**No. 14-41127**

# UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

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

*v.*

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

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UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

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

*v.*

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

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

*v.*

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

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

*v.*

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

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

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## SUPPLEMENTAL EN BANC BRIEF FOR THE TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND AND IMANI CLARK

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May 9, 2016

## CERTIFICATE OF INTERESTED PERSONS

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

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/s/ Natasha M. Korgaonkar
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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES

**STATUTES, RULES, AND REGULATIONS**



**OTHER AUTHORITIES**

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case challenges the most restrictive and, arguably, most racially discriminatory voter ID law in the nation: Senate Bill 14 ("SB 14") in Texas. SB 14 was passed by the Texas State Legislature in 2011 with the intent to restrict the voting rights of Black and Latino Texas voters. Each of the seven federal judges in the three federal courts to have considered the legality of SB 14 has concluded that it violates the Voting Rights Act or the U.S. Constitution. Despite these successive rulings, Texas continues to enforce this unconstitutional and intentionally discriminatory law. As a result, over 600,000 registered voters—a disproportionate number of whom are Black and Latino—have been denied their fundamental right to vote since June of 2013.

The lengthy and detailed findings of the district court, which reflect that court's careful review and reasoned analysis of nearly three weeks of trial testimony, are correct and do not reflect any clear error. This Court should therefore affirm that court's reasoned judgment that SB 14 violates the Voting Rights Act and the Constitution and enjoin the law immediately.

## STATEMENT OF THE CASE

### A. SB 14's Enactment

Before the enactment of SB 14 in 2011, Texas voters were permitted to cast their ballots with a state-issued registration certificate that each citizen-registrant

automatically received upon registering to vote. Tex. Elec. Code §63.001(b). Voters without that certificate could vote by signing an affidavit and presenting any one of several common, identifying documents, including a student ID, federal employee ID, driver's license from another state, or mail addressed to the voter from a government agency. *Id.* §§13.142, 63.0101.

SB 14 imposes an extremely restrictive photo ID requirement for in-person voting, mandating that registered voters present: (1) a Texas driver's license, personal identification card, or license to carry a concealed handgun; (2) a U.S. military identification card containing a photo; (3) a U.S. citizenship certificate containing a photo; or (4) a U.S. passport. Tex. Elec. Code §63.0101. Apart from citizenship certificates, these forms of ID must be unexpired or recently expired. *Id.* Voters who do not have these forms of ID can obtain an Election Identification Certificate ("EIC"), Tex. Transp. Code §521A.001, if they are able to provide multiple forms of documentation of identity at a Department of Public Safety ("DPS") office or other EIC-issuing facility, 37 Tex. Admin. Code §15.182(2). The EIC, which Texas initially touted as a "free" catch-all form of identification for voters who did not have any of the other forms of ID, is unattainable for many Texas voters. In fact, as Plaintiffs demonstrated at trial, the EIC is not free at all; it requires multiple forms of underlying documents that are extremely burdensome, ROA.27097, costly, ROA.27087, or even impossible to obtain, ROA.27096-27097,

for many of Texas's most vulnerable citizens. By the time of the district court trial, only 279 EICs had been issued in all of Texas, even though over 600,000 Texans lacked an SB 14-compliant ID. ROA.27129-27131.

The proponents of SB14 proffered two primary rationales for this legislation: preventing non-citizen voting and combating in-person voter impersonation. ROA.98736; ROA.99935; ROA.101170; ROA.101273. Both justifications are implausible and pretextual. As Plaintiffs proved at trial, SB 14 was passed with the intent to discriminate against Black and Latino voters, and it disproportionately disfranchises legally-registered Texas voters of color. Texas's argument that the law was passed solely to respond to the State's concerns about voter fraud is belied by the law's needlessly strict parameters as well as the unusual series of departures from normal legislative procedure that enabled its passage. SB 14 does very little to deter non-citizen voting, and in-person voter fraud—the only kind of fraud SB 14 was purportedly designed to combat—was not a meaningful problem in Texas. Indeed, from 2000 to 2010, "only two cases of in-person voter impersonation fraud were prosecuted to conviction—a period of time in which 20 million votes were cast." ROA.27038.

Moreover, the circumstances surrounding SB 14's passage are further evidence of discriminatory intent. In the decade preceding the enactment of SB 14, Black and Latino Texans accounted for 78.7 percent of the state's total population

growth. As a result, by 2010, Texas was transformed into a majority-minority state. ROA.45101; ROA.99668. Once this rapid change in demographics became apparent, lawmakers in the 2011 legislative session debated English-only initiatives and the abolition of "sanctuary cities," ROA.98730-98731, and passed a redistricting bill that intentionally discriminated against Black and Latino citizens, ROA.45101; ROA.99666-99668. SB 14—which was passed on an expedited basis through an unusual series of procedural deviations—was enacted by the same legislature during the same session. ROA.44393-44395; ROA.44399; ROA44404.

Despite the counterfactual justifications for SB 14, the Legislature demanded, and secured, a law that was more restrictive than the voter ID proposals that had been presented in the three preceding sessions. ROA.38743-37844; ROA.100333; ROA.58330; ROA.99672-99673. SB 14 prohibits the use of several forms of ID, such as student IDs and state and federal government-issued IDs, that had been permitted by Texas's previous voter ID law and that are currently permitted under various other states' voter ID laws. ROA.99687-99689. In the course of enacting SB 14, the Legislature rejected numerous proposed amendments that would have expanded the list of permissible IDs to ensure that the burden of presenting ID would not fall disproportionately on voters of color and the poor. None of these amendments would have impeded the Legislature's stated

objectives. ROA.28747-28750; ROA.44398-44399; ROA.38398; ROA.61021; ROA.61393.

Texas has also rejected evidence of SB 14's discriminatory effect since the law's inception. Under Section 5 of the Voting Rights Act ("VRA"), Texas was required to obtain preclearance for SB 14. The Department of Justice ("DOJ") denied Texas's request for administrative preclearance and a three-judge court denied Texas's request for judicial preclearance, holding that Texas failed to meet its burden of showing that SB 14 would not have a retrogressive effect on Black and Latino voters. *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012), *vacated and remanded*, 133 S. Ct. 2886 (2013). The Supreme Court vacated that opinion after *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) and, shortly after *Shelby County* was announced, Texas began enforcing SB 14. ROA.61049-61050; ROA.61123-61124; ROA.61372; ROA.101090-101091. Notwithstanding the findings of the DOJ and the three-judge court that Texas had failed to prove that SB 14 was not retrogressive, Texas made no effort to amend SB 14 or otherwise ameliorate its disproportionate impact on Black and Latino voters before enforcing it.

### B. District Court Litigation

Imani Clark is a Black student at Prairie View A&M University, a historically Black land-grant university in rural Waller County, Texas. Ms. Clark

has been registered to vote in Texas since 2010. ROA.100537-100539. In 2010 and 2012, Ms. Clark was able to vote using her student ID and other forms of ID that were accepted under Texas's previous voter ID law but are not accepted under SB 14. Since the passage of SB 14, Ms. Clark has been unable to vote because she does not possess an SB 14-compliant ID. Because Ms. Clark does not own a car and has limited access to transportation and limited time due to her work and school commitments, it is unduly burdensome for her to obtain an SB 14-required ID. ROA.100540; ROA.100542. As a result, Ms. Clark has been denied the exercise of her fundamental right to vote in every election since Texas began enforcing SB 14. ROA.100539.

Along with others,[1] Ms. Clark intervened in support of a lawsuit brought by the DOJ against Texas and other government officials (collectively, "Texas") challenging SB 14. Ms. Clark alleged that SB 14 violates the results test of Section

[1] Plaintiff-Intervenor Texas League of Young Voters Education Fund (the "Texas League") remains non-operational as of the filing of this brief. However, upon information and belief, many of the Texas voters whose inability to meet SB 14's strict requirements gave rise to the Texas League's standing remain disfranchised by SB 14. Ultimately, both because Plaintiff-Intervenor Clark remains a legally-registered Texas voter without SB 14-required identification and because she and other Plaintiffs in this case have standing, whether the Texas League should remain in this case is irrelevant. Should the Court consider this question, Plaintiff-Intervenors respectfully request that this issue be remanded to the district court for briefing and, if necessary, additional fact-finding, on whether intervenors require independent standing when they present identical claims and seek identical relief as Plaintiffs with Article III standing. *See Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998).

2 of the VRA, intentionally discriminates on the basis of race or color in violation of Section 2 and the Fourteenth and Fifteenth Amendments, and violates the Fourteenth Amendment by unjustifiably and severely burdening the right to vote. After lengthy discovery and a nine-day bench trial during which the court heard testimony from nearly 50 witnesses and received thousands of pages of deposition excerpts and exhibits, including 28 expert reports, the court issued a 147-page opinion exhaustively setting forth the following findings:

***Discriminatory Intent.*** The court found, as a factual matter, that the Legislature's motivation in passing SB 14 was at least in part discriminatory. ROA.27151-27159. In light of the "seismic demographic shift" and racially-polarized voting patterns in the state, the court concluded that SB 14's proponents faced a declining voter base and could "gain partisan advantage by suppressing the overwhelmingly [opposition] votes of African Americans and Latinos." ROA.27153 (quoting Lichtman Report (ROA.45102)). The court also found, among other things, that the Legislature rejected a "litany of ameliorative amendments that would have redressed some of the bill's discriminatory effects" without detracting from its purported objectives, ROA.27157, and that it used "extraordinary departures" from normal practice to push SB 14 through, despite the "tenuous nexus" between SB 14's stated goals and its actual provisions, ROA.27154-27155.

