No.

In the Supreme Court of the United States

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL., PETITIONERS

v.

MARC VEASEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The district court found, and the court of appeals affirmed, that "Plaintiffs have not demonstrated that any particular voter . . . cannot get the necessary ID or vote by absentee ballot under [Texas' voter-ID law]." App. 425a. Nor is there evidence that Texas' voter-ID law affected political participation by minority voters. In the Sixth, Seventh, and Ninth Circuits, this would be fatal to a vote-*denial* or vote-*abridgement* claim under §2 of the Voting Rights Act. But the Fifth Circuit below (and later the Fourth Circuit) created a split by holding that a voter-ID law violates §2 based solely on a statistical racial disparity in preexisting ID possession, the general correlation of race and socioeconomic status, and a nine-factor analysis developed for vote-*dilution* claims.

The Fifth Circuit also contravened multiple precedents of this Court by remanding plaintiffs' discriminatory-purpose claim after vacating the district court's finding. After the district court eviscerated legislative privilege and granted unprecedented discovery, legislators produced thousands of documents, including internal confidential communications, and sat for lengthy depositions. But that discovery yielded no evidence of discriminatory purpose.

The questions presented are:

1. Whether Texas' voter-ID law "results in" the abridgement of voting rights on account of race.

2. Whether judgment should be rendered for petitioners on the claim that Texas' voter-ID law was enacted with a racially discriminatory purpose.

PARTIES TO THE PROCEEDING

Petitioners are Greg Abbott, in his official capacity as Governor of Texas; Carlos Cascos, in his official capacity as Texas Secretary of State; The State of Texas; and Steve McCraw, in his official capacity as Director of the Texas Department of Public Safety.

Respondents are Marc Veasey; Jane Hamilton; Sergio DeLeon; Floyd Carrier; Anna Burns; Michael Montez; Penny Pope; Oscar Ortiz; Koby Ozias; League of United Latin American Citizens; John Mellor-Crummey; Ken Gandy; Gordon Benjamin; Evelyn Brickner; Texas Association of Hispanic County Judges and County Commissioners; The United States of America; Texas League of Young Voters Education Fund; Imani Clark; Texas State Conference of NAACP Branches; Mexican American Legislative Caucus, Texas House of Representatives; Lenard Taylor; Eulalio Mendez, Jr.; Lionel Estrada; Estela Garcia Espinoza; Margarito Martinez Lara; Maximina Martinez Lara; and La Union Del Pueblo Entero, Inc.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General of Texas, on behalf of Governor Greg Abbott, *et al.*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App. 1a-245a) is available at 2016 WL 3923868. The opinion of the three-judge panel of the court of appeals (App. 246a-306a) is reported at 796 F.3d 487. The opinion of the district court (App. 307a-484a) is reported at 71 F. Supp. 3d 627.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions (U.S. Const. amend. XIV, U.S. Const. amend. XV, 52 U.S.C. §10301, Tex. Elec. Code §63.001, and Tex. Elec. Code §63.0101) are reproduced in the appendix to this petition.

STATEMENT

1. *Crawford v. Marion County Election Board*, 553 U.S. 181, 191-97 (2008) (plurality op.), held that photo voter-ID laws are legitimate means of deterring fraud and boosting public confidence in elections, even in States that have no history of in-person voting fraud.[1] An overwhelming majority of Texans agreed and supported a photo voter-ID law. *See, e.g.*, R.77940, 87386-88, 93705-06.

Accordingly, in 2011, the Texas Legislature enacted Senate Bill 14 ("SB14"). Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws 619. SB14 requires

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[1] Unlike *Crawford*, the record in this case does contain evidence of in-person voter fraud in Texas, R.21841-63, 29184-85, as well as registration fraud, R.27683, 29092, 100135. This is so even though voter-impersonation fraud is difficult to detect, R.72389-91, and some perpetrators are not charged because they lack the requisite mens rea, R.21885-86, 33916-17. Citations to "R.p" refer to pages of the Fifth Circuit record on appeal.

voters to present certain government-issued photo ID when voting in person. Acceptable forms of ID include a Texas driver's license, a Texas personal identification card, a Texas concealed-handgun license, a U.S. military identification card, a U.S. citizenship certificate, a U.S. passport, and a Texas election identification certificate ("EIC"). Tex. Elec. Code §63.0101. SB14 requires the Texas Department of Public Safety to issue EICs for free. Tex. Transp. Code §521A.001(a)-(b).

The Department subsequently promulgated rules outlining the documentation required to obtain a free EIC, which included a birth certificate. 37 Tex. Admin. Code §15.182. A separate statute had imposed a $2-$3 fee to obtain a birth certificate copy. Tex. Health & Safety Code §191.0045. But consistent with its intent to provide free voter IDs, the Texas Legislature enacted Senate Bill 983 in 2015, providing that government may not charge any fee to obtain birth certificates or other records sought to get a free EIC. *Id.* §191.0046(e); *cf. Crawford*, 553 U.S. at 198 n.17 (plurality op.) (noting that Indiana had charged $3-$12 for supporting documentation necessary to obtain qualifying ID).

SB14 did not alter preexisting law allowing voters age 65 or older, and the disabled, to vote by mail without photo ID. Tex. Elec. Code §§82.002, 82.003. And SB14 exempts from the in-person photo-ID requirement religious objectors, people lacking sufficient ID due to natural disaster, and the disabled. *Id.* §§63.001(h), 65.054(b)(2)(B)-(C). In-person voters who do not present required photo ID can cast a provisional ballot that will count if they present acceptable ID within six days of the election. *Id.* §§63.001(g), 63.011(a), 65.0541.

Texas began enforcing SB14 on June 25, 2013. App. 8a. It was in effect for three statewide elections, six special elections, and many local elections before trial in October 2014. App. 184a-85a (Jones, J., dissenting).

2. Individual and organizational plaintiffs brought this lawsuit alleging that SB14 (1) is a poll tax; (2) purposefully abridges the right to vote on account of race; (3) results in abridgement of the right to vote on account of race, in violation of §2 of the Voting Rights Act; and (4) unconstitutionally burdens the right to vote. R.915-21, 1403-07. The Department of Justice filed a separate lawsuit, later consolidated with the private plaintiffs' action, likewise alleging that SB14 has the purpose and result of abridging the right to vote on account of race. R.114566-67.

Over petitioners' objections, the district court ordered the production of thousands of legislatively privileged documents and numerous depositions of legislators. *E.g.*, R.50, 61-62, 6502-09, 62520:15-21:1, 100814:8-16:25, 101007:8-69:5; *see* App. 140a n.15 (Jones, J., dissenting) (quoting a request for production of all documents related to communications between a Senator, other legislators, legislative staff, government officials, or the public concerning voter-ID legislation beginning on January 1, 2005); *id.* at 140a-41a (noting that plaintiffs deposed more than two dozen witnesses, including eleven legislators and staff members, and that the record contained twenty-nine additional depositions taken in preclearance litigation, including sixteen legislator depositions).

