No. 14-41127

In the United States Court of Appeals for the Fifth Circuit

MARC VEASEY; JANE HAMILTON; SERGIO DELEON; FLOYD CARRIER; ANNA BURNS; MICHAEL MONTEZ; PENNY POPE; OSCAR ORTIZ; KOBY OZIAS; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; JOHN MELLOR-CRUMMEY; KEN GANDY; GORDON BENJAMIN; EVELYN BRICKNER, Plaintiffs-Appellees,

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

v.

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

UNITED STATES OF AMERICA, Plaintiff-Appellee,

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

v.

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

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

v.

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

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

v.

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

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

REPLY BRIEF FOR APPELLANTS

Counsel listed on inside cover

KEN PAXTON
Attorney General

CHARLES E. ROY
First Assistant Attorney General

SCOTT A. KELLER
Solicitor General

J. CAMPBELL BARKER
MATTHEW H. FREDERICK
Deputy Solicitors General

RICHARD B. FARRER
Assistant Solicitor General

AUTUMN HAMIT PATTERSON
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697
scott.keller@texasattorneygeneral.gov

Counsel for Appellants

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Argument

Nothing in the briefs of plaintiffs or their amici establish an unconstitutional burden on the right to vote, much less a poll tax. As the district court concluded, there is no evidence that SB14 prevents anyone from voting, and none of the plaintiffs' handful of anecdotes establishes even an as-applied substantial burden on the right to vote. In fact, each anecdote actually undercuts plaintiffs' position, as the record reflects that these individuals could vote by mail without a photo ID or obtain supporting documentation necessary to get a free voter ID without a significant burden. Plaintiffs cannot evade this fatal flaw in their case, and they ignore the holding of *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), that voter ID laws coupled with free voter IDs impose lawful, minimal burdens—even if supporting documentation to get a free voter ID has a nominal cost, as it did in Indiana.

Without a burden on the right to vote, DOJ posits a sweeping new theory of VRA §2 liability that raises serious constitutional doubts. Plaintiffs do not even attempt to show that SB14 caused a racial disparate impact in voting or voter turnout. Rather, plaintiffs assert §2 liability based on an alleged racial disparity in mere ID possession. This metric does not even try to measure the burden of *obtaining* an SB14-compliant ID, which is the relevant inquiry to

determine if someone can vote. Plaintiffs' position would almost certainly mean that any voter-ID law violates §2, even though *Crawford* held that voter-ID laws impose only minimal, lawful burdens on the right to vote. More fundamentally, there is nothing proportional between DOJ's theory of §2 liability and the constitutionally protected right to vote.

Plaintiffs fare no better in trying to rehabilitate their discriminatory-purpose claim. Plaintiffs and their amici do not dispute that the district court ordered, with plaintiffs' urging, unprecedented discovery into the internal communications and motives for legislators supporting SB14. That fishing expedition turned up no evidence of intentional discrimination—and certainly nothing approaching the clear proof needed to override the Legislature's stated purposes. That is precisely why the district court acknowledged there was no direct evidence of discriminatory intent. The Legislature enacted SB14 against the backdrop of *Crawford* and President Carter's commission blessing voter ID laws, thus confirming the Legislature's valid purpose in enacting SB14 was to prevent fraud and safeguarded voter confidence. The district court reached the opposite conclusion by making multiple errors of law.

I. SB14 Is Not A Poll Tax.

Only one set of plaintiffs attempts to defend the district court's poll-tax finding. *See* Veasey-LULAC Br.47-52; *see also* Tex. Elec.

Adm'rs Amicus Br. *Crawford* forecloses this argument. *Crawford* addressed—and rejected—application of the *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), per se rule against poll taxes to voter-ID laws offering free voter IDs.[1] Texas Br. 13-16. The Court stated that a voter ID law would be a poll tax under *Harper* "if the State required voters to pay a tax or a fee to obtain a new photo identification"—but it immediately clarified that laws offering "free" voter IDs, like Indiana's, are not poll taxes. 553 U.S. at 198. And *Crawford* would have had no reason to use the voter-qualification balancing test under *Anderson* and *Burdick* if a law providing for free voter IDs could, instead, amount to an impermissible poll tax under *Harper*. *See Gonzalez v. Arizona*, 677 F.3d 383, 409 (9th Cir. 2012) (en banc), *aff'd on other grounds*, 133 S.Ct. 2247 (2013).

Like Indiana, Texas offers free voter IDs. Tex. Transp. Code §521A.001(b). The district court and plaintiffs say this is irrelevant because supporting documentation can cost a nominal amount. But

[1] Multiple cases cited by plaintiffs ignore *Crawford* on this point. *See City of Memphis v. Hargett*, 414 S.W.3d 88, 106 (Tenn. 2013) (rejecting a poll-tax claims on the basis of an indigency affidavit, although not discussing *Crawford* and instead relying on a pre-*Crawford* Missouri Supreme Court decision); *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 463-66 (Mich. 2007) (pre-*Crawford* case relying on an indigency affidavit); *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (pre-*Crawford* decision that is incorrect in light of *Crawford*).

Crawford held that Indiana's voter ID law did not significantly burden the right to vote even when Indiana charged a nominal amount ($3-$12) for a birth certificate to get a free voter ID. 553 U.S. at 198 n.17. Here, Texas charges even less than that for a birth certificate to get a free voter ID ($2-$3). *See* Tex. Health & Safety Code §191.0045(e). Indiana did permit individuals to vote without an ID by provisional ballot if they signed an indigency affidavit before a court clerk within 10 days of the election. 553 U.S. at 186. *Crawford*'s holding, however, did not depend on that feature, as *Crawford* instead held that the burdens of obtaining a voter ID are minimal:

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

Id. at 198.

Likewise, the Ninth Circuit en banc recently rejected a poll-tax claim regarding Arizona's voter-ID law on the basis that a "photo identification requirement is not an invidious restriction under *Harper*, and the burden is minimal under *Crawford*." *Gonzalez*, 677 F.3d at 410. The court held—just like *Crawford*—that "[r]equiring voters to provide documents proving their identity is not an invidi-

ous classification based on impermissible standards of wealth or affluence, *even if some individuals have to pay to obtain the documents*." *Id.* at 409 (emphasis added). Likewise, SB14 is not a poll tax.[2]

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

The district court's across-the-board invalidation of SB14 as a substantial burden on the right to vote cannot be squared with *Crawford*. Plaintiffs may disagree with *Crawford*'s conclusions, but

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[2] Moreover, SB14 itself does not impose *any* fees for supporting documentation, or even require *any* specific documentation to get a free voter ID. *See* Tex. Transp. Code §521A.001(b) (DPS "may not collect a fee for an election identification certificate"). Supporting documentation is required by DPS rules, 37 Tex. Admin. Code §15.182, and the costs of those supporting documents are set by separate statutes, Tex. Health & Safety Code §191.0045(e). Insofar as plaintiffs complain about the costs of supporting documentation, their arguments pertain to the DPS rules. *Cf. Milwaukee Branch of NAACP v. Walker*, 851 N.W.2d 262, 266 (Wis. 2014) (interpreting administrative rules implementing Wisconsin's voter ID statute in light of the statute's provision for free voter IDs).

Plaintiffs cursorily suggest that defendants waived this argument, among a few others, by not raising it below. *See, e.g.*, U.S. Br. 17, 49-50; NAACP Br. 24, 44 n.15, 46 n.16. Not so: Defendants have not waived any argument pertaining to the issues regarding poll tax, unconstitutional burden on the right to vote, VRA §2, discriminatory purpose, and the proper remedy. ROA.22847-22943 (Defendants' Findings of Fact and Conclusions of Law). "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Citizens United v. FEC*, 558 U.S. 310, 330-31 (2010) (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)). The waiver cases cited by plaintiffs address "issues not raised below," not specific arguments about issues that were raised. *Conley v. Bd. of Trustees of Grenada Cnty. Hosp.*, 707 F.2d 175, 178 (5th Cir. 1983); *see EEOC v. LHC Group, Inc.*, 773 F.3d 688, 703 (5th Cir. 2014) ("EEOC abandoned its failure-to-accommodate claim on appeal").

they cannot relitigate them by simply pointing to facets of SB14 that are wholly irrelevant to *Crawford*'s reasoning.

