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 United States 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.

SUPPLEMENTAL EN BANC BRIEF FOR APPELLANTS

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697
scott.keller@
texasattorneygeneral.gov

SCOTT A. KELLER
Solicitor General

J. CAMPBELL BARKER
MATTHEW H. FREDERICK
Deputy Solicitors General

PRERAK SHAH
Assistant Solicitor General

Counsel for Appellants

(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*

CERTIFICATE OF INTERESTED PERSONS

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.

Plaintiffs-appellees	**Former or present counsel**
• Marc Veasey • Jane Hamilton • Sergio DeLeon • Floyd Carrier • Anna Burns • Michael Montez • Penny Pope • Oscar Ortiz • Koby Ozias • John Mellor-Crumley • League of United Latin American Citizens	• Neil G. Baron • Brazil & Dunn • Joshua James Bone • Kembel Scott Brazil • Campaign Legal Center • Armand Derfner • Chad W. Dunn • J. Gerald Hebert • Luis Roberto Vera, Jr.
• United States of America	• Anna Baldwin • Meredith Bell-Platts • Robert S. Berman • Richard Dellheim • Daniel J. Freeman • Bruce I. Gear • Bradley E. Heard • Jennifer L. Maranzano • Avner Michael Shapiro • John Alert Smith, III • U.S. Department of Justice • Elizabeth S. Westfall

• Mexican American Legislative Caucus, Texas House of Representatives • Texas State Conference of NAACP Branches • Estela Garcia Espinosa • Lionel Estrada • La Union Del Pueblo Entero, Inc. • Margarito Martinez Lara • Maximina Martinez Lara • Eulalio Mendez, Jr. • Sgt. Lenard Taylor	• Vishal Agraharkar • Jennifer Clark • Brennan Center for Justice • Lindsey Beth Cohan • Covich Law Firm LLC • Dechert LLP • Jose Garza • Daniel Gavin Covich • Robert W. Doggett • Law Office of Jose Garza • Lawyers' Committee of Civil Rights Under Law • Kathryn Trenholm Newell • Priscilla Noriega • Myrna Perez • Mark A. Posner • Ezra D. Rosenberg • Amy Lynne Rudd • Texas Rio Grande Legal Aid Inc. • Marinda Van Dalen • Wendy Weiser • Michelle Yeary • Erandi Zamora
• Texas League of Young Voters Education Fund • Imani Clark • Texas Association of Hispanic County Judges and County Commissioners • Hidalgo County	• Leah Aden • Danielle Conley • Kelly Dunbar • Lynn Eisenberg • Tania C. Faransso • Ryan Haygood • Sonya Lebsack • Natasha Korgaonkar • NAACP Legal Defense and Educational Fund, Inc. • Jonathan E. Paikin

	• Preston Edward Henrichson Rolando L. Rios • Deuel Ross • Richard F. Shordt • Gerard J. Sinzdak • Christina A. Swarns • WilmerHale

Defendants-appellants	**Former or present counsel**
• 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	• Adam W. Aston • J. Campbell Barker • James D. Blacklock • J. Reed Clay, Jr. • Arthur C. D'Andrea • Ben Addison Donnell • Richard B. Farrer • Matthew H. Frederick • Stephen Ronald Keister • Scott A. Keller • Donnell Abernethy Kieschnick • Jonathan F. Mitchell • Autumn Hamit Patterson • Jennifer Marie Roscetti • Office of the Attorney General • Stephen Lyle Tatum, Jr. • John B. Scott • Prerak Shah • G. David Whitley • Lindsey Elizabeth Wolf

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

Third-party movants	Current or former counsel
• Bipartisan Legal Advisory Group of the United States House of Representatives • Kirk P. Watson • Rodney Ellis • Juan Hinojosa • Jose Rodriguez • Carlos Uresti • Royce West • John Whitmire • Judith Zaffirini • Lon Burnam • Yvonne Davis • Jessica Farrar • Helen Giddings • Roland Gutierrez • Borris Miles • Sergio Munoz, Jr. • Ron Reynolds • Chris Turner • Armando Walle	• Bishop London & Dodds • James B. Eccles • Kerry W. Kircher • Alice London • Office of the Attorney General • Office of the General Counsel • U.S. House of Representatives

Interested third parties	Appearing pro se
• Robert M. Allensworth • C. Richard Quade	• Robert M. Allensworth, pro se • C. Richard Quade, pro se

/s/ Scott A. Keller
SCOTT A. KELLER
Attorney of record for Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions and Statutes

Other Authorities

INTRODUCTION

Plaintiffs' highly aggressive arguments challenging Texas's voter-ID law (Senate Bill 14, or "SB14") conflict with binding voting-law standards in myriad ways and would render §2 of the Voting Rights Act unconstitutional.

After correctly reversing on the poll-tax claim, the panel properly rejected the district court's discriminatory-purpose finding. As the panel recognized, the district court eviscerated legislative privilege, giving plaintiffs unfettered access to the personal files and testimony of Texas legislators, which plaintiffs urged was "crucial" to their claim. Yet after getting thousands of pages of documents and deposing over a dozen legislators, plaintiffs found no evidence of a desire to harm voters because of their race. Even legislators opposing SB14 admitted that its proponents had no illicit purpose. That is unsurprising, because Texas's photo-voter-ID law has the same valid purpose endorsed by the Supreme Court and the Carter-Baker commission on election reform: to deter voter fraud and increase public confidence in the integrity of elections. In light of the unprecedented discovery plaintiffs obtained, no reasonable fact-finder could conclude that plaintiffs established the requisite "clearest proof" that the Texas Legislature acted with a discriminatory purpose. The panel's only misstep on this claim was to remand rather than render judgment for the State.

In contrast, by sustaining liability for a discriminatory effect under VRA §2, the panel adopted an atextual interpretation that would render the statute unconstitutional. VRA §2 requires proof that a law *results* in denial or abridgement of the right *to vote*, and does so *on account of race*. 52 U.S.C. §10301(a).

But plaintiffs put forth no evidence that SB14 had any effect on voter turnout or registration—much less that any such effect was on account of race. Rather than relying on voter turnout or registration statistics, plaintiffs relied on predictions about the race of particular Texas citizens and whether they already possessed SB14-compliant ID at a single point in time. That is not voting data. And it says nothing about the ease of obtaining an SB14-compliant ID, particularly since Texas offers free voter IDs.

Plaintiffs could not even show that SB14 will prevent any of the fourteen named individual plaintiffs from voting (which is why their separate claim of a substantial obstacle on the right to vote also fails). Nine of the individual plaintiffs can vote by mail without ID, as permitted by an exception under Texas law; three have SB14-compliant ID; another chose to get a California driver's license instead of a Texas license; and the final individual conceded that he could obtain an SB14-compliant personal ID card. Plaintiffs thus found no one facing a substantial obstacle to voting—even though the United States had its lawyers crisscross Texas, microphones in hand, searching homeless shelters for voters "disenfranchised" by SB14.

This confirms just how unbounded plaintiffs' theories are. If VRA §2 prohibits state voting regulations that have neither an illicit purpose nor a demonstrable effect on voting, the statute is not congruent and proportional to the underlying constitutional guarantee against purposeful racial discrimination in

voting. Plaintiffs have not offered any limiting principle that avoids that congruence-and-proportionality problem. Numerous judges have recognized the constitutional infirmities with such a theory.

These judges have also recognized the unacceptable consequences of such a sweeping theory of VRA §2 liability. If plaintiffs' test is adopted, this case will become a roadmap for dismantling a wide range of election laws: Any time a court finds socioeconomic disparities among racial groups, any race-neutral election law with derivative costs of any magnitude (even the cost of gasoline to drive to a polling place) will be deemed a violation of §2. The breadth of that theory is astounding. It would jeopardize fundamental voting practices, like in-person voting or age restrictions, that have been in place for decades. Congress never intended such a drastic result.

Judgment should be reversed and rendered for the State on all claims.

Issues Presented

1. Whether SB14 constitutes a poll tax.

2. Whether SB14 was enacted for an unconstitutional race-based purpose.

3. Whether SB14 has the result of abridging the right to vote based on race.

4. Whether SB14 is a substantial burden on the right to vote.

Statement of the Case

1. By 2011, the Supreme Court had endorsed photo-voter-ID laws as legitimate means of deterring fraud and boosting public confidence in elections.

Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191-97 (2008). The Commission on Federal Election Reform, chaired by former President Jimmy Carter and former Secretary of State James Baker, concurred: "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 are currently needed to board a plane, enter federal buildings, and cash a check. Voting is equally important." ROA.77850. An overwhelming majority of Texans agreed with that common-sense notion. *See, e.g.*, ROA.77940, 87386-88, 93705-06.

2. Accordingly, in 2011, the Texas Legislature enacted SB14. Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws 619. SB14 generally requires voters to present certain government-issued photo ID when voting in person. Acceptable forms of photo ID include a Texas driver's license, a free Texas election identification certificate ("EIC"), a Texas personal identification card, a Texas concealed-handgun license, a U.S. military identification card, a U.S. citizenship certificate, and a U.S. passport. Tex. Elec. Code §63.0101.

SB14 requires the Department of Public Safety to issue EICs for free. Tex. Transp. Code. §521A.001(a)-(b). The department subsequently promulgated rules outlining the documentation required to obtain an EIC, which included in some cases a copy of a birth certificate. 37 Tex. Admin. Code §15.182. A separate statute had imposed a $2 or $3 fee to obtain a copy of a birth certificate. Tex. Health & Safety Code §191.0045. But in conformance with its intent to provide free voter IDs, the Texas Legislature enacted Senate Bill 983

in 2015, providing that the state registrar, local registrars, and county clerks may not charge any fee to obtain birth certificates or other records sought to get a free EIC. *Id.* §191.0046(e); *see also id.* §191.0046(f).

