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

(*See inside cover for continuation of caption*)

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

SUPPLEMENTAL EN BANC BRIEF FOR THE UNITED STATES AS APPELLEE

KENNETH MAGIDSON
United States Attorney
Southern District of Texas

JOHN ALBERT SMITH, III
Office of the U.S. Attorney
800 Shoreline Blvd., Ste. 500
Corpus Christi, TX 78401

VANITA GUPTA
Principal Deputy Assistant
Attorney General

DIANA K. FLYNN
ERIN H. FLYNN
CHRISTINE A. MONTA
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-2195

(*Continuation of caption*)

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 ESPINOSA; 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

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RULE:

IN THE UNITED STATES COURT OF APPEALS
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No. 14-41127

MARC VEASEY; *et al.*,

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v.

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

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

SUPPLEMENTAL EN BANC BRIEF FOR THE UNITED STATES AS APPELLEE

INTRODUCTION

After a nine-day trial, the district court found that Senate Bill 14 (SB14), Texas's photo-identification requirements for in-person voters, violates Section 2 of the Voting Rights Act (VRA), 52 U.S.C. 10301, for two independent reasons. First, the Legislature passed SB14 at least in part for the discriminatory purpose of gaining partisan advantage by suppressing African-American and Hispanic votes. Because minority voters overwhelmingly vote against Texas's current governing party, the Legislature and Governor had a powerful incentive to counteract the emerging strength of the rapidly growing African-American and Hispanic

electorate. Indeed, bill proponents could not explain material departures from supposed model legislation—departures that made Texas's law the strictest in the country and one that adversely affected minority voters. Second, regardless of its purpose, SB14 has a discriminatory result because its requirements interact with social, political, and historical conditions tied to race discrimination to result in less opportunity for minority voters to participate in the political process relative to other voters.

In determining that SB14 violates Section 2, the court issued detailed findings of fact and applied established legal standards. Texas claims that the Section 2 determinations depend on numerous legal errors, but the State's arguments lack merit. Texas's novel assertions of what plaintiffs must show to establish either discriminatory purpose or a discriminatory result conflict with the VRA, Supreme Court precedent, and the decisions of this Court and others. Rather than engage in any real discussion of Section 2 and the cases interpreting it, Texas quotes language out of context and distorts the applicable legal standards. This Court should reject the State's attempt to insulate even the most discriminatory voting practices from VRA scrutiny.

Because the district court committed no legal error in analyzing the Section 2 claims, Texas must show that the court's factual findings are clearly erroneous. But not only are the findings amply supported by the record, Texas did not even

dispute, and has not challenged here, the overwhelming majority of the evidence. Instead of trying to show clear error, Texas ignores the factual findings and credibility determinations, substitutes its view of the record, and invites this Court to reweigh the evidence. This Court does not decide factual issues anew, and no principled basis exists to intrude upon the district court's determinations. This Court should affirm the Section 2 liability determinations and reinstate the permanent injunction.

RELEVANT BACKGROUND

1. Section 2 Of The VRA

Section 2 imposes a "permanent, nationwide ban on racial discrimination in voting." *Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612, 2631 (2013). It prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement" of the right to vote "on account of race or color." 52 U.S.C. 10301(a). The terms "vote" and "voting" encompass "all action necessary to make a vote effective," including "casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast." 52 U.S.C. 10310(c)(1). In 1982, Congress amended Section 2 to make clear that a statutory violation can be established by showing a discriminatory purpose, a discriminatory result, or both. See *Thornburg* v. *Gingles*, 478 U.S. 30, 34-37, 43-

45 & nn.8-9 (1986); 52 U.S.C. 10301; S. Rep. No. 417, 97th Cong., 2d Sess. 27 (1982) (Senate Report).

2. Texas's Identification Requirements For In-Person Voting

a. From 2003 until 2013, in-person voters in Texas could cast a regular ballot by presenting a registration certificate, which is mailed to them upon successful registration and reissued biennially. ROA.27038. Voters appearing without that certificate could cast a regular ballot by executing an eligibility affidavit and presenting alternate ID, such as a current or expired driver's license, employee or student ID, or utility bill, paycheck, bank statement, or government document showing the voter's name and address. ROA.27038.

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

Opponents argued that these proposals would adversely affect minority constituents and blocked the legislation. ROA.27070-27071.

After Republicans gained sizeable majorities in the Texas House and Senate in 2010, the 2011 Legislature enacted photo-ID requirements stricter than those previously rejected. ROA.30607-30623 (enrolled bill). Though fully aware that hundreds of thousands of voters might lack the requisite photo ID, and that African Americans and Hispanics would be most affected, the Legislature accepted amendments that broadened Anglo voting opportunities while rejecting those that would have assisted minority voters and studied the law's effect. ROA.27072-27075. The Legislature enacted SB14 in the face of well-known facts and available data showing that African Americans and Hispanics in Texas are more likely than Anglos to live in poverty, to lack access to a vehicle, and to have lower incomes, less education, and poorer health. ROA.27088-27091, 27101-27102, 27148-27149. Texas also has significant racial gaps in voter registration and turnout. ROA.27149.

Despite the Legislature's purported reliance on the 2005 report of the Carter-Baker Commission on Federal Election Reform (Tex. Supp. Br. 4), the Legislature flouted the Commission's recommendations. The Commission, *inter alia*, recognized the "utmost importance" of the Voting Rights Act, identified absentee voting as the largest source of potential fraud, proposed linking ID issuance to

voter registration, counseled that non-drivers be able to obtain ID with ease and free of charge, emphasized the importance of voter outreach and education, and recommended that photo-ID laws be phased in over two federal election cycles. ROA.77830-77831, 77836, 77841-77842, 77850-77852, 77867-77868. The Legislature disregarded those concerns in enacting SB14.

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

SB14 also created a new form of photo ID—the election identification certificate (EIC)—available to voters who lack qualifying ID. ROA.27043. Eligible voters who travel to a DPS office or other EIC-issuing location and present DPS-designated proof of citizenship and identity can obtain a free EIC that generally is valid for six years; because EIC applicants by definition lack a U.S. passport or citizenship certificate, a certified copy of a birth certificate is usually necessary. ROA.27094-27095 & n.275. Among voters who lack SB14 ID, African Americans and Hispanics are disproportionately burdened by documentation, eligibility, and underlying fee requirements for obtaining an EIC; onerous distances to ID-issuing locations, which are often inaccessible by public

transit; and the lack of SB14-dedicated education and assistance. ROA.27095-27099, 27101-27105.

Although voters who fail to present qualifying ID may cast a provisional ballot under SB14, Texas counts that ballot only if the voter, within six days of the election, either presents SB14 ID or executes an affidavit attesting (a) a religious objection to being photographed or (b) loss of a photo ID in a recent natural disaster. ROA.27044. Voters are not always told that provisional ballots are available, that they must be timely cured, that EICs are available as a means of complying with SB14, or that free birth certificates are available to some Texas-born voters. ROA.27057, 27093 & n.269, 27131-27132, 27141 n.498.

c. When SB14 was enacted, Texas was subject to Section 5 of the VRA, 52 U.S.C. 10304, and could not enforce SB14 unless and until it showed that the law had neither a discriminatory purpose nor a discriminatory effect. A three-judge court concluded that Texas had not shown that SB14 would not have a prohibited effect; it declined to reach whether the State had established that SB14 had no discriminatory purpose. See *Texas* v. *Holder*, 888 F. Supp. 2d 113, 115 (D.D.C. 2012). The Supreme Court vacated that decision, 133 S. Ct. 2886 (2013), in light of *Shelby County*, which held that Section 4(b) of the VRA could no longer be used as a basis to impose Section 5 preclearance, see 133 S. Ct. at 2631.

3. Proceedings Below

a. Within hours of *Shelby County*, Texas announced that SB14 would take effect as enacted. The United States and private plaintiffs responded by filing challenges to SB14, which were consolidated and placed on an expedited schedule. ROA.27026-27027 & n.3; ROA.97550-97564. The United States alleged that SB14 violates Section 2, both because of its racially discriminatory purpose (ROA.27151 & n.524) and its discriminatory result (ROA.27143 & n.502).

b. After an extensive trial with over 40 witnesses, including 17 experts, and thousands of pages of evidence, the court issued detailed findings of fact and conclusions of law. ROA.27026-27172. It found that SB14 is the "strictest" voter ID law nationwide and provides the "fewest opportunities" to cast a regular ballot. ROA.27045. The court credited expert testimony that over 600,000 registered voters lack qualifying ID, and that a sharply disproportionate number of them are African American or Hispanic. ROA.27075-27084. It further found that, among affected voters, African Americans and Hispanics would find it more difficult to satisfy SB14. ROA.27084-27091. The court concluded that SB14 interacts with conditions tied to race discrimination to provide minority voters less opportunity relative to Anglos to participate in the political process and elect their candidates of choice, thereby producing a prohibited discriminatory result. ROA.27144.

The court also found that this result was not accidental, and that the Legislature had enacted SB14 at least in part because of its detrimental effect on minority voters. ROA.27158-27159. Among other findings, the court stated that "demographic trends and polarized voting patterns" gave the governing party a powerful incentive to "gain partisan advantage by suppressing" the "votes of African-Americans and Latinos," and that proponents could not explain SB14's most restrictive provisions. ROA.27153, 27158. The court concluded that the evidence supported an inference of a discriminatory purpose, and that Texas had not shown that the Legislature would have enacted SB14 absent this purpose. ROA.27158-27159.

To redress the Section 2 violations, the court enjoined Texas from enforcing SB14 and restored the State's preexisting voter ID law. ROA.27167, 27192.

c. Texas sought an emergency stay pending appeal, which this Court granted based "primarily" on the imminence of the November 2014 election. ROA.27377. Plaintiffs filed emergency applications with the Supreme Court that were denied. See Nos. 14A393, 14A402, 14A404 (S. Ct. Oct. 18, 2014). With a stay in effect, this Court expedited the appeal.

4. The Panel Opinion

A unanimous panel of this Court affirmed the district court's finding that SB14 has a discriminatory result. Panel Op. 20-36 (5th Cir. Aug. 5, 2015). The

panel vacated the district court's judgment that SB14 was enacted for a discriminatory purpose, concluding that the court had relied too heavily on certain evidence, and remanded on that claim and for a remedy. Panel Op. 9-20, 48-49.

On Texas's petition, this Court granted rehearing en banc and vacated the panel's opinion and judgment. Absent an order from this Court or the Supreme Court, Texas plans to enforce SB14 for the November 2016 presidential election.

