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; 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*

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

v.

STATE OF TEXAS; TEXAS SECRETARY OF STATE; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety, *Defendants-Appellants*

On Appeal from the U.S. District Court for the Southern District of Texas, Corpus Christi Division

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VEASEY-LULAC APPELLEES' BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED PERSONS
CASE NO. 14-41127

The case number is 14-41127. The case is styled as *Veasey v. Abbott.* 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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- Marc Veasey
- Jane Hamilton
- Sergio DeLeon
- Floyd Carrier
- Anna Burns
- Michael Montez
- Penny Pope
- Oscar Ortiz
- Koby Ozias
- John Mellor-Crumley
- League of United Latin American Citizens

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- Anna Baldwin
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- U.S. Department of Justice
- Elizabeth S. Westfall

- Mexican American Legislative Caucus, Texas House of Representatives
- Texas State Conference of NAACP Branches
- Estela Garcia Espinosa
- Lionel Estrada
- La Union Del Pueblo Entero, Inc.
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- Maximina Martinez Lara
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- Vishal Agraharkar
- Jennifer Clark
- Brennan Center for Justice
- Lindsey Beth Cohan
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- Lawyers' Committee of Civil Rights Under Law
- Kathryn Trenholm Newell
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- Amy Lynne Rudd
- Texas Rio Grande Legal Aid, Inc.
- Marinda Van Dalen
- Wendy Weiser
- Michelle Yeary
- Erandi Zamora

- Texas League of Young Voters Education Fund
- Imani Clark
- Texas Association of Hispanic County Judges and County Commissioners
- Hidalgo County
- Leah Aden
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Third-Party Defendants	**Former or Present Counsel**
- Third party legislators - Texas Health and Human Services Commission	- Arthur C. D'Andrea - Office of the Attorney General - John B. Scott

Third-Party Movants	**Former or Present Counsel**
- Bipartisan Legal Advisory Group of the United States House of Representatives - Kirk P. Watson - Rodney Ellis - Juan Hinojosa - Jose Rodriguez	- Bishop London & Dodds - James B. Eccles - Kerry W. Kircher - Alice London - Office of the Attorney General - Office of the General Counsel - U.S. House of Representatives

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- Helen Giddings
- Roland Gutierrez
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- Sergio Munoz, Jr.
- Ron Reynolds
- Chris Turner
- Armando Walle

Interested Third Parties

- Robert M. Allensworth, pro se
- C. Richard Quade, pro se

Respectfully submitted,

/s/ Chad W. Dunn
Chad W. Dunn

STATEMENT REGARDING ORAL ARGUMENT

This Court's Order of December 10, 2014, provides for oral argument, which is appropriate in this case.

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INTRODUCTION

Based on voluminous evidence, mostly uncontradicted, the district court made findings of fact supporting judgment for Plaintiffs on all four challenges to S.B. 14: (1) discriminatory purpose, (2) discriminatory results, (3) poll tax, and (4) undue burden on the right to vote. The district court made its findings with care, applied the correct legal standards, faithfully followed procedural rules, issued an appropriate remedy, and should be affirmed.

This case is not about "voter ID laws." It is about *this* voter ID law, S.B. 14 of 2011. Yet Texas acts as if the Supreme Court's decision in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), validated any voter ID law a state might configure, no matter its provisions or impact. Unlike the Indiana law upheld in *Crawford*, which permitted use of any photo ID issued by the United States or Indiana, the Texas legislature engaged in methodically picking and choosing which state or federal photo IDs would be permitted and which would not. In Texas, where 95% of voters possess an S.B. 14 ID, the remaining 5% amount to more than 600,000 registered voters, and minority voters are disproportionately represented within this group.

Because most people have photo IDs, some may assume that photo ID laws are neutral regulations. That is not true. A photo ID law divides voters into two categories: those who have valid photo IDs are in a favored class that meets the

new requirements without any further action, while all other voters, who must take action to regain the franchise, are in a disfavored class.

Drafting and enacting laws that pick and choose among categories of voters is a familiar legislative process, but its legitimacy depends on the even-handedness of the legislature's choices (especially racial evenhandedness), and the nature and degree of the burden that the legislature imposes on the disfavored category. In this case, the Texas legislature failed on both counts, *i.e.*, its selection of qualifying IDs was discriminatory rather than evenhanded, and it imposed an undue burden on disfavored voters. That is why S.B. 14 was correctly held to violate the above-cited statutory and constitutional provisions.

STATEMENT OF ISSUES

1. Did the district court err in finding as fact that S.B. 14 was adopted with a racially and ethnically discriminatory purpose (14th and 15th Amendments, and Section 2 of the Voting Rights Act)?

2. Did the district court err in finding as fact that S.B. 14 "results" in racial and ethnic discrimination (Section 2 of the Voting Rights Act)?

3. Did the district court err in holding that because S.B. 14 provides no free way to vote in person, it is a tax on voting (14th and 24th Amendments)?

4. Did the district court err in applying a balancing test and holding that the burdens S.B. 14 imposes on voters are not justified by the State's legitimate interests (1st and 14th Amendments)?

5. Did the district court abuse its discretion in its remedy?

STATEMENT OF THE CASE

I. Procedural History

S.B. 14 was enacted on May 27, 2011, and Texas began enforcing it on June 25, 2013.[1] This lawsuit began the next day, when Congressman Marc Veasey and others filed a complaint in the United States District Court for the Southern District of Texas. ROA.118–ROA.130. The United States and other Plaintiffs thereafter filed suit or intervened, and the district court consolidated all the lawsuits with consent of all parties. ROA.531; ROA.1628–ROA.1629.

These suits collectively challenged S.B. 14 on four main grounds (though not all grounds were in every suit):

(1) S.B. 14 was enacted with discriminatory purpose against African-American and Hispanic voters (statutory violation under Section 2 of the Voting Rights Act, as well as constitutional violation under the 14th and 15th Amendments);

(2) S.B. 14 results in discrimination against African-American and Hispanic voters (statutory violation under Section 2 of the Voting Rights Act);

[1] The law was initially blocked because of its failure to gain preclearance under Section 5 of the Voting Rights Act, *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012), but that decision was vacated, *Texas v. Holder*, 133 S. Ct. 2886 (2013), following the Supreme Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013). Texas AG Abbott announced the day *Shelby County* was decided that Texas would begin enforcing the law immediately.

(3) S.B. 14 is a tax on the right to vote (constitutional violation under the 14th and 24th Amendments);

(4) S.B. 14 unduly burdens the right to vote without sufficient justification (constitutional violation under the 1st and 14th Amendments).

Pursuant to a 2013 Scheduling Order, ROA.1101, the trial began on September 2, 2014, and ran for two weeks, including a day for closing arguments.

The district court's Opinion, ROA.27026–ROA.27172, and Order, ROA.27192, found liability on all four grounds, and the district court entered an injunction against enforcement of S.B. 14.

This appeal followed.[2]

II. Statement of the Facts

The parties of course dispute the *ultimate* facts in this case, such as whether the purpose of S.B. 14 was to discriminate and whether the burdens it imposes on voters are heavy. The *underlying* facts, however, are essentially undisputed. This Statement of Facts references the district court's findings throughout.

[2] Based on then-upcoming elections, without addressing the merits of the case, this Court granted a stay pending appeal, *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014), which the Supreme Court declined to lift, *Veasey v. Perry*, 135 S. Ct. 9, 9 (2014).

A. Prior Law

Before enactment of S.B. 14, the requirements for voting in Texas were (1) to register and (2) to present an ID (with or without photo)—such as the voter registration card, official mail, a utility bill, a bank statement, or a paystub—that identified the voter and the voter's address. TEX. ELEC. CODE § 63.0101.

Under this regime, all forms of in-person voter fraud were extremely rare, and voter fraud involving "in-person impersonation" (a person appearing at the polls and pretending to be someone else) was virtually non-existent, as discussed *infra* at 24–25 & n.15. ROA.27038–ROA.27042.

B. Provisions of S.B. 14

The heart of S.B. 14 is Sections 9 and 14, which require voters appearing at the polls to present one of the following seven specified types of photo ID:

- 4 types of photo ID issued by the Texas Department of Public Safety (DPS): driver's license, DPS personal ID, concealed handgun permit, or Election Identification Certificate (EIC);
- 3 types of photo ID issued by the United States: U.S. passport, U.S. citizenship certificate, or U.S. military ID.

ROA.27042 –ROA.27043. The Election Identification Certificate (EIC) is a new form of photo ID created by Section 20 of S.B. 14. Section 20 was not in the original House or Senate versions of S.B. 14 but was added in conference

committee. ROA.27062–27063. This section directs DPS to create the EIC and directs that it be free, but otherwise leaves EIC issuance and administration in the hands of DPS. ROA.27103.

Two categories of people may vote without photo ID: (1) voters who are over 65 (or who satisfy various other restrictive criteria) may vote absentee by mail; and (2) voters who have a religious objection or have certified proof of disability may complete a documentary procedure to obtain a waiver of the photo ID requirement. ROA.27044; ROA.27105–ROA.27106; ROA.27136. Still other provisions of S.B. 14 deal with various administrative issues, including assigning the Secretary of State to issue regulations governing the knotty problem of voters whose registration card and photo ID do not match. ROA.27043.

C. The Numerical Effect of S.B. 14, on Voters Generally and on Minority Voters

State's awareness of the number of no-matches. Before enactment of S.B. 14, Texas knew that a large number of voters, disproportionately poor and minority, would lack the specified photo IDs. Ann McGeehan, then-Director of the Secretary of State's Elections Division, testified that, after Senate passage of S.B. 14 and before House consideration, her office ran a computer analysis that found that around 800,000 registered voters lacked a DPS-issued photo ID. ROA.27057; ROA.100282:288:6–ROA.100283:289:22. Rep. Todd Smith, former Chair of the House Elections Committee and an S.B. 14 supporter, testified that

during legislative consideration he understood the number of voters without S.B.14 ID to be about 700,000. ROA.27072; ROA.100321:327:4–14. Lt. Governor David Dewhurst testified that at the time S.B. 14 was under consideration, he estimated that 3%-7% of all registered voters lacked S.B. 14 IDs. ROA.100831:69:21–ROA.100832:70:16.

