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-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 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.

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; STATE OF TEXAS; 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.

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.

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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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.

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

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No. 14-41127

In The United States Court of Appeals for the Fifth Circuit

Marc Veasey, et al.

v.

Greg Abbott, et al.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

The Court's order of December 10, 2014, provides for this case to be placed on the first available oral-argument calendar. Appellees agree that this case warrants oral argument.

TABLE OF CONTENTS

Page

INTRODUCTION 1
JURISDICTIONAL STATEMENT 5
ISSUES PRESENTED 5
STATEMENT OF THE CASE 5
A. SB14 6
B. Texans Lacking SB14 ID 8
C. Obstacles to Obtaining SB14 ID 9
D. Legislative Enactment Process 11
E. Electoral Context in Which SB14 Operates 16
F. This litigation, and prior litigation, regarding SB14 17
SUMMARY OF ARGUMENT 19
ARGUMENT 22
I. THE DISTRICT COURT'S DETAILED FACTUAL DETERMINATIONS ARE REVIEWABLE ONLY FOR CLEAR ERROR AND ARE ENTITLED TO DEFERENCE 22
II. SB14 SPECIALLY BURDENS HUNDREDS OF THOUSANDS OF TEXANS, PARTICULARLY AFRICAN AMERICANS AND LATINOS 24
A. A Substantial Number of Texans Lack SB14 ID, and African Americans and Latinos Lack SB14 ID at Higher Rates 25
B. SB14 ID Imposes Onerous Burdens on Thousands of Voters, Who Are Disproportionately African American and Latino 29
III. THE DISTRICT COURT'S DETERMINATION THAT SB14 HAS A DISCRIMINATORY PURPOSE SHOULD BE AFFIRMED 36

TABLE OF CONTENTS
(continued)

Page

A. The District Court's Purpose Findings Are Supported by the Record 37

B. The District Court Applied the Correct Legal Standards 42

1. Proponents' publicly stated purposes do not constrain the Arlington Heights analysis 43

2. The district court properly drew inferences from the facts 43

3. The district court properly relied upon circumstantial evidence of discriminatory purpose 44

4. The trial court appropriately considered the testimony of SB14's opponents 46

5. The district court appropriately considered SB14's legislative history 46

6. The district court properly considered SB14's historical background 48

C. Texas Failed To Meet Its Burden To Prove That SB14 Would Have Been Enacted Even Without a Discriminatory Purpose 49

IV. THE DISTRICT COURT'S DETERMINATION THAT SB14 VIOLATES THE SECTION 2 RESULTS TEST SHOULD BE AFFIRMED 51

A. SB14 Interacts with Social and Historical Conditions to Abridge the Voting Rights of African Americans and Latinos 53

B. None of Texas' Other Arguments Overcome the District Court's Findings that SB14 Violates Section 2 58

TABLE OF CONTENTS
(continued)

Page

1. Section 2 does not require proof that SB14's racially disparate burdens make it impossible to vote and these burdens may not be dismissed as a "decision not to vote." 58

2. Mail-in voting does not alleviate the disproportionate burdens imposed on African-American and Latino voters 60

3. A determination that SB14 violates Section 2 does not hinge on voter turnout data..... 62

4. The district court properly considered SB14's implementation procedures 63

V. SB14 VIOLATES THE FIRST AND FOURTEENTH AMENDMENT RIGHT TO VOTE 64

A. The District Court's Determination That SB14 Does Not Pass the *Anderson/Burdick* Test is Fully Supported by the Factual Record 64

B. *Crawford* Does Not Insulate SB14 From Liability..... 67

1. *Crawford* requires a case-by-case balancing of burdens and justifications..... 67

2. The instant factual record is far different than *Crawford's* 69

3. *Crawford* does not affect the purpose and Section 2 findings 70

4. *Anderson/Burdick* does not hinge on voting impossibility..... 70

VI. THE DISTRICT COURT'S REMEDY IS PROPER..... 71

CONCLUSION 72

CERTIFICATE OF SERVICE 76

CERTIFICATE OF COMPLIANCE..... 77

TABLE OF AUTHORITIES

Page(s)

CASES

Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n,
No. 13-11043, 2015 WL 178989 (5th Cir. Jan. 14, 2015) 46

Am. Civil Liberties Union v. Santillanes,
546 F.3d 1313 (10th Cir. 2008) 60

Anderson v. Celebrezze,
460 U.S. 780 (1983) ..... passim

Anderson v. City of Bessemer City,
470 U.S. 564 (1985) 22

Arizona v. InterTribal Council of Arizona,
133 S. Ct. 2247 (2013) 53, 54

Brooks v. Volpe,
460 F.2d 1193 (9th Cir. 1972) 43

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

Bursztajn v. United States,
367 F.3d 485 (5th Cir. 2004) 22

Chisom v. Roemer,
501 U.S. 380 (1991) 55

Cleveland ex rel. Cleveland v. United States,
457 F.3d 397 (5th Cir. 2006) 22

Crawford v. Marion County Election Board,
553 U.S. 181 (2008) ..... passim

Equal Emp't Opportunity Comm'n v. LHC Grp.,
773 F.3d 688 (5th Cir. 2014) 24

TABLE OF AUTHORITIES
(continued)

Page(s)

First National Bank v. Cities Service Co.,
391 U.S. 253 (1968) 47

Frank v. Walker,
768 F.3d 744 (2014) 54

Gonzalez v. Arizona,
677 F.3d 383 (9th Cir. 2012) 53

Huff v. N.D. Cass Co. of Ala.,
468 F.2d 172 (5th Cir. 1972) 23

Hunter v. Underwood,
471 U.S. 222 (1985) 23, 50

In re Luhr Bros. Inc.,
157 F.3d 333 (5th Cir. 1998) 22

Indiana Dem. Party v. Rokita,
458 F. Supp. 2d 775 (2006) 60, 61

Irby v. Virginia State Bd. of Elections,
889 F.2d 1352 (4th Cir. 1989) 55

Jones v. City of Lubbock,
727 F.2d 364 (5th Cir. 1984) 43

Kirksey v. Bd. of Supervisors,
554 F.2d 139 (5th Cir. 1977) 60

League of Women Voters v. North Carolina,
769 F.3d 224 (4th Cir. 2014) 53

Leverette v. Louisville Ladder Co.,
183 F.3d 339 (5th Cir. 1999) 44

LULAC v. Perry,
548 U.S. 399 (2006) 16, 49

TABLE OF AUTHORITIES
(continued)

Page(s)

Mercantile Tex. Corp. v. Bd. of Governors of Fed. Reserve Sys.,
638 F.2d 122 (1981) 46

Ohio State Conf. of NAACP v. Husted,
768 F.3d 524 (6th Cir. 2014) 53

Oklahoma v. Weinberger,
741 F.2d 290 (10th Cir. 1983) 43

Operation PUSH v. Mabus,
932 F.2d 400 (5th Cir. 1991) ..... passim

Ortiz v. City of Philadelphia,
28 F.3d 306 (3d Cir. 1994) 54, 55

Pers. Adm'r of Mass. v. Feeney,
442 U.S. 256 (1979) 36, 37

Pluet v. Frasier,
355 F.3d 381 (5th Cir. 2004) 24

Price v. Austin Independent School District,
945 F.2d 1307 (5th Cir. 1991) 45

Roberts v. Wamser,
679 F. Supp. 1513 (E.D. Mo. 1987) 56

Rogers v. Lodge,
458 U.S. 613 (1982) 56, 57

Smith v. Salt River Project Agric. Improvement & Power Dist.,
109 F.3d 586 (9th Cir. 1997) 55

Smith v. Town of Clarkton,
682 F. 2d 1055 (4th Cir. 1982) 43

South Carolina v. United States,
898 F. Supp. 30 (D.D.C. 2012) 63

TABLE OF AUTHORITIES
(continued)

Page(s)

Spirit Lake Tribe v. Benson Cnty.,
No. 10-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010) 56

Symm v. United States,
439 U.S. 1105 (1979) 61

Teague v. Attala Cnty.,
92 F.3d 283 (5th Cir. 1996) 60

Texas v. Holder,
888 F. Supp. 2d 113 (D.D.C. 2012) 19

Texas v. United States,
887 F. Supp. 2d 133 (D.D.C. 2012) 17, 18

Thornburg v. Gingles,
478 U.S. 30 (1986) ..... passim

United States v. Berks Cnty.,
277 F. Supp. 2d 570 (E.D. Pa. 2003) 56

United States v. Martinez,
263 F.3d 436 (5th Cir. 2001) 57

United States v. Texas,
445 F. Supp. 1245 (S.D. Tex. 1978) 61

United States v. Thames,
214 F.3d 608 (5th Cir. 2000) 58

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1976) ..... passim

Voting for America, Inc. v. Steen,
732 F.3d 382 (5th Cir. 2013) ..... passim

Walgren v. Howes,
482 F.2d 95 (1st Cir. 1973) 60

TABLE OF AUTHORITIES
(continued)

Page(s)

Westchester Disabled On the Move v. Cnty. of Westchester,
346 F. Supp. 2d 473 (S.D.N.Y. 2004) 61

STATUTES

28 U.S.C. § 1292 5

28 U.S.C. § 1331 5

28 U.S.C. § 1343 5

28 U.S.C. § 1345 5

52 U.S.C. § 10301 ..... 2, 52, 58, 59

52 U.S.C. § 10302 72

52 U.S.C. § 10304 19

52 U.S.C. § 10308 5

TEX. ELEC. CODE § 13.002 7

TEX. ELEC. CODE § 63.001 7

TEX. ELEC. CODE § 63.0101 6

TEX. ELEC. CODE § 63.011 6

TEX. ELEC. CODE § 65.054 7

TEX. ELEC. CODE § 63.0541 6

OTHER AUTHORITIES

FED. R. APP. P. 28 57

FED. R. CIV. P. 52 ..... passim

Fed. R. Evid. 103 44

TABLE OF AUTHORITIES
(continued)

Page(s)

First Amendment ..... passim

Fourteenth Amendment ..... passim

Fifteenth Amendment ..... passim

INTRODUCTION

This Court should affirm the district court's determination that SB14, this country's most stringent photo ID law, violates the Voting Rights Act and the Constitution. The district court's 147-page opinion sets forth comprehensive factual findings based on detailed record citations. After an eight-day trial, the court weighed the credibility of 49 witnesses, including live and video recorded testimony from 16 voters who explained how SB14 makes it onerous to vote and six legislators who described SB14's aberrational and racially-tinged legislative process. Sixteen witnesses called by Plaintiffs presented scientific research and expert testimony on topics ranging from SB14's disproportionate racial effect to its discriminatory purpose, and their opinions were credited by the district court. Over 2,000 exhibits were admitted. Texas produced no legislators and just one expert as a live witness, and that expert's testimony was found unconvincing.

