No. 14-41127

In the United States Court of Appeals for the Fifth Circuit

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

TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS, Intervenor Plaintiffs-Appellees,

v.

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

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 ESPINOZA; 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 U.S. District Court for the Southern District of Texas, Corpus Christi Division, Nos. 2:13-cv-193, 2:13-cv-263, 2:13-cv-291, and 2:13-cv-348

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Certificate of Interested Persons

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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Statement Regarding Oral Argument

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

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Introduction

The district court found that "Plaintiffs have not demonstrated that any particular voter absolutely cannot get the necessary ID or vote by absentee ballot under SB 14," Texas' voter-ID law. ROA.27129. But even though plaintiffs failed to show that SB14 prevented a single person from voting—including the named plaintiffs—the district court ruled that the law (1) is a poll tax, (2) unconstitutionally burdens the right to vote, (3) has a racially discriminatory effect on the right to vote, and (4) was enacted with a racially discriminatory purpose to prevent minorities from voting. The district court then purported to impose a preclearance requirement that compels Texas to seek the district court's permission before enforcing any future voter-ID measure.

The district court's ruling is manifestly erroneous. The district court ran roughshod over *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), which rejected a challenge to Indiana's analogous voter-ID law. And it accepted plaintiffs' baseless accusation that the legislators who passed SB14 were motivated by a specific desire to harm minority voters because of their race—even though plaintiffs could not identify a single legislator who supposedly harbored an illicit motive.

Plaintiffs' failure to prove intentional discrimination was not for lack of opportunity. The district court gave plaintiffs unprecedented

discovery into the office files, bill books, personal correspondence, official e-mails, private e-mails, home e-mails, and business e-mails of dozens of legislators who voted for SB14. Plaintiffs obtained thousands of documents from these legislators, their staff, and the Lieutenant Governor containing their confidential communications and impressions of SB14. And many legislators and their staff, including Senator Dan Patrick and Lieutenant Governor Dewhurst, were forced to testify under oath.

That fishing expedition turned up no evidence of discriminatory purpose. With no evidence of racial discrimination or disparate impact, the district court relied entirely on weak and inconclusive circumstantial evidence—speculation by political opponents of the bill, legislative procedure indicative of nothing illicit, and sweeping generalizations about the bill's "background." Even if that were sufficient to find racial discrimination—it was not, and the court failed to apply the governing legal standard—there was no basis to facially invalidate SB14 and impose a burdensome preclearance regime. The district court's decision should be reversed in full.

Statement of Jurisdiction

The district court entered final judgment on Saturday, October 11, 2014. The State filed a notice of appeal that day. ROA.27193-97. This Court has jurisdiction under 28 U.S.C. §1291. The district court's subject-matter jurisdiction rests on 28 U.S.C. §1331.

Statement of the Issues

1.a. Did the district court err by holding that Texas' voter-ID law is a poll tax?

1.b. Did the district court err by holding that Texas' voter-ID law unconstitutionally burdens the right to vote?

1.c. Did the district court err by holding that Texas' voter-ID law violates the "results" prong of §2 of the Voting Rights Act?

2. Did the district court err by holding that Texas' voter-ID law was enacted with a racially discriminatory purpose?

3.a. Did the district court err by requiring Texas to "preclear" all future voter-ID measures with the district court?

3.b. Did the district court err by facially invalidating Texas' voter-ID law?

Statement of the Case

I. Background

In 2011, the Texas Legislature enacted Senate Bill 14 (SB14). Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws 619. It generally requires voters to present government-issued photo ID when voting at the polls. The acceptable forms of photo ID include a:

- Texas driver's license;
- free Texas election identification card (EIC);
- Texas personal identification card;
- Texas license to carry a concealed handgun;

- U.S. military identification card;
- U.S. citizenship certificate; and
- U.S. passport.

Tex. Elec. Code §63.0101; Tex. Transp. Code §521A.001.[1]

Significantly, SB14 provides for *free* election identification cards (EICs) that satisfy its photo ID requirements. SB14 dictated that the Department of Public Safety "may not collect a fee for an election identification certificate or a duplicate election identification certificate issued under this section." Tex. Transp. Code §521A.001(b).

The Department of Public Safety has promulgated rules for issuing free EICs.[2] Under the Department's rules, an applicant who is registered and eligible to vote, 37 Tex. Admin. Code §15.181, can obtain an EIC in three different ways: by presenting (1) one piece of "primary" ID, (2) two pieces of "secondary" ID, or (3) one piece of

[1] The ID must also either be unexpired or have expired no earlier than 60 days before the date presented for voting. Tex. Elec. Code §63.0101. If a voter's identity is verified, then the voter "shall be accepted for voting." *Id.* §63.001(d). If the voter's ID lists a name "substantially similar" to a name on the voter rolls, the voter also shall be entitled to vote after submitting an affidavit that the voter is the person on the list of registered voters. *Id.* §63.001(c).

[2] SB14 provides that the Department of Public Safety "may require each applicant" for an EIC to furnish "information required by [Tex. Transp. Code] Section 521.142." Tex. Transp. Code §521A.001(f). Section 521.142, in turn, refers to an application for an original driver's license and requires "presentation of proof of identity." The Department has delegated rulemaking authority to implement this provision. *See* Tex. Gov't Code §411.004(3) (power to "adopt rules considered necessary for carrying out the department's work"); 36 Tex. Reg. 8384 (Dec. 9, 2011).

"secondary" ID plus two pieces of "supporting identification," *id.* §15.182(1). The rules define a "primary" ID as a Texas driver's license or personal-ID card that has been expired for less than two years. *Id.* §15.182(2). The rules list four "secondary" forms of ID, which can come from the federal government or other states: (A) an original or certified copy of a birth certificate; (B) an original or certified copy of a U.S. Department of State certification of birth; (C) an original or certified copy of a court order with name and date of birth indicating an official change in name or gender; or (D) U.S. citizenship or naturalization papers without a photo. *Id.* §15.182(3). And the rules recognize twenty-eight broad types of "[s]upporting identification," such as voter registration cards, school records, insurance policies, military records, Social Security cards, W-2 forms, expired driver's licenses, government agency ID cards, Texas or federal parole or mandatory release forms, federal inmate ID cards, Medicare or Medicaid cards, immunization records, tribal membership cards, Veteran's Administration cards, and any other document that could be used to obtain a Texas driver's license. *Id.* §15.182(4). More documents count as supporting identification for obtaining an EIC than for obtaining a driver's license. *See id.* §15.24.

A statutory provision separate from SB14 imposes a $2 or $3 fee any time a certified copy of a birth certificate is issued. Tex. Health

& Safety Code §191.0045. The Department of State Health Services has waived most of the fees for obtaining a birth certificate copy to get a free EIC. 25 Tex. Admin. Code §181.22(c), (t); 38 Tex. Reg. 7307 (Oct. 18, 2013). Texas Health and Safety Code §191.0045(d) and (e) state that the Bureau of Vital Statistics, local registrars, and county clerks "shall" collect a $2 fee any time they issue a certified copy of a birth certificate, and §191.0045(h) permits a local registrar or county clerk to collect an additional $1 fee for issuing birth-certificate copies.[3]

SB14 contains multiple exceptions to the photo-ID requirement. A photo ID need not be shown if a person has a religious objection to being photographed. Tex. Elec. Code §65.054(b)(2)(B). No photo ID is needed if a person lacks sufficient ID as a result of a natural disaster. *Id.* §65.054(b)(2)(C). The disabled can vote without a photo ID, as a disabled person can receive an exemption by providing written documentation with a registration application showing that either the U.S. Social Security Administration found a disability or the U.S. Department of Veterans Affairs found a disability rating of at least 50%. *Id.* §§13.002(i), 63.001(h).

[3] The Department of State Health Services waives the statutory $2 fee and issues free birth-certificate copies to EIC applicants who visit its Austin office. The Department continues to remit funds to the Comptroller, out of its own budget, each time it issues a free birth-certificate copy to an EIC applicant. ROA.61142:59:11-12; ROA.61164:148:18-25.

And even if SB14's requirements are not satisfied at the poll, a voter can still cast a provisional ballot, *id.* §63.001(g), after executing an affidavit stating that the voter is registered and eligible, *id.* §63.011(a). The election officer then must give this voter written information, in a form prescribed by the Secretary of State, that lists the ID requirements, the procedure for presenting ID, a map showing the location where ID can be presented, and notice that if these procedures are followed and the voter is eligible then the vote will count. *Id.* §63.001(g)(2). If the voter presents acceptable ID within six days after the election, the vote will count. *Id.* §65.0541.

SB14 also included voter-education measures. The voter registrar of each county is required to provide notice of the ID requirements with each voter-registration certificate issued. *Id.* §15.005. The Secretary of State and the voter registrar of each county that maintains a website must also provide notice of SB14's requirements online and "in each language in which voter registration materials are available." *Id.* §31.012(a). A physical copy of that same notice must be posted by the county clerk in each county "in a prominent location at the clerk's office" and "in each language in which voter registration materials are available." *Id.* §31.012(c). SB14 also obligates the Secretary of State to "conduct a statewide effort to educate voters regarding the identification requirements for voting"

under SB14. *Id.* §31.012(b). Presiding judges of polling places must "post in a prominent place on the outside of each polling location a list of the acceptable forms of identification" and in "a font that is at least 24-point." *Id.* §62.016. And when a voter presents an insufficient form of ID, the election officer must give that person written notice of what IDs are acceptable and how to obtain an acceptable free ID. *Id.* §63.0012.

SB14 requires various forms of training for election officials. *Id.* §32.111(c); *id.* §32.114(a); *see* SB14, §22 (requiring the Secretary of State and county clerks to adopt training standards for implementing SB14, under Texas Election Code sections 32.111 and 32.114, "as soon as practicable").