***Discriminatory Result.*** The district court found that 608,000 registered Texas voters are unable to vote in person under SB 14 because they do not have any of the required forms of ID. The court determined that a disproportionate number of these voters are Black and Latino. ROA.27075-27076; ROA.27078-20084. The court held that SB 14's disproportionate impact is not "mere chance," ROA.27150, but, instead, that its requirements interact with social and historical conditions in Texas to create an inequality in the electoral opportunities available to Black and Latino voters as compared to Anglos, ROA.27144; ROA.27150-27151.

***Unconstitutional Burden on the Right to Vote.*** The district court held that SB 14 violates the Fourteenth Amendment by substantially burdening the right to vote for these 608,000 registered voters. ROA.27141. Based on the "abundant evidence" presented over the course of the trial, the court found that "there is significant time, expense, and travel involved in obtaining SB 14-qualified ID." ROA.27129-27130. The court heard testimony from more than twenty registered voters who face these burdens, as well as numerous experts. For example, Dr. Coleman Bazelon, one of the experts whose testimony was credited by the court, estimated that the average cost of travel to get an EIC is $36.23, or 149% of average nationwide hourly earnings. ROA.27102; ROA.27164. The court found

that the proffered countervailing state interest did not justify these burdens. ROA.27137-27141.

### C. Fifth Circuit Panel Decision

In August 2015, ten months after the district court's opinion, a three-judge panel of the Fifth Circuit unanimously affirmed the district court's holding that SB 14 violates the VRA. The Court found that "the State [did] not dispute the underlying factual findings" and it unanimously rejected Texas's arguments regarding "purported legal errors in the district court's decision." Panel Op. at 26. Specifically, the Court held that because "each finding was well-supported" and the district court's "analysis comports with the Supreme Court's … instruction," *id.* at 26, the district court did not "reversibly err in determining that SB 14 violates Section 2 by disparately impacting minority voters," *id.* at 36.

Because the Court upheld the district court's finding that the law violated the effects test of Section 2, it did not reach the question of whether SB 14 substantially burdened the right to vote in violation of the Fourteenth Amendment. Panel Op. at 38. The Court reasoned that Plaintiffs would be entitled to the same relief under Section 2 and cited several cases supporting the court's power to permanently enjoin statutes—including voter ID laws—that unconstitutionally burden the right to vote. *Id.* at 513-514. The Court also remanded Plaintiffs' discriminatory purpose claim to the district court for reexamination.

In light of its discriminatory effect finding, the Court ordered the parties to "work cooperatively with the district court" to implement relief prior to the November 2015 elections. Panel Op. at 48. In September of 2015, Texas applied for en banc reconsideration of the panel's decision and this Court granted rehearing en banc in March 2016.

* * *

Every one of the seven judges that has ruled on the matter has agreed that SB 14 has an unlawful, discriminatory effect on voters of color. Nonetheless, Texas enforced SB 14 in the November 2014 general election, the November 2015 general election, the March 2016 primary election, and countless other state and local elections across the state since June 2013. The fact that an intentionally racially discriminatory voting law has been in force in Texas continuously for nearly three years is beneath the most basic standards of democracy that every American should expect and enjoy. This Court must affirm the district court's well-reasoned determination that SB 14 violates the Voting Rights Act and the U.S. Constitution.

## ARGUMENT

### I. SB 14 WAS ENACTED WITH DISCRIMINATORY INTENT

Both Section 2 of the Voting Rights Act and the U.S. Constitution prohibit laws, like SB 14, that are "conceived or operated as purposeful devices to further

racial discrimination." *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (citation omitted); *McMillan v. Escambia Cty.*, 748 F.2d 1037, 1046 (5th Cir. 1984). For a voting law to violate the statutory and constitutional bans on intentional discrimination, "[r]acial discrimination need only be one purpose, and not even a primary purpose, of an official act." *Velasquez v. City of Abilene*, 725 F.2d 1017, 1022 (5th Cir. 1984). The district court properly found, based on a vast record of evidence, that SB 14 was enacted, at least in part, with the intent to discriminate against Black and Latino voters. ROA.27151-27159.

### A. Standard Of Review

Intentional discrimination is a "question of fact" to be decided by the district court. *Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 408 (5th Cir. 1991). The district court made extensive factual findings supporting its conclusion that SB 14 was motivated by discriminatory intent, and it properly relied on *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-268 (1977) to assess the existence of discriminatory purpose.[2] As the panel recognized, such fact findings are reviewed for clear error and are not easily reversed. Panel Op. at 23; *see also Rogers*, 458 U.S. at 632 (noting that "issues of intent are commonly treated as factual matters" subject only to clear error review); Fed. R. Civ. P. 52(a)(6). "[T]he application of the clearly-

[2] In addition, the court properly held that the Senate Factors corroborated this finding of discriminatory purpose. ROA.27152; *see Rogers*, 458 U.S. at 620-621.

erroneous standard … preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986). Because a district court's factual findings regarding legislative purpose "represent[] … a blend of history and an intensely local appraisal of the design and impact of the [electoral law] in the light of past and present reality, political and otherwise," appellate courts are generally loathe to overturn such findings. *Rogers*, 458 U.S. at 622 (citation omitted). The panel recognized this high bar and agreed that "[i]f the district court's findings are plausible in light of the record viewed in its entirety, we must accept them." Panel Op. at 10 (quoting *Price v. Austin Indep. Sch. Dist.*, 945 F.2d 1307, 1312 (5th Cir. 1991) (internal quotation marks omitted)). This Court must review the district court's intent determination for clear error.

### B. The District Court Properly Applied *Arlington Heights* To Find Intentional Discrimination

Texas asserts that "[a] claim that a State *legislature* enacted a neutral law with a racially discriminatory purpose is no ordinary purpose claim," Br. at 13, but offers no support for this *ipse dixit*. As the panel found, the district court properly concluded that "the framework articulated in [*Arlington Heights*] … remains the proper analytical framework for these kinds of cases." Panel Op. at 10; *see also Arlington Heights*, 429 U.S. at 265. "Racial discrimination need only be one

purpose, and not even a primary purpose, of an official action for a violation to occur." *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009).

The district court properly relied upon each of the *Arlington Heights* factors to find that SB 14 was enacted for a discriminatory purpose, including:

- that "SB 14's effects bear more heavily on Hispanics and African-Americans than on Anglos in Texas," ROA.27158; *see Arlington Heights*, 429 U.S. at 266 ("The impact … may provide an important starting point.");

- that "[t]he specific sequence of events leading up to the challenged decision," which "may shed some light on the decisionmaker's purpose," *Arlington Heights*, 429 U.S. at 267, included the SB 14 supporters' complete lack of consideration for "opposing legislators' very vocal concerns," supporters' knowledge of SB 14's discriminatory impact, ROA.27154, and their series of intentional choices to enhance that impact, ROA.27073-27075;

- that legislators made "contemporary statements," *Arlington Heights*, 429 U.S. at 268, contributing to the "racially charged environment" in which SB 14 was passed, ROA.27157; and

- that the passage of SB 14 included "[d]epartures from the normal procedural sequence," which "might afford evidence that improper purposes are playing a role," *Arlington Heights*, 429 U.S. at 267, such as the "devices intended to force SB 14 through the Legislature without regard for its substantive merit." ROA.27154.

*See Arlington Heights*, 429 U.S. at 265-268; *see also Brown*, 561 F.3d at 433. The district court also found the presence of certain Senate Factors, including a history of racial discrimination in voting, racially polarized voting, and racial appeals in campaigns, which support an intent finding. ROA.27151-27159; *see also Brown*, 561 F.3d at 433 ("The [Senate] factors … supply a source of circumstantial

evidence regarding discriminatory intent."); *McCarty v. Henson*, 749 F.2d 1134, 1136 (5th Cir. 1984)).

In sum, the district court found and relied on exactly the kinds of direct and circumstantial evidence required under the applicable standard to make its discriminatory purpose finding. ROA.27152; *Arlington Heights*, 429 U.S. at 266-268.

### 1. The district court properly credited the extensive direct evidence of discriminatory purpose

The district court properly found both direct and circumstantial evidence supporting its intent finding. Although direct evidence is not required for an intentional discrimination claim to succeed, *Lodge v. Buxton*, 639 F.2d 1358, 1363 (5th Cir. 1981), *aff'd sub nom. Rogers v. Lodge*, 458 U.S. 613 (1982), the uncontroverted trial record shows that SB 14 proponents purposefully crafted a law that had a disparate impact on Black and Latino voters, ROA.27075; ROA.44025-44027, and the district court concluded that Plaintiffs presented direct evidence demonstrating that "discriminatory purpose was at least one of the motivating factors," ROA.27158. *See also Arlington Heights*, 429 U.S. at 265-266. The district court properly relied on three key items of direct evidence to support its intent finding: (1) SB 14 supporters' knowledge of the disproportionate impact that the law would have on Black and Latino voters, coupled with (2) a consistent refusal by those supporters to adopt any modifications that would ameliorate the

impact on voters of color, and (3) a racially-charged atmosphere in the Legislature when SB 14 was passed, including contemporaneous statements from legislators. ROA.27153-27158.