A. *Crawford* Already Performed The *Anderson-Burdick* Balancing That Defeats Plaintiffs' Facial Challenge.

1. The *Anderson-Burdick* balancing test recognizes that the right to vote, while unquestionably important, is not absolute. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). All "[e]lection laws will invariably impose some burden upon individual voters." *Burdick*, 504 U.S. at 433. There is no right to be free from any burden or inconvenience in voting. A contrary rule would improperly "tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.*

Challenges to election regulations therefore involve a weighing process. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). A "severe restriction" requires the challenged state law to be "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S., at 434. But a reasonable, nondiscriminatory restriction triggers a less exacting review, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359-64 (1997), and will generally be upheld if "important regulatory interests" support the law. *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 788 & n.9.

2. The Supreme Court already performed this balancing test for voter-ID laws in *Crawford*, 553 U.S. at 191-202, reaching several key conclusions:

- a photo-ID requirement is an evenhanded restriction that promotes integrity in the election process, *id.* at 189-97;
- a photo-ID requirement, where the government provides free ID to those without it, is not facially unconstitutional as a substantial burden on the right to vote because the statute's broad application to all voters imposes "only a limited burden on voters' rights," *id.* at 203;
- for most voters who need it, the burden of getting free photo ID using supporting documentation that may cost $3 to $12, if not already possessed, does not exceed the usual burdens of voting and "surely" does not qualify as a substantial burden on the right to vote, *id.* at 198-200 & n.17; and
- any heavier burden felt by particular persons in obtaining photo ID is generally mitigated by their ability to cast a provisional vote that will count after curing any defect in ID, *id.* at 199.

3. Texas need not relitigate these holdings from *Crawford*. *See Voting for Am. v. Steen*, 732 F.3d 382, 394 (5th Cir. 2013). And Texas does not have to make a "showing of real, substantial concerns underlying its facial assertions of justification for [SB14]." NAACP Br. 65-66. *Crawford* reached conclusions of law, which apply here. Plaintiffs cannot simply point to factual distinctions irrelevant to *Crawford*'s reasoning to avoid the *Anderson-Burdick* bal-

ancing performed there. For example, nothing in *Crawford*'s reasoning turned on how one might count the "types of photo ID" allowed by Indiana's law or its inclusion of "an indigence exception." NAACP Br. 69. While those may be accurate descriptions of the law there, they did not feature in the Court's weighing of potential burdens against legitimate state interests. *Crawford*, 553 U.S. at 197-203.

Rather than staking out every detail of Indiana's law as an outer boundary of legality, *Crawford* reached its conclusion based on general points and holdings: (i) the law provided for free photo ID, *id.* at 198; (ii) the burden on most voters to gather documents required for a free identification, which could include a $3 to $12 fee to get them (although "Some States charge substantially more"), is no "significant increase over the usual burdens of voting," *id.* at 198 & n.17; (iii) the mitigating existence of provisional voting, *id.* at 199; and (iv) the facial-challenge standard and "the State's broad interests in protecting election integrity," *id.* at 200. Those points are all common to this case. Texas Br. 15-19, 22-23.

4. Plaintiffs would not prevail even if they could redo *Crawford*'s application of the *Anderson-Burdick* balancing test. *Cf.* Veasey-LULAC Br. 58-60; TLYVEF Br. 37-49; NAACP Br. 64-66. Even under the district court's figures, over 95% of eligible Texas voters al-

ready have sufficient voter ID. That alone precludes facial invalidation. Texas Br. 60-62. Plaintiffs' theory that nonpossession of ID in the present implies inability to *obtain* compliant photo ID in the future has no support in the record. *See also Frank v. Walker*, 768 F.3d 744, 749-50 (7th Cir. 2014), *cert. denied*, 2015 WL 131119 (U.S. Mar. 23, 2015). Current rates of ID possession do not prove a substantial burden on the right to vote, and the district court's conclusion to the contrary was impermissible. *See Easley v. Cromartie*, 532 U.S. 234, 249 (2001) ("statement of the conclusion is no stronger than the evidence that underlies it").

Like Indiana, Texas followed the recommendation of the Commission on Federal Election Reform, which was co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker, III, by providing for free photo ID and for provisional voting in the event of ID defects. ROA.77830. And *Crawford*'s holding, that the usual burdens in obtaining such ID are minimal, applies here. 553 U.S. at 198.

5. Contrary to the plaintiffs' claim, it is their approach to *Crawford* that is "specious." NAACP Br. 68. *Crawford* of course left open the possibility that if another record showed that some "small number of voters" faced "excessively burdensome" duties, they might receive relief that does not "invalidate the statute in all its applica-

tions." 553 U.S. at 200, 202. But the NAACP plaintiffs wrongly suggest that *facial* invalidation of a photo-ID law materially similar to the one in *Crawford* could be possible—so long as the next challenger in line simply offers some additional quanta of testimony of a burden on certain subsets of voters. NAACP Br. 68-69 (arguing that with such evidence, "a photo ID law" in its entirety may fail the *Anderson-Burdick* balancing).

Crawford did not purport to radically alter the law on facial challenges, and it never suggested that any later-established burden on a small "class of voters" in Indiana would undermine the law's facial validity. 553 U.S. at 202. Just the opposite. *Crawford* recognized that the plaintiffs there sought to "invalidate the statute in all its applications," that is, make a "facial attack." *Id.* at 200. So the Court cited *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), to explain the standard in a facial challenge: "a plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the Act would be valid, i.e., that the law is unconstitutional in all of its applications." *Id.* at 449 (quotation and alteration marks omitted); *see Crawford*, 553 U.S. at 202-03 (citing that case and rejecting challengers' argument that "the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute").

Crawford specifically criticized the challengers for doing what plaintiffs attempt here: seeking facial invalidation but ignoring the no-set-of-circumstances test and instead using a "unique balancing analysis that looks specifically at a small number of voters who may experience a special burden." *Id.* at 200.[3] Not only did *Crawford* reject that argument with binding case law, but it explained that such a novel legal development would not gain the plaintiffs anything—their evidence of supposed substantial burdens as applied was lacking. *Id.* at 200-02.

B. Plaintiffs' Anecdotes Fail To Establish That A Single Person Faced An Unconstitutional Burden On The Right To Vote.

Not only does *Crawford* foreclose plaintiffs' facial challenge, as explained above, but its reasoning defeats even as-applied relief. To be clear, plaintiffs' claims concern a triply-limited fraction of qualified Texas voters:

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

(b) the fraction of that group that does not have the primary, secondary, or supporting documentation required by DPS for a free photo ID *and* that cannot simply vote by mail, and then only:

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

(c) the fraction of that sub-group for which the cost of getting the documentation required for a free photo ID is either more than the $3-$12 in *Crawford* or for which the burden of getting that free photo ID is substantially heavier than "[f]or most voters," 553 U.S. at 198.

And that is only the scope of plaintiffs' *claim* that could conceivably require *Anderson-Burdick* balancing not settled by *Crawford*.

No such claim ultimately materializes. That is not for lack of effort: DOJ does not deny that its lawyers have traveled to homeless shelters across Texas with microphone in hand, searching for "disenfranched voters." *See* Texas Br. 20. Yet plaintiffs cannot point to a single, identifiable person whose right to vote has been abridged by SB14.[4]

Like the district court's opinion, plaintiffs' briefing relies on a handful of anecdotes. ROA.27092. But they all break down on examination and thus fail to constitute the "concrete" evidence contemplated by *Crawford*, 553 U.S. at 201:

Veasey-LULAC Br. 21-22:

- Floyd Carrier: He was eligible to vote by mail. ROA.98722:90:21-98723:91:1.
- Ken Gandy: He has actually voted by mail since SB14 went into effect. ROA.99833:216:12-21; *see also* ROA.99827:210:8-10 (Gandy filled out the mail ballot "at the County Clerk's Office and handed it to them right there").