Texas' election laws also allow voters who are 65 or older to vote by mail without a photo ID. Tex. Elec. Code §82.003. And disabled voters can vote by mail without a photo ID simply by checking a box indicating that they are disabled. *Id.* §82.002.

Since SB14 took effect, Texas has held three statewide elections, six special elections, and countless local elections. No disenfranchisement was reported. ROA.64028:55:20-24. And state and county officials of both political parties testified that the number of complaints and incidents of voters turned away from the polls were "vanishingly small." ROA.64028:53:25-54:2; *see also* ROA.62054:43:14-15; ROA.63712:10-63716:10; ROA.65424:19-24.

II. Procedural Posture.

The United States brought this lawsuit challenging SB14 as a violation of the Fourteenth Amendment and §2 of the Voting Rights Act. Private plaintiffs brought a separate lawsuit, which was consolidated with the United States' case, pressing those same claims and adding a claim that SB14 is an unconstitutional "poll tax."

Before trial, plaintiffs and their experts conducted studies and surveys costing tens of thousands of dollars. *See, e.g.*, ROA.99721:6-10; ROA.99925:5-10; ROA.99168:1-20; ROA.100176:25-100177:3. Yet at trial, plaintiffs' experts could not identify a single voter who would be unable to vote because of SB14. ROA.98854:12-17; ROA.99022:9-18; ROA.99568:14-22; ROA.99909:21-99910:10; ROA.99917:17-99918:14; ROA.100111:15-100112:21; ROA.100484:19-100485:5.

Nevertheless, after a nine-day bench trial, the district court entered a final judgment finding that SB14 is a poll tax, unconstitutionally burdens the right to vote, violates §2 of the Voting Rights Act, and was enacted with a racially discriminatory purpose. ROA.27027; ROA.27192. This Court stayed the district court's judgment pending appeal. *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014). Judge Costa concurred in that order, noting that "concern about confusion resulting from court changes to election laws close in time to the election should carry the day in the stay analysis." *Id.*

at 897. The Supreme Court denied an application to vacate the stay, over a dissenting opinion written by Justice Ginsburg and joined by Justices Sotomayor and Kagan. *Veasey v. Perry*, 135 S.Ct. 9 (2014).

Summary of Argument

I.A. SB14 is not a poll tax because Texas provides free SB14-compliant voter IDs. *Crawford* forecloses the poll-tax argument, as it held that a voter-ID law does not unconstitutionally burden the right to vote when a state issues free voter IDs—even if it may cost a nominal amount of money and time to obtain documentation to get a free voter ID. 553 U.S. at 198 & n.17. The poll-tax argument is so weak that not a single judge on a recent Ninth Circuit en banc panel accepted it.

I.B. SB14 does not unconstitutionally burden the right to vote. As the district court found, "Plaintiffs have not demonstrated that any particular voter absolutely cannot get the necessary ID or vote by absentee ballot under SB 14." ROA.27129. Texas offers free voter IDs, and they can be obtained with birth certificates that cost only $2-$3—less than in *Crawford*, where birth certificates cost $3-$12. 553 U.S. at 198 n.17. The district court ignored *Crawford*'s holding that any "inconvenience of making a trip to the BMV" or "gathering the required documents" to obtain a free photo ID is no more significant than "the usual burdens of voting." *Id.* at 198. And it disre-

garded *Crawford*'s instruction that voter-ID laws legitimately prevent voter fraud and safeguard voter confidence, regardless of whether the record contains any proven episodes of voter impersonation. Moreover, Texas mitigated any minor inconveniences caused by the need to obtain ID by allowing the elderly and disabled to vote by mail and anyone without ID to vote by provisional ballot. It is debatable whether Texas' voter ID law is the "strictest" in the country. But regardless, it does not unconstitutionally burden the right to vote because Texas provides free voter IDs and recognizes exceptions where those most inconvenienced do not have to show a photo ID to vote.

I.C. SB14 did not cause a discriminatory effect in voting under §2 of the Voting Rights Act. Plaintiffs did not show that SB14 caused a single voter to be disenfranchised. The district court made at least three legal errors in considering this §2 claim: (1) it did not find *causation*; (2) it did not examine whether the *challenged practice itself* (SB14—and not the Department of Public Safety's rules for obtaining free voter IDs or historical events) caused any effect; and (3) it did not identify a disparate impact in *voting*, but instead identified a supposed racial disparity in possessing SB14-compliant IDs. Furthermore, the ID disparity identified by the district court was premised on unreliable statistical guessing, which predicted incorrectly the race of 6 of the 22 named plaintiffs.

II. SB14 was not enacted with a discriminatory purpose. There was no evidence that any legislator who supported SB14 acted out of racially discriminatory motives. Plaintiffs would have offered that evidence if it existed, because the district court granted them unprecedented discovery into the files and e-mails of legislators and their staff who supported SB14. Without such direct evidence, any circumstantial evidence should have been greatly discounted. And when there is neither direct evidence of discriminatory intent nor a showing of discriminatory effect, a finding of illicit purpose is foreclosed. The district court impermissibly relied on self-serving conjecture from legislators who opposed SB14, inferences drawn from irrelevant facts, and a "historical background" of discrimination that essentially held the SB14 Legislature responsible for others' acts that occurred decades ago.

III.A. The district court erred in requiring Texas to preclear any future voter-ID laws with the district court. Preclearance is only permissible when multiple constitutional violations have been shown, and it cannot be imposed when mere circumstantial evidence is all that supports a finding of discriminatory purpose.

III.B. Facial invalidation was not proper. An overwhelming percentage of registered Texas voters (at least 95.5% according to even the district court, ROA.27116) already have SB14-compliant voter IDs. The proper remedy, therefore, would have been an as-applied

injunction preventing SB14's enforcement against possible Texas voters who cannot obtain an SB14-compliant voter ID.

Argument

"[T]his Court analyzes the legal standards applied by a district court de novo, and the factual findings for clear error." *Rodriguez v. Bexar Cnty.*, 385 F.3d 853, 860 (5th Cir. 2004) (citation omitted).

I. The Effect Of SB14 Does Not Violate The Constitution Or The Voting Rights Act.

Plaintiffs' three claims challenging SB14's effect all fail. SB14 is not a poll tax, it does not unconstitutionally burden the right to vote, and it does not violate the results prong of §2 of the Voting Rights Act.

A. SB14 Is Not A Poll Tax.

SB14 is nothing close to a poll tax, and *Crawford* forecloses this argument. The district court ruled that SB14 constitutes a "poll tax" because voters who lack *both* a photo ID *and* a birth certificate will have to pay for the birth certificate needed to obtain a free photo ID. ROA.27159-27166.

Justice Stevens' controlling opinion in *Crawford* explained that laws related to voter qualifications, like voter-ID laws that do not require voters to pay a tax or fee to obtain a voter ID, cannot be

treated as poll taxes.[4] *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), created a per se rule that the Equal Protection Clause is violated "'whenever [a State] makes the affluence of the voter or payment of any fee an electoral standard.'" *Crawford*, 553 U.S. at 189 (quoting *Harper*, 383 U.S. at 666). In contrast to that per se rule against poll taxes, *Crawford* recognized that "'even-handed restrictions that protect the integrity and reliability of the electoral process itself' are not invidious" because they are not "unrelated to voter qualifications."[5] *Id.* at 189-90 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)). *Crawford* then explained that the per se rule against poll taxes would apply, "under [the Court's] reasoning in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification." *Id.* at 198. But voter-ID laws in States providing free voter IDs do not substantially burden the right to vote, much less constitute a poll tax:

> But just as other States provide free voter registration cards, the photo identification cards issued by Indiana's BMV are also free. For most voters who need them, the

[4] Justice Stevens' opinion is the holding of *Crawford*. *Marks v. United States*, 430 U.S. 188, 193 (1977).

[5] To determine whether a restriction is related to voter qualifications, the Supreme Court adopted a balancing test, established in *Anderson* and *Burdick v. Takushi*, 504 U.S. 428 (1992). *Crawford*, 553 U.S. at 190. The *Anderson-Burdick* balancing test only applies where *Harper*'s per se rule against poll taxes does not apply. And *Crawford* itself applied this balancing test, which further confirms that voter-ID laws are not poll taxes. *See* 553 U.S. at 189-91 (discussing the *Anderson-Burdick* balancing test); *id.* at 203 (quoting *Burdick*).

> inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.

Id.

As the district court noted, Texas provides free voter IDs, just like Indiana did in *Crawford*. ROA.27163 ("The EIC itself, issued by DPS, must be issued free of charge."). The district court nevertheless concluded that SB14 was a poll tax because an applicant can only obtain a free voter ID by providing supporting documents, and the applicant would have to pay a fee for the supporting documents. ROA.27164. According to the district court, a voter-ID law is a poll tax no matter how *de minimis* the monetary cost of obtaining supporting documentation. ROA.27165 ("the amount of the fee is irrelevant").

Crawford rejects this position. Indiana also required a supporting document like a birth certificate to get a free voter ID, and Indiana charged "between $3 and $12" for "a copy of one's birth certificate." 553 U.S. at 198 n.17. *Crawford* determined that this Indiana practice did not substantially burden the right to vote. *Id.* at 198. Texas charges even less for a supporting birth certificate—$2 to $3. ROA.27047. Furthermore, SB14 itself does not impose any fees for supporting documentation or require a birth certificate to get a free voter ID; the Department of Public Safety's rules, 37 Tex.

Admin. Code §15.182, combined with a preexisting statute, Tex. Health & Safety Code §191.0045(e), impose these requirements.