SB14 exempts from the photo-ID requirement religious objectors, people lacking sufficient ID due to natural disaster, and the disabled. Tex. Elec. Code §§63.001(h), 65.054(b)(2)(B)-(C). And SB14 did not alter preexisting law allowing voters age 65 or older to vote by mail, which does not require a photo ID. *Id.* §§82.002, 82.003. In-person voters who do not present required photo ID can cast a provisional ballot that will count if they present acceptable ID within six days of the election. *Id.* §§63.001(g), 63.011(a), 65.0541.

3. Private plaintiffs brought this lawsuit in the Southern District of Texas, alleging that SB14 (1) is unconstitutional as a poll tax; (2) purposefully denies or abridges the right to vote on account of race, in violation of the Constitution; (3) results in a denial or abridgment of the right to vote on account of race, in violation of VRA §2; and (4) is an unconstitutional burden on the right to vote. ROA.915-21, 1403-07. The United States filed a separate lawsuit, later consolidated with the private plaintiffs' action, likewise alleging that SB14 has the purpose and result of denying or abridging the right to vote on account of race. ROA.114566-67.

After a bench trial, the district court entered a judgment adopting every one of plaintiffs' theories. The court held that SB14 is a poll tax, was enacted with a racially discriminatory purpose, results in abridgement of the right to vote on account of race, and unduly burdens the right to vote. ROA.27027.

4. On appeal, a three-judge panel overturned many of the district court's conclusions. It reversed and rendered for the State on the poll-tax claim. *Veasey v. Abbott*, 796 F.3d 487, 514-17 (5th Cir. 2015). It also vacated the discriminatory-purpose conclusion and the holding of an undue burden on voting rights. *Id.* at 498-504, 513-14. But the panel remanded rather than deciding whether the record could plausibly support a purpose finding under the correct legal standard. *Id.* at 504. The panel then endorsed plaintiffs' disparate-impact theory of liability under VRA §2. *Id.* at 505-13.

The State filed a petition for rehearing en banc, noting the textual and constitutional deficiencies with the panel's interpretation of VRA §2, as well as the error in remanding rather than rendering on the discriminatory-purpose claim. The Court granted the State's petition.

SUMMARY OF THE ARGUMENT

1. The panel correctly reversed and rendered judgment on the poll-tax claim. *Crawford* squarely forecloses a poll-tax claim where a state's voter-ID law provides free IDs, even if obtaining that ID requires documents, and even if those documents require a nominal fee (which they do not in Texas). 553 U.S. at 198 & n.17.

2. The district court erred in finding that the Texas Legislature enacted SB14 for the purpose of denying or abridging citizens' right to vote on account of their race. To override the Legislature's legitimate reasons for adopting SB14, the plaintiffs had to present the "clearest proof" of a racially discriminatory purpose. *Smith v. Doe*, 538 U.S. 84, 92 (2003).

Despite unprecedented access to legislatively privileged materials, the plaintiffs introduced no such evidence. In light of direct evidence confirming legislators' wholly legitimate motives, it was error for the district court to consider circumstantial evidence. In any event, the panel correctly held that this record does not establish a discriminatory purpose. The panel's only misstep was to remand the discriminatory-purpose claim rather than render judgment for the State. There is no more evidence to discover, and the weak circumstantial evidence in the record is insufficient as a matter of law to establish the clearest proof of a racially discriminatory purpose.

3. The district court's conclusion that SB14 results in abridgement of the right to vote on account of race cannot be sustained under VRA §2. Plaintiffs' expansive theory of §2 liability conflicts with the statute's text, would render §2 unconstitutional, and would threaten many legitimate election laws. The district court found a §2 violation without evidence of a change in voter turnout or registration, contrary to this Court's en banc holding in *LULAC Council No. 4344 v. Clements*, 999 F.2d 831, 867 (5th Cir. 1993) (en banc). Every individual who joined this lawsuit as a plaintiff can vote under SB14—and many have. Moreover, plaintiffs' list of registered voters lacking photo ID does not show that any of them could not get photo ID, including a free EIC, or vote by mail.

Nor did the district court demand proper causation evidence that any postulated effect on voting was "on account of race." *Cf. Gonzalez v. Arizona*, 677

F.3d 383, 406 (9th Cir. 2012) (en banc) (rejecting a §2 claim because the plaintiffs failed to prove "a causal connection between [Arizona's voter-ID law] and the observed difference in the voting rates of Latinos").

Rather than demand evidence of an effect on voting and causation on account of race, the district court assumed that a statistical disparity in rates of preexisting ID possession across racial groups would diminish minority electoral opportunity because of a correlation between race and poverty. That sweeping interpretation would render §2 invalid as no longer congruent and proportional to the Fifteenth Amendment. If §2 imposes liability based on a statistical disparity in something other than voter turnout or registration, combined with the predicted effect of background socioeconomic conditions, it threatens to "sweep[] away almost all registration and voting rules." *Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014).

4. The district court's judgment that SB14 unconstitutionally burdens the right to vote conflicts with *Crawford*. *Crawford* held that a voter-ID law does not create a facially unconstitutional burden on the right to vote when a state issues free voter IDs, even if obtaining an ID sometimes requires nominal effort such as getting vital-statistics records costing a small fee. 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. Plus, over 95% of eligible Texas voters had sufficient photo ID before 2014, even on the district court's figures. ROA.27075.

The district court also disregarded *Crawford*'s holding that voter-ID laws legitimately prevent voter fraud and safeguard voter confidence, regardless of whether the record contains any proven episodes of voter impersonation. Of course, the record here *did* include evidence of voter fraud in Texas that could have been stifled by a voter-ID law. SB14 does not facially impose an unconstitutional burden, because Texas law provides for free voter IDs and allows those most inconvenienced to vote without photo ID.

Nor could plaintiffs possibly show an as-applied violation, as none of the fourteen named individual plaintiffs face any substantial obstacle to voting. Nine can vote by mail without photo ID. ROA.27110. Of the remaining five plaintiffs, three already have an SB14-compliant ID. ROA.27104-05. One chose to get a California driver's license instead of a Texas license because she plans to return to California after college graduation. ROA.10543-44. And the final plaintiff testified that he can obtain an SB14-compliant personal ID card. ROA.99375.[1]

[1] Plaintiffs have previously asserted that defendants have waived arguments. That is incorrect. Defendants have consistently raised all the issues addressed in this brief: that SB14 is not a poll tax, was not enacted with a discriminatory purpose, does not violate VRA §2, and is not an unconstitutional burden on the right to vote. *See, e.g.*, Appellants' Br.10-13; ROA.22847-943. Defendants did not have to make the precise arguments below pertaining to issues that were properly raised: "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Citizens United v. FEC*, 558 U.S. 310, 330-31 (2010) (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)). The waiver cases cited by plaintiffs address "issues not raised below," not specific arguments about issues that were raised. *Conley v. Bd. of Trustees of Grenada Cnty. Hosp.*, 707 F.2d 175, 178 (5th Cir. 1983); *see EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 703 (5th Cir. 2014).

ARGUMENT

I. SB14 Is Not a Poll Tax.

By no stretch of the imagination is SB14 a poll tax, which is why the panel properly reversed and rendered for the State on this claim. 796 F.3d at 514-17. SB14 does not charge for the privilege of voting; indeed, it required the Department of Public Safety to provide EICs for free. Tex. Transp. Code §521A.001(b).

Insofar as plaintiffs complain about the cost of obtaining records that may be required to authenticate their identity and get a free EIC, that is not an attack on SB14. SB14 does not direct what documentation is required. *Id.* §521A.001(f). Instead, that is an attack on DPS rules defining various forms of sufficient documentation that, if not already possessed, may require a small fee to obtain. *See* 37 Tex. Admin. Code §§15.181-.182. That attack could never justify invalidating SB14 as opposed to the DPS rules. Of course, after DPS promulgated those rules, the Legislature directed state and local officials to provide EIC-supporting documentation for free. Tex. Health & Safety Code §191.0046(e).

Regardless, *Crawford* forecloses the poll-tax argument. *See* Appellants' Br.13-16; Reply Br.2-5. *Crawford* upheld Indiana's photo-ID law, which could be satisfied by a free election ID that required identity-authenticating documents to obtain—which could cost $3 to $12. 553 U.S. at 198 n.17. *Crawford* thus effectively rejected any poll-tax argument. *Id.* at 189-91, 198. This argument is so weak that not a single judge on a recent Ninth Circuit en banc panel

accepted it. *Gonzales*, 677 F.3d at 410. And the argument is even weaker here, since acquiring identity-authenticating documents in Texas now costs $0.

II. The Legislature Did Not Enact SB14 for a Racially Discriminatory Purpose.

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 legislative motive].").

Here, the district court cited no direct evidence that SB14 was enacted with a racially discriminatory purpose. Plaintiffs have not identified a single legislator who supposedly harbored an illicit motive. As even the district court acknowledged: "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. To the contrary, the record demonstrates that the Legislature enacted SB14 to deter and detect voter fraud, and to preserve voter confidence in the integrity of elections.[2] In fact, legislators *opposing* SB14 expressly stated that legislators supporting SB14 were acting for valid purposes. *See infra* pp.26-27. That should have ended the

[2] *E.g.*, ROA.30194-200; ROA.101159:25-60:8; ROA.101178:5-6; ROA.100777:13-24; ROA.100801:19-02:6; 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.

inquiry. Where "there were legitimate reasons for the . . . Legislature to adopt and maintain" a law, courts "will not infer a discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987).