[4] In fact, approximately 22,000 voters on the no-match list voted in at least one election since SB14's implementation. ROA.97440-97447.

- Gordon Benjamin: His claims compare well with an anecdote from *Crawford*. There, testimony described "the difficulty [an] elderly woman had in obtaining an identification card, although her testimony indicated that she intended to return to the BMV since she had recently obtained her birth certificate and that she was able to pay the birth certificate fee." 553 U.S. at 201. *Crawford* held that such evidence "does not provide any concrete evidence" of a substantial burden on the right to vote. *Id.* Similarly, Benjamin described some initial difficulty but also was able to obtain a birth certificate through his sister and, moreover, is now able to vote by mail. ROA.99222-25.[5]

TLYVEF-Clark Br. 18-19:

- Imani Clark: She has a California driver's license and birth certificate and, therefore, does not need additional documentation to get a free ID. She thus falls squarely within *Crawford*'s mine-run of cases in which the burden of gathering the required papers and getting that free ID were held limited, "usual," and "surely" not a substantial burden on the right to vote. 553 U.S. at 198. Clark has simply chosen not to get that ID because she has "a job and extracurricular activities and I just really don't have time in my schedule to retrieve these forms." ROA.100542:189:11-16.

- Eulalio Mendez: He in fact voted in the June election before trial, using a recent license. ROA.99034:102:16-99035:103:8. He can also vote by mail. ROA.99030:98:5. And he has never tried to get a free photo ID; he thinks he should not have to. ROA.99036:104:21-25.

[5] The Veasey-LULAC's claims about Benjaman are also overblown. Contrary to their claim that he had to make three "different" trips to DPS offices, "each time enduring a lengthy and costly bus ride," Veasey-LULAC Br. 22, the testimony was that Benjamin has a senior transit card that lets him ride for either $0.25 or for free, ROA.99223:291:5-8, and that he took the same documentation each time despite being told not to, ROA.99222:290-24-99223:291:2.

- Naomi Eagleton and Sammie Louise Bates: Both can vote by mail. ROA.97466, 97450.

AARP Br. 7 & n.5, 14 n.16 (and Tex. Elec. Adm'rs Amicus Br. 8, though not by name):

- Elizabeth Gholar: She can vote by mail. ROA.97454. She also has a certified copy of her birth certificate. ROA.97455.

AARP Br. 7 n.5 (and Elec. Adm'rs Amicus Br. 8, though not by name):

- Margarito and Maxima Lara: Siblings who lack birth certificates (due to unregistered births) but can each vote by mail due to age. Maxima Lara also has a Texas driver's license. ROA.99836, 99854, 99864.

U.S. Br. 32 n.7:

- Unnamed persons: Citing the district court's opinion, at ROA.27131-32, the United States asserts that "some plaintiffs were turned away from the polls without an opportunity to cast any type of ballot." The district court, however, did not identify anyone who was turned away "without an opportunity to cast any type of ballot," ROA.27131-32, but instead stated that "some Plaintiffs testified that they were turned away without being given the provisional ballot opportunity," ROA.27131. The district court provided no record support for that conclusion.

In short, plaintiffs' anecdotes fall far short of establishing that SB14 unconstitutionally burdens the right to vote as applied to anyone, much less a burden that would facially invalidate SB14.

III. Plaintiffs Have Not Established A Racially Discriminatory Effect On Voting Under VRA §2.

Plaintiffs have failed to prove that SB14 has been "imposed or applied . . . in a manner which results in a denial or abridgment of the right of any citizen . . . to vote on account of race or color," 52 U.S.C. §10301(a), or "because he is a member of a language minority group," *id.* §10303(f)(2). At most, plaintiffs have proven a statistical disparity in the possession of SB14-compliant ID, a generalized disparity in socioeconomic conditions, and non-proximate historical voting discrimination. This evidence, even if accepted, does not prove that SB14 has caused any denial or abridgment of the right to vote.

Plaintiffs maintain, nevertheless, that SB14 has a discriminatory result because (1) some percentage of registered Texas voters lack an SB14-compliant ID; (2) the burden of obtaining ID bears more heavily on poor voters; (3) African-American and Hispanic voters are more likely than non-Hispanic white voters to live in poverty; and (4) African-Americans and Hispanics are more likely to live in poverty because of "'more than a century of discrimination' in employment, income, education, health, and housing." DOJ Br. 25; *see also* ROA.27084-85, 27091. This argument accurately tracks the district court's reasoning, but it does not reflect a valid theory of §2 liability.

A. Plaintiffs Have Not Proven—And The District Court Did Not Find—A Racially Disparate Impact On Voting.

Plaintiffs' §2 claim centers on the so-called no-match list, which purports to show the number of voters without an SB14-compliant ID. Plaintiffs offered a variety of no-match lists, but the precise number of registered or eligible voters who allegedly lack identification is not material to plaintiffs' argument or to the district court's conclusion. *See* TLYVEF Br. 38-39 (quoting ROA.27144)). The district court found that, regardless of the particular list, "a disproportionate number of African-Americans and Hispanics populate that group of *potentially* disenfranchised voters." ROA.27076 (emphasis added). But even if there were a racially disparate impact on the rate of current ID possession, it does not prove that SB14 will deny or abridge any person's right to vote.

1. To begin, it is not clear that the alleged disparity in ID possession demonstrates a racially disparate impact. Choosing from among the various no-match lists, the district court found that "approximately 608,470 registered voters in Texas lack proper SB 14 ID," and that "4.5% of voters are potentially disenfranchised." ROA.27084.[6] The underlying analysis concluded that 96.4% of registered non-Hispanic white voters, 92.5% of registered Black voters,

[6] Those findings correspond to Dr. Ansolabehere's analysis of all voter-registration records, minus deceased voters, using Catalist data. *See* ROA.43320. That was an unreliable analysis. Texas Br. 34-36.

and 94.2% of registered Hispanic voters had SB14-compliant ID. *See* ROA.43320.

But the total number of voters without ID, according to the data accepted by the district court, includes 296,156 white voters (48.67%), 127,908 African-American voters (21.02%), 174,715 Hispanic voters (28.71%), and 9,691 "Other" voters (1.59%). ROA.43320. In other words, the group of potentially affected voters includes far more white voters than African-American or Hispanic voters. If the class of voters potentially affected by SB14's ID requirement is almost half white and less than half African-American and Hispanic combined, there is a serious question whether the district court's findings even indicate a disparate racial impact based on ID possession. *See* Texas Br. 34-36.

2. But even if African-American and Hispanic voters were more likely to lack SB14 ID, that disparity would not establish that any individual's right to vote has been denied or abridged. Plaintiffs wrongly claim that voters without ID "are immediately disfranchised by the law." TLYVEF Br. 15-16. This equivocates on the term "disenfranchised" and is contrary to how courts have defined disenfranchise. *See, e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 223 n.** (1985) ("disenfranchisement" is being prohibited "from registering, and from voting"). SB14's ID requirement denies or abridges an individual's right to vote only if he (1) does not have ID, (2) does not

have the documents necessary to get an ID, (3) faces a significant burden to obtain the documents necessary to get an ID, and (4) would have voted but for the lack of ID. A disparity in ID possession does not prove that SB14 will have a racially disparate impact on voting without (at the very least) proof of a corresponding disparity in possession of, or access to, the documents necessary to obtain a qualifying ID.

Nor does a disparity in ID possession prove that SB 14 will deprive any person or group of an equal opportunity to vote. 52 U.S.C. §10301(b). Plaintiffs assert that SB14 will deny or abridge the right to vote because it will give "members of a particular group . . . an *unequal* opportunity," NAACP Br. 58, or "less opportunity," TLYVEF Br. 20, to participate in the political process. This argument rests on an assumption, unsupported by proof, that every voter who does not already possess a qualifying ID also lacks the documents necessary to get one and cannot get those documents without a severe burden. Some plaintiffs, for example, assert that "[a] voter without SB14 ID must obtain the required underlying documentation before getting ID." NAACP Br. 31. DOJ maintains that the district court found "African Americans and Hispanics . . . are more likely than Anglos to live in poverty, . . . 'less likely to own and need' qualifying ID already, [and] 'less likely to have the means to get that ID.'" DOJ Br. 25 (citing ROA.27087-88). But neither the

district court nor plaintiffs cite any evidence that a certain percentage of voters without ID lack the documents necessary to get ID, or that a certain percentage of voters cannot get the necessary documents without facing substantial burdens. *Cf. Frank*, 768 F.3d at 749.