Nor does a different analysis apply under the Twenty-Fourth Amendment's ban on poll taxes. A requirement that a person show ID at a voting poll is not a tax. *Cf. Harman v. Forssenius*, 380 U.S. 528, 538-40 (1965) (finding unconstitutional a law requiring either payment of "the customary poll tax" or filing of "a certificate of residence" to vote). A tax on gasoline is not a "poll tax," even though nearly every voter must spend money for transportation to the polls. And the price of a stamp is not a "poll tax" when a person votes by mail.

This Court should follow *Gonzalez v. Arizona*, 677 F.3d 383, 410 (9th Cir. 2012) (en banc), *aff'd on other grounds*, 133 S.Ct. 2247 (2013), which recognized that a "photo identification requirement is not an invidious restriction under *Harper*, and the burden is minimal under *Crawford*." Ten of the eleven judges in *Gonzalez* found that a voter-ID law was not a poll tax under the Fourteenth or Twenty-Fourth Amendments, and Judge Pregerson did not reach the issue. *Id.* at 383-444.

B. SB14 Does Not Unconstitutionally Burden The Right To Vote.

Crawford held that voter-ID laws do not substantially burden the right to vote when States offer free voter IDs. Plaintiffs' claim

under the First and Fourteenth Amendments fails because they have not shown that SB14 has prevented a single person from voting. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009) (rejecting challenge to voter-ID law where plaintiffs "failed to identify a single individual who would be unable to vote because of the Georgia [voter-ID] statute or who would face an undue burden to obtain a free voter identification card").

1. The District Court Defied *Crawford*.

Crawford held that any "inconvenience of making a trip to the BMV" or "gathering the required documents" to obtain a free photo ID is no more significant than "the usual burdens of voting." 553 U.S. at 198. The district court thought it could ignore *Crawford* because Indiana accepted more forms of photo ID than Texas, and Indiana permitted an "indigency affidavit" in lieu of photo ID. *See* ROA.27115-27116. None of these observations, however, changes the fact that the process of obtaining a photo ID is not "a significant increase over the usual burdens of voting." 553 U.S. at 198. And Texas charges only $2 or $3 for a supporting birth certificate, ROA.27047, while Indiana charged between $3 and $12, *Crawford*, 553 U.S. at 198 n.17.

The process of casting a ballot always imposes *some* costs on voters. That may be why many people choose not to vote. Traveling to

the polls requires voters to spend money on gasoline or public transportation and incur the opportunity costs of time away from work. The Constitution does not require States to abolish in-person voting for mail voting, or abolish voting on Tuesdays for weekend or holiday voting. Registering to vote also involves expenditures of time and resources; that is one reason why many do not register. But none of these laws deny or abridge the right to vote for persons who choose not to incur these costs. *Frank v. Walker*, 768 F.3d 744, 748 (7th Cir. 2014), *cert. pet. pending*, No. 14-803 (U.S. Jan. 7, 2015). These burdens are constitutionally permissible, just like the minor inconveniences associated with obtaining photo ID. *Crawford*, 553 U.S. at 198.

The district court also defied the Supreme Court when it held that the State's interest in preventing voter fraud was insufficient to justify SB14 because "voter impersonation fraud" is "very rare." ROA.27138. "Here, as in *Crawford*, Texas need not show specific local evidence of fraud in order to justify preventative measures." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 394 (5th Cir. 2013); *accord Frank,* 768 F.3d at 750; *Billups*, 554 F.3d at 1353-54; *Am. Civil Liberties Union of N.M. v. Santillanes*, 546 F.3d 1313, 1323 (10th Cir. 2008). The district court therefore erred in examining "whether a change in [Texas' voter-ID] law was required." ROA.27138. *Craw-*

ford expressly held that voter-ID laws are legitimate fraud-prevention methods even where the "record contain[ed] no evidence of any such fraud actually occurring in [the State] at any time in its history." 553 U.S. at 194. Moreover, *Crawford* recognized a separate state interest in safeguarding voter confidence. *See id.* at 197. The district court therefore disregarded *Crawford* by holding that the State's interests in preventing voter fraud and safeguarding voter confidence were insufficient to justify a photo-ID requirement.[6]

The district court's actions are even more egregious in light of plaintiffs' failure to identify a single voter who will be disenfranchised under SB14. To compensate for this fatal flaw in plaintiffs' case, the district court noted that most of the fourteen plaintiffs alleging a personal injury "attempted to obtain, but were unsuccessful in securing, a qualified SB 14 ID because they lacked the underlying documentation required to obtain such forms of identification." ROA.27092. That is insufficient to prove an unconstitutional burden on the right to vote or that these plaintiffs were unable to vote. *See Crawford*, 553 U.S. at 198 & n.17. It simply means that at

[6] SB14 deters more than simply "in-person voter impersonation fraud." ROA.27138. Voter-ID laws deter minors from registering because their photo ID will reveal their date of birth—and expose their fraud—when they appear to cast their ballot at the polls. *Frank*, 768 F.3d at 750. And it is undisputed that voter-registration fraud and vote harvesting are prevalent in Texas. ROA.99153:17-99158:16 (noting from experience that vote harvesting is prevalent in Texas and hard to catch).

the time they attempted to get a free voter ID, they lacked a supporting document proving their identity; it does not follow that they were unable to get a $2 or $3 birth certificate to prove their identity for a free voter ID. Indeed, there was not even a finding that SB14 prevented the named plaintiffs from voting. Thus, there is no substantial burden on the right to vote under *Crawford*.

Since *Crawford* was decided almost seven years ago, opponents of voter-ID laws have been relentlessly searching for individuals "disenfranchised" by such laws, and they have come up short. The United States has spared no expense in mounting an attack on SB14. Lawyers from the Department of Justice have crisscrossed Texas, traveling to homeless shelters with a microphone in hand, searching for voters "disenfranchised" by SB14. ROA.99075-77. The United States also spared no expense with experts, hiring six testifying experts in this case alone. *E.g.*, ROA.60082-60312 (Rice University sociology professor charged the United States six figures to opine on the history of racial discrimination in Texas, and he never even testified at trial). LULAC, MALC, NAACP, TLYVEF, and LUPE also searched the State for disenfranchised voters, but they could not identify any such voters. *Compare* ROA.99181:20-99181:4 (TLYVEF describing its efforts to register voters all over the state), *with* ROA.99199:7-17 (TLYVEF not being able to identify a single person who is unable to vote because of SB14); *see also* ROA.24741-

24744 (stipulation of facts regarding La Union Del Pueblo Entero, providing that LUPE was not relying on any alleged injury to their members for standing purposes); ROA.24702-24705 (TLYVEF stipulation of facts); ROA.24727-24731 (LULAC stipulation of facts); ROA.64201:129:9-14 (plaintiff NAACP was not aware of the identity of any member of the organization who has been or would be injured by SB14).

While plaintiffs brought over a dozen voters to testify at trial—including one voter who refused to get an ID out of principle, and several who preferred to vote in-person rather than by mail—plaintiffs failed to produce a single individual unable to vote on account of SB14.[7] This is hardly surprising in light of the steps Texas took to mitigate the already minor inconveniences associated with securing photo ID. Texas offers free voter IDs, Tex. Transp. Code §521A.001; allows voters to cast provisional ballots if they appear at the polls without photo ID, Tex. Elec. Code §63.001(g); allows voters who are 65 or older to vote by mail without a photo ID, *id.* §82.003; allows disabled voters to vote by mail without a photo ID simply by checking a box indicating that they are disabled, *id.*

[7] *See* ROA.27026-27168 (district court's opinion); *see also* ROA.98854:12-17; ROA.99022:9-18; ROA.99917:17-99918:14; ROA.99568:14-22; ROA.100111:15-100112:21; ROA.100484:19-100485:5.

§82.002; and allows disabled voters to vote in person without a photo ID, *id.* §13.002(i).

These mitigation steps address the concerns Justice Stevens articulated about specific subsets of potential voters who may have "a somewhat heavier burden" under voter-ID laws. *Crawford*, 553 U.S. at 199. For example, the "elderly" and those with "personal limitations" might have a slightly greater burden, *id.*, and Texas allows the elderly and disabled to vote by mail, Tex. Elec. Code §§13.002(i), 82.003. Furthermore, Justice Stevens explained that any burden imposed by Indiana's voter-ID law on these subsets of voters is "mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted." 553 U.S. at 199. Texas also allows such provisional ballots. Tex. Elec. Code §63.001(g).

Texas even takes steps to make free voter IDs easy to obtain. The Texas Department of Public Safety currently has 225 driver's license offices. ROA.100502:23-100503:7; ROA.39345-39356. Approximately 98.7% of the Texas population lives within 25 miles of a DPS office, and approximately 99.95% lives within 50 miles of a DPS office. ROA.39355-39356; ROA.100567:4-100568:1; ROA.99567:17-99568:25. Free voter IDs are available at every DPS driver's license office. ROA.100569:9-19. And DPS has a "homebound program" to issue IDs to people with disabilities.

ROA.100515-100516. The Secretary of State's office, the Department of Public Safety, and Counties have implemented a program to issue free voter IDs on a full-time basis in Counties that do not have a DPS office, and "mobile EIC units" were made available in targeted areas in the weeks leading up to the 2013 and 2014 elections. ROA.100499:4-8; ROA.100573:8-100575:12; ROA.64026:47:1-48:13; ROA.59945:15:13-19; ROA.97237-97239; ROA.97406-97439. Because of these efforts, every County in the State had a physical location where a voter could obtain a free EIC. *See* ROA.100616:6-21; ROA.97240 (EIC state and county participation map). As a result, the percentage of Texans living within 25 miles of an EIC-issuing office is greater than 98.7%. ROA.100567:18-100568:2.