That is particularly true here, because, as the panel recognized, the plaintiffs had unfettered access to privileged legislative materials, including bill files and sworn testimony by legislators. According to the plaintiffs, these materials were the best possible evidence of the Legislature's purpose. Yet this treasure trove of privileged material revealed no evidence of purposeful discrimination; it only confirmed that the Legislature acted to detect and deter voter fraud and preserve voter confidence. Plaintiffs demanded this discovery on the basis that it was "vital" to their case, yet they now want to ignore it.

The panel correctly reversed the district court's finding of discriminatory purpose. The panel's only misstep was to remand rather than reverse. Remand is inappropriate if, on a correct view of the law, "the record permits only one resolution of the factual issue." *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982). Applying that rule to the record here, the only option is to reverse *and render* for the State. Plaintiffs marshaled their evidence, buoyed by unprecedented discovery into legislators' private files, and still fell far short of the clearest proof of a discriminatory purpose. Nothing on remand will change that.

A. Standard of Review.

While 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 discriminatory-purpose claim is reviewed de novo when the district court's "factual findings [are] made under an erroneous view of controlling legal principles," *Hous. Expl. Co. v. Halliburton Energy Servs., Inc.*, 359 F.3d 777, 779 (5th Cir. 2004); *see Pullman-Standard*, 456 U.S. at 291-92; *Maritrend, Inc. v. Serac & Co. (Shipping) Ltd.*, 348 F.3d 469, 470 (5th Cir. 2003); 9C Charles Alan Wright et al., Federal Practice and Procedure §§2585, 2589 (3d ed.).

B. The District Court Applied the Wrong Legal Standard to Find Discriminatory Purpose.

1. The district court did not apply the correct legal standard to find intentional discrimination. A claim that a State *legislature* enacted a neutral law with a racially discriminatory purpose is no ordinary purpose claim. Instead, constitutional analysis of a statute's purpose is quite deferential. Where "there [are] legitimate reasons for" a law, courts "will not infer a discriminatory purpose." *McClesky*, 481 U.S. at 298-99. Courts "defer to the legislature's stated intent," and "only the clearest proof will suffice to override" that deference. *Smith v. Doe*, 538 U.S. 84, 92 (2003) (quotation marks omitted); *accord Hendricks*, 521 U.S. at 361; *Flemming*, 363 U.S. at 617.

The Legislature's stated purpose in enacting SB14 was to deter voter fraud and safeguard confidence in elections. ROA.4878, ROA.4907-08, ROA.38712. To override that wholly legitimate purpose, plaintiffs needed to provide the clearest proof that the Legislature passed SB14 with the specific intent to harm minority voters. This requires much more than a showing that

it took a deliberate step that caused a discriminatory effect, even if the legislature was aware of that effect. As the Supreme Court clarified decades ago:

> "[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 omitted).

Here, the district court based its conclusion primarily 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 legislators 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. At most, these arguments could only possibly support a finding that the Legislature acted with awareness of purported discriminatory consequences. But they cannot support the necessary inference that the Legislature enacted SB14 *because of* its alleged impact, let alone provide the clearest proof of intentional racial discrimination. The district court failed to apply the governing legal standard, and the panel correctly held that its conclusion was erroneous.

2. The clearest-proof standard exists for good reason. It keeps the legislative-purpose test judicial in nature, safeguarding against a devolution into

policy-based reasoning that elevates views about a law's policy merit into findings of invidious purpose. Political actors can be quick to perceive an illicit intent when they are not persuaded that good policy justifies a law they believe will affect some groups differently than others. *See Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) ("In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed."). But disputes about whether a law is "undemocratic and unwise" are properly left for the statehouse, not the courthouse. *Feeney*, 442 U.S. at 280. The clearest-proof standard keeps the Judiciary above the political fray, and keeps the purpose inquiry tied to the Constitution.

The Supreme Court explained this in *Feeney*, which involved a similar purpose claim, only with the accusation going to gender rather than race discrimination. As the Court explained: "Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law." 442 U.S. at 271-72. *Feeney* emphasized, however, that "[t]he calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility." *Id.* at 272. *Feeney* therefore held that a discriminatory-purpose finding cannot be made by reasoning that a law had a known impact too great not to be intended. *Id.* at 279 ("Discriminatory purpose, however, implies more than intent as volition or intent as awareness of consequences.") (quotation marks omitted).

A claim of unconstitutional discrimination requires clear proof that the legislature "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." *Id.*; *see United States v. Cherry*, 50 F.3d 338, 343 (5th Cir. 1995) (this is a "difficult burden to bear"). *Feeney* held such a finding foreclosed as to a State's veteran-preference employment law. First, "the benefit of [the law] was consistently offered to any person who was a veteran." 442 U.S. at 279. Although a disproportionate number of veterans were men, the law could not be viewed as having a purpose to discriminate on account of gender, because veteran status is a rational basis for job preference and "is not uniquely male." *Id.* at 275. The same reasoning applies here. Requiring voters to show photo identification is a rational measure to confirm their identity when they show up to vote, and possession of photo ID is not unique to any race. *Cf., e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (finding constitutional violation where geographic dividing line for business licensing had no rational basis, and all ineligible persons were Chinese). Similarly, *Feeney* noted that "significant numbers of nonveterans are men," and "[t]oo many men are affected by [the law] to permit the inference" that its true purpose was gender discrimination. 442 U.S. at 275. That point applies with equal force here. Of the small percentage of voters found to lack sufficient ID as of 2014, a significant number (somewhere around half) were white. ROA.43320. *Feeney* thus forecloses any inference of a discriminatory purpose based on SB14's purported impact.

The clearest-proof standard also reflects the deference due States in our system of government, as it avoids examination into the subjective motivations of individual legislators as opposed to the purpose of legislation itself. *Croft v. Governor of Texas*, 562 F.3d 735, 743 (5th Cir. 2009) ("Examining legislative purpose . . . is a deferential and limited inquiry, and courts have no license to psychoanalyze the legislators.") (quotation marks omitted); *see Tenney*, 341 U.S. at 377 (it is "not consonant with our scheme of government for a court to inquire into the motives of legislators"); *see also Evenwel v. Abbott*, 136 S. Ct. 1120, 1129 n.11 (2016) ("That politics played a part, however, does not warrant rejecting principled argument.").

That justification is highest in the voting-rights context because of the grave nature of an illicit-purpose accusation. Although the States have the primary responsibility for the conduct of elections, *see* U.S. Const. art. I, §4, a discriminatory-purpose finding can subject a jurisdiction to preclearance under VRA §3(c), which is "a drastic departure from basic principles of federalism." *Shelby County v. Holder*, 133 S. Ct. 2612, 2618 (2013). Those high stakes underscore the importance of the Supreme Court's command that an accusation of a racial purpose for neutral legislation requires substantiation by the "clearest proof." *Smith*, 538 U.S. at 92.

C. The District Court's Evaluation of Circumstantial Evidence Was Legally Erroneous.

The district court's reliance on circumstantial evidence to discern legislative purpose in this case was legal error for multiple, independent reasons.

1. The district court erred by considering circumstantial evidence where plaintiffs obtained a massive amount of privileged legislative materials.

The district court erred by considering circumstantial evidence, because plaintiffs were given an unprecedented amount of discovery into privileged legislative materials and testimony.

The Supreme Court has 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." *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977) (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.[3] This discovery included office files, bill books, personal correspondence concerning SB14, email accounts (official and personal), and even confidential email communications between legislators and lawyers at the Texas Legislative Council.[4] (The district court denied defendants' analogous request for discovery of opposing legislators' files. ROA.98466-71; ROA.98490-501.)

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[3] *See, e.g.*, ROA.61-62 (June 6, 2014 minute order); ROA.6502-09 (allowing access to documents); ROA.27448-501 (plaintiffs' exhibit list); ROA.100814:8-16:25 (Dewhurst); ROA.101007:8-69:5 (Patrick); ROA.62520:15-21:1 (Straus).

[4] *See* ROA.50 (Apr. 1, 2014 minute order); ROA.98086:18-87:10.

Legislators, staff, and the Lieutenant Governor produced thousands of documents containing their confidential communications and impressions concerning SB14.[5] They were also forced to sit for 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 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 legislators. 429 U.S. at 268.

Plaintiffs got this unprecedented discovery by insisting that their entire discriminatory-purpose case turned on access to privileged matters. *E.g.*, ROA.7226 ("vital discovery"); ROA.97657:19-22 ("at the heart of the United States' claim" of racial intent); ROA.97938:8-10 ("[T]hat evidence is going to be very, very important in this case dealing with the intent behind SB 14 itself.").