DOJ wrongly suggests that *Crawford* has no bearing on a §2 claim. DOJ Br. 36-38. It does. *Crawford* held that voter-ID laws offering free IDs impose minimal burdens on the constitutional right to vote. 553 U.S. at 198. If a law's burdens are minimal, it does not result in an "abridgement of the right . . . to vote." 52 U.S.C. §10301(a). DOJ's position highlights the gap between its interpretation of §2 and the constitutionally protected right to vote. DOJ does not think *Crawford* is on point for a §2 claim precisely because it wants to drastically expand §2's reach far beyond enforcement of the right to vote. Not only does that contravene §2's plain text, but it would raise serious constitutional doubts. *See infra* Part III.D.

3. Plaintiffs' §2 claim requires evidence that SB14—which creates a voting qualification—has caused or will cause a racially disparate impact *on voting*. Plaintiffs assert that SB14 will have a disparate impact on voter turnout, yet they do not cite evidence that SB14 actually depressed turnout in any of the elections to which it applied. *Cf. Miss. St. Ch., Operation Push, Inc. v. Mabus*, 932 F.2d

400, 410 (5th Cir. 1991) (upholding a judgment that voter-registration requirements had a discriminatory result under §2 where the evidence showed "black citizens in Mississippi registered to vote at a rate 25% lower than white citizens in the state").[7] Instead, plaintiffs speculate that SB14 will decrease turnout. DOJ, for example, relies on the general proposition "that restrictive photo-ID laws increase the 'costs of voting,' thereby depressing turnout." DOJ Br. 36. Similarly, the NAACP plaintiffs assert that "election procedures that increase voting costs (financial and non-financial), such as a strict photo ID law, typically discourage participation." NAACP Br. 63.

Plaintiffs cite the district court's finding that SB14 "would decrease voter turnout." TLYVEF Br. 24 (quoting ROA.27068–69); *see also* NAACP Br. 63. But the district court did not find that the effect on turnout would vary by race, much less cite evidence to support that conclusion. Instead, the district court's "finding" of an effect on turnout rests on testimony that "SB 14 is *likely to deter*, or in some cases even prevent, black and Latino voters from casting effective

[7] Similarly, the hypothetical outlined in Justice Scalia's *Chisom v. Roemer* dissent assumes a racially disparate impact on African-American voter registration actually occurred. 501 U.S. 380, 408 (1991) (Scalia, J., dissenting) ("If, for example, a county permitted voter registration for only three hours one day a week, *and that made it more difficult for blacks to register* than whites, blacks would have less opportunity '*to participate* in the political process' than whites, and §2 would therefore be violated." (first emphasis added)).

ballots," ROA.43927 (emphasis added), because "[c]osts are especially consequential for people who suffer sociodemographic disadvantages and for non-habitual voters," ROA.43929. To the extent it considered SB14's actual effect on turnout, the district court found "no credible evidence that election turnout since then *has been any better* than before" its implementation. ROA.27140 (emphasis added).

Other plaintiffs dismiss turnout entirely, arguing that §2 "does not *require* evidence of SB 14's negative effect on elections." TLYVEF Br. 24. They cite *Hunter v. Underwood*, 471 U.S. at 227, and *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 245 (4th Cir. 2014), *mandate stayed*, 135 S. Ct. 6 (2014), as cases "striking down a voting law . . . without considering its effect on turnout." TLYVEF Br. 24. But *Hunter* was not a §2 case.[8] And in *League of Women Voters*, the court cited evidence that the elimination of same-day registration and out-of-precinct voting would have a racially disparate impact on *voting* because African-American voters had used each method "at a higher rate than

[8] In *Hunter*, the Supreme Court invalidated a constitutional criminal-disenfranchisement provision under the Equal Protection Clause based on clear evidence of racially discriminatory purpose ("to establish white supremacy in this State"), 471 U.S. at 229, decades of disparate impact, *id.* at 227, and the defendant's concession that the challenged provision "certainly would not have been adopted by the convention or ratified by the electorate in the absence of the racially discriminatory motivation," *id.* at 231.

whites in the three federal elections during which [they were] offered." 769 F.3d at 245.[9] Far from undermining the significance of turnout, these cases confirm §2 imposes a threshold requirement of evidence that a challenged law has had, or will have, a racially disparate impact on voting.

Yet the district court made no finding about SB14's impact on turnout, and plaintiffs point to no evidence that SB14 caused a disparate impact on minority voter turnout since its implementation. Neither the district court nor plaintiffs have identified other evidence to show that SB14 has had or will have a disparate effect on minority voting. This is not the "intensely local appraisal of the design and impact of the contested electoral mechanism[]" called for by §2. *E.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986), *cited in* TLYVEF Br. 26; DOJ Br. 37. And it cannot support the district court's judgment.

[9] Plaintiffs also cite *Bell v. Southwell*, 376 F.2d 659, 664-65 (5th Cir. 1967), which invalidated an election based on the "gross, spectacular, completely indefensible nature of . . . state-imposed, state-enforced racial discrimination and the absence of an effective judicial remedy prior to the holding of the election," and *Brown v. Post*, 279 F. Supp. 60, 64 (W.D. La. 1968), which found a racially discriminatory effect (though not discriminatory purpose), where the defendants failed to provide African-American voters with the same opportunity to cast absentee ballots that they provided to white voters. *See* TLYVEF Br. 24.

B. Socioeconomic Data and Historical Discrimination Do Not Prove Unequal Access to the Political Process.

Plaintiffs do not grapple with the district court's failure to trace the alleged burden on minority voting rights to SB14 rather than historical conditions. *See* Texas Br. 31. Instead, plaintiffs insist that SB14 denies minority voters equal access to the political process because, given "Texas's long history of intentional racial discrimination, socioeconomic status in Texas has 'very deep racial and ethnic connections.'" DOJ Br. 24 (quoting ROA.99298). The district court's failure to trace any racial voting disparity to SB14 was legal error; plaintiffs cannot avoid that mistake by repeating it.

This Court has correctly interpreted §2 to require more than proof of socioeconomic disparities and past discrimination for liability under §2's results prong:

> [T]he Senate Report, while not insisting upon a causal nexus between socioeconomic status and depressed participation, clearly did not dispense with proof that participation in the political process is in fact depressed among minority citizens.

LULAC Council No. 4434 v. Clements, 999 F.2d 831, 867 (5th Cir. 1993) (en banc). "[S]ocioeconomic disparities and a history of discrimination, without more," do not suffice to prove a lack of equal access to the political system. *Id.* The notion that "[i]nequality of access is an inference which flows from the existence of economic

and educational inequalities . . . was decisively rejected by Congress in 1982." *Id.* at 866.

Even where existing socioeconomic disparity has some connection to past discrimination, §2 requires proof that past discrimination affects current access to voting. In *Clements*, this Court accepted "that disparities between white and minority residents in several socioeconomic categories are the tragic legacies of the State's discriminatory practices." *Id.* at 866. It held, however, that "these factors, by themselves, are insufficient to support the district court's 'finding' that minorities do not enjoy equal access to the political process absent some indication that these effects of past discrimination actually hamper the ability of minorities to participate." *Id.* "The Voting Rights Act responds to practices that impact *voting*; it is not a panacea addressing social deficiencies." *Id.* (citing *Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491 (1992)).

