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-CRUMMEY; KEN GANDY; GORDON BENJAMIN; EVELYN BRICKNER, *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, CARLOS CASCOS, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; STATE OF TEXAS; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, *Defendants-Appellants.*

(caption continued on inside cover)

On appeal from the U.S. District Court, Southern District of Texas
Nos. 2:13-cv-193, 2:13-cv-263, 2:13-cv-291, and 2:13-cv-348

BRIEF FOR TWENTY-SEVEN U.S. SENATORS AND REPRESENTATIVES FROM TEXAS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

S. Kyle Duncan
Gene C. Schaerr
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 714-9492
KDuncan@Schaerr-Duncan.com

Counsel for Amici Curiae

(caption continued)

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

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

v.

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

TEXAS STATE CONFERENCE OF NAACP BRANCHES; MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES, *Plaintiffs-Appellees*,

v.

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

LENARD TAYLOR; EULALIO MENDEZ, JR.; LIONEL ESTRADA; ESTELA GARCIA ESPINOZA; MARGARITO MARTINEZ LARA; MAXIMINA MARTINEZ LARA; LA UNION DEL PUEBLO ENTERO, INCORPORATED, *Plaintiffs-Appellees*,

v.

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

SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES

No. 14-41127, *Marc Veasey, et al. v. Greg Abbott, et al.*

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 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.

U.S. Senators
Hon. John Cornyn
Hon. Ted Cruz

U.S. Representatives
Hon. Brian Babin
Hon. Joe Barton
Hon. Kevin Brady
Hon. Michael C. Burgess, M.D.
Hon. John Carter
Hon. K. Michael Conaway
Hon. John Culberson
Hon. Blake Farenthold
Hon. Bill Flores
Hon. Louie Gohmert
Hon. Kay Granger
Hon. Jeb Hensarling
Hon. Will Hurd
Hon. Sam Johnson
Hon. Kenny Marchant
Hon. Michael T. McCaul
Hon. Randy Neugebauer
Hon. Pete Olson
Hon. Ted Poe
Hon. John Ratcliffe
Hon. Pete Sessions
Hon. Lamar Smith
Hon. Mac Thornberry
Hon. Randy Weber
Hon. Roger Williams

Counsel for *Amici Curiae*
S. Kyle Duncan
Gene C. Schaerr
SCHAERR | DUNCAN LLP

/s/ S. Kyle Duncan
S. Kyle Duncan
Attorney of record for Amici Curiae

TABLE OF CONTENTS

Supplemental Certificate of Interested Parties i

Table of Authorities iii

Interest of *Amici Curiae* 1

Introduction 1

Summary of Argument 5

Argument 9

I. The panel misinterpreted Section 2 of the Voting Rights Act 9

A. Plaintiffs must show that Texas's voter ID law excludes minority voters from the political process by imposing disparate burdens 10

B. Plaintiffs must show that Texas's voter ID law proximately causes the disparate burdening of minority voters 17

C. Plaintiffs failed to show—and the panel did not find—that Texas's voter ID law harms minorities relative to an objective benchmark 21

D. The panel's interpretation of Section 2 would violate the Constitution 25

Conclusion 31

Certificate of Compliance 32

Certificate of Service 33

TABLE OF AUTHORITIES

Cases

Abrams v. Johnson,
521 U.S. 74 (1997) 27

Arizona v. Inter Tribal Council of Arizona, Inc.,
133 S. Ct. 2247 (2013) 20, 30

Arlington Heights v. Metrop. Housing Dev. Corp.,
429 U.S. 252 (1977) 26

Burdick v. Takushi,
504 U.S. 428 (1992) 12

Chisom v. Roemer,
501 U.S. 380 (1991) 17, 25

City of Boerne v. Flores,
521 U.S. 507 (1997) 26, 27

City of Mobile v. Bolden,
446 U.S. 55 (1980) 9, 26

Crawford v. Marion County Election Board,
533 U.S. 181 (2008) 2-3, 7, 13

Crowell v. Benson,
285 U.S. 22 (1932) 29

Frank v. Walker,
768 F.3d 744 (7th Cir. 2014) 5, 11, 16

Georgia v. Ashcroft,
539 U.S. 461 (2003) 25

Gonzalez v. Arizona,
677 F.3d 383 (9th Cir. 2012) 19-20

Gregory v. Ashcroft,
501 U.S. 452 (1991) 29-30

Holder v. Hall,
512 U.S. 874 (1994) ..... passim

Irby v. Virginia State Bd. of Elections,
889 F.2d 1352 (4th Cir. 1989) 10-11, 19

Johnson v. De Grandy,
512 U.S. 997 (1994) 24, 25

League of United Latin Am. Citizens v. Clements,
999 F.2d 831 (5th Cir. 1993) 20

League of United Latin Am. Citizens v. Perry,
548 U.S. 399 (2006) 12, 27, 28

Miss. Republican Exec. Comm. v. Brooks,
469 U.S. 1002 (1984) 14

N.C. State Conf. of the NAACP v. McCrory,
No. 1:13cv658, 2016 WL 204481 (M.D.N.C. Jan. 15, 2016) 13