SUMMARY OF ARGUMENT

Texas asks this Court to cobble together new Section 2 standards from language the State quotes without reference to context or logic. Texas has not asked this Court to revisit guiding precedent, nor could this Court do so under Supreme Court rulings. To be sure, States have a legitimate interest in fraud prevention and electoral integrity. But States may not insulate specific laws that have a racially discriminatory purpose or a discriminatory result merely by invoking such an interest. Texas offers no principled basis for departing from settled precedent simply because the challenge here involves photo-ID legislation. This Court should reject Texas's arguments and affirm the judgment below.

ARGUMENT

I

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

A. Standard Of Review

Whether SB14 has a prohibited discriminatory result is a question of fact reviewed for clear error. See *Thornburg* v. *Gingles*, 478 U.S. 30, 79 (1986); *Rogers* v. *Lodge*, 458 U.S. 613, 622-623 (1982). Clear-error review applies to both subsidiary and ultimate facts and prohibits appellate courts from deciding factual issues anew. See *Teva Pharm. USA, Inc.* v. *Sandoz, Inc.*, 135 S. Ct. 831, 836-837 (2015); Fed. R. Civ. P. 52(a)(6). If a trial court's findings are "plausible" in light of the entire record, this Court must accept them. *Ali* v. *Stephens*, No. 14-41165, 2016 WL 1741573, at *4 (5th Cir. May 2, 2016) (citation omitted). Clear-error review prohibits "second-guess[ing] the district court's resolution of conflicting testimony or its choice of which experts to believe," determinations "peculiarly within" the district court's province. *Ibid.* (citation omitted). Legal questions are reviewed *de novo*. See *ibid.*

B. Section 2 Required The District Court To Examine SB14 In Light Of Texas's "Past And Present Reality"

Section 2 prohibits jurisdictions from imposing or applying a "prerequisite to voting" or "standard, practice, or procedure" that "results in a denial or

abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. 10301(a); see 52 U.S.C. 10303(f)(2) (applying VRA protections to language minorities). A Section 2 violation is established if, "based on the totality of circumstances," members of a racial group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b).

Section 2 liability is not based simply on racial disparities in an electoral system or correlations between race and poverty. Rather, the "essence" of a results claim is that a challenged practice "interacts with social and historical conditions" attributable to race discrimination "to cause an inequality in the opportunities enjoyed by [minority] and white voters." *Gingles*, 478 U.S. at 47; see Senate Report 27-30 & nn.109-120. Section 2 thus requires a "peculiarly" fact-based inquiry into the "design and impact of the contested electoral mechanism[]" in light of the jurisdiction's "past and present reality." *Gingles*, 478 U.S. at 79 (citations and internal quotation marks omitted). For decades, this Court and others have applied Section 2 to challenges involving voters' access to the ballot box.[1]

[1] See, *e.g.*, *Mississippi State Chapter, Operation PUSH, Inc.* v. *Mabus*, 932 F.2d 400, 404-405, 409-410 (5th Cir. 1991); *Ortiz* v. *City of Phila. Office of the City Comm'rs*, 28 F.3d 306, 308-310, 317 (3d Cir. 1994); *League of Women Voters of N.C.* v. *North Carolina*, 769 F.3d 224, 238-241, 245-246 (4th Cir. 2014), cert. denied, 135 S. Ct. 1735 (2015); *Stewart* v. *Blackwell*, 444 F.3d 843, 877-879 (6th Cir. 2006), superseded as moot, 473 F.3d 692 (6th Cir.

(continued…)

For Section 2 cases involving access to the polls, courts apply a two-step inquiry. First, the court must assess whether the law bears more heavily on minority voters. This incorporates both the likelihood that minority voters are affected and their relative ability to overcome burdens the law imposes. If a discriminatory impact is established, the court engages in a fact-intensive localized inquiry to determine whether, "based on the totality of circumstances," the law works in concert with conditions tied to race discrimination to produce a discriminatory result "on account of race or color." See, *e.g.*, *Operation PUSH*, 932 F.2d at 405; *League of Women Voters*, 769 F.3d at 240-241; *Ohio State Conference*, 768 F.3d at 554, 559; *Frank*, 768 F.3d at 754-755; *Salt River*, 109 F.3d at 595-596 & n.7; *Johnson*, 405 F.3d at 1236-1239 & n.7 (Tjoflat, J., concurring).

When examining the totality of circumstances, courts rely on a non-exhaustive list of factors articulated in the Senate Report accompanying the 1982 VRA Amendments (Senate Factors). See *Gingles*, 478 U.S. at 44-45; Senate

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(…continued)
2007); *Ohio State Conference of the NAACP* v. *Husted*, 768 F.3d 524, 552 (6th Cir.), vacated on other grounds, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); *Smith* v. *Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 594-596 & nn.5-8 (9th Cir. 1997) (*Salt River*); *Gonzalez* v. *Arizona*, 677 F.3d 383, 405-407 (9th Cir. 2012) (en banc), aff'd on other grounds, *sub nom. Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013); *Johnson* v. *Governor of Fla.*, 405 F.3d 1214, 1227 n.26 (11th Cir. 2005) (en banc); see also *Frank* v. *Walker*, 768 F.3d 744, 751-755 (7th Cir.), reh'g en banc denied, 773 F.3d 783 (7th Cir. 2014) (Posner, J., dissenting), cert. denied, 135 S. Ct. 1551 (2015).

Report 28-29. No particular factor is necessary to prove a violation, and a factor's relevance will vary with "the kind of rule, practice, or procedure called into question." Senate Report 28. Regardless of the type of claim, the Senate Factors help courts analyze whether a challenged practice interacts with preexisting conditions to deny or abridge the right to vote "on account of race or color." *Gingles*, 478 U.S. at 45 & n.10. Texas's argument that the Senate Factors "generally have nothing to do with vote-*denial* claims" (Supp. Br. 41) plainly fails. See note 1, *supra* (cases); U.S. Br. 16-17; U.S. Opp. to Reh'g 13-14.

As part of the totality of circumstances, courts examine a jurisdiction's claimed interest in imposing a challenged practice and whether the practice actually advances that interest. See Senate Report 29-30 & n.117; *LULAC, Council No. 4434* v. *Clements*, 999 F.2d 831, 869-876 (5th Cir. 1993) (en banc) (citing *Houston Lawyers' Ass'n* v. *Attorney General*, 501 U.S. 419, 426-428 (1991)). Yet a defendant cannot defeat liability merely by asserting a substantial interest or non-tenuous justification for a category of laws. See *Clements*, 999 F.2d at 871. Thus, the fact that the Supreme Court has recognized one State's legitimate interest in requiring some proof of a voter's identity, see *Crawford* v. *Marion County Election Board*, 553 U.S. 181 (2008), does not insulate any particular voter-ID law from a tenuousness finding, let alone Section 2 scrutiny.

C. The District Court Properly Applied The Results Test To Find That SB14 Has A Prohibited Discriminatory Result

The district court undertook the fact-intensive analysis that Section 2 requires. Based on extensive evidence, it found that SB14 disproportionately affects African-American and Hispanic voters. ROA.27075-27084. It further found that the burdens of obtaining qualifying ID bear more heavily on minority voters and that the provision of EICs and alternate voting methods do not offset SB14's racial impact. ROA.27084-27111. Finally, it found that SB14 interacts with the effects of past and present race discrimination in Texas to result in less opportunity for minority voters relative to Anglos to participate in the political process. ROA.27143-27151. Contrary to Texas's assertion (Supp. Br. 33-40), the court's extensive findings, which are amply supported by the record and evince no clear error, demonstrate how SB14 abridges the voting rights of African Americans and Hispanics in violation of Section 2.

1. Minority Voters Disproportionately Lack SB14 ID And Face Disproportionate And Material Burdens In Obtaining Such ID That Are Not Offset By Purported Mitigating Measures

a. The court's analysis of SB14 logically started with whether registered voters have SB14 ID. Based on expert evidence that compared Texas's database of registered voters to federal and state databases containing records of those individuals who possessed such ID, the court found that over 600,000 registered voters (4.5% of registered voters) lacked qualifying ID. ROA.27075-27078,

27084. Even assuming (contrary to fact) that every such voter who lacks SB14 ID but is eligible to vote absentee or under SB14's limited disability-based exemption does so, approximately 377,000 voters still cannot cast a ballot that will be counted absent obtaining an EIC or other SB14 ID. ROA.27043, 27075-27076; ROA.43264-43267, 43321-43322; ROA.98791-98794.[2]

The court credited numerous expert studies demonstrating that African-American and Hispanic voters lack qualifying ID at statistically significant higher rates than Anglos. ROA.27078-27084, 27145.[3] The evidence also showed that, *among registered voters who voted in pre-SB14 elections in 2010 and 2012*, African Americans and Hispanics lacked qualifying ID at statistically significant higher rates than Anglos. ROA.43267-43268. The court thus found that SB14 disproportionately affects minority voters. That is, absent a ready way to obtain

[2] Texas complains that this analysis captures ID-possession rates "at a single point in time." Supp. Br. 33. But experts explained that database matching is a reliable technique that social scientists use to assess whether a voter-ID law affects racial groups differently. ROA.98861-98862. While some voters may obtain ID, identification held by others will be lost or expire, and some new registrants will lack SB14 ID. ROA.99007-99009.

[3] See, *e.g.*, ROA.98762-98768, 98780-98794; ROA.98944-98946, 98961-98962, 98997-98999; ROA.99261-99316; ROA.100434-100450; ROA.43228-43229, 43274-43283, 43312; ROA.44599-44610; ROA.43586-43594; ROA.43859-43866. Dr. Stephen Ansolabehere, the expert for the United States on SB14 ID-possession rates, showed that minority voters were *at least* 1.5 to 2.5 times as likely to lack a form of ID than registered Anglo voters. ROA.43261-43264, 43277. We have included in the Addendum three tables from Dr. Ansolabehere's report summarizing the results of his analyses. Our merits brief discusses this evidence and explains why Texas cannot show that the court clearly erred in finding a racial disparity. U.S. Br. 19-24.

qualifying ID, SB14 removes a greater share of African Americans and Hispanics than Anglos from the electorate.

b. Yet, as Texas ignores (Supp. Br. 33-34, 39), the court's impact analysis went beyond finding a disparity in the rates at which racial groups possess qualifying ID. ROA.27084-27091. A disparity in ID possession might not result in less opportunity for minority voters to cast a ballot if the court were to find, for example, that the burdens the law imposes on affected voters are non-material or that minorities can obtain SB14 ID more easily than other voters. But the court found that minority voters disproportionately face significant hurdles to obtaining even an EIC.