Plaintiffs are correct: this extensive discovery *should* be dispositive of the discriminatory-purpose claim—because even after getting thousands of privi-

[5] *See, e.g.*, ROA.83310-36; ROA.80237-54; ROA.80282-84; ROA.80452-53; ROA.80454-69; ROA.82638; ROA.82639; ROA.82643; ROA.82644; ROA.82645; ROA.82650-54; ROA.82655-57; ROA.82865-67; ROA.83559-62; ROA.83579-85; ROA.83603-14; ROA.83635-37; ROA.83768-69; ROA.83783-86; ROA.84033; ROA.84034-36; ROA.84075; ROA.84100-02; ROA.84743-58; ROA.84759-78.

leged documents and weeks of intrusive depositions, plaintiffs could not identify *a single document or statement* expressing an intention to suppress minority voting through SB14. *See* 796 F.3d at 503 (noting "the extensive discovery of legislators' private materials that yielded no discriminatory evidence"). The panel understood how remarkable that is. *Id.* at 503 n.16 ("It is also unlikely that such a motive would permeate a legislative body and not yield any private memos or emails."). This direct evidence only confirmed that the Legislature's purpose was to ensure voter confidence by detecting and deterring voter fraud.[6]

Unsurprisingly, plaintiffs now want to ignore this evidence. But their sweeping access to the best possible evidence of legislative purpose (according to plaintiffs) required applying a dispositive—or at the very least, heavy—discount to all of plaintiffs' circumstantial purpose evidence. This Court recognized that principle in *Price v. Austin Independent School District*, 945 F.2d 1307 (5th Cir. 1991), noting that if legislators provide direct evidence without privilege protections—in contrast to what *Arlington Heights* presumed would occur, 429 U.S. at 268 & n.18—"the logic of *Arlington Heights* suggests that the [direct evidence] is actually stronger than the circumstantial evidence." 945

[6] *E.g.*, ROA.30198-200; ROA.30194-98; ROA.101159:25-60:8; ROA.101178:5-6; ROA.100777:13-24; ROA.100801:19-02:6; 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.

F.2d at 1318. Given the extraordinary availability of direct evidence, the district court's failure to discount the plaintiffs' meager circumstantial evidence contradicted that logic. *See* ROA.27152-53. This was legal error.

2. The district court ignored *Crawford* and SB14's legitimate purpose.

The district court rejected the determination of legislative fact made by the Supreme Court in *Crawford*, 553 U.S. at 196-97, and by the Texas Legislature in SB14—that voter-ID laws deter fraud and promote confidence in elections. But the Legislature's judgment that SB14 serves the legitimate policy goal of promoting integrity and confidence in elections is not subject to second-guessing by courts.

As the Seventh Circuit explained in *Frank*, "whether a photo ID requirement promotes public confidence in the electoral system is a 'legislative fact'—a proposition about the state of the world, as opposed to a proposition about these litigants or about a single state." 768 F.3d at 750. Once the Supreme Court determined that photo-ID requirements promote public confidence in elections, that question was closed to the lower courts. "On matters of legislative fact, courts accept the findings of legislatures and judges of the lower courts must accept findings by the Supreme Court." *Id.*

The district court took the opposite tack. Rather than accept the Legislature's judgment, it faulted the State for failing to *prove* that SB14 would increase public confidence in elections. ROA.27067. But "it is not the function of the courts to substitute their evaluation of legislative facts for that of the

legislature." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 (1981). The State had no burden to prove that its legislative judgment was correct, especially after *Crawford*:

> After a majority of the Supreme Court has concluded that photo ID requirements promote confidence, a single district judge cannot say as a "fact" that they do not, even if 20 political scientists disagree with the Supreme Court.

Frank, 768 F.3d at 750; *accord Voting for Am. v. Steen*, 732 F.3d 382, 394 (5th Cir. 2013). Here, the plaintiffs themselves validated the Legislature's judgment. Plaintiff Imani Clark testified that "requiring voters to show a photo ID at the polls will help det[e]r voter fraud" and that it will give her "more confidence in the voting system to know that everyone was showing a photo ID of themselves when they show up to vote." ROA.100547:7-10, 13-17.

Even the district court conceded, as it had to, that "[t]here is no question that the State has a legitimate interest" in detecting and preventing voter fraud as well as in protecting voter confidence. ROA.27137-38 & n.493. But the court erred when it purported to find that SB14 did not serve those legitimate interests. In effect, the district court made a legislative determination that the State's voter-confidence "justification is not served by the overly strict terms of SB 14." ROA.27140. That was not the district court's decision to make, and its second-guessing of the Legislature's policy judgment was legal error.

D. The District Court Legally Erred by Finding a Discriminatory Purpose When There Is No Discriminatory Effect.

The panel correctly rejected the district court's analysis of the *Arlington Heights* factors. 796 F.3d at 498-503. But there was no need to even analyze those factors. In *Arlington Heights*, the Supreme Court identified the factors as issues to consider in determining whether a law with a racially disparate *effect* also had a racially discriminatory *purpose*. 429 U.S. at 264-68 ("official action will not be held unconstitutional solely because it results in a racially disproportionate impact").

In contrast, plaintiffs here did not even show that SB14 reduced voter participation, much less that it did so on account of race. *See infra* Part III. If a race-neutral law does not have a racially disproportionate effect, there is no need to examine circumstantial evidence of legislative purpose. "Absent discriminatory effect, judicial inquiry into legislative motivation is unnecessary, as well as undesirable." *Crawford v. Bd. of Educ. of City of L.A.*, 458 U.S. 527, 544 n.31 (1982) (citation omitted); *see also Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 523 (9th Cir. 2011) ("failure to establish . . . discriminatory impact prevents any inference of intentional discrimination"); *Brown v. Califano*, 627 F.2d 1221, 1234 n.78 (D.C. Cir. 1980) (when there is no discriminatory effect, a court should "refrain from further investigation into the historical background and legislative history to unearth illegitimate intent").

E. The District Court's Analysis of the *Arlington Heights* Factors Was Erroneous.

Even if the district court could have considered circumstantial evidence, its analysis of the *Arlington Heights* factors was incorrect, as the panel recognized.

1. The district court erroneously relied on "historical background" to impugn current officeholders' motives.

The district court erroneously relied on decades-old incidents of racial discrimination. ROA.27028-34 (starting discussion with 1895 law). As the panel recognized, "[a]ll of the most pernicious discriminatory measures predate 1965." 796 F.3d at 500. And "unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value." *McCleskey*, 481 U.S. at 298 n.20.

Events from the 1890s through the 1960s cannot possibly have any probative value in determining the Texas Legislature's motives with respect to SB14. The district court committed legal error when it relied on those decades-old events to conclude, before even discussing SB14, that Texas has "a penchant for discrimination . . . with respect to voting." ROA.27032. That historical background cannot condemn the voter-ID law here.[7]

[7] The district court was incorrect when it 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. 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). The Supreme Court invalidated that plan in *Bush v. Vera* because race was the "predominant factor" in creating three

As the panel correctly held, it "was error" for the district court to place such "heavy reliance on long-ago history." 796 F.3d at 500. The circumstances in which the Legislature enacted SB14 do not resemble whatsoever the historical circumstances in which past legislators detestably imposed all-white primaries, literacy tests, and poll taxes. To take just one example, Texas now has significant minority voting participation. According to U.S. Census Bureau data, a greater percentage of African-American citizens in Texas voted in the November 2012 election (63.1%) than non-Hispanic whites (60.9%), and a slightly greater percentage of African-American citizens in Texas were registered to vote in the November 2012 election (73.2%) than non-Hispanic whites (73.0%).[8]

To the extent the district court relied on any reasonably contemporary evidence, it was woefully insufficient. As the panel acknowledged:

> In a state with 254 counties, we do not find the reprehensible actions of county officials in one county (Waller County) to make voting more difficult for minorities to be probative of the intent of legislators in the Texas Legislature, which consists of representatives and senators from across a geographically vast, highly populous, and very diverse state.

796 F.3d at 500.

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additional minority-opportunity districts. 517 U.S. 952, 959 (1996). This redistricting history therefore cannot show a pattern of deliberate vote suppression.

[8] U.S. Census Bureau, Voting and Registration in the Election of November 2012: Detailed Tables, https://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html (Table 4b).

2. The district court erred by purporting to discern legislative intent from statements by opponents of SB14.

Going even further astray, the district court legally erred when it purported to discern a secret purpose behind SB14 from speculative testimony by the law's *opponents*. *See, e.g.*, *id.* at 501 (describing district court's reliance on "speculation by the bill's opponents about proponents' motives"); ROA.27070-75 (citing legislators who "testified that SB14 had nothing to do with voter fraud but instead had to do with racial discrimination").

Speculation by a legislator who *opposed* a law cannot prove that legislators who voted *for* the law acted with improper motives. As members of the opposition, these legislators are not decisionmakers under *Arlington Heights*, and their speculation is not probative evidence as a matter of law. *See, e.g.*, *NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964) (cautioning against "reliance upon the views of . . . legislative opponents"); *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"); *cf., e.g.*, *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, 776 F.3d 321, 332 (5th Cir. 2015) (reversing conspiracy finding that relied on plaintiff's own "hollow labels" describing defendants' "good ol' boys club" atmosphere).

Not only did the district court improperly rely on opponents' speculation, it cherry-picked their statements and ignored testimony that did not support its conclusion. SB14 opponent Senator Rodney Ellis, for instance, stated on

the Senate floor that he knew the SB14 sponsor's "intent" was that the law allow everyone to vote. *See* ROA.27607:201:1-10. Similarly, Senator Wendy Davis, a vocal opponent of SB14, conceded that it is "an important duty of any elected official to represent constituents and represent policy that constituents favor," and she had no reason to believe that the strong public support for voter-ID was "for an illegitimate reason." ROA.99656:11-99657:2. Senator Davis also conceded that none of SB14's authors or any other member of the Legislature "ma[d]e a statement to [her] or to anybody else that [she was] aware of that they supported SB 14 because they wanted to harm minority voters." ROA.99656:2-6.