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,
551 U.S. 701 (2007) 29

Reno v. Bossier Parish Sch. Bd.,
528 U.S. 320 (2000) 21, 24

Ricci v. DeStefano,
557 U.S. 557 (2009) 29

Salas v. Sw. Texas Jr. Coll. Dist.,
964 F.2d 1542 (5th Cir. 1992) 10, 19

Shaw v. Hunt,
517 U.S. 899 (1996) 28

Thornburg v. Gingles,
478 U.S. 30 (1986) 7, 9, 14, 15, 17-18

Veasey v. Abbott,
796 F.3d 487 (5th Cir. 2015) 1, 6

Veasey v. Perry,
71 F.Supp.3d 627 (S.D. Tex. 2014) 1-2

Wygant v. Jackson Bd. of Educ.,
476 U.S. 267 (1986) 29

Statutes

52 U.S.C. § 10301 ..... passim

Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws
619 ..... passim

Tex. Elec. Code §63.0101 4

Tex. Health & Safety Code §191.0046 4

Tex. Transp. Code §521A.001 4

Constitutional Provisions

U.S. Const., amend XIV 8, 28-30

U.S. Const., amend. XV 8, 26-28

Rules

Fed. R. App. Proc. 29 1

Other Authorities

128 Cong. Rec. 14133 (1982) 15

COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS (Jimmy Carter & James A. Baker, III, co-chairs) (2005) 3

H.R. Rep. No. 97-227 (1981) 14

NAT'L CONF. OF STATE LEGISLATURES, VOTER ID, *available at* http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx 23

NAT'L CONF. OF STATE LEGISLATORS, *THE CANVASS*, VOTER REGISTRATION EXAMINED (March 2012) 17

S. Rep. No. 97-417, 97th Cong., 2d Sess. 28 (1982) 9

INTEREST OF THE *AMICI CURIAE*

Amici curiae are United States Senators and Representatives representing the State of Texas. They support efforts to ensure the integrity of and public confidence in the electoral process through the use of evenhanded and non-burdensome voter identification measures. They strongly believe SB 14 is one such effort that serves an important function in preserving fair elections in the State of Texas.[1]

INTRODUCTION

This case involves challenges by the United States and private parties to Texas's voter identification law, SB 14, which generally requires voters to present certain government-issued photo ID when voting in person. Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws 619. Accepting all of plaintiffs' claims, the district court invalidated SB 14 on the grounds that the law "was enacted with a racially discriminatory purpose, has a racially discriminatory effect, is a poll tax, and unconstitutionally burdens the right to vote." *Veasey v. Abbott*, 796 F.3d 487, 493 (5th Cir. 2015) (citing *Veasey v. Perry*, 71

[1] Some but not all parties to this appeal have consented to the filing of this *amicus* brief. In accordance with Federal Rule of Appellate Procedure 29(a), counsel for *amici* has filed a motion for leave to file this brief. No person or entity other than *amici* or their counsel had any role in authoring this brief or made a monetary contribution intended to fund the brief's preparation or submission.

F.Supp.3d 627, 633 (S.D. Tex. 2014)). Like Texas, *Amici* believe the district court erred in accepting any of these claims. *See* Suppl. En Banc Br. for Appellants, at 13-55 (Apr. 15, 2016). This brief focuses, however, on the claim that SB 14 has a discriminatory effect in violation of Section 2 of the Voting Rights Act. *See* 52 U.S.C. § 10301(a) (proscribing any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color"). In reaching the conclusion that SB 14 has a discriminatory effect, the panel interpreted Section 2 in a way that departs from its text, misapplies controlling precedent, and would render Section 2 unconstitutional under the Fourteenth and Fifteenth Amendments.

Proper evaluation of SB 14 under the Voting Rights Act must take into account the settled benefits of voter identification laws. As recognized in *Crawford v. Marion County Election Board*, 533 U.S. 181 (2008), voter identification laws provide at least three related benefits that are "unquestionably relevant" to the State's interest in "protecting the integrity and reliability of the electoral process." *Id.* at 191 (plurality op.). First, voter identification laws "improve and modernize"

antiquated and inefficient election procedures, thereby "establishing a voter's qualification to vote," "ensur[ing] that citizens are only registered in one place," and fostering "orderly administration and accurate recordkeeping," by, for instance, cutting down on "inflated voter rolls." *Id.* at 191, 193, 196-97 (plurality opinion) (citing COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS § 2.5 (Jimmy Carter & James A. Baker, III, co-chairs) (2005) ("Carter-Baker Report")). Second, voter identification laws aid in "deterring and detecting voter fraud"—for instance by "counting only the votes of eligible voters" and preventing "in-person voter impersonation at polling places"—and thus help prevent fraud from "'affect[ing] the outcome of a close election.'" *Id.* at 191, 193-94, 195-96 (plurality opinion) (quoting Carter-Baker Report, at §2.5). Third, voter identification laws help "[s]afeguard[ ] voter confidence" and "encourage citizen participation in the democratic process," by "protecting public confidence in the integrity and legitimacy of representative government." *Id.* at 191, 195-96, 197; *see also, e.g., id.* at 230 (Souter, J., dissenting) (agreeing that States have a "legitimate interest in safeguarding public confidence").