African Americans and Hispanics in Texas, the court explained, are more likely than Anglos to live in poverty, lack access to a vehicle, and rely on public transit, making them "less likely to own and need" SB14 ID already, "less likely to have the means to get that ID," and less likely to have a choice over "how they spend their resources." ROA.27087-27088; see also ROA.99411-99425. The court credited experts to find that minorities disproportionately live in poverty because they still bear the effects of "more than a century of discrimination" in employment, education, health, and housing. ROA.27088-27091.

Even for voters who manage to assemble the necessary documents for an EIC, the court found that low-income Texans, a disproportionate number of whom

are African American or Hispanic, face "particular" burdens in reaching EIC-issuing locations. ROA.27101-27103. In contrast to the more than 8000 polling places Texas provides for Federal general elections (ROA.101084), it has only 225 DPS offices, 61 county offices with EIC-issuing agreements, and a few mobile units in sporadic use. ROA.38297-38299; ROA.38313-38338; ROA.39345-39354. The court credited expert evidence showing that hundreds of thousands of eligible voters face round-trip travel times of 90 minutes or more to their nearest EIC-issuing location; of those who lack access to a household vehicle, 54% would face a round trip of three hours or more. ROA.27101-27102. These burdens fall most heavily on African Americans and Hispanics. ROA.14063-14070.

But the court did not assess SB14's burdens based solely on statistics. It heard from registered voters who attempted to vote in person but who could not cast a regular ballot because of the time, distance, expense, and other difficulties involved in obtaining necessary documents and traveling to an EIC-issuing location. ROA.27092-27103. The court also credited testimony from social service providers who work with minority clients and who explained the "plight" indigent individuals face in obtaining photo ID. ROA.27106-27109; see also ROA.99045-99077; ROA.99200-99219.

Significantly, the court found SB14 voter education "woefully lacking" (ROA.27045) and "grossly" underfunded (ROA.27056), and implementation of the

EIC program "insufficient" (ROA.27093). It found that Texas had made "[n]o real effort" to "educate the public about the availability of an EIC to vote, where to get it, or what is required to obtain it." ROA.27094. It further found that Texas did not publicize the availability of EIC-only birth certificates, leading voters to pay increased fees or forgo obtaining SB14 ID altogether. ROA.27095-27101.[4] Although Texas touts its provision of EICs, it omits that, as of September 2014 (more than a year after SB14's implementation), it had issued only 279 EICs. ROA.27131.[5]

c. SB14's purported mitigating measures do not offset its disproportionate racial impact. Texas asserts, for instance, that many voters who lack SB14 ID are unaffected by the law because they can obtain a disability-based exemption or vote absentee by mail. Supp. Br. 33. But expert evidence showed that, even once

[4] After the panel argument, Texas passed Senate Bill 983, which provides that registrars and county clerks may not charge any fee to dispense records that voters seek in order to get an EIC. Tex. Health & Safety Code § 191.0046(e) and (f). There is no evidence regarding SB983's implementation, nor does SB983 alleviate other burdens attendant to obtaining an EIC, particularly for voters born outside of Texas. See U.S. Letter (5th Cir. May 29, 2015).

[5] Other States with photo-ID laws have issued significantly more voter IDs. Georgia issued 2182 no-fee IDs in the first six months following its law's implementation. ROA.100623. Alabama has issued over 7800 voter IDs since it began enforcing its law. *Greater Birmingham Ministries* v. *Alabama*, No. 2:15cv2193, 2016 WL 627709, at *3 (N.D. Ala. Feb. 17, 2016). Both laws differ in other important respects from SB14, *e.g.*, by accepting a wider range of ID, allowing ID that has expired for more than 60 days, and imposing less arduous requirements to obtain no-fee IDs. See *id.* at *2-3 & n.7; ROA.27046. By January 2016, North Carolina issued 2139 IDs under its law, which included a two-year rollout and targeted outreach. Importantly, North Carolina's law now encompasses a reasonable impediment exception that enables affected voters to cast a countable ballot at the polls. See *North Carolina State Conference of the NAACP* v. *McCrory*, No. 1:13cv658, 2016 WL 1650774, at *13-14, *19-27 (M.D.N.C. Apr. 25, 2016).

voters 65 and older who may vote absentee and voters with a qualifying disability are removed from the no-match list, statistically significant racial disparities persist. ROA.98791-98794; ROA.43264-43267, 43321-43322. In fact, absentee voting exacerbates SB14's racial impact. ROA.43946-43947, 43979.

The court also found that absentee voting was not a viable alternative to in-person voting. ROA.27132-27136. Absentee voting is not available to absentee-eligible voters who arrive at the polls unaware of SB14's specific requirements or with the mistaken belief that they possess qualifying ID. ROA.27132-27133. It also fails to help voters who need assistance that may be available only at polling places. ROA.27133-27134. The court further found that many voters highly distrust absentee ballots because of the risks of fraud and lost ballots. ROA.27109-27110, 27134; see also ROA.43952. It also credited testimony that African Americans in particular prefer to vote in person, both to ensure their vote is cast and to celebrate the exercise of the franchise. ROA.27110-27111, 27135-27136.

Provisional ballots also provide little relief to SB14-affected voters who appear at the polls without qualifying ID. Even where voters cast provisional ballots, those ballots are counted only if voters travel to the county registrar and present SB14 ID within six days after the election. ROA.27044, 27131-27132. The court found that the individual plaintiffs "fall squarely within the demographic

expectations" of affected voters and showed that many provisional ballots cannot be timely cured. ROA.27132.

2. SB14 Interacts With Conditions Tied To Race Discrimination To Produce A Discriminatory Result

The court found that SB14's racial impact is "clear," but correctly noted that "disproportionate impact is not enough." ROA.27144-27145. Thus, in addition to analyzing minority voters' lesser opportunity to participate in the political process, the court examined Senate Factors evidence that showed how SB14 interacts with social, political, and historical conditions tied to race discrimination to cause a prohibited discriminatory result. It considered:

- Texas's history of official discrimination in voting and SB14's perpetuation of unequal access to the political process (ROA.27028-27034);
- The existence of racially polarized voting and its importance in understanding how SB14 may affect political participation and election outcomes (ROA.27034-27035);
- the effects of discrimination in such areas as employment, income, health, and education on minority participation and how a history of discrimination creates present disadvantage that "translates to" substantial burdens and further depressed participation when affected voters "are confronted with the time, expense, and logistics of obtaining a photo ID that they did not otherwise need" (ROA.27084-27091);
- the use of overtly racial political campaigns (ROA.27036-27038);
- the disproportionate lack of minority elected officials (ROA.27036);
- the failure of elected officials to respond to minority needs, including during SB14's consideration (ROA.27149-27150, 27169-27172); and

- the tenuousness of the policies underlying SB14 (ROA.27062-27075).

ROA.27147-27151; see also ROA.99534-99558; ROA.43927-43953. The court found that each factor weighed in favor of finding a discriminatory result, with several weighing "strongly" or "heavily" toward that finding. ROA.27148-27150.

Consistent with this Court's decision in *Clements* and other cases evaluating Section 2 claims in light of the legitimate interest a jurisdiction invokes to justify a challenged practice, the district court recognized the "important legislative purposes" of "combating voter fraud," "prohibiting non-citizens from voting," and "improving election integrity and voter turnout." ROA.27064. After accepting the legitimate interests that States have in enacting voter-ID legislation generally, see *Crawford*, 553 U.S. at 191-197, the court examined whether SB14 furthered Texas's stated goals and whether those goals could be adequately accommodated by other, nondiscriminatory means. The court's analysis tracked *Clements*, in which this Court accepted the linkage interest that the Supreme Court found substantial in *Houston Lawyers' Association* and then proceeded to examine that interest under the totality of circumstances. See 999 F.2d at 871-876.

The district court found a "significant factual disconnect" between SB14's ostensible goals and its actual provisions (ROA.27064), especially in light of the "negligible" amount of in-person voter impersonation relative to fraud that occurs "in connection with absentee balloting" (ROA.27042). The court further found no

evidence of non-citizen voting and stated that SB14's role in preventing any such voting was "illusory," given that non-citizens may obtain DPS-issued ID. ROA.27065-27067. The court concluded that SB14's "justifications do not line up with" its content. ROA.27070; see also ROA.27150. It also found "no credible evidence" that turnout was depressed by a lack of electoral confidence stemming from alleged in-person voter impersonation, that SB14 would increase electoral confidence, or that increased confidence would translate to increased turnout. ROA.27067-27068.

Based on the totality of circumstances, the court found that SB14 "does not disproportionately impact African-Americans and Hispanics by mere chance. Rather, it does so by its interaction with the vestiges of past and current racial discrimination." ROA.27150-27151. The court did not clearly err in ultimately finding that SB14 results in the denial or abridgement of the right of African Americans and Hispanics to vote on account of race or color. ROA.27151.

D. Texas Distorts Section 2's Results Standard By Misreading This Court's Precedents And Misstating The District Court's Factual Findings

Texas argues that, because the court did not find that minority voter registration and turnout decreased under SB14, the court erred in finding a Section 2 violation. Supp. Br. 34-40. But Texas selectively quotes *Clements* out of context, disregards the VRA's plain text, and omits relevant factual findings. It also ignores (a) the very real burdens that SB14 imposes on voters who must

obtain qualifying ID, and (b) the court's totality-of-circumstances analysis, both of which were critical to the finding of a Section 2 violation. Nor did the district court find, as Texas contends, that SB14 causes a discriminatory result based on "poverty, age, or some other characteristic that happens to correlate with race." Supp. Br. 40. Texas's argument that a liability finding "raises serious constitutional questions and threatens an array of nondiscriminatory election laws" (Supp. Br. 34) likewise depends on gross distortion of the results standard.

1. Neither Clements *Nor The VRA Requires Plaintiffs To Show That SB14 Has Resulted In Decreased Minority Voter Registration And Turnout*

a. Texas quotes *Clements* to argue that there can be no Section 2 liability without "proof that participation in the political process *is in fact depressed* among minority citizens." Supp. Br. 34-35 (quoting *Clements*, 999 F.2d at 867). Texas maintains that this language requires plaintiffs to prove that the challenged practice suppressed minority registration and turnout—that is, that "the inability to comply with SB14 caused minority voters not to register or vote." Supp. Br. 37. Texas is wrong.