***Disregard for the Foreseeable Effects of SB 14***

The district court properly considered and credited direct evidence from legislators indicating that they knew that SB 14 would have a detrimental impact on Black and Latino voters. Representative Todd Smith, a key proponent of SB 14, "admitted that it was 'common sense'—he did not need a study to tell him—that minorities were going to be adversely affected by SB 14." ROA.27157; *see also* ROA.100339-100340. While mere knowledge of disparate impact is not sufficient, on its own, to prove discriminatory intent, *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979), awareness of such an impact is not "irrelevant to the question of intent." *Id*. at 277 n.23; *see also id.* at 279 n.25 ("This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are … inevitable … a strong inference that the adverse effects were desired can be reasonably drawn."). Texas (at 28) simply discounts this evidence and precedent, arguing that Representative Smith's statement "reflects nothing more than a general awareness of a statistical correlation between poverty and racial-minority status." But the binding law is

clear: such an awareness can and, here, does support a finding of intentional discrimination, as the district court recognized. *See Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979) ("[A]ctions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose."). The district court's reliance on this direct evidence was appropriate.

Others, beyond Representative Smith, knew that SB 14 would have disparate racialized consequences. Bryan Hebert, a staffer "who assisted Lieutenant Governor Dewhurst in shepherding SB 14 through the legislature and who drafted the EIC provision, expressed concern to various legislative staffers about preclearance, recommending that, at a minimum, the list of acceptable photo IDs should be expanded to include federal, state, and municipal government-issued IDs." ROA.27157; *see also* ROA.45134-45135. Senator Tommy Williams, in 2011, requested that the Secretary of State conduct an analysis of SB 14's impact, but the findings of that analysis were not shared with the Legislature. ROA.27057 n.118. When Senator Rodney Ellis, a skeptic of SB 14, asked the Secretary of State for information about the law's impact, he received no response whatsoever. *Id.* Despite their efforts to fully understand the impact of this law, legislators with reservations about SB 14's impact on Black and Latino people simply received no information to suggest that the law would not be harmful.

This legislative history and context was properly considered by the district court as direct evidence of intent. *See Arlington Heights*, 429 U.S. at 267 ("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, *particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached*." (emphasis added)).

***Consistent Selection of Only the Strictest Modifications***

The Legislature's awareness of, and disregard for, the disparate impact that SB 14 was likely to have on voters of color was not the only direct evidence considered by the district court. That court also properly found that the Legislature's choices with respect to the forms of ID required by the law demonstrated a consistent pattern of adopting modifications that benefited white voters and rejecting those that would have benefited Black and Latino voters. ROA.27073-27074. Thus, although it was aware that SB 14 would exclude voters of color from the polls at disproportionate rates, ROA.27072–27073, the Legislature repeatedly rejected any amendments that would broaden the forms of required ID, or provide indigency exceptions. ROA.27073-27074; *see also* ROA.99677-99681; ROA.27157-27159. SB 14's proponents were unable to explain why they rejected amendments that would have added student IDs, DPS-issued state employee IDs, or federal IDs to the list of permissible forms of photo

identification. ROA27158-27159; ROA.27169; ROA.101397. As the district court noted, these inexplicably rejected amendments would have decreased SB14's specific "discriminatory features." ROA27158-27159.

At the same time, the Legislature exempted absentee ballots, and adopted provisions that expanded the list of IDs to include military photo IDs and concealed handgun licenses, all of which disproportionately benefited white voters. ROA.27073-27074; *see also* ROA.45117-45118; ROA.45145-45147; ROA.99676-99677; *cf. Hunter v. Underwood*, 471 U.S. 222, 232-233 (1985) (holding that the purposeful selection of crimes thought to be more frequently committed by Black voters for inclusion in a felon disfranchisement bill was strong evidence of intent). Each of these decisions rejecting ameliorative changes to SB 14 was properly considered and weighed by the district court and properly supported that court's discriminatory intent finding. *See Arlington Heights*, 429 U.S. at 267 ("The specific sequence of events leading up the challenged decision also may shed some light on the decisionmaker's purposes.").

The Legislature also rejected modest amendments that would have lessened SB 14's discriminatory results and rendered the bill more consistent with voter ID laws from such other states as Indiana and Georgia. ROA.27074; ROA.27157; *see also, e.g.*, ROA.62739-62740; ROA.101051. Together, these pieces of direct evidence support the district court's finding that in passing SB 14, the Legislature

acted, at least in part, with the intent to discriminate against Black and Latino voters.

***Racially Charged Atmosphere and Appeals***

The district court also properly recognized that the contemporaneous statements of photo ID proponents and racial appeals in electoral campaigns in Texas revealed a "racially charged environment," ROA.27157, which colored the choices the Legislature made in pushing the most restrictive version of SB 14 to passage. *See Arlington Heights*, 429 U.S. at 268 ("The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.").

Specifically, the district court properly credited the expert findings of Dr. Vernon Burton that "racial appeals—once more explicit—have become increasingly subtle" in Texas. ROA.27036-27037 (quoting Burton Report at ROA.44019). For example, the district court credited Dr. Burton's finding that "immigration" is often a racial code word, ROA.27037, and Representative Trey Martinez-Fisher's testimony that "[o]ver time, proponents of the photo ID bill [in the Texas Legislature] began to conflate voter fraud with concern over illegal immigration," ROA.27065. Further, the district court credited Dr. Burton's testimony that during the time period that the Legislature was considering

increasingly strict voter ID bills, Black voters were being associated with "voter fraud" and a need for narrower ID laws. As Dr. Burton explained, a 2008 mailer, for example, tried to discourage and intimidate Black voters by linking legitimate turnout efforts to "voter fraud." ROA.27037-27038; ROA.44023. Dr. Burton also testified that the claim that SB 14 was a necessary response to voter fraud is consistent with Texas's history of enacting intentionally discriminatory voting devices, such as all-white primaries and poll taxes, under the guise of anti-fraud measures. *See infra* pp. 25-26.

* * *

Texas asks this Court to discount all of this direct evidence. Apart from the extremely high burden to overcome factual findings—a burden that Texas has not even come close to surmounting—the conclusion that direct evidence supports the district court's finding that intentional discrimination motivated the Legislature's passage of SB 14 is nearly inescapable. *See Arlington Heights*, 429 U.S. at 266-268 (listing as relevant considerations, *inter alia*, a law's "historical background," "the specific sequence of events leading up the challenged decision," "departures from the normal procedural sequence," legislative history, and "contemporary statements."). The district court properly found that the fact that Texas passed a carefully crafted and unnecessarily strict law that would have a known, disproportionate impact on Black and Latino voters, would not be studied before

its implementation, would yield to no amendments whatsoever, and would be passed through a series of departures from the normal legislative process evinces Texas's unlawful intent. *See id.* at 266 ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."); *see also Hunt v. Cromartie*, 526 U.S. 541, 553-554 (1999) (recognizing that the "District Court is more familiar with the evidence than this Court, and is likewise better suited to assess the [Legislature's] motivations").

These facts taken together constitute "very significant" direct evidence of intent. *See United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1571 (11th Cir. 1984); *cf. Velasquez*, 725 F.2d at 1022-1023.

**2. The district court properly considered circumstantial evidence**

It was similarly proper for the trial court to rely on the considerable circumstantial evidence, including historical context, supporting the finding of discriminatory purpose. Indeed, precedent expressly supports the consideration of such evidence. *Arlington Heights*, 429 U.S. at 266; *see also Brown*, 561 F.3d at 433. In fact, the district court could have made an intent finding relying on only the circumstantial evidence. *See Lodge*, 639 F.2d at 1363 ("The existence of a right to redress does not turn on the degree of subtlety with which a discriminatory plan is effectuated. Circumstantial evidence, of necessity, must suffice, so long as

the inference of discriminatory intent is clear."). At a minimum, the consideration of circumstantial evidence falls within the discretion of the trial court. *See Price*, 945 F.2d at 1312 (emphasizing broad deference to district court's intent findings); *see also Hunt*, 526 U.S. at 548-549 (determining that "[v]iewed *in toto*, appellees' evidence tends to support an inference that the State drew its district lines with an impermissible racial motive—even though they presented *no direct evidence* of intent" (emphasis added)).

The district court properly found, based on the extensive direct and circumstantial evidence before it, that "proponents of SB 14 … were motivated, at the very least in part, *because of* and not merely *in spite of* the voter ID law's detrimental effects on the African-American and Hispanic electorate." ROA.27159. That finding was not clearly erroneous and, even without the considerable direct evidence before the district court, *supra* Part I.B.1, the circumstantial evidence is sufficient to support the district court's discriminatory intent finding. That evidence includes: (1) Texas's repeated disregard for the VRA as it applies to redistricting, including its intentional discrimination in redistricting during the same legislative cycle when SB 14 was passed; (2) Texas's repeated history of adopting disfranchising devices under the guise of protecting against voter fraud; (3) racially polarized voting in Texas; and, (4) the unexplained

departures from the normal legislative process employed by SB 14 proponents to ensure the discriminatory law's passage.