Plaintiffs insisted that direct evidence from legislators was essential to proving the discriminatory-purpose

claim. *E.g.*, R.7226 ("vital discovery"); R.97657:19-22 ("at the heart of the United States' claim"); R.97938:8-10 ("[T]hat evidence is going to be very, very important in this case dealing with the intent behind SB14 itself."). But that unprecedented discovery only confirmed the Legislature's stated purpose: SB14 was enacted to prevent voting fraud and to preserve voter confidence in the integrity of elections.[2] As the district court recognized, this massive amount of intrusive discovery adduced no evidence that SB14 was enacted with a racially discriminatory purpose. App. 458a ("There are no 'smoking guns' . . . with respect to the incentive behind the bill.").

DOJ took extraordinary steps to try to find persons who were harmed by SB14: lawyers crisscrossed Texas, traveling to homeless shelters looking for anyone disenfranchised by the law. R.99075-77. Plaintiff organizations made similar efforts. *See* R.24741-44, 24702-05, 24727-31, 64201, 99199. But at trial, plaintiffs' experts could not identify any person who would be unable to vote because of SB14. R.98854:12-17, 99022:9-18, 99568:14-22, 99909:21-10:10, 99917:17-18:14, 100111:15-21, 100484:19-85:5. The district court acknowledged that "Plaintiffs ha[d] not demonstrated that any particular voter . . . cannot get the necessary ID or vote by absentee ballot under SB14." App. 425a.

Even the named plaintiffs could not show that SB14 substantially burdened their ability to vote. Nine of the

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[2] *E.g.*, R.30194-200, 61013:69:3-8, 61026:122:14-23, 61359:85:19-22, 62109:56:6-9, 64255:37:14-18, 64280:138:13-22, 65521:49:13-15, 78410, 100777:13-24, 100801:19-02:6, 101159:25-60:8, 101178:5-6.

fourteen individual plaintiffs could vote by mail without photo ID, App. 404a; and of these nine, at least two actually had voted after SB14 took effect, R.99833:12-19, 99034:16-35:5, and at least two others had SB14-compliant ID, App. 397a, R.99854:18-55:3. Among the five remaining individual plaintiffs, three had an SB14-compliant ID, App. 397a; one chose to get a California driver's license instead of a Texas license because she planned to return to California after college, R.100543:11-44:23; and the final plaintiff testified that he could obtain an SB14-compliant personal identification card. R.99375:6-9.

Plaintiffs proffered a list of approximately 608,000 registered voters—only about 4.5% of all registered Texas voters—who lacked a qualifying photo ID as of 2014. App. 58a. Plaintiffs' evidence then predicted the race of these voters. App. 59a. This prediction showed that almost half of these individuals were white (roughly 296,000, or 48.7%). R.43320. And 96.4% of registered non-Hispanic white voters, 92.5% of registered African-American voters, and 94.2% of registered Hispanic voters had an SB14-compliant ID. R.43320. The record does not show how many registered voters lacked the necessary documents or otherwise faced an obstacle to obtaining a qualifying ID. The district court nevertheless concluded that SB14 had a "disparate impact" because "a disproportionate number of African-Americans and Hispanics populate that group of potentially disenfranchised voters." App. 367a.

After a nine-day bench trial, the district court entered a judgment adopting every one of plaintiffs' legal theories and permanently enjoining the State from en-

forcing SB14's voter-ID provisions. App. 469a. Petitioners appealed, and the Fifth Circuit granted their motion to stay the injunction pending appeal. 769 F.3d 890 (5th Cir. 2014). This Court then denied plaintiffs' motions to vacate that stay. 135 S. Ct. 9 (2014).

3. a. A three-judge panel of the Fifth Circuit overturned several aspects of the district court's judgment. It reversed and rendered for petitioners on the poll-tax claim. App. 294a-300a. It also vacated the district court's determinations that SB14 was enacted with a discriminatory purpose, and that SB14 substantially burdened voting rights. App. 259a-71a, 291a-94a. But the panel endorsed the district court's conclusion that SB14 resulted in a racially discriminatory effect on the right to vote under VRA §2. App. 271a-91a.

Petitioners sought, and were granted, en banc rehearing. App. 487a. Plaintiffs filed a second motion to vacate the stay of the district court's injunction, which this Court denied. 136 S. Ct. 1823 (2016).

b. The fractured en banc court of appeals produced eight separate opinions, with the court largely readopting the panel's holdings.

The court of appeals rendered judgment for petitioners on the poll-tax claim, App. 92a-97a, and dismissed the substantial-burden claim, App. 90a-91a.

The court of appeals reversed the district court's judgment that SB14 was passed with a racially discriminatory purpose, holding that the district court relied on a series of "infirm," "unreliable," and "speculati[ve]" categories of evidence. App. 15a-25a. But despite recognizing that the record "does not contain direct evidence" that SB14 was passed with a racially invidious purpose,

App. 26a, the court remanded for the district court to reconsider the claim in light of circumstantial evidence that "could support [such] a finding," App. 28a.

Six judges dissented from the court's decision to remand, rather than render judgment for petitioners, on the discriminatory-purpose claim. *See* App. 136a (Jones, J., dissenting) ("Inferences cannot substitute for proof where the available evidence demonstrates no invidious intent."); App. 221a (Clement, J., dissenting) ("As the [original] panel correctly noted, it is rather unlikely that a discriminatory motive 'would permeate a legislative body and not yield any private memos or emails.'" (quoting 796 F.3d at 503 n.16)).

The court of appeals then affirmed the district court's holding that SB14 results in a racially discriminatory effect on the right to vote in violation of VRA §2. App. 43a-90a. The court acknowledged that plaintiffs had failed to show that the photo-ID requirement caused an actual "racial voting disparity" or "lower turnout" among minority voters. App. 79a-80a. But the court nevertheless found a discriminatory effect under a test that drew from *Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986), a redistricting case that considered nine factors set forth in a Senate report designed to aid courts in analyzing vote-*dilution* claims. According to the majority, election laws violate VRA §2—even if they have no effect on political participation—where some racial statistical disparity related to voting can be shown and race correlates with socioeconomic status:

> (1) SB14 specifically burdens Texans living in poverty, who are less likely to possess qualified photo ID, are less able to get it, and may not otherwise need it;

> (2) a disproportionate number of Texans living in poverty are African-Americans and Hispanics; and (3) African-Americans and Hispanics are more likely than Anglos to be living in poverty because they continue to bear the socioeconomic effects caused by decades of racial discrimination.