In fact, the quoted portion of *Clements* involved only a challenge to application of one Senate Factor: Factor Five. See 999 F.2d at 866-867 & n.30. Although there was "little or no evidence" that minority participation "was in fact depressed," the district court had nevertheless concluded that "the effects of past

discrimination hindered the ability of minority groups to participate in the political process." *Id.* at 863. This Court held that the district court had "employed the wrong legal standard" by inferring unequal ability to participate in the political process without a showing "that participation in the political process is in fact depressed among minority citizens." *Id.* at 867. This Court did *not* hold, as Texas asserts, that plaintiffs must show that the challenged practice caused the depressed minority voter registration and turnout. Instead, *Clements* simply held that "socioeconomic status and a history of discrimination, without more," do not establish under Factor Five that minorities' effective participation in the political process is hampered. *Ibid.* Rather, to satisfy Factor Five, plaintiffs must show that preexisting minority participation rates are depressed.

In *Clements*, the record included "no evidence" of reduced levels of voter registration or turnout among minorities, or anything "tending to show that past discrimination has affected their ability to participate in the political process." 999 F.2d at 867. Here, by contrast, the district court found *not only* that African Americans and Hispanics continue to bear the effects of past discrimination in education, employment, income, and health, which explains current socioeconomic disparities (ROA.27088-27091, 27148-27149; see also ROA.43938-43940), *but also* that their voter registration and turnout "lag far behind" that of Anglos.

ROA.27149.[6] Plaintiffs thus proved that participation in Texas's political process "is in fact depressed among minority citizens," *Clements*, 999 F.2d at 867. The district court's finding that Factor Five weighed "strongly" toward a violation (ROA.27149) is neither legally nor clearly erroneous.

b. Apart from misstating *Clements*, Texas proffers an impractical standard that conflicts with the VRA's plain text. Texas's attempt to graft a prerequisite onto Section 2 requirements—that SB14 has caused racial disparities in voter registration and turnout—has no legal basis, for good reason.

By its terms, Section 2 requires plaintiffs to show only that, as a result of a challenged practice, minority voters have "less opportunity" to participate relative to other voters, not that they have *no* opportunity. 52 U.S.C. 10301(b); see 52 U.S.C. 10301(a) (prohibiting a "denial or abridgement" of voting rights); Senate Report 30 (requiring only that the law "result[s] in the denial of equal access to any phase of the electoral process for minority group members"). That aggregate minority turnout could theoretically increase despite SB14 does not negate the fact that, under SB14, the pool of registered minority voters has *less opportunity* to cast

[6] Texas cites 2012 Census estimates to argue that African-American and Anglo participation rates are roughly equal. Supp. Br. 25. But the court reached a contrary finding based on expert evidence (ROA.27149)—a finding that Texas does not acknowledge let alone show to be clearly erroneous. ROA.43278-43283; ROA.43931-43933 (expert evidence explaining that Census survey estimates overstate minority participation). Texas does not even cite Hispanic participation rates despite asserting that the State "now has significant minority voting participation." Supp. Br. 25.

a regular ballot *relative to other voters* because of the increased rates at which they lack SB14 ID and the disproportionate and real burdens they face in obtaining such ID. In other words, SB14 knocks out a larger portion of eligible African-American and Hispanic voters and provides no easy way for affected voters to cast a ballot that counts. This results in "less opportunity" for minority participation relative to Anglos. Indeed, even if registered minority voters ultimately navigated numerous SB14-specific obstacles successfully, they still would have "less opportunity" under Section 2; the VRA does not punish voters for overcoming extraordinary burdens.

The dual findings of disproportionate ID possession and disproportionate burdens distinguish this case from *Gonzalez*, another case Texas cites. See Supp. Br. 35. The holding in *Gonzalez*, which applied clear-error review to a no-liability finding, emphasized two pieces of evidence missing from that record: (1) that "Latinos, among other ethnic groups, are less likely to possess the forms of [ID] required under Proposition 200"; and (2) that "Latinos' ability or inability to obtain or possess identification for voting purposes * * * resulted in Latinos having less opportunity to participate in the political process and to elect representatives of

their choice." 677 F.3d at 407 (citation omitted). Plaintiffs here provided that evidence.[7]

To be sure, minority participation rates can be relevant to determining whether a law has a discriminatory result. See, *e.g.*, Senate Report 29 & n.114; *Operation PUSH*, 932 F.2d at 402-405. But the VRA does not *require* plaintiffs to endure a discriminatory practice for multiple elections in order to show that the practice depresses participation. Indeed, the VRA permits the Attorney General to institute an action for "preventive relief," including a permanent injunction, where there are reasonable grounds to believe Section 2 is about to be violated. 52 U.S.C. 10308(d); see *Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612, 2619 (2013) (Section 2 can be used "in appropriate cases to block voting laws from going into effect"). In light of the VRA's text and purpose, it would be illogical to require voters to bear the effects of a discriminatory law unless and until they could show threshold reductions in registration and turnout.

Nor would a court necessarily expect to find decreased registration and turnout as a result of a photo-ID law. Most photo-ID laws do not interfere with voter registration. Eligible voters in Texas, for example, can register in person at

[7] Establishing such a record was relatively difficult in *Gonzalez* because Arizona's election-day voters need only present one form of federal, state, or local government-issued photo ID or two forms of non-photo ID with the person's name and address. See 677 F.3d at 404 & n.31. Moreover, Arizona's requirements do not apply to early voting. See *id.* at 388; *Purcell* v. *Gonzalez*, 549 U.S. 1, 2 (2006) (per curiam).

their county registrar's office, by mail or fax, or by submitting a completed application to a volunteer deputy registrar, DPS, or a voter registration agency. See Tex. Elec. Code §§ 13.002, 13.038, 20.001; 52 U.S.C. 20504-20506. None of those methods requires SB14 ID. No reason thus exists to link Section 2 liability to a showing that minority registration has decreased.

Aggregate voter turnout also is not particularly indicative of a discriminatory result. Plaintiffs' experts explained that turnout data will not necessarily show a photo-ID law's suppressive or deterrent effect. ROA.43655-43657, 43981-43983. A law may prevent individuals who lack qualifying ID from casting a ballot, but a host of unrelated factors—*e.g.*, the type of election, issues involved, candidates running, and hours and locations of polling places—can increase or decrease aggregate turnout. ROA.99560-99564, 99587. These factors can mask a law's effect; even where turnout increases, it could have been even higher had voters who lacked qualifying ID been able to cast a ballot. ROA.43656 (illustration).

Texas also relies on *Frank* (Supp. Br. 35), though the language it quotes was not discussing Section 2. In reviewing a challenge that Wisconsin's photo-ID law unconstitutionally burdens the right to vote, the panel in *Frank* merely remarked that the record did not reveal what happened to turnout in *other States* that require photo ID. See 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."). *Frank* did not state, as Texas asserts, that such data is *required*, even under the Constitution. Nor should it be essential under Section 2. Indeed, the effect of voter-ID laws in *other States* is at best marginally relevant in light of Section 2's localized inquiry and the differing geography, demographics, socioeconomic conditions, and photo-ID requirements of the States. See *White* v. *Regester*, 412 U.S. 755, 765-770 (1973) (striking down use of multi-member districts in two Texas counties despite allowing such districts in Indiana two years earlier in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971)).

In any event, plaintiffs here presented expert evidence, and the district court found, that firmly rooted political-science principles establish that increases to voting costs, whether monetary or non-monetary, decrease participation (ROA.27068-27069); Texas's expert agreed (ROA.100883-100891). Texas's expert also conceded that Georgia's photo-ID law resulted in "across-the-board suppression of turnout" in the 2012 presidential election, with Hispanics impacted most severely—an effect that had been masked by increased overall turnout for the 2008 presidential election. ROA.27068; see *Frank*, 773 F.3d at 793 (Posner, J., dissenting from the denial of rehearing en banc) (explaining that strict voter-ID laws can depress turnout and affect election outcomes).

2. The Totality-Of-Circumstances Analysis Ensures That A Section 2 Results Violation Is "On Account Of Race Or Color"

Texas wrongly contends that the court found that SB14 denies or abridges the right to vote "on account of race or color" based on "levels of preexisting ID possession," "socioeconomic conditions," and "historical events." Supp. Br. 40. As the VRA requires, the court examined relevant Senate Factors evidence to determine whether SB14 interacts with social and political conditions tied to race discrimination to cause a prohibited discriminatory result. ROA.27146-27151. Texas argues the court nonetheless erred because: (1) it did not link "current socioeconomic conditions to proximate state-sponsored discrimination"; and (2) it assumed a causal link between socioeconomic conditions and diminished political opportunity. Supp. Br. 41-44. We have disposed already of the second argument. See pp. 24-26, *supra*. The first argument fails too.

Texas's argument that the court had to find contemporary evidence of official discrimination explaining current socioeconomic conditions is simply another challenge to the court's application of Senate Factor Five. That factor instructs courts to examine "the extent to which members of the minority group * * * bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." Senate Report 29. Whereas Congress expressly limited Senate Factor One to "official discrimination," Factor Five requires no such showing.

Senate Report 28-29; see *Gomez* v. *City of Watsonville*, 863 F.2d 1407, 1418 (9th Cir. 1988) (Factor Five's "language describes the people discriminated against, not the discriminator").

Factor Five concerns how "disproportionate educational employment, income level and living conditions arising from *past discrimination* tend to depress minority political participation." Senate Report 29 n.114 (emphasis added). To establish Factor Five, plaintiffs must show (a) socioeconomic conditions attributable to past discrimination and (b) depressed minority participation rates. *Clements*, 999 F.2d at 866-867. The court then assesses how a challenged practice interacts with the established factor to further diminish participation opportunities.[8] In considering such evidence here (ROA.27084-27091), the district court correctly brought the effects of past discrimination "home to this case," *Clements*, 999 F.2d at 847.

Texas relies on *Frank* to argue that, because "[u]nits of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination," only current official discrimination matters under Section 2. Supp. Br. 41 (quoting *Frank*, 768 F.3d at 753). But Texas, like *Frank*,

[8] *Clements* made clear that once socioeconomic disparities and depressed minority political participation are shown, plaintiffs "need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation." 999 F.2d at 867 (quoting Senate Report 29 n.114).

misunderstands the relevance of the Senate Factors, which look to whether a voting practice impermissibly gives additional force to public and private discrimination.