***Recurring and Current Discrimination in Redistricting***

Within this past decade, the Supreme Court has not only found that Texas used redistricting to deny Latino voters the opportunity to elect a candidate of choice "because Latinos were about to exercise [that opportunity]," but also that such a fact "*bears the mark of intentional discrimination*." *LULAC v. Perry*, 548 U.S. 399, 440 (2006) (emphasis added). Accordingly, the district court here gave "great weight" to Dr. Alan Lichtman's undisputed testimony that proponents of SB 14 began considering photo ID laws and finally adopted SB 14 at the precise moment when the state was "going through a seismic demographic shift," transforming from a majority Anglo state to a majority Black and Latino state. ROA.27153. Consistent with the Supreme Court's decision in *LULAC v. Perry*, the district court found that the Texas Legislature passed SB 14 to diminish Black and Latino voting strength at the very moment when these communities were poised to use their voting strength at unprecedented levels. *Id*.

With the recurring intent of diminishing growing Black and Latino voting strength, the same Legislature that enacted intentionally discriminatory redistricting plans also enacted SB 14. *Texas v. United States*, 887 F. Supp. 2d 133, 159 (D.D.C. 2012), *vacated and remanded*, 133 S. Ct. 2885 (2013). This

finding of intentional discrimination in redistricting was based on circumstantial evidence and *Arlington Heights* factors that are nearly identical to the evidence credited by the district court here: specifically, the fact that, in the past four redistricting cycles, Texas was unsuccessful every time it faced a redistricting challenge under the VRA (demonstrating the state's repeated failure to comply with the VRA), ROA.27032; ROA.27154, and the fact that the sequence of events leading to the passage of the post-2010 statewide redistricting plans was characterized by the exclusion of Black and Latino Texas legislators from the drafting process, ROA.27051-27075. In *Texas*, the court noted that "Texas did not adequately engage with the evidence raised by the other parties on [discriminatory intent]." *Texas*, 887 F. Supp. 2d at 161. The same infirmity exists here.

***History of Intentionally Discriminatory Voting Devices***

Apart from Texas's recurring pattern of flouting the VRA when it comes to redistricting, Texas also has an extensive and demonstrated history of enacting voting devices, such as SB 14, in order to prevent Black and Latino Texans from gaining access to the ballot. This egregious and undisputed history of voting discrimination in Texas also serves as important circumstantial evidence supporting a finding of purposeful discrimination. *See Arlington Heights*, 429 U.S. at 267 ("[H]istorical background of the decision is one evidentiary source.").

The district court properly relied on Dr. Burton's testimony regarding Texas's history of enacting successive disfranchising devices similar to SB 14, including all-white primaries (1894-1944), literacy and "secret ballot" requirements (1905-1970), poll taxes (1902-1966), and re-registration requirements coupled with yearly purges (1966-1976) to support its intent finding. ROA.27028-27034. Although Texas justified each of these voter restrictions by asserting a purported need "to combat voter fraud," these laws (each of which, except for the all-white primaries, is facially-neutral) are now universally understood to have been motivated by prohibited racial animus against Black and Latino Texans. ROA.27033. In addition, the district court repeatedly referred to the testimony and report of expert witness George Korbel regarding dozens of Section 2 violations and Section 5 objections in Texas over the last twenty-years. ROA.27029-27037; ROA.27073.

The district court's reliance on Dr. Burton's and Mr. Korbel's testimony, showing, among other things, that SB 14 falls into a virtually unbroken pattern of Texas's justifying discriminatory, disfranchising laws with claims of attempting to prevent voter fraud, is far from a "legal error." Texas Br. 24-25. It is, instead, a direct application of *Arlington Heights* to the facts of this case. *See Arlington Heights*, 429 U.S. at 266 ("Sometimes a clear pattern, unexplainable on grounds

other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.").

***Additional Circumstantial Evidence of Intent***

Uncontested evidence of racially polarized bloc voting by white Texans in support of the incumbent party and of Black and Latino Texans' bloc voting in favor of the opposition party, further buttresses the district court's intent finding. ROA.27034-27035. Racially polarized voting is one of the Senate Factors and it can, itself, constitute evidence of "racial hostility" in Texas. *See Gingles*, 478 U.S. at 71 n.33; *Rogers*, 458 U.S. at 623 ("Voting along racial lines allows those elected to ignore black interests without fear of political consequences"). The combination of Texas's demographic shift and racially polarized voting supports the district court's careful and detailed finding that, because some members of the Texas Legislature "fac[ed] a declining voter base," they intentionally sought to gain an advantage by "suppressing the overwhelmingly [opposition] votes of African-Americans and Latinos." ROA.27153 (quoting Lichtman Report (ROA.45102)); ROA.27073; *see also supra* at 23-24.

Finally, as the district court found, the series of unusual legislative maneuvers that led to the passage of SB 14 further supports an inference of racially discriminatory purpose. ROA.27049-27059; ROA.27154. The district court properly considered, *inter alia*, each of the following proven departures from

procedure: the unusual speed with which SB 14 proponents forced the bill through the Legislature, ROA.27052-27059; the fact that the passage of SB 14 was introduced as "emergency legislation," exempting it from the normal four-fifths Senate vote requirement to push it through the state Senate early in the session, ROA.27053; the extraordinary suspension, for SB 14 only, of the two-thirds procedural rule (which provides that a bill may only be considered as an expedited "special order" when two-thirds of the Senate agrees), ROA.27053-27054; and SB 14's bypassing normal committee consideration before its presentation to the Senate as a whole, ROA.27054-27055. Each of these stark departures decreased the opportunity for opponents and skeptics of SB 14 to shape or to challenge the law's passage. These departures from the normal legislative procedure constitute powerful evidence of discriminatory intent. *See Arlington Heights*, 429 U.S. at 267 ("[d]epartures from the normal procedural sequence" are evidence of intentional discrimination).

The likelihood that each of these pieces of circumstantial evidence arose independently and merely by chance is improbable at best. *Cf. Texas*, 887 F. Supp. 2d at 161 ("The improbability of these events alone could well qualify as a 'clear pattern, unexplainable on grounds other than race,' *Arlington Heights*, 429 U.S. at 266, … and lead us to infer a discriminatory purpose."). The district court did not err in finding that, taken together, all of the circumstantial evidence demonstrates

that SB 14 continues the "troubling blend of politics and race" in Texas and that the official history of discrimination is relevant circumstantial evidence of contemporary intentional discrimination. *See Perry*, 548 U.S. at 442.

**3. "Smoking gun" evidence is not required**

Contrary to Texas's argument, the fact that Plaintiffs undertook extensive discovery in this case and found no "smoking gun" evidence of intent neither defeats, nor compromises, the district court's discriminatory intent finding. "Smoking gun" evidence is not required by *Arlington Heights* or any other precedent for an intent claim to succeed. *Lodge*, 639 F.2d at 1363 n.8; *see also Hunt*, 526 U.S. at 553 ("Outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence.").

Texas argues (at 18-21) that the district court erred by considering circumstantial evidence given the breadth of discovery into legislative materials. In other words, Texas asserts that when plaintiffs access legislative correspondence, memos, or other materials through discovery, the standard for discriminatory purpose claims should no longer be that which was set forth in *Arlington Heights*—that a "discriminatory purpose" inquiry "demands a sensitive inquiry into such *circumstantial and direct* evidence of intent *as may be available*," 429 U.S. at 266 (emphases added). Instead, Texas posits that under such circumstances, a new standard where "smoking gun" evidence is strictly

required must govern. There is no legal or rational basis for this invented and specious standard.

Texas relies on a misinterpretation of *Price v. Austin Independent School District*, 945 F.2d 1307 (5th Cir. 1991), a discriminatory intent claim in the education context, to support its position that direct evidence of discrimination is required. In *Price*, the court reasoned that where legislators testify "without invoking any privilege" and where that testimony, in the district court's view, "do[es] not demonstrate a pretext for intentionally discriminatory actions, the logic of *Arlington Heights* suggests that [such] evidence … is actually stronger than the [contrary] circumstantial evidence proffered by the plaintiffs." *Price*, 945 F.2d at 1318. The *Price* scenario is not, however, before this Court. In the instant case, the supporters of SB 14 chose not to testify at trial, ROA.27158, and those who were deposed did invoke privileges. *See, e.g.*, ROA.58693; ROA.58699. Texas's reliance on *Price* is misplaced and the district court properly weighed, and discounted, the self-serving denials of discriminatory intent offered by SB 14 supporters. *Cf. Batson v. Kentucky*, 476 U.S. 79, 94 (1986).

Furthermore, *Price* does not require "applying a dispositive … discount to all of plaintiffs' circumstantial purpose evidence." Texas Br. 20. And for good reason: such a rule would legalize manifestly discriminatory violations of the voting rights of Black and Latino people, as long as the offending legislators were

discreet enough not to verbalize their racially discriminatory motives. And as the panel court correctly recognized, "it is unlikely for a legislator to stand in the well of the state house or senate [or in a witness chair] and articulate a racial motive." Panel Op. at 19 n.16. Moreover, if this Court were to validate Texas's argument and declare that the legal framework for the proper analysis of a factual or legal question *is* linked to the volume or nature of discovery a party obtained, parties might be adversely incentivized to seek *less* discovery in hope that their findings would be adjudicated based on a lower standard. A standard that so blatantly encourages such gamesmanship is plainly inappropriate and was certainly not contemplated by *Arlington Heights*.