App. 88a.

Six judges also dissented from this discriminatory-effect holding, reasoning that plaintiffs had not shown any diminished minority political participation. *See* App. 192a (Jones, J., dissenting) ("[A] racial disparity in ID possession . . . does not [without more] establish that SB 14 resulted in or caused a diminution of the right to vote[.]" (internal quotation marks omitted)); App. 226a n.5 (Elrod, J., dissenting) ("Out of the entire state of Texas, plaintiffs have not produced anyone who cannot vote today because of SB 14's requirements. . . . Without a denial or abridgement, no §2 claim can stand.").

The Fifth Circuit then directed the district court to implement an interim remedy for the 2016 election season addressing the VRA §2 discriminatory-effect claim (which the court has entered, *Veasey v. Abbott*, No. 2:13-CV-00193, ECF. No. 895 (S.D. Tex. Aug. 10, 2016)), and then to reexamine the discriminatory-purpose claim. App. 105a-07a.

REASONS FOR GRANTING THE PETITION

This Court's review is necessary because the Fifth Circuit enjoined a law for "denying" or "abridging" the right to vote where plaintiffs presented no evidence that the law resulted in diminished minority political participation or prevented even a single person from voting. That holding turns VRA §2 on its head and creates a split with the Sixth, Seventh, and Ninth Circuits over the proper test for determining whether a voting prerequisite violates VRA §2.

Under the Fifth Circuit's decision below, and a subsequent Fourth Circuit opinion, voting prerequisites can be invalid under VRA §2 even if there is no evidence that they affect voter participation. The Fifth Circuit held that a discriminatory effect can be shown by identifying a statistical racial disparity—other than voter turnout or registration—and then recognizing the uncontested fact, which could be proved in any case, that some degree of statistical correlation exists between racial and socioeconomic classifications.

In contrast, the Sixth, Seventh, and Ninth Circuits have correctly required an actual effect on voter participation to establish a discriminatory effect under VRA §2. These Circuits have thus rejected the Fourth and Fifth Circuits' sweeping test for VRA §2 liability, which would jeopardize numerous legitimate voting provisions such as registration laws, age restrictions, and Tuesday elections.

Furthermore, the Fifth Circuit's test would render §2's discriminatory-effect prong unconstitutional as neither congruent nor proportional to the underlying constitutional prohibition on the purposeful abridgement of

voting on account of race. The court of appeals effectively sidestepped this constitutional issue, relying on outdated precedent decided before this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

These drastic consequences from such an expansive test for VRA §2 liability have been recognized not just by the six dissenting judges below, App. 198a-204a, 224a-28a, but also by various other judges in the Second, Seventh, Ninth, and Eleventh Circuits, *infra* p. 27. For example, Judge Kozinski and six other Ninth Circuit judges warned, "Evidence of socioeconomic disparities could be the source of countless lawsuits" and "virtually every decision by a state as to voting practices will be vulnerable." *Farrakhan v. Washington*, 359 F.3d 1116, 1126 (9th Cir. 2004) (Kozinski, J., dissenting from denial of reh'g en banc). Unlike the Fifth Circuit below, the en banc Ninth Circuit ultimately heeded that warning and rejected this theory of VRA §2 liability. *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (en banc) (per curiam).

The Fifth Circuit also contravened multiple precedents of this Court by remanding the discriminatory-purpose claim after recognizing that the district court's finding was infirm. Plaintiffs cannot possibly demonstrate legislative intent to harm minority voting rights, as the record includes a massive amount of privileged, direct legislative evidence confirming that SB14 was enacted to prevent voter fraud and safeguard voter confidence. Not a shred of evidence suggests that the Texas Legislature had a racially invidious purpose in enacting this voter-ID law.

I. The Fifth Circuit Created an Exceptionally Important Circuit Split In Erroneously Finding that Texas' Voter-ID Law Violates VRA §2.

A. The Fractured Fifth Circuit Decision Creates a Circuit Split on the Appropriate Test for VRA §2 Discriminatory-Effect Claims.

The Sixth, Seventh, and Ninth Circuits correctly require VRA §2 plaintiffs to show that a challenged voting prerequisite causes a measurable effect on minority voting—that is, an actual effect on voter turnout or registration. The Fourth and Fifth Circuits, by contrast, hold that a voting prerequisite can violate VRA §2 even if there is no evidence whatsoever that it negatively affects minority political participation or prevents a single person from voting.

This Court has never decided a "vote-denial" or "vote-abridgement" case under VRA §2's results prong; its cases have all involved "vote-*dilution*" claims.[3] As the Fifth Circuit correctly observed, "there is little authority on the proper test to determine whether the right to vote has been *denied* or *abridged* on account of race" under §2. App. 45a (emphasis added). This Court's guidance is therefore needed to resolve this exceptionally important circuit split.

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[3] A "vote-dilution" claim concerns a minority group's unequal opportunity to elect preferred representatives, whereas a "vote-denial" or "vote-abridgement" claim concerns the ability to cast a ballot in the first instance. *Ohio Democratic Party v. Husted*, No. 16-3561, 2016 WL 4437605, at *12 & n.9 (6th Cir. Aug. 23, 2016).

1. The Sixth, Seventh, and Ninth Circuits Reject VRA §2 Claims if Plaintiffs Cannot Prove a Voting Prerequisite Causes a Reduction in Minority Political Participation.

a. The Fifth Circuit's decision below squarely conflicts with *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014). In *Frank*, the Seventh Circuit rejected a VRA §2 challenge to Wisconsin's photo-voter-ID law, even though there was a larger statistical racial disparity in preexisting ID possession than in the instant case. *Id.* at 751-55.

The *Frank* district court had found that, in Wisconsin, 7.3% of white registered voters, 13.2% of African-American registered voters, and 14.9% of Hispanic registered voters lacked qualifying ID. *Id.* at 752. On this basis, the district court held that Wisconsin's voter-ID law resulted in an abridgement of the right to vote "because white registered voters are more likely to possess qualifying photo IDs, or the documents necessary to get them." *Id.*

The Seventh Circuit reversed, explaining that "[a]lthough these findings document a disparate outcome, they do not show a 'denial' of anything by Wisconsin, as § 2(a) requires." *Id.* at 753. The court recognized that the mere lack of ID at a particular moment in time does not prove that a voter cannot obtain ID, let alone that his right to vote has been abridged. Some voters already have a birth certificate, for example, and if they choose not to get a photo ID, "it is not possible to describe the need for a birth certificate as a legal obstacle that disfranchises them." *Id.* at 749.