Congress's intent to have courts examine the "past and present reality" of all aspects of race discrimination in determining whether to find a Section 2 violation is evident from its inclusion of several Senate Factors. The extent of racially polarized voting and the presence of racial appeals in political campaigns, for instance, concern private conduct that not only may be a danger sign for discriminatory state action, see *Lodge*, 458 U.S. at 624, but whose impact may be amplified by the decision to impose a particular practice. By examining signs of public and private discrimination, Section 2 protects against voting practices that give force to racial bias where discrimination or its effects still linger in the voting community. See Senate Report 33 (Section 2's results test "distinguishe[s] between situations in which racial politics play an excessive role in the electoral process, and communities in which they do not"); *Gingles*, 478 U.S. at 44 n.9 (Section 2 corrects "an active history of discrimination," deals with the "accumulation of discrimination," and prohibits practices that "perpetuate the effects of past purposeful discrimination"); see also, *e.g.*, *Salt River*, 109 F.3d at 591, 595 n.7; *Johnson*, 405 F.3d at 1235-1239 & n.7 (Tjoflat, J., concurring).

This analysis of the impact of a challenged practice and the social and political context in which it occurs enables courts evaluating Section 2 claims to

conclude that a discriminatory result is "on account of race or color" within the meaning of Section 2. See, *e.g.*, Senate Report 27-30 & n.109, 67-68 & n.120; *Gingles*, 478 U.S. at 44-45; *Salt River*, 109 F.3d at 591, 595-596. Here, after engaging in the proper analysis of Factor Five and other relevant factors, the district court correctly concluded that SB14's discriminatory result was linked to the vestiges of past and current racial discrimination in Texas and was not the result of "mere chance" (ROA.27150) or a simple correlation between race and "poverty, age, or some other characteristic" (Supp. Br. 40). The court committed no legal error and its liability determination should be affirmed.

3. The District Court's Decision Raises No Constitutional Concerns

Texas argues that Section 2 liability in this case dooms electoral systems from top to bottom. Supp. Br. 44-49. But Texas again distorts Section 2's results test and the district court's factual findings and legal analysis.

"[C]onstitutional avoidance has no role to play" where, as here, a statute's text and history are clear and no plausible competing interpretation exists. *Warger* v. *Shauers*, 135 S. Ct. 521, 529 (2014). The district court's conclusion did not rest on mere "socioeconomic disparities." Tex. Supp. Br. 44-45. Rather, it depended on the particular ways in which SB14's features, including its forms of qualifying ID and the onerous procedures specific to Texas for obtaining such ID, act in concert with already depressed minority political participation and social and

political indicators of lingering race discrimination to result in unequal access to the political process. That SB14 has a prohibited result does not jeopardize other electoral practices that must be judged separately in light of the past and present reality of a jurisdiction, the design and impact of the challenged law, the burdens associated with compliance, and the interests and policy justifications asserted in support of the law.[9]

Nor is there any constitutional reason to alter Section 2's settled standard. The results test does not amount to "prophylaxis-upon-prophylaxis." Tex. Supp. Br. 46-48. When examining Congress's exercise of its legislative power under the Fourteenth and Fifteenth Amendments, the Supreme Court repeatedly has emphasized Congress's broad authority to enact legislation to effectuate the constitutional prohibition on race discrimination in voting. See, *e.g.*, *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 736 (2003); *City of Boerne* v. *Flores*, 521 U.S. 507, 517-518 (1997); *City of Rome* v. *United States*, 446 U.S. 156, 179-180 (1980); *Ex parte Virginia*, 100 U.S. 339, 345-346 (1879). The totality-of-

[9] Texas primarily cites Judge Kozinski's dissent from the denial of rehearing en banc in *Farrakhan* v. *Washington*, 359 F.3d 1116 (9th Cir. 2004). Supp. Br. 44-45. But Judge Kozinski was concerned that *statistical disparities alone* with no Senate Factors evidence would trigger Section 2 liability. See *Farrakhan*, 359 F.3d at 1117-1119, 1126; *Frank*, 768 F.3d at 754 (expressing similar concern). Judge Kozinski also was writing in the context of felon disenfranchisement, which has received distinct treatment under the VRA in light of the text of Section 2 of the Fourteenth Amendment. See *Farrakhan* v. *Gregoire*, 623 F.3d 990 (9th Cir. 2010) (en banc); *Hayden* v. *Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc); *Johnson* v. *Governor of Fla.*, *supra*. Felon-disenfranchisement cases have not suggested any doubt over applying the totality-of-circumstances analysis to other prerequisites to voting.

circumstances analysis sufficiently ties Section 2's results test to this constitutional prohibition, because it limits liability to instances in which the challenged practice not only has a disparate impact, *but also* impermissibly accommodates or amplifies the existence or lingering effects of race discrimination. See Senate Report 39-43.

The Section 2 finding here does not compel "race-based decisionmaking." Tex. Supp. Br. 48-49. Legislatures, by their nature, will "almost always be aware of racial demographics." *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995). Where a legislature has decided to act, crafting a facially neutral practice that takes into account the jurisdiction's social and political reality does not require officials to maximize minority voting opportunities or proceed in any way that gives rise to equal-protection concerns. See *ibid.*; *Bush* v. *Vera*, 517 U.S. 952, 958 (1996); *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015). Legislating against the backdrop of Section 2 merely encourages officials to consider alternatives to voting practices that bear in materially more heavily ways on racial groups that continue to experience the effects of discrimination. Moreover, legislation that avoids placing material burdens on the right to vote benefits all citizens regardless of race. Taking current realities into account also provides jurisdictions an opportunity to move further toward the goal of an inclusive electoral process free of race discrimination.

II

THIS COURT SHOULD AFFIRM THE FINDING THAT SB14 HAS A DISCRIMINATORY PURPOSE

A. Standard Of Review

A district court's discriminatory purpose finding is a question of fact reviewed for clear error. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287-288 (1982). This Court gives "great deference" to such a finding, as the district court is "in a far better position to evaluate the local political, social, and economic realities than is this Court." *Lodge* v. *Buxton*, 639 F.2d 1358, 1375 (5th Cir. 1981), aff'd sub nom. *Rogers* v. *Lodge*, 458 U.S. 613 (1982).

A finding of legal error does not open the door for an appellate court to decide a discriminatory-purpose claim *de novo*. See Tex. Supp. Br. 13 (misstating *Swint* and citing inapposite cases). "[F]actfinding is the basic responsibility of district courts." *Swint*, 456 U.S. at 291 (citation omitted). If an appellate court determines that a district court's finding rests on "an erroneous view of the law," the proper course is not for the appellate court to make "its own determination as to the motives of" the Legislature, but to remand to allow the district court to evaluate the evidence under the correct standard. *Id.* at 291-293. Because the court here made no legal errors in arriving at its ultimate finding that SB14 was enacted at least in part to suppress the increasing strength of the growing minority electorate, its conclusion is entitled to "great deference," *Lodge*, 639 F.2d at 1375.

B. Intentional Discrimination Claims Are Analyzed Under A Settled Standard And Do Not Require The "Clearest Proof" Of Discriminatory Intent

The standard for proving discriminatory intent under Section 2 is well-established. Plaintiffs must show that a discriminatory purpose was a "motivating factor" behind a law's enactment. *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-266 (1977). Mere "awareness of consequences" is not enough; rather, discriminatory purpose implies that the legislature acted at least in part "because of," and not merely "in spite of," a law's "adverse effects upon an identifiable group." *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979). That said, a discriminatory purpose "need only be one purpose, and not even a primary purpose," of a law, *United States* v. *Brown*, 561 F.3d 420, 433 (5th Cir. 2009) (citation omitted), as any additional purpose "would not render nugatory the purpose to discriminate," *Hunter* v. *Underwood*, 471 U.S. 222, 232 (1985). Once such a purpose is shown, "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Id.* at 228.

Discriminatory purpose can be proven by "direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendant's actions." Senate Report 27 n.108; see *Lodge*, 458 U.S. at 617-618; *Brown*, 561 F.3d at 433. *Arlington Heights* identified a non-exhaustive list of factors relevant to assessing whether a law has a discriminatory purpose. They

include: a law's discriminatory impact; its historical background; the sequence of events preceding its enactment; substantive and procedural departures from normal legislative processes; and contemporaneous statements by decisionmakers. See 429 U.S. at 265-268. The Senate Factors also "supply a source of circumstantial evidence regarding discriminatory intent." *Brown*, 561 F.3d at 433; see *Lodge*, 458 U.S. at 620-621. Neither the Supreme Court nor Congress has ever limited a court's ability to examine circumstantial evidence of discriminatory intent based on the extent of discovery, and Texas offers no case to the contrary. See Tex. Supp. Br. 18-20.

Without citing any intentional discrimination case, Texas asserts that, because this case involves state law, the district court was required to "defer to the legislature's stated intent" unless plaintiffs presented "the clearest proof" of a discriminatory purpose. Supp. Br. 13 (quoting *Smith* v. *Doe*, 538 U.S. 84, 92 (2003)). Texas is wrong. This claimed requirement, which Texas imports from an unrelated context, has no basis in discriminatory-intent jurisprudence and is inconsistent with the very premise of discriminatory-purpose claims.

The Supreme Court has never "command[ed] that an accusation of a racial purpose for neutral legislation requires substantiation by the 'clearest proof.'" Tex. Supp. Br. 17 (quoting *Smith*, 538 U.S. at 92). The cases Texas cites are not discriminatory-intent cases but rather all involve *ex post facto* and related

challenges to civil laws alleged to impose criminal punishment. See *Smith*, 538 U.S. at 92-96 (sex-offender registration); *Kansas* v. *Hendricks*, 521 U.S. 346, 360-369 (1997) (civil commitment); *Flemming* v. *Nestor*, 363 U.S. 603, 613-620 (1960) (disqualification from benefits). In each case, the Court explained that, in determining whether a law actually constitutes "punishment" for purposes of an *ex post facto* violation, courts "ordinarily defer to the legislature's stated intent" to create a civil, nonpunitive law. *Hendricks*, 521 U.S. at 361. Courts will override the legislature's "civil" categorization only upon "the clearest proof" that the law is "so punitive either in purpose or effect as to negate" that label. *Ibid.*

How the Court approaches *ex post facto* cases is irrelevant here. Plaintiffs alleging that a racially discriminatory purpose was a "motivating factor" behind a law need only establish such purpose by a preponderance of the evidence. See, *e.g.*, *Hunter*, 471 U.S. at 225 (citation omitted); *Lodge*, 458 U.S. at 621; Senate Report 132 (Subcomm. Rep.) ("In the context of civil rights violations, it is only necessary that an inference of intent be raised 'by a preponderance of the evidence.'"). For this reason, Texas's "clearest proof" standard appears nowhere in *Arlington Heights*, *Feeney*, *Hunter*, *Lodge*, or any other discriminatory intent case.