State's awareness of racial composition. As to the composition of the no-match pool, Rep. Smith summed up the obvious: "it's a matter of common sense" that minorities would be disproportionately affected by S.B. 14—he did not need a "study" to confirm it. ROA.27072; ROA.100339:345:14–ROA.100340:346:6. Likewise, in a memo to Senate staff, the lieutenant governor's general counsel, Bryan Hebert, expressed doubt that S.B. 14 could receive Section 5 preclearance because of its racially discriminatory impact. He unsuccessfully urged the legislature to expand the list of S.B. 14 IDs. ROA.27158; ROA.39225–ROA.39226.

Statistical analysis of the registered voter pool. Expert reports and testimony at trial confirmed what the state already knew. Plaintiffs and Defendants and their experts engaged in a comprehensive joint process to calculate the number of registered voters who lack S.B. 14 ID by computer matching the registered voter list against the lists of holders of each type of S.B. 14 ID, including analyzing huge state databases and those of the State Department and other federal agencies. After

the lists were "scrubbed" to minimize errors or duplicate entries, Plaintiffs and Defendants each designed their preferred, separate algorithms to calculate the number of "match" and "no-match" registered voters.

No-match number. Three expert witnesses—two for Plaintiffs and one for Defendants—engaged in this process.[3] Both Plaintiffs' experts, Drs. Steven Ansolabehere and Michael Herron, testified that the number of no-match registered voters was more than 600,000 no matter whether using Plaintiffs' or Defendants' algorithm. ROA.27076–ROA.27078; ROA.43260; ROA.44626.[4] Defendants' expert, Dr. M.V. Hood, did not conduct a detailed analysis and testified that his preliminary review generally confirmed Plaintiffs' experts' results, *i.e.*, he also found a no-match figure of approximately 5%. ROA.100956:194:10–ROA.100957:195:6.

District court finding of Texas voters without ID. Based on this essentially undisputed testimony, the district court made a finding of fact that the number of no-match registered voters was approximately 608,470, around 5% of the 13 million registered voters in Texas. ROA.27075. The district court found that the

[3] Texas suggests that only the Plaintiffs' experts engaged in this process, Appellants' Br. 9, but Texas's experts also participated throughout the process.

[4] In fact, Dr. Herron found a larger no-match list using Defendants' algorithm. ROA.44535.

number of voters disfranchised by S.B. 14 is large enough to influence election results. ROA.27084.

Composition of the no-match list. Turning to the racial and ethnic results, Drs. Ansolabehere and Herron analyzed the no-match list to estimate the proportion of such voters who are Anglo, African-American, and Hispanic. Each expert, working separately, used several different scientifically accepted statistical and Census-based methods, and reported that minority voters are disproportionately more likely to lack S.B. 14 IDs as compared to Anglo voters, and that these differences are statistically significant. ROA.27078–ROA.27082; ROA.43260–ROA.43268; ROA.44599–ROA.44610. Plaintiffs' expert Dr. Coleman Bazelon also conducted a demographic analysis of the no-match group and found that African-American and Hispanic voters were less likely than Anglo voters to possess S.B. 14 ID. ROA.27082; ROA.26832–ROA.26839. These results were in line with Texas's expectations as described by Rep. Smith and Mr. Hebert.

The disproportionality reflected in the match and no-match percentages represents a very large number of minority voters disfranchised by S.B. 14. [5] Even

[5] We use the word "disfranchise" correctly to include any interference with a person's eligibility to cast a vote, whether the bar is absolute or can be overcome. The individual plaintiffs were entitled to vote the day before S.B. 14 was enacted, but not on the next day—just as if their names had been removed from the registration rolls. *See United States v. McElveen*, 177 F. Supp. 355, 360 (E.D. La.

if one were to accept the registration and ID possession rates claimed in Texas's brief,[6] that would still mean a discriminatory deficit of approximately 200,000 African-American and Hispanic voters caused by S.B. 14; put differently, 200,000 *more* minority voters are disfranchised than if minority voters possessed IDs at the same rate as Anglo voters. This figure does not change whether one focuses on the "match" list or "no-match" list. Moreover, no matter what data sources or estimates one uses, the number (not just the percentage) of minority voters disfranchised by S.B. 14 remains very large.

Survey results. Using a different method, Drs. Matthew Barreto and Gabriel Sanchez conducted a scientifically valid survey of potential voters (registered and non-registered) to determine the total number of no-matches, broken down by race and ethnicity. Their survey found that approximately 1,200,000 citizens of voting age lacked S.B 14 IDs and that there was a statistically significant deficit in ID possession by minority voters. ROA.27082–ROA.27083; ROA.43586–ROA.43591. They also reported that ID possession rates were lower among poor people, again an unsurprising result.

1959), *injunction aff'd sub nom., United States v. Thomas*, 362 U.S. 58 (1960) (removing voters from the rolls described as "disenfranchisement" even though challenged voters could re-register); *c.f. Purcell v. Gonzales*, 549 U.S. 1, 6 (2006) (Stevens, J. concurring) (referring to the unresolved "scope of the disfranchisement that the novel identification requirements will produce").

[6] Appellants' Br. 35, 52–53. There are obvious inaccuracies in these data.

Texas's expert. As noted, Dr. Hood's preliminary analysis generally confirmed the results of Plaintiffs' experts. Apart from this, Dr. Hood restricted himself to suggesting defects in the procedures followed by Drs. Ansolabehere and Barreto. Dr. Hood testified that he had no criticism of Dr. Herron's results. ROA.101001:239:6–20. Cross-examination of Dr. Hood revealed a number of inconsistencies and errors in his analysis of Dr. Ansolabehere's and Dr. Barreto's presentations, and the district court accordingly refused to accept Dr. Hood's criticisms. ROA.27083. In any event, even accepting Dr. Hood's criticisms of Dr. Barreto, Dr. Hood's reconstruction of Dr. Baretto's survey still reveals that minorities are disproportionately less likely than Anglos to possess S.B. 14 IDs. ROA.27083.

D. The Legislative Process for S.B. 14

S.B. 14 was the culmination of a series of voter ID bills, starting with a 2005 bill that would have allowed voters to use many types of photo and non-photo ID. ROA.27049. The requirements became successively more stringent with each new bill. The 2007 bill was generally similar to the Indiana law upheld in *Crawford* (as well as Georgia's photo ID law), ROA.27050, but the 2009 Texas bill stripped away some IDs allowed in Indiana and Georgia, ROA.27050–ROA.27051, and the 2011 Texas bill (which became S.B. 14) stripped away still other IDs allowed in Indiana and Georgia. What was left in the 2011 Texas bill was a sharply curtailed

list of IDs, far more limited than those previously upheld by the courts. ROA.27045–ROA.27048; ROA.45101–ROA.45110.

During consideration of the bill that became S.B. 14, the legislature employed a number of unorthodox parliamentary maneuvers that allowed the bill to move quickly to passage. But these procedures also largely prevented meaningful legislative debate. One example was to bypass the House Elections Committee—the standing committee with normal jurisdiction—and instead to steer the bill to a newly created, this-bill-only handpicked committee. ROA.27058–ROA.27059; ROA.45114–ROA.45116.

Both in the Senate and the House, legislators fruitlessly asked for information or studies about the bill's likely effect on poor and minority voters. ROA.27059. The bill's sponsors and floor leaders (mainly Sen. Fraser and Rep. Harless) often answered: "I am not advised, ask the Secretary of State." ROA.27052.[7] Supporters also erroneously claimed that S.B. 14 was modeled on the Indiana and Georgia laws, which are in fact very different. ROA.27069;

[7] ROA.27952; ROA.28054; ROA.28071–ROA.28075; ROA.28085–ROA.28086; ROA.28113; ROA.28114; ROA.29471; ROA.29476; *see also* ROA.28057 – ROA.28060 (Sen. Fraser refusing to support or oppose mandating an annual report on S.B. 14's disparate racial impact); ROA.99801:184:4–22 (Sen. Ellis testifying that Sen. Fraser would consistently tell him to ask the Secretary of State but that the Secretary of State would tell him "nothing"); ROA.99443:211:23–ROA.99444:212:16 (Sen. Uresti testifying to the same thing); *see also* ROA.61354:66:4–ROA.61356:76:10 (deposition of S.B. 14 sponsor Rep. Harless); ROA.62578:111:1–ROA.62598:140:25 (deposition of Speaker Straus).

ROA.45129–ROA.45138. They also claimed that the public supported S.B. 14, but based this claim on public opinion polls showing support for voter ID laws in general; these polls did not ask about S.B. 14's limited list of acceptable IDs and had, in fact, been conducted when Texas was considering earlier, more expansive legislation. ROA.27074; ROA.45139–ROA.45140.

Both in the Senate and the House, ameliorative amendments were offered—some to restore provisions of earlier bills—but were routinely tabled or defeated with little or no debate. ROA.27060; ROA.27169–ROA.27172. The Senate did pass an amendment allowing—as in Indiana—an exemption for those who sign an affidavit of indigence, but the House stripped out this provision. ROA.27061–ROA.27062. The conference committee kept it out. *See* ROA.28617.

The conference committee also added a new ID, the EIC. Unlike the DPS personal ID, the EIC can be used only for voting and is labeled "For Elections Purposes Only. Cannot Be Used For Identification." ROA.38297–ROA.38304. The EIC was to be free, but as discussed below, the question of whether it really is free is a central issue in this case. ROA.27062–ROA.27063.