Plaintiffs' experts' analyses established that African-American and Latino Texans are two to three times less likely to possess SB14 ID than Anglos, and that these disparities are statistically significant. Testimony from experts, voters, and professionals who assist Texans

with obtaining ID established that African Americans and Latinos are more likely to face heavy burdens to get SB14 ID. Texas' Election Identification Certificate program does not mitigate these burdens. As the record shows, the program is a farce: among other things, the EIC is not "free" because Texas requires underlying documentation that imposes significant costs on poor voters; most voters who need an EIC have never heard of it; and the administrator in charge of the program derided it, noting that "zero" would be "a good number" of EICs to issue.

A wealth of evidence showed that imposing these disparate burdens is what animated SB14's enactment, in violation of the Fourteenth and Fifteenth Amendments, and Section 2 of the Voting Rights Act, 52 U.S.C. §10301. For example, it was common knowledge that Texas' Latino population was undergoing tremendous growth, and SB14's leading proponents understood that the legislation would specially harm minority voters (the House sponsor of the predecessor 2009 photo ID bill acknowledged that this was "common sense" (ROA27072), and the Lieutenant Governor's aide warned that SB14 would be found discriminatory (ROA27074)). Legislators also knew that voter impersonation fraud is extremely rare but, as the legislative

process proceeded, the photo ID bill became increasingly stringent and ameliorative amendments were rejected. Legislators' explanations for replacing the pre-existing, nondiscriminatory ID law were not supported by any empirical evidence. The district court's finding of a discriminatory purpose is buttressed by the holding of another federal court that statewide redistricting plans enacted in the same legislative session were racially motivated.

Undisputed testimony demonstrated that SB14's racially disparate effects interact with the totality of the electoral circumstances, including Texas' long history of racial discrimination in voting and other areas of public life, and an electoral atmosphere characterized by polarized voting and appeals to race, to deny minority voters an equal electoral opportunity. Under Supreme Court and Fifth Circuit precedent, this violates Section 2 of the Act.

The district court also found that SB14 violates the First and Fourteenth Amendment right to vote, because the interests advanced in support of SB14 did not make it necessary to impose the law's significant burdens on voters lacking ID. Those interests had been adequately served by the pre-existing ID law.

Texas does not challenge the district court's factual findings under Rule 52's clearly-erroneous standard or assert that the district court's weighing of expert testimony constituted an abuse of discretion. Unable to overcome the facts, Texas resorts to legal arguments (some improperly raised for the first time on appeal) that ignore precedent and conflict with the text of the Constitution and the Voting Rights Act.

The Fifteenth Amendment and the Voting Rights Act, by their terms, prohibit states from abridging the right to vote on account of race or color, yet Texas claims (contrary also to Fifth Circuit precedent) that only those restrictions that make it impossible to vote are unlawful. Texas mistakenly invokes *Crawford v. Marion County Elections Board*, 553 U.S. 181 (2008), as an all-purpose validation of photo ID laws. But *Crawford* upheld a very different law, on a record in which no burden was shown, and did not address racial discrimination.

Finally, with regard to discriminatory purpose and results, Supreme Court and Fifth Circuit precedent require a comprehensive examination of the evidence. Yet Texas urges this Court to ignore all circumstantial evidence of discriminatory purpose, and to analyze SB14's result by focusing almost entirely on the law's facial provisions.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is pursuant to 28 U.S.C. §1292(a)(1) and the district court had jurisdiction under 28 U.S.C. §§1331, 1343(a)(3), and 1345, and 52 U.S.C. §10308(f).

ISSUES PRESENTED

Did the district court correctly determine, under Rule 52's clearly-erroneous standard of review, that Texas' photo identification requirement for in-person voting (a) was enacted with a discriminatory purpose in violation of Section 2 of the Voting Rights Act, and the Fourteenth and Fifteenth Amendments, (b) violates the Section 2 results standard, and (c) violates the First and Fourteenth Amendment right to vote?

Did the district court properly exercise its discretion to enjoin Texas from implementing a racially discriminatory, unconstitutional voting law?

STATEMENT OF THE CASE

This appeal, involving four consolidated lawsuits, concerns Texas Senate Bill 14 (2011) ("SB14"), which repealed the state's pre-existing voter identification law to replace it with the nation's most restrictive

requirement for government-issued photo identification for in-person voting.

A. SB14

Prior to SB14, the only document required to vote in person in Texas was the voter registration certificate issued to each registered voter. ROA27038. Photographic and non-photographic identification were accepted as alternative forms of identification. *Id*.

By contrast, SB14 requires registered voters to present one of the following forms of photographic identification when voting in person: a driver's license, personal ID card, Election Identification Certificate ("EIC"), or concealed handgun permit (all issued by the Texas Department of Public Safety ("DPS")); or a U.S. military photographic identification card, a U.S. citizenship certificate containing a photograph, or a U.S. passport. TEX. ELEC. CODE §63.0101. Each must be current or have expired no more than 60 days prior to the date on which it is presented for voting. *Id*. Otherwise, the voter can submit a provisional ballot, which will be counted only if the voter appears within six days with a valid photo ID. *Id*. § 63.011, §65.0541. SB14 also contains a provisional ballot procedure for voters with religious

objections to being photographed and voters whose photo IDs were lost in natural disasters. *Id*. §65.054. Individuals who establish disability through Social Security Administration or Veterans Administration documentation can obtain an exemption from the photo ID requirement. *Id*. §13.002, §63.001.

Although no fee is charged for an EIC, DPS requires documentary proof of identity and citizenship to obtain one. ROA27043. The non-reimbursable cost of obtaining that documentary proof (and other DPS-issued forms of ID) ranges from $2 to 680. ROA 27047-48.

SB14 is the strictest photo ID law in the country in terms of the types of ID required and the exceptions allowed. Unlike photo ID laws enacted by other states, for example, SB14 does not exempt indigent or elderly persons who find it burdensome to obtain the underlying documentation required to obtain SB14 ID. ROA27045-47.

The only voter fraud addressed by SB14 is voter impersonation fraud, which is "very rare." ROA27033. In the ten years preceding SB14, only two Texans were convicted of in-person voter impersonation fraud, voting under the names of family members. ROA27038-39. A Texas official testified that assertions of voter impersonation fraud have

not been borne out by official investigations, as two experts confirmed. ROA27039-40. Voter fraud appears to occur most often in connection with absentee voting. SB14 does not address absentee voting. ROA27042.

B. Texans Lacking SB14 ID

The district court credited the testimony of Plaintiffs' experts that hundreds of thousands of Texans lack SB14 ID, and that the law disproportionately impacts both African Americans and Latinos. ROA27084.[1]

Dr. Ansolabehere used voter registration and ID databases, and a matching procedure, to identify registered voters who lack SB14 ID; there was no dispute as to the propriety of this analysis. ROA27076-78; ROA27076. Dr. Ansolabehere's analysis demonstrated that approximately 4.5 percent of registered voters (608,470 voters) lack SB14 ID; approximately 12 percent qualify for the disability exemption. ROA27116. The number of voters potentially disenfranchised by SB14 is significant in comparison to the number of registered voters in Texas. ROA27084. Dr. Ansolabehere employed several independent statistical

[1] By contrast, the district court found unconvincing and gave little weight to the analysis of Texas' expert, Dr. Hood, regarding SB14 ID possession. ROA27083.

methods to estimate the race/ethnicity of registered voters lacking SB14, and found that African Americans and Latinos possess ID at rates lower than Anglos, to a statistically significant extent. *Id*.

Separately, Drs. Barreto and Sanchez conducted a four-week survey of over 2,300 eligible Texas voters, which showed that over a million eligible Texans lack SB14 ID, and that African Americans and Latinos possess SB14 ID at statistically-significant lower rates than Anglos. ROA27082-83, ROA43605.

C. Obstacles to Obtaining SB14 ID

Disparities in education, employment, housing, and transportation resulting from long and systematic racial discrimination in Texas leave a disproportionate number of African Americans and Latinos living in poverty with little choice when it comes to spending money on anything that is not a necessity. ROA 27033; ROA27084; ROA27088-89. SB14 specifically burdens Texans living in poverty, who are less likely to possess SB14 ID, are less able to get it, and may not otherwise need it. ROA27085-88.

The obstacles to obtaining SB14 ID include (but are not limited to) the following.

The underlying documents to obtain an EIC all cost money. The normal fee for a birth certificate in Texas is $22-23, which was not reduced at the time SB14 was adopted, even after concerns were raised about the hardship the fee would cause. ROA27095. And although the fee was later reduced to $2-3 for birth certificates used only to obtain EICs, this reduced-fee birth certificate was not publicized and is less available because, unlike a regular certificate, it can only be obtained in person. *Id*. A voter whose birth was unregistered cannot receive a reduced-fee birth certificate, and must pay $47 and complete a 14-page packet of instructions and forms for a delayed birth certificate. ROA27096. Additional fees are required to correct errors appearing on birth certificates. ROA27097-98. Fees for out-of-state birth certificates can be much higher. ROA27098. Several Plaintiffs established that obtaining the required documents would place a severe or insurmountable financial burden on them and their families. ROA27100-101.

Few people know that EICs exist. Several Plaintiffs without ID testified that they were turned away from the polls without being told

about the EIC. ROA27093. Texas has since made little effort to educate the public about EICs. ROA27094.

There are limited locations and times for obtaining an EIC. DPS offices almost uniformly are open only on weekdays, and are not open at night. Numerous rural counties lack a DPS office, and others have an office open only for a few days a week. ROA26517-18.

Travel times to DPS offices add to the substantial and unreasonable burden involved in obtaining an EIC. ROA27102. Dr. Chatman's analysis of travel routes to such offices, credited by the court, showed that 88 percent of voting-age citizens who lack access to a household vehicle face a round-trip travel time of 90 minutes or more, and that the travel burden, to a statistically significant extent, falls most heavily on African Americans and Latinos. ROA27101-02.

Only 278 EICs had been issued at the time of trial. ROA27131.

D. Legislative Enactment Process

Photo ID bills were introduced unsuccessfully in the 2005, 2007, and 2009 legislative sessions (passing one house of the Legislature), before SB14 was enacted in 2011. ROA27049-51.

In the 2000s, Texas' Latino population grew tremendously, resulting in a significant increase in the Latino population percentage. Legislators knew of this demographic change as they considered the photo ID bills. ROA27153. The district court credited Dr. Burton's expert testimony that voter restrictions tend to arise in a predictable pattern when those in power perceive a threat of an increase in minority voting. ROA27065.