Texas's SB 14 is an excellent example of a voter identification law that fosters each of these benefits through evenhanded, race-neutral, and non-burdensome means. Not only does Texas accept an array of state and federal documents to comply with SB 14,[2] but the Texas Legislature mandated that state officials issue one means of complying—a Texas election identification certification ("EIC")—to voters *for free*. *See* Tex. Transp. Code §521A.001(a)-(b) (Department of Public Safety "may not collect a fee" for an EIC); Tex. Health & Safety Code §191.0046(e) (providing that state and local officials "shall not charge a fee" to obtain supporting documents required for an EIC). Simply put, an application of Section 2 of the Voting Rights Act that would invalidate such a commonsense measure cannot be correct. The *en banc* Court should rule that SB 14 does not have a discriminatory effect in violation of Section 2 of the Voting Rights Act.

[2] *See* Tex. Elec. Code §63.0101 ("acceptable form[s] of photo identification" include a Texas driver's license, a Texas election identification certificate, a Texas personal identification card, a Texas handgun license, or a U.S. military identification card, citizenship certificate, or passport that contains the person's photograph).

SUMMARY OF ARGUMENT

Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, contemplates two types of claims. One is a "vote-dilution" claim—a claim that, despite equal ballot access, districting practices unlawfully dilute minority voting power. The other is a "vote-denial" claim, which targets voting practices that unlawfully deny protected individuals the opportunity to cast ballots. This case only presents a "vote-denial" challenge to SB 14.

In a vote-denial challenge, Section 2 does not require States to maximize minority opportunities by eliminating the usual burdens of voting to overcome socioeconomic disparities. Nor does it invalidate voting practices because they "ha[ve] a disparate effect on minorities." *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014). Instead, Section 2 prohibits states from imposing voting practices that actually cause minority voters to be disproportionately *excluded* from the political process. *See* 52 U.S.C. § 10301(b) (a Section 2 violation is shown if a State's political processes are not "equally open" to members of a protected class in that they have "less opportunity" than others to participate).

Given that high bar, it ought to be extremely difficult to mount a viable Section 2 challenge to a race-neutral law that, like SB 14, only defines *how* eligible voters go about voting. A regulation of the time, place, and manner of elections does not deny anyone the "opportunity" to vote, *see id.*; it merely regulates when, where, and how that opportunity must be exercised. For that reason, valid vote-denial challenges aimed solely at the *process* of voting are rare. Plaintiffs in this situation must show that a facially neutral electoral process is somehow not "equally open" and provides minorities "less opportunity" than other voters. *Id.*

The panel here adopted a radically different theory of Section 2. The panel invalidated Texas's race-neutral regulation of the time, place, and manner of voting through its voter ID law. It found that minorities are less likely to possess qualifying IDs because of underlying socioeconomic inequalities, which the panel predicted could lead to a disparity in minority voter participation. *Veasey*, 796 F.3d at 512-13. The panel thus concluded that Texas's race-neutral election process violates Section 2. *Id.* at 513. For several reasons, this novel theory contradicts both Section 2's plain language and Supreme Court and

Circuit precedent identifying the sort of discriminatory "results" proscribed by the statute.

First, Section 2 prohibits a regulation of the time, place, or manner of voting *only* if it "results" in minorities' having "less *opportunity*" to vote because the system is not "equally open" to them. 52 U.S.C. §10301. SB 14 does not do so, because, it does not *deny or abridge* anyone's right to vote; rather, it imposes only the "usual burdens of voting." *Crawford*, 553 U.S. at 198 (Stevens, J.).

Second, and relatedly, if the State's voting system *is* "equally open" and provides equal "opportunity," any relative shortfall in minority participation cannot be the "result" of, or caused by, any voting "practice" "imposed" by the State. As Justice Brennan emphasized in the seminal decision of *Thornburg v. Gingles*, a voting practice has a prohibited "result" only if the practice *itself* "proximately cause[s]" a disproportionate exclusion of minority voters. 478 U.S. 30, 50 n. 17 (1986).

Third, Section 2 plaintiffs must establish that the challenged practice results in less minority opportunity compared to what would result from an "*objective*" "benchmark," not compared to what would

result from a minority-maximizing alternative. *Holder v. Hall*, 512 U.S. 874, 881 (1994) (opinion of Kennedy, J.). Here, however, the panel did not point to any "benchmark" of ID requirements, let alone a benchmark that is *objectively superior* to SB 14.