E. The Choices the Legislature Made

The ID choices the legislature made uniformly disadvantaged minority voters or assisted Anglo voters. Dr. Lichtman testified, without contradiction from

any lay or expert witness, that each of the following major choices disproportionately hurt minority voters and/or helped Anglo voters:

- Excluding federal government employee IDs other than military IDs;
- Excluding Texas state employee IDs;
- Excluding Texas county or local government IDs, largely possessed by county and local employees;
- Excluding student IDs, even those from state colleges and universities;
- Including concealed handgun permits; and
- Exempting mail-in ballots.

ROA.27073–ROA.27074; ROA.45116:ROA.45128. Dr. Lichtman testified that government employees in Texas (the first three excluded categories above) are disproportionately minority, as are college students (the fourth excluded category).[8] ROA.45120–ROA.45125. Thus, by excluding these categories, the legislature magnified the proportion of minority voters put into the no-match, disfavored category. By contrast, as Dr. Lichtman testified, those who possess concealed handgun permits and those who vote by mail are disproportionately Anglo. ROA.45117–ROA.45120; ROA.45145–ROA.45147.

[8] Dr. Lichtman explained that the non-citizen student population does not affect this result.

These inclusions and exclusions were not just happenstance, nor mere oversight, since most of these issues were addressed several times: once in drafting the bill, once more when amendments were offered in the Senate, and still again when similar amendments were offered in the House.

The inclusions and exclusions were essentially unexplained by legislators who sponsored or supported S.B. 14. There was little or no explanation in the legislative debates or at trial for differentiating between federal military IDs (acceptable) and federal civilian IDs (not acceptable), nor for why the bill excluded state employee IDs (which—for at least 90 state agencies—are produced by DPS, ROA.27169). And Mr. Hebert testified that he knew of no case of voter fraud anywhere in the country involving a student ID. ROA.10397:212:6–14. Nor was there any real explanation, on the floor or in testimony, for exempting mail-in ballots when all legislators and witnesses agreed that mail-in ballots were and remain the primary source of what voter fraud exists. ROA.27155; ROA.45144.

F. Nature of the Burdens S.B. 14 Imposes on Voters

The Texas Director of Elections testified that S.B. 14 implementation was like "building the airplane while we were flying it." ROA.101124:362:23–24. The evidence showed that many of the problems resulted from S.B. 14's requirement that voters acquire IDs at DPS offices, which often have limited-hours and are poorly located for non-drivers, instead of allowing voters to obtain the IDs (as in

some other states) at county voter registration offices, which are more numerous and generally better located for non-drivers. ROA.27101–ROA.27103.

The statute also gives broad discretion to DPS, a law enforcement agency with no experience recognizing the rights or interests of voters. That discretion is most prominent in Section 20 of S.B. 14, which creates the EIC, the ID that is purportedly free and thus most likely to be sought by no-match voters.

From the start, DPS issued regulations requiring EIC applicants to be fingerprinted, and eventually stopped the practice only at the urging of the Secretary of State.[9] Those regulations remained on the books until the day after the DPS representative was cross-examined at trial. *See* 37 TEX. ADMIN. CODE 15.183(a)(3).

DPS officials stated incorrectly that EIC applicants would be subjected to "warrant checks," which could lead to arrest. ROA.27108; ROA.100497:144:9–22; ROA.100498:145:5–15. Although the prospect of warrant checks was widely publicized, DPS provided no public contradiction. *Id*. Not until cross-examination of the DPS representative at trial did DPS take any action, and then only to post a disclaimer on its website. ROA.24833–ROA.24834. (That was also the first time DPS added to its website a *Spanish* version of the instructions on how to obtain an

[9] ROA.27108; ROA.100276:282:11–19; ROA.100497:144:3–6; ROA.100497:144:23–ROA.100498:145:4; ROA.100639:286:5–ROA.100641:288:1.

EIC, *see id.*, again after cross-examination on this topic, *see* ROA.100627:274:22–ROA.100628:275:4.)

The evidence also showed that DPS exercises broad discretion, derived from the statute, in deciding who receives an EIC. This discretion is possessed and exercised by DPS clerks throughout the state—with no guidelines, though sometimes with the involvement of supervisors—in choosing whether to require or waive documentary requirements for each EIC applicant. This issue arose when the DPS official in charge of the EIC program (who testified at trial as the DPS representative), Tony Rodriguez, was asked at trial about one applicant (Anglo) who received an EIC without meeting documentary rules, while other applicants in the same position were turned away. Mr. Rodriguez testified that this variation was in accord with the discretion vested in each local DPS office throughout the State, and confirmed that the source of this discretion is the transportation code, which he claimed fills gaps in S.B. 14.[10]

Mr. Rodriguez also testified that in deciding where to locate DPS offices, convenience for drivers and availability of large tracts of land are principal

[10] ROA.27093; ROA.27103–ROA.27104; ROA.100560:207:18–ROA.100561:208:24; ROA.100625:272:13–ROA.100627:274:17. Section 20(f) of S.B. 14, TEX. TRANS. CODE 521A.001(f), allows DPS to require any EIC applicant to show documentation required by the driver's license provision of the Texas Transportation Code, TEX. TRANS. CODE § 521.142, and that provision, in turn, includes a catch-all provision, § 521.142(e), allowing DPS to require applicants to provide almost any document or information it chooses.

considerations, resulting in a preference for suburban locations near highways as opposed to inner-city locations. *See* ROA.100635:282:15–ROA.100639:286:4.

After a time, DPS began contracting with certain counties to allow certain county officials to issue EIC's, but this program was unfunded, poorly planned, lacked involvement of election officials, and resulted in few issuances. ROA.27116; ROA.101127:365:7–ROA.101132:370:10.

As of the time of trial, after DPS had operated the EIC program for more than a year, it had issued only 279 EICs. ROA.27131.

These dismal results were not surprising, in view of statements by Mr. Rodriguez expressing hostility to the EIC program and complaining that it was outside the normal DPS mission.[11]

G. The Cost of Acquiring S.B. 14 IDs

Every form of S.B. 14 ID available to the general public—that is, every form other than the military IDs—requires payment of an application fee, ROA.27047–

[11] ROA.39717 (email from Rodriguez to EIC employees stating that he needs "negative activity reports to feed the machine up here"); ROA.29718 (email reply from Rodriguez to EIC employee stating that "zero" EIC issuances is "a good number"); ROA:39719 (email reply from Rodriguez to EIC employee stating that "this is getting better by the day" because there had been no EIC issuances or inquiries); ROA.39721 (email from Rodriguez to the head of DPS calling the lack of EIC issuances a "clean sweep" and stating that they had a "close call . . .but the customer opted out"); ROA.100578:225:8–ROA.100580:227:8; ROA.100589:237:2–18 (discussing email in which Rodriguez called the EIC program "mission creep").

ROA.27048, except for the so-called free EIC, which cannot be used for any purpose other than voting (and is so labeled), ROA.38297–ROA.38304. However, under DPS regulations, EIC applicants must present an original or certified copy of their birth certificate, which is not free. 37 TEX. ADMIN. CODE 15.182; ROA.27047.[12]

The normal cost for a certified Texas birth certificate is at least $22, ROA.27047, and it can be significantly higher in some circumstances, ROA.27096–ROA.27099. Apparently recognizing that such a fee if applied to voting would likely be a poll tax, Texas created a new form of certified birth certificate usable only for voting (and so labeled), the so-called EI Birth Certificate. ROA.27095; ROA.40320. Although most of the $22 fee for a certified birth certificate has been waived for the EI Birth Certificate, some of the fee remains. *Id.* By statute, the Bureau of Vital Statistics must "collect an additional $2 fee" when "issuing a certified copy of a certificate of birth." TEX. HEALTH &

[12] The only other documents that will suffice are available only to tiny, specialized categories of people: a driver's license expired for less than two years, a name or gender change court order, or a Citizenship or Naturalization Certificate. ROA.27094–ROA.27095. Texas points to a variety of types of "supporting" documents, Appellants Br. 5, but these are useless unless the applicant also has a birth certificate or one of the other documents listed in the first sentence of this footnote.

SAFETY CODE § 191.0045(e); ROA.27095.[13] Because this fee is statutory, EI Birth Certificate applicants must pay it. Moreover, those seeking EI Birth Certificates must apply in person, even though applicants for other certified birth certificates can apply online or by mail. ROA.27047; ROA.100750:397:16–ROA.100751:398:15. And even applicants who appear in person are automatically charged the full $22 unless they know to ask for the discount rate. ROA.100743:390:2–ROA.100744:391:20.

H. Burden of Obtaining EIC or Other S.B. 14 ID–Witness Testimony

Many plaintiffs testified about the prohibitive barriers they faced when attempting to acquire S.B. 14 ID.

For instance, Floyd Carrier, an 84-year-old veteran, needed his birth certificate to acquire a valid ID but had been born in a location that could have been in any of three different counties. ROA.27097; ROA.98686:34:11–23; ROA.98712:80:4–ROA.98713:81:12. Mr. Carrier and his son contacted local officials, followed up numerous times, paid a fee, and finally received a certified copy of Mr. Carrier's birth certificate, but the certificate was riddled with errors. ROA.27097–ROA.27098; ROA.98653:21:1–6. After again following up numerous times, Mr. Carrier received a "corrected" certificate, but this certificate still listed the wrong date of birth. ROA.27098; ROA.98653:21:7–19;

[13] Local records offices are authorized to add a $1 surcharge, so the actual statutory fee can be $3. ROA.27095.

ROA.98664:32:1–98664:33:1–10. Because Mr. Carrier failed to acquire an accurate, certified copy of his birth certificate, he was unable to acquire an S.B. 14 ID, and was denied the right to vote in the 2013 election. ROA.98711:79:10–ROA.98712:80:3.