The district court noted that Texas has issued only a few hundred free EICs. ROA.27131. But that does not prove Texas is engaging in discrimination or that EICs are hard to obtain. That fact is just as consistent with the conclusion that very few registered voters lacked ID to begin with, so the demand for EICs is low.[8] Demand for EICs would be even lower because a driver's license or ID card, in contrast to an EIC, can be used for purposes besides voting.[9]

[8] Indeed, since the implementation of SB14, approximately 22,000 of the registered voters that plaintiffs claim do not have a photo ID have voted in at least one election. ROA.97440-97447.

[9] [redacted]

[redacted]

2. Empirical Evidence Supports *Crawford* And Undermines Plaintiffs' Expert Testimony.

Crawford alone confirms the district court's multiple errors, but empirical evidence also supports *Crawford* and demonstrates that voter-ID laws do not prevent people from voting and do not reduce minority turnout.

Two of the United States' own experts—lead expert Ansolabehere as well as Minnite—have published academic papers reporting no connection between voter-ID laws and reduced minority turnout. Ansolabehere concluded that "the actual denials of the vote in these two surveys suggest that photo-ID laws may prevent

almost no one from voting." ROA.78413 (*Political Science and Politics* paper); *see* ROA.77975-78047 (rebuttal report). Ansolabehere concludes: "Voter ID does not appear to present a significant barrier to voting . . . . Although the debate over this issue is often draped in the language of civil and voting rights movements, voter ID appears to present no real barrier to access." ROA.78413. Minnite, in turn, published an academic study concluding that even though her "sympathies lie with the plaintiffs in voter ID cases," "[w]e should be wary of claims—from all sides of the controversy—regarding turnout effects from voter ID laws . . . . [T]he data are not up to the task of making a compelling statistical argument." ROA.94872 (*Election Law Journal* paper).

These concessions are confirmed by voter turnout statistics in both Indiana and Georgia, showing that turnout did not decrease—and instead actually increased—after those States' voter-ID laws were implemented. ROA.77984 (citing *Political Science and Politics* paper, ROA.78283-78287); ROA.78091-78094; ROA.78091 (citing University of Missouri Institute of Public Policy paper, ROA.78267-78282).

The Texas Legislature relied on these empirical studies and others in passing SB14. *See, e.g.*, ROA.100786:6-10 (Lt. Gov. Dewhurst: "All the empirical data [that] I [have] seen has shown that there is no—no example that I [am] aware of wherein any jurisdiction with

a photo voter ID requirement, that individuals have not been able to obtain access to acceptable documents."); ROA.64264:76:12-17.

Texas' experience in the three statewide elections and numerous local and special elections under SB14 confirms the concessions made by the United States' experts and the empirical studies from Georgia and Indiana. A representative from the Secretary of State testified that reports of voters being unable to present ID or experiencing other problems have been "vanishingly small." ROA.64028:53:24-54:2. As the Director of the Elections Division explained:

> [W]e get thousands of phone calls every month, and there have been absolutely almost no phone calls, emails, problems related to lack of an ID. . . . Thousands of phone calls every month. We've got a public hotline that is on the back of every voter registration card, and we get all kinds of calls. We get calls because my name doesn't match. We get calls because of a lot of reasons, but not that I don't have an ID.

ROA.64028:55:9-24. Texas Legislators reported a similar lack of complaints over the rollout of SB14.[10] County election officials also testified that they received virtually no complaints whatsoever.[11]

[10] *See* ROA.101017:11-21; ROA.101015:19-23; ROA.101018:10-101019:23; ROA.64628:253:3-254:5; ROA.101097:10-101098:1.

[11] *E.g.*, ROA.62054:43:13-15 (Jasper County); ROA.63712:10-63716:10 (Jefferson County); ROA.65424:109:19-24 (Harris County).

3. Even If Texas Has One Of The Strictest Voter-ID Laws In The Country, That Does Not Prove An Unconstitutional Burden On The Right To Vote.

Finally, the district court repeatedly described SB14 as the "strictest" voter ID law in the United States. ROA.27045, 27141, 27156. That subjective claim is open to debate. Texas does not require photo ID for absentee balloting, but Wisconsin does. *Frank*, 768 F.3d at 746. In any event, plaintiffs have offered no evidence that the allegedly strict requirements of SB14 have prevented a single person from voting. ROA.27129. For all we know, the number of registered and eligible voters who lack SB14-compliant IDs but possess IDs accepted in other States, such as student IDs, is a null set.

There is also reason to believe that accepting additional forms of ID would have a negligible effect. In Wisconsin, student ID cards are accepted only if they contain the student's signature plus an issuance and expiration date that are no more than two years apart. And the presentation of a student ID card must be accompanied by a document demonstrating that the student is enrolled at the college during the semester in which the election is conducted.[12] Plaintiffs provided no evidence that any college in Texas issues IDs that meet such requirements.

[12] *See* State of Wis., Gov't Accountability Bd., http://gab.wi.gov/node/3391.

Moreover, many colleges require another photo ID in order to obtain a student ID.[13] Georgia permits student IDs only from public institutions, not private schools.[14] Indiana also does not accept student IDs from private institutions, and it allows student IDs from Indiana state schools only if the ID (1) displays a photo, (2) displays a name conforming to one's voter-registration record, (3) displays an expiration date and is either current or has expired sometime after the date of the last General Election, and (4) is issued by Indiana or the U.S. government.[15] Finally, neither Tennessee, South Carolina, nor North Carolina accept student IDs.[16]

The acceptance of federal or state employee IDs was not shown to have any effect, as plaintiffs failed to introduce any evidence that federal or state employees lack SB14-compliant ID or cannot easily obtain it. A separate ID is almost certainly needed to be hired as a

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[13] *See* ROA.99809:17-99810:16 (testimony of Senator Rodney Ellis discussing requirements to obtain an ID at the University of Texas); *see also* Univ. of Tex., ID Center, https://www.utexas.edu/its/idcenter/ (stating that "a valid government-issued photo ID" must be presented and a $10 fee must be paid); Prairie View A&M Univ., Panther Card, http://www.pvamu.edu/auxiliaryservices/auxiliaryenterprises/panther-card/ (stating that one must present a valid Driver's License, Passport, Military ID, or School ID to obtain a Panther Card, and that replacement cards cost $35).

[14] Photo ID for Voting, http://sos.ga.gov/admin/files/acceptableID.pdf.

[15] Photo ID Law, http://in.gov/sos/elections/2401.htm.

[16] Voter Identification Requirements, https://www.tn.gov/sos/election/photoID.htm; Voter Photo ID, http://www.tn.gov/safety/photoids.shtml; Photo ID Requirements, http://www.scvotes.org/2012/09/24/photo_id_requirements; N.C. Gen. Assembly, Session Law 2013-381, http://www.ncleg.net/Sessions/2013/Bills/House/PDF/H589v9.pdf.

federal or state employee. *See, e.g.*, I-9 Form, http://www.uscis.gov/sites/default/files/files/form/i-9.pdf. Given this lack of evidence, the decision not to inject further confusion into the process by significantly increasing the number of IDs that poll workers must learn about and verify is reasonable. ROA.101035:7-12.

Texas' decision to exclude student IDs while accepting concealed handgun permits is perfectly legitimate. The amendment to accept concealed handgun permits was proposed by a Democratic legislator. ROA.84072; ROA.101161:7-15. And the distinction between student IDs and concealed handgun permits is quite sensible based on the characteristics of those IDs. Concealed handgun permits are issued by the Department of Public Safety and look very similar to driver's licenses. The Transportation Security Administration makes the same distinction: it has never accepted student ID cards for screening purposes, but for years it accepted concealed handgun licenses (a policy it abandoned a few weeks after Texas brought it to the attention of the district court).[17]

[17] *Compare* Transp. Sec. Admin., Acceptable IDs, https://web.archive.org/web/20140210185049/http://www.tsa.gov/traveler-information/acceptable-ids (last updated Dec. 5, 2013) ("Acceptable IDs include . . . Driver's Licenses or other state photo identity cards issued by Department of Motor Vehicles (or equivalent)"), *with* Transp. Sec. Admin., Acceptable IDs, https://web.archive.org/web/20140702052720/http://www.tsa.gov/traveler-information/acceptable-ids (last updated June 20, 2014) ("Note: A weapon permit is not an acceptable form of identification.").

The district court's conjecture about Texas' voter-ID law distracts from the fact that plaintiffs have not proven that SB14 prevented a single person from voting. It therefore does not unconstitutionally burden the right to vote.

C. SB14 Does Not Violate The "Results" Prong Of Section 2 Of The Voting Rights Act.

SB14 does not violate §2 of the VRA, which prohibits a voting qualification "which results in a denial or abridgement of the right . . . to vote on account of race or color." 52 U.S.C. §10301(a).

1. Plaintiffs Did Not Prove That SB14 Caused Any Voting Disparity.

The district court committed at least three fundamental legal errors in sustaining the §2 claim.

First, the district court did not ask whether the challenged law (SB14) *caused* a racial voting disparity. Section 2's results prong only covers voting qualifications that "result[] in" a "denial or abridgement of the right . . . to vote." 52 U.S.C. §10301(a). It is not enough for a plaintiff to identify a statistical disparity; it must prove that the challenged policy causes the alleged discriminatory impact. *Salas v. Sw. Tex. Jr. Coll. Dist.*, 964 F.2d 1542, 1554 (5th Cir. 1992); *see Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 554 n.9 (6th Cir. 2014). *Gonzalez* rejected a §2 results-prong claim against Arizona's voter-ID law, explaining that "proof of

causal connection between the challenged voting practice and a prohibited discriminatory result is crucial." 677 F.3d at 405 (internal quotation marks omitted). The district court admitted that plaintiffs did not show that SB14 prevented a single person from voting. ROA.27129. That alone suffices to reject the §2 claim, regardless of any disparate impact.