Finally, the panel's reading of Section 2 would render it unconstitutional. Requiring states not only to refrain from adopting laws that cause minority voters to have less opportunity (which Section 2 clearly does) but also to rearrange their laws to maximize or achieve proportional minority participation (as the panel required) would exceed Congress's power to enforce the Fifteenth Amendment's prohibition on intentional discrimination. Moreover, requiring States to base their laws on what most benefits minority voters, rather than on race-neutral considerations, or to act in a racially biased way to remedy societal disparities, would violate the Equal Protection Clause. The Court should avoid these grave constitutional concerns by rejecting the panel's interpretation of Section 2.

ARGUMENT

I. THE PANEL MISINTERPRETED SECTION 2 OF THE VOTING RIGHTS ACT

As originally enacted, Section 2 prohibited States from "impos[ing] or appl[ying]" any voting practice "to deny or abridge the right . . . to vote on account of race or color." That language paralleled the Fifteenth Amendment. And because the Fifteenth Amendment prohibits only "purposeful" discrimination, the Supreme Court concluded that Section 2 likewise prohibited only purposeful discrimination. *City of Mobile v. Bolden*, 446 U.S. 55, 60–61 (1980) (plurality op.).

In 1982, however, Congress revised the law to make a showing of purposeful discrimination unnecessary. It amended what is now subsection (a) to prohibit States from imposing or applying voting practices "in a manner which *results in* a denial or abridgment of the right . . . to vote on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). Congress also added what is now subsection (b), which provides that

> [a] violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes . . . are not equally open to participation by members of a [protected] class . . . in that its members have less opportunity than other members of the electorate to

> participate in the political process and to elect representatives of their choice.

Id. § 10301(b). These changes reflected the belief that requiring Section 2 plaintiffs to show purposeful discrimination leads to "'unnecessarily divisive . . . charges of racism on the part of individual officials or entire communities,' . . . places an 'inordinately difficult' burden of proof on Plaintiffs, and . . . 'asks the wrong question.'" *Gingles*, 478 U.S. at 44 (quoting S. Rep. No. 97-417, 97th Cong., 2d Sess. 28, at 36 (1982)). The right question is whether the law causes minorities to be disproportionately excluded from voting, not why it was enacted. While this legislative change had the effect of expanding the scope of Section 2 liability, in this case the panel went far beyond what Section 2's language can bear.

A. Plaintiffs Must Show That Texas's Voter ID Law Excludes Minority Voters from the Political Process by Imposing Disparate Burdens

The text and history of Section 2 show that, in the vote-denial context at issue here, the law prohibits only those voting practices that disproportionately exclude minority voters from the political process. It does not require States to adopt practices to affirmatively enhance minority voting rates.

First, Section 2(a) provides that a voting practice may not be "*imposed or applied* by any State . . . in a manner which *results* in a denial or abridgement of the right . . . to vote on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). Section 2 thus applies only when a State "impose[s] or applie[s]" a voting practice that "results in," or *causes*, a forbidden result. *See Salas v. Sw. Texas Jr. Coll. Dist.*, 964 F.2d 1542, 1554-56 (5th Cir. 1992); *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1358 (4th Cir. 1989). It must be the *state-imposed voting practice* that causes the forbidden result. Thus, while Section 2 forbids state-imposed practices that disproportionately exclude minority voters, it does not reach disparities in voter participation resulting from other sources. *See, e.g., Frank*, 768 F.3d at 755 (emphasizing that a section 2 vote-denial claim must be supported by evidence of "discrimination by the [government] defendants").

Second, Section 2(b) provides that a challenger may show a violation of Section 2(a) by demonstrating that "the political processes . . . are not *equally open to participation* by members of a [protected class] . . . in that its members have less *opportunity* . . . *to participate* in the political process and to elect representatives of their

choice." 52 U.S.C. § 10301(b) (emphasis added). A political process is "equally open to participation" by members of all races if everyone "has the same opportunity" to vote free from state-created barriers that impose differential burdens. *Frank*, 768 F.3d at 755. As the Supreme Court has emphasized, "the ultimate right of § 2 is equality of *opportunity*." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006) (emphasis added). It does not require "electoral advantage," "electoral success," "proportional representation," or electoral "maximiz[ation]" for minority groups. *Bartlett v. Strickland*, 556 U.S. 1, 20 (2009). And, crucially, an opportunity does not become unequal simply because some groups "are less likely to *use* that opportunity." *Frank*, 768 F.3d at 753 (emphasis in original). For this reason, laws that provide an *equal opportunity* satisfy Section 2 regardless of whether they have *proportionate outcomes*.