Similarly, Gordon Benjamin, who recently moved back to Texas and was a duly registered Texas voter, found himself unable to comply with S.B. 14 even though he has a valid Arizona driver's license, a Social Security card, and a Texas voter registration card. ROA.99222:290:13–23; ROA.99222:290:24–ROA.99223:291:18. Mr. Benjamin, who no longer drives, made at least three different trips to different DPS offices, each time enduring a lengthy and costly bus ride and each time being told that he needed additional documentation to receive an EIC. *Id*. Because Mr. Benjamin was born in Louisiana, the reduced-cost Texas EI Birth Certificate is unavailable to him, and the Louisiana fee was prohibitive for him. ROA.99225:293:6–14. He was denied the right to vote in the 2013 election because he lacked S.B. 14 ID. ROA. 99222:290:2–12. He finally acquired a certified birth certificate only after his sister acquired it for him on a trip through Louisiana. ROA:99224:292:17–ROA:99225:293:3; ROA:99225:293:15-ROA:99226:294:5.

Third, Ken Gandy, who serves on the Ballot Board for Nueces County, possesses only an expired Texas Personal Identification Card. ROA.27110;

ROA.99825:208:2–4, 15–17; ROA.99826:209:6–9. Mr. Gandy took a bus trip lasting over an hour to the closest DPS office, but failed to receive an EIC because, although he has a copy of his birth certificate, the copy is not certified. ROA.27102; ROA.99825:208:23–ROA.99825:209:3. To get a certified copy, Mr. Gandy must pay $30 to New Jersey, his state of birth, and that's more than he can afford. ROA.27099. In the meantime, he must vote absentee, ROA.99827:210:1–13, even though similarly-situated Texans with S.B. 14 ID can vote either in person or by mail, and even though he testified that mail-in voting is not an adequate substitute for in-person voting.[14]

None of these witnesses or any other Plaintiff was ever afforded a "discretionary" waiver of the documentary requirements, as the Anglo voter was, *see supra* at 18, nor were they told that such treatment might be available if the DPS clerk chose to exercise her discretion.

I. History of Discrimination in Texas

There was extensive evidence of the long background of voting discrimination in Texas. ROA.27028–ROA.27038; ROA:45098–ROA:45100. This evidence featured recent instances of discrimination, but included historical discrimination too, because of the surviving legacy of such discrimination, including Anglo voters' tendency to bloc vote against minority or minority-

[14] Other Plaintiffs explain in their briefs why mail balloting is not an adequate substitute for voters who lack S.B. 14 ID but are eligible to vote by mail.

supported candidates, and Anglo candidates' overt racial appeals in contests against minority candidates. ROA.27034–ROA.27038.

J. Legitimate State Interests

Either during legislative debates or during this case, five state interests were advanced to justify S.B. 14: (1) prevent and detect voter fraud; (2) deter and prevent non-citizen voting; (3) increase voter confidence; (4) increase voter turnout; and (5) address bloated voter registration rolls. ROA.27041; ROA.27064–ROA.27070; ROA.27117; ROA.27137–ROA.27138.

The district court acknowledged the legitimacy of these interests, but also inquired about whether any justified or necessitated the burdens imposed by S.B. 14—both as to the number of voters affected and the degree of burden on each voter. That examination did not question the legitimacy or weight of the State's interests, but focused on the link between those interests and specific choices in S.B. 14 favoring and disfavoring certain voters.

For example, the question for the district court was not whether preventing and detecting voter fraud could justify a photo ID law in the abstract, but whether there was evidence that the particular selection of acceptable photo IDs in S.B. 14 was related to the State's need to prevent voter fraud. Here, evidence of the rarity of in-person fraud, especially but not only impersonation, was largely unrebutted. ROA.27064–ROA.27067; ROA.45822–ROA.45823. The structure of voting

makes in-person impersonation so difficult that only "a fool" (to quote Rep. Smith) would risk a prison sentence to try it.[15] ROA.27041; ROA.100337:343:22–25.

Likewise, allegedly bloated voter rolls are not an interest in themselves but possibly facilitate fraud, so the scarcity of in-person impersonation also undermines the bloated rolls-related justification for the specific provisions of S.B. 14. ROA.27140. In addition, the Secretary of State and other state and county offices regularly remove the names of deceased or ineligible voters from the rolls. ROA.47559–ROA.47567; ROA.101564:140:6–24.

As to preventing non-citizens from voting, non-citizens are entitled to obtain several S.B. 14 IDs, most notably the driver's license. ROA.27139; ROA.45158. DPS records show that as of May 2014, over 2,000,000 Texas driver's license-holders were non-citizens, another 4,000,000+ were verified as U.S. citizens, and 14,000,000+ were not recorded as being definitively in either category. ROA.54655–54657.

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[15] A would-be impersonator would have to obtain the "target" voter's registration card, be confident that the target would not appear to vote, and be confident that no one at the polls would know *either* the impersonator *or* the target. ROA.27041; ROA.99131:199:11–ROA.99134:202:10. Out of 20 million votes cast in Texas in the past decade, the number of reported cases of impersonation fraud was two. ROA.45822–ROA.45823. The most experienced elections lawyer in the state (former director of the Secretary of State's Election Division) testified that he knows of only one case of in-person impersonation fraud in 44 years. ROA.99131:199:4–10

The State's interest in enhancing voter confidence was of course recognized as important, but there was no evidence that voter confidence would be affected by the onerous requirements of S.B. 14. ROA.27139. Indeed, there was evidence that the strict and arbitrary terms of S.B. 14 could erode voter confidence. ROA.27139–ROA.27140.

Finally, there was no evidence that voter turnout would increase as a result of S.B. 14, and some evidence that S.B. 14 or similarly strict photo ID laws could decrease voter turnout, especially in view of the large no-match numbers. ROA.27140.

K. The District Court's Remedy

The district court enjoined the statute in its entirety, as required after finding that a statute is infected with discriminatory purpose and would not have been enacted without that purpose. ROA.27167–ROA.27168. Although the district court recognized that the poll tax and undue burden (*Crawford*) claims are "as-applied" claims, the broad injunction necessitated by the discriminatory purpose finding left the district court with no occasion to consider more limited relief that might be appropriate for those two claims alone. ROA.27167–ROA.27168. Additionally, the district court postponed consideration of "preclearance" relief under Section 3(c) of the Voting Rights Act, ROA.27168, and retained jurisdiction

to consider whether any modified photo ID provision would comply with its injunction.[16] *Id.*

[16] The district court's retention of jurisdiction was routine; courts often retain jurisdiction to ensure that injunctions are not evaded. *See Thomas ex rel. D.M.T. v. School Bd. of St. Martin Parish*, 756 F.3d 380, 386–87 (5th Cir. 2014).

SUMMARY OF ARGUMENT

None of Texas's arguments justifies reversing the district court's well-reasoned conclusions.

Intentional racial discrimination. Rather than challenge the district court's factual finding of intentional discrimination under the appropriate "clearly erroneous" standard of review, Texas indulges mainly in fruitless pursuit of *de novo* review. But under decades of Supreme Court and Fifth Circuit precedent, this Court reviews intentional discrimination findings for clear error, and the record here provides ample support for the district court's findings.

Results test of Section 2. The district court correctly found that S.B. 14 results in discrimination in violation of Section 2 of the Voting Rights Act. Other Plaintiff briefs will address the merits of this claim in detail.

Poll tax. Texas insists that the poll tax claim fails under *Crawford*, even though *Crawford* actually reaffirms that charging a fee as a condition for voting violates the 14th Amendment. Moreover, Texas presents hardly any defense to the Veasey-LULAC Plaintiffs' Twenty-Fourth Amendment claim.

Right to vote. Under *Crawford*, courts must carefully balance the state's interests against the burdens that a voter ID law imposes on the right to vote, keeping in mind that any burdens must be *necessary* to serve the state's legitimate interests. Here, the district court found as a matter of fact that S.B. 14 imposes

significant burdens on voters, and found as a matter of fact that, although the State's interests are legitimate and important, S.B. 14's onerous provisions do little to serve those interests. Thus, under *Crawford*, the burdens S.B. 14 imposes on the right to vote are not necessary to serve legitimate interests. Before this Court, Texas has failed to show that this finding was clear error.

ARGUMENT

I. The District Court's Factual Finding that S.B. 14 Is Infected With Racially Discriminatory Purpose Should Be Affirmed

With the voluminous record in this case, the district court's finding of intentional discrimination is well-supported and should be affirmed. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Supreme Court held that a racially discriminatory purpose need not be "the 'dominant' or 'primary' one," counseled courts to engage in a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available," and outlined various evidentiary sources that courts should consider. *Id.* at 264–68; *see also United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009) (applying *Arlington Heights*'s list of evidentiary sources under Section 2's intent prong). Following the Supreme Court's direction, the district court in this case ultimately determined that "proponents of S.B. 14 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 Hispanic electorate." ROA.27159.

Discriminatory purpose is a factual finding reviewable only for clear error. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573–74 (1985) ("clear error" review applies to intentional discrimination findings even when based on "physical or documentary evidence or inferences from other facts"); *Brown*, 561

F.3d at 433-35 (same holding in voting case). "This standard dictates that 'if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" *Brown*, 561 F.3d at 432 (quoting *Anderson*, 470 U.S. at 573–74).

A. The Record Supports the District Court's Ultimate Finding

The district court's intent finding rests on evidence relating to every one of the following *Arlington Heights* evidentiary sources: (1) disparate racial impact; (2) historical background of the decision; (3) sequence of events leading up to the decision; (4) departures from normal procedural practices; (5) substantive departures from the norm; and (6) contemporaneous actions and statements. *Arlington Heights*, 429 U.S. at 266–67.