The Seventh Circuit held that, because rates of ID possession alone prove so little, evidence of an effect on voting behavior is essential:

> If as plaintiffs contend a photo ID requirement especially reduces turnout by minority groups, students, and elderly voters, it should be possible to demonstrate that effect.

Id. at 747. But the *Frank* district court "did not make findings about what happened to voter turnout." *Id.*

Frank also expressly rejected the argument that VRA §2 liability could be premised on socioeconomic disparities. The district court had "made extensive findings demonstrating that the poor are less likely to have photo IDs than persons of average income." *Id.* It also concluded that "the reason Blacks and Latinos are disproportionately likely to lack an ID is because they are disproportionately likely to live in poverty." *Id.* at 753. And it found that this socioeconomic disparity "is traceable to the effects of discrimination in areas such as education, employment, and housing." *Id.* But the Seventh Circuit rejected this as a basis for VRA §2 liability because there was no finding that minorities "have less 'opportunity' than whites to get photo IDs." *Id.*

b. The en banc Ninth Circuit similarly rejected a §2 challenge to Arizona's voter-ID law. *Gonzalez v. Arizona*, 677 F.3d 383, 405-07 (9th Cir. 2012) (en banc), *aff'd on other grounds sub nom. Arizona v. InterTribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013).

Like the Fifth Circuit, the district court below, and the *Frank* district court, the *Gonzalez* district court

"found that Latinos had suffered a history of discrimination in Arizona that hindered their ability to participate in the political process fully, that there were socioeconomic disparities between Latinos and whites in Arizona, and that Arizona continues to have some degree of racially polarized voting." *Id.* at 406.

Yet the *Gonzalez* district court rejected the §2 claim. It reasoned that "not a single expert testified to a causal connection between [Arizona's voter-ID law] and the observed difference in the voting rates of Latinos," and there had been no showing that the law actually "impact[ed] Latino voting." *Id.*

The Ninth Circuit affirmed, recognizing that causation is a "crucial" inquiry in determining whether a law results in a discriminatory effect for purposes of VRA §2. *Id.* at 405. Because the plaintiff "adduced no evidence that Latinos' ability or inability to obtain or possess identification for voting purposes . . . resulted in Latinos having less opportunity to participate in the political process," the Ninth Circuit concluded that the plaintiff "failed to prove causation." *Id.* at 407. *Gonzalez* correctly held that §2 requires more than just a disparity in existing ID possession. It requires an additional showing that (1) minorities have a disproportionate barrier "to obtain or possess identification," and (2) this barrier "result[s] in [minorities] having less opportunity" to vote. *Id.*

c. The Sixth Circuit also rejected a §2 vote-abridgement challenge to Ohio's reduction of its early-voting period, reasoning that the plaintiffs failed to show that the law affected minority registration or turnout. *Ohio Democratic Party*, 2016 WL 4437605, at *12-15. As the court explained, a §2 claim requires proof that the challenged

standard or practice "causally contributes to the alleged discriminatory impact by affording protected group members less opportunity to participate in the political process." *Id.* at *13.

Applying that standard, the Sixth Circuit held that plaintiffs failed to establish §2 liability because statistical evidence showed that African-American voters "registered at higher percentages than whites" and "participat[ed] . . . at least equal[ly] to . . . white voters" following Ohio's reduction of the early-voting period. *Id.* at *14. Like evidence of mere disparate ID possession, evidence indicating that minorities "may use early in-person voting at higher rates than other voters and may therefore be theoretically disadvantaged by reduction of the early voting period" was insufficient to prove a §2 claim without evidence showing that minorities' registration or turnout rates were actually diminished by the law. *Id.* at *8; *see also N.E. Ohio Coal. for the Homeless v. Husted*, Nos. 16-3603, 16-3691, 2016 WL 4761326, at *8-9 (6th Cir. Sept. 13, 2016) (rejecting §2 challenge to restrictions on absentee and provisional ballots and poll-worker assistance where plaintiffs failed to demonstrate disparate effect on minority voters).

2. The Fourth and Fifth Circuits Interpret VRA §2 to Invalidate Voting Prerequisites Without Any Evidence of Diminished Minority Political Participation.

a. In contrast to the Sixth, Seventh, and Ninth Circuits, the Fifth Circuit below held that Texas' voter-ID law violated §2 despite recognizing that plaintiffs failed to show that the law caused any "racial voting disparity."

See App. 79a (refusing to require proof that the challenged law "directly caused a reduction in turnout"). The court focused instead on evidence of a small, preexisting statistical "disparity in voter ID possession." *Id.*

Plaintiffs could not have prevailed in the Sixth, Seventh, or Ninth Circuits. *Supra* pp.13-16. The record does not include any evidence that the disparity in ID possession correlated with, let alone caused, a disproportionate decline in minority registration or turnout. App. 79a-80a; *see also* Samuel Issacharoff, *Ballot Bedlam*, 64 Duke L.J. 1363, 1381 (2015) ("To date, empirical studies have focused on the effect of voter-ID laws, but have been unable to find any substantial decline either in overall turnout or in the turnout of racial minorities as a result of these laws."). To the contrary, plaintiffs failed to show "that a single Texan is prevented from voting by SB14," even though the law had been in effect for multiple elections before trial. App. 228a (Elrod, J., dissenting); *cf. Ohio Democratic Party*, 2016 WL 4437605 at *8 (rejecting §2 liability where "[p]laintiffs d[id] not point to any individual who . . . will be precluded from voting").

In enjoining Texas' voter-ID law without evidence of any "racial voting disparity," the Fifth Circuit reasoned that any law that disparately impacts poor voters necessarily results in discrimination on account of race if minority voters are more likely to be poor. App. 88a. This interpretation of §2 directly conflicts with the Seventh Circuit's holding that a voter-ID law does not violate §2 merely because certain groups "have lower income" and therefore "are less likely to *use* th[eir] opportunity" to "get photo IDs." *Frank*, 768 F.3d at 753.

b. The Fourth Circuit also held that plaintiffs may establish §2 liability without proof that a voting prerequisite has an actual effect on minority voter turnout or registration. The "two-part framework" the Fifth Circuit used was adopted from Fourth Circuit precedent. App. 46a (citing *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014)).[4]

The Fourth Circuit invalidated a series of North Carolina's voting prerequisites, including its voter-ID requirement. *N.C. State Conf. of NAACP v. McCrory*, Nos. 16-1468, 16-1469, 16-1474, 16-1529, 2016 WL 4053033, at *24 (4th Cir. Jul. 29, 2016). Although that opinion focuses on claims of discriminatory purpose, the Fourth Circuit pointed to findings that African-Americans "disproportionally lacked the photo ID required by [the challenged law]" in discussing the law's alleged discriminatory *effect* on voting. *Id.* at *15. Rejecting the import of evidence showing that African-American voter turnout actually *increased* following implementation of the law, the court observed that the ID requirement "inevitably increases the steps required to vote, and so slows the process." *Id.* at *15-16. Thus, "slow[ing] the [voting] process" alone is sufficient to establish §2 liability in the Fourth Circuit.