Even if this Court could set aside Supreme Court precedent, there is no "good reason" (Tex. Supp. Br. 14) for imposing a heightened burden here.

Discriminatory motives are usually "cleverly cloaked in the guise of propriety." *Lodge*, 639 F.2d at 1363. Indeed, in amending Section 2, the Senate Judiciary Committee specifically recognized the "inherent danger" of an intent requirement in that States may "plant[] a false trail of direct evidence in the form of official resolutions, sponsorship statements and other legislative history eschewing any racial motive, and advancing other governmental objectives." Senate Report 37. It is therefore unsurprising that, upon finding circumstantial evidence of discriminatory intent, courts are "entitled to discredit" legislators' claims "that there was no racial motivation behind their action." *McMillan* v. *Escambia Cnty.*, 688 F.2d 960, 964 (5th Cir. 1982)[10]; see, *e.g.*, *Miller*, 515 U.S. at 919 (holding that a district court "was justified in rejecting the various alternative explanations" offered for legislative line-drawing); *United States* v. *Texas*, 793 F.2d 636, 646 (5th Cir. 1986) ("In assessing the motivation of the decisionmaker, it is essential to determine the genuineness of the state interests asserted, their nature and strength, and the degree to which they are served by the challenged action.").

Moreover, an official act can have more than one motive. See *Arlington Heights*, 429 U.S. at 265-266; *Hunter*, 471 U.S. at 232; *Brown*, 561 F.2d at 433. It would make no sense to say that a court must "defer" to the State's asserted

[10] The Supreme Court vacated *McMillan* on other grounds, see 466 U.S. 48 (1984); this Court reaffirmed the intent finding on remand, see 748 F.2d 1037, 1046-1047 (5th Cir. 1984).

purpose: even assuming the legislature's "stated intent" was genuine, that would not preclude a finding that impermissible racial motives also played a role. What Texas truly seeks is for this Court to "defer" to the Legislature's insistence that SB14 had nothing to do with suppressing a rapidly growing electorate that favored its opponents. But lawmakers generally are not "willing to declare racially motivated reasons for their legislative action." *United States* v. *Cherry*, 50 F.3d 338, 343 (5th Cir. 1995). A predictable and self-serving disavowal of racial intent warrants no particular deference.[11]

The intent inquiry also does not require courts to pass on a law's "policy merit." Tex. Supp. Br. 15. The question is not whether a law serves legitimate purposes. It is whether a particular legislature was in fact motivated, at least in part, by a discriminatory purpose. In *Hunter*, for example, the Supreme Court struck down a felon-disenfranchisement provision in Alabama's Constitution because it was enacted to disenfranchise African Americans. 471 U.S. at 229-231. The Court acknowledged that States can have a "legitimate interest" in such laws and that Alabama's particular provision might "be valid if enacted today without any impermissible motivation." *Id.* at 232-233. But because the "original

[11] Of course, if a court finds the proffered evidence insufficient to prove discriminatory intent, it may then after rejecting a claim of intentional discrimination defer to the stated intent as a rational means of addressing a problem. See *McCleskey* v. *Kemp*, 481 U.S. 279, 298-299 (1987); *Feeney*, 442 U.S. at 272-273, 276-281; *Cherry*, 50 F.3d at 343.

enactment was motivated by a desire to discriminate against blacks on account of race," it could not stand. *Ibid.* Similarly here, Texas cannot invoke *Crawford* as a shield to any meaningful inquiry into discriminatory intent. See Supp. Br. 21-22.[12] "When there is proof that a discriminatory purpose has been a motivating factor in the decision," judicial deference to legislative prerogative "is no longer justified." *Arlington Heights*, 429 U.S. at 265-266.

That the challenge here involves state legislation does not warrant a different standard. See Tex. Supp. Br. 13. The Supreme Court and this Court routinely analyze discriminatory purpose challenges to state legislation under the standards articulated in *Arlington Heights*, *Feeney*, and *Hunter*—indeed, *Feeney* and *Hunter* themselves were challenges to state laws. It would be particularly anomalous to apply a more deferential standard to state *voting* legislation in light of the specific constitutional provisions prohibiting States from engaging in race discrimination in voting. Indeed, the Supreme Court repeatedly has recognized that Congress's power to enforce the guarantees of the Reconstruction Amendments can impinge on a State's authority to enforce certain electoral practices. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 325 (1966); *Katzenbach* v. *Morgan*, 384 U.S. 641, 647

[12] Relying on *Frank*, Texas argues that *Crawford* requires blind deference to "legislative fact[s]." Supp. Br. 21; but see *Frank*, 773 F.3d at 795 (Posner, J., dissenting from the denial of rehearing en banc). Yet, *Crawford* did not involve a discriminatory intent claim. As explained *supra*, the Supreme Court and this Court regularly examine the nature and strength of a State's claimed interests and the extent to which they are served by the challenged law in assessing a legislature's motivation for enacting a specific law.

(1966); *Oregon* v. *Mitchell*, 400 U.S. 112, 125-127 (1970); *Ex parte Virginia*, 100 U.S. at 345-346. Congress could have required plaintiffs to satisfy a heightened showing for VRA claims, but it did not. See Senate Report 27 n.108.[13]

C. The District Court's Factual Findings Are Not Clearly Erroneous

The district court correctly applied settled legal principles, making careful and detailed factual findings guided by factors that *Arlington Heights* and *Brown* identified as relevant to discerning a discriminatory purpose. ROA.27152-27158. It concluded, consistent with *Feeney* and *Hunter*, that SB14's proponents "were motivated, at the very least in part, *because of* and not merely *in spite of*" SB14's "detrimental effects on the African-American and Hispanic electorate," and that Texas failed to demonstrate that SB14 "would have been enacted" absent this discriminatory motive. ROA.27158-27159. Because the court "was amply cognizant of the controlling cases" and analyzed the evidence within the proper legal framework, *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 464 (1979); see *Lodge*, 458 U.S. at 620-622, the court's ultimate finding of discriminatory intent and subsidiary factual findings are reviewable only for clear error. Texas does not assert that the court clearly erred in making *any* factual findings.

[13] The availability of Section 3(c) relief does not merit a wholesale revision of discriminatory-intent jurisprudence. See Tex. Supp. Br. 17. A district court, in its equitable discretion, may impose Section 3(c) relief upon finding discriminatory intent. 52 U.S.C. 10302(c). The validity and scope of any such relief is not before the Court.

1. Arlington Heights *Analysis*

Applying the *Arlington Heights* factors, see 429 U.S. at 265-268, the district court found ample evidence supporting an inference of discriminatory purpose:

a. Impact. A law's discriminatory impact "may provide an important starting point" in discerning a legislature's intent. *Arlington Heights*, 429 U.S. at 266. The court found SB14's racially disproportionate impact "virtually unchallenged." ROA.27158; see ROA.27145. SB14's "obvious" and foreseeable racial impact (ROA.27073) gave rise to a "strong inference" that its "adverse effects were desired," *Feeney*, 442 U.S. at 279 n.25. See *Brown*, 561 F.3d at 433; *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526, 536 n.9 (1979).

b. Historical context. The court also found that the broader historical context of SB14's enactment provided insight into the Legislature's motives. The push for a restrictive photo-ID bill coincided with a "seismic demographic shift" showing unprecedented African-American and Hispanic population growth relative to Anglos. ROA.27153. The court gave "great weight" to expert evidence that this demographic trend was perceived to threaten Republican electoral power and provided lawmakers a strong incentive to suppress minority voters. ROA.27153; see also ROA.27033, 27065 & n.152. The court reasonably could infer that SB14's enactment was driven by a desire of the "party in power" to stem the tide of emerging minority voting power. ROA.100389-100390.

The court found additional support for that inference in Texas's "long history of discriminatory voting practices." ROA.27153. The court credited expert findings that, throughout Texas's history, discriminatory voting restrictions have "tend[ed] to arise in a predictable pattern when the party in power perceives a threat of minority voter increases." ROA.27065 & n.152. The "stated rationale" behind such practices—white primaries, secret ballot provisions, the poll tax, re-registration requirements, and voter purges—was "reduc[ing] voter fraud," the same "primary justification" provided for SB14. ROA.27033 & n.24; see also ROA.43991-44006; ROA.100375-100389.

c. Inability to explain discriminatory drafting choices. The court reasonably found that SB14's enactors consistently chose options that "made the voting requirements much more restrictive for African-Americans and Hispanics while making it less so for Anglos." ROA.27156.

Bill proponents claimed, for example, that they modeled SB14 on Indiana and Georgia's laws (ROA.27155), but they eliminated forms of ID those States accepted, such as federal ID, government-issued employee ID, and state-issued student ID, that are "disproportionately held by African-Americans and Hispanics" (ROA.27074). Bill proponents also eliminated several features designed to protect poorer voters, such as affidavits of indigence, expanded ID-expiration periods, and presentation of two forms of non-photo ID—choices that again disproportionately

affected minorities. ROA.27091, 27150. In contrast, SB14's enactors retained features that "favor[ed] Anglos" by accepting concealed-carry licenses and military ID and leaving absentee-voting procedures untouched. ROA.27073-27074, 27141 n.498.

Staffers "warned" that SB14 "would likely fail" preclearance (ROA.27074) unless "the list of acceptable photo IDs" was expanded "to include federal, state, and municipal government-issued IDs," but the Legislature retained the law's discriminatory features. ROA.27157; see also ROA.38985-38987; ROA.99690-99692; ROA.101388-101392. The court found that SB14's proponents were unable to justify substantive departures from model legislation or to "articulate any reason that a more expansive list of photo IDs" would undermine their fraud-prevention efforts. ROA.27138; see also ROA.26635-26637, 26639, 26641-26647 (marshalling evidence of proponents' inability to explain SB14's provisions).

The court further found that the Legislature rejected a "litany of ameliorative amendments" that would have reduced SB14's adverse impact on minority voters without interfering with its stated purpose. ROA.27157; see also ROA.27060-27063, 27169-27172. The court found that SB14's proponents could not articulate "why they rejected so many ameliorative amendments," some of which had appeared in the Legislature's prior photo-ID bills and in other States' laws that were the supposed models for SB14. ROA.27158-27159; see also ROA.26647-

26651, 26662 (marshalling evidence of proponents' inability to explain rejected amendments).

