's interest, it was entirely appropriate to take stock of the fact that in-person voter fraud is a vanishingly rare form of fraud. *See Crawford*, 553 U.S. at 230 (Souter, J.,

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[10] Texas's observation (at 17-18) that "[t]he process of casting a ballot always imposes *some* costs on voters" misses the point. The question is not whether voting comes with costs (it does). The point is that when a state enacts a new voting restriction, if that restriction imposes a substantial burden on voters, then it must be justified by some countervailing state interest under the *Anderson/Burdick* balancing test. Because voting comes with *some* costs, does not give states license to impose *whatever* costs they like on certain classes of voters.

dissenting) ("[T]he ultimate valuation of the particular interest a State asserts has to take account of evidence against it as well as legislative judgments for it.").

Nothing in *Crawford* is to the contrary. The plurality in *Crawford* explained that even a "slight burden" on the right to vote must be "justified by relevant and legitimate state interests." 553 U.S. at 191. In that context, the plurality recognized the stated justifications for Indiana's voter ID law, including deterring voter fraud, were legitimate, without any further evidentiary showing required. *Id.* at 196. But the recognition of a legitimate state interest was the end of the balancing test for the *Crawford* plurality because the evidence in the record did not establish any burden. The record did not show "the number of registered voters without photo identification," *id.* at 200; it did not "provide any concrete evidence of the burden imposed on voters who currently lack photo identification," *id.* at 201; and it said "virtually nothing about the difficulties faced by … indigent voters," *id.* Given that record, the plurality declined to undertake a more rigorous "balancing analysis"—that is, the exacting inquiry a court should, indeed, must, undertake where (as here) there is substantial evidence of a burden on affected voters. *Id.* at 200-201; *see id.* at 223 (Souter, J., dissenting) ("Because the lead opinion finds only 'limited' burdens on the right to vote … it avoids a hard look at the State's claimed interests.").

IV. THE REMEDIES IMPOSED WERE PROPER

Finally, Texas argues (at 56-62) that the remedy imposed by the district court was overbroad. A district court, however, is granted "great leeway" in crafting a remedy, which is reviewed only for abuse of discretion. *Brown*, 561 F.3d at 435-438; *Harper v. City of Chicago Heights*, 223 F.3d 593, 601 (7th Cir. 2000). There is no abuse of discretion here.

A. The District Court Did Not Abuse Its Discretion In Retaining Jurisdiction Over Remedial Voter ID Changes

The district court permanently enjoined those sections of SB 14 that "relate to voter identification for in-person voting" (ROA.27167 n.583); it ordered that Texas "return to enforcing the voter identification requirements for in-person voting in effect immediately prior to the enactment and implementation of SB 14" (ROA.27168); and it "retain[ed] jurisdiction to review" new voter ID legislation or regulations to ensure they "properly remedie[d] the violations" the district court found (*id.*). The court deferred to a separate proceeding, however, "Plaintiffs' request for relief under Section 3(c) of the Voting Rights Act." *Id.*

The district court did not abuse its discretion in adopting this remedial scheme. *See, e.g.*, *Louisiana v. United States*, 380 U.S. 145, 154-155 (1965) (striking down Louisiana's understanding test and further enjoining it from enacting a different voting qualification until the effects of the prior violation were fully redressed); *Brown*, 561 F.3d at 436-438 (describing the district court's broad

remedial powers). In remedying violations under the VRA, "[t]he court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior [violation] and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. No. 97-417, at 31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 208. Accordingly, "[t]o prevent a recurrence of [Defendants'] past transgressions," *Brown*, 561 F.3d at 436 (internal quotations omitted), the district court was obligated to retain jurisdiction over future voter ID laws until such a time as Texas enacts a nondiscriminatory law, and, thereafter, to determine if that new law cures the identified violation. *See Mabus*, 932 F.2d at 406-407 (affirming a district court's decision to place a state under similar receivership as to the imposition of new voter registration laws); *see also United States v. Virginia*, 518 U.S. 515, 547 (1996) (a court should "aim[] to 'eliminate so far as possible the discriminatory effects of the past' and to 'bar like discrimination in the future'").