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[4] The Sixth Circuit nominally used the same two-part framework to analyze the §2 claim in *Ohio Democratic Party*, but that court importantly "emphasize[d]" that the first element of the test "requires proof that the challenged standard or practice causally contributes to the alleged discriminatory impact" via reduced "participat[ion] in the political process." 2016 WL 4437605, at *13.

B. The Fifth Circuit's Erroneous Holding Jeopardizes Numerous Election Laws and Raises Serious Constitutional Questions.

1. The Fifth Circuit Improperly Imposed VRA §2 Liability Without Finding that Texas' Voter-ID Law Affected Political Participation.

The Fifth Circuit's reasoning reflects two fundamental errors. First, a statistical disparity in rates of ID possession is not a disproportionate "result" prohibited by §2; plaintiffs were required to show that SB14 caused an actual effect on minority voting participation. Second, the Fifth Circuit replaced this crucial causation inquiry with an amorphous analysis of the nine "Senate factors."

a. Since 1982, VRA §2 has prohibited a "voting qualification or prerequisite to voting" that "results in a denial or abridgement of the right . . . to vote on account of race or color." 52 U.S.C. §10301(a). Under this section, a violation exists if, as a result of the challenged voting practice, "the political processes . . . are not equally open to participation by members of [a racial group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* §10301(b).

By its plain text, the statute requires a tailored causation analysis connecting the challenged voting prerequisite to the prohibited result—that is, the inability to equally "participate in the political process" and "vote." *See* App. 192a (Jones, J., dissenting) (citing *Gingles*, 478 U.S. at 48 n.15); *accord Ohio Democratic Party*, 2016

WL 4437605, at *13 ("[T]o be actionable, [a voting prerequisite] must result in an adverse disparate impact on protected class members' opportunity to participate in the political process.").

Plaintiffs must therefore demonstrate a disparity among racial groups in actual voter turnout or registration in order to establish an unequal ability to "participate" in elections under §2. *Frank*, 768 F.3d at 747; *Gonzalez*, 677 F.3d at 406; *Ohio Democratic Party*, 2016 WL 4437605, at *12-15. Indeed, prior en banc Fifth Circuit precedent correctly rejected §2 liability without "evidence of decreased participation among minorities." *LULAC Council No. 4344 v. Clements*, 999 F.2d 831, 866-67 (5th Cir. 1993) (en banc) (denying §2 claim where plaintiffs presented "no evidence of reduced levels of [minority] voter registration" or "lower turnout among [minority] voters"); *see* App. 192a-93a (Jones, J., dissenting).

Instead of analyzing voter participation, the district court and Fifth Circuit relied principally upon plaintiffs' "No-Match List"—one expert's attempt to predict the number of registered Texas voters who lacked SB14-compliant ID at the time of trial and their race. App. 58a-59a. That expert determined that 92.5% of registered African-American voters and 94.2% of registered Hispanic voters had SB14-compliant ID, compared with 96.4% of registered non-Hispanic white voters. *Supra* p.6.

But the degree of preexisting ID possession does not establish an unequal opportunity for minorities "to obtain" photo IDs and vote. *Gonzalez*, 677 F.3d at 407; *see Frank*, 768 F.3d at 752-53 (ID disparity "as of . . . trial"

insufficient). That is particularly so given that Texas offers free voter IDs and free underlying documents to obtain those free IDs. *Supra* p.3. A conclusion that SB14 has a discriminatory effect under §2 would require proof that minority voters who lacked IDs faced substantial obstacles to get them, and that the inability to comply with SB14 caused minority voters not to register or vote.

The Fifth Circuit, however, did not require the factual findings necessary to bridge that inferential gap. The court did not, for instance, assess how many voters who lacked SB14-compliant IDs already had the documents necessary to obtain them. *Cf. Frank*, 768 F.3d at 749. Nor did it determine whether registered voters who lacked both SB14-compliant IDs and the documents necessary to get them could obtain the underlying documents—or whether there was a racial disparity in such a figure. And it made no effort to determine whether individuals on the No-Match List voted before SB14 took effect. *Cf. id.* at 753.

The Fifth Circuit's central error was its expansive definition of what qualifies as a prohibited result under VRA §2. As this Court has recognized in other contexts involving a disparate-impact standard, the actionable result or effect must be carefully circumscribed. In the employment context, for example, a challenger must show a statistical disparity confirming that a practice "operates to *exclude* [minorities]." *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (emphasis added)). In other words, the statistical disparity must show that the challenged practice will actually "*select* applicants for hire or promotion in a racial pattern significantly different from that

of the pool of applicants." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (emphasis added). It is not enough to show a bare statistical disparity that *might* affect employment, such as college education or specialized training. The only disparity that matters is the actual employment result.

Similarly, as the Sixth, Seventh, and Ninth Circuits have noted in the voting context, the statistical disparity that matters is voter participation, as evidenced by registration and turnout. After all, if an election law has no effect on voter registration or turnout, then there is no basis to conclude that the law restricts access to the political process—much less that it does so on account of race.

Despite exhaustive efforts, plaintiffs failed to identify a single individual who faces a substantial obstacle to vote because of SB14. *Supra* pp.5-6. At most, plaintiffs proved that a small percentage of registered Texas voters did not have SB14-compliant ID at the time of trial. But they did not prove that SB14 will prevent or deter any person from casting a ballot. *Cf. Crawford*, 553 U.S. at 187 (plurality op.) (record contained no evidence of "a single, individual Indiana resident who will be unable to vote as a result of SEA 483"). The critical distinction between what §2 requires and what plaintiffs were able to show was candidly summed up by plaintiffs' expert: "I wasn't asked to study who's been deprived of rights to vote. I was asked to study who has IDs." R.99022:17-18.

b. Lacking proof that SB14 diminished minority political participation, the Fifth Circuit examined a non-exhaustive list of nine factors from a 1982 Senate report to assess "the requisite causal link" between (1) the alleged

"burden on voting rights" imposed by SB14 and (2) "the fact that this burden affects minorities disparately because it interacts with social and historical conditions that have produced discrimination against minorities currently, in the past, or both." App. 47a. This was error for multiple reasons.