The court also found that "despite opposing legislators' very vocal concerns" that a strict photo-ID requirement would disproportionately burden minorities, the Legislature never conducted any "impact study or analysis" to quantify the bill's likely effects even though it debated "increasingly strict" (ROA.27049) photo-ID bills for six years. ROA.27154. Indeed, Representative Todd Smith, the primary sponsor of an earlier photo-ID bill, stated that it was "common sense" that the people lacking photo ID are "more likely to be minority" and that he did not "need a study to tell [him] that." ROA.27072; see also ROA.27157.

d. Tenuousness. The court reasonably found that "the stated policies behind SB 14 are only tenuously related to its provisions." ROA.27150; see also ROA.27064. It noted, for example, that while in-person fraud is "negligible," absentee-voter fraud is more common. ROA.27042. Yet SB14 "does nothing to combat" absentee fraud (ROA.27042); instead, it has the "odd[]" result of relegating many voters from in-person polls to what is "openly acknowledged" to be an unsecure mail-in ballot system. ROA.27155. The court further stated that, although some proponents justified SB14 as a means to prevent non-citizens from voting, persons legally present in the United States can obtain a valid Texas

driver's license or concealed-carry license, both of which are accepted under SB14. ROA.27066. The court also found it incongruous that, in a purported effort to increase public confidence and voter turnout, the Legislature "chose legislation that will cause many qualified, registered voters to be turned away at the polls." ROA.27155. In short, the court found that SB14 "was pushed through in the name of goals that were not being served by its provisions." ROA.27157.

e. Sequence of events and procedural departures. Finally, the court reasonably found that the "sequence of events leading to" SB14's passage, including three failed attempts to pass a photo-ID bill, suggested discriminatory intent. ROA.27153; see also ROA.27049-27059. For six years, photo-ID proponents proposed "increasingly harsh" bills that "increasingly threatened" minority voting rights. ROA.27154. Party leadership employed increasingly aggressive "procedural mechanisms" to push those bills through (ROA.27154), including suspending the two-thirds vote requirement—an "extraordinary" rule change (ROA.27054) that, since 1981, has only occurred "for two categories of legislation: redistricting and voter ID bills" (ROA.27073).[14] The court found that the Legislature used "extraordinary" and "unorthodox" procedural deviations to

[14] Notably, the court found that Texas had violated the VRA in every redistricting cycle since it became a covered jurisdiction in 1975. ROA.27032; see also ROA.41727-41731 (1991 State House Plan). Texas claims that these violations do not show a history of "deliberate vote suppression." Supp. Br. 24-25 & n.7. Yet they reflect a repeated pattern of the governing party impermissibly using race to its benefit.

bypass meaningful debate and to enact SB14 "relatively unscathed" and with "unnatural speed" over the objection of legislators representing predominantly minority districts. ROA.27154; ROA.27051-27063.

2. Ultimate Finding

Having conducted the sensitive inquiry that *Arlington Heights* requires, the district court concluded, based on "the totality of the relevant facts," *Washington* v. *Davis*, 426 U.S. 229, 242 (1976), both that: (1) SB14's enactors "were motivated, at the very least in part, *because of* and not merely *in spite of*" SB14's "detrimental effects on the African-American and Hispanic electorate"; and (2) Texas failed to show that SB14 "would have been enacted" absent this discriminatory motive. ROA.27158-27159. Those are certainly reasonable inferences from the totality of evidence.

Texas's argument that plaintiffs' evidence supports only a finding of awareness, not of intent, misrepresents the court's findings. See Supp. Br. 14. The court's purpose conclusion did not rest solely on the "four findings" Texas suggests; it rested on the extensive findings outlined above. The court rationally could infer from those findings that the Legislature was not only aware of SB14's "obvious" impact on minority voters (ROA.27073), but that it enacted SB14 at least in part "*because of*" that adverse impact (ROA.27159).

Texas continues to cite polls showing general public support for "voter-ID laws" as evidence that "constituent policy preferences" drove SB14, not voter suppression. Supp. Br. 29-30. The question, however, is not whether the Legislature might have passed *some* photo-ID law without a discriminatory motive; it is why it passed *this* law, and whether it would have done so absent discriminatory intent. Here, the court found that Texas departed substantially from other States' photo-ID laws, enacting the "strictest photo ID law in the country" (ROA.27156) and one with a substantial and "obvious" discriminatory impact (ROA.27073). And it found that Texas failed to "provide any evidence" that SB14's "discriminatory features"—including those "material departure[s]" (ROA.27155-27156)—served any purpose other than to make it harder for minorities to vote. ROA.27158. It was reasonable for the court to conclude on this record that the Legislature would not have enacted *this* photo-ID bill, with *these* discriminatory features, but for its "detrimental effects on the African-American and Hispanic electorate." ROA.27159.

D. Texas's Effort To Overturn The District Court's Factual Findings Under The Guise Of "Legal Error" Is Meritless

Texas does not contend that the district court's discriminatory purpose finding was clearly erroneous. Instead, it seeks to bypass clear-error review by picking out isolated subsidiary findings and urging that they were premised on "legal errors." See Supp. Br. 21-22, 24, 26, 29. But the purported "legal errors"

are nothing more than complaints about the weight the court gave to, or the inferences it drew from, various pieces of evidence.

1. Impact. First, Texas argues that the district court "legally erred" in conducting the *Arlington Heights* analysis at all because plaintiffs failed to show that SB14 had a racially disproportionate impact. Supp. Br. 23. As explained in Argument I, the court's finding that SB14 had a racial impact was sound. Regardless, Texas's argument is baseless. *Arlington Heights* identifies disparate impact as one of several "evidentiary source[s]" from which courts might infer discriminatory intent. 429 U.S. at 266-267; see also *id.* at 266 (stating only that impact "may provide an important starting point"); *Washington*, 426 U.S. at 242; *Brown*, 561 F.3d at 433. Nothing in these cases suggests that a court must first find a disparate impact before it can consider other circumstantial evidence. In any event, the district court here *did find* that SB14 "produces a discriminatory result" before considering whether that result was purposeful. ROA.27150.

2. Historical Evidence. Nor did the court commit "legal error" in considering Texas's "long history of discriminatory voting practices" (ROA.27153). Tex. Supp. Br. 24. *Arlington Heights* expressly instructs courts to consider a law's "historical background" as one "evidentiary source" from which a court might infer discriminatory purpose. 429 U.S. at 267. The Court reiterated in

Lodge that "[e]vidence of historical discrimination is relevant to drawing an inference of purposeful discrimination." 458 U.S. at 625.

Texas misconstrues the nature of the court's historical analysis. The court did not use historical evidence to "impugn" the motives of SB14's proponents (Supp. Br. 24) "in the manner of original sin." *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 (1980) (plurality op.). Rather, it found Texas's extensive history of voting discrimination relevant in two legitimate ways. First, the history provides circumstantial support for the experts' theory that SB14 was enacted to counteract the increasing voting power of Texas's growing minority population, as prior discriminatory provisions also responded to the perceived "threat of minority voter increases" (ROA.27065). That is permissible use of historical evidence. As this Court has recognized, "[a] history of pervasive purposeful discrimination may provide *strong circumstantial evidence* that the present-day acts of elected officials are *motivated by the same purpose*." *McMillan*, 748 F.2d at 1044 (emphasis added) (citation omitted).

Second, the history provides additional reason to doubt proponents' claims that they enacted SB14 to "deter and detect voter fraud" (Tex. Supp. Br. 11)—beyond the fact that in-person voter impersonation, the only type of fraud that SB14 targets, is "almost non-existent" (ROA.27071)—because combating voter fraud also was the stated rationale behind multiple racially discriminatory voting

measures in Texas's history. See ROA.27033 & n.24. That is also a legitimate consideration. This Court has acknowledged that a legislature's discriminatory purpose is likely to be "cleverly cloaked in the guise of propriety." *Lodge*, 639 F.2d at 1363. That "combat[ing] voter fraud" has consistently been the cloak of choice when enacting unquestionably discriminatory voting laws like white primaries and poll taxes certainly provides circumstantial evidence that the invocation of "voter fraud" here serves the same function. ROA.27033 & n.24; see also ROA.44408-44409; ROA.100375-100389.

Nor did the Supreme Court's decision in *Shelby County* limit the historical evidence a court can consider in assessing a discriminatory-purpose claim. See Panel Op. 13. *Shelby County* concerned only Section 4(b)'s "decades-old" formula for Section 5 preclearance. The Court explicitly stated that its decision "in no way affects" Section 2's "permanent, nationwide ban on racial discrimination in voting." 133 S. Ct. at 2629. Moreover, the decision to strike down Section 4(b) was premised on federalism concerns specific to preclearance that the Court explained "must be justified by 'current needs.'" *Id.* at 2627 (citation omitted); see also *id.* at 2618, 2623-2624. The Court did not purport to establish any limitation on how courts can consider historical evidence under *Arlington Heights* and outside of the preclearance context. Cf. *League of Women Voters*, 769 F.3d at 242-243 (holding that the district court in a Section 2 case "failed to adequately

consider North Carolina's history of voting discrimination" in reliance on *Shelby County*).

To be sure, the older the historical evidence, the less probative it may be as to current legislators' intent. See *McCleskey*, 481 U.S. at 298 n.20; *Bolden*, 446 U.S. at 74. But probative value is a factual issue, not a legal one. The court did not make any findings regarding Texas's extensive history of voting discrimination that this Court could deem clearly erroneous.

3. Opponents' Statements. Nor did the court "legally err[]" by considering the views of SB14's opponents. Tex. Supp. Br. 26; see Panel Op. 15-17. Contrary to Texas's assertion, no case holds that the views of a bill's opponents are "not probative evidence as a matter of law." Supp. Br. 26. Even the cases Texas cites acknowledge that "statements by a bill's opponents are *relevant* in determining [legislative] intent." *Mercantile Tex. Corp.* v. *Board of Governors of Fed. Reserve Sys.*, 638 F.2d 1255, 1263 (5th Cir. 1981) (emphasis added). They simply observe that such statements are "entitled to little weight" when construing statutory language. *Ibid.*; see *NLRB* v. *Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964) (same). To be sure, courts analyzing a discriminatory-intent claim cannot rely simply on witnesses' yes-or-no testimony of whether a practice was adopted with discriminatory intent. See *Price* v. *Austin Indep. Sch. Dist.*, 945 F.2d 1307, 1317-1318 (5th Cir. 1991); see also *Butts* v. *City of New*

York, 779 F.2d 141, 147-148 (2d Cir. 1985) (finding based primarily on "the speculations and accusations" of the law's "few opponents" was clearly erroneous). But that is not what occurred here.