It is not enough to cite a general link between poverty and diminished political engagement. Evidence demonstrating "the common sense proposition that depressed political participation typically accompanies poverty and a lack of education . . . certainly does not amount to proof that minority voters *in this case* failed to participate equally in the political processes." *Id.* at 867. Plaintiffs must prove "that the effects of past discrimination have hindered

their ability to participate in the political process." *Id.* at 868 (emphasis added). Here, however, plaintiffs only have speculation, citing expert testimony that intentional discrimination "in 'all areas of public life,' including education, employment, health, housing, and transportation, [has] the 'foreseeable result' of causing severe inequalities." TLYVEF Br. 23 (quoting ROA.27088, in turn quoting ROA.44007). This Court has properly rejected such "generalized armchair speculation" as incompetent to prove a §2 violation. *Clements*, 999 F.2d at 867.

C. Plaintiffs Have Not Proven That Racially Polarized Voting Means SB14 Has A Disparate Impact On Voting.

Plaintiffs rely on the district court's "finding" of racially polarized voting in Texas as evidence that SB14 will affect elections and depress minority turnout. *See* NAACP Br. 55; DOJ Br. 34. It is not clear how the existence of racially polarized voting could possibly establish that SB14 has caused a disparate impact on voting. But even it were relevant, racially polarized voting has not been proven here. The district court's purported finding of racially polarized voting rests on a definition that has been rejected by Congress, the Supreme Court, and this Court.

The Senate Report to the 1982 VRA amendments explained that "racial bloc voting" exists where "racial politics . . . dominate the

electoral process," or "race is the predominant determinant of political preference," S. Rep. No. 97-417 at 33, *reprinted in* 1982 U.S.C.C.A.N. 177, 211. To prove racially polarized voting within the meaning of §2, plaintiffs must show that voting preferences are caused by racial considerations, not merely partisanship or policy preference. *Clements*, 999 F.2d at 855.[10]

In *Gingles*, Justice Brennan's plurality opinion argued that racially polarized voting "refers only to the existence of a correlation between the race of voters and the selection of certain candidates." *See* 478 U.S. at 74. A majority expressly rejected this interpretation of §2. Justice White found Justice Brennan's interpretation, in which the race of the voters is dispositive and "the race of the candidate . . . is irrelevant," to be inconsistent with congressional intent. *Id.* at 68 (White, J., concurring). Justice O'Connor agreed, in an opinion joined by Justices Burger, Powell, and Rehnquist; she distinguished voting patterns attributable to "racial hostility" from circumstances in which "racial animosity is absent although the interests of racial groups diverge." *Id.* at 100 (O'Connor, J., concurring).

[10] *See also, e.g., Nipper v. Smith*, 39 F.3d 1494, 1523-24 (11th Cir. 1994) (en banc); *Vecinos de Barrio Uno v. City of Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995).

Embracing the rejected *Gingles* plurality view, the district court asserted: "Racially polarized voting exists when the race or ethnicity of a voter correlates with the voter's candidate preference." ROA.27034 (citing *Gingles*, 478 U.S. at 53 n.21). The district court departed from controlling authority; its finding of racially polarized voting is legally erroneous and factually unsupported.

D. Invalidating SB14 Based On An Alleged Disparity In ID Possession Pushes §2 Beyond Constitutional Boundaries.

Congress enacted the Voting Rights Act to enforce the Fifteenth Amendment. *Chisom v. Roemer*, 501 U.S. 380, 383 (1991). The Fifteenth Amendment safeguards the right to vote:

> **Section 1.** The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> **Section 2.** The Congress shall have power to enforce this article by appropriate legislation.

When Congress uses its enforcement powers under the Reconstruction Amendments, legislation that reaches beyond the Constitution's substantive guarantees "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) (quoting *City of Boerne v. Flores*,

521 U.S. 507, 520 (1997)); *see Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327 (2012).

A facially neutral law violates the Fifteenth Amendment only if it is motivated by a discriminatory purpose. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997). An interpretation of §2 that prohibits laws with a mere discriminatory *effect* on voting already takes the statute one step beyond the substantive constitutional guarantee that it is designed to enforce.

Here, nevertheless, plaintiffs ask this Court to take a further step away from the constitutional guarantee of the right to vote underlying §2. They allege that SB14 violates §2 because it creates a racial disparity in current ID possession. This lacks a sufficient nexus to the Fifteenth Amendment's right to vote. Plaintiffs allege that disparities in ID possession may lead to a racially discriminatory effect on the right to vote. But they need to prove that disparate impact on voting, as such a disparate impact is already one step removed from what the Fifteenth Amendment protects. By extending §2 beyond a disparate impact on voting to a disparate impact on ID possession regardless of any effect on voting, plaintiffs are pushing a novel theory of §2 liability. *Cf. In re Cao*, 619 F.3d 410, 447 (5th Cir. 2010) (constitutional standards cannot depend on "'prophylaxis-upon-prophylaxis' speculation"). This sweeping interpretation of §2, which is divorced not only from the Fifteenth

Amendment but also §2's text, should be rejected under the canon of constitutional avoidance. Texas Br. 34.

Plaintiffs' interpretation of §2 raises a separate constitutional problem to the extent it would require States to avoid racial disparities in ID possession. If plaintiffs are right, then any State passing a voter-ID law will almost certainly have a strong basis in evidence to anticipate that the law will violate §2. *See Ricci v. DeStefano*, 557 U.S. 557, 584–85 (2009). This will inevitably lead States to use race as the predominant consideration when creating election rules—to avoid disparate impact, legislatures will be forced to scrutinize the racial effects of every voting law—thereby subjecting the States to liability under the Equal Protection Clause. *Cf. id.* at 584 (declining to hold "that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case"). Because plaintiffs' interpretation would put §2 on a collision course with the Equal Protection Clause, it must be avoided. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 927 (1995) (explaining that the "implicit command that States engage in presumptively unconstitutional race-based districting brings [VRA §5] into tension with the Fourteenth Amendment").

Plaintiffs' theory of §2 liability would be unworkable in practice even if it were defensible in theory. As interpreted by plaintiffs, §2

would likely prohibit *any* prerequisite to voting, no matter how minimal the burden. Under plaintiffs' theory, every voting qualification imposes some cost; any cost will weigh more heavily on the poor; and any burden on the poor currently will have a disproportionate effect on minorities. By plaintiffs' logic, the National Voter Registration Act would deny or abridge the right to vote on account of race because it requires States to permit voters to register "simultaneously with a driver's license application, in person, or by mail." *Arizona v. InterTribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2251 (2013); *see Frank*, 768 F.3d at 754 ("Motor-voter registration, which makes it simple for people to register by checking a box when they get drivers' licenses, would be invalid, because black and Latino citizens are less likely to own cars and therefore less likely to get drivers' licenses."). The same would hold for felon-disenfranchisement laws, which courts consistently uphold notwithstanding their disparate impact on minorities. *See, e.g.*, *Richardson v. Ramirez*, 418 U.S. 24 (1974).

It follows from plaintiffs' reading of the VRA that any prerequisite to voting violates §2. That is not the law. *See Frank*, 768 F.3d at 754 ("[I]t would be implausible to read §2 as sweeping away almost all registration and voting rules."). Rather, §2 requires plaintiffs to prove that a (1) challenged law (2) caused a disparate impact

(3) on voting. Plaintiffs cannot establish any of these three elements. Texas Br. 30-34.

IV. SB14 Was Not Enacted With A Legislative Purpose Of Disadvantaging Voters Based On Their Race.

A. The Purpose Finding Rests On Legal Errors.

Contrary to plaintiffs' arguments (*e.g.*, U.S. Br. 38, 40), the clear-error standard of review cannot shield the district court's finding of an invidious discriminatory purpose from reversal. The clear-error standard does not apply "when the trial court does not apply governing legal standards in making its findings," *Chevron Chem. Co. v. Voluntary Purchasing Grps., Inc.*, 659 F.2d 695, 703 (5th Cir. Unit A 1981), or when its "factual findings [are] made under an erroneous view of controlling legal principles," *Hous. Exploration Co. v. Halliburton Energy Servs., Inc.*, 359 F.3d 777, 779 (5th Cir. 2004).