This Court has never applied the "Senate factors" to vote-abridgement claims, and the authors of the 1982 Senate committee report would not have envisioned applying them beyond redistricting vote-dilution claims. *See Gingles*, 478 U.S. at 44-45 (citing S. Rep. No. 97-417, at 2 (1982)). Several circuits have observed that many of the factors—for example, racially polarized voting, racial appeals in campaigns, the election of minorities to statewide office, and elected officials' responsiveness to minority needs—have no bearing on vote-abridgement claims, where the opportunity to cast a ballot is at issue. *See Simmons v. Galvin*, 575 F.3d 24, 42 n.24 (1st Cir. 2009) ("[A] satisfactory test for vote denial cases under Section 2 has yet to emerge [, and] the Supreme Court's seminal opinion in *Gingles* . . . is of little use in vote denial cases." (internal quotation marks omitted)); *Frank*, 768 F.3d at 754 (noting that the Fourth, Sixth, and Seventh Circuits "found *Gingles* unhelpful in [vote-abridgement] cases" and that the Ninth Circuit in *Gonzalez* "did not use most of [the Senate's] nine factors").

The Senate factors cannot substitute for proof that a challenged voting prerequisite causes a disparate effect on minority voting. Even in the vote-dilution context, the three initial *Gingles* preconditions must be satisfied—to show that additional minority-preferred representatives could in fact be elected—before a court even reaches the

Senate factors. *Johnson v. De Grandy*, 512 U.S. 997, 1011-13 (1994). Accordingly, the Senate factors are an additional *hurdle* to ensure that a facially neutral voting law imposing a racially disparate impact on voting participation is not invalidated under §2 unless the law is adequately tied to social and historical conditions that have produced discrimination. *Ohio Democratic Party*, 2016 WL 4437605, at *13-14 (explaining that §2 "asks not just whether social and historical conditions 'result in' a disparate impact, but whether the challenged *voting standard or practice* causes the discriminatory impact as *it* interacts with social and historical conditions").

Having incorrectly assumed a disparate effect on minority voting participation, the Fifth Circuit proceeded to use the Senate factors as a substitute for proof of causation. Yet that is precisely what the Sixth and Ninth Circuits warned could not be done when assessing VRA §2 liability. *See id.* at *14 ("[I]f the second step is divorced from the first step requirement of causal contribution by the challenged standard or practice itself, it is incompatible with the text of Section 2 and incongruous with Supreme Court precedent."); *Gonzalez*, 677 F.3d at 405 (causation is a "crucial" inquiry under VRA §2).

Even if the Senate factors were relevant to a vote-abridgement claim, they do not show a discriminatory effect on minority voting participation here. The Fifth Circuit erred by relying on "historical and contemporary examples of discrimination." App. 54a. The court had already held that reliance on decades-old examples of State discrimination "was error" in the context of plaintiffs' discriminatory-purpose claim. App. 19a. And the

court recognized that the "relatively contemporary examples of discrimination" cited by the district court were also "limited in their probative value." *Id.*

As the court of appeals observed, one example involved the actions of county officials in just one of Texas' 254 counties. App. 19a-20a ("[W]e do not find the reprehensible actions of county officials in one county . . . to be probative of the intent of legislators in the Texas Legislature[.]"). And the two statewide redistricting cases cited by the district court similarly "form[ed] a thin basis for drawing conclusions regarding contemporary State-sponsored discrimination." App. 20a. One of those cases, *Bush v. Vera*, 517 U.S. 952, 976 (1996), involved plans to create *additional* majority-minority districts. App. 20a. The other, *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 439-40 (2006), upheld a majority-African-American district but invalidated a separate district as dilutive against Hispanics, even though the Texas Legislature had drawn another majority-Hispanic district to remedy the dilution. App. 20a-21a.

Yet, in contrast to rejecting their relevance to the discriminatory-purpose claim, the court of appeals held these out as examples of purported "official discrimination" that somehow supported the district court's finding that SB14 has a discriminatory *effect*. App. 73a. *But cf.* App. 169a (Jones, J., dissenting) ("[T]he majority's 'contemporary examples' about Texas's State-sponsored discrimination are neither contemporary nor probative."). Even if there were evidence of diminished minority political participation—and there is none—decades-old instances of discrimination cannot form the basis for finding a discriminatory effect when there is no evidence of

contemporary State-sponsored discrimination. *See, e.g.*, *Shelby County v. Holder*, 133 S. Ct. 2612, 2618-19, 2631 (2013).

2. The Fifth Circuit's Decision Jeopardizes Many Legitimate Election Laws.

The Fifth Circuit's test for vote-abridgement claims removes any meaningful limit on the scope of VRA §2, jeopardizing countless election laws. Any voting requirement imposes a marginally greater burden on poorer voters than more affluent voters because costs—whether measured in time, effort, or money—generally weigh more heavily on poorer voters. Yet most voting practices are legitimate and uncontroversial despite their marginal burdens.

Texas, for instance, requires voters to register, Tex. Elec. Code §11.002(a)(6); to vote in the precinct where they reside, *id.* §11.003; and to vote within 17 days of an election, *id.* §85.001. Each one of those practices would impose a marginally greater burden on poorer voters than on more affluent voters, but they do not abridge the right to vote "on account of race." *Frank*, 768 F.3d at 753.

The Fifth Circuit's holding jeopardizes all these measures, regardless of their actual effect on voting, based on the general correlation between poverty and race. App. 228a (Elrod, J., dissenting) ("[The majority] improperly would permit challenges to virtually all aspects of the voting process simply because poverty adds to the burdens of everyday activities and wealth distribution is unequal across racial groups.").

These few examples from Texas are hardly the only laws threatened by the Fourth and Fifth Circuit's VRA

§2 test. As one of the dissenting opinions below cataloged, existing VRA §2 lawsuits currently challenge laws establishing limits on polling locations, time periods and justifications for early voting, the accuracy of mail-in ballots, the accuracy of provisional ballots, time periods for voter registration, pre-registration for under-18 voters, the number of vote-counting machines a county must maintain, and several other voting prerequisites. *See* App. 188a & n.54 (Jones, J., dissenting).

The dissenting judges below are not the first to recognize the sweeping consequences of imposing VRA §2 liability based on socioeconomic disparities without proof of an actual effect on voting behavior. Judges in the Second, Seventh, Ninth, and Eleventh Circuits have made the same warning. *Frank*, 768 F.3d at 754 (conflating poverty with race under §2 threatens to "sweep[] away almost all registration and voting rules"); *accord Johnson v. Gov. of Fla.*, 405 F.3d 1214, 1229-32 (11th Cir. 2005) (en banc); *Hayden v. Pataki*, 449 F.3d 305, 330-37 (2d Cir. 2006) (Walker, C.J., concurring); *Farrakhan*, 359 F.3d at 1126 (Kozinski, J., dissenting from denial of reh'g en banc).