Second, the district court did not ask whether the *challenged law* (SB14) caused a racial voting disparity. Instead, it asked "whether that [disparate] impact is caused by or linked to *social and historical conditions* that currently or in the past produced discrimination against members of the protected class." ROA.27144 (emphasis added). That is not the proper §2 inquiry; the "challenged voting practice" must cause the disparate impact or it does not violate §2. *Gonzalez*, 677 F.3d at 405; *see Frank*, 768 F.3d at 755 (§2 inquiry must "distinguish discrimination by the defendants from other persons' discrimination"); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 245 (4th Cir. 2014) (challenged practice must impose a discriminatory burden); *Husted*, 768 F.3d at 554 (same).

The district court couched its analysis in the factors used for vote-dilution claims under *Thornburg v. Gingles*, 478 U.S. 30 (1986). ROA.27146-27147. The *Gingles* factors do not apply in a case like this concerning voter-qualification claims. *See Frank*, 768 F.3d at

754 (noting that the Fourth, Sixth, and Seventh Circuits "found *Gingles* unhelpful in voter-qualification cases" and that the Ninth Circuit in *Gonzalez* "did not use most of [*Gingles*'] nine factors"); *see also Gingles*, 478 U.S. at 45 ("the enumerated factors will often be pertinent to certain types of §2 violations, particularly to vote dilution claims"). In any event, *Gingles* itself noted that a challenged "electoral law, practice, or structure" must "cause an inequality" to violate §2. *Id.* at 47. And here, most of the district court's analysis had nothing to do with SB14. Instead, it dealt with a purported "History of Official Discrimination," "Racially Polarized Voting," "Education, Employment, and Health Effects on Political Participation," "Racial Appeals in Campaigns," "Proportional Representation," and "Lack of Legislative Responsiveness to Minority Needs." ROA.27148-27149. The district court's reasoning under the only factor that deals with SB14 ("Policy Underlying SB14 is Tenuous," ROA.27150) contradicts *Crawford*'s holding that preventing voter fraud is a constitutional policy interest even where there is no record evidence of voter fraud, 553 U.S. at 194-95.

Furthermore, the district court failed to distinguish between SB14's statutory provisions and *the Department of Public Safety's rules* regarding the supporting documents necessary to obtain an EIC. *See* 37 Tex. Admin. Code §§15.181-183. Nowhere does SB14 require a birth certificate to get a free voter ID. And SB14 said

"[t]he department may not collect a fee for an election identification certificate." Tex. Transp. Code §521A.001(b). SB14 does provide that the Department of Public Safety "may" require EIC applicants to furnish identification information. *Id.* §521A.001(f). But that simply means the Department has discretion to determine which, if any, documents are required to obtain a free voter ID. Thus, any disparity caused by needing a birth certificate to get a free voter ID was not caused by SB14 or the Texas Legislature. The district court erred by not analyzing whether SB14 itself caused any disparity.

Third, the district court did not ask whether the challenged law (SB14) caused a racial *voting* disparity. *See Frank*, 768 F.3d at 747 ("the judge did not make findings about what happened to voter turnout"). Section 2 only covers voting qualifications that result in a denial or abridgement of the right to "vote." 52 U.S.C. §10301(a). The disparity identified by the district court was not based on voting, but rather an alleged disparity in those who "lack SB 14-qualified ID." ROA.27129. Voting and ID possession are not the same. Voting always imposes some costs on voters. *See supra* Part I.B.1. The decision not to get a voter ID could reflect a decision not to vote. *Frank*, 768 F.3d at 748-49. This follows from *Crawford*'s holding that the inconveniences associated with obtaining a photo ID do not "represent a significant increase over the usual burdens of voting." 553 U.S. at 198. Consequently, the decision not to get an SB14-

compliant ID does not entail that a person's right to vote is being denied or abridged.

In any event, the canon of constitutional avoidance precludes an interpretation of §2's "results" prong that would require the State to ensure that voters of various races possess photo ID in exactly equal proportion. *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009). Because the Fourteenth and Fifteenth Amendments prohibit only *purposeful* racial discrimination, *City of Mobile v. Bolden*, 446 U.S. 55 (1980), there is a serious constitutional question whether Congress' enforcement powers under those Amendments extend to mere disparate impact, *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373-74 (2001). And an interpretation of §2 that "subordinate[s] traditional race-neutral . . . principles" to "racial considerations" would likely violate the Equal Protection Clause. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

2. The District Court Erred In Finding A Disparate Impact.

In addition to the fact that SB14 did not cause any voting disparity, the ID disparity identified by the district court is premised on an unreliable analysis. To compensate for plaintiffs' failure to establish that SB14 prevented anyone from voting, plaintiffs attempted to establish, via statistical guessing, that a disproportionate number of registered voters who lack photo ID (the wrong in-

quiry to begin with) are minorities. Plaintiffs' list-matching analysis simply made constitutionally suspect "race-based predictions" premised on guesses about a data set that could not possibly show discriminatory effect. *Bartlett*, 556 U.S. at 18.

Plaintiffs' experts compared the list of registered voters with the names listed in databases of persons with SB14-compliant ID. Registered voters who could not be found in those databases were placed on a "no-match" list. But there is no way to know the race or ethnicity of these voters because there is no record of the race of registered voters. So plaintiffs' experts tried to guess by deploying an algorithm from Catalist LLC, which attempts to discern race from a person's name and address.[18]

Plaintiffs' experts estimated that at least 2.0% of registered non-Hispanic white voters, 8.1% of African-American registered voters, and 5.9% of Hispanic registered voters appeared on their "no-match" list. ROA.24994; ROA.25001. The actual ID disparity is but a few percentage points, yet the district court manipulated these statistics to claim that "African-American registered voters were 305% more likely and Hispanic registered voters 195% more likely than Anglo registered voters to lack SB 14-qualified ID." ROA.27145. Dividing percentages is "a misuse of data" designed to

[18] ROA.98783:16-98785:5; ROA.98786:24-98787:10; ROA.98787:21-98788:7; ROA.98846:17-19.

inflate the purported impact of SB14, and it "produces a number of little relevance to the problem." *Frank*, 768 F.3d at 752 n.3. Additionally, plaintiffs' experts made no effort to determine whether voters on their "no-match" list *cannot obtain* ID. ROA.98854:12-17; ROA.99331:15-99332:13; ROA.99013:10-22; ROA.99022:4-18; ROA.100232:24-100233:14. Absent this determination, the racial makeup of plaintiffs' "no-match" list is irrelevant.

Worse yet, DOJ's expert did not even check those statistical guesses against the self-reported racial data in DPS's database for the approximately 400,000 persons on the no-match list for whom the Department of Public Safety has data. ROA.98847:2-11. This was no mere oversight; DOJ *instructed* its expert *not* to conduct that quality-control review. ROA.98838:15-25; ROA.98847:6-11. This is alarming but hardly surprising: Catalist guessed the race of 6 of the 22 named plaintiffs wrongly. ROA.98845:14-98846:19.

II. SB14 Was Not Enacted With A Racially Discriminatory Purpose.

There is no direct evidence whatsoever that SB14 was enacted with a racially discriminatory purpose. As the district court found: "There are no 'smoking guns' in the form of an SB 14 sponsor making an anti-African-American or anti-Hispanic statement with respect to the incentive behind the bill." ROA.27157. The district

court therefore relied solely on circumstantial evidence. The Supreme Court has strongly cautioned against the use of mere circumstantial evidence to find discriminatory intent. And for good reason: a finding of intentional discrimination is a grave charge that can subject a jurisdiction to preclearance under VRA §3(c). In this case, the district court applied an erroneous legal standard to find discriminatory purpose.

The court further erred by considering circumstantial evidence when there was neither direct evidence of discrimination nor a racially discriminatory effect. Then, in considering circumstantial evidence, the district court drew legally impermissible inferences. And the district court failed to consider whether the alleged discriminatory purpose was necessary to enact SB14—an essential step in the discriminatory-purpose analysis.

A. Standard of Review

Courts may not second-guess a legislature's stated purpose absent clear and compelling evidence to the contrary. *See Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) ("[W]e ordinarily defer to the legislature's stated intent."); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) ("[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground [of improper legisla-

tive motive]."). In this case, the evidence demonstrates that the Legislature enacted SB14 to deter and detect voter fraud, and to preserve voter confidence in the integrity of elections.[19]

This Court guards against using "multiple inferences" to infer discriminatory purpose. *Jones v. City of Lubbock*, 727 F.2d 364, 371 (5th Cir. 1984) (reversing discriminatory-purpose finding resting on "multiple inferences" and reviewing each for whether it "goes too far"). Even if intentional discrimination by a legislature is considered to be a "question of fact," *Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 408 (5th Cir. 1991), a district court's finding of intentional discrimination is reviewed de novo when it rests on a mistaken application of the law, *see Maritrend, Inc. v. Serac & Co. (Shipping) Ltd.*, 348 F.3d 469, 470 (5th Cir. 2003) ("[t]he clearly erroneous standard of review does not apply to [those] factual findings made under an erroneous view of controlling legal principles"); CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§2585, 2589. That is the case here, and the district court's purported finding of intentional discrimination must be reversed.

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[19] *E.g.*, ROA.30198-30200; ROA.30194-30198; ROA.101159:25-101160:8; ROA.101178:5-6; ROA.100777:13-24; ROA.100801:19-100802:6; ROA.61359:85:19-22; ROA.62109:56:6-9; ROA.65521:49:13-15; ROA.61013:69:3-8; ROA.61026:122:14-23; ROA.64255:37:14-18; ROA.64280:138:13-22; ROA.78410.