1. Disparate Racial Impact

At trial, Plaintiffs presented stark, "virtually unchallenged" evidence of disparate impact. ROA.27158. The district court credited the findings of both Dr. Stephen Ansolabehere, who found that "Hispanic registered voters are 58% more likely and African-American registered voters are 108% more likely than Anglo voters to lack qualified S.B. 14 ID," and of Dr. Michael Herron, who reached "effectively the same" conclusion. *Id*. The district court also credited surveys conducted by Drs. Gabriel Sanchez and Matthew Barreto, who found that

"African-American eligible voters are 1.78 times more likely to lack qualified S.B. 14 ID than Anglo eligible voters" and "Hispanic eligible voters . . . are 2.42 times more likely to lack qualified S.B. 14 ID." *Id*. Even the generally "unconvincing" report of Texas's expert Dr. Hood "confirmed Plaintiffs' experts' conclusions regarding the disparate racial impact of S.B. 14." ROA.27082–ROA.27083. Texas complains that in describing S.B. 14's racial disproportionality, the district court used percentages that are a "misuse of data" and "are of little relevance," Appellants' Br. 36, but those bald assertions ignore the fact that the data—whether focusing on the percentages of "match" voters or "no-match" voters—adds up to a very large number of minority voters disproportionately disfranchised by S.B. 14—even under the state's expert's (Dr. Hood's) analysis. *See supra* at 10–11.

2. Historical Background of the Decision

The district court examined Texas's "long history of discriminatory voting practices," ROA.27153, including the recent example of the racially discriminatory districting plan struck down by the Supreme Court in *LULAC v. Perry*, 548 U.S. 399 (2006). ROA.27032. The district court also described how past forms of voting discrimination have left legacies that contribute to the racially divided atmosphere in which the Texas legislature has operated. ROA.27034–ROA.27037. The district court concluded that this history demonstrates a "recalcitrance that has

persisted over generations despite the repeated intervention of the federal government and its courts on behalf of minority citizens." ROA.27032.

In assessing the immediate background of the new law, the district court also considered the largely unrebutted report of Plaintiffs' expert Dr. Allan Lichtman, who explained that "demographic trends and polarized voting patterns . . . demonstrate that Republicans in Texas are inevitably facing a declining voter base and can gain partisan advantage by suppressing the overwhelming Democratic votes of African-Americans and Latinos." ROA.27153; ROA.45101–ROA.45103.

3. Sequence of Events Leading Up to the Decision

The district court found that events leading up to adoption of S.B. 14 demonstrated the legislature's pursuit of intentionally discriminatory ends. The legislature made successive voter ID bills "increasingly harsh," and, "despite opposing legislators' very vocal concerns," never conducted an "impact study or analysis . . . [to] determine whether the bill would unduly impair minority voting rights." ROA.27154. The bill's proponents rejected an amendment that would have required the Secretary of State to assess the racial impact of S.B. 14 after implementation and report publicly what the legislature already knew and intended. ROA.27171.

A logical course of action following the Supreme Court's 2008 decision in *Crawford v. Marion County Election Board* would have been to make the Texas

bill more like the Indiana law, or at least maintain features in previous Texas bills that were similar to the Indiana law. Instead, in 2009 and 2011, Texas not only made photo ID legislation increasingly stringent but moved the ultimate Texas photo ID law further from the Indiana statute. This counter-intuitive behavior suggests that *Crawford* was being used as subterfuge rather than as a good-faith model.

4. Departures from Normal Procedural Practices

In enacting S.B. 14, the legislature departed sharply from its usual procedures. Texas argued at trial that these short-cuts were needed to overcome opposition that had blocked previous bills, but the district court found that the maneuvers—such as designating the bill as an "emergency" and bypassing the standing committee with jurisdiction—were in fact designed not just to move the bill expeditiously but to block real consideration of serious issues, *i.e.*, to ensure that the bill "would reach the end of the legislative journey relatively unscathed." ROA.27153.

This truncated process foreclosed due consideration of whether certain provisions were likely to injure minority voters, or of why S.B. 14 had been changed from previous bills to depart further from the Indiana and Georgia laws. ROA.27074.

The legislature's refusal to consider or ameliorate S.B. 14's racial impact was most obvious at the amendment stage, when amendments likely to benefit minority voters were routinely rejected, while the concealed carry amendment, benefiting Anglo voters, was adopted. ROA.27062–ROA.27063; ROA.27169–ROA.27172.

5. Substantive Departures from the Norm

Moreover, the district court found that S.B. 14 departed substantively from its stated goal of combating voter fraud. Although everyone, including legislators, agreed that mail ballot fraud was Texas' most significant voter fraud problem, S.B. 14 not only provided no protection against such fraud but actually increased the threat of fraud by making mail balloting mandatory—not optional—for voters over age 65 who, as is often the case, no longer have a driver's license or other form of S.B. 14 ID.

In drafting S.B. 14, as Dr. Lichtman testified without contradiction, every significant choice the legislature made to exclude or include voters was a choice that disadvantaged minority voters or benefited Anglo voters, often with no conceivable relation to combatting voter fraud. ROA.27073–ROA.27074. Although Texas insists that the legislature modeled S.B. 14 on the Georgia and Indiana law, those laws, unlike S.B. 14, allow voters to show any state or federal government-issued photo ID, Georgia allows voters to use student IDs and county-

issued IDs, and Indiana allows indigents to vote without ID—all differences that disproportionately harm minority voters in Texas. ROA.27156. S.B. 14's supporters were well aware of these differences, yet rejected ameliorative amendments to eliminate the differences, while exempting mail ballots, a method more often used by Anglo voters. ROA.27074. Overall, the district court found that these provisions were designed to maximize the number of Anglos who can vote while disfranchising racial and ethnic minorities. ROA.27073–ROA.27074.

6. Contemporaneous Actions and Statements

Contemporaneous statements by legislators and key staff show the Texas legislature knew exactly what it was doing. Rep. Todd Smith, for example, stated he knew minorities would be disproportionately affected by S.B. 14. ROA.27157. And Bryan Hebert, doubting that S.B. 14 could receive Section 5 preclearance given its racially discriminatory impact, unsuccessfully urged the legislature to expand the list of S.B. 14 IDs. ROA.27158.

The district court noted that the 2011 legislative session also addressed a number of other racially charged issues, including "anti-immigration laws [and] an effort to abolish sanctuary cities—and there were even concerns about leprosy being raised." ROA.27157. The district court observed that two courts had made decisions indicating racial discrimination in other actions of the 2011 Texas

legislature. ROA.27154.[17] The district court was well aware of the limits on the significance of these two decisions, but they could hardly be ignored—as Texas would like this Court to do—as pieces of the mosaic of evidence confronting the district court.[18]

Finally, the district court recognized that the Section 2 Senate factors,[19] including historical evidence, provide "circumstantial evidence of discriminatory purpose." ROA.27152 (citing *Brown*, 561 F.3d at 433); *see Rogers v. Lodge*, 451 U.S. 613, 624 (1984) (finding Senate factors relevant to discriminatory intent).

B. Texas's Objections Are Meritless

As noted, the district court's finding of discriminatory purpose is reviewable only for clear error. Because of that standard, district court findings of

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[17] In one case, a district court found a redistricting plan to be racially discriminatory. *See Texas v. United States*, 887 F. Supp. 2d 133, 225 (D.D.C. 2012), *vacated and remanded on other grounds*, 133 S. Ct. 2885 (2013). In the other case, a different district court, in drawing an interim plan for a different legislative body, pointed to evidence that the legislature had discriminated against Hispanic voters as a means of obtaining partisan advantage. *Perez v. Perry*, No. 11-360, Order (W.D. Tex. Mar. 19, 2012) (three-judge court) (Smith, Garcia, Rodriguez, J.J.).

[18] Texas criticizes the district court for citing the first case because vacatur erases a case's "ruling and guidance." Appellants' Br. 53 n.26. But the district court acknowledged that the decision was vacated, and vacatur does not bar a court from taking note of evidence and unrefuted findings. As to the second case, Texas's only complaint is that the case is still pending, but that does not preclude a court from taking note of a preliminary finding.

[19] The Senate factors are from the Senate Report explaining the 1982 amendments to Section 2 of the Voting Rights Act. S. Rep. No. 97-417.

discriminatory purpose are virtually never overturned by this Court. Texas has found only one such case, *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984), which is far different from this one. Relying only on evidence that one member of a city charter amendment commission was an apparent racist, the district court had found a charter amendment passed by that commission to be intentionally racially discriminatory. This Court held that the district court had failed to apply *Arlington Heights* properly, because while a legislative body might have one racist member, that does not mean the body always acts with a racially discriminatory intent. *Jones*, 727 F.2d at 371. That is a far cry from the facts of this case, with its voluminous evidence on every facet of proof deemed relevant by *Arlington Heights*. *Cf.* ROA.27152 ("The Court does not attempt to discern the motivations of particular legislators and attribute that motivation to the legislature as a whole.").[20]

In this case, Texas suffers not only from Plaintiffs' massive proof, but also from a dearth of contrary evidence presented by Texas in defense of S.B. 14. Particularly noteworthy is the relative absence of floor or committee statements by

[20] Citing *Jones*, Texas also argues that district courts cannot use "multiple inferences" to find discriminatory purpose. Appellants' Br. 38. It's not clear what Texas means by "multiple inferences." The only general rule to draw from *Jones* is that courts should not find discriminatory intent based entirely on conjecture and unsupported assumptions and should instead follow *Arlington Heights*. Such a proposition is unexceptional. The district court's finding here is based on far more than conjecture and adheres closely to the *Arlington Heights* analysis.

supporters (the usual main type of evidence offered to support a supposed legitimate purpose) to explain the dubious "picking and choosing" provisions. Afforded the opportunity at trial to supply the missing explanations, legislative sponsors and supporters testified that they could not remember why these actions were taken.

Faced with these challenges, Texas takes two insufficient and misguided approaches: asking for *de novo* review instead of clear error review, and urging that the findings it would have made are more persuasive than those the district court made.

1. Texas's "Clear and Compelling Evidence" Standard Is Erroneous

In its first argument for rigorous review of the district court's fact finding, Texas creates from whole cloth a supposed evidentiary standard that would require reversal unless an intentional discrimination finding is supported by "clear and compelling evidence." Appellants' Br. 37.