Third, Section 2(a) prohibits only those voting practices that "result[] in a *denial or abridgment of the right . . . to vote* on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). This language clarifies that Section 2 does not prohibit ordinary race-neutral regulations of the time, place, and manner of elections, because such

regulations do not deny or abridge anyone's right to vote. "Election laws will invariably impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). States must determine when and where voting must occur, how voters must establish their eligibility, what kind of ballots they must use, how the ballots must be counted, and so on. Shouldering these "usual burdens of voting" is an inherent part of voting. *Crawford*, 553 U.S. at 198 (Stevens, J.). And because such baseline requirements are an inherent part of the right to vote, they cannot be said to *deny or abridge* the right to vote. The same is true of photo ID laws, since they do not "'represent a significant increase over the usual burdens of voting.'" *N.C. State Conf. of the NAACP v. McCrory*, No. 1:13CV658, 2016 WL 204481, at *10 (M.D.N.C. Jan. 15, 2016) (quoting *Crawford*).

Fourth, for these reasons, Section 2 "does not condemn a voting practice just because it has a disparate effect on minorities." *Frank*, 768 F.3d at 753. If Congress wanted to prohibit *all* disparate effects, it could have simply said so. "[T]here wouldn't have been a need for" subsection (b) to ask whether the political process is "equally open," or whether members of minority races have "less opportunity" to

participate. *Id.* at 753 (emphasis and internal quotations removed). Terms such as "impose," "denial," "abridgement," "equally open," and "less opportunity" show that Section 2 does not target just any disparate result; it targets only the disparate *exclusion* of minority voters caused by the voting practice. Such disparate exclusion can occur only if the state-imposed voting qualification disproportionately "denies" minorities the vote or if the state-controlled processes for voting disparately "abridge" the right to vote by imposing unequal burdens on minorities—such as making polling places relatively inaccessible to them.

Fifth, the legislative history of the 1982 amendments confirms that Congress meant what it said. "It is well documented" that the 1982 amendments were the product of "compromise." *Holder*, 512 U.S. at 933 (Thomas, J., concurring in the judgment); *see*, *e.g.*, *id.* at 956 (Ginsburg, J., dissenting); *Thornburg v. Gingles*, 478 U.S. 30, 84 (1986) (O'Connor, J., concurring in the judgment). The original version of the 1982 amendments proposed by the House of Representatives would have prohibited "all discriminatory 'effects' of voting practices." But "[t]his version met stiff resistance in the Senate." *Miss. Republican*

Exec. Comm. v. Brooks, 469 U.S. 1002, 1010 (1984) (Rehnquist, J., dissenting) (citing H.R. Rep. No. 97-227, at 29 (1981)). The Senate feared that such a law would "lead to requirements that minorities have proportional representation, or . . . devolve into essentially standardless and ad hoc judgments." *Id.* Senator Dole stepped in with a compromise, which Congress eventually enacted. *See Gingles*, 478 U.S. at 84 (O'Connor, J., concurring in the judgment). The key to this compromise was that it prohibited states from providing unequal voter *opportunity*, but did not require equality of political *outcomes*. Senate Dole assured his colleagues that, under the compromise, Section 2 would "[a]bsolutely not" allow challenges to a jurisdiction's voting mechanisms "if the process is open, if there is equal access, if there are no barriers, direct or indirect, thrown up to keep someone from voting . . . , or registering . . . ." 128 Cong. Rec. 14133 (1982). It would do violence to this legislative compromise to invalidate a voting practice that gives everyone equal access to the political process—again, Texas mandates that photo ID cards be provided to the public *for free*—based merely on whether members of some groups may happen to use that access more than others.

At bottom, the panel's theory fundamentally rewrites Section 2. It replaces a ban on *state-imposed barriers* to minority voting with an affirmative duty of *state augmentation* of minority voting. It converts a prohibition on *abridging* minority voters' right to vote into a mandate for *boosting* minority voter turnout. It transforms a guarantee of equal *opportunity* into a guarantee of equal *outcomes*. And it revamps a law about disproportionate *exclusionary* effects into a law about *all* disproportionate effects. None of this is consistent with the statutory text or the legislative compromise underlying its passage.

The consequences of the panel's interpretation vividly illustrate why Congress could not have intended it. If (as the panel says) Section 2 really forbids all voting practices under which majority and minority voters participate at different rates, it would "swee[p] away almost all registration and voting rules"—not just voter ID. *Frank*, 768 F.3d at 754. Indeed, the requirement of registration itself would be invalid if, hypothetically, someone could show that minority voters disproportionately find it difficult to assemble the documents that registration typically requires. Yet the practice of voter registration was ubiquitous in 1982 and dates to the 1800s. *See* Nat'l Conf. of State

Legislators, *The Canvass*, Voter Registration Examined (March 2012). It is unthinkable that, when Congress amended Section 2 in 1982, it meant to prohibit a voting practice such as registration—especially when not a single proponent, opponent, or commentator ever mentioned such an outcome anywhere in the 1982 Amendments' extensive and divisive legislative history. *See Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) ("Congress'[s] silence in this regard can be likened to the dog that did not bark."). Any reading of Section 2 that would eliminate such a wide swath of hitherto uncontroversial voting laws must be rejected. Congress enacted Section 2 to end discrimination, not to put a stop to ordinary election laws that help ensure the integrity of the entire voting system.