Texas's discussion (at 57-60) of whether Section 3(c)'s requirements could be satisfied are an irrelevant detour. The district court deferred consideration of that remedy to a separate phase that has not yet begun. ROA.27168. Instead, based on its inherent equitable authority to craft a remedy for statutory and constitutional violations, the court retained jurisdiction over any purported voter ID

law changes to ensure that they, in fact, remedy the violations found. Texas cites no authority suggesting that retention of jurisdiction was unlawful.

Although Section 3(c) is not at issue now, it bears emphasis that Texas's arguments about the scope of Section 3(c) are either contradicted by the record, inconsistent with precedent interpreting Section 3(c), or both. *See, e.g.*, Texas Br. 58-59. For example, the district court found that multiple, recent "violations of the fourteenth or fifteenth amendment … have occurred within the territory of" Texas. 52 U.S.C. §10302(c); *see* ROA.27031-27034 & nn.20-23, 27; ROA.44003-44006; ROA.44665-44675; *see also Jeffers v. Clinton*, 740 F. Supp. 585, 591-592 (E.D. Ark. 1990) (three-judge court) (imposing Section 3(c) preclearance where plaintiffs, in attacking a statewide reapportionment plan, also proved other violations). And Texas is plainly liable for constitutional violations committed by its agencies and political subdivisions. *See* 52 U.S.C. §10101(c); *Jeffers*, 740 F. Supp. at 592 ("For purposes of the Fourteenth and Fifteenth Amendments … no legal distinction exists between State and local officials."). But such arguments are premature and best addressed when the district court "consider[s] Plaintiffs' request for relief under Section 3(c)." ROA.27168.

B. The District Court Did Not Abuse Its Discretion In Imposing Remedies For The Section 2 Results Or Right-To-Vote Claims

Texas separately objects to the district court's remedy enjoining it from enforcing SB 14's photo ID requirements with respect to the Section 2 results and

right-to-vote claims. Texas argues (at 60) that the purported "as-applied" nature of those claims bars relief "from extend[ing] … beyond the named plaintiffs." Of course, the question of remedy with respect to these claims has practical significance only if this Court reverses the district court's finding of intentional discrimination. As Texas does not dispute, total invalidation of SB 14's photo ID requirements is the *only* appropriate remedy for that claim.

But even considering the Section 2 results and right-to-vote claims in isolation, the appropriate remedy is invalidation of SB 14's photo ID requirements. While SB 14's photo ID requirements significantly burden those registered voters who lack an ID, a remedy that enjoined application of the requirements only to those who lack a photo ID would be impracticable. There is no obvious way that election clerks at the polls could judge whether an individual voter without a photo ID actually lacks such an ID, short of a judicially created remedy such as a voter affidavit that appears nowhere in the statute. The district court thus would be tasked with crafting the language of an affidavit and ensuring enforcement of the requirement, jobs that well exceed the judicial role. In such circumstances, the least intrusive and "only practical remedy is to enjoin enforcement of the photo ID requirement." *Frank v. Walker*, 17 F. Supp. 3d 837, 863 (E.D. Wis.), *rev'd*, 769 F.3d 494, 496 (7th Cir. 2014).

Furthermore, invalidation of the photo ID requirements is the only way to avoid serious equal protection concerns. It would raise a vexing constitutional question whether a state could impose differential ID requirements on broad classes of voters. *Cf. Husted*, 697 F.3d at 429 (equal protection analysis applies to laws resulting in "disparate treatment of voters"). Thus, the district court did not abuse its discretion in rejecting Texas's ill-defined proposal (at 62) to limit relief "to the individual voters or groups of voters whose legal rights have or will be violated."

For those reasons, this is the unusual case in which an "as applied" challenge necessarily "operate[s] as a *de facto* facial invalidation," *Justice For All v. Faulkner*, 410 F.3d 760, 772 (5th Cir. 2005), because the only sensible way to redress the harms identified under a Section 2 results or a right-to-vote analysis is to enjoin the enforcement of SB 14's photo ID requirements. The district court did not abuse its discretion in doing so.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted.

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March 3, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and 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

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B)(i).

1. In compliance with Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), the brief has been prepared in proportionally spaced Times New Roman font with 14-point type using Microsoft Word 2010.

2. In compliance with Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains 13,973 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Fifth Circuit Rule 32.2. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), I have relied upon the word count feature of Microsoft Word 2010 in preparing this certificate.

/s/ Ryan P. Haygood
RYAN P. HAYGOOD

March 3, 2015