B. The District Court Applied The Wrong Legal Standard To Find Intentional Discrimination.

A law does not violate the Equal Protection Clause "simply because it may affect a greater proportion of one race than another," *Rogers v. Lodge*, 458 U.S. 613, 618 (1982); it must be enacted for the specific purpose of disadvantaging individuals because of their membership in a minority group. As the Supreme Court has explained:

> "[d]iscriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (citation and footnote omitted). That means plaintiffs must do more than prove that the Legislature took a deliberate step that caused a disparate impact, or that the Legislature was aware that its actions could have a disparate impact. The district court paid lip service to this standard but flouted it in practice.

The district court's finding of intentional discrimination is subject to de novo review because it did not apply the standard required by the Constitution. The district court's conclusion rested on four findings: (1) SB14 was not justified as a policy matter; (2) SB14 addressed only one type of voter fraud; (3) the 2011 legislative session

was "highly racially-charged" (according to two Democrats who opposed SB14 and a plaintiff's expert); and (4) "the legislators' knowledge that SB 14 would clearly impact minorities disproportionately and likely disenfranchise them." ROA.27075 & n.204; ROA.27156 (reasoning that, despite SB14 providing free voter IDs, it "lacked any accommodations" for indigents, whom "the legislature knew" were disproportionately minorities). At most, these arguments might support a finding that the Legislature acted with volition or with awareness of consequences. But they cannot support the necessary inference that the Legislature enacted SB14 *because of* its alleged impact—a question the district court never answered. *Feeney* requires more, and the district court's failure to apply the governing legal standard requires reversal.

C. The District Court's Consideration Of The *Arlington Heights* Factors Was Legally Erroneous.

1. The District Court Erred By Considering Circumstantial Evidence When The Record Contained Neither Direct Evidence of Discriminatory Purpose Nor Proof Of A Racially Discriminatory Effect.

In *Arlington Heights*, the Court explained that discriminatory impact suffices to prove discriminatory intent when "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action." *Village of Arlington Heights v. Metro.*

Hous. Dev. Corp., 429 U.S. 252, 266 (1977); *cf. Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (exemption to laundromat regulation granted to 80 petitioners, who were not Chinese, but denied to 200 others, who were all Chinese). But in the ordinary case, "impact alone is not determinative, and the Court must look to other evidence." *Arlington Heights*, 429 U.S. at 266 (footnotes omitted). For those cases, where a disparate impact exists, the Court identified "subjects of proper inquiry in determining whether racially discriminatory intent existed." *Id.* at 268. The circumstantial analysis outlined in *Arlington Heights* therefore presumes a racially discriminatory impact, and the "subjects of proper inquiry" allow courts to determine whether disparate impact is intentional when no direct evidence of intent exists. *Arlington Heights* discussed secondary circumstantial proof only to determine whether the "arguably" racially disparate impact of a decision resulted from a racially discriminatory purpose.

Arlington Heights reflects "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 240 (1976). It follows that where there is no evidence of disparate impact or direct evidence of discriminatory purpose, *Arlington Heights* does not permit further examination of secondary circumstantial proof to identify a racially

discriminatory purpose. Because the record in this case does not establish a disparate racial impact in voting, *see supra* Part I.C, and contains no direct evidence of racial discrimination, the district court erred by considering additional circumstantial evidence.

2. Plaintiffs Had Unprecedented Access To The Best Evidence Of The Alleged Discriminatory Purpose, Yet They Turned Up Nothing.

There is yet a second reason why the district court was foreclosed from considering circumstantial evidence, as a matter of law. *Arlington Heights* allows circumstantial evidence to prove purpose because the Supreme Court assumed that direct evidence would usually be unavailable. *See* 429 U.S. at 268 & n.18 (explaining that federal district courts should avoid forcing legislators to submit to invasive discovery and to sit for depositions). But where invasive discovery into legislators' states of mind is permitted, the circumstantial evidence otherwise permitted by *Arlington Heights* must be discounted substantially.

Here, plaintiffs insisted that legislatively privileged documents and testimony were essential to their effort to uncover the purpose behind SB14. The district court improvidently granted plaintiffs unfettered access to direct evidence of legislative intent, compelling production of privileged documents and forcing legislators and legislative staff to sit for extensive depositions. Plaintiffs asserted that

this was the most probative evidence of the Legislature's purpose. Having granted plaintiffs access to this most probative evidence, the district court should have held plaintiffs to what this evidence proved: nothing at all. Instead, the district court allowed plaintiffs to prove their case entirely through circumstantial evidence. This was error.

In *Arlington Heights*, the Court recognized that "[p]lacing a decisionmaker on the stand" should be avoided because "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." 429 U.S. at 268 n.18 (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130-31 (1810)). The district court nevertheless gave plaintiffs unprecedented access to the privileged and confidential papers, communications, and testimony of Lieutenant Governor Dewhurst and dozens of legislators who voted for SB14.[20] This discovery included office files, bill books, personal correspondence concerning SB14, e-mail accounts (official and personal), and even confidential e-mail communications between legislators and lawyers at the Texas Legislative Council.[21] (The district court denied defendants' analogous

[20] *See, e.g.*, ROA.61 (June 6, 2014 minute order); ROA.27454-27459 (plaintiffs' exhibit list); ROA.100814:8-100816:25 (Dewhurst); ROA.101007:8-101069:5 (Patrick); ROA.62520:15-62521:1 (Straus); ROA.6502-09 (allowing access to documents).

[21] *See* ROA.27454-59 (plaintiffs' exhibit list); ROA.50 (Apr. 1, 2014 minute order); ROA.98086:18-98087:10.

request for discovery of other legislators' files. ROA.98447-98479; ROA.98481-98516.)

Legislators, staff, and the Lieutenant Governor produced thousands of documents containing their confidential communications and impressions concerning SB14.[22] They were also forced to testify in seven-hour depositions, where the United States and private plaintiffs asked about their conversations with other legislators, their mental impressions, and their motives for passing SB14. Plaintiffs who received these once-privileged documents included Democratic legislators who had opposed SB14, along with counsel for the Texas Democratic Party. And all this despite the Supreme Court's admonition in *Arlington Heights* that legislative privilege will, except in the most extraordinary instances, block testimony from legislative members. 429 U.S. at 268.

In demanding wholesale abrogation of the Republican legislators' privilege, plaintiffs insisted that their entire case on illicit purpose turned on gaining access to these privileged matters. They explained that such discovery would be dispositive.[23] This discovery

[22] *See, e.g.*, ROA.83310-83336; ROA.80237-80254;; ROA.80282-80283; ROA.80284; ROA.80452-80453; ROA.80454-80469; ROA.82638; ROA.82639; ROA.82643; ROA.82644; ROA.82645; ROA.82650-82654; ROA.82655-82657; ROA.82865-82867; ROA.83559-83562; ROA.83579-83585; ROA.83603-83614; ROA.83635-83637; ROA.83768-83769; ROA.83783-83786; ROA.84033; ROA.84034-84036; ROA.84075; ROA.84100-84102; ROA.84743-84758; ROA.84759-84778.

[23] *See, e.g.*, ROA.97657:19-22 (Ms. Baldwin: "and also the legislative documents, which are documents that are at the heart of the United States' claim

turned up nothing whatsoever. After plaintiffs collected thousands of privileged documents and conducted weeks of intrusive depositions, the district court could not identify *a single document or statement* from a legislator or staffer expressing a desire to suppress minority voting.

After plaintiffs' fishing expedition produced no fish, the district court should not have permitted plaintiffs to rely on circumstantial evidence alone. Having allowed plaintiffs to invade legislative privilege in search of direct evidence of legislative intent, the district court should have given diminished weight, if any, to the circumstantial evidence they fell back on. This Court recognized that principle in *Price v. Austin Independent School District*, 945 F.2d 1307 (5th Cir. 1991). There, the school-board members whose decision was challenged "testified fully without invoking any privilege" at trial. *Id.* at 1318. On appeal, plaintiffs argued that the district court erred in relying on that direct evidence, rather than on the circumstantial evidence, in finding no discriminatory purpose. *Id.* at 1317. This Court rejected that contention, explaining that if legislators

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that this law was passed in part based on a discriminatory intent"); ROA.97938:8-10 (Mr. Rosenberg: "[T]hat evidence is going to be very, very important in this case dealing with the intent behind SB 14 itself."); ROA.7226 (United States' opposition to motion to quash, demanding this "vital discovery from current and former legislators").

provide direct evidence—in contrast to what *Arlington Heights* presumed would occur—"the logic of *Arlington Heights* suggests that the [direct evidence] is actually stronger than the circumstantial evidence." *Id.* at 1318. Contrary to *Price*'s holding that the availability of direct evidence vitiates the force of circumstantial evidence, the district court failed to discount plaintiffs' circumstantial evidence at all, much less in proportion to the extraordinary availability of direct evidence. *See* ROA.27152-27153. This was error.

3. The District Court Erred By Purporting To Discern Legislative Intent From Statements By Legislators Who Opposed SB14.

The district court committed further error when it disregarded the testimony of legislators who voted for SB14 in favor of testimony from legislators who opposed the bill. *Arlington Heights* noted that "contemporary statements by members of the decisionmaking body" may be relevant to the question of legislative intent. 429 U.S. at 268. To determine the purpose behind SB14, the district court could have relied on evidence from the legislators who made the decision to pass it.[24] Instead, the district court improperly drew conclusions based on circumstantial evidence given by legislators who

[24] About the only statements from SB14 proponents that the district court relied on were five justifications offered for the law. ROA.27137-27139. The district court said this showed the Legislature's "asserted rationales shifted," but it then immediately said "[t]here is no question that the State has a legitimate interest in each of those issues." ROA.27137-27138.

opposed SB14. ROA.27070-27075 (finding that the law was "racially motivated" by citing legislators who "testified that SB14 had nothing to do with voter fraud but instead had to do with racial discrimination," as they concluded based on their own policy views that the statute could rest on no other purpose); ROA.27157 (repeating view that the legislative session was a "racially charged environment").