B. Plaintiffs Must Show That Texas's Voter ID Law Proximately Causes the Disparate Burdening of Minority Voters

To violate Section 2, a voting practice must proximately cause harm to minority voters. That is so because Section 2 liability is established only if a voting practice "*imposed* . . . by [the] *State*" "*results in* a denial or abridgement of the right of any citizen . . . to vote on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). Thus,

if the alleged "abridgement" "results" from something *other* than the *state-imposed practice*, Section 2 does not reach it.

Precedent confirms the force of this textual requirement. In *Thornburg v. Gingles*, Justice Brennan's majority opinion emphasized this requirement. Section 2, the Court stated, "only protect[s] racial minority vote[r]s" from denials or abridgements that are "proximately caused by" the challenged voting practice. 478 U.S. at 50 n.17. Applying this rule in the vote-dilution context, *Gingles* held that plaintiffs challenging at-large, multi-member districts must show, as a "necessary precondition[]" to establishing a potential Section 2 violation, that it was the state-imposed voting practice—*i.e.*, the multi-member electoral system—that caused the disparate exclusion of minority candidates from the relevant offices. *Id.* at 50. Section 2 plaintiffs accordingly must show that challenged vote dilution is *not* attributable to a general socioeconomic condition—*i.e.*, the absence of a minority community "sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* If they cannot make that showing, then the state-imposed "*multi-member form* of the district cannot be responsible for minority voters' inability to elect its

[*sic*] candidates." *Id.* (emphasis in original). And if the voting procedure "cannot be blamed" for the alleged dilution, there is no cognizable Section 2 problem because the "results" standard does "*not assure racial minorities proportional representation*"—but only protection against "diminution proximately caused by the districting plan." *Id.* at 50 n.17 (emphasis in original). It follows that, in the vote denial context, a Section 2 plaintiff must show that the alleged deprivation flows from a state-imposed voting practice rather than some factor not within the State's control.

That is why this Court has already rejected a Section 2 claim that was premised solely upon a statistical disparity in voter turnout. *Salas v. Sw. Texas Jr. Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992). The Court made clear that Section 2 requires more than proof of a racial disparity; plaintiffs must prove that "the given electoral practice is responsible for" the prohibited discriminatory result. *Id.* at 1554. Likewise, the Fourth Circuit rejected a Section 2 challenge to Virginia's decision to select school-board members by appointment rather than election. Although there was a "significant disparity . . . between the percentage of blacks in the population and the racial composition of the

school boards," there was "no proof that the appointive process caused the disparity." *Irby*, 889 F.2d at 1358 (internal quotations removed). Instead, the disparity was attributable only to the reality that black people were "not seeking school board seats in numbers consistent with their percentage of the population." *Id.* Along similar lines, the Ninth Circuit explained that "a § 2 challenge based purely on a showing of some relevant statistical disparity between minorities and whites, without any evidence that the challenged voting qualification *causes* that disparity, will be rejected." *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc) (emphasis added) (citation and quotation marks omitted), *aff'd sub nom. Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013).

Here, Plaintiffs have not shown—and the panel did not find—that SB 14 proximately causes the exclusion of minority voters. Nor could it. For one thing, there was no proof that, following SB 14, "participation in the political process is in fact depressed among minority citizens"—a basic requirement of a Section 2 claim. *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993). For another, even if there were such proof, plaintiffs did not establish that SB 14

caused it. Under Texas law, every person has an equal right to vote and an equal right to secure free photo IDs. Even if some persons may choose not to take advantage of these opportunities, that provides no evidence that SB 14 is the proximate cause of this phenomenon. The panel thus erred in finding a Section 2 violation.

C. Plaintiffs Failed To Show—And The Panel Did Not Find—That Texas's Voter ID Law Harms Minorities Relative to an Objective Benchmark

To demonstrate that a voting practice violates Section 2, a challenger must also identify an "objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice." *Holder*, 512 U.S. at 881 (opinion of Kennedy, J.). This requirement of an "objective standard" to select a benchmark follows from Section 2's text. Section 2(a) prohibits practices that result in the "denial or abridgement" of voting rights on account of race or color. The concept of abridgement "necessarily entails a comparison." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) (*Bossier II*). "It makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice." *Id.* In Section 2 cases, "the comparison must be made with . . . what the right

to vote *ought to be*." *Id.* The benchmark for measuring "how hard it should be" must be objective, not one that is purportedly superior only because it enhances minority voting power or participation. *Holder*, 512 U.S. at 880 (opinion of Kennedy, J.). In some cases, "the benchmark for comparison . . . is obvious." *Id.* For example, the effect of a poll tax can be evaluated by comparing a system with a poll tax to a system without one. In other cases, however, there may be "no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice." *Id.* at 881. If that is so, then "the voting practice cannot be challenged . . . under § 2." *Id.*