The legislative process leading to SB14's enactment was unusual and sometimes unprecedented. Photo ID legislation was designated in 2011 as an "emergency" by the Governor without explanation, allowing proponents to bypass ordinary parliamentary procedures. ROA27053. A special Senate Committee of the Whole was convened exclusively for the purpose of moving SB14. ROA27029-30. The Senate adopted an unprecedented exemption for SB14 from the longstanding "two-thirds" rule governing the votes needed to move a bill to the floor. ROA27053-54. The fiscal note that accompanied SB14 contemplated a grossly inadequate level of funding to conduct an educational media campaign. ROA27055-57.

An analysis by the Texas Secretary of State showing that 504,000 to 844,000 registered voters lacked Texas photo ID was withheld from the Legislature. But the Lieutenant Governor, who is the President of the Senate, was given an estimate from this analysis that 678,000 to 844,000 voters lack ID. ROA27057-58.

SB14 passed the Senate after three days of consideration with little debate. ROA27057-58.

In the House, SB14 was not referred to the standing committee on elections; instead, it was referred to a select committee convened to consider that single bill. ROA27058-59. SB14 was placed on the emergency calendar and passed the House on March 24, 2011 with minor amendments. ROA27059.

Throughout the legislative process, SB14 proponents were unwilling to negotiate, and the bill was viewed as "pre-packaged." ROA27051-52. Legislators offered 104 amendments, but the most ameliorative amendments were tabled, eliminating them from discussion. ROA27060-63; ROA27169-72. Ameliorative amendments that did make it into the House and Senate bills were excised in conference committee. ROA27062-63. The district court credited Dr.

Lichtman's expert analysis showing that the amendments to SB14 adopted by the Legislature generally were the ones that broadened Anglo voting, and that the rejected amendments would have broadened minority voting. ROA27073-74. Dr. Lichtman concluded that SB14 employed intentional discrimination against minorities to achieve a partisan political advantage. *Id*.

Legislators also testified at trial that SB14 was passed with a racially discriminatory intent. ROA27070-72. Other evidence bears this out.

SB14 proponents knew that this legislation would harm African-American and Latino voters. ROA27070-75. Members of the public testified at legislative hearings about the burdens minority voters would face. Legislators raised concerns about the burden on minority voters. In addition, Representative Smith (sponsor of the 2009 photo ID bill) testified in his deposition that it was "common sense" that people lacking photo ID are more likely to be minorities. ROA27072. The Lieutenant Governor's deputy general counsel recognized that minorities would be most affected, and warned legislators that SB14 would be found discriminatory. ROA27072, ROA27074.

Photo ID bills became increasingly restrictive during the legislative process from 2005 to 2011 with regard to the types of ID that would be accepted. ROA27049-51. Yet legislative hearings held during this time demonstrated that in-person voter impersonation fraud – the one type of voting fraud addressed by voter ID requirements – almost never occurred under the then-existing voter ID law. ROA27064.

SB14 proponents conflated concerns over voter fraud with illegal immigration. Representative Todd Smith (the House sponsor of the 2009 photo ID bill) admitted that he had no facts to support concerns he had expressed about non-citizen voting. ROA27065-66.

There was no credible evidence to support proponents' contentions that voter turnout is low because of lack of confidence in elections or that a photo ID law would increase voter confidence. ROA27069-27070. Moreover, the district court credited Dr. Burden's testimony that SB14 would decrease voter turnout by increasing the cost of voting. ROA27068. Defendants' expert, Dr. Hood, agreed that it is an established political-science principle that increasing the costs of voting tends to decrease turnout. ROA27068-69.

Public opinion polls relied upon by proponents, reporting high levels of support for a photo ID law, were limited in their scope. The polls did not mention that voter impersonation fraud is rare, the limited universe of photo ID permitted by SB14, or the burdens that many eligible citizens face to obtain photo ID. ROA27069.

The Governor signed SB14 into law on May 27, 2011. ROA27026.

E. Electoral Context in Which SB14 Operates

SB14 must be viewed in the context of Texas' long history of repeatedly using election devices to minimize the influence of minority citizens. ROA27029. In the past, Texas attempted to justify discriminatory devices on the grounds of reducing voter fraud. ROA27033. Texas did not dispute the length, severity, or effects of this past discrimination, or its own past recalcitrance. ROA27034.

Federal courts have repeatedly entered judgments against Texas for racial gerrymandering of election districts. ROA27032. The Supreme Court, for example, found that Texas' 2003 congressional redistricting plan violated Section 2 of the Voting Rights Act, and that the plan bore "the mark of intentional discrimination." *LULAC v. Perry*, 548 U.S. 399, 440 (2006). In 2012, a three-judge panel of the U.S.

District Court for the District of Columbia found that Texas' senate and congressional redistricting plans were intentionally racially discriminatory. ROA27032; *Texas v. United States,* 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated and remanded on other grounds,* 133 S. Ct. 2885 (2013).

Undisputed testimony also established that voting is racially polarized across Texas, ROA27035, and that racial campaign appeals continue to be used in the state. ROA27037-38. African Americans and Latinos remain underrepresented in the Texas Legislature and at lower levels of government. ROA27036.

F. This Litigation, and Prior Litigation, Regarding SB14.

The district court conducted an eight-day trial, and issued a 147-page decision awarding Plaintiffs declaratory and injunctive relief.

The district court concluded that "the evidence in the record demonstrates that proponents of SB14 within the 82nd Texas Legislature 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 Latino electorate" and thereby "violate[d] the VRA as

well as the 14th and 15th Amendments." ROA27159 (emphasis in original).

The district court applied the Section 2 results test to the record facts and found that: "Plaintiffs have met their burden of proving that SB14 produces a discriminatory result that is actionable because SB14's voter ID requirements interact with social and historical conditions in Texas to cause an inequality in the electoral opportunities enjoyed by African-American and Latino voters as compared to Anglo voters." ROA27150.

The court also concluded that SB14 violates the right to vote, under the First and Fourteenth Amendments, because it "imposes a substantial burden on the right to vote, which is not offset by the state's interests." ROA27141[2]

This Court stayed the district court's injunction, but disclaimed any consideration of the merits of the district court decision. 769 F.3d 890 (2014). The Supreme Court declined to vacate the stay. 135 S. Ct. 9 (2014).

[2] The district court additionally found that SB14 is an unconstitutional poll tax, a claim alleged only by the *Veasey* Plaintiffs and not addressed in this brief.

SB14 previously was denied preclearance under Section 5 of the Voting Rights Act, 52 U.S.C. §10304. *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012), *vacated and remanded on other grounds*, 133 S. Ct. 2886 (2013).

SUMMARY OF ARGUMENT

This Court should affirm the district court's case-specific and fact-driven determinations that Texas' photo ID requirement was enacted with a discriminatory purpose, violates the Section 2 results test, and violates the constitutional right to vote. The district court applied the well-established legal frameworks governing such claims, and its extensive findings of fact amply support its legal conclusions. These findings may be overturned by this Court only if clearly erroneous, and Texas does not contend (with one small exception) that the findings fail this standard of review. Texas, instead, proffers several legal arguments, all of which conflict with governing precedent.

At the outset, the district court properly found that hundreds of thousands of Texans lack SB14 ID, that these citizens are disproportionately African American and Latino, that obtaining SB14 ID can be a complicated and onerous process, and that the burdens

imposed on obtaining ID disproportionately fall upon Texas' minority citizens. These findings are important components of the district court's holdings regarding discriminatory purpose, discriminatory result, and the constitutional right to vote.

The district court conducted the detailed inquiry required when discriminatory purpose is alleged, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1976), and found abundant evidence (direct and circumstantial) that SB14 had a discriminatory purpose. This evidence includes, but is not limited to, SB14's harmful impact on minority citizens, proponents' knowledge of this impact, the pretextual nature of SB14's purported justifications (for example, Texas' prior voter ID law essentially eliminated the type of voter fraud that SB14 was allegedly adopted to address), the many procedural irregularities in the legislative process leading to SB14's enactment, Texas' history of voting discrimination, and the racially-charged nature of the legislative session in which SB14 was enacted.

The district court also properly undertook the functional analysis of SB14 required by the Section 2 results standard. *Thornburg v. Gingles*, 478 U.S. 30 (1986). The court found that SB14 operates to

deprive minority voters of an equal opportunity to participate in the electoral process, based upon objective factors identified by *Gingles*, including a statewide pattern of racially polarized voting, Texas' long history of discrimination in voting and other areas of public life, and the tenuousness of SB14's purported policy justifications. Texas asserts that SB14 imposes a legally cognizable, discriminatory burden only if it makes voting impossible, but that is contrary to the express terms of the Fifteenth Amendment and the Voting Rights Act.

The district court faithfully applied the long-established *Anderson/Burdick* balancing test to resolve whether SB14 violates the First and Fourteenth Amendment right to vote. The district court properly found that the balance tips decidedly against the state because SB14 substantially burdens voting for hundreds of thousands of Texans, and its purported justifications lack substance and do not match with the law's strict provisions and the burdens imposed. Texas relies on the Supreme Court's decision in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). But *Crawford* requires that each photo ID law be judged on its case-specific evidentiary record.

Finally, the district court's injunction is appropriate. It bars Texas from continuing to implement a voting practice that is unconstitutional and violates the Voting Rights Act. The injunction allows Texas to continue to enforce its prior voter ID law, and also allows Texas to enact a different ID law, subject to review by the district court to ensure that the new law remedies the violations found.

ARGUMENT

I. THE DISTRICT COURT'S DETAILED FACTUAL DETERMINATIONS ARE REVIEWABLE ONLY FOR CLEAR ERROR AND ARE ENTITLED TO DEFERENCE

Pursuant to FED.R.CIV.P. 52(a) "[f]indings of fact . . . must not be set aside unless clearly erroneous." In this regard, Rule 52 recognizes the fundamental importance of "the trial court's opportunity to judge the witnesses' credibility." The rule is strictly applied by the Supreme Court and this Court. *See, e.g.*, *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985); *In re Luhr Bros. Inc.*, 157 F.3d 333, 337-39 (5th Cir. 1998). This Court pays strong deference to a district court's weighing of expert testimony, *Bursztajn v. United States*, 367 F.3d 485, 489 (5th Cir. 2004), and reviews the trial court's decision to credit one expert over another for abuse of discretion. *See Cleveland ex rel. Cleveland v. United States*, 457 F.3d 397, 407 (5th Cir. 2006).

These principles apply here. Purpose determinations entail the drawing of factual inferences from a wide array of circumstantial and direct evidence. *Hunter v. Underwood*, 471 U.S. 222, 228-29 (1985). Determinations of racially discriminatory intent "are peculiarly dependent upon the credibility of witnesses. When testimony conflicts as to the intent, design, motive or purpose behind a certain action, credibility choices must be made. Because of its opportunity to observe the witnesses and judge their credibility, such choices are for the trial court." *Huff v. N.D. Cass Co. of Ala.*, 468 F.2d 172, 176 (5th Cir. 1972). Section 2 determinations depend on a fact-driven analysis of the totality of the electoral circumstances. *Gingles*, 478 U.S. at 79. Right-to-vote determinations call for a fact-intensive balancing of voting burdens and justifications. *Voting for America, Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013).