3. The district court improperly relied on isolated, non-probative statements.

The district court compounded its errors by improperly relying on isolated statements by non-legislators or statements made after SB14 was enacted. The district court relied heavily on a statement by Bryan Hebert about possible difficulties in receiving VRA §5 preclearance for SB14. ROA.27074. Hebert was not a member of the Legislature; he was counsel to Lieutenant Governor Dewhurst. Yet plaintiffs have characterized his prediction of difficulties in the preclearance process as a "smoking gun" that proves the Legislature's illegitimate purpose. DOJ Br.52. Hebert's discussion of a separate lawsuit, governed by a different legal standard, sheds no light on the issue

here. And a staff member's concern about the outcome of preclearance proceedings under VRA §5 proves nothing about the Legislature's purpose when it enacted SB14.

The district court also relied on a statement by former Representative Todd Smith—made long after SB14 was passed—that he expected SB14 to have an effect on people who were poor or elderly, ROA.100339-40, and that he believed it was "common sense" that the affected population would be more likely to be minorities. ROA.100339-40. That statement reflects nothing more than general awareness of a statistical correlation between poverty and racial-minority status. It does not suggest intentional discrimination by Representative Smith, let alone the entire Texas Legislature.[9] *Cf. United States v. O'Brien*, 391 U.S. 367, 383-84 (1968). The Massachusetts legislature in *Feeney* found it "common sense" that veterans eligible for the employment preference were more likely men than women. *Feeney*, 442 U.S. at 282. No doubt it was. But the Supreme Court held that awareness of consequences does not demonstrate a discriminatory *purpose*. *Id.* at 279.

If a neutral law's classification is rational, courts do not infer an illicit discriminatory motive from awareness of possible disparities in how its effects are felt across society. The panel correctly held that "these bare acknowledg-

[9] The data credited by the district court indicate that Representative Smith's "common sense" was only partially accurate—nearly half of registered voters on plaintiffs' "No-Match list" were identified as white. *See* ROA.43320.

ments by two people of the law's potential impact are insufficient to demonstrate that the entire legislature intended this disparate effect." 796 F.3d at 498 n.8. (citing *Lewis v. Ascension Parish Sch. Bd.*, 662 F.3d 343, 349 (5th Cir. 2011)). The district court erred as a matter of law by inferring discriminatory purpose from these two isolated statements concerning SB14's potential effect.

4. The legislative history identified by the district court suggests an urgent voter demand for SB14, not racial discrimination.

The district court also erred when it relied on legislative procedure and drafting history to conclude that SB14 was passed with a discriminatory purpose. ROA.27154-57.

a. *Arlington Heights* did not state that procedural departures are inherently discriminatory—after all, legislatures waive, modify, or take advantage of procedures all the time. Whether a departure indicates racial discrimination depends on whether the legislature acted *because of race*. If the procedures used to enact a law are no more indicative of an improper purpose than a legitimate purpose, they cannot establish an improper purpose.

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 constituent policy preferences and nothing to do with race. The record shows why SB14 supporters 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.[10] *See* ROA.87386-87; *see also* ROA.77938-45. Support was so strong that 58% of Democrats, 63% of African-Americans, and 68% of Hispanics supported a voter-ID law. ROA.87387-88. The record confirms that legislators reasonably believed they had a mandate to pass a voter-ID bill. *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.101007:10-08:5; ROA.101161:21-64:24.

Despite the popularity of voter-ID laws, opponents had used extraordinary procedural maneuvers to block voter-ID bills in three previous legislative sessions. Those tactics included "chubbing" (or filibustering) the bills and refusing to allow a vote in the Senate. ROA.100788:2-25; ROA.100793:21-95:6; ROA.100807:24-09:25; ROA.101041:23-43:20; ROA.101043:24-46:4. There is no indication that the prior bills were racially discriminatory, but they were blocked anyway. This explains any "departures from normal practice" and

[10] This political imperative to pass a voter-ID bill was sufficient to guarantee passage of SB14 regardless of, not because of, any alleged impact on any group of voters. As the district court put it, "the political lives of some legislators depended upon SB 14's success." ROA.27073. Thus, even if SB14 had been "motivated in part by a racially discriminatory purpose"—and there is absolutely no evidence that it was—SB14 is still valid because it would have been enacted "even had the impermissible purpose not been considered." *Arlington Heights*, 429 U.S. at 270 n.21 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)); *see also Hartman v. Moore*, 547 U.S. 250, 260 (2006); *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). *See* Appellants' Br.54-56.

the rejection of amendments designed to water down the bill. The district court also criticized the lack of compromise in SB14. *See* ROA.27155-57. 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 supporters' effort to guard against similar tactics indicates nothing more than a desire for the bill to pass, not evidence of a discriminatory purpose. ROA.101046:18-49:4 ("[T]hey used the rules to stop the bill and we used the rules to pass the bill."); *see* ROA.101023:17-29:8.

b. 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.27156-57 (finding that the law was the "strictest" in the country and that "ameliorative amendments" were rejected). The panel correctly explained that "rejection of purportedly ameliorative amendments does not itself constitute a procedural departure." 796 F.3d at 503; *see also Bryant v. Yellen*, 447 U.S. 352, 376 (1980) (explaining that "failure[s] to enact suggested amendments . . . are not the most reliable indications of congressional intention"). Nothing in the record shows that the amendments rejected would have eased any alleged effects of the law, much less that the legislators acted *because* of race.[11] The amendments

[11] The district court's analysis also ignores that the Texas Senate adopted seven amendments offered by SB14 *opponents*. ROA.94351; *see* ROA.98891:259:25-92:260:6 (Veasey Testimony) (admitting that amendments proposed by Sen. Hinojosa and Sen. Davis were adopted); ROA.99980:363:1-25 (Anchia Testimony) (admitting that he "was given

could just as readily be viewed as bad policy, unnecessary, or unduly complicating.

F. Remand of the Discriminatory-Purpose Claim Is Not Appropriate.

The district court's purpose finding must be reversed. It rests on multiple legally impermissible inferences, from the scantest of evidence. The panel recognized as much, correctly rejecting most of the evidence the district court cited to support its intentional-discrimination finding. 796 F.3d at 498-504. Rather than rendering judgment for the State, the panel unnecessarily remanded for further consideration of the discriminatory-purpose claim.

But "the record permits only one resolution of the factual issue": SB14 was not passed with a discriminatory purpose. *Meche v. Doucet*, 777 F.3d 237, 246-47 (5th Cir. 2015) (quoting *Pullman-Standard*, 456 U.S. at 292); *see Aransas Project v. Shaw*, 775 F.3d 641, 658 (5th Cir. 2014) (per curiam). By suggesting that the district court on remand could "decide whether any additional evidence may be proffered," 796 F.3d at 520, the panel appears to have recognized that the record permits only one finding: the Legislature did not enact SB14 for the purpose of discriminating on the basis of race.

The insufficiency of plaintiffs' evidence does not reflect a lack of opportunity. The district court granted unprecedented discovery of thousands of

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ample opportunity" to express his concerns and "engage in debate about SB14 during its consideration" and that one of his proposed amendments was adopted).

pages of privileged legislative documents and allowed plaintiffs to depose dozens of legislators. *See supra* pp.18-20. But that "extensive discovery of legislators' private materials," which plaintiffs deemed critical to their intentional-discrimination claim, "yielded no discriminatory evidence." 796 F.3d at 503. Accordingly, there is nothing more for plaintiffs to proffer and no reason to remand. Given the legitimate purpose behind SB14, plaintiffs cannot possibly provide the "clearest proof" necessary to show discriminatory purpose.

III. SB14 Does Not Violate VRA §2.

The district court did not cite any evidence of a decline in registration or turnout among minority voters, much less that SB14 caused any such decline. But that is precisely what §2 requires; it prohibits voting requirements only if they are "imposed or applied . . . in a manner which *results in a denial or abridgment of the right* of any citizen of the United States *to vote* on account of race or color." 52 U.S.C. § 10301(a) (emphases added). The district court's finding of liability without proof of an impact on *voting* subverts §2's text.

With no evidence of a decline in minority voting, the district court relied on a statistical disparity in preexisting rates of ID possession, but that is not a discriminatory result under §2. Lack of ID at a single point in time does not prove that any person's right to vote will be denied or abridged. It does not account for the ability to get an ID such as a driver's license or free EIC, and it does not account for the fact that seniors and disabled citizens can vote by mail without ID. Indeed, every one of the individual plaintiffs who lacked ID

at the time of trial can either obtain an ID or vote by mail. None faced a substantial burden preventing them from voting. And when the United States' lawyers crisscrossed Texas with microphones in hand, looking for "disenfranchised" voters, they could not find a single one. Plaintiffs bore the burden to show that SB14 reduces *voting* participation, and they failed.

Interpreting §2 to impose liability without proof of an impact on voting not only conflicts with §2's text, it also raises serious constitutional questions and threatens an array of nondiscriminatory election laws—a critical point that Judges Easterbrook, Kozinski, Walker, and others have noted. Section 2's results test is already a prophylactic measure that goes beyond the Fifteenth Amendment's ban on intentional racial discrimination. If §2 extends further to impose liability without evidence of any effect on *voting*, the statute is no longer congruent and proportional to Congress's enforcement power.