#### 4. Texas's attempt to undermine the *Arlington Heights* framework fails

Throughout this appeal, Texas has presented a variety of changing, yet equally unavailing, arguments to counter the district court's discriminatory intent finding. Initially, Texas argued that the district court did not properly apply *Arlington Heights*. Texas Panel Br. 40. Having failed at that effort, Texas (at 15-16) now argues to this Court that the *Arlington Heights* framework is jeopardized by the *Feeney* case. This argument, too, is meritless.

In *Feeney*, the Supreme Court held that a facially-gender neutral law that provided benefits to employers that granted employment-preference to veterans did not violate the Equal Protection Clause's protections against gender discrimination,

even though veterans were disproportionately male and therefore disproportionately likely to receive those benefits. *Feeney*, 442 U.S. at 281. The Court in *Feeney*, however, recognized that laws that do not contain express classifications can still be discriminatory: "Certain classifications … in themselves supply a reason to infer antipathy. … This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination." *Id.* at 272; *see also Lodge*, 639 F.2d at 1363 ("Neither the Supreme Court nor this Court … has denied relief when the weight of the evidence proved a plan to intentionally discriminate, even when its true purpose was cleverly cloaked in the guise of propriety."). Put differently, the *Feeney* court, contrary to Texas's characterization, acknowledged that facially-neutral laws (such as SB 14) can be intentionally discriminatory; laws do not need to classify along racial lines in order to be discriminatory. *See also Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

Ultimately, Texas (at 16) argues that *Feeney*'s holding—that a lifetime employment preference for veterans did not violate the Equal Protection Clause merely because that policy had a foreseeably broader applicability to men (who are more likely to be veterans)—"forecloses any inference of a discriminatory purpose based on SB14's purported impact." This conclusion is compelled by neither *Feeney*, nor any other precedent. *Feeney* leaves open—and expressly states—that

facially-neutral laws that are merely pretext for racial discrimination can be discriminatory.

Texas's argument errs in at least two additional, fundamental respects. *First*, as the Supreme Court itself notes, *Feeney* concerns a gender classification that impinges upon "public employment," which, unlike voting, is "not a constitutional right." *Feeney*, 442 U.S. at 273. Thus, unlike *Feeney*'s question of whether the Fourteenth Amendment prohibits gender discrimination as an irrational state action, the instant challenge to SB 14 concerns racial discrimination in the exercise of a constitutional right under both the Fourteenth and Fifteenth Amendments. By definition, these facts require the highest level of judicial scrutiny. *See Plyler v. Doe*, 457 U.S. 202, 217 n.15 (1982) ("[W]e have also recognized the fundamentality of participation in … elections on an equal basis with other citizens in the jurisdiction …. With respect to suffrage, we have explained the need for strict scrutiny as arising from the significance of the franchise as the guardian of all other rights." (citation omitted)); *see also City of Mobile v. Bolden*, 446 U.S. 55, 62 (1982) ("[A]ction by a State that is racially neutral on its face violates the Fifteenth Amendment … if motivated by a discriminatory purpose.").

*Second*, Texas (at 16) misapprehends Plaintiffs' and Intervenors' arguments, as well as the district court's reasoned finding. The discriminatory purpose ruling

is not, as Texas states, "infer[red] … based on SB 14's purported impact." Instead, both the record and the district court's opinion make clear that the discriminatory purpose finding is firmly rooted in direct and circumstantial evidence from the State Legislature. It is the other claims in this case—the Section 2 effects claim and the *Anderson*/*Burdick*/*Crawford* claim—that concern themselves with the impact of SB 14 on Texas voters.

* * *

Its careful, detailed, and exacting 147-page opinion demonstrates that the district court did not take lightly the difficult task of assessing whether the Legislature passed SB 14, at least in part, with the intent to discriminate against Black and Latino voters. Instead, that Court "determine[d], under all the relevant facts, in whose favor the 'aggregate' of the evidence preponderates," *Rogers*, 458 U.S. at 621 (citation omitted), that SB14 violated Section 2 of the VRA and the Fourteenth and Fifteenth Amendments, which prohibit racial discrimination in voting. Texas's arguments that this Court should reject the district court's detailed factual findings are legally and factually unavailing. The direct and circumstantial evidence in this case, analyzed through the binding precedent of *Arlington Heights*, demonstrates that SB 14 was enacted, at least in part, with the intent to discriminate against Black and Latino voters, and, thus, violates Section 2 of the Voting Rights Act and the Constitution.

## II. SB 14 VIOLATES THE "RESULTS" TEST OF SECTION 2

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

The panel opinion and the record in this case make clear that SB 14's strict photo ID requirement is precisely the type of voting policy that Section 2 proscribes: SB 14 imposes "discriminatory burden[s]" on Black and Latino voters who, as a result, "have less opportunity … to participate in the political process"; and SB 14's burdens are, in part, "caused by … 'social and historical conditions' that have or currently produce discrimination" against Black and Latino voters. Panel Op. at 20-21 (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014)). The district court made comprehensive factual findings on exactly these questions. *E.g.*, ROA.27150

As the panel correctly held, the district court's well-supported findings were not erroneous. Panel Op. at 36 ("The district court thoroughly evaluated the 'totality of the circumstances,' each finding was well-supported, and the State has failed to contest many of the underlying factual findings."). This en banc Court should review the district court's opinion solely for clear error and must not supplant that opinion with new or independent findings of fact. The district court's detailed factual findings in this case clearly meet and exceed the standard of mere plausibility. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-574 (1985).

### B. Texas's Contrary Legal Arguments Are Meritless

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

#### 1. The district court expressly held that SB 14 denies or abridges the right to vote for thousands of voters of color

Texas (at 34) argues that Plaintiffs cannot prevail on a Section 2 claim as a matter of law because the "district court did not find that SB 14 has an effect on voting." Specifically, Texas argues that Section 2 requires proof that the challenged law either "has, or will have, a negative effect on minority voting" and attempts to disregard the district court's explicit findings that SB 14 has depressed, or will in fact depress, Black and Latino electoral participation. *See* ROA.27078-27084. Because Section 2 does not require proof of lower turnout or registration and because the district court found, and relied on, evidence that SB 14 will have a significant negative impact on the rights of thousands of voters, a disproportionate number of whom are voters of color, Texas is wrong on both the facts and the law.

##### *i. Section 2 is concerned with abridgments of the effective right to vote, and does not require proof of lower turnout or registration*

Texas (at 35) argues that, without establishing "a disparity in voter turnout or registration," as opposed to a disparity in possession of SB 14-compliant ID and in the burdens faced in obtaining such ID, Plaintiffs cannot prove that the political processes are not open to participation by members of a particular racial group.

However, proof of discrimination does not *require* evidence that SB 14 has a negative effect on voter turnout or registration. Section 2 asks whether the challenged law results in "*less opportunity* … to participate in the political process," 52 U.S.C. §10301(b) (emphasis added), and it applies to "abridgment[s]" as well as "denial[s]" of the right to vote, *id.* §10301(a). *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 333-334 (2000) (the "core meaning" of "[t]he term 'abridge' … is 'shorten'").

Indeed, the VRA protects the "effective" right to vote, *Chisom v. Roemer*, 501 U.S. 380, 391 (1991), which includes all aspects of voting. As the panel correctly noted, Panel Op. at 25 n.21, the VRA itself defines "vote" to include "all action necessary to make a vote effective including, *but not limited to*, registration *or other action* required by State law prerequisite to voting, casting a ballot, and having such ballot counted." 52 U.S.C. §10101(e) (emphases added). By its express terms, the VRA is not confined to registration or turnout.

Accordingly, courts have consistently found that voting laws or policies that *limit access* to the ballot—including those that neither result in outright vote denial nor affect registration or turnout—can violate the VRA. *See, e.g.*, *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996) (payment of a fee as a prerequisite to voting may violate the VRA even where one plaintiff had already paid the fee); *League of Women Voters*, 769 F.3d at 244-247 (enjoining limits on out-of-precinct

voting without considering the effect on turnout); *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 555 (6th Cir. 2014) (cuts to early voting); *Gilmore v. Greene Cty. Democratic Party Exec. Comm.*, 435 F.2d 487, 491-492 (5th Cir. 1970) (prohibitions on sample ballots); *Bell v. Southwell*, 376 F.2d 659, 664-665 (5th Cir. 1967) (invalidating an election plagued by discrimination even where a new election would not change the outcome); *cf. LULAC v. Perry*, 548 U.S. at 439-440 (holding that Section 2 was violated and Senate Factor 5 met in a vote dilution case where, in response to *increased* Latino registration and turnout, "the State took away the Latinos' opportunity because Latinos were about to exercise it"); *United States v. Dallas Cty. Comm'n*, 739 F. 2d 1529, 1538-1539 (11th Cir. 1984) (holding that restrictions on the times and places for voter registration were indicative of a Section 2 violation even in a county where Black and white registration rates were nearly equal).

Furthermore, SB 14 imposes a burden that is akin to the dual or re-registration requirements. *See Operation Push*, 932 F.2d at 403 (dual registration); *Beare v. Briscoe*, 498 F.2d 244, 244-245 (5th Cir. 1974) (re-registration). A voter who lacks the required photo ID must effectively "re-register" a second time in order to obtain the SB 14 ID required to vote. A voter who cannot overcome this second procedural hurdle is just as disfranchised as a voter who is unable to

register twice and faces twice the burden of other voters. *Cf. Operation Push*, 932 F.2d at 403.