The district court's analysis is contrary to *Arlington Heights*. A legislator who voted *against* a law cannot provide, through his own subjective generalizations about legislative "environment," proof that legislators who voted *for* the law acted for improper reasons. *Cf., e.g.*, *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, No. 13-11043, 2015 WL 178989, at *7 (5th Cir. Jan. 14, 2015) (reversing judgment and rejecting reliance on plaintiff's own "hollow labels" describing a "good ol' boys club" atmosphere). As members of the opposition, these legislators do not qualify as decisionmakers under *Arlington Heights*. At least that was the reason given by the district court for refusing to abrogate their legislative privilege. ROA.98447-98479; ROA.98481-98516. In any event, their testimony is not probative as a matter of law. *See, e.g.*, *Mercantile Tex. Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 638 F.2d 1255, 1263 (5th Cir. Unit A Feb. 1981) ("statements by a bill's opponents . . . are entitled to little weight").

4. The Legislative History Identified By The District Court Suggests An Urgent Voter Demand For SB14—Not Racial Discrimination.

Where the legislative procedure used to enact a law is no more indicative of an improper purpose than a legitimate purpose, it cannot establish an improper purpose. *Cf., e.g.*, *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 280 (1968) ("not only is the inference that Cities' failure to deal was the product of factors other than conspiracy at least equal to the inference that it was due to conspiracy, thus negating the probative force of the evidence showing such a failure, but the former inference is more probable"). In this case, the very evidence that led the district court to infer racial discrimination proves that the procedural maneuvers used to enact SB14 had everything to do with politics and nothing to do with race.

The record leaves no question why the Republican majority took steps to ensure passage of a voter-ID bill in 2011. A few months before SB14's passage, a poll conducted by the University of Texas and the Texas Tribune revealed that an overwhelming 75% of Texas voters agreed that voters should be required to present a government-issued photo ID to vote. *See* ROA.87386-87387; *see also* ROA.77938-77945. Despite the popularity of voter-ID laws, Democrats had used extraordinary procedural maneuvers to block voter-ID bills in three previous legislative sessions. Republicans reasonably believed they had a mandate to pass a voter-ID bill. In fact,

legislators' testimony in this case often cited polling as a reason why they voted for SB14. *See, e.g.*, ROA.101038:4-8 (Sen. Patrick: "[I]t seems to me I remember a number where 96 percent of the Republicans and 74 percent of Democrats supported photo voter ID."); ROA.60366:55:11-22; ROA.101007:10-101008:5; ROA.101161:21-101164:24. This explains any "departures from normal practice" and the rejection of amendments designed to water down the bill.

The bill's opponents used drastic procedural measures to defeat voter-ID bills during the 2005, 2007, and 2009 sessions. Those tactics included "chubbing" (or filibustering) previous voter-ID bills and refusing to allow a vote in the Senate. ROA.100788:2-25; ROA.100793:21-100795:6; ROA.100807:24-100809:25; ROA.101041:23-101043:20; ROA.101043:24-101046:4. There is no indication that the prior bills were racially discriminatory, but they were blocked anyway. The district court also criticized the lack of compromise in SB14. *See* ROA.27155-27157. But proponents of the bill had repeatedly compromised before, only to have opponents block the bill with procedural maneuvers. In light of that history, the Republicans' effort to guard against similar tactics indicates nothing more than a desire for the bill to pass. ROA.101046:18-101049:4 ("[T]hey used the rules to stop the bill and we used the rules to pass the bill."); *see* ROA.101023:17-101029:8.

Ignoring the most ready conclusion, the district court determined this background could only support an inference of discrimination. This amounts to an improper application of the legal standard, and the district court's conclusion should be reviewed de novo. *Arlington Heights* did not establish that procedural departures are inherently race-based or discriminatory—legislatures waive, modify, or take advantage of procedures all the time. *See, e.g.*, Sarah Mimms, *How Democrats Play the Obstruction Game*, Nat'l J., Apr. 7, 2014, http://www.nationaljournal.com/congress/how-democrats-play-the-obstruction-game-20140407 (describing how Democratic former U.S. Senate Majority Leader Harry Reid blocked amendments by "filling the tree").

Whether a departure indicates racial discrimination depends on the question posed by *Feeney*: did the legislature act because of, or in spite of, race. In this case, the legislative history strongly supports the inference that SB14 passed because a Republican supermajority refused to let the Democratic minority block a popular bill for a fourth time. There is no contrary evidence, much less evidence that the 2011 Legislature suddenly decided to push the bill through because of a racially discriminatory motive.

Procedural maneuvers prove nothing without an affirmative link, based in evidence, to racial discrimination. The voter-ID law upheld by the Supreme Court in *Crawford* could have been passed

by the Texas Legislature in exactly the same way as SB14, and it would not thereby become unconstitutional.

The district court similarly erred in drawing impermissible inferences from SB14's legislative drafting history. ROA.27154 ("[T]he bill sponsors made each bill increasingly harsh, turning to procedural mechanisms to pass the bill rather than negotiation and compromise."); ROA.27156-27157 (finding the law as the "strictest" in the country and that "ameliorative amendments" were rejected). Drawing inferences of racial discrimination from this legislative drafting history is impermissible. There is no proof that the amendments rejected would have eased any alleged racial effects of the law, much less that the legislators acted *because* they wished racially disparate effects to occur. Legislators could easily have viewed the amendments as unnecessary, unduly complicating, or bad policy. Indeed, the law passed by the Legislature, SB14 itself, does not impose *any* cost to obtain the needed voter ID and calls for *free* voter ID. Tex. Transp. Code §521A.001(b).

5. The District Court Erroneously Relied On "Historical Background" To Impugn Current Officeholders Based On Decades-Old Incidents Of Racial Discrimination.

The last category of circumstantial evidence cited by the district court is the historical background of and "events leading up to" SB14. ROA.27153-27154. *Arlington Heights* noted, for example,

that the challenged action, despite its possible disparate impact, did not resemble official actions taken for invidious purposes. 429 U.S. at 267 (citing cases involving a 1946 competency test for voting, 1950s and 1960s laws in opposition to imminent school desegregation, and a locality suddenly changing its laws when it learned of plans to erect integrated housing). In other words, *Arlington Heights* observed that the law there was not the latest attempt by the legislature to cycle from one discriminatory mechanism to the next.

Nothing about the historical background impugns the voter-ID law here.[25] Texas now has significant minority voting participation. According to U.S. Census Bureau data, a greater percentage of black citizens in Texas voted in the November 2012 election (63.1%) than non-Hispanic whites (60.9%). U.S. Census Bureau, Voting and Registration in the Election of November 2012: Detailed Tables, https://www.census.gov/hhes/www/socdemo/voting/publica-

[25] The district court inaccurately and misleadingly stated that "[i]n every redistricting cycle since 1970, Texas has been found to have violated the VRA with racially gerrymandered districts." ROA.27032 & n.23. For example, in the 1990s, "the state legislature drew a congressional redistricting plan designed to favor Democratic candidates"—"the shrewdest gerrymander of the 1990s." *LULAC v. Perry*, 548 U.S. 399, 410 (2006). *Bush v. Vera* invalidated that plan because race was the "predominant factor" in creating three *additional* majority-minority districts that favored minorities. 517 U.S. 952, 959 (1996). This redistricting history therefore cannot show a pattern of minority-vote suppression.

tions/p20/2012/tables.html (Table 4b). And a slightly greater percentage of black citizens in Texas were registered to vote in the November 2012 election (73.2%) than non-Hispanic whites (73.0%). *Id.*

At the time of SB14's passage, the Supreme Court had specifically endorsed voter-ID laws as a lawful means of preventing fraud and boosting public confidence in the election process.[26] *See Crawford*, 553 U.S. at 195-96 (discussing the United States' extensive history of voter fraud). Congress too had agreed "that photo identification is one effective method of establishing a voter's qualification to vote and that the integrity of elections is enhanced through improved technology." *Id.* at 193. And prominent veterans of the Executive Branch had publicly endorsed photo-ID laws. The Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James A. Baker III, concluded:

> The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. *Photo IDs* currently are needed to

[26] The district court incorrectly explained that the SB14 "legislature also enacted at least two redistricting plans that were held by a three judge federal court to have been passed with a discriminatory purpose." ROA.27154. One of the cases cited by the district court was vacated. *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012) (three-judge court), *vacated by*, 133 S. Ct. 2886 (2013). And when a district court's decision is vacated on appeal, "its ruling and guidance" are "erased." *United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013). The other case, *Perez v. Texas*, is still pending in the district court. *See* 970 F. Supp. 2d 593 (W.D. Tex. 2013) (three-judge court).

> board a plane, enter federal buildings, and cash a check. *Voting is equally important.*

ROA.77850 (emphasis added). And, perhaps more importantly, an overwhelming majority of Texas voters supported a voter-ID law. *See supra* Part II.C.4.