Texas's supposed rule is based on misinterpreting two cases that do not involve discriminatory intent and instead involve issues of statutory interpretation: *Kansas v. Hendricks*, 521 U.S. 346 (1997), and *Flemming v. Nestor*, 363 U.S. 603 (1960). Texas says these cases stand for the proposition that courts should generally defer to the "legislature's stated purpose," Appellants' Br. 37, but this rule applies only in the statutory interpretation context, where courts naturally

defer to the stated purpose of the authors of legislative text. *Hendricks*, 521 U.S. at 361; *Flemming*, 363 U.S. at 616–17. In this case, this Court is not attempting to discern the meaning of S.B. 14's *text.*

Texas fails to cite any case where this Court or any other has demanded "clear and convincing" evidence to demonstrate racially discriminatory *purpose*. The law is plainly contrary to Texas's desired rule. *See Mississippi State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 408 (5th Cir. 1991) (applying clear error review to "whether the Mississippi Legislature enacted [a law] for a discriminatory purpose").

2. Texas's Assertion that the District Court Applied the Wrong Legal Standard Is Meritless

Texas's next claim is that the district court applied the wrong legal standard for finding intentional discrimination. Texas is wrong.

As the district court explained, "Discriminatory purpose implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part because of its adverse effects upon an identifiable group." ROA.27151–ROA.27152. Texas acknowledges that the district court stated the correct standard (though it calls it "lip service"), but complains at length that the evidence the district court relied on (which it grievously misstates) "cannot support the necessary inference that the legislature enacted S.B. 14 *because of* its alleged

impact." Appellants' Br. 40. But whether, under the correct definition of intentional discrimination, the evidence supports the district court's ultimate finding is quite obviously a question of fact, reviewed for clear error.

3. Texas Misconstrues *Arlington Heights*

Texas's third argument for *de novo* review is that, "as a matter of law," *Arlington Heights* somehow "foreclosed" the district court from considering circumstantial evidence. This argument is entirely at odds with *Arlington Heights*'s instruction that courts examine "such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. Nonetheless, Texas presents two theories.

First, Texas says that, absent direct evidence of intent, *Arlington Heights* allows an inquiry into circumstantial evidence only after a plaintiff has demonstrated disparate racial impact. But *Arlington Heights* says nothing like this, instead noting only that "the impact of the official action, whether it bears more heavily on one race than another, may provide an important starting point." *Arlington Heights*, 429 U.S. at 266. Suggesting a possible starting point is a far cry from Texas's absurd rule. Furthermore, despite Texas's contrary assertions, there is extensive evidence that S.B. 14 has a disparate racial impact, as well as evidence that legislative leaders anticipated as much. *See supra* at 8–11 (statistical evidence and Rep. Smith and Hebert statements).

Second, Texas contends that *Arlington Heights* allows consideration of circumstantial evidence only when legislative privilege has blocked access to direct evidence. Appellants' Br. 42–46. Although *Arlington Heights* observed that legislators' testimony will often be unavailable, nothing in *Arlington Heights* even remotely supports Texas's strange proposal. Texas also relies on *Price v. Austin Independent School District*, 945 F.2d 1307 (5th Cir. 1991), but that decision simply affirmed—under a clearly erroneous standard of review—that district courts can consider both direct evidence from lawmakers and circumstantial evidence.[21]

4. Texas's Complaints About the Evidence Do Not Show Any Error By the District Court, Let Alone Clear Error

Texas raises three other challenges to the district court's finding, all of which deal with the district court's consideration of the evidence. Apart from one passing comment about *de novo* review, Appellants' Br. 50, Texas seems to understand that these complaints are part of "clearly erroneous" review. None diminishes the force of the district court's intent finding. It is worth noting,

[21] Related to this is an argument that the district court should have given more weight to the absence of "smoking gun" evidence. Appellants' Br. 45. Though such evidence is rarely available in modern times, Rep. Smith's openness about the racial implications of S.B. 14 comes pretty close. In any event, the district court did consider the testimony of S.B. 14's supporters, but that testimony simply did not convey what Texas might have liked. As this Court explained in *Price*, district courts are in the best position to weigh all available intent evidence. *Price*, 945 F.2d at 1317 (criticizing the plaintiffs for "merely seek[ing] to have this court reassess the credibility of witnesses and the overall weight of the evidence").

moreover, that these meritless "flyspeck" objections address only a tiny fraction of the evidence before the district court. That in itself confirms the soundness of the district court's finding of fact.

Opposition legislators. Texas first asserts that the district court improperly relied on statements by legislators opposed to S.B. 14 as evidence of the views of the bill's supporters. That is simply wrong. In the fact section of its opinion, the district court did note that legislators opposed to S.B. 14 testified that the bill "had to do with racial discrimination" rather than voter fraud, ROA.27070–ROA.27072, as well as about the unprecedented legislative process and their continued, fruitless requests for studies of S.B. 14's impact, ROA.27051–ROA.27063. But the district court did not regard this testimony as representing the views of the bill's supporters, and instead simply treated it as part of the broad record demanded by *Arlington Heights*. *See Anderson*, 470 U.S. at 574 (noting that trial judges have particular expertise in making credibility determinations).[22]

Legislative process. Texas next asserts that the district court should have found that supporters of S.B. 14 were responding to legitimate pressures, including public opinion polls and Democratic legislators' intransigence. According to

[22] Texas cites a case involving statutory meaning, Appellants' Br. 47, but even in that different context the views of a bill's opponents, though obviously deserving less weight, "are relevant." *Mercantile Tex. Corp. v. Board of Governors*, 638 F.2d 1255, 1263 (5th Cir. 1981).

Texas, public opinion polls showing wide support for voter ID laws and the Supreme Court's decision in *Crawford* gave Texas a green light to adopt any voter ID law it pleased. But "acts generally lawful may become unlawful when done to accomplish an unlawful end." *Western Union Tel. Co. v. Foster*, 247 U.S. 105, 114 (1918); *see also White v. Regester*, 412 U.S. 755, 768 (1973) (striking down multi-member districts in Texas as intentionally discriminatory, soon after upholding a similar plan in Indiana). As to the opinion polls, the district court found that the public support for voter ID requirements provides no basis for S.B. 14's specific onerous provisions, ROA.27074, nor does it explain why ameliorative amendments to S.B. 14 were routinely rejected with little discussion.

As for Texas's complaints about Democratic intransigence, the district court fully understood the realities of the legislative process, but found that departures from legislative norms allowed the legislature to speed to passage a discriminatory law without having to explain the need for the bill's particular discriminatory provisions. ROA.27154. In light of the uncontradicted testimony of Dr. Lichtman that the legislature's picking and choosing consistently disfavored minority voters or favored Anglo voters, the district court had good reason to reject Texas's preferred justification for legislative maneuvering. ROA.27073–ROA.27074.

Impugning Texas for its history of intentional discrimination. Texas finally claims the district court placed too much reliance on long-ago problems, like the

"white primary." But Texas's acts of invidious discrimination are not ancient history. Consistent with *Arlington Heights*, the district court recognized recent and ongoing recurrences of the state's discriminatory ways and considered the continuing legacy of past discrimination, including socio-economic disparities, racially polarized voting, and Anglo candidates' racial appeals. Texas argues that increasing minority voter participation in recent Texas elections somehow separates S.B. 14 from the State's history, but rising rates of minority voter participation are actually one reason, according to Dr. Lichtman, why Texas legislators had a strong incentive to pass a discriminatory law. ROA.27153. In light of the overall record, the district court's consideration of Texas' history of voting discrimination was fair and well supported.

C. S.B. 14 Would Not Have Been Enacted Absent Racially Discriminatory Intent

"Once 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." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). As the district court observed, because Plaintiffs had met their initial burden on the intent issue, Texas had the burden of proving that the legislature would have enacted S.B. 14 absent racially discriminatory intent. But Texas presented no evidence showing that "the

discriminatory features of S.B. 14 were necessary to accomplish any fraud-prevention effort." ROA.27158.

Texas argues that "the political imperative to pass a voter-ID bill was sufficient to guarantee passage of S.B. 14 in spite of, not because of, any alleged impact on any group of voters." Appellants' Br. 55–56. But the proper question under *Hunter* is whether Texas would have enacted the particular, onerous provisions of S.B. 14 absent racially discriminatory intent, not whether Texas would have passed some other voter ID bill. Texas has presented no evidence to carry its burden on this question.

Because the district court committed no clear error in determining that Texas enacted S.B. 14 at least in part for discriminatory reasons, and because Texas has failed to show that S.B. 14's onerous restrictions would have been enacted absent discriminatory intent, this Court should affirm the district court's holding that S.B. 14 violates the "purpose prong" of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution.

II. S.B. 14 Has a Discriminatory Result in Violation of Section 2 of the VRA

The district court carefully reviewed the facts and law in correctly finding that S.B. 14 violates the "results" prong of Section 2 of the Voting Rights Act. The Veasey-LULAC Plaintiffs refer this Court to the briefs of the other Plaintiffs, to which these Plaintiffs fully subscribe.

III. S.B. 14 Is a Tax on Voting In Violation of the 14th and 24th Amendments

In 1964, the Constitution was amended to declare that a citizen's right to vote in a federal election "shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." U.S. Const. amend. XXIV. The Supreme Court subsequently declared it *per se* unconstitutional under the Fourteenth Amendment for states to "make[] the affluence of the voter or payment of any fee an electoral standard." *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 666 (1966).

For those who lack S.B. 14 ID and who are ineligible to receive a free military ID, S.B. 14 conditions voting on presentation of a certified birth certificate, a document that cannot be obtained without paying a fee. Therefore, as the district court held, the law (not simply the regulations) violates the 24th Amendment because it is "any poll tax or other tax," and it violates the 14th Amendment because it "makes . . . payment of any fee an electoral standard."[23]

[23] As the district court rightly recognized in its analysis and in awarding relief, ROA.27167–ROA.27168, the poll tax claim is an "as-applied challenge, *i.e.*, as applied to voters lacking S.B. 14 ID now and in the future. Appropriate relief for this claim is discussed *supra* at 26 and *infra* at 63.