Texas fails almost entirely to assert that the district court's findings do not meet the clearly-erroneous standard. The sole exception is its Point II(D), where Texas argues that SB14 would have been enacted notwithstanding its discriminatory purpose (an assertion the evidence does not bear out, see *infra* at III.C). Texas disputes the

district court's acceptance of Plaintiffs' experts' opinions, ignoring that these arguments are governed – and vitiated – by the abuse of discretion standard. Plaintiffs put 16 expert witnesses on the stand, upon whom the district court relied, and Texas called one expert, whom the district court found "unconvincing" and entitled to "little weight." ROA27083.[3]

Texas has abandoned challenging the district court's findings, with the exception of its Point II(D) argument. *See, e.g.*, *Equal Emp't Opportunity Comm'n v. LHC Grp.*, 773 F.3d 688, 703 (5th Cir. 2014).

II. SB14 SPECIALLY BURDENS HUNDREDS OF THOUSANDS OF TEXANS, PARTICULARLY AFRICAN AMERICANS AND LATINOS

The district court found that, whether viewed through the metrics of "statistical methods, quantitative analysis, anthropology, political geography, regional planning, field study, common sense, or educated observation," SB14 disproportionately burdens the voting rights of African-American and Latino Texans. ROA27144. Expert and first-hand testimony showed that (1) minorities lack SB14 ID at significantly

[3] Texas further compounds its errors by attempting, improperly, to challenge the district court's fact-finding with non-record evidence (relating to student IDs and employee IDs in other states). *See Pluet v. Frasier*, 355 F.3d 381, 385 (5th Cir. 2004).

higher rates than Anglos, and (2) these voters face disproportionately greater burdens obtaining ID.

As discussed below, the special burdens that SB14 imposes on minority voters, and on hundreds of thousands of voters generally, are important starting points for, and components of, the purpose, results, and right-to-vote analyses, although other factors also are a part of these legal analyses.

A. A Substantial Number of Texans Lack SB14 ID, and African Americans and Latinos Lack SB14 ID at Higher Rates

Multiple experts using independent social science methodologies demonstrated that African-American and Latino Texans lack SB14 ID at higher rates than Anglo Texans. The district court found this expert testimony reliable and persuasive, and Texas offers no valid criticisms of that testimony. As noted, Texas bears the burden of demonstrating that the district court abused its discretion in crediting Plaintiffs' experts over Texas' sole expert who testified live, a hurdle Texas does not attempt to overcome.

The analysis conducted by Drs. Barreto and Sanchez directly surveyed a representative sample of Texas eligible voters about SB14ID

possession. ROA27082. The survey indicates that more than seven percent of Texas' eligible voters lack such ID, which extrapolates to over one million Texans, and that about 3.8 percent of Texas registered voters lack SB14 ID. ROA43605. Texas does not dispute this analysis on appeal.[4]

The second analysis, conducted by Dr. Ansolabehere and supported by other experts, used sophisticated matching techniques to compare a computer database of all Texas registered voters ("TEAMS") with databases of Texas residents who possess SB14 ID, to identify which registered voters do not possess SB14 ID. ROA27076. Because TEAMS does not contain racial or ethnic data, and because the state does not otherwise maintain reliable racial or ethnic data on its voters, Dr. Ansolabehere used several techniques to estimate the racial composition of registered voters who lack SB14 ID.[5] These included:

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[4] The district court found that the review of the survey by Texas' expert, Dr. Hood, "contained several significant methodological oversights," as well as "a multitude of errors, omissions, and inconsistencies." ROA27083. And despite the flaws, "Dr. Hood's result still confirmed Plaintiffs' experts' conclusions regarding a statistically significant disparity in the lack of qualified SB14 ID among African-American and Latino registered voters as well as eligible voters relative to the Anglo population." *Id.*

[5] As Texas notes, DPS maintains racial and ethnic data in its database, but these data are of little or no use because DPS did not maintain data on Latino Texans before May 2010, ROA27078, and because DPS has no racial data for registered voters who do not have DPS ID but do have a federal form of SB14 ID.

ecological regression (which derives race estimates from U.S. Census data); analysis of racially-homogeneous census areas; and an analysis using estimates prepared by Catalist (an election data company) of Texas registered voters' race/ethnicity. ROA27078-79.[6]

Dr. Ansolabehere's database analysis showed, and the district court found, that approximately 600,000 registered voters, or 4.5 percent of the state's registered population, lack SB14 ID. ROA27075-76. Only 18 registered voters had obtained a SB14 disability exemption (as of January 2014), ROA27106, and Dr. Ansolabehere's analysis using federal disability databases indicates that about 12 percent of registered voters without ID are eligible for that exemption. ROA27075-76.

The survey and database analyses showed that racial disparities in ID possession are substantial, and are uniformly statistically significant. ROA27079-80, 27082. The precise racial estimates vary slightly between the two analyses, and among the different race-

[6] Texas questions Dr. Ansolabehere's analysis only with regard to the Catalist data. The reliability of these data were supported at trial by unrebutted testimony from Dr. Ansolabehere and a second expert, Dr. Ghitza. Further, even if the Catalist analysis is put aside, Dr. Ansolabehere's findings remain unscathed because they rest on other independent analyses of the racial make-up of voters who lack ID, analyses that Texas does not challenge on appeal.

estimate approaches used in the database analysis. However, all analyses arrived at the same basic conclusion: African Americans and Latinos have statistically significant, higher non-possession rates than Anglos; and the African-American and Latino rates are generally two to three times higher than the Anglo rates.[7]

The following summarizes the Barreto-Sanchez and Ansolabehere results:

Texas Registered Voters	Percent Who Lack SB14 ID	Ratio of African American % to Anglo %	Ratio of Latino % to Anglo %
Anglos Barreto-Sanchez Ansolabehere	 2.1% 2.0 – 3.6%	--	--
African Americans Barreto-Sanchez Ansolabehere	 4.9% 7.5 – 11.5%	 2.3 2.1 – 4.1	--
Latinos Barreto-Sanchez Ansolabehere	 6.8 5.7 – 8.6%	--	 3.2 1.6 – 3.0

ROA43605, ROA25001-02.

[7] Another Plaintiffs' expert, Dr. Herron, used the matching results produced by Dr. Ansolabehere's algorithm to prepare his own racial estimates using ecological regression and analysis of racially homogeneous census areas. These results were strikingly similar to Dr. Ansolabehere's. ROA27081. Texas did not introduce any testimony indicating whether it sought to estimate the racial composition of those identified as lacking SB14 ID based on a database matching algorithm it developed.

These disparities, contrary to Texas' suggestion, do not lose their relevance because most voters of all races have ID. Texas does not contest the existence of racial disparities or that the disparities are statistically significant. Further, the district court found that the number of affected voters is large enough, and racial polarization significant enough, that the disparity in possession rates could easily affect the outcome of elections. ROA27084 ("When 4.5% of voters are potentially disenfranchised, election outcomes can easily change."); ROA27148 (finding that "it's likely that SB14 could affect the outcome of elections" due to polarized voting).

B. SB14 ID Imposes Onerous Burdens on Thousands of Voters, Who Are Disproportionately African American and Latino

Minority voters also face disproportionately higher burdens in obtaining qualifying ID. For many Texans of means, obtaining SB14 ID is an unremarkable nuisance that involves collecting underlying documents, obtaining funds to pay for ID, and travelling to the ID-issuing office. But, as the district court found, for many of the over one million eligible voters and 600,000 registered voters without ID, and especially for Texans subsisting below the poverty line (one of every

three Texans who are African American or Latino),[8] obtaining ID can be a protracted odyssey that forces a choice between basic necessities and voting. Imposing such choices abridges the right to vote. Due to preexisting racially discriminatory historical and socioeconomic conditions, African-American and Latino Texans are more likely to have to make such sacrifices to vote, as they are more commonly poor and without vehicle access. ROA27088-91.

Texas wrongly and repeatedly states that Plaintiffs did not show that SB14 has prevented a single person from voting. The district court, in fact, found that the record "contains the accounts of several 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." ROA27117.

Texans making less than $20,000 annually are over eight times as likely as Texans earning $100,000 or more to lack SB14 ID. ROA27085. Among Texans earning below $20,000 who also lack ID, 16% are Anglo, 41% African American, and 40% Latino. ROA43591. As the district

[8] This is compared to one in every ten Anglo Texans. ROA27088-89.

court found, poor Texans in their day-to-day lives are less likely to need the types of photo ID that SB14 requires, given the types of financial transactions they engage in and the greater likelihood they do not own a car. ROA27086-87. No SB14 ID is truly free, as it costs money to pay for underlying documents, to travel to obtain those documents, and to travel to obtain ID. ROA27047-48. The district court credited the testimony of professionals working to assist individuals in obtaining ID, who testified that it routinely costs low-income Texans between $45 and $100 to obtain ID, factoring in underlying documentation, time, and travel costs. ROA27107-08.

A voter without SB14 ID must obtain the required underlying documentation before getting ID. All of the Texas-issued IDs, including the EIC, effectively require a birth certificate, which adds at least $22 and up to $47 to the cost of obtaining ID.[9] ROA27047-48. Obtaining a birth certificate can be far from a minor inconvenience. The district court credited the experience of a Latino voter who lives below the poverty line and does not drive who had to pay a $22 fee just to prove to

[9] As discussed in further detail below, the $2-3 EIC birth certificate is so underused and unknown as to be illusory.

a government official that his birth was unregistered,[10] and had no choice but to impose on family to drive him to three offices in two counties only to have his birth certificate application denied twice. ROA27096. His next steps were to include paying $47 for a delayed birth certificate and completing a form so complicated it necessitates 14 pages of instructions. *Id*. The court also considered the experience of an 84 year-old African-American veteran who did not have a birth certificate because he was born at home, who no longer drives after his stroke, and whose ordeal to locate his birth certificate involved contacting offices in three different counties and paying a search fee, just to receive an error-filled birth certificate months later. ROA27097-98. He then enlisted a notary and, with his son's assistance, completed an application to amend his birth certificate, but the amended certificate was not issued until months later, and even then it was error-filled. Because DPS requires that the name on the birth certificate match the name on other documentation, or additional documentation connecting the two names, this erroneous birth

[10] A common misconception is that Texas birth certificates automatically issue upon birth. Leaving aside those who are born outside a regulated setting, even a newborn's birth certificate must be ordered and purchased.

certificate is not usable to get SB14 ID. *Id.* The district court credited the account of another voter, born at home in Louisiana when African Americans were unwelcome in hospitals, whose birth certificate is too riddled with errors to obtain SB14 ID, and who needs a Louisiana lawyer to correct the problem. ROA27097.