1. The District Court's Method Of Finding Invidious Intent Contravenes *Feeney*.

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), laid out some bright-lines rules for the method of finding discriminatory intent, but the district court's analytical method contravenes them. Plaintiffs do not dispute that *Feeney* involves the same discriminatory-purpose standard as here, only with the protected class being gender instead of race. *See* DOJ Br. 39; NAACP Br. 36. And *Feeney* has three key principles relevant here.

First, an invidious-intent argument cannot rest on argument of "a known impact too great not to be intended." The Court in *Feeney* rejected in this context the ability to infer an intent to achieve known consequences. *Id.* at 278. Were it otherwise, the "because of race" intent inquiry would lose its moorings.

Second, the test for constitutionally invidious intent demands proof that the decisionmaker chose an action "'because of,' not merely 'in spite of,' its adverse effects." *Id.* at 278. And in making that showing, "the statutory history" is the guide. If it "shows that the [facially nondiscriminatory status or benefit created by the law] was consistently offered to 'any person' who was [eligible for it]," then there is no discriminatory intent. *Id.* For example, *Feeney* held that the Massachusetts veterans-preference law "is not a law that can rationally be explained" as a gender-based classification because veteran status "is not uniquely male." *Id.* at 275. So too here. Photo-identified status is not uniquely of any race.

Third, the Court in *Feeney* explained that a legitimate, non-pretextual basis for a preferential classification exists when, using the example of veteran preference and gender, "significant numbers of nonveterans are men, and all nonveterans—male as well as female—are placed at a disadvantage." *Id.* at 275. That meant that "[t]oo many men are affected by [the law] *to permit the inference* that the statute is but a pretext for preferring men over women."

Id. (emphasis added). That same inference is denied here as to photo identification and race. Significant numbers of photo-unidentified voters are white. (In fact, somewhere around half are.) And all photo-unidentified voters—of all racial groups—are placed at a "disadvantage" here, assuming arguendo that having to get a photo ID or vote another way is a disadvantage. Just as in *Feeney*, simply "[t]oo many" members of the supposedly preferred majority are affected by SB14 "to permit the inference that [SB4] is but a pretext for preferring" one race over another.

The *Feeney* burden is a "difficult burden to bear" for good reason: adverse "impact alone . . . is not determinative." *United States v. Cherry*, 50 F.3d 338, 343 (5th Cir. 1995); *accord Sonnier v. Quarterman*, 746 F.3d 349, 368 (5th Cir. 2007). In contrast, the district court's reasoning repeatedly draws inferences based on legislators' assumed awareness of *impacts* from their choices to proceed.

That mode of analysis invites just the sort of debate that *Feeney*'s strict standard avoids: free-wheeling arguments about whether a law is "undemocratic and unwise." 442 U.S. at 280. That sort of argument is reserved for the statehouse, not the courthouse. SB14 offers photo IDs to "any person" who is a qualified voter, for use to ensure that only proper votes are counted. That follows in the lead of the bipartisan Carter-Baker Commission convened to

carefully study these issues. That legitimate purpose and the even-handed definition of eligibility requires, under *Feeney*, proceeding no further with speculation about hidden motives that must have existed given touted impacts. *See Price v. Austin Indep. Sch. Dist.*, 945 F.2d 1307, 1319 (5th Cir. 1991).

2. The District Court Failed To Demand Only The Most Compelling Evidence To Second-Guess SB14's Purpose.

Just as *Feeney* envisions, this Court recognizes that a court must conduct a "limited" and "deferential" inquiry when trying to tunnel under stated legislative intent. *Croft v. Governor of Texas*, 562 F.3d 735, 743 (5th Cir. 2009) ("Examining legislative purpose . . . is a deferential and limited inquiry, and courts have no license to psychoanalyze the legislators.") (quotation marks omitted). Plaintiffs have no answer (*see, e.g.*, LULAC-Veasey Br. 39-40) to the district court's failure to demand this.

The Supreme Court has held that, where "there are legitimate reasons for the . . . Legislature to adopt and maintain" a law, courts "will not infer a discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987). Accordingly, courts should "ordinarily defer to the legislature's stated intent," and "only the clearest proof will suffice to override" that consideration. *Smith v. Doe*, 538 U.S. 84, 92 (2003).

That requirement that only the clearest proof can second-guess the legislative intent manifest from a law's face is heightened when the district court allows unprecedented access to the best evidence of legislators' minds—their privileged and private files. Plaintiffs do not dispute that they obtained an unprecedented scope of discovery. With that door opened, *Price* only strengthens *Feeney*'s prohibition on inferring legislative intent from mere circumstantial proof and speculation from supposed foreseeable impacts. As this Court recognized in *Price*, if legislators provide direct evidence, "the logic of *Arlington Heights* suggests that the [direct evidence] is actually stronger than the circumstantial evidence." 945 F.2d at 1318. Plaintiffs offer no meaningful response. And here, the direct evidence of legislative intent squarely contradicts racial discrimination and shows the legitimate and nondiscriminatory purpose for SB14's passage.

3. Without Direct Evidence Or Disparate Impact, The District Court Should Not Have Considered Circumstantial Evidence As A Matter Of Law.

The district court should never have considered circumstantial evidence of legislative purpose because (1) the district court acknowledged there was no direct evidence of discriminatory intent, ROA.27157, and (2) SB14 has not caused a racially disparate impact in voting, *see supra* Part III. Texas Br. 40-42. Contrary to

DOJ's argument, this principle has a firm "basis in law." DOJ Br. 49.

The Ninth Circuit has recognized that "failure to establish . . . discriminatory impact prevents any inference of intentional discrimination." *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 523 (9th Cir. 2011). The D.C. Circuit has also held that when there is no discriminatory effect, a court should "refrain from further investigation into the historical background and legislative history to unearth illegitimate intent." *Brown v. Califano*, 627 F.2d 1221, 1234 n.78 (D.C. Cir. 1980).

Citing the D.C. Circuit, the Supreme Court agreed that "'[a]bsent discriminatory effect, judicial inquiry into legislative motivation is unnecessary, as well as undesirable.'" *Crawford v. Bd. of Educ. of City of L.A.*, 458 U.S. 527, 544 n.31 (1982) (quoting *Brown*, 627 F.2d at 1234). Establishing a "disproportionate adverse effect on racial minorities," *id.* at 545, was necessary before examining any circumstantial evidence of "legislative motivation," *id.* at 544 n.31. Indeed, the Court quoted *Arlington Heights* and *Feeney* for the proposition that disparate impact was an "important starting point" before circumstantial evidence could be used to prove discriminatory intent. *Id.* at 544 (quoting *Feeney v. Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979), in turn quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). It was

therefore legal error for the court to consider circumstantial evidence. *Id.*

B. The District Court's *Arlington Heights* Analysis Misapplied The Law And Clearly Erred On The Facts.

Plaintiffs contend that Texas's challenge to the district court's purpose-related findings merely invites this Court to reweigh the evidence, DOJ Br. 52, but that is not the case. The district court certainly reached clearly erroneous conclusions, but its application of the *Arlington Heights* factors also reflects an incorrect interpretation of law.

1. Plaintiffs' attempt to marshal "contemporary statements by members of the decisionmaking body," *Arlington Heights*, 429 U.S. at 267, demonstrates the district court's pervasive legal and factual errors. Like the district court, plaintiffs rely on speculative, post-hoc statements by SB14's legislative opponents. The statements are not probative of the purpose behind the bill. *See NLRB v. Fruit & Vegetable Pakers*, 377 U.S. 58, 66 (1964) (cautioning against "reliance upon the views of . . . legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach."); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951) ("The fears and doubts of the opposition are no authoritative guide to the construction of legislation."). For the most part, the cited statements are not even contemporaneous with SB14. *See*

ROA.27072, ROA.27074; DOJ Br. 41-42; TLYVEF Br. 27; Veasey-LULAC Br. 8, 36. The court also ignored contemporaneous statements that contradict the district court's conclusion. SB14 opponent Senator Rodney Ellis, for instance, admitted on the Senate floor that he knew the SB14 sponsor's intent was that everyone would be able to exercise their right to vote. *See* ROA.27607:201:1-10.