#### *ii. The district court relied on compelling evidence of the negative effect of SB 14 on the rights of hundreds of thousands of Black and Latino voters*

Texas (at 35) next argues that the district court lacked "competent evidence that SB 14 depresses voting participation," but ignores the district court's factual findings and the expert testimony to the contrary.

*First*, with respect to the facts, the trial record indisputably established that more than 600,000 registered voters lack SB 14-required ID and are therefore immediately disfranchised by the law. *See infra* Part III.A.1.a. The district court found that a "disproportionate number" of these voters are Black and Latino. ROA.27076; *see also* ROA.27145 (crediting this evidence as "essentially unrebutted and … the experts' methodology and testing [as] reliable"); ROA.27084 (same). While only 2% of registered white voters need to acquire SB 14-required ID in order to vote, approximately 8% of Black voters and 6% of Latino voters need such ID. ROA.43262. Put another way, Latino registered voters are 195% and Black registered voters are 305% more likely than white voters to lack the ID required to vote under SB 14. These "racial disparities are statistically significant and 'highly unlikely to have arisen by chance.'" ROA.27079 (quoting Ansolabehere Report (ROA.24945)); *cf. Hunter*, 471 U.S. at

227 (holding unconstitutional a facially neutral law with a discriminatory effect where Black people were "1.7 times as likely as whites to suffer disfranchisement" (internal quotation marks omitted)).

To determine the race of the affected voters, the district court reasonably credited the testimony of Plaintiffs' numerous expert witnesses, "all of whom are impressively credentialed and who explained their data, methodologies, and other facts upon which they relied in clear terms according to generally accepted and reliable scientific methods for their respective fields." ROA.27084; *see also* Panel Op. at 26-27. Texas cannot and does not show that these experts' methodologies were in any way unreliable. These methodologies—including regression analyses and surveys, ROA.27145—have long been accepted by courts as a means of determining the race of voters in Section 2 litigation, *see Gingles*, 478 U.S. at 53-54 n.20 (regression analysis); *Husted*, 768 F.3d at 534 (same); *Teague v. Attala Cty.*, 92 F.3d 283, 289-290 (5th Cir. 1996) (same); *Operation Push*, 932 F.2d at 410-412 (surveys). The racial disparities in the rate of SB 14-required ID possession are substantial and impair the rights of *hundreds of thousands* of Black and Latino registered voters. The district court, therefore, did not clearly err in crediting the discriminatory effect of SB 14 as reported by Drs. Ansolabehere, Bazelon, Ghitza, and Herron and corroborated by Texas's own expert, Dr. Hood. ROA.27079-27084. *Cf. Operation Push*, 932 F.2d at 410-412.

*Second*, Texas (at 37) claims that "[a] conclusion that SB 14 has a discriminatory effect under [Section] 2 would require, at the least, proof that minority voters … were not able to get [photo ID], and that the inability to comply with SB 14 caused minority voters not to … vote." Yet, this is exactly the type of discrimination that the district court found. The court concluded that voters of color are less likely to possess the underlying documents needed to get compliant photo ID, ROA.27087-27088; ROA.27097 n.289, face more severe burdens in traveling to offices to obtain SB 14-required ID, ROA.27101-27102, and are less able to afford the costs of obtaining SB 14 ID, ROA.27088-27090.

The court also found that several individual Plaintiffs and witnesses who had regularly voted prior to SB 14 were no longer able to vote for want of SB 14-ID. ROA.27093; ROA.27131. For example:

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

> workers to assist her with the logistics of casting a ballot. ROA.27133-27134.

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

SB 14 has denied and, if left in place, will continue to deny these and hundreds of thousands of other citizens their fundamental and individual right to vote. They deserve full and swift relief. "The right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily." *Frank v. Walker*, No. 15-3582, 2016 WL 1426486, at *2 (7th Cir. Apr. 12, 2016).

Moreover, as discussed in more detail *infra* p. 54, Texas attempts to show that it mitigated the significant and discriminatory burdens of acquiring SB 14-ID, but the district court's specific, detailed factual findings about the insufficiency of this purported "mitigation" are well-supported and not clearly erroneous. Each of Texas's "mitigation steps" failed to relieve the discriminatory burdens of SB 14. ROA.27130-27136. For example, Texas (at 38) claims that nine of the Plaintiffs

can vote absentee by mail without SB 14-ID; however, the district court correctly found that requiring these Plaintiffs, and a disproportionately elderly Black and Latino class of voters, to vote by mail can deny them the opportunity to receive necessary assistance in casting their ballots. ROA.27133; *cf. Gilmore*, 435 F.2d at 491-492 (finding discrimination in the limitations placed on the assistance afforded to undereducated Black voters); *see also United States v. Texas*, 445 F. Supp. 1245, 1256-1257 (S.D. Tex. 1978) (three-judge court) (holding that a requirement that limited some voters to absentee voting unconstitutionally abridged their rights), *aff'd mem. sub nom. Symm v. United States*, 439 U.S. 1105 (1979).

### 2. The district court found the proper causal relationship between racial discrimination and the effects of SB 14

Texas argues (at 40) that "Plaintiffs failed to make the required causation showing." This argument fails both legally and factually.

The text of Section 2 requires a contextual inquiry of causation "based on the totality of circumstances," using the flexible, non-exhaustive Senate Factors as a guide.[3] 52 U.S.C. §10301(b); *see Johnson v. DeGrandy*, 512 U.S. 997, 1018

[3] The Senate Factors consider: (1) the history of voting-related discrimination in the State; (2) the extent to which voting is racially polarized; (3) the State's use of voting practices that enhance the opportunity for discrimination; (4) the exclusion of people of color from candidate slating processes; (5) the extent to which voters of color bear the effects of past socioeconomic discrimination; (6) the use of overt or subtle racial appeals; (7) the extent to which people of color have been elected to public office in the jurisdiction; (8) the responsiveness of elected

(1994). "The essence of a [Section] 2 claim is that a certain electoral law … interacts with social and historical conditions to cause an inequality…." *Gingles*, 478 U.S. at 47.

*First*, while Texas maintains (at 41) that the Senate Factors "generally have nothing to do with vote-*denial* claims," it points to no case supporting that proposition. Every court to consider vote denial cases, including this one, has applied the Senate Factors.[4] *See, e.g.*, *League of Women Voters*, 769 F.3d at 240; *Husted*, 768 F.3d at 554; *Gonzalez v. Arizona*, 677 F.3d 383, 406-407 (9th Cir. 2012) (en banc); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1197-1198 (11th Cir. 1999); *Operation Push*, 932 F.2d at 405-406; *cf. Frank v. Walker*, 768 F.3d 744, 754-755 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015) (adopting this framework arguendo).

Although "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other," *Gingles*, 478 U.S. at

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officials to the particularized needs of communities of color; and (9) the tenuousness of the policy underlying the contested law. *Perry*, 548 U.S. at 426.

[4] Indeed, "the 'totality of the circumstances' test established in [Section] 2(b) was initially applied *only* in 'vote denial' claims such as this." *Smith v. Salt River Project Agr. Improvement & Power Dist.*, 109 F.3d 586, 595 n.8 (9th Cir. 1997) (rejecting a vote denial claim because the plaintiffs refused to offer evidence on the Senate Factors); *see, e.g., Gaston County v. United States*, 395 U.S. 285, 293 (1969) ("[I]t is appropriate for a court to consider whether a literacy or educational requirement has the 'effect of denying … the right to vote on account of race or color' because the State … has maintained separate and inferior schools for its Negro residents who are now of voting age.").

45 (citation omitted), the district court found that Plaintiffs proved the existence of *seven* of the nine Senate Factors, and offered unrebutted proof of Senate Factors 1, 2, 6, and 7.[5] ROA.27148-27150.

*Second*, the court clearly and properly found that the Senate Factors established the necessary causal connection between SB 14 and inequality of political opportunity for voters of color in Texas. For example, the court found that Senate Factors 1 and 5 "weigh[ed] strongly in favor of finding that SB 14 produces a discriminatory result." ROA.27149. Relying on testimony from historian Dr. Burton, ROA.44007-44019; ROA.100394-100399, the court found that SB 14's burdens do not result from "mere chance," ROA.27150, and, instead, that the racial disparities produced by SB 14 are the "foreseeable result" of discrimination—including intentional and contemporary discrimination by the state of Texas—in education, employment, health, housing, and "all areas of public life," which produces severe socioeconomic inequalities, ROA.27088 (quoting Burton Report, ROA.44007); *see also* ROA.27033; ROA.27148-27149.

Texas (at 43) attempts to dismiss some of this prior discrimination as "decades-old," but it is nonetheless relevant, and the district court also found contemporary instances of discrimination in education and employment.

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[5] This alone could establish a Section 2 violation. *McMillan v. Escambia County*, 748 F.2d 1037, 1043-1046 (5th Cir. 1984). But the district court also found the existence of Senate Factors 5, 8, and 9. ROA.27149-27151.