A. The District Court Did Not Find that SB14 Has an Effect on Voting.

1. VRA §2 requires proof that the challenged law affects voting behavior.

To prove that a law "results in a denial or abridgment of the right . . . to vote on account of race or color," 52 U.S.C. § 10301(a), a plaintiff must show that it has, or will have, a negative effect on minority voting. That requires proof of a disparity in voter turnout or registration. Judge Higginbotham's opinion for the en banc Court in *Clements* correctly required "proof that participation in the political process *is in fact depressed* among minority citizens"

to establish liability under VRA §2, 999 F.2d at 867 (emphasis added). There, the Court rejected a §2 claim because the plaintiffs presented "no evidence of reduced levels of [minority] voter registration" or "lower turnout among [minority] voters." *Id.*

As this Court explained in *Clements*, the notion that §2 could result in liability without "evidence of decreased participation among minorities" was "decisively rejected by Congress in 1982." *Id.* at 866. So if a plaintiff cannot establish a disparity in voter turnout or registration, then it cannot establish that "the political processes . . . are not equally open to participation by members of [a racial group] in that its members have less opportunity than other members of the electorate to participate in the political process." *Id.* at 849 n.21; *see Gonzalez*, 677 F.3d at 406 (rejecting discriminatory-effects liability without proof of "a causal connection between [Arizona's voter-ID law] and the observed difference in the voting rates of Latinos"); *cf. Frank*, 768 F.3d at 747 ("If as plaintiffs contend a photo ID requirement especially reduces turnout by minority groups, students, and elderly voters, it should be possible to demonstrate that effect.").

2. The district court did not have any competent evidence that SB14 depresses voting participation.

Instead of voting-participation evidence, the district court relied on plaintiffs' so-called No-Match List, which reflected one expert's attempt to determine the number of registered Texas voters without an SB14-compliant ID. Based on the No-Match List, the district court found that approximately

608,000 registered voters—about 4.5% of all registered voters in Texas—lacked a qualifying photo ID as of 2014. ROA.27116.

The No-Match List did not establish a racial disparity in rates of photo-ID possession, however, because Texas does not record the race of registered voters. To fill that gap in the evidence, plaintiffs attempted to determine the race of individuals on the No-Match List based on census data, statistical analysis, and software designed to *predict* the race of potential voters. ROA.27078-81. The expert who provided the No-Match List identified 48.7% of unmatched voters as white (roughly 296,000 people), 28.7% as Hispanic (roughly 175,000 people), and 21.0% as African-American (roughly 128,000 people). ROA.43320. Comparing those figures to the total number of registered voters, he estimated that 96.4% of registered non-Hispanic white voters, 92.5% of registered African-American voters, and 94.2% of registered Hispanic voters had an SB14-compliant ID. ROA.43320. Based on those data, the district court concluded that SB14 had a "disparate impact" because "a disproportionate number of African-Americans and Hispanics populate that group of potentially disenfranchised voters" without SB14-compliant ID. ROA.27076.

Even assuming the No-Match List and accompanying racial estimates are accurate,[12] they do not prove that SB14 will deny or abridge any person's right to vote. The degree of preexisting ID possession does not establish an unequal opportunity for anyone "to obtain" photo IDs and vote. *Gonzalez*, 677 F.3d at

[12] *But see* Appellants' Br.34-36.

407; *see Frank*, 768 F.3d at 752-53 (ID disparity "as of trial" insufficient). That is particularly so given that SB14-compliant EICs—and the underlying documents to obtain them—are available for free. A conclusion that SB14 has a discriminatory effect under §2 would require, at the least, proof that minority voters who lacked ID were not able to get it, and that the inability to comply with SB14 caused minority voters not to register or vote. *See Clements*, 999 F.2d at 866 ("The Voting Rights Act responds to practices that impact *voting*; it is not a panacea addressing social deficiencies.").

But the district court did not make the factual findings necessary to bridge that inferential gap. The court did not, for instance, determine how many unmatched voters already had the documents necessary to obtain an SB14-compliant ID. *Cf. Frank*, 768 F.3d at 749 (noting that if individuals with birth certificates choose not to get a photo ID, "it is not possible to describe the need for a birth certificate as a legal obstacle that disfranchises them"). Nor did it determine whether registered voters who lacked both SB14-compliant ID and the documents necessary to get it could obtain the underlying documents. And it made no effort to determine whether individuals on the No-Match List voted before SB14 took effect. *Cf. id.* at 753 ("[I]t may be that the people who do not get photo IDs are also those least likely to vote without photo IDs."). In short, the district court did not determine whether individuals on the No-Match List could obtain an SB14 ID, whether they could vote without it, or whether they were likely to vote at all. As a result, the district court had no

basis to estimate how many individuals on the No-Match List, if any, might face a substantial burden to vote as a result of SB14.[13]

Despite exhaustive efforts, the plaintiffs have failed to identify a single individual who faces a substantial obstacle to voting because of SB14. DOJ lawyers crisscrossed Texas, microphone in hand, visiting homeless shelters to search for voters "disenfranchised" by SB14. ROA.99075-77. They found none. The organizational plaintiffs either did not allege or could not prove that any of their members lacked SB14-compliant ID. *See* ROA.99199:7-17 (Texas League of Young Voters not able to identify any constituent unable to vote because of SB14); ROA.24741 (stipulation that LUPE does not allege that any member is injured by SB14); ROA.24727 (stipulation that LULAC cannot identify any member who lacks SB14 ID); ROA.64201 (NAACP witness not aware of any member registered to vote but not in possession of SB14 ID). Tellingly, "[n]ine of the fourteen" individual plaintiffs "are eligible to vote by mail" without photo ID, ROA.27110, and none of the other five face a substantial obstacle to voting. *See supra* p.9.

[13] The list's creator, Dr. Ansolabehere, testified that he was not even asked to identify individuals who were unable to obtain ID. ROA.98854:12-17. Dr. Herron testified that he did not consider possession of birth certificates or other underlying documents. ROA.99017:2-12. Dr. Bazelon testified that he did not determine whether any person on the No-Match List possessed a birth certificate. ROA.100484:23-25. Dr. Webster, who attempted to identify households without a car, was not asked to determine whether individuals living there were registered to vote, whether they had a photo ID, or whether they had birth certificates. ROA.99917:17-18:14.

The district court therefore erred by relying on a "disparate impact"—based on a disparity in levels of ID possession at the time of trial—instead of evidence showing an effect on voting behavior. ROA.27145. That approach cannot be justified by precedent finding a §2 violation based on disparate levels of voter registration. *Cf. Mabus*, 932 F.2d at 409, 413; *see also Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting) (explaining that a limitation on voter-registration hours that actually "made it more difficult for blacks to register than whites" would provide "less opportunity '*to participate* in the political process'"). Voter-registration statistics can determine voter-turnout statistics, which preexisting ID rates obviously do not. *See, e.g.*, Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 198 (2007) (explaining that when turnout statistics "use voting age population as the denominator, as opposed to citizen voting age population or eligible voters," individuals who are not eligible to register or vote will make "turnout rates appear dramatically lower").

At most, plaintiffs proved that a small percentage of registered Texas voters did not have SB14-compliant ID at the time of trial, but they did not prove that SB14 will prevent any person from casting a ballot. *Cf. Crawford*, 553 U.S. at 187 (record contained no evidence of "a single, individual Indiana resident who will be unable to vote as a result of SEA 483"); *Frank*, 768 F.3d at 752 (holding that §2 requires more than mere proof that "white registered voters are more likely to possess qualifying photo IDs, or the documents necessary to get them"). The critical distinction between what §2 requires and what the

plaintiffs proved—and the flaw in the plaintiffs' case—was candidly summed up by the Veasey plaintiffs' expert: "I wasn't asked to study who's been deprived of rights to vote. I was asked to study who has IDs." ROA.99022:17-18.

B. Plaintiffs Failed to Make the Required Causation Showing.

The district court's conclusion that levels of preexisting ID possession would result in denial or abridgment of the right to vote "on account of" race lacks any legal or factual support. The district court assumed, based on general socioeconomic conditions and past discrimination, that minority voters would face a disproportionate burden in complying with SB14:

> (1) SB14 specifically burdens Texans living in poverty, who are less likely to possess qualified photo ID, are less able to get it, and may not otherwise need it; (2) a disproportionate number of Texans living in poverty are African-Americans and Hispanics; and (3) African-Americans and Hispanics are more likely than Anglos to be living in poverty because they continue to bear the socioeconomic effects caused by decades of racial discrimination.

ROA.27084-85. But socioeconomic conditions and historical events do not prove that minority voters cannot participate equally in the electoral process, let alone that they are excluded "on account of race." Reading §2 to invalidate laws based on the predicted effect of poverty, age, or some other characteristic that happens to correlate with race is "implausible," as it would "sweep[] away almost all registration and voting rules." *Frank*, 768 F.3d at 754; *see infra* Part III.C.1.

The district court conducted the causation analysis, not as an inquiry into cause and effect, but by reviewing a non-exhaustive list of factors from a 1982 U.S. Senate report typically used in vote-*dilution* claims—that is, claims about the efficacy of votes already cast. *See* 796 F.3d at 505 (listing these "Senate factors"); *Thornburg v. Gingles*, 478 U.S. 30, 43-45 (1986); *id.* at 45 ("the enumerated factors will often be pertinent to *certain types* of § 2 violations, particularly to vote dilution claims") (emphasis added). The Senate factors generally have nothing to do with vote-*denial* claims—that is, whether a voting qualification reduces opportunities to vote on account of race. *See generally Simmons v. Galvin*, 575 F.3d 24, 29 (1st Cir. 2009) (explaining that such claims challenge "practices that prevent people from voting or having their votes counted"). Regardless, to the extent the Senate factors are relevant to voter-qualification claims, they must be applied to determine whether the challenged law will deprive minority voters of equal access to the political process, not merely to catalogue historical discrimination and background socioeconomic conditions. *Gingles*, 478 U.S. at 78 (explaining that §2 requires an "intensely local appraisal" of the "design and impact" of the challenged law).