A. The Mandatory Fee for the Mandatory Birth Certificate for the EIC is a Poll Tax

Incidental burdens on voters are not taxes, as the district court correctly ruled.[24] What Texas has done is far different. Through the interaction of S.B. 14 with other statutes and regulations, Texas has created an ingenious regime in which a non-military voter disfranchised by S.B. 14 *cannot* regain the franchise *without* paying a fee to the State for a certificate that has no function except to allow that voter to cast a ballot.[25]

- Step 1: The EIC is the only S.B. 14 photo ID that purports to be free,
- *BUT*, Step 2: A certified birth certificate is a prerequisite for getting the EIC,
- *SO*, Step 3: Texas created the supposedly free "EI Birth Certificate," usable only for voting purposes, *but still* charges a fee for it.

To make it clear that both the EIC and the EI Birth Certificate are nothing more than tickets of admission to the ballot box, each says on its face in bold letters: "For Elections Purposes Only. Cannot Be Used For Identification."

[24] Incidental costs such as paying for gas to drive to the polls are not mandatory costs imposed as a condition for voting.

[25] Certain narrow categories of people, not the general public, may provide alternative documents. *See supra* at n.12.

Moreover, as the district court noted, Texas added an extra "thorn": whereas ordinary birth certificates may be obtained online or by mail, the EI Birth Certificate requires an application in person (for reasons unknown, ROA.100753:400:4–11), and the voter must know enough to ask for the reduced price. ROA.27047.

Thus, under S.B. 14, it is not just that *some* voters may need birth certificates and *may* have to pay money to obtain them; state law conditions voting on payment for required documents. Since the certified birth certificate is "functionally essential" to vote, as the district court found, the mandatory fee qualifies S.B. 14 as a poll tax.[26]

Texas makes a point of saying, as if it makes a difference, that "S.B. 14 itself does not impose any fees for supporting documentation or require a birth certificate to get a free voter ID; [agency regulations] plus a pre-existing statute impose these requirements." Appellants' Br. 33–34. But as the district court recognized, the Constitution "nullifies sophisticated as well as simple-minded modes of impairing the right guaranteed."[27] Texas's scheme is not even in the sophisticated category.

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[26] Texas appears still to be under a permanent injunction barring use of a poll tax. *United States v. Texas*, 252 F. Supp. 234, (W.D. Tex 1966), *aff'd*, 384 U.S. 155 (1966).

[27] Quoting *Harman v. Foersennius*, 380 U.S. 528, 540–41 (1965).

Texas's main defense as to the 24th Amendment is to claim, with no supporting citations, that the birth certificate fee is not a tax. Yet, if the $2-$3 statutory fee for the certified birth certificate brings no goods or services other than the right to vote, it is a tax for being allowed to vote. *See National Fed. Of Ind. Businesses v. Sebelius*, 132 S.Ct. 2566, 2595 (2012), *citing License Tax Cases*, 5 Wall. 462, 471 (1867) (finding that mandatory fees can constitute taxes). The 24th Amendment bans not only a poll tax but any "other tax," showing that it is meant to be applied broadly to prevent any evasions, "simple-minded" or "sophisticated."

Texas's main defense as to the 14th Amendment is to cling to Justice Stevens's words in *Crawford*. But *Crawford* reaffirmed *Harper*'s *per se* rule that requiring payment of fees as a precondition for voting is unconstitutional, even as *Crawford* refused to extend that *per se* rule beyond the poll tax context. *See Crawford*, 553 U.S. at 198 ("The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under our reasoning in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification."). True, *Crawford* found that *Harper*'s *per se* rule did not doom the Indiana law, but that was primarily because, unlike S.B. 14, the Indiana law allowed indigents to cast ballots *without paying the statutory fee*. *See id.* at 186 & n.2. The Texas law contains no similar

accommodation and thus falls squarely within the explicit prohibition of *Harper*.[28] Moreover, the Supreme Court in *Crawford* was not confronted with the spectacle of a ticket of admission to the ballot box labeled "For Elections Purposes Only. Cannot Be Used For Identification," and carrying a price tag.

This is consistent with the approach taken in Georgia, where the initial photo ID statute requiring payment of a fee was struck down as a poll tax, *see Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1366–70 (N.D. Ga. 2005), and where the amended statute was upheld only because the legislature eliminated all statutory fees, *see Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1346–47 (11th Cir. 2009); *see also Milwaukee Branch v. Walker*, 851 N.W.2d 262, 277 (Wis. 2014) (holding that a fee for a required birth certificate would violate *Harper*, and interpreting state law to eliminate the poll tax); *City of Memphis v. Hargett*, 414 S.W.3d 88, 106 (Tenn. 2013) (holding that fees for voter identification did not constitute poll taxes only because voters could comply with the law without paying a fee); *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 463-66 (Mich. 2007) (same).

Texas also emphasizes the Ninth Circuit's opinion in *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012), but that case provides Texas no help. Unlike S.B. 14,

[28] In any event, nothing in *Crawford* provides any defense to the 24th Amendment, which was not an issue in that case.

the Arizona law challenged in *Gonzalez* allowed all voters to vote early without showing photo ID and to present a "wide variety" of free identification documents at the polls, such as official mail. *Gonzalez v. Arizona*, No. 06-1268, 2006 WL 3627297 at *6 (D. Ariz. Sep. 11, 2006).[29]

B. The Poll Tax Is Not Just a Regulatory Problem But Invalidates S.B. 14 Itself

Texas argues that if there is a poll tax, it is simply a regulatory issue not affecting S.B. 14. However, Sections 9 and 14 of S.B. 14 condition the right to vote on presentation of one of seven specified IDs. Because the EIC is not truly free, S.B. 14 provides no free path to the ballot box and is therefore unconstitutional, just as if the EIC had never been created, or as if S.B. 14 specifically provided that an EIC costs $2 or $3.

Accordingly, this Court, like the district court, should prevent Texas from turning back the clock fifty years by re-implementing a poll tax.

[29] Moreover, in *Gonzalez*, the Ninth Circuit read *Harper* to require a showing of "invidious intent." *Gonzalez*, 677 F.3d at 408–09. This unique reading of *Harper* is demonstrably wrong, since, under *Harper*, "the requirement of fee paying *causes* an invidious discrimination that runs afoul of the Equal Protection Clause." *Harper*, 383 U.S. at 668 (emphasis added).

IV. S.B. 14 Violates the 1st and 14th Amendment Rights of Voters Who Lack S.B. 14 ID

A. The Constitutional Test

As observed *supra*, Texas argues as if the Supreme Court's *Crawford* decision was a free pass for the State to enact any voter ID law it liked. That is clear from Texas's opening sentence, which says: "*Crawford* held that Voter ID laws do not substantially burden the right to vote when States offer free IDs." Appellants' Br. 16.

But that is *not* what *Crawford* held (nor, in any event, does Texas offer free IDs). What *Crawford* requires, and what the district court did, is to recognize *both* of two sometimes-competing claims—the individual's right to vote and the state's interest in regulating elections—and to balance them.

The balancing requirement (not mentioned by Texas in its entire 15-page discussion of the *Crawford* claim) arises from the fact that the right to vote is deemed fundamental. *E.g. Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). At the same time, states have a strong interest in regulating elections (but only to ensure that they are fair, honest, and orderly). *Storer v. Brown*, 415 U.S. 724, 730 (1974). Such regulations "inevitably affect[]—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). The district court recited this balancing test as its first step:

> 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*."

ROA.27127 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)); *accord Voting for America, Inc. v. Steen*, 732 F.3d 382, 387–88 (5th Cir. 2013); *Wilson v. Birnberg*, 667 F.3d 591, 598 (5th Cir. 2012).

As the district court recognized, the requirement that courts "tak[e] into consideration" whether voting restrictions impose burdens that are not necessary to serve legitimate state interests is not the same as "strict scrutiny," which *requires* the narrowest possible tailoring, or "rational basis" review, which would discount or ignore the voter's interests. *See Burdick*, 504 U.S. at 440 n.10 (distinguishing its test from strict scrutiny's "rigid narrow tailoring requirements").

Crawford itself understood that this balancing test applies to voter ID laws. As Justice Stevens described the test in *Crawford*, any burden "must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation" on voting, "however slight that burden may appear." 553 U.S. at 191.

This balancing was not actually carried out in *Crawford*, because, as the Supreme Court explained, the factual record in that case failed to provide any

substantial information regarding the nature and scope of the burdens imposed by the Indiana statute. *Id.* at 200. In particular, plaintiffs failed to identify "the number of registered voters without photo identification" or to "provide any concrete evidence of the burden imposed on voters who currently lack photo identification." *Id.* at 200-01. This lack of burden evidence in *Crawford*, in turn, limited the Court's ability to conduct a rigorous balance of the interests asserted by Indiana, or to evaluate the extent to which those interests justified the restriction. *Id.* at 200-02.

The plaintiffs in *Crawford* were further handicapped because they were bringing a facial challenge to the statute, in all its applications and as applied to *all* voters, in contrast to this case, which involves an as-applied challenge, *i.e.*, a challenge to S.B. 14 solely as applied to those voters who lack or will lack a qualifying photo ID.

B. The District Court's Evaluation of the Burdens

Having spelled out the correct legal standard, the district court began with the first question posed by the Supreme Court, that is, on how many voters does the burden fall? The comprehensive process jointly conducted by Plaintiffs and Texas produced detailed expert testimony placing the number of registered voters

lacking S.B. 14 ID at more than 600,000.[30] *See supra* at 8–10. The number of registered voters affected here is thus 12 to 15 times greater (depending on whose figures are used) than the 43,000 registered voters that the Supreme Court used as the most likely figure in *Crawford.* So the number of voters burdened in Texas is vastly larger.