As set forth in the testimony of experts and individual Plaintiffs, SB14 imposes extensive and racially disparate travel burdens. Of Texas' 254 counties, 78 have no DPS office; for some Texans living along the southern border, the nearest one is over 100 miles away. ROA27101. Over 737,000 eligible voters face a roundtrip travel time of 90 minutes or more to the nearest office issuing Texas SB14 ID. *Id.* Of those who lack household vehicle access, 88 percent have to travel at least that long to go to the nearest office issuing Texas SB14 ID, and Latinos and African Americans lack vehicles at rates approaching two and three times that of Anglos. ROA27101-02. Plaintiffs' expert, Dr. Chatman, found that the travel burden facing minority citizens to obtain SB14 ID is statistically significantly greater than for Anglos. ROA27102. The district court credited the stories of two Latino Plaintiffs who don't drive, face a 60-mile roundtrip to the nearest DPS,

and have to rely on the kindness and schedules of others to get around. ROA27102.

Obtaining an EIC (or other DPS-issued ID) also is challenging for many because of limited office hours. DPS offices generally are not open on weekends or at night, and in rural areas some are open only a few days a week. ROA26517-18.

The EIC program does nothing to mitigate the burdens faced by voters who lack ID. To obtain an EIC, one must provide virtually identical documents as for a driver's license, including a birth certificate. ROA27095. While Texas belatedly created a special EIC birth certificate costing $2-3, the State did not tell issuing offices of its existence, and the Department of State Health Services website advertising it went live mid-trial. ROA27116. EIC birth certificates are not available to people born outside of Texas, those whose births were unregistered, or those whose birth certificates contain errors. ROA27096-99. No effort was made to educate the public on the EIC birth certificate, or to ensure it was offered to voters. ROA27116.[11]

[11] Unsurprisingly, none of the voters who testified had heard of the EIC birth certificate prior to involvement in the litigation, and each paid at least $22 and sometimes much more to obtain – or attempt to obtain – their birth certificates. ROA27057, 27087, 27095-96.

Unlike regular birth certificates, EIC birth certificates must be applied for in person, and not at DPS offices, so substantial travel burdens remain for those without household vehicle access, or who face an hour-plus trip to government offices. ROA26517-18. The district court credited the testimony of an expert accountant, Mr. Jewell, who compared the Ortiz Plaintiffs'[12] low incomes to the costs to obtain an EIC, and found that for most the costs relative to their income were "extraordinary." ROA27164.

The few voters who are able to successfully navigate the procedures to obtain an EIC or the EIC birth certificate ultimately receive documents that Texas prohibits from being used for any purpose other than voting. ROA27109. The district court credited testimony that the documents' limited usability discourages citizens from obtaining them, as conceded by a Texas official. ROA27109.

The EIC program is administered by DPS, a law enforcement agency. The district court found, based on testimony from multiple witnesses, that many Texans fear DPS, because they owe tickets they cannot pay or because they are intimidated. ROA27108. DPS

[12] In this appeal, these are the Taylor Appellees.

fingerprinted EIC applicants until the Secretary of State requested cessation, and has conducted no education to address public perception that applicants undergo fingerprinting and warrant checks. *Id.* No DPS employees devote all or even a majority of their time to the EIC program, and the DPS official in charge of EICs (who spent 2-3 hours per week on the program) was hostile to the program, noting that issuing zero EICs would be "a good number." ROA26522-24.

In addition, EICs do not mitigate the burdens of SB14 because the people who need EICs have never heard of them. ROA27093. Witnesses who attempted to vote without ID were not informed of EICs by poll workers, and most were unaware of EICs prior to this litigation. *Id.* This is unsurprising, as DPS budgeted no money to educate voters on the EIC program. ROA27056.

III. THE DISTRICT COURT'S DETERMINATION THAT SB14 HAS A DISCRIMINATORY PURPOSE SHOULD BE AFFIRMED

Arlington Heights controls the inquiry into whether SB14 was enacted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon [African Americans and Latinos]." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Under *Arlington Heights*, courts must

undertake a wide-ranging factual inquiry into the available direct and circumstantial evidence using the list of relevant factors set forth in that case. These factors are considered in their totality to determine whether a facially neutral law was enacted with a discriminatory purpose. 442 U.S. at 265-68. Racial discrimination need be only one purpose, and not even a primary purpose, to render an action unlawful. *Id.* at 266.

A. The District Court's Purpose Findings Are Supported by the Record

Applying the *Arlington Heights* factors, the district court properly determined that SB14 was enacted with a discriminatory purpose, in violation of the Fourteenth and Fifteenth Amendments, and Section 2 of the Voting Rights Act. Each of these factors is present here, and together they form a powerful picture of discriminatory motivation.

Under *Arlington Heights*, "an important starting point" for the purpose analysis is whether SB14 "bears more heavily" on minority voters. *Id.* (internal quotation marks omitted). As discussed, the district court credited an abundance of evidence that SB14 does exactly that. Moreover, the evidence demonstrated that SB14 proponents knew this would occur. The evidence included the court's first-hand

observations of legislative opponents who credibly testified that racial discrimination motivated SB14. ROA27070-73. It also included the admission by the House sponsor of the 2009 photo ID bill (Representative Smith) that minorities would be specially disadvantaged; the Lieutenant Governor's knowledge of the Secretary of State's impact study (concealed from the Legislature, notwithstanding legislators' requests for such information) which confirmed that hundreds of thousands of voters lack SB14 ID; and the warning by the Lieutenant Governor's legislative aide that passing SB14 would result in minorities being disproportionately harmed. ROA27057; ROA27072-74.

Additional testimony pointed to knowledge of a discriminatory purpose. This included that proponents were unable to explain why they rejected ameliorative amendments, ROA27158-59; testimony by proponents that showed there was no credible evidence to support the reasons offered in support of SB14, ROA27066; proponents' testimony that they were unaware of anyone not voting out of concern regarding voter fraud, ROA27067; and proponents' admission that the legislative

procedures used to steamroll passage of SB14 were unprecedented. ROA27052-54.

This testimony was buttressed by a mountain of the precise sorts of circumstantial evidence *Arlington Heights* deems important. First, the "historical background of the decision," 429 U.S. at 267, includes Texas' long history of discriminatory voting practices (many of which were justified as supposedly necessary to combat voter fraud), the recent and contemporaneous passage of discriminatory statewide redistricting plans, racially polarized voting, and election race-baiting. ROA27029-37, ROA27148-49.

Second, "the specific sequence of events leading up to the challenged decision . . . shed[s] . . . light" on the Legislature's purpose. 429 U.S. at 267. This includes the seismic demographic shift in Texas that led up to and continued during the legislative push to enact a photo ID law, and which was viewed by photo ID proponents as a threat to Anglo political power. ROA27153. The push to enact a photo ID law also saw the bills becoming increasingly strict from the 2005 to the 2011 legislative session, notwithstanding that there was no evidence of any

increase from near zero in the type of fraud (in-person voter impersonation) that voter ID requirements address. ROA27064-67.

Departures from the "[n]ormal procedural sequence" and substantive departures from "the factors usually considered important by the decision-maker" also are relevant and probative. 429 U.S. at 266. The record contained an overwhelming amount of evidence of both. The procedural departures proponents utilized to force SB14 through the Legislature included the emergency declaration by Governor Perry (solely for SB14) despite the absence of evidence of any emergency, the bypassing of standard committee practice (solely for SB14), and abrogation of the century-old two-thirds rule in the Senate for bringing up legislation (again, solely for SB14). ROA27052-55.

The substantive departures included: the enactment of the "strictest [photo ID] law in the country," ROA27141, when the pre-existing voter ID law had rendered voter impersonation fraud nearly nonexistent (while ignoring the real problem of absentee ballot fraud); the claim that SB14 would address non-citizen voting when SB14 includes types of IDs that non-citizens may obtain and when there was no evidence of any pattern of voting by non-citizens; the claim that

SB14 was patterned after Indiana and Georgia photo ID laws that had withstood legal challenges, when SB14 was knowingly designed to be far stricter; and the claim that SB14 was the necessary result of opinion polls when those polls did not address the strict provisions proponents chose to include in SB14 or the fact that the pre-existing law was successfully preventing voter fraud. ROA27137-40; ROA27154-55.[13]

Finally, the "legislative . . . history [is] highly relevant." 429 U.S. at 268. This included the rejection of numerous ameliorative amendments to SB14 with little or no explanation. For example, one amendment would have allowed indigent applicants to obtain underlying documents necessary for SB14 ID at no cost. ROA27170. Also notable was the "anti-Latino sentiment" that pervaded the 2011 legislative session, wherein proponents "conflate[d] voter fraud with concern over illegal immigration," and some equated Latino immigration "with risks of leprosy." ROA27065-67.[14]

[13] In its brief, Texas claims that SB14 provides new protection against voting by underage citizens, however, the voter registration card used under the prior voter ID law included the voter's date of birth.

[14] Given this abundant evidence, Texas' claim that the district court's purpose determination was entirely based on "four [discrete] findings" (App.Br.39-40) is incredible.

Based on this wealth of evidence, the court drew reasonable factual inferences that SB14 was enacted "because of" its adverse effects on minority voters. When matters are handled differently than usual, when factors normally considered important take a backseat, and when stated reasons for acting are suspect, there is a firm basis to infer that something else is driving the decision. When those suspicions are coupled with knowledge of harm to minority voters, an increasingly strict bill, the summary rejection of ameliorative amendments, and an inability to explain legislative choices, the basis to infer intent to discriminate becomes even stronger. And when the governmental action is part of a long and current history of voting discrimination and the product of a "racially charged" legislative environment, and minorities are seeking to exercise the political power that flows from a growing population, the basis to infer that racial discrimination played a part in the official action is unassailable under Rule 52.

B. The District Court Applied the Correct Legal Standards

Texas' claims of legal errors by the district court are all meritless.

1. Proponents' publicly stated purposes do not constrain the *Arlington Heights* analysis.

The district court was not required to credit purposes publicly asserted by SB14's proponents. The cases cited by Texas concerning statutory interpretation are inapposite. Discriminatory purpose is not the same as statutory interpretation. *Arlington Heights* requires an intensive factual inquiry not bound by the statutory language or legislative record, and nowhere does the case speak of deference. That is because decision-makers are likely to conceal an illicit motive behind racially neutral public justifications. *See Smith v. Town of Clarkton*, 682 F. 2d 1055, 1064 (4th Cir. 1982). Discerning the meaning of a statute is a question of law, resolved through a more limited analysis of its language and legislative history. *See, e.g.*, *Brooks v. Volpe*, 460 F.2d 1193, 1194 (9th Cir. 1972); *Oklahoma v. Weinberger*, 741 F.2d 290, 291 (10th Cir. 1983).