ROA.27088-27091; *see also* ROA.10283-10295. Furthermore, as the panel recognized, because school desegregation in Texas only commenced in the 1970s, most Black and Latino Texans over the age of 50 were required by the state to attend racially segregated schools for all or part of their education. Panel Op. at 32; *see also* ROA.27089-27091; ROA.10283-10288; *cf. Gingles v. Edmisten*, 590 F. Supp. 345, 362 (E.D.N.C. 1984) (three-judge court), *aff'd in relevant part* 478 U.S. at 69-70. Based on this extensive evidence of discrimination, the district court found that "SB 14's requirements will fall significantly more heavily on the poor" and that Black and Latino voters "are substantially more likely than Anglos to live in poverty in Texas because they continue to bear the socioeconomic effects caused by … discrimination." ROA.27091; *cf. Gingles*, 478 U.S. at 69-70 (finding that "because of inferior education and poor employment opportunities, blacks earn less than whites [and] will not be able to provide the candidates of their choice with the same level of financial support that whites can provide"). This finding was amply supported by the record, *see* ROA.44007-44019; ROA.100394-100399, and is in accord with a long line of judicial findings, *see, e.g.*, *Perry*, 548 U.S. at 440 ("[T]he political, social, and economic legacy of past discrimination for Latinos in Texas may well hinder their ability to participate effectively in the political process.") (citations omitted)); *Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir. 1984) (same).

*Third*, this Court has recognized that where the "disproportionate educational, employment, income level and living conditions aris[e] from past discrimination" and "the level of black participation in politics is depressed, plaintiffs *need not prove any further causal nexus* between their disparate socio-economic status and the depressed level of political participation." *LULAC v. Clements*, 999 F.2d 831, 866-867 (5th Cir.1993) (en banc) (quoting S. Rep. No. 97-417, 29 n.114, *reprinted in* 1982 U.S.C.C.A.N. 177, 207 n.114) (emphasis added). This is exactly the finding that the district court made: that Texas's socioeconomic disparities were caused by the effects of recent and past state-sponsored discrimination, ROA.27150-27151; that voters of color have lower photo ID possession, ROA.27087, and political participation rates than white voters, ROA.27149; and that SB 14 was likely to further hamper voter turnout, ROA.27068-27069. Plaintiffs are "not required to prove a [further] causal connection between these factors and a depressed level of political participation." *Teague*, 92 F.3d at 294.

Given these extensive findings, the Seventh Circuit's rejection of this causation analysis in *Frank* (Texas Br. 43), where the plaintiffs failed to prove that the state of Wisconsin had discriminated in the socioeconomic areas, 768 F.3d at 753, does nothing to undermine the district court's decision. Plaintiffs here have indisputably proven that—as a result of official discrimination within and outside

of the electoral system, which contributed to SB 14's disparate effect—SB 14 has denied or abridged their rights on account of race in violation of Section 2.

### 3. The district court's analysis was specific to SB 14 and its interpretation of Section 2 raises no constitutional concerns

Texas argues (at 45-50) that the district court's interpretation of Section 2 would threaten legitimate election laws and render the VRA unconstitutional. This argument is unpersuasive, and Texas's challenges to the results tests' constitutionality are wholly without merit. *See Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002, 1002 (1984) (summarily affirming the constitutionality of Section 2); *Jones*, 727 F.2d at 375 (upholding Congress's authority to enact Section 2 as a "modest step [that] shift[s] to states … the burden of accommodating their political systems when that system seriously prejudices minority groups"); *see also United States v. Cannon*, 750 F.3d 492, 505 (5th Cir. 2014) ("Even if the legal landscape regarding the Reconstruction Amendments has changed in light of *Shelby County* and *Flores*, absent a clear directive from the Supreme Court, we are bound by prior precedents.").

Contrary to Texas's argument, the district court's opinion does not threaten—and Plaintiffs did not challenge—age limitations, internet voting, election dates, or voter registration taking place at motor vehicle offices.[6] Instead,

[6] Texas's concerns about Section 2 undermining the viability of a motor vehicle office based voter registration are baseless and significantly undercut by

the district court engaged in an intensely local appraisal of the design and impact of SB 14 in particular on voters of color in Texas. Any challenge to Texas's other voting requirements would require proof of a variety of specific facts about those requirements that are simply not at issue here.

Texas argues (at 46) that Section 2 liability does not attach to voting restrictions that exploit the correlation between race and poverty even where, as here, that correlation is the direct result of discrimination. But, Texas's deeply flawed argument would prevent Section 2 from reaching even prototypical discriminatory devices like poll taxes and literacy tests, which were facially race-neutral qualifications that interacted with societal discrimination and other conditions to cause racial inequalities in electoral opportunities. *See, e.g.*, *Oregon v. Mitchell*, 400 U.S. 112, 133 (1970) (Opinion of Black, J.) ("[I]t is a denial of equal protection to condition the political participation of children educated in a dual school system upon their educational achievement."). Thus, Section 2 must continue to be interpreted by this Court to protect both "the broad and general

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the fact that the National Voter Registration Act of 1993 is itself a *federal* civil rights law that requires registration at motor vehicle *and* public benefits offices—a race-neutral aspect of the Act's design that addresses racial disparities in driver's licensure rates. *Gonzalez v. Arizona*, 624 F.3d 1162, 1177-1180 (9th Cir. 2010). Furthermore, this Court and the Supreme Court have already ruled that, in certain circumstances, the VRA may reach discriminatory restrictions on registration, *Operation Push*, 932 F.2d at 405, election dates, *NAACP v. Hampton Cty. Election Comm'n*, 470 U.S. 166, 179 (1985), and age-based rules, *Symm*, 439 U.S. at 1105.

opportunity to participate in the political process," including individual voters' "freedom to engage fully and freely in the political process, untrammeled by such devices," such as poll taxes or SB 14. *LULAC Council No. 4434 v. Clements*, 914 F.2d 620, 624 (1990) (en banc), *rev'd on other grounds sub nom. Houston Lawyers' Ass'n v. Attorney General of Texas*, 501 U.S. 419 (1991). Texas's proposal fails to accomplish that fundamental goal.

## III. SB 14 UNCONSTITUTIONALLY BURDENS THE RIGHT TO VOTE

Applying established Supreme Court precedent, the district court held that SB 14's photo ID requirements unconstitutionally burden the right to vote of more than 608,000 registered Texas voters. Texas's challenge (at 50-55) to that conclusion relies on the erroneous view that *Crawford* blesses *every* state photo ID law, regardless of the specific features of the law and even if the law imposes heavy burdens and offers nonexistent benefits. Once that implausible reading of *Crawford* is rejected, Texas is left with threadbare objections to the court's findings, which fail to show any error, much less clear error.

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

The right to vote is "at the heart of our democracy," *Burson v. Freeman*, 504 U.S. 191, 198 (1992), and Supreme Court precedent requires application of the "*Anderson*/*Burdick* balancing test" to ensure that a state does not "unnecessarily

burden access to the ballot." *Pilcher v. Rains*, 853 F.2d 334, 336 (5th Cir. 1988). Under this precedent, when a state imposes a limitation on voting, there is no "'litmus-paper test'" it may invoke to demonstrate its scheme is constitutional. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Instead, a court must make fact-bound determinations—"the hard judgment[s]"—as to whether the limitation is justified by (1) the "character and magnitude" of the burden; (2) the state's "precise interests" in imposing the burden; and (3) "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 789-90.

Applying that standard, the district court found that "SB 14 imposes a substantial burden on the right to vote, which is not offset by the state's interest." ROA.27141. That conclusion is supported by the record and by Texas's failure to contest that record before the district court, the panel, and now the full court.

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

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

### *i. The universe of affected persons is substantial*

Unlike in *Crawford v. Marion County Election Board*, where the record failed to identify "the number of registered voters without photo identification," 553 U.S. 181, 200 (2008), the district court found, based on "sophisticated statistical methods employed by highly qualified experts" (whose admission into evidence Texas does not challenge), ROA.27129, that approximately *608,000* registered voters lack SB 14-required ID. ROA.27075-27076; ROA.24910-24911. As the district court found, "[u]nlike the record in *Crawford*, the experts here provided a clear and reliable demographic picture of those voters based on the best scientific methodology available": they are disproportionally poor, young, and Black or Latino. ROA.27116-27117; 27079-27087. This record was essentially unrebutted at trial. ROA.27145 ("[W]hile [Texas] criticized Plaintiffs' experts' methods … they failed to raise a substantial question regarding this fact."). As the panel repeatedly noted, this fact is all but uncontested on appeal.

### *ii. The burdens imposed by SB 14 are substantial*

The district court's finding that SB 14 imposed a "substantial burden on voters without SB 14-qualified ID," ROA.27141, is also based on an extensive and unchallenged factual record. Testimony of multiple expert witnesses and Texas voters support the district court's finding that affected voters must either effectively give up their right to vote or incur substantial costs in time, money, and

travel to obtain an SB 14-required ID and the documents required to obtain that ID. ROA.27101-27103.