3. The Fifth Circuit's VRA §2 Interpretation Raises Serious Constitutional Questions.

The Fifth Circuit's expansive interpretation of §2 also raises serious constitutional questions, so it should be rejected under the constitutional-avoidance canon. *E.g.*, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009).

a. As expanded by the Fifth Circuit, VRA §2 is neither congruent nor proportional to the Fifteenth Amendment's prohibition on purposeful racial discrimination in voting. The VRA enforces the Fifteenth Amendment, *Chisom v. Roemer*, 501 U.S. 380, 383 (1991), which prohibits only laws that abridge the right to vote and are motivated by a racially discriminatory *purpose*. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997); *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality op.). The Fifteenth Amendment does not prohibit laws that have a mere disparate effect on voting participation. *Reno*, 520 U.S. at 481. VRA §2's "results" prong, which was added in 1982, goes a significant step beyond the Fifteenth Amendment to prohibit laws with the effect, but not the purpose, of diminishing minority political participation. *See Chisom*, 501 U.S. at 403.

If interpreted to extend an additional layer of prophylaxis—barring laws that do not have *any* effect on voting behavior—VRA §2 would exceed Congress's authority to enforce the Fifteenth Amendment, because it lacks "congruence and proportionality" to the Fifteenth Amendment's prohibition of intentional voting discrimination. *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) (quoting *City of Boerne*, 521 U.S. at 520). Besides the dissenting judges below, App. 198a-204a, 224a-28a, various other judges have echoed these congruence-and-proportionality concerns, *see, e.g.*, *Johnson*, 405 F.3d at 1229-32; *Hayden*, 449 F.3d at 330-37 (Walker, C.J., concurring); *Farrakhan*, 359 F.3d at 1121-25 (Kozinski, J., dissenting from denial of reh'g en banc).

Rather than grapple with these significant constitutional issues, the court of appeals cursorily dismissed them by adhering to outdated precedent decided before this Court fashioned the "congruence and proportionality" test for congressional power in *City of Boerne*, 521 U.S. at 520. *See* App. 69a-70a n.47. This weighty constitutional issue alone warrants this Court's review.

b. In addition, if States face liability for enacting neutral election laws without any disparate effect on voting behavior, then States may be forced to "subordinate[] traditional race-neutral . . . principles" to "racial considerations" in violation of the Equal Protection Clause. *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *see Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2524 (2015) (explaining that courts must avoid interpreting statutes "to inject racial considerations" into government decisionmaking). For example, if a State passes a voter-registration, early-voting, or voter-ID law, it would first have to consider the racial statistics of any related disparity under the Fifth Circuit's decision. Section 2 would thus "force considerations of race on state lawmakers who will endeavor to avoid litigation by eliminating any perceived racial disparity in voting regulations." App. 203a (Jones, J., dissenting).

II. The Fifth Circuit Erroneously Remanded the Discriminatory-Purpose Claim.

This case presents an exceptional scenario. Plaintiffs demanded and obtained a treasure trove of privileged legislative material—thousands of internal legislative documents and hours of legislator depositions. That material contained no evidence of racial discrimination; it only confirmed that the Legislature passed SB14 for legitimate reasons recognized by *Crawford*. On that basis alone, it would be clear error for any court to find a discriminatory purpose here. Yet, the district court found that the Texas Legislature had such an illicit purpose when enacting its voter-ID law.

The court of appeals correctly held this finding was "infirm" in myriad ways, App. 24a, but it nevertheless remanded for further consideration. Given plaintiffs' extraordinary access to direct evidence regarding the legislative process behind SB14, the Fifth Circuit erred in remanding this claim. Remand is inappropriate if, on a correct view of the law, "the record permits only one resolution of the factual issue." *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982). Here, the record only permits a finding that the Texas Legislature did not act with a discriminatory purpose in passing SB14.

This exceptional case warrants this Court's review before further proceedings continue in district court on the grave charge that the Texas Legislature acted with a racially invidious purpose.

A. Through a trio of well-established precedents, this Court has imposed significantly heightened standards for finding that any actor—but particularly a State legislature—has acted with a racially discriminatory purpose. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

Under these precedents, even proof that a State legislature passed a law knowing it would cause a discriminatory effect is insufficient to establish a discriminatory purpose. As this Court made clear decades ago:

> 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*, not merely in spite of, its adverse effects upon an identifiable group.

Feeney, 442 U.S. at 279 (citation, internal quotation marks, and footnote omitted) (emphasis added).

Accordingly, *Davis* upheld an employment test that white applicants passed in proportionately greater numbers than African-Americans, because plaintiffs failed to adduce any proof that racial discrimination entered into the formulation of the test. 426 U.S. at 245-47. Similarly, *Arlington Heights* upheld a zoning board decision denying permission to build low- and moderate-income housing projects because there was no evidence that the decision was racially motivated. 429 U.S. at 269-71. And in *Feeney*, the Court upheld an employment preference for veterans, despite its substantial disparate impact on the

basis of sex, because nothing in the record demonstrated that the preference was originally devised or reenacted to harm women's job prospects. 442 U.S. at 279.

At bottom, non-invidious classifications like those at issue in *Davis*, *Arlington Heights*, and *Feeney* are upheld unless plaintiffs can prove that the justification for the law is "obvious pretext" for racial discrimination—that is, the law "can plausibly be explained only as a [race]-based classification." *Id.* at 272, 275. The Court therefore "will not infer a discriminatory purpose" where there were "legitimate reasons" to enact a law. *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987); *see also Smith v. Doe*, 538 U.S. 84, 92 (2003) (holding that "only the clearest proof will suffice to override" the legislature's stated intent).

B. As the Fifth Circuit recognized, the Texas Legislature's stated purpose in passing a voter-ID law was "protect[ing] the sanctity of voting, avoiding voter fraud, and promoting public confidence in the voting system." App. 17a. Plaintiffs were unable to meet their substantial burden of showing that this stated justification was "obvious pretext" for race discrimination. *Feeney*, 442 U.S. at 272. To the contrary, the record only confirmed the Legislature's stated purposes. *Supra* p.5 n.2.

The courts below acknowledged that plaintiffs failed to adduce *any* direct evidence of purposeful discrimination pertaining to SB14—even though plaintiffs obtained unprecedented discovery of privileged legislative materials. App. 26a ("[T]he record does not contain direct evidence that the Texas Legislature passed SB14 with a racially invidious purpose[.]"). There was not even evi-

dence that the Texas Legislature requested, let alone examined, data showing the race of voters without SB14-compliant ID—although even that evidence would have been insufficient under *Feeney*. *Cf. N.C. State Conf. of NAACP*, 2016 WL 4053033 at *3 (evidence showed that the North Carolina Legislature requested and received racial data as to possession of photo ID). Indeed, nearly half of the voters on plaintiffs' No-Match List are white, precluding a discriminatory-purpose finding under *Feeney*, 442 U.S. at 275 ("Too many men are affected by [the law] to permit the inference" that its true purpose was sex discrimination).