2. The district court properly drew inferences from the facts.

Texas argues that the trial court committed legal error by supposedly using "multiple inferences" to infer discriminatory purpose, citing *Jones v. City of Lubbock*, 727 F.2d 364, 371 (5th Cir. 1984). But *Jones* found error when a district court made multiple inferences from a

single fact. Here, quite differently, the district court drew a single inference from multiple facts to conclude that discriminatory purpose motivated SB14's adoption.

3. The district court properly relied upon circumstantial evidence of discriminatory purpose.

Texas erroneously claims that *Arlington Heights* requires findings of discriminatory impact and direct proof of discriminatory intent before circumstantial evidence may be considered.[15] *Arlington Heights*, however, established no such requirements.

The Court in *Arlington Heights* explained that disparate impact "may provide an important starting point," but then proceeded to consider circumstantial evidence even though such impact was only "arguably" present. 429 U.S. 266, 269. In any event, the district court found that SB14 bears more heavily on minority voters, and Texas does not challenge that finding under Rule 52.

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[15] Texas did not raise this issue below by making an evidentiary objection under Fed.R.Evid. 103 or by raising it in its pre-trial or post-trial proposed conclusions of law. This Court typically does not consider an issue raised for the first time on appeal "absent extraordinary circumstances." *Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999). Texas also criticizes the district court's grant of legislative discovery, but does not argue that this constituted an abuse of discretion, and therefore has waived that argument as well.

Nowhere in *Arlington Heights* did the Court say that circumstantial evidence may be considered only if there is direct evidence of discriminatory purpose. The Court expressly stated that the purpose inquiry requires an examination of "such circumstantial and direct evidence of intent *as may be available*." *Id.* (emphasis added). *Price v. Austin Independent School District*, 945 F.2d 1307 (5th Cir. 1991), cited by Texas, likewise held that both types of evidence are relevant to the purpose determination, and thus does not support Texas' assertion.

Texas argues, in the alternative, that at least where legislative discovery is allowed on the purpose issue, plaintiffs then must produce direct evidence of discriminatory purpose in order to introduce circumstantial purpose evidence. This also finds no support in *Arlington Heights*. Furthermore, as discussed above, the discovery in fact did turn up important direct evidence of the Legislature's discriminatory purpose.

Texas also chose to limit the direct evidence by not calling any SB14 proponents to testify live. And several key legislators and aides, including SB14's House sponsor, testified (by deposition) that they

lacked any recollection of the most basic of facts, including, significantly, why they rejected ameliorative amendments to SB14. ROA27158-59.

4. The trial court appropriately considered the testimony of SB14's opponents.

Texas argues that the district court erred, as a matter of law, by considering testimony of SB14 opponents (most of whom testified live).[16] But nothing in *Arlington Heights* precludes consideration of such testimony.[17]

5. The district court appropriately considered SB14's legislative history.

Texas argues that the district court erred by allegedly treating the Legislature's deviations from settled procedure as inherently discriminatory. But *Arlington Heights* expressly held that "legislative or administrative history may be highly relevant," and "[d]epartures from the normal procedural sequence also might afford evidence that

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[16] Again, Texas failed to object to the testimony of the SB14 opponents at trial (or in its post-trial conclusions of law). Texas' objection to the trial court's consideration of this testimony is therefore waived.

[17] Texas' case citations are inapposite. *Mercantile Tex. Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 638 F.2d 122, 1263 (1981) (issue was statutory interpretation, not discriminatory purpose, and this Court held that "statements by a bill's opponents are relevant"); *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, No. 13-11043, 2015 WL 178989 (5th Cir. Jan. 14, 2015) (an antitrust case, where this Court found opponents' testimony insufficient, not legally irrelevant).

improper purposes . . . play[ed] a role." 459 U.S. at 267-68. The district court, therefore, took SB14's procedural irregularities into account, but did not treat them as outcome-determinative or inherently discriminatory.[18]

Texas claims that the procedural irregularities "had everything to do with politics and nothing to do with race," and that they indicated "nothing more than a desire for [SB14] to pass." App.Br. 48-49. Texas pins its argument on a pre-enactment poll which indicated general support for photo ID. Texas' argument essentially is that popular support for some kind of photo ID law gave the Legislature a blank check to enact any ID law it might choose.

As the district court found, however, the polling questions did not relate to the specific features of SB14, and did not include the information known to legislators regarding SB14's harmful impact on hundreds of thousands of registered voters. ROA27069. The district

[18] Texas' reliance on *First National Bank v. Cities Service Co.*, 391 U.S. 253 (1968), is puzzling. *First National Bank* was an antitrust case; it did not deal with legislative procedure or legislative purpose.

court thus explained why the poll did not provide a neutral justification for SB14, and Texas ignores the court's factual findings. *Id.*[19]

6. The district court properly considered SB14's historical background.

Texas argues that the district court erred by considering historical evidence of voting discrimination in Texas, because Texas now has "significant minority voting participation," the Supreme Court in *Crawford* "endorsed voter-ID laws," and Texas voters supported a voter ID law. App.Br. 51-54.

The district court properly considered this factor and weighed the evidence. That minorities are poised to exercise greater political power in Texas is not a reason to reject consideration of historical discrimination, but all the more reason to consider that history. As the Supreme Court explained in finding that Texas' 2003 congressional redistricting plan violated Section 2: "In essence the State took away the Latinos' [political] opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could

[19] Texas also argues that the district court wrongly inferred discriminatory purpose from other aspects of SB14's drafting history, but in this regard Texas does not claim any legal error. Instead, it simply disagrees with how the district court viewed the fact that the voter ID bills got progressively stricter over time and the fact that proponents summarily rejected ameliorative amendments, without asserting that the district court's findings are clearly erroneous.

give rise to an equal protection violation." *LULAC*, 548 U.S. at 440. Indeed, the district court found that it was precisely this recent and dramatic demographic shift that contributed to the "racially-charged" atmosphere in the legislative session that passed SB14. ROA27157.

That the Supreme Court in *Crawford,* the Carter-Baker Commission, and poll respondents indicated some level of support for, or non-opposition to, particular forms of a photo ID requirement does not undercut the district court's purpose determination. Neither *Crawford,* nor the Carter-Baker Commission, nor the Texas poll respondents considered the specific provisions of the Texas law, its background, or its racially disparate impact. Moreover, SB14 proponents knew that the law is significantly stricter than the Indiana law at issue in *Crawford*, which further undercuts Texas' claim that *Crawford* provided a non-discriminatory justification for SB14.

C. Texas Failed To Meet Its Burden To Prove That SB14 Would Have Been Enacted Even Without a Discriminatory Purpose

As the district court stated, "'[o]nce racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the [challenged] law, the burden shifts to the law's defenders to

demonstrate that the law would have been enacted without this factor.'" ROA27158 (quoting *Hunter v. Underwood*, 471 U.S. at 228). Texas accuses the district court of making only a "passing reference" to this standard and not applying it. In fact, the district court devoted three full paragraphs to Texas' failure to prove that SB14 would have been enacted anyway.

The district court began its analysis by focusing on its finding that SB14's "list of acceptable IDs was the most restrictive of any state and more restrictive than necessary to provide reasonable proof of identity." ROA27158. In that context, the district court explained that Texas failed to offer any evidence as to why the specific discriminatory features of SB14 were necessary to accomplish any of the facially legitimate legislative ends that relate to voter ID laws generally, such as combating fraud and increasing voter confidence. *Id*. The district court then noted that none of the SB14 proponents were able to testify why they rejected ameliorative amendments, or why they refused to include provisions from other states' laws that could have decreased SB14's specific "discriminatory features." ROA27158-59.

Accordingly, the district court did not, as Texas would have it, place the burden on Texas to prove how voter ID laws generally stop voter fraud or increase voter confidence. Instead, the district court called on Texas to demonstrate why and how the law's particular and uniquely strict provisions fulfill its purported purposes, and thus would have led to the enactment of this law notwithstanding its discriminatory purpose.[20]

IV. THE DISTRICT COURT'S DETERMINATION THAT SB14 VIOLATES THE SECTION 2 RESULTS TEST SHOULD BE AFFIRMED

The district court correctly held that Texas' photo ID requirement violates Section 2 of the Voting Rights Act because it places a disparate, unjustified burden on African-American and Latino Texas voters and interacts with historical, social, and other factual circumstances in Texas to deny minority voters an equal opportunity to participate in the political process.

Section 2 of the VRA prohibits states from imposing or applying any "standard, practice, or procedure . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to

[20] Texas cannot meet its burden simply by noting, and taking out of context, the district court's finding that "the political lives of some legislators depended upon SB14's success." ROA27073.

vote on account of race." 52 U.S.C. § 10301(a). A violation of Section 2 is established if the "totality of circumstances" shows that members of a particular racial group "have less opportunity than other members of the electorate to participate in the political process." *Id*. § 10301(b).

"The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed" by voters based on race. *Gingles*, 478 U.S. at 47; *id.* at 71 (proof of discriminatory intent is not necessary). The "social and historical conditions" typically considered relevant to a totality of circumstances inquiry were detailed in a Senate Committee Report accompanying the 1982 amendments and were recognized by the Supreme Court in *Gingles*. These "Senate Factors" "typically may be relevant to a § 2 claim," however, "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." The factors are helpful in determining both the role race discrimination plays and the burden imposed by the challenged voting practice, and are of use to fact finders in identifying such discrimination even when there is insufficient evidence of discriminatory intent. *Id*. at 44-45.

A. SB14 Interacts with Social and Historical Conditions to Abridge the Voting Rights of African Americans and Latinos

Having found that SB14 disproportionately burdens African-American and Latino Texans, the district court considered whether the totality of circumstances, as viewed through the lens of the Senate factors, demonstrates that SB14 has a discriminatory result within the meaning of Section 2. This "searching practical evaluation of the 'past and present reality'" has been the standard for conducting Section 2 inquiries for decades. *Gingles*, 478 U.S. at 45-47.

Texas' claim that the Senate Factors do not apply to challenges to voting prerequisites is directly refuted by Fifth Circuit precedent. *Operation PUSH v. Mabus*, 932 F.2d 400, 495 (5th Cir. 1991). Other circuit courts likewise have recognized that the Senate Factors are used in such cases to determine whether a law's impact produces a discriminatory result, even highlighting factors of particular relevance. *League of Women Voters v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554-55 (6th Cir. 2014); *Gonzalez v. Arizona*, 677 F.3d 383, 405-06 (9th Cir. 2012), *aff'd on other grounds sub nom., Arizona v. InterTribal Council of*

Arizona, 133 S. Ct. 2247 (2013); *Ortiz v. City of Philadelphia*, 28 F.3d 306, 309-10 (3d Cir. 1994).[21] Section 2 is comprehensive in that it "prohibits all forms of voting discrimination." *Gingles*, 478 U.S. at 45 n.10.