Although the district court referred in its lengthy background discussion to various opponents' testimony that SB14 was enacted for a discriminatory purpose (ROA.27070-27071)—suspicions that were confirmed by expert findings (ROA.27073-27075)—it did not mention those statements in its legal analysis. ROA.27151-27159. Rather, applying *Arlington Heights* and *Brown*, the court focused on the wealth of objective evidence supporting an inference of discriminatory intent. Even if the court had implicitly credited the opponents' views, that played a small role in its overall analysis and certainly was not the primary basis for its ultimate finding.

The panel also found error in the district court's crediting opponents' testimony that the 2011 legislative session was "imbued with anti-immigrant sentiment." Panel Op. 16. Multiple legislators testified that the 2011 session was a racially charged and "very tense atmosphere," citing, for example, "repeated references to illegal-aliens" and comments "equating Hispanic immigration with risks of leprosy." ROA.27067; see also ROA.27065-27067, 27075 n.204, 27157. The court, having heard the witnesses' testimony and observed their demeanor, certainly could credit their impressions of the atmosphere pervading the legislative

session. While concerns about undocumented immigrants do not necessarily go hand-in-hand with a desire to suppress minority voting (Panel Op. 16 n.11), the fact that anti-immigrant feelings permeated the 2011 session certainly provides support for the theory that SB14 was a response to Texas's growing Hispanic population.

4. Procedural Deviations. Likewise, the court committed no "legal error" in finding that the Legislature's various procedural deviations indicated discriminatory intent. *Arlington Heights* instructs courts to consider "[d]epartures from the normal procedural sequence" as possible "evidence that improper purposes are playing a role." 429 U.S. at 267. The district court did not find that "procedural departures are inherently discriminatory." Tex. Supp. Br. 29. It found that, in the circumstances of this case and viewing the evidence in its totality, the Legislature's procedural maneuvers provided additional evidence supporting an inference of discriminatory motive. Although Texas urges that those deviations "indicate[] nothing more than a desire for the bill to pass" (Supp. Br. 31), the district court was not obligated to draw that inference. Rather, the court was free to conclude—as plaintiffs' experts did—that these "unorthodox" procedural departures reflected an effort "to force SB 14 through the legislature without regard for its substantive merit." ROA.27154; see also ROA.45114-45116; ROA.44423-44424, 44427. While this Court may "have weighed the evidence

differently," clear-error review bars it from substituting its own inferences for the permissible inferences of the district court. *Brown*, 561 F.3d at 432 (citation omitted).

Although the panel admonished that the "rejection of purportedly ameliorative amendments" constitutes a "procedural departure" only if opponents were "deprived of process" (Panel Op. 18), the district court did not consider the rejection of opponents' purported mitigating amendments evidence of a *procedural* deviation. Compare ROA.27154 (discussing procedural departures), with ROA.27157 (discussing rejected amendments). Rather, it considered the Legislature's inability to explain why it had rejected so many amendments that "would have redressed some of the bill's discriminatory effects" without "detract[ing] from the legislation's stated purpose" circumstantial evidence that those discriminatory effects were in fact desired. ROA.27157-27159. That was a rational inference.[15]

5. Absence Of "Smoking Gun" Evidence. Texas contends that the district court gave too little weight to the fact that plaintiffs did not uncover evidence of

[15] The fact that the Legislature accepted a few amendments offered by SB14 opponents (Tex. Supp. Br. 31 n.11) does not undermine that inference. Those amendments were minor measures that generally benefitted only a narrow set of voters (often Anglos and voters who already possessed ID), such as accepting concealed-carry licenses, adding an affidavit option for persons with religious objections to being photographed, expanding ID-expiration periods to 60 days, and permitting use of ID with a "substantially similar" name to the voter's if accompanied by an affidavit. ROA.94351-94352. Conversely, amendments "that would have ameliorated the harsh effects of SB14 were largely tabled." ROA.27060; see also ROA.27169-27172.

any legislator expressly confessing an "intention to suppress minority voting through SB14." Supp. Br. 20. There was nothing clearly erroneous in the district court's weighing of that fact. As the Supreme Court has recognized, "[o]utright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence." *Hunt* v. *Cromartie*, 526 U.S. 541, 553 (1999). Rarely if ever will there be a "smoking gun" in the form of legislators "willing to declare racially motivated reasons for their legislative action." *Cherry*, 50 F.3d at 343; see also *Lodge*, 639 F.2d at 1363 & n.8; *Smith* v. *Town of Clarkton*, 682 F.2d 1055, 1063-1064 (4th Cir. 1982). It was thus reasonable for the court to ascribe little significance to the absence of any smoking gun.

That plaintiffs were permitted to depose SB14's proponents and granted discovery into their files does not affect this conclusion. Granting plaintiffs such discovery did not make it more likely that a "smoking gun" existed or that SB14's proponents would admit any discriminatory intent. Although the panel suggested that it was "unlikely that such a motive would permeate a legislative body and not yield any private memos or emails" (Panel Op. 19 n.16), it is hardly surprising that legislators "sufficiently sensitive to the operation of our judicial system" would be careful not to "create such documentation" even in their private correspondence. *Lodge*, 639 F.2d at 1363 n.8. That is particularly true given that the Legislature

knew that SB14 would be subject to Section 5 scrutiny. See, *e.g.*, ROA.101180 (SB14's principal author conceding that he took care when making statements).

Again trying to evade the clear-error standard, Texas argues that *Price* v. *Austin Independent School District*, *supra*, establishes a legal rule requiring courts to "apply[] a dispositive—or at the very least, heavy—discount to all of plaintiffs' circumstantial purpose evidence" when plaintiffs fail to uncover a "smoking gun" despite having access to legislative files. Supp. Br. 20. But *Price* merely applied clear-error review: the plaintiffs claimed that the district court gave "too much weight" to school board members' testimony that they harbored no discriminatory intent, and this Court held that the district court did not clearly err in crediting that testimony. 945 F.2d at 1317-1318. Thus, *Price* actually undermines Texas's argument, as it simply reaffirms that assessments of credibility and evidentiary weight are the district court's prerogative.

III

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

A court's grant of equitable relief to redress a Section 2 violation is reviewed only for an abuse of discretion. See *Brown*, 561 F.3d at 435. Given SB14's discriminatory purpose (ROA.27159), the court did not abuse its discretion in permanently enjoining Texas from enforcing SB14's photo-ID provisions (ROA.27167, 27192). See *Hunter*, 471 U.S. at 233. As for SB14's discriminatory

result, limiting relief to the named plaintiffs, as Texas proposes (Supp. Br. 49), ignores the United States' presence as a plaintiff and the Attorney General's ability to seek equitable relief to restore all affected voters' access to the ballot. See 52 U.S.C. 10308(d); *United States* v. *East Baton Rouge Parish Sch. Bd.*, 594 F.2d 56, 58 (5th Cir. 1979).

CONCLUSION

This Court should affirm the district court's Section 2 liability findings and reinstate the permanent injunction.

Respectfully submitted,

KENNETH MAGIDSON
United States Attorney
Southern District of Texas

JOHN ALBERT SMITH, III
Office of the U.S. Attorney
800 Shoreline Blvd., Ste. 500
Corpus Christi, TX 78401

VANITA GUPTA
Principal Deputy Assistant
Attorney General

s/ Erin H. Flynn
DIANA K. FLYNN
ERIN H. FLYNN
CHRISTINE A. MONTA
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-2195

CERTIFICATE OF SERVICE

I certify that on May 9, 2016, I electronically filed the foregoing SUPPLEMENTAL EN BANC BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that on May 9, 2016, I served a copy of the foregoing brief on the following counsel by certified U.S. mail, postage prepaid:

Jennifer Clark
New York University
Brennan Center for Justice
161 Avenue of the Americas
New York, N.Y. 10013-0000

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney

CERTIFICATE OF COMPLIANCE

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

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,984 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

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

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney

Date: May 9, 2016

ADDENDUM

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

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

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

Table of Trial Witnesses with ROA Citations

(In order of appearance)

Plaintiffs' Trial Witnesses

Expert Witnesses

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

Affected Voters and Social Service Providers

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

Elected Officials

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

State Employees

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

Other

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

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

Defendants' Trial Witnesses

Expert Witnesses

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

Elected Officials

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

State Employees

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

Other

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

* Indicates declaration submitted to the district court

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

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

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

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

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

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

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

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

Illustration from Drs. Matthew Barreto and Gabriel Sanchez's Rebuttal Report
(ROA.43656)

of focus which ignores the very real evidence that existing registered voters who have a right to vote are denied the opportunity to vote if they lack a photo ID, or the means to obtain a photo ID. By focusing on aggregate voter turnout Hood and Milyo are effectively saying as long as the overall voter turnout rate does not decline under voter ID regimes there is no harm. Rather than a direct disparity in turnout, the threshold has been whether eligible voters have equal access to the *opportunity to vote*. If there are unequal possession rates of the required identification across the population in the state of Texas then many voters would be disenfranchised. Consequently, the discussion of the academic literature focused on the relationship between voter ID laws and turnout is irrelevant to the question addressed in our report. Regardless of aggregate turnout rates, harm is still being faced by the hundreds of thousands of individuals who lack ID and will not be able to vote in future elections. It is irrelevant if *other* individuals who do possess a valid ID start to vote at higher rates now. We illustrate this with a simple example:

5. Table 1: Example how turnout can increase but eligible voters remain disenfranchised

	Year 1	Total Voted	Turnout Rate		Year 2	Total Voted	Turnout Rate
Registered voters have valid photo ID	850	700	82%		950	900	95%
Registered voters LACK valid photo ID	150	100	67%	100 register	150	0	0%
Eligible, but not registered have valid photo ID	200	0	0%		100	0	0%
Eligible, but not registered LACK valid photo ID	200	0	0%		200	0	0%
Overall	1400	800	57%		1400	900	64%

6. The example in Table 1 is a very close approximation of what happened in the state of Georgia between 2004 and 2008. It is also demonstrates that the overall aggregate voter turnout rate can increase, but this does not prove voter ID laws do not have a disenfranchising effect. In the example above in Table 1 the jurisdiction goes from an overall turnout rate of 57% in year 1 to an increased turnout rate of 64% in year 2. However the turnout increase is only among those who have a valid photo ID. In year 2 after implementation of voter ID, it is likely that any registered voter who does not possess a valid photo ID on Election Day will not be able to vote even if they had voted in year 1. Further, other eligible voters who were previously not registered to vote but have a valid ID now enter the electorate for the first time in year 2, and because they have an ID they are able to vote. Witnessing a higher voter turnout rate among those who already have a valid ID does not prove at all that voter ID laws are preventing other voters who lack ID from voting, and this is the critical question we must answer are eligible voters being disenfranchised?