In *Holder*, the Supreme Court rejected a Section 2 challenge asserting that the use of a single-member commission instead of a five-member commission "resulted" in vote dilution. The five-member alternative clearly would "enhance" minority voting strength because the minority community was large enough to elect one out of five commissioners, *id.* at 878. Nevertheless, there was "no principled reason" why the five-member alternative ought to be the "benchmark for comparison" as opposed to a "3-, 10-, or 15-member body." *Id.* at 881. This establishes that Section 2 plaintiffs must show that the State

has deprived minorities of voting opportunity compared to an "objective" alternative, not merely alternatives that would *enhance* minority participation.

In this case, the panel ignored this requirement altogether. It did not identify any objective benchmarks for the proper form of voter ID. Nor could it. The fifty states have chosen a cornucopia of methods to verify voters' identities. *See* NAT'L CONF. OF STATE LEGISLATURES, VOTER ID, *available at* http://www.ncsl.org/ research/elections-and-campaigns/voter-id.aspx (last visited Apr. 21, 2016). Thirty-three states require voters to show some form of ID at the polls. Of those, seventeen require photo ID; sixteen will accept non-photo ID. When a voter appears without proper ID, eleven states require voters to take additional steps. The remaining twenty-two states require state officials to act in some way. And those steps vary state-by-state. "The wide range of possibilities makes the choice inherently standardless." *Holder*, 512 U.S. at 889 (O'Connor, J., concurring in part). There is, in short, "no objective and workable standard for choosing a reasonable benchmark." *Id.* at 881 (opinion of Kennedy, J.).

It is no answer to say that Texas's voting practices harm minorities *relative to a conceivable alternative that would be better for minorities* such as non-photo ID. That is not how Section 2 works. It is always possible to hypothesize an alternative practice that would increase the minority voting rates. For example, one might speculate that a larger number of minority voters would vote if Texas required no ID at all and accepted voters' say-so about where they live. Yet Section 2 does not require Texas to adopt those alternatives for the same reason that *Holder* did not require a five-member commission: "Failure to maximize cannot be the measure of § 2." *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994).

Nor do Texas's prior laws provide an appropriate benchmark, because such an approach would conflate Section 2 with Section 5 of the Voting Rights Act. Section 5 proceedings "uniquely deal only and specifically with *changes* in voting procedures," so the appropriate baseline of comparison "is the status quo that is proposed to be changed." *Bossier II*, 528 U.S. at 334. Section 2 proceedings, by contrast, "involve not only changes but (much more commonly) the status quo itself." *Id.* Because "retrogression"—*i.e.*, whether a change

makes minorities worse off—"is not the inquiry [under] § 2," the fact that a state *used to have* a particular practice in place does not make it the benchmark for a Section 2 challenge. *Holder*, 512 U.S. at 884 (opinion of Kennedy, J.).

At bottom, by ignoring the requirement of an objective benchmark, the panel converted Section 2 into a statute that requires States to adopt whichever voting regime would perfectly equalize the voting rates and voting power of minorities. The Supreme Court rejected this argument in *Holder*, and this Court should reject it here.

D. The Panel's Interpretation of Section 2 Would Violate the Constitution

In addition, the panel's approach raises serious constitutional questions. As Justice Kennedy has repeatedly emphasized, the Supreme Court has never confronted whether Section 2's "results" test complies with the Constitution. *See, e.g.*, *Chisom*, 501 U.S. at 418 (Kennedy, J., dissenting) ("Nothing in today's decision addresses the question whether § 2 . . . is consistent with the requirements of the United States Constitution."); *DeGrandy*, 512 U.S. at 1028–29 (1994) (Kennedy, J., concurring in the judgment) (same). *Cf. Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring) (it would be a "fundamental

flaw" to require "consideration[] of race" in order to "compl[y] with a statutory directive" under the Voting Rights Act). Justice Kennedy's pointed reminders underscore that Section 2's results test teeters at the edge of constitutionality. Interpreting Section 2 to prohibit Texas's race-neutral and commonsensical voting laws, and to require Texas to adopt new laws for the racial purpose of amplifying minority voting, would surely push it over the ledge.