Texas argues that the district court failed to show that SB14 causes racial discrimination, focusing instead on social and historical conditions present in Texas. App.Br. 31-32. This argument misunderstands both the district court's findings and decades of Section 2 jurisprudence. As explained above, the Section 2 results analysis requires a court to determine whether the challenged law "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed" by voters based on race. *Gingles*, 478 U.S. at 47. Thus, in examining social and historical conditions in Texas, the district court made precisely the causality determination demanded by Section

[21] The Seventh Circuit has said that it is "skeptical" on this issue, but did not hold that the Senate Factors do not apply to cases challenging voting prerequisites. *Frank v. Walker*, 768 F.3d 744, 755 (2014). The *Frank* court was concerned that the Senate Factors do not "distinguish discrimination by the defendants from other persons' discrimination," but this misapprehends the role these factors play. As explained in *Gingles*, the Senate Factors demonstrate the manner in which a challenged voting practice functions in the electoral process. A state is held accountable for any resulting electoral inequality because it was the one that enacted the challenged practice, not because it necessarily caused all of the electoral circumstances that bore on that result. 478 U.S. at 44-45.

2.[22] *See Chisom v. Roemer*, 501 U.S. 380, 394 (1991). It is when plaintiffs rely exclusively on statistical disparities that courts have found insufficient causation to sustain a Section 2 violation.[23] Contrary to Texas' argument, neither the district court nor Plaintiffs are offering an interpretation of Section 2 that relies on disparate impact alone.

While a direct finding of intent is not necessary to prove a Section 2 violation, the Senate factors are clearly probative of discrimination on account of race. In this case, the district court found that the relevant Senate Factors all support the conclusion that the voter ID requirements interact with social and historical conditions to deprive minority voters of equal ballot access based on race.

The district court examined Texas' history of official discrimination in voting and determined that it has impacted and continues to impact the right to vote of minorities, magnifying and solidifying the racially disparate burdens of SB14. ROA27028-38, 27148. The court further found that Latinos and African Americans

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[22] "SB14 does not disproportionately impact African-Americans and Latinos by mere chance. Rather, it does so by its interaction with the vestiges of past and current racial discrimination." ROA27150-51.

[23] *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 596 (9th Cir. 1997); *Ortiz*, 28 F.3d at 313-14; *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1358 (4th Cir. 1989).

bear the effects of discrimination in education, employment, and health, with resultant socioeconomic disparities hindering the ability of minorities to participate in the political process, and amplifying the burdens of SB14. ROA27084-91, 27148-49. This Senate Factor is particularly relevant, as the effects of such discrimination have long-lasting impact that burdens voters of color with "entrenched problems" affecting political participation, including lower incomes, rates of automobile ownership, occupational status, and literacy rates.[24] The district court found that racially polarized voting is prevalent in Texas, which translates to a greater likelihood that the heavier burdens SB14 places on African Americans and Latinos will affect the outcome of elections, further depressing political participation by minority voters. ROA27148. Racially polarized voting also means that the legislators who passed SB14 had little need to be responsive to concerns about the disparate effects it would have on African Americans and Latinos, because they were not put in office by such voters. *See Rogers v. Lodge*,

[24] *Spirit Lake Tribe v. Benson Cnty.*, No. 10-095, 2010 WL 4226614, at *4 (D.N.D. Oct. 21, 2010); *see also Operation PUSH*, 674 F. Supp. at 1255 (N.D. Miss. 1987), *aff'd, Operation PUSH*, *supra*; *United States v. Berks Cnty.*, 277 F. Supp. 2d 570, 581 (E.D. Pa. 2003); *Roberts v. Wamser*, 679 F. Supp. 1513, 1531 (E.D. Mo. 1987).

458 U.S. 613, 623 (1982) ("Voting along racial lines allows those elected to ignore black interests without fear of political consequences[.]").

The district court additionally found that racial appeals continue in campaigns, and that there is persistent underrepresentation of minorities in public office. The Texas Legislature also lacks responsiveness to minority needs, as illustrated by its unwillingness to accept ameliorative amendments to decrease the racial impact of SB14. ROA27149-50.

Finally, the district court found (as discussed above with regard to discriminatory purpose) that SB14 is poorly tailored to its stated justifications, and thus the policy underlying SB14 is tenuous. In particular, Texas' prior ID law had so successfully prevented in person voter-impersonation fraud that such fraud was vanishingly rare, with an exhaustive search turning up two instances in Texas over the course of a decade. ROA27040.

Of the above findings, Texas disputes only whether the policy underlying SB14 is tenuous; it has conceded the remainder of the district court's findings on the Senate Factors. *See* FED.R.APP.P. 28(a)(9)(A); *United States v. Martinez*, 263 F.3d 436, 438 (5th Cir. 2001);

United States v. Thames, 214 F.3d 608, 611 n.3 (5th Cir. 2000). And Texas fails to even argue that the district court's extensive factual findings supporting its tenuousness conclusion are clearly erroneous.

B. None of Texas' Other Arguments Overcome the District Court's Findings that SB14 Violates Section 2

Unable to dispute the weight of the record, Texas proffers a mélange of unfounded legal arguments in an attempt to avoid the district court's factual findings. These arguments should be rejected.

1. Section 2 does not require proof that SB14's racially disparate burdens make it impossible to vote and these burdens may not be dismissed as a "decision not to vote."

Texas repeatedly argues that the burdens found by the district court are not cognizable under Section 2 because SB14, allegedly, does not make it absolutely impossible for any voter to cast a ballot.

Texas cites no support for this argument, because it is not the legal standard. Section 2 bars voting practices which "result in a denial *or abridgement* of the right to vote on account of race," and asks whether members of a particular group have an *unequal* opportunity to participate in the political process, not whether they have none. 52

U.S.C. § 10301 (emphasis added); *see Gingles* 478 U.S. at 74-76.[25] The voting process is not "equally open" to all eligible voters when those without ID are disproportionately minority, when minorities disproportionately face onerous financial, travel, and documentation burdens to obtain ID, and these facts interact with social and historical conditions that bear more heavily on minorities. In *Operation PUSH* – the Fifth Circuit case most analogous to the instant litigation – this Court held that a Mississippi voter restriction on voter registration violated the Section 2 results standard notwithstanding that the challenged law did not absolutely bar any citizen from registering to vote, and notwithstanding that it was possible, with a sufficient expenditure of effort, for citizens to ultimately overcome obstacles to registration that the restriction imposed. 932 F.2d at 400.

Without any evidence to support its claim, Texas also attempts to classify affected voters' lack of SB14 ID as a "decision not to vote." App.Br. 33. This Court, however, has rejected the proposition that

[25] Also, the Voting Rights Act defines "vote" to include all "action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly," 52 U.S.C. §10301(c)(1), which underscores that Texas may discriminatorily abridge the right to vote and deny minority voters an equal electoral opportunity through the enactment of a photo ID requirement that erects a discriminatory prerequisite to in-person voting.

Section 2 liability can be skirted by arguing that lower levels of minority participation, on their face, show that voters have chosen self-disenfranchisement. *See Teague v. Attala Cnty.*, 92 F.3d 283, 293-95 (5th Cir. 1996) (depressed participation among African Americans attributable to discrimination and low socioeconomic levels, not "voter apathy"); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139, 145 (5th Cir. 1977) (absent record evidence, failure to register cannot be attributed to apathy). Here, the district court's findings contain no evidence of voter apathy. In fact, its findings paint precisely the opposite picture: Texans who were lifelong voters and willing to expend time and resources on attempting to secure ID still faced substantial obstacles to obtaining it. ROA27092.

2. Mail-in voting does not alleviate the disproportionate burdens imposed on African-American and Latino voters.

Nor can Texas escape Section 2 liability by arguing that the burdens imposed by SB14 are alleviated by a mail voting alternative available to some voters. Courts have routinely recognized that mail voting is not equivalent to voting in person,[26] and that relegating a

[26] *See Walgren v. Howes*, 482 F.2d 95, 100 (1st Cir. 1973); *Am. Civil Liberties Union v. Santillanes*, 546 F.3d 1313, 1320 (10th Cir. 2008); *Indiana Dem. Party v. Rokita*,

particular class of voters to mail-in voting is suspect. *See United States v. Texas*, 445 F. Supp. 1245, 1256 (S.D. Tex. 1978) (reviewing laws struck down for burdening voters by forcing them to vote by mail rather than in-person), *aff'd sub nom. Symm v. United States*, 439 U.S. 1105 (1979); *Westchester Disabled*, 346 F. Supp. at 478 (enforcing equal access to in-person voting for individuals with disabilities).

Based on multiple witnesses' testimony, the district court found that casting a ballot in-person at the polls fosters voter confidence. ROA27110. The district court found such confidence was not misplaced, as experts agreed that "a much greater risk of fraud occurs in absentee balloting." ROA27109. Additionally, the district court found that many minority voters attach participatory significance to voting at the polls, because it represents hard-won civic engagement and a badge of equality. ROA27110. By telling older voters who lack ID that they should be satisfied with a mail-in ballot, Texas has created a class system for voting, whereby first-class voters may vote in person with

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458 F. Supp. 2d 775, 830-31 (2006), *aff'd sub nom. Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008). Absentee voting is "an inadequate substitute for voting in person" because such voters "have to vote well in advance of election day," and absentee voting "impose[s] additional costs, risks and inconveniences." *Westchester Disabled On the Move v. Cnty. of Westchester*, 346 F. Supp. 2d 473, 478 (S.D.N.Y. 2004).

the rest of their community, but second-class voters are excluded from this form of political participation. Furthermore, the district court found that absentee voting imposes its own set of burdens. ROA27109-10.

Lastly, absentee voting actually exacerbates SB14's disparate impact on minorities. Anglos vote by mail at statistically-significant higher rates than non-whites, and a disproportionate share of Texas' over-65 population (eligible to vote by mail) is Anglo. ROA26504.

3. A determination that SB14 violates Section 2 does not hinge on voter turnout data.

Texas wrongly asserts that a racial disparity in turnout is the definitive marker of a discriminatory abridgement of the right to vote. As discussed above, Section 2 is violated when the opportunity to cast a ballot is burdened to the extent that minority voters have an abridged and unequal opportunity to participate in the political process, even if minority voters are able, through extraordinary exertions, to overcome those burdens and cast a ballot.

In addition, voter turnout is the result of tens of factors (including competitiveness, candidate appeal, and the weather), ROA26632; ROA43976-43978, and thus it is difficult to isolate the impact of any one

factor.[27] Nonetheless, the district court credited expert evidence (including that of Texas' expert, Dr. Hood) that election procedures that increase voting costs (financial and non-financial), such as a strict photo ID law, typically discourage participation. ROA27068. Dr. Hood also testified that Georgia's voter ID law resulted in across-the-board depressed turnout in 2008 for those lacking ID. ROA27068.