The district court, however, failed to link current socioeconomic conditions to proximate state-sponsored discrimination—which, in any event, does not exist. "[U]nits of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination." *Frank*, 768 F.3d at 753. The district court avoided this part of the analysis, instead relying on the sweeping, unfounded assumption that decades-old historical state-

sponsored discrimination caused the current socioeconomic status of every minority citizen in Texas—at least those below the poverty line. *See* ROA.27091 ("African-Americans and Latinos are less educated . . ., suffer poorer health . . ., are less successful in employment . . ., and are likewise impoverished in greater numbers because of discrimination."). To the extent it relied on an expert's testimony that socioeconomic disparities "are the natural result of long and systematic racial discrimination," ROA.27033, it credited "the sort of generalized armchair speculation" that this Court rejected in *Clements*, 999 F.2d at 867 (holding that testimony supporting "the common sense proposition that depressed political participation typically accompanies poverty and a lack of education . . . certainly does not amount to proof that minority voters *in this case* failed to participate equally in the political processes").

The Seventh Circuit corrected a similar error in *Frank*. Like the district court here, the district court in *Frank* had found "socioeconomic disparities between whites and minorities in Wisconsin" that are "traceable to the effects of discrimination in areas such as education, employment, and housing." *Frank v. Walker*, 17 F. Supp. 3d 837, 878 (E.D. Wis. 2014), *rev'd*, 768 F.3d 744. The Seventh Circuit reversed because the district court's finding of historical discrimination in "education" and "employment" was not specific to the State, as opposed to society at the time; thus, the State was not the proximate cause of the range of socioeconomic consequences articulated by the district court as the basis for its §2 ruling. *Frank*, 768 F.3d at 753; *cf. Oregon v.*

Mitchell, 400 U.S. 112, 133 (1970) ("Congress also had before it this country's history of discriminatory educational opportunities in both the North and the South.").

The panel attempted to distinguish *Frank* based on the district court's finding of "both historical and contemporary examples of discrimination in both employment and education by the State of Texas." 796 F.3d at 504 n.17. But the panel itself noted that the decades-old racial discrimination on which the district court relied does not show current racial discrimination. *Id.* at 501. And the panel correctly explained that "[t]he only relatively contemporary evidence regarding statewide discrimination comes from a trio of redistricting cases that go in three directions, thus forming a thin basis for drawing any useful conclusions here"; "these cases do not support a finding of 'relatively recent' discrimination." *Id.*

Even if it had established a proximate connection between state-sponsored discrimination and general socioeconomic conditions, the district court did not explain how those conditions would cause SB14 to impair the right of minorities to vote. In *Clements*, the Court accepted "that disparities between white and minority residents in several socioeconomic categories are the tragic legacies of the State's discriminatory practices," 999 F.2d at 866, but it held that socioeconomic disparities do not prove diminished political participation:

> [T]hese factors, by themselves, are insufficient to support the district court's "finding" that minorities do not enjoy equal access to the political process absent some indication that these effects of past discrimination actually hamper the ability of minorities to participate.

Id. No such indication appears in the record here. The district court made no findings about the socioeconomic status of voters on the No-Match List.[14] And the effects of past discrimination obviously will not cause SB14 to hamper participation by the overwhelming majority of registered African-American voters (92.5%) and registered Hispanic voters (94.2%), who already have SB14-compliant ID. ROA.43320. By assuming a causal link between general socio-economic conditions and diminished political opportunity, the district court contradicted this Court's en banc decision in *Clements*.

C. The District Court's Interpretation of VRA §2 Would Threaten Many Legitimate Election Laws and Render the Statute Unconstitutional.

The district court's interpretation of §2 raises serious practical and constitutional problems, confirming it should be rejected.

1. Under the district court's view of §2, "[e]vidence of socioeconomic disparities could be the source of countless lawsuits." *Farrakhan v. Washington*, 359 F.3d 1116, 1126 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc). Internet voting, for instance, would violate §2 as long as "[p]laintiffs could show disparities in wealth, leading to disparities in computer ownership and Internet access, leading to disparities in participation on election day." *Id.* "Holding elections on a Tuesday could be a thing of the past

[14] The plaintiffs' experts testified that they did not consider the income levels of voters on the No-Match List, ROA.99016:7-15, their socioeconomic status, ROA.99568:14-22, or their travel costs to obtain a photo ID, ROA.100484:19-22; ROA.99909:21-10:10; ROA.100111:14-21.

if a plaintiff somewhere can show that minority voters are disproportionately more likely to be hourly wage earners, who are disproportionately less likely to vote because they can't take time off from work." *Id.*

If socioeconomic disparities trigger liability, §2 will prohibit even the most basic voting requirements, including voter registration. As Judge Easterbrook explained for the Seventh Circuit:

> if whites are 2% more likely to register than are blacks, then the registration system top to bottom violates § 2; and if white turnout on election day is 2% higher, then the requirement of in-person voting violates § 2. Motor-voter registration, which makes it simple for people to register by checking a box when they get drivers' licenses, would be invalid, because black and Latino citizens are less likely to own cars and therefore less likely to get drivers' licenses.

Frank, 768 F.3d at 754. Even age limits are vulnerable. Plaintiffs in another case recently argued that excluding 17-year-olds from primary elections under Ohio's Threshold Voter Law would violate §2 because "African-Americans and Latinos in the State of Ohio are represented in the greatest numbers in younger age cohorts, including the 15- to 17-year-old age cohort, and their opportunity to participate in the political process would be denied or abridged." Pls.' Mot. for TRO and Prelim. Inj. 18, *Smith v. Husted*, No. 2:16-cv-212 (S.D. Ohio Mar. 10, 2016). It is absurd to believe that Congress crafted VRA §2 to forbid States from enacting age requirements for voting.

As Judge Kozinski and six other Ninth Circuit judges explained, "The permutations are endless. The bottom line is that virtually every decision by a state as to voting practices will be vulnerable, no matter how unrelated to

race." *Farrakhan*, 359 F.3d at 1126 (Kozinski, J., dissenting from denial of reh'g en banc). The en banc Ninth Circuit ultimately vindicated that position. *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (en banc) (per curiam) (rejecting such a §2 test). Plaintiffs have yet to offer a limiting principle that would preclude that result, yet allow them to prevail here.

These consequences are not mere speculation. Texas, for example, requires voters to register, Tex. Elec. Code § 11.002(a)(6), to vote in the precinct where they reside, *id.* § 11.003, to vote early within 17 days before election day, *id.* § 85.001, and to register before election day, *id.* § 13.143. Those requirements likely affect poor voters more than wealthy voters. But no one seriously contends that they deny or abridge the right to vote "on account of race."

This is why Section §2's causation requirement is "crucial." *Gonzalez*, 677 F.3d at 405. Conflating race and poverty—or any other characteristic that happens to correlate with race—removes any limitation on the scope of liability under §2 and puts virtually every election regulation at risk.

2. Plaintiffs' interpretation of §2, moreover, creates two serious constitutional defects and should be rejected under the canon of constitutional avoidance. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 380-82 (2005).

a. When Congress acts to enforce the Reconstruction Amendments, legislation that reaches beyond the Constitution's substantive guarantees "must exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Bd. of Trustees of the*

Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001) (quotation marks omitted); *see Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327 (2012). A law of general applicability violates the Reconstruction Amendments only if it is motivated by a discriminatory *purpose* to suppress voting on the basis of race; the Constitution does not prohibit voting laws because of their results. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997); *Washington v. Davis*, 426 U.S. 229 (1976).

VRA §2 does contain such a prohibition, banning laws that result in denial or abridgment of the right to vote because of race. 52 U.S.C. § 10301(a). It thus goes one step beyond the constitutional guarantee. If interpreted to extend yet another layer of prophylaxis—to cases without evidence of an effect on voter behavior and based instead on mere socioeconomic disparities—§2 is no longer sufficiently tied to the constitutional ban on purposeful racial discrimination. *Cf. In re Cao*, 619 F.3d 410, 447 (5th Cir. 2010) (constitutional standards cannot depend on "prophylaxis-upon-prophylaxis").

As interpreted by the district court, therefore, §2 would exceed Congress's authority because it lacks congruence and proportionality to the constitutional prohibition. Judges Kozinski, Walker, and others have flagged the congruence-and-proportionality concerns with similar expansions of §2 liability. *See, e.g.*, *Hayden v. Pataki*, 449 F.3d 305, 330-37 (2d Cir. 2006) (Walker, C.J., concurring); *Johnson v. Gov. of Fla.*, 405 F.3d 1214, 1229-32 (11th Cir. 2005) (en banc); *Farrakhan*, 359 F.3d at 1121-25 (Kozinski, J., dissenting from denial of reh'g en banc).

Contrary to the panel's understanding, this is not an argument that VRA §2's results test is *facially* unconstitutional. *Cf.* 796 F.3d at 508 n.24. The State does not challenge Congress's power to enact prophylactic measures, provided they are congruent and proportional to constitutional guarantees. But if VRA §2 is interpreted to extend liability where no effect on voter turnout or registration is shown, then the statute would be an unconstitutional exercise of Congress's enforcement powers.

b. The district court's interpretation also puts §2 in conflict with the Fourteenth Amendment because it compels the States to engage in race-based decisionmaking. If States face liability for enacting neutral election laws that have a disparate impact on racial minorities—or any group in which minorities are overrepresented compared to their share of the total population—then States will be forced to "subordinate traditional race-neutral . . . principles" to "racial considerations" in violation of the Equal Protection Clause. *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *see Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Proj., Inc.*, 135 S. Ct. 2507, 2524 (2015) (explaining that courts must avoid interpreting statutes "to inject racial considerations" into government decisionmaking).