Plaintiffs rely heavily, as did the district court, on a statement by Bryan Hebert about possible difficulties in SB14 receiving now-inapplicable VRA §5 preclearance from DOJ. DOJ Br. 42; *see also* ROA.27074. Hebert was not a member of the Legislature; he was Deputy General Counsel to Lt. Gov. Dewhurst. Yet plaintiffs characterize his prediction of difficulties in the preclearance process as a "smoking gun" that proves the Legislature's illegitimate purpose. DOJ Br. 52. Hebert was giving a legal-risk analysis that does not even map to the claims at issue here. A staff member's concern about the outcome of proceedings under VRA §5 proves nothing about the Legislature's intent.

Plaintiffs, like the district court, also rely on a statement by former Representative Todd Smith, whom they characterize as "a key proponent of SB14." TLYVEF Br. 27. Representative Smith stated that he expected SB 14 to have an impact on people who were poor or elderly, ROA.100339, and that he believed it was "common sense" that the affected population would be minorities. ROA.100339-40.

But the data credited by the district court indicate that Representative Smith's "common sense" was wrong when it came to the population that lacked SB14-compliant ID. *See* ROA.43320; *supra* Part III.A.1.

2. Plaintiffs also deride the Legislature's reliance on public support for photo-ID legislation. *See, e.g.*, NAACP Br. 47. They complain that the polls failed to convey "SB14's harmful impact on hundreds of thousands of registered voters." *Id.* The district court concluded, without explanation, that "the particular polls were not formulated to obtain informed opinions from constituents," ROA.27069. But public approval remained high across various polls, ROA.38790-92, and complaints since its implementation have been scarce.[11] Senator Davis, a vocal opponent of SB14, conceded that it is "an important duty of any elected official to represent constituents and represent policy that constituents favor," and she had no reason to believe that the public supported voter ID "for an illegitimate reason." ROA.99656:39:11-99657:40:2. Senator Davis also conceded that none of SB14's authors or any other member of the Legislature made a statement indicating that they supported SB14 to disadvantage minority voters. ROA.99655-56.

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[11] ROA.101016:254:6-12; ROA.101017:11-21; ROA.101015:19-23; ROA.101018:10-101019:23; ROA.64628:253:3-254:4; ROA.101098:10-101098:1; ROA.101285:100:10-12; ROA.62054:43:13-15; ROA.63712:10-63716:10; ROA.65424:109:19-24.

3. The court's examination of the evidence is replete with examples reflecting a failure to grapple with the clearest proof of legislative purpose and a preference instead for strained inferences of discriminatory intent. For example, the court impermissibly discounted statements from SB14 proponents that they modeled Texas's law after similar laws in Indiana and Georgia. The court justified its refusal to credit the legislators' statements on the basis that SB14 "eliminated forms of ID those [other] States accepted 'that are disproportionately held by African-Americans and Hispanics,' such as government-employee and student ID." U.S. Br. 44 (quoting ROA.27074). Rather than examine the direct evidence about why SB14 proponents declined to include those alternate forms of ID, the district court instead rushed to an inference of discriminatory intent. *See* ROA.27074; *but see Bryant v. Yellen*, 447 U.S. 352, 376 (1980) (explaining that "failure[s] to enact suggested amendments . . . are not the most reliable indications of congressional intention").

The direct evidence shows the Legislature chose to limit the types of identification to assist both voters and election workers, ROA.27567:41:13-19; ROA.27608:207:1-18, and the legislature believed any possible resulting burdens on voters would be ameliorated "by providing access to free ID cards," ROA.4878:28:1-3 (discussion in Senate). Since the Legislature's previous consideration

of a voter-ID bill, the Legislature had "two additional years to hear from the public on their concerns of the integrity of the ballot box" and concluded that "[o]nly a true photo ID bill [would] deter and detect fraud at the polls and [] protect the public's confidence in the election." ROA.4914 (House Journal).

The Legislature declined to otherwise expand the list of acceptable IDs for similarly good reasons.[12] The various amendments that proposed an affidavit exception, for example, were rejected because "anyone could forge a signature, vote, and leave undetected" with "no way to trace the forgery back to the person." ROA.38993 (Hebert Email). The Legislature thus reasonably concluded that an affidavit exception would "basically gut[] the bill." ROA.38993. The Legislature also heeded lessons learned from Georgia's and Indiana's experiences with an affidavit exception. ROA.29107-08 (chairman of the bipartisan Indiana election commission's testimony at the House hearing) (concluding that the longer time provided to cure provisional ballots in Indiana than in Georgia had actually led to less people returning to cure the provisional ballot than in Georgia).

[12] The district court's analysis ignores many of the amendments SB14 proponents adopted at the behest of SB14 opponents. *See* ROA.98891:259:25-98892:260:6 (Veasey Testimony) (admitting that amendments proposed by Sen. Hinojosa and Sen. Davis were adopted); ROA.99980:363:1-25 (Anchia Testimony) (admitting that he "was given ample opportunity" to express his concerns and "engage in debate about SB14 during its consideration" and that one of his proposed amendments was adopted).

The record likewise reflects sound reasons for the Legislature's refusal to include student IDs in the list of acceptable IDs. "[T]here are over 100 public institutions of higher education in Texas," and student IDs are not standardized in Texas. ROA.28821 (Senate). Accordingly, the Legislature could permissibly conclude that it would be too difficult for poll workers to know whether a given student ID belonged to an existing public university or was a forgery. *Id.*[13]

The district court also misconstrued the purposes actually stated by the Legislature. For example, the court erroneously assumed throughout its analysis that preventing in-person voter-impersonation fraud was the only driving purpose of SB14. *See* ROA.27038-42 (operating under this assumption when addressing the status quo before SB14); ROA.27064 (failing to address the potential fraud-deterrent effect of SB14 when purporting to examine purpose); ROA.27069 (disregarding Legislature's stated purpose of being responsive to constituents, based on in-person-fraud-prevention rationale); ROA.27071 (using only low rates of "in-person voter impersonations" to justify inference that Legislature "barrel[ed]-

[13] The extensive evidence regarding the Legislature's choices in adopting and rejecting amendments undercuts LULAC's baseless assertion that there was "a dearth of contrary evidence presented by Texas in defense of S.B. 14" and that no explanation was given for why certain amendments were rejected or accepted. LULAC Br. 38-39

through a voter ID law despite the lack of need"); ROA.27075 (crediting supposed expert testimony that erroneously recited the legislature's stated purpose).

Yet the record is replete with direct evidence reflecting that the purposes of SB14 extended beyond fraud-prevention to include detecting in-person voter fraud and safeguarding voter confidence. *E.g.*, ROA.4908 ("But when elections are won or lost on two votes, we need to put every check and balance we can to restore the public's confidence . . . . When people have confidence that their vote counts, they are more apt to show up and vote."); ROA.38712.

Although the district court conceded, as it must, that "[t]here is no question that the State has a legitimate interest" in detecting and preventing voter fraud as well as in protecting voter confidence, ROA.27137-38 & n.493 (citing *Crawford*, 553 U.S. at 196-97, and *Texas v. Holder*, 888 F. Supp. 2d 113, 125 (D.D.C. 2012)), the court dismissed the voter-confidence rationale without citing a single piece of evidence, and without justifying or even explaining why anyone could ignore all the consistent evidence from multiple sources. Indeed, plaintiff Imani Clark admitted she thinks that "requiring voters to show a photo ID at the polls will help detour voter fraud" and that it will give her "more confidence in the voting system to know that everyone was showing a photo ID of themselves when they show up to vote." ROA.100547:194:7-10, 13-17. In the face of

all that, the court offered only *ipse dixit* by which it tried to take on the mantle of a legislator, opining that the voter-confidence "justification is not served by the overly strict terms of SB 14." ROA.27140.