4. The district court properly considered SB14's implementation procedures.

Texas claims that the district court erred in failing to distinguish between the provisions of SB14 and various administrative rules, suggesting that Section 2 is concerned only with the statute's provisions and not the manner in which it is implemented. But Section 2 requires a fact-intensive "functional analysis" of the political process, *Gingles*, 478 U.S. at 66, not merely a review of the facial aspects of the challenged voting practice. *See also South Carolina v. United States*, 898 F. Supp. 30 (D.D.C. 2012) (relying on South Carolina's procedures

[27] For this reason, one cannot, as Texas would have it, gauge the impact of a new photo ID requirement on turnout simply by comparing the first election in which the requirement is implemented to the prior election in which it was not used, since there may be multiple other reasons why the two elections differ. However, if Texas' logic were to be adopted, the nearly five percentage point drop in turnout in the 2014 gubernatorial election, as compared to the 2010 gubernatorial election, would indicate that SB14 depressed turnout statewide. *Turnout and Voter Registration Figures* (1970-current), http://www.sos.state.tx.us/elections/historical/70-92.shtml.

for implementing its photo ID law to find the law nondiscriminatory). The state, having delegated the administration of significant aspects of SB14 to agencies wholly inexperienced in election administration — such as the Department of Public Safety, whose director is a defendant in this lawsuit, and the Department of State Health Services — cannot now claim that those agencies' stringent and inconsistent applications of the law are irrelevant to the Section 2 analysis. ROA27103-04.

V. SB14 VIOLATES THE FIRST AND FOURTEENTH AMENDMENT RIGHT TO VOTE

A. The District Court's Determination That SB14 Does Not Pass the *Anderson/Burdick* Test is Fully Supported by the Factual Record

The test for determining whether a voting practice violates the First and Fourteenth Amendment right to vote is established by the Supreme Court's decisions in *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983):

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick, 504 U.S. at 434 (quoting *Anderson*) (internal citations omitted).

Thus, *Anderson/Burdick* requires balancing SB14's burdens "against the precise interests put forward by [Texas] as justifications . . . taking into consideration the extent to which those interests make it necessary to burden [citizens'] rights." *Burdick*, 504 U.S. at 434 (internal quotation marks omitted). This Court has explained that *Anderson/Burdick* "mandate[s]" a "nuanced analysis" of the facts to ensure that a state's "chosen means" are "sufficiently tailored" to the problem presented so as to be justified by the state's policy interests. *Voting for America*, 732 F.3d at 395-96.

Here, the district court found that SB14 substantially burdens the right to vote because it affects over 600,000 registered voters, and many of these voters – particularly the poor – face substantial and difficult obstacles to obtaining qualifying ID. This, in turn, under *Anderson/Burdick* balancing, obligated Texas to offer more than a mere recital of facially legitimate interests which – the district court recognized – support voter ID laws in general. Instead, Texas was required to make a countervailing showing of real, substantial concerns

underlying its facial assertions of justification for the specific photo ID law it enacted.

Texas failed to do this. As the district court found, "SB14's restrictions go too far and do not line up with the proffered State interests." ROA27141. Thus, Texas' "interests [did not] make it necessary to burden the plaintiff's rights," *Burdick*, 504 U.S. at 434, and were not "sufficiently tailored," *Voting for America*, 732 F.3d at 395. In particular, in-person voter impersonation fraud is exceedingly rare in Texas, and there was no rationale for abandoning the prior ID law in favor of a substantially stricter requirement. Texas' other proffered justifications also do not hold water: as to the claim of non-citizen voting, the evidence presented to the Legislature was that any such voting is rare, and SB14 ID includes types of ID that non-citizens may obtain; as to the photo-ID opinion polls, their questions and results did not match up with SB14's strict provisions; as to voter turnout, there was no evidence that photo ID laws lead to higher voter turnout (indeed, as discussed above, the evidence shows the opposite is likely true); and as to following other states' laws, proponents knew that they

were adopting a requirement more restrictive than adopted by other states.

B. *Crawford* Does Not Insulate SB14 From Liability

Texas bases its challenge to the district court's liability finding on a badly flawed reading of the Supreme Court's *Crawford* decision, a case in which the Supreme Court rejected a claim that Indiana's photo ID law violated the right to vote.[28]

1. *Crawford* requires a case-by-case balancing of burdens and justifications.

Texas asserts that *Crawford* held that all photo ID requirements (that include a no-fee photo ID) are *per se* lawful, regardless of how severe and restrictive the law and its implementation procedures may be. Specifically, Texas argues that *Crawford* held that all such photo ID laws *never* substantially burden voting, and *always* are justified by facial concerns regarding fraud prevention and voter confidence. Therefore, according to Texas, *Crawford* precludes any case-specific balancing of SB14's burdens and justifications under *Anderson/Burdick*.

[28] Plaintiffs agree with Texas that *Crawford* should be analyzed by referring to Justice Stevens' plurality opinion. *See Voting for America, Inc.*, 732 F.3d at 394-95.

This argument is specious. In *Crawford*, the Supreme Court explicitly qualified its holding stating that it was ruling based on "*the record that has been made in this litigation*." 553 U.S. at 202 (emphasis added). In particular, the *Crawford* plaintiffs failed to demonstrate that Indiana's law imposed any substantial burdens: "the record [did] not provide [the Court] with the number of registered voters without photo identification," and did not "provide any concrete evidence of the burden imposed on voters who currently lack photo identification." *Id.* at 200-01. Absent this evidence, the Court could not undertake a detailed review of whether any burden imposed was "fully justified," *id.* at 200, and found that the interests advanced by Indiana were "sufficient to defeat [plaintiffs'] facial challenge." *Id.* at 203.[29]

Crawford, therefore, stands for the proposition that photo ID laws do not, on their face, violate the right to vote. Put differently, whether

[29] As Texas notes, *Crawford* made several general observations regarding the burdens a photo ID requirement might impose. The Court indicated that "[f]or most voters" who lack qualifying ID, the effort required to obtain it would not "represent a significant increase over the usual burdens of voting." 553 U.S. at 198. On the other hand, the Court acknowledged that ID requirements "may . . . impose[] a special burden on [the] right to vote" (*i.e.*, one that goes beyond "the usual burdens of voting") on certain subgroups of voters, such as low income citizens. *Id.* at 199. These observations provided the background for the Court's determination that the evidentiary record made regarding the Indiana law was insufficient.

or not a photo ID law fails *Anderson/Burdick* depends upon the facts of each case.[30]

2. The instant factual record is far different than *Crawford's.*

Crawford does not provide support for Texas' photo ID requirement as a factual matter. As the district court found, SB14 on its face is significantly stricter than Indiana's law, and the evidence regarding the number of Texans without photo ID and the burdens imposed on Texans to obtain ID is far more compelling and extensive than what was contained in the Indiana record.

Texas focuses on a facial comparison, but there are significant dissimilarities between the two laws. Indiana allows for more types of photo ID, includes an indigence exception, and allows certain elderly voters to obtain a photo ID without a birth certificate. ROA27115-16; *Crawford*, 553 U.S. at 199. That the Texas EIC birth certificate is

[30] The federal courts rarely specify *per se* rules regarding the validity of particular voting practices (absent a specific constitutional or statutory provision), and instead rely on case-by-case litigation. For example, although voter registration is required by almost all states, particular restrictions on the opportunity to register to vote may violate Section 2 or the right to vote depending upon the facts. *Compare Operation PUSH*, 932 F.2d at 413 (Mississippi registration restriction violated Section 2) *with Voting for America*, 732 F.3d at 385-86 (upholding Texas restrictions against a right-to-vote challenge).

cheaper is immaterial because of the significant obstacles Texas has placed in the way of those that may seek to obtain one.

3. *Crawford* does not affect the purpose and Section 2 findings.

The district court's findings of discriminatory purpose and result are fully consistent with *Crawford*. *Crawford* was not a racial discrimination case. 553 U.S. at 185-89. Moreover, insofar as the district court's purpose and Section 2 findings address SB14's burdens and justifications, these findings are unaffected by *Crawford* because the Supreme Court's holding regarding the Indiana law's burdens and justifications was based on the record in that case.

4. *Anderson/Burdick* does not hinge on voting impossibility.

As discussed above, Plaintiffs need not show that SB14 makes voting impossible to prevail under Section 2, and neither is that required to prevail on the right-to-vote claim. *Crawford* does not set forth any such requirement; nor does *Burdick*. *See* 504 U.S. at 441 (Hawaii's prohibition on write-in voting upheld because it did not substantially burden the right to vote; the fact that it did not make voting impossible was not considered and thus was irrelevant).

VI. THE DISTRICT COURT'S REMEDY IS PROPER

The district court properly enjoined the photo ID provisions contained in SB14.

Texas wrongly asserts that the district court merely should have prohibited Texas from charging a birth-certificate fee when applying for SB14 ID. That remedy would do nothing to address the multiple other difficulties the district court identified with regard to obtaining photo ID. It also would do nothing for Texans not born in the state.

Texas claims that an injunction should apply only to those without SB14 ID, but never explains how a dual system that both enforces and does not enforce SB14 would or could be administered. Plainly, it would result in mass confusion among voters and county election officials.

Finally, the district court properly determined that it should review any remedy Texas may decide to adopt. In *Operation PUSH*, the district court found that Mississippi's voter registration system violated Section 2, and this Court agreed that the district court properly gave the state the opportunity to remedy the violation and then properly reviewed the state's remedy to ensure it addressed the violation. 932 F.2d at 405-09. Likewise, Texas has been given the opportunity to

remedy the violations, subject to review by the district court. Contrary to what Texas asserts, the district court did not order preclearance under Section 3(c) of the Voting Rights Act, 52 U.S.C. §10302(c). ROA27167-68.

CONCLUSION

For these reasons, this Court should affirm the district court's holdings that SB14 was enacted with a discriminatory purpose, has a discriminatory result under Section 2 of the Voting Rights Act, and violates the constitutional right to vote, and should affirm the district court's remedy.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March, 2015, 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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CERTIFICATE OF COMPLIANCE

1. I certify that, on March 3, 2015, this document was transmitted the Clerk of the United States Court of Appeals for the Fifth Circuit via the Court's CM/ECF document filing system.

2. I certify that this brief complies with the type-volume limitation of FED.R.APP.P. 32(a)(7)(B) because this brief contains 13,951 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3. I certify that this brief complies with the typeface requirements of FED.R.APP.P. 32(a)(5) and the type style requirements of FED.R.APP.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word using 14-point Century Schoolbook typeface.

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