The next step was to consider evidence about the degree of burden faced by these 600,000 registered voters, which was also greater here than in Indiana. The district court considered S.B. 14's requirement that voters visit DPS offices to acquire S.B. 14 IDs. DPS offices are open only during limited hours and are often located in places that may be inaccessible to inner-city residents, particularly those who must depend on generally non-existent public transportation or on finding rides. There was substantial evidence cited by the district court that what may seem a small burden to a middle-class driver with a relatively flexible schedule is far from insignificant for a poor person with no car who works when the closest, but still distant, DPS office is open. ROA.27084–ROA.27091. Trial testimony by

[30] Texas's expert, Dr. Hood, who would have made only slight reductions, still found that the number of registered voters unable to vote in person because of S.B. 14 exceeds 500,000. ROA.27129–ROA.27130; ROA.97443.

would-be voters who are poor made these points movingly, and Texas failed to counter their stories. ROA.27101–ROA.27111.[31]

The district court also reviewed the evidence concerning the EIC. The legislature simply told DPS, a law enforcement agency, to create the EIC, with virtually no guidance. The result was predictably dismal. DPS required fingerprints and its personnel made statements threatening EIC applicants with "warrant checks" and possible arrest. The head of the EIC program expressed open hostility to the program. *See supra* at 19 & n.11.

Two of the most serious flaws resulting from S.B. 14's open-ended delegation to DPS were (and remain) the birth certificate fiasco and the standardless discretion of DPS personnel. The birth certificate problem is more fully described in the poll tax section of this Brief, but it imposes a specific cost on virtually every applicant for the supposedly free EIC. ROA.27093–ROA.27101. As to discretion, Plaintiffs presented evidence of DPS's disparate treatment of EIC applicants, allowing some but not others to receive the EIC needed to vote without showing supposedly required documents. ROA.27103–ROA.27.104.

When the DPS representative in charge of the EIC program (Mr. Rodriguez) was questioned at trial about this disparate treatment, he testified that it was an

[31] Additional detailed evidence describing the burdens is contained in the briefs of other Plaintiffs, including arguments presented under Section 2's "results" test, and that evidence also supports the *Crawford* claim.

exercise of discretion that was available for use by any of the hundreds of DPS clerks throughout the state, sometimes in consultation with supervisors. *See supra* at 18. He further testified that there are no rules or guidelines about how or when to exercise this discretion, leaving those DPS clerks essentially on their own in deciding whether to provide the right to vote to those who apply for an EIC. *See id*.[32] This is not simply an administrative issue; asked what authorized such discretion, Mr. Rodriguez testified that the discretion is provided pursuant to state statute. *See id*. Because Mr. Rodriguez was in charge of the EIC program, and was put forward at trial as the DPS representative, his statements about the administration of the EIC, including discretion, are authoritative. *Voting for America*, 732 F.3d at 387. Moreover, Plaintiffs' expert Buck Wood provided unrebutted testimony that election regulations are often administered at the local level in a discriminatory fashion. *See* ROA.99141:209:20–ROA.99143:211:8.

C. The District Court's Recognition of the State's Interests and Its Balancing of Them Against the Voters' Interests

Against the background of this proof of substantial burdens, the district court turned to the state's interests. Under Supreme Court cases, including *Crawford*, the court below inquired as to both the legitimacy and the weight of the state's

[32] Minority applicants for the EIC did not receive the benefits of the discretion accorded an Anglo voter, who was provided an S.B. 14 ID despite lacking supporting documentation. *See supra* at 18.

interests. The inquiry, then, is not simply whether *a* voter ID law is needed to advance certain state interests, including preventing voter fraud, maintaining voter confidence, and promoting voter turnout. The question is whether the specific provisions of S.B. 14 were necessary for those purposes.

Here, the court acknowledged the full force of these state interests as a matter of law, but found as a matter of fact that these interests did not justify the burdens S.B. 14 imposes on voters. ROA.27141–ROA.142; *see Miller v. Johnson*, 515 U.S. 900, 917–19 (1995) (reviewing findings of fact for clear error even though those findings went to whether a particular law is sufficiently narrowly tailored). As explained above, legislators barely even attempted to tie their picking and choosing of IDs to some legitimate state interest. The racial disparities resulting from the burdens further undermine Texas's claim that S.B. 14 is "necessary" to advance the state's legitimate interests. This is not to say that the Constitution empowers the courts to be a statute's editor, but when a statute is so out-of-keeping with the avowed purposes and interests advanced by the state, the *Burdick-Crawford* test obligates the court to make the hard judgment that the statute is unconstitutional. That is precisely what happened here.

D. The State's Objections are Insufficient

Texas nowhere in its 15-page brief section on *Crawford* talks about balancing burdens and state interests. Texas instead proceeds as if the statute

should be judged under the "rational basis" test, but as the district court observed, and as is explained *supra*, that is manifestly not the test here. ROA.27127–ROA.27129. A rational basis test would give no weight to the individual's interest in voting, a proposition emphatically contradicted in numerous Supreme Court cases. *E.g. Burdick*, 504 U.S. at 433 (observing that because "voting is of the most fundamental significance under our constitutional structure," laws that burden the right to vote must receive heightened scrutiny). Nor, of course, is the *Anderson-Burdick-Crawford* balancing test a form of strict scrutiny. The balancing test, which the district court correctly applied here, is between the two poles of "strict scrutiny" and "rational basis," recognizing the interests of the state and the individual.

Appellants also make a number of other specific legally flawed arguments. Relying on *Billups*, they say that plaintiffs have failed to show that S.B. 14 causes any injury because plaintiffs have failed to find anyone whom S.B. 14 absolutely prevents from voting. But "absolutely prevents" is plainly not the constitutional test; a law need not "absolutely" prevent people from voting to be regarded as disfranchising and thus be held invalid. Moreover, Texas ignores the no-match list and survey results—and even the findings of Texas's own expert—showing that hundreds of thousands of voters lack S.B. 14 IDs. *See supra*. That critical testimony was missing in *Billups*, where the plaintiffs tried to quantify the number

of affected voters but produced results that were incomplete and erroneous. *Billups*, 554 F.3d at 1354. Here, on the other hand, the district court accepted Plaintiffs' well-supported expert testimony and the live testimony of witnesses who were *in fact* disfranchised by S.B. 14, *i.e.*, who in fact lack S.B. 14 ID. *See Applewhite v. Commonwealth*, No. 330 M.D.2012, 2012 WL 4497211, at *2–*3 (Pa. Comm. Ct. Oct. 2. 2012) (finding that issuance of over 10,000 new election IDs did not sufficiently eliminate "voter disenfranchisement" resulting from Pennsylvania's voter ID law when "somewhat more than 1% and significantly less than 9%" of the state lacked sufficient ID).

Appellants also claim that studies in Indiana and Georgia showed no decline in turnout after their voter ID laws were implemented, but those studies largely involved the 2008 Presidential election, which, as Texas's expert Dr. Hood himself testified, cannot be relied upon because of the "Obama effect." ROA.27068.

Appellants say that DPS arranged for voters to obtain photo IDs in counties where there was no DPS office, but evidence showed that these arrangements are just as defective as the remainder of Texas's effort. For example, the sole Edwards County official who could issue EICs was the "dispatcher and temporary jailer." ROA.40841–ROA.40842. And many counties, including La Salle County and Hansford County, accept EIC applications only on certain days at specific times,

even though the offices that issue EICs are open during all normal business hours. ROA.40879–ROA.40880; ROA.40857–ROA.40858.

E. The District Court's Decision Rests on Findings of Fact

The degree of burden on the right to vote is a question of fact. The legitimacy and weight of the state's interests is a question of law, but whether S.B. 14 and its resulting burdens were necessary to advance those interests is a question of fact. *See Miller*, 515 U.S. at 917–19 (treating whether state provisions were sufficiently narrowly tailored to achieve a compelling state interest as a question of fact).

The district court made the requisite findings of fact called for in *Crawford*, and those findings are entitled to deference, including review under a "clearly erroneous" standard. The district court's holding that S.B. 14 unnecessarily violates voters' 1st and 14th Amendment rights should thus be affirmed.

V. The District Court's Remedy Was Appropriate

Finding a racially discriminatory purpose in S.B. 14, and with insufficient proof that the law would have been enacted without that invidious purpose, the district court enjoined the photo ID portions of S.B. 14 in their entirety, as it was required to do because an official act taken with a discriminatory purpose has "no credentials whatsoever." *City of Richmond v. United States*, 422 U.S. 358, 378

(1975). Texas's Brief conspicuously contains no objection to the broad relief granted on the discriminatory purpose claim.

The district court also retained jurisdiction to ensure that any modification to Texas's photo ID regime would be consistent with the injunction.

Texas raises several objections, all without merit.

First, as explained *supra* at n.16 and by other Plaintiffs, the district court's retention of jurisdiction to ensure compliance with its injunction was entirely proper.

Second, as explained *supra* at 26, the district court did not improperly order "facial invalidation" as a remedy for Plaintiffs' "as-applied challenges." Appellants' Br. 60. The district court was aware of the more limited remedy that would ordinarily be appropriate in an as-applied case, but had no need to fashion such a remedy here because of the intentional discrimination finding.

Third, as explained *supra* at 52, the poll tax resides in the statute itself, not merely administrative practice. If the state takes some action to eliminate the statutory fee or decrease the statute's burdens on the right to vote, that could be a matter within the district court's retained jurisdiction—except for the fact that the entire statute has been properly enjoined because of its racially discriminatory purpose.

Fourth, contrary to Texas's complaint, the district court was mindful of the severability clause, and severed and upheld Section 16 of S.B. 14, which deals with categories and penalties for election offenses. All other parts of S.B. 14 simply build upon Sections 9 and 14, which impose the basic requirements, so the invalidity of Sections 9 and 14 leaves nothing else severable.

As to Texas's suggestion to "sever" some voters, that is a repeat of the complaint about enjoining the entire statute, and is disposed of by the *City of Richmond* case cited above.

CONCLUSION

For the above reasons, the judgment below should be affirmed in full.

Respectfully submitted,

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Pursuant to 5th Circuit R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5TH CIR. R. 32.2.7(b)(3), THE BRIEF CONTAINS (select one):

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