Under SB 14, "every form of SB 14-qualified ID available to the general public is issued at a cost." ROA.27165; *see also* ROA.27047-27048. That direct cost is only a portion of the burden. As the panel described, "[e]ven obtaining an EIC poses an obstacle," Panel Op. at 26, as "Plaintiffs and others similarly situated often struggle to gather the required documentation, make travel arrangements and obtain time off from work to travel to the county clerk or local registrar, and then to the DPS, all to receive an EIC" or photo ID. Panel Op. at 42 (EIC), 43 (other documentation). These burdens fall most heavily on the poor, who "are less likely to have a driver's license and face greater obstacles in obtaining photo identification" to begin with. *Id.* at 507. And they fall disproportionally on racial minorities. *E.g.*, ROA.43888 (affected Black voters who needed to acquire an EIC to vote would be "required to expend a share of their wealth that is *more than four times higher* than the share" of wealth a white voter would need to expend (emphasis added)); ROA.44169 (more than 131,000 poor Black and Hispanic citizens would need to travel over 3 hours to receive an EIC).

The district court also credited the testimony—that was, once again, essentially uncontested below—of "individuals who were turned away at the polls, who could not get a birth certificate to get the required ID, or for whom the costs

of getting the documents necessary to get qualified photo ID exceeded their financial and/or logistical resources." ROA.27117; *see supra* pp. 40-41 (discussing testimony of affected voters). The state thus clearly errs in its contention that the record does not contain evidence of individuals whose right to vote has been burdened by SB 14. As the panel put it, "[t]his record reveals that Plaintiffs and those who lack both SB 14 ID and underlying documentation face more difficulty than many Texas voters in obtaining SB 14 ID." Panel Op. at 42.

On far less extensive records, this Court has affirmed a finding of "significant burden" on the right to vote. *Pilcher*, 853 F.2d at 335-336 (requiring signatories to provide voter registration number significantly burdened First and Fourteenth Amendment rights); *Texas Indep. Party v. Kirk*, 84 F.3d 178, 187 (5th Cir. 1996) (same). It should do so here as well.

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

At trial, Texas's limited presentation of evidence focused on showing that it had taken steps—either in the provisions of SB 14 itself or through DPS's implementation of the law—to alleviate the burdens described above. The district court made specific and detailed factual findings that each of those steps was insufficient. But Texas made no effort before the panel to show that those findings were clearly erroneous, and it does not do so now.

Rather, Texas ignores the extensive evidence supporting the district court's findings that the EIC was not a "bona fide safe harbor" and did not mitigate the burdens imposed by SB 14, ROA.27130; that the provisional ballot procedure "does nothing" for voters who lack an SB 14-required ID and who would face a substantial burden in acquiring one, ROA.27131-27132; that "voting by mail is not actually a viable 'alternative means of access to the ballot'" for many voters, particularly for vulnerable populations who make up a disproportionate share of affected registered voters, ROA.27136; and that relegating a subset of voters to mail-in ballots imposed an intolerable burden on the right to vote and implicated fundamental equal protection concerns, ROA.27135; *see Bush v. Gore*, 531 U.S. 98, 104 (2000) ("The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the *manner of its exercise*.") (emphasis added).

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

The district court considered and weighed the substantial burdens imposed by SB 14 against each of the State's justifications that, although "shift[ing]" during the "time period during which photo ID laws were debated," had been suggested "[a]t one time or another." ROA.27137-27138. Following *Crawford*, the court concluded that, based on the record, those interests, while clearly cognizable, did

not justify the substantial burdens under the *Anderson/Burdick* balancing test. ROA.27137-27141; ROA.27064-27070.

For example, the State's purported justification for SB 14's photo ID requirement is preventing in-person voter fraud. The district court acknowledged that interest as legitimate, but found that the weight of the interest was substantially diminished based on the record developed at trial. That record—based on the testimony of the State's leading election law-enforcement official—demonstrated that "[i]n the ten years preceding SB 14, only two cases of in-person voter impersonation fraud were prosecuted to a conviction—a period of time in which 20 million votes were cast." ROA.27038; *see also* ROA.27039 (crediting testimony of the former Director of Elections that, "in over 44 years of investigating and litigation issues … he has never found a single instance of successful voter impersonation").

The force of the State's interest was further undermined by the fact that SB 14 does not address the only type of voting fraud that *is* common: mail-in ballot fraud. The court considered testimony from several witnesses who all concurred that voting by mail is subject to fraud that can and does occur. ROA.27042 & n.59; ROA.99134-99135 (mail-in ballot fraud is "a serious problem" because it is "very easy"). But SB 14 does nothing to prevent that type of fraud, and instead erects substantial barriers to the right to vote for hundreds of thousands of voters in

order to combat a fraud problem that does not exist. The "validity of [Texas's] asserted interest is undermined by the State's willingness" to let mail-in ballot fraud continue unabated. *Anderson*, 460 U.S. at 798; *see also id.* at 805 (under-inclusiveness of restriction undermines legitimacy of the interest asserted).

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

### B. Texas's Legal Arguments Conflict With Settled Case Law

Misconstruing the *Crawford* plurality, Texas argues that the massive record and careful factual findings made by the trial court do not matter and that the trial court erred by applying the *Anderson/Burdick* balancing test. The State contends (at 51) that the "the Supreme Court already performed this balancing test in *Crawford*" for *all* voter ID laws. And Texas (at 54) compounds that unfounded argument with another, alleging that the district court's detailed findings can be disregarded because they are not "concrete." These objections to the district court's decision fail because they depend on a distorted reading of *Crawford* to conflict with *Anderson*, *Burdick*, and basic principles of clear error review.

*First*, Texas's argument that *Crawford* forecloses evaluating SB 14—and, indeed, all voter ID laws—under the *Anderson/Burdick* balancing test defies precedent, text, and reason. Texas (at 52) argues that *Crawford* created a *per se* rule, resolving the constitutionality of all Voter ID laws as "conclusions of law" that cannot be "revisit[ed]." This reading conflicts with the clear command in *Anderson* that "Constitutional challenges to specific provisions of a State's election laws … cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." 460 U.S. at 789. And it conflicts with *Crawford*, in which the Court stated that it has never "identif[ied] any litmus test for measuring the severity of a burden that a state law imposes" and made clear that it "remains faithful" to the "flexible standard" established in *Anderson* and reaffirmed in *Burdick*. 553 U.S. at 190-191 & n.8. Indeed, the concurrence *criticized* the plurality for its "record-based resolution of these cases," *id.* at 208 (Scalia, J., concurring in the judgment), and both dissents faulted the plurality for its treatment of the record under the *Anderson/Burdick* test—not for abandoning that test for a *per se* rule.

*Second*, any argument that *Crawford* permanently resolved either side of the *Anderson/Burdick* balancing test for *all* voter ID laws—rather than applying the test to the facts of the case—is equally flawed. On the burden side, the plurality in *Crawford* explicitly stated that it was only "on the basis of the record that has been

made in this litigation" that it could not "conclude that the statute imposes 'excessively burdensome requirements' on any class of voters.'" 553 U.S. at 202; *see also id.* at 200 ("[O]n the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on [groups of voters] or the portion of the burden imposed on them that is fully justified."); *id*. at 201 ("From this limited evidence we do not know the magnitude of the impact [the voter ID law] will have on indigent voters"). And on the justification side, the *Crawford* plurality's non-searching analysis of the State's asserted interests was keyed to its conclusion that the record showed "only a limited burden on voters' rights." *Id.* at 202-203 (internal quotation marks omitted).

But nothing in *Crawford* allows a court to ignore record evidence that a statute substantially burdens the right to vote. *Cf. Frank v. Walker*, 773 F.3d 783, 784 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc) ("*Crawford* dealt with a particular statute and a particular evidentiary record. The statute at issue in this case has different terms and the case challenging it a different record[.]"); *see also Frank*, 2016 WL 1426486, at *2-3. And nothing in *Crawford* abandons *Burdick's* holding that "the rigorousness of [the] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

*Third*, once its misreading of *Crawford* is rejected, Texas is left with the barest of evidentiary objections to the court's straightforward application of the balancing test. Texas's assertion that there is no "concrete" evidence that SB 14 substantially burdens the right to vote is belied by the trial court's extensive findings to the contrary. *See supra* p. 57. Texas cannot possibly show that the court clearly erred in either this subsidiary finding or its ultimate conclusion that SB 14's burden was not justified by a countervailing interest. *See Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 574 U.S. ----, 135 S. Ct. 831, 837 (2015) (Federal Rule of Civil Procedure 52 "does not make exceptions … from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous" and "applies to both subsidiary and ultimate facts") (internal quotation marks omitted); *see also Pilcher*, 853 F.2d at 335 ("Because we hold that the district court applied the correct legal test for an unconstitutional burden on ballot access, and because the factual findings of the district court are not clearly erroneous, we affirm.").[7]

## CONCLUSION

For the foregoing reasons, Intervenor Plaintiffs-Appellees respectfully request that this en banc court affirm the judgment of the district court.

[7] Although the panel resolved this appeal on statutory grounds, it should not have dismissed Plaintiffs' *Anderson/Burdick* count. That count would not have been mooted until the district court fashioned an appropriate Section 2 remedy on remand and that remedy was upheld on appeal. If this Court affirms without reaching the constitutional claims, it should vacate the district court's judgment and remand for appropriate proceedings, not dismiss those claims.

Respectfully submitted,

/s/ Natasha M. Korgaonkar

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May 9, 2016

## CERTIFICATE OF COMPLIANCE

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

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

2. In compliance with Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains 13,951 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Fifth Circuit Rule 32.2. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), I have relied upon the word count feature of Microsoft Word 2010 in preparing this certificate.

/s/ Natasha M. Korgaonkar
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May 9, 2016

## CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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