Unsurprisingly then, the Fifth Circuit reversed the district court's judgment that SB14 was passed with a racially discriminatory purpose, holding that the lower court improperly credited "infirm," "unreliable," and "speculati[ve]" circumstantial evidence in finding that the Legislature acted with a racially invidious purpose. App. 15a-25a; *see* App. 207a (Smith, J., dissenting) ("The plurality opinion . . . roundly and repeatedly scolds [the district judge] for mishandling [the] evidence and making erroneous findings therefrom.").

But the court of appeals should not have remanded this claim for further proceedings. Although discriminatory intent may be proved by circumstantial evidence in certain cases, *see Arlington Heights*, 429 U.S. at 266, this was no ordinary case. Plaintiffs were provided with unprecedented access to legislative materials and testimony after insisting that such evidence was essential to their discriminatory-purpose claim. *Supra* pp.4-5; *cf. N.C. State Conf. of NAACP*, 2016 WL 4053033 at *14 ("[A]s the Supreme Court has recognized, testimony as

to the purpose of challenged legislation frequently will be barred by legislative privilege. That is the case here." (internal quotation marks and alterations omitted)).

That discovery included privileged and confidential papers, communications, and testimony from the Lieutenant Governor and dozens of legislators who voted for SB14. *Supra* p.4. Ultimately, legislators and their staff produced thousands of documents and sat for depositions where plaintiffs asked about conversations among legislators, mental impressions, and motives for passing SB14. *See* App. 140a-41a & nn. 15-16 (Jones, J., dissenting).

Plaintiffs obtained this unprecedented discovery despite this Court's admonition in *Arlington Heights* that "[p]lacing a decisionmaker on the stand" should be avoided because "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." 429 U.S. at 268 n.18. As the six dissenting judges observed:

> The Court in *Arlington Heights* noted the need to consider circumstantial evidence in cases where testimony by the actual decisionmakers was barred by privilege. . . . But . . . where decisionmakers are called to testify about their actions and the justifications advanced in their testimony do not demonstrate a pretext for intentionally discriminatory actions, the logic of *Arlington Heights* suggests that the direct evidence is actually stronger than the circumstantial evidence proffered by the plaintiffs.

App. 221a (Clement, J., dissenting) (internal quotations marks and alterations omitted).

Yet after obtaining that extensive discovery here, plaintiffs failed to adduce a single document or statement suggesting that any legislator—much less the Legislature as a whole—intended to suppress minority voting through SB14. App. 26a; *see* App. 126a-27a (Jones, J., dissenting) ("[T]he multi-thousand page record yields not a trace, much less a legitimate inference, of racial bias by the Texas Legislature."); App. 221a (Clement, J., dissenting) ("[Plaintiffs] intrusive search—typically reserved only for extraordinary cases—yielded no such evidence [of discriminatory intent.]" (internal quotation marks omitted)). Instead, the record confirmed that the statute was designed to prevent voting fraud and safeguard voter confidence—even legislators who *opposed* SB14 conceded that legislators supporting the law did not intend to harm minority voters. *See* R.27607:201:1-10, 99656:2-6, 99656:11-99657:2.

The remaining shreds of circumstantial evidence not already discredited by the court of appeals cannot possibly satisfy this Court's heightened standard for finding purposeful discrimination. *See* App. 172a-73a (Jones, J., dissenting) ("[T]he weak, or unsupported inferences claimed by the majority are contradicted by the overwhelming evidence from the complete record that negated any racially discriminatory purpose behind SB14."). In light of the unprecedented amount of direct, legislatively privileged evidence confirming the Legislature's legitimate intentions, the remaining "circumstantial evidence would have to be overwhelming to support a theory—not borne out by any direct evidence—that there was a vast but silent conspiracy to pass a racially discriminatory law." App. 142a (Jones, J., dissenting).

Nothing close to such overwhelming evidence exists, and this Court's review is necessary to reject the grave charge that the Texas Legislature acted with a racially invidious purpose.

III. No Vehicle Issues Preclude Review of the Questions Presented.

There are no barriers preventing this Court from reviewing the questions presented. The district court entered a final judgment, and the en banc Fifth Circuit sustained the finding of a discriminatory effect under VRA §2. The Fifth Circuit did remand for further consideration of the discriminatory-purpose claim and the remedy for the discriminatory-effect claim, but neither issue will bear on questions regarding the appropriate standards for liability at issue in this petition.

It is true that petitioners could seek certiorari on either question presented after further proceedings in the district court. *E.g.*, *Mercer v. Theriot*, 377 U.S. 152, 153-54 (1964) (per curiam) (quoting *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257–58 (1916)); *see* Stephen M. Shapiro, et al., Supreme Court Practice 84 (10th ed. 2013).

But there are significant advantages for this Court to review these certiorari-worthy questions now. A significant circuit split on the scope of VRA §2 liability persists. The Court's guidance is thus needed now, especially when resolution of the first question presented affects the validity of numerous election laws.

Moreover, if the Court were to overturn the Fifth Circuit's discriminatory-effect finding under VRA §2,

that would avoid unnecessary proceedings on the discriminatory-purpose claim. The district court acknowledged that there was no direct evidence of discriminatory purpose. App. 458a. And without a showing of discriminatory effect, circumstantial evidence cannot establish discriminatory purpose. *See, e.g.*, *Crawford v. Bd. of Educ. of City of L.A.*, 458 U.S. 527, 544 n.31 (1982) ("Absent discriminatory effect, judicial inquiry into legislative motivation is unnecessary, as well as undesirable." (quoting *Brown v. Califano*, 627 F.2d 1221, 1234 (D.C. Cir. 1980)); *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 523 (9th Cir. 2011) ("failure to establish . . . discriminatory impact prevents any inference of intentional discrimination").

* * *

The Fifth Circuit held that Texas' voter-ID law violates VRA §2 despite the fact that plaintiffs presented no evidence of diminished minority political participation, or even a single person who would be unable to vote as a result of the law. The court's decision creates a split with three circuits and threatens countless longstanding election laws. And it subjects the Texas Legislature to the ongoing charge of intentional racial discrimination—on a record showing no discriminatory effect on voting and only legitimate purposes recognized by this Court in *Crawford*. Review of these exceptionally important issues is warranted now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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