The panel dismissed this concern on the ground that §2 does not "mandate the sort of remedy to which the State objects." 796 F.3d at 508. But the problem is what States must do to avoid liability, not what remedies courts may order. The point is that disparate-impact liability based on statistical ra-

cial disparities would force States to fixate on race in order to avoid any statistical disparity. For example, States would have to use racial considerations instead of enacting legitimate election laws, like age restrictions or voter-registration laws. This was already a problem with the nonretrogression doctrine under VRA §5; it should not be imported into VRA §2. *See Georgia v. Ashcroft*, 539 U.S. 461, 491-92 (2003) (Kennedy, J., concurring) ("[C]onsiderations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5."). Statistical disparities and background findings that can be repeated in any case cannot trigger §2 liability.

D. The District Court's Remedy Is Infirm.

Even if the plaintiffs had proven a violation of §2, the district court's remedy was vastly overbroad given that SB14 will impose no burden on registered Texas voters who already have an SB14-compliant ID—at least 95% according to the district court, ROA.27116—or who can vote without an ID, either in person or by mail. An appropriate remedy under §2 could reach no further than particular plaintiffs unable to obtain an ID or vote without one. Since none of the plaintiffs fall into that category, *see supra* p.9, no such remedy would be appropriate here.[15]

[15] The Veasey plaintiffs' claim against Governor Abbott cannot support relief in any event because their alleged injuries are not fairly traceable to the Governor and would not be redressed by an injunction against him. *See Okpalobi v. Foster*, 244 F.3d 405, 426-27 (5th Cir. 2001) (en banc).

IV. SB14 Does Not Impose an Unconstitutional Burden on Voting.

The district court's facial invalidation of SB14 as a substantial burden on the right to vote cannot be squared with *Crawford*'s holding that voter-ID laws deter fraud and safeguard voter confidence. Nor could as-applied relief be justified here because plaintiffs have not identified a single person—not even themselves—who faces a substantial obstacle to voting because of SB14.[16] Thus, there is no basis on this record to conclude that SB14 unconstitutionally burdens the right to vote, either facially or as-applied.

A. *Crawford* Already Performed the *Anderson-Burdick* Balancing that Defeats Plaintiffs' Facial Challenge.

1. The right to vote, while unquestionably important, is not absolute. *Burdick v. Takaushi*, 504 U.S. 428, 433 (1992). The Constitution expressly authorizes States to regulate the times, places, and manner of holding elections, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986), and compels them to take "an active role in structuring elections," *Burdick*, 504 U.S. at 433, to assure that the electoral process is orderly, fair, and honest, *Storer v. Brown*, 415 U.S. 724, 730 (1974). All "[e]lection laws will invariably impose

[16] The Seventh Circuit's recent opinion in *Frank* highlights the limited scope of the relief available in an as-applied challenge—a point relevant to the plaintiffs' §2 and unconstitutional-burden claims here. Emphasizing that the *Frank* plaintiffs "now accept the propriety of requiring photo ID from persons who already have or can get it with reasonable effort," the court explained that they could still attempt to prove "that high hurdles for some persons eligible to vote entitle *those particular persons* to relief." *Frank v. Walker*, No. 15-3582, 2016 WL 1426486, at *2 (7th Cir. Apr. 12, 2016) (emphasis added). Unlike Texas, Wisconsin generally requires photo ID from voters who request absentee ballots. *See* 17 F. Supp. 3d at 844.

some burden upon individual voters." *Burdick*, 504 U.S. at 433. But there is no right to be free from any burden or inconvenience in voting. A contrary rule would improperly "tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.*

Accordingly, challenges to election regulations involve a weighing process. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). A "severe" restriction requires the challenged state law to be "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S., at 434. But "less exacting review" applies to "reasonable, nondiscriminatory restrictions," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), which will generally be upheld if supported by "important regulatory interests," *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 788 & n.9.

2. The Supreme Court already performed this balancing test in *Crawford*, concluding that voter-ID laws are facially evenhanded restrictions that promote integrity in the election process.

When the government provides free ID, a photo-ID requirement is not facially unconstitutional because the statute's broad application to all voters imposes "only a limited burden on voters' rights." *Crawford*, 553 U.S. at 203 (quoting *Burdick*, 504 U.S. at 439). Even if it requires supporting documentation that may cost $3 to $12, getting a free photo ID does not exceed the usual burdens of voting and "surely" does not qualify as a substantial burden on the right to vote. *Id.* at 198. Finally, any heavier burden felt by particular persons

in obtaining photo ID is generally mitigated by their ability to cast a provisional vote that will count after curing any defect in ID. *Id.* at 199-203.

Texas need not relitigate these holdings. *See Voting for Am.*, 732 F.3d at 394. *Crawford* reached conclusions of law. Plaintiffs may disagree with *Crawford*, but they cannot reopen the decision by pointing to factual distinctions irrelevant to *Crawford*'s reasoning. *Crawford* did not stake out every detail of Indiana's law as an outer boundary of legality; it reached its conclusion based on general points and holdings, all of which are common to this case. Appellants' Br.15-19, 22-23.

3. Plaintiffs would not prevail even if they could revisit *Crawford*'s application of the *Anderson-Burdick* balancing test. Under the district court's figures, over 95% of eligible Texas voters already have sufficient photo ID. That alone precludes facial invalidation. Appellants' Br.60-62. Nor is there any support in the record for Plaintiffs' theory that nonpossession of ID in the present implies inability to *obtain* compliant photo ID in the future. Current rates of ID possession do not prove a substantial burden on the right to vote, and the district court's conclusion to the contrary was impermissible. *See Frank*, 768 F.3d at 749-50.

Like Indiana, Texas followed the recommendation of the Carter-Baker Commission, providing free photo ID and provisional voting in the event of ID defects. ROA.77830. Moreover, unlike Indiana, Texas charges no fees at

all for the supporting documents necessary to obtain a free photo ID. *Crawford*'s holding, that the usual burdens in obtaining such ID are minimal, applies here. 553 U.S. at 198.

On the other hand, the State's interest in counting only eligible votes cuts to the heart of respect for democracy and public confidence in the electoral process. States have an obligation to combat voter fraud and protect every citizen's right to vote.[17] *Id.* at 193-97; *see* Br. of Texas et al. 2-13, *Crawford v. Marion Cnty. Election Bd.*, 2007 WL 4351592 (U.S. Dec. 10, 2007) (noting history, seriousness, and ongoing threat of voter fraud). That "neutral and sufficiently strong" justification for the photo-ID requirement, 553 U.S. at 204, weighed against its minimal burden, forecloses any facial relief. Even if that issue were open to debate after *Crawford*, plaintiffs could not possibly show that SB14 is unconstitutional in every application.

B. Plaintiffs Do Not Identify a Single Person Who Faces an Unconstitutional Burden on the Right to Vote.

1. *Crawford* left open the possibility that a "small number of voters" facing "excessively burdensome" duties might receive *as-applied* relief that does not "invalidate the statute in all its applications." *Id.* at 200, 202. But *Crawford* did not purport to alter the law on facial challenges, let alone suggest that any later-established burden on a small "class of voters" would under-

[17] *See, e.g.*, ROA.21885; ROA.29184–85.

mine the law *facially*. *Id.* at 202-03 (rejecting argument that "the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute").

In fact, *Crawford* expressly criticized the challengers for doing what plaintiffs attempt here: seeking facial invalidation while ignoring the no-set-of-circumstances test, instead using a "unique balancing analysis that looks specifically at a small number of voters who may experience a special burden." *Id.* at 200.[18] Not only did *Crawford* reject that argument, it explained that such a novel legal development would not gain the plaintiffs anything because their evidence of purported as-applied burdens was lacking. *Id.* at 200-02.

2. The same is true here. Plaintiffs cannot point to a single, identifiable person whose right to vote is abridged by SB14.[19] None of the 14 named individual plaintiffs face a substantial obstacle to voting. *See supra* p.9. Like the district court, plaintiffs relied on a handful of vignettes, ROA.27092, all of which break down on examination and fail to constitute the "concrete" evidence required by *Crawford*. *See* Reply Br.12-14.

Even the most charitable reading of plaintiffs' claims would address only a triply-limited fraction of qualified Texas voters:

- the fraction of qualified voters who lack a sufficient form of ID (less than 5%, even on plaintiffs' numbers), ROA.27076-77, and then only:

[18] That would be all the more improper here because SB14 has a strong severability clause. Appellants' Br.62.

[19] In fact, approximately 22,000 voters on the No-Match List voted in at least one election since SB14's implementation. ROA.97440-47.

- the fraction of that group that does not have documentation required to obtain a free photo ID *and* cannot vote by mail without ID, and then only:
- the fraction of that sub-group for which the burden of getting free photo ID is substantially heavier than "[f]or most voters," 553 U.S. at 198.

Plaintiffs' failure to identify a single person who falls within that final subcategory precludes a finding that SB14 imposes an unconstitutional burden, facially or as applied to the plaintiffs. *See, e.g.*, *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009) (plaintiffs "failed to identify a single individual who would be unable to vote").

CONCLUSION

The Court should reverse the district court's judgment and render judgment for defendants.

Respectfully submitted.

/s/ Scott A. Keller

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

SCOTT A. KELLER
Solicitor General

J. CAMPBELL BARKER
MATTHEW H. FREDERICK
Deputy Solicitors General

PRERAK SHAH
Assistant Solicitor General

Counsel for Appellants

Certificate of Service

On April 15, 2016, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Scott A. Keller
Scott A. Keller

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,754 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Scott A. Keller
Scott A. Keller