D. SB14 Would Have Been Enacted Without Any Alleged Impermissible Purpose.

An Equal Protection Clause violation occurs only if racial discrimination is a cause-in-fact of the challenged legislative action. As the Court explained in *Arlington Heights,* if a law "was motivated in part by a racially discriminatory purpose," it may not be invalidated if the law would have been enacted "even had the impermissible purpose not been considered." 429 U.S. at 270 n.21 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)); *see Hunter v. Underwood*, 471 U.S. 222, 231 (1985). "[T]he causation is understood to be but-for causation, without which the adverse action would not have been taken . . . ." *Hartman v. Moore*, 547 U.S. 250, 260 (2006). Thus even if racial discrimination was part of the Legislature's purpose (and it certainly was not), SB14 would violate the Equal Protection Clause only if racial discrimination was essential to its enactment.

Although the district court made a passing reference to this element of the legal standard, it failed to apply this test. ROA.27157 & n.547. Instead of considering whether discriminatory purpose

was a but-for cause of SB14's enactment, the district court asked whether "SB 14's discriminatory features"—that is, the list of acceptable IDs and lack of an indigency provision—"were necessary components to a voter ID law." ROA.27158-27159. The district court shifted the burden to defendants to prove, not that SB14 would have been enacted regardless of whether discriminatory purpose existed, but that these voter ID provisions "were necessary to accomplish any fraud-prevention effort," "to prevent non-citizens from voting," and to increase "voter confidence or voter turnout." ROA.27158. In essence, the district court wanted defendants to prove what *Crawford* recognized as a matter of law: that voter-ID laws prevent voter fraud and safeguard voter confidence. 553 U.S. at 194-97.

Under the correct test, plaintiffs' claim would fail as a matter of law, as SB14 would have been enacted regardless of any alleged discriminatory purpose. Even under clear-error review, the district court's conclusion would demand reversal. Its own findings demonstrate that the Republican-dominated Legislature was going to pass the overwhelmingly popular SB14 for reasons that had nothing to do with any individual member's discriminatory motive. And as the district court put it, "the political lives of some legislators depended upon SB 14's success." ROA.27073. The political imperative to pass a voter-ID bill was sufficient to guarantee passage of SB14 in spite

of, not because of, any alleged impact on any group of voters. The discriminatory purpose claim therefore fails.

III. The District Court's Remedy Was Improper.

A. The District Court Erred In Requiring Texas To Preclear Voter ID Laws.

The district court's opinion purports to require Texas to seek the court's permission before implementing any change to the voting requirements in place before SB14. ROA.27168 (describing "the injunction to be entered" as requiring Texas to return to enforcing its pre-existing ID provisions and then further stating: "Any remedial enactment by the Texas Legislature . . . must come to the Court for approval . . . ."). This apparent attempt to impose preclearance fails for at least two reasons. First, the district court's *judgment* does not require the State to seek permission to change its voter ID laws. ROA.27192 (ordering return to pre-existing ID requirements, but not requiring approval to enact new voter-ID laws); *see* Fed. R. Civ. P. 58(a) (judgment must be document separate from opinion); Fed. R. Civ. P. 65(d)(1)(C) (requiring specific and detailed statement of acts restrained or required); *cf. Jennings v. Stephens*, 135 S. Ct. 793, 799 (2015) ("Courts reduce their opinions and verdicts to judgments precisely to define the rights and liabilities of the parties."). Second, the district court had no authority to impose a preclearance require-

ment on the State. The district court made clear that it did not rely on §3(c) of the Voting Rights Act. ROA.27167-27168. But without §3(c), the court had no authority to require preclearance at all, as Congress has delineated in §3(c) when preclearance is a permissible remedy.

Even if the district court's judgment imposed preclearance under §3(c), the remedy would be invalid as a matter of law. Preclearance is an extraordinary remedy that requires more than a single constitutional violation. The statute expressly requires that the court find "*violations* of the fourteenth or fifteenth amendment justifying equitable relief." 52 U.S.C. §10302(c) (emphasis added). Congress devised preclearance to thwart the "common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer v. United States*, 425 U.S. 130, 140 (1976); *see South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966).

Under *Shelby County*, preclearance remedies must be reserved for situations involving "'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination" that cannot be remedied through normal litigation. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2629-30 (2013). The district court's findings cannot possibly satisfy that standard. First, a single unconstitutional legislative act cannot justify pre-

clearance. Second, even if a single act could suffice, a finding of intentional voting discrimination based on circumstantial evidence cannot justify preclearance where there is not a shred of evidence that the challenged statute preventing anyone from voting. Third, this case demonstrates that the type of constitutional violations alleged can be remedied through traditional litigation. The district court's findings do not come close to showing the pervasive, flagrant, widespread, and rampant discrimination necessary for the drastic remedy of preclearance. Fourth, many of the district court's complaints about Texas' voter-ID law stem from the Department of Public Safety's rulemaking regarding the requirements for obtaining a free voter ID and preexisting fees for the supporting documentation chosen by the Department. In contrast, SB14 itself stated that the Department "may not collect a fee" for free voter IDs. Tex. Transp. Code §521A.001(b).

An order placing a State or its subunits into federal receivership based on a single constitutional violation—in addition to departing from the statutory text—would exceed any semblance of "congruence" or "proportionality." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). At the very least, this interpretation of §3(c) would raise serious constitutional questions and must be rejected for that reason alone. *See, e.g., Nw. Austin Mun. Util. Dist. No. One v. Holder*,

557 U.S. 193, 205-11 (2009) (avoiding preclearance constitutional question).

A preclearance regime premised on a single constitutional violation cannot be salvaged by resorting to non-proximate historical discrimination, no matter how egregious. A regime that "require[s] States to obtain federal permission before enacting any law related to voting" represents "a drastic departure from basic principles of federalism." *See Shelby Cnty.*, 133 S.Ct. at 2618. Current burdens—particularly burdens that subject a State legislature to prior restraint—"must be justified by current needs." *Nw. Austin*, 557 U.S. at 203; *see Shelby Cnty.*, 133 S. Ct. at 2629.

Section 4(b)'s preclearance coverage formula was invalidated because it was "based on 40-year-old facts having no logical relation to the present day." *Id.* Section 3(c) does not authorize a single district court to replicate that unconstitutional coverage formula by relying on the same 40-year-old transgressions. But that is exactly what the district court relied on—both to find the predicate constitutional violation and to justify preclearance. ROA.27029-27031 ("1895-1944: All-White Primary Elections"; "1905-1970: Literacy and 'Secret Ballot' Restrictions"; "1902-1966: Poll Taxes"; "1966-1976: Voter Re-Registration and Purging"). To the extent the district court attempted to link that history to the present, it relied on criminal acts by private individuals, ROA.27028 (describing the

murder of James Byrd), actions by county officials, ROA.27031 (describing a longstanding controversy with officials in Waller County), and a factually inaccurate summary of statewide redistricting, ROA.27032; *see supra* Part II.C.5. Even if the historical record is viewed in the worst possible light—as it is in the district court's opinion—it cannot support the conclusion that Texas has engaged in or will engage in the 1960s-style "common practice . . . of staying one step ahead of the federal courts by passing new discriminatory voting laws." *Beer*, 425 U.S. at 140.

Assuming that a single legislative act could so flagrantly discriminate as to merit preclearance, that act would look nothing like SB14. Receptive as the district court was to plaintiffs' claims, it found no evidence that SB14 prevented anyone from voting or that any member of the Legislature supported SB14 because he or she wanted to harm minority voting rights.

B. The District Court Erred In Facially Invalidating SB14.

Facial invalidation of SB14 is not proper under plaintiffs' effects-based claims. The district court repeatedly claimed that it was resolving only an "as-applied challenge" to SB14—and not a "facial" challenge. ROA.27115, 27121, 27129, 27167. Yet the law is clear that, in an as-applied challenge, a district court may not extend relief beyond the named plaintiffs to the lawsuit. *See, e.g.*, *Jackson*

Women's Health Org. v. Currier, 760 F.3d 448, 458 (5th Cir. 2014). The district court's judgment, in contrast, "enjoin[s] the Defendants from enforcing the voter-identification provisions, Sections 1 through 15 and 17 through 22, of SB 14." ROA.27192. It also orders the State "to return to enforcing the voter-identification requirements for in-person voting in effect immediately prior to the enactment and implementation of SB 14." ROA.27192. Even accepting the district court's questionable figures, some 95.5% of registered voters in Texas already have an SB14-compliant ID. ROA.27116. The district court's blanket permanent injunction against the enforcement of SB14 therefore was not a permissible remedy for plaintiffs' effects-based claims.

Even under the district court's reasoning, SB14 itself does not constitute a poll tax, much less a poll tax on every voter. It is the Department of Public Safety's rules that require a birth certificate to obtain a free voter ID, 37 Tex. Admin. Code §15.182, and preexisting statutes required the imposition of a $2 fee, Tex. Health & Safety Code §191.0045(e). Any remedy must be directed at the Department's rules or the preexisting statutory fee requirement, as applied to those seeking the birth certificate for voting.

Facial invalidation is equally improper on plaintiffs' unconstitutional-burden and §2 claims. If the State enforced SB14 while repealing the $2-$3 fee for birth certificates, at least as applied to

those who need a birth certificate to obtain SB14-compliant ID, that would cure any alleged unconstitutional burden or §2 violation. At the very least, the remedy must allow for the State to resume enforcement of SB14 if the $2 or $3 fee is waived or repealed.

Additionally, §25 of SB14 contains a severability clause that requires courts to sever not only the discrete statutory provisions of SB14, but also the statute's *applications to individual voters*: "Every provision in this Act and every application of the provisions in this Act are severable from each other." Under this severability clause, any relief must be limited to the individual voters or groups of voters whose legal rights have been or will be violated. *See Leavitt v. Jane L.*, 518 U.S. 137, 138 (1996) (per curiam); *Voting for Am.*, 732 F.3d at 398.

Conclusion

The judgment of the district court should be reversed, and judgment should be rendered for defendants.

Respectfully submitted.

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