First, if the panel's interpretation of Section 2 is accepted, the statute would exceed Congress's power to enforce the Fifteenth Amendment. The Fifteenth Amendment prohibits only "purposeful discrimination"; it does not prohibit laws that only "resul[t] in a racially disproportionate impact." *City of Mobile*, 446 U.S. at 63, 70 (quoting *Arlington Heights v. Metrop. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977)). Of course, Congress has power to "enforce" that prohibition "by appropriate legislation." U.S. Const. amend. XV, § 2. This allows Congress to proscribe more than purposeful discrimination, but only if the law is a "congruent and proportional" "means" to "prevent or remedy" the unconstitutional "injury" of intentional discrimination. *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997). The enforcement

power does not allow Congress to "alte[r] the meaning" of the Fifteenth Amendment's protections. *Id.* at 519. Accordingly, if Section 2 is not a congruent and proportional effort to weed out *purposeful* discrimination, but instead requires states to alter sensible race-neutral laws to maximize minority voting participation or render their participation perfectly proportional, it is not a legitimate effort to "enforce" the Constitution. Rather, it is a forbidden attempt to "change" the Fifteenth Amendment's ban on purposeful discrimination into a ban on disparate effects. *Id.* at 532.

For this reason, in the vote-dilution context, the Supreme Court has been careful to interpret Section 2's "results" test in a way that prohibits districting efforts only where there is a strong inference of a discriminatory purpose. The very first *Gingles* "pre-condition" requires plaintiffs to establish that minority voters could naturally constitute a "geographically compact" majority in a district adhering to "traditional districting principles, such as maintaining communities of interest and traditional boundaries." *Abrams v. Johnson*, 521 U.S. 74, 92 (1997); *see LULAC*, 548 U.S. at 433. Because districts normally encompass identifiable "geographically compact" groups, the failure to draw such a

district when a minority community is involved gives rise to a plausible inference of intentional discrimination. Conversely, the Supreme Court's interpretation of Section 2 does not require States to engage in *biased* treatment by *deviating* from traditional districting principles in order to create majority-minority districts. *LULAC*, 548 U.S. at 434. The same holds true in the vote-denial context: Section 2 cannot be interpreted to require departure from ordinary race-neutral election regulations in order to enhance minority voting participation. Otherwise, Section 2 would exceed the powers granted to Congress in the Fifteenth Amendment.

Second, interpreting Section 2 to require states to boost minority voting participation would also violate the Constitution's equal-protection guarantee. Subordinating "traditional districting principles" for the purpose of enhancing minority voting strength violates that aspect of the Constitution. *See Shaw v. Hunt*, 517 U.S. 899, 905 (1996). Section 2 thus cannot require States to abandon neutral and commonsensical electoral practices, such as requiring voter ID, for the "predominant" purpose of maximizing minority voter participation. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Yet requiring States to

adjust their race-neutral laws to enhance minority participation rates would require exactly that "sordid business" of "divvying us up by race" through deliberate race-based decision-making. *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring in part and dissenting in part). This is especially true under the panel's interpretation since, in its view, any failure to enhance minority voting opportunity constitutes a discriminatory "result," and Section 2's text flatly prohibits all such "results," *regardless* of how strong the State's justification. *Cf. Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring) (observing that government hiring practices "intentionally designed" to function as racial quotas "would . . . seemingly violate equal protection principles").

Moreover, interpreting Section 2 to require states to remedy the effects of any private actions contravenes the Equal Protection Clause requirement that race-based government action be justified by "some showing of prior discrimination by the *governmental unit* involved." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion) (emphasis added); *see Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731 (2007) (Roberts, C.J.) ("[R]emedying past societal discrimination does not justify race-conscious government

action"). Requiring States to adjust their voting laws because of private choices would require just that forbidden course.

Because the panel's interpretation raises "serious constitutional question[s]" concerning both Congress's enforcement powers and the Fourteenth Amendment's equal-treatment guarantee, it must be rejected if it is "fairly possible" to interpret Section 2 as outlined above. *Crowell v. Benson*, 285 U.S. 22, 62 (1932). This is particularly true because the panel's interpretation rearranges "the usual constitutional balance of federal and state powers." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citation omitted). Thus, unless Congress's intent to achieve this result has been made "unmistakably clear in the language of the statute," it must be rejected. *Id.* The same conclusion follows from the fact that the Constitution reserves to the States the power to fix and enforce voting qualifications and procedures. *See Inter Tribal Council of Ariz.*, 133 S. Ct. at 2259. If Section 2 truly did authorize the federal judiciary to override state election laws as extensively as the panel claims, Congress, at a minimum, would have needed to say so clearly.

* * *

In sum, the panel's interpretation of Section 2 contradicts its text and history, clashes with binding Supreme Court precedent, and violates the Constitution. It should be rejected, and Texas's reasonable voter ID laws should be upheld.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

/s/ S. Kyle Duncan
S. Kyle Duncan (La. Bar No. 25038)
Gene C. Schaerr
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 714-9492
KDuncan@Schaerr-Duncan.com

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **5,974** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: April 22, 2016

/s/ S. Kyle Duncan
S. Kyle Duncan

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2016, I electronically filed a true and correct copy of the foregoing Brief with the Clerk of the Court by using the appellate CM/ECF system, which will send notification of such filing to all registered users of the CM/ECF system.

Dated: April 22, 2016

/s/ S. Kyle Duncan
S. Kyle Duncan