Nor is the court's pretense that only fraud prevention underlies SB14 justified by accusations that the Legislature impermissibly shifted rationales for SB14. *See* ROA.27064. Far from that being shown by the clearest proof, the uncontradicted evidence shows that the purposes and rationales behind SB14 remained constant in all of the House and Senate debates and hearings—SB14 was intended to (1) deter and detect in-person voter fraud,[14] and (2) increase voter confidence and turnout.[15]

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[14] ROA.4878:26:6-27:13 (explaining that SB14 is necessary to protect and improve voter confidence and deter and detect voter fraud); ROA.4879:29:8-10 ("Elections are too important to leave unprotected when the Legislature could take proactive steps to prevent fraud and protect our democracy."); ROA.4907 ("This bill is about protecting, deterring, and detecting possible fraud in elections.").

[15] ROA.28012:156:20-22 (bill will "restore the public confidence in the election system"); ROA.28118:262:16-19 ("[W]e believe the confidence in the voters will increase, and we believe it will actually increase the voting percentages."); ROA.4886:3:1-6 ("While there is, and perhaps will always be, a disagreement regarding the extent of the voter fraud, the lack of public confidence in our voting system cannot be questioned. People who lack confidence in the election system see no reason to show up and vote."); ROA.4889:6:3-9 ("[P]hoto I.D. requirements increase the public's confidence in the election process, which has been shown in these states to increase voter participation."); ROA.4893:10:24-25 ("[T]his is about restoring confidence in the election process"); ROA.4896:13:6-10 ("And not only does it restore the public's confidence in the election, there's been documented evidence in the two states that have passed this more restrictive photo I.D. that voter turnout increases."); ROA.4908 ("But when elections are won or lost on two votes, we need to put every check and balance we can to restore the publics' confidence, and not only does it restore

Plus, the evidence reflected that legislators were aware of "a number of very, very close elections and that because of that, we've had elections decided by a handful of votes." ROA.59506:56:16-18 (Rep. Smith); ROA.38877 ("Last year, after a re-count, State Representative Donna Howard won her election by 3 votes."). The evidence also reflected that although fraud was not pervasive, thankfully, it was unfortunately not nonexistent. ("In Texas during the May 29th primary, we had 239 dead people vote with 213 of those dead people voting in person.").[16] Proponents of SB14, therefore, concluded that "without regard to the extent to which [in-person fraud] occurs, it's important to do what you can do to ensure that it does not occur." ROA.59506:56:18-20; ROA.4908 ("[W]hen elections are won or lost on two votes, we need to put every check and balance we can to restore the public's confidence . . . .").

4. As a general matter, the district court committed legal error by relying on its own policy judgment to ignore or dismiss relevant evidence of the Legislature's purpose. Plaintiffs frame the problem nicely: "the district court called on Texas to demonstrate why and

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the publics' confidence in the election, there's been documented evidence in the two states that have passed this more restrictive photo ID that voter turnout increases. When people have confidence that their vote counts, they are more apt to show up and vote.").

[16] That proof shows the fallacy of the district court's clearly erroneous conclusion that the State "failed to present evidence that the deceased are voting, which they could have done by comparing the deceased voter list against the list of those who have voted." ROA.27041.

how the law's particular and uniquely strict provisions fulfill its purported purposes." NAACP Br. 51. This is an accurate statement, but it underlines the flaws in the district court's legal analysis. "States are not required to convince the courts of the correctness of their legislative judgments." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981).

The district court, like plaintiffs, concluded that SB14 is intentionally discriminatory largely because of its disagreement with the underlying policy and its belief that SB14 will not achieve its stated goals. DOJ, for example, concludes that the Legislature's stated goals cannot be genuine because of "[t]he absence of any real need" for SB14. DOJ Br. 43. Other plaintiffs complain that SB14 "ignored the real problem of absentee ballot fraud." The district court agreed. ROA.27042. Ultimately, it discredited the stated purpose of SB14, not because the stated purpose was illegitimate, but because it found "that the justifications do not line up with the content of SB14." ROA.27070. This was legally impermissible. *See Clover Leaf Creamery*, 449 U.S. at 464 ("[I]t is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature.").

The court therefore gave no weight whatsoever to the Legislature's legitimate policy objectives. It conspicuously failed to consider SB14's actual legislative history, despite the Supreme Court's

admonishment in *Arlington Heights* that "[t]he 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." 429 U.S. at 268. The court's failure to consider the actual statements of legislators who supported SB14, was legally erroneous, and it fatally undermines the district court's ultimate conclusion.

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

DOJ argues that the district court did not enter "an order imposing preclearance." DOJ Br. 61. Regardless of how the district court's order is labeled, it is clear that the order requires Texas to get pre-approval from the court before any change in Texas's voter ID law can take effect: "Any remedial enactment by the Texas Legislature, as well as any remedial changes by Texas's administrative agencies, *must come to the Court for approval*, both as to the substance of the proposed remedy and the timing of implementation of the proposed remedy." ROA.27168. (emphasis added). The cases cited by DOJ on a court's power to retain jurisdiction over a case do not support the further remedy of preclearance, which is improper here. *See United States v. Brown*, 561 F.3d 420, 436-37 (5th Cir. 2009) (affirming appointment of referee to administer Democratic primary election where "defendants recidivated," demonstrating

"that they could not be relied upon to voluntarily remedy their §2 violation"); *Westwego Citizens for Better Gov't v. Westwego*, 946 F.2d 1109, 1123-24 (5th Cir. 1991) (holding that city should have first opportunity to devise remedial redistricting plan to remedy vote dilution caused by at-large scheme because of city's "primary jurisdiction over [its] electoral system"); *Mabus*, 932 F.2d at 405-06 (affirming district court's approval of remedial registration law where district court "refused to order immediate relief" for §2 violation, giving legislature first opportunity to provide a remedy); *cf. Jeffers v. Clinton*, 740 F. Supp. 585, 601 (E.D. Ark. 1990) (imposing preclearance under VRA §3(c) based on "a series of majority-vote statutes passed for the purpose of suppressing black political success").

Conclusion

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

Respectfully submitted.

/s/ Scott A. Keller

KEN PAXTON
Attorney General

CHARLES E. ROY
First Assistant Attorney General

SCOTT A. KELLER
Solicitor General

J. CAMPBELL BARKER
MATTHEW H. FREDERICK
Deputy Solicitors General

RICHARD B. FARRER
Assistant Solicitor General

AUTUMN HAMIT PATTERSON
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697
scott.keller@texasattorneygeneral.gov

Counsel for Appellants

Certificate of Service

I certify that this document has been served by ECF or e-mail on April 2, 2015, upon the following:

Chad Wilson Dunn, Esq.
chad@brazilanddunn.com

J. Gerald Hebert, Esq.
hebert@voterlaw.com

Erin Helene Flynn, Esq.
erin.flynn@usdoj.gov

Anna Baldwin
anna.baldwin@usdoj.gov

Diana Katherine Flynn
diana.k.flynn@usdoj.gov

Robert Acheson Koch
Robert.Koch@usdoj.gov

Christine Anne Monta
christine.monta@usdoj.gov

John Albert Smith, III
john.a.smith@usdoj.gov

Vishal Agraharkar
vishal.agraharkar@nyu.edu

Jennifer Clark
jenniferl.clark@nyu.edu

Amy Lynne Rudd
amy.rudd@dechert.com

Lindsey Beth Cohan
lindsey.cohan@dechert.com

Robert Wayne Doggett
rdoggett@trla.org

Jose Garza
jgarza@trla.org

Counsel for Plaintiffs-Appellees

Ryan Paul Haygood
rhaygood@naacpldf.org

Leah Camille Aden
laden@naacpldf.org

Natasha M. Korgaonkar
nkorgaonkar@naacpldf.org

Sonya Ludmilla Lebsack
sonya.lebsack@wilmerhale.com

Deuel Ross
dross@naacpldf.org

Christina A. Swarns
cswarns@naacpldf.org

Amy Lynne Rudd
amy.rudd@dechert.com

Lindsey Beth Cohan
lindsey.cohan@dechert.com

Preston Edward Henrichson
preston@henrichsonlaw.com

Rolando Leo Rios, I
rrios@rolandorioslaw.com

Counsel for Intervenor Plaintiffs-Appellees

/s/ Scott A. Keller
SCOTT A. KELLER

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/s/ Scott A. Keller
SCOTT A. KELLER