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-Appellant*.

(caption continued on inside cover)

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

BRIEF OF THE PROJECT ON FAIR REPRESENTATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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(caption continued)

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, INC., *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*.

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 29.2, *amicus curiae* provides this supplemental statement of interested persons in order to fully disclose all those with an interest in this brief. The undersigned counsel of record certifies that the following supplemental list of persons and entities 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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Amicus curiae certifies that it is a 501(c)(3) nonprofit organization. *Amicus curiae* has no corporate parent and is not owned in whole or in part by any publicly held corporation.

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OTHER AUTHORITIES

Absentee Voting, New York Board of Elections 12

Don't Wait on Iowa, Georgians Can Vote Now, Georgia Secretary of State 12

Jason D. Mycoff, et al., *The Effect of Voter Identification Laws on Aggregate and Individual Level Turnout*, Am. Pol. Sci. Ass'n, Ann. Meeting Paper (Aug. 2007) 29

Jason D. Mycoff, et al., *The Empirical Effects of Voter-ID Laws: Present or Absent?*, PS: Pol. Sci. & Pol. (Jan. 2009) 28

Jeffrey Milyo, *The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis*, Report 10-2007, Inst. Pub. Pol'y, Univ. Mo. (Nov. 2007) 28

Kentucky 2015 General Election Guide, Kentucky Secretary of State (2015) 13

M.V. Hood III & Charles S. Bullock III, *Worth a Thousand Words? An Analysis of Georgia's Voter Identification Statute*, 36 Am. Pol. Res. 555 (2008) 29

Nate Cohn, *Why Voter ID Laws Don't Swing Many Elections*, N.Y. Times, Nov. 19, 2014 23

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Samuel Issacharoff, *Ballot Bedlam*, 64 Duke L.J. 1363 (2015) 27, 29

State Voter Information Directory, U.S. Vote Foundation 13

Stephen Ansolabehere, *Access Versus Integrity in Voter Identification Requirements*, 63 N.Y.U. Ann. Surv. Am. L. 613 (2008) 27

Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day,* PS: Pol. Sci. & Pol., Jan. 2009 27

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Project on Fair Representation ("The Project") is a public interest organization dedicated to the promotion of equal opportunity and racial harmony.[1] The Project works to advance race-neutral principles in voting, education, public contracting, and public employment. Through its resident and visiting academics and fellows, The Project conducts seminars and releases publications relating to the constitutionality of the Voting Rights Act. The Project also has been involved in cases involving these important issues, *see, e.g., Shelby Cty. v. Holder,* 133 S. Ct. 2612 (2013), and has filed amicus briefs as well, *see, e.g., Perry v. Perez,* 132 S. Ct. 934 (2012); *Riley v. Kennedy,* 553 U.S. 406 (2008).

The Project has a direct interest in this case. The Project has a long history of opposing interpretations of the Voting Rights Act that cannot be reconciled with the Constitution or the law's text. The decision here runs contrary to the principles of race neutrality to which The Project is dedicated and to the American ideal of individual equality to which The Project is profoundly committed. For these reasons, The Project respectfully submits this brief in support of Appellants and urges the Court to reverse the judgment below.

[1] No party's counsel authored this brief in whole or in part, and no party, party's counsel, or person other than *amicus curiae*, or its counsel, contributed money intended to fund the brief's preparation or submission. Counsel for all parties consent to the filing of this brief.

SUMMARY OF ARGUMENT

Section 2 of the Voting Rights Act ("VRA") provides that a State may not impose a measure that restricts access to the ballot box if it "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race" or membership in a language-minority group. 52 U.S.C. § 10301(a). Section 2 is constitutional only to the extent that it is "appropriate" enforcement legislation. With respect to vote-denial claims (as opposed to vote-dilution claims), such as this challenge to SB14's photo-ID requirement, the Fourteenth Amendment and Fifteenth Amendment protect two distinct rights. The Fourteenth Amendment prevents States from imposing excessively burdensome restrictions on access to the ballot. The Fifteenth Amendment prohibits voting rules that discriminate on the basis of race or ethnicity. These two rights are complimentary. The Fifteenth Amendment ensures equal treatment; the Fourteenth Amendment ensures that obstacles do not needlessly impede exercise of the franchise. But neither right is unlimited. The Constitution does not immunize any class of citizens from "the usual burdens of voting." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (Stevens, J.).

Accordingly, Section 2 must be interpreted to invalidate only those measures denying minorities a fair and reasonable opportunity to exercise the franchise. Section 2 does not prevent States from enacting rules that disproportionately

impact minorities; that is an impossible standard that would force election codes across the country to be rewritten from top to bottom. Section 2 instead provides that, if minority voters are disproportionately impacted, that burden does not result in denial of the right to vote. Limiting voting to days and times when it would be extraordinarily difficult for minority voters to make it to the polls, for example, violates Section 2. But shortening the early-voting period from three weeks to two weeks would not be a Section 2 violation given the many other avenues for voting. The former, in other words, denies minorities a fair and reasonable opportunity to vote. The latter clearly would not. Interpreting Section 2 in the manner the United States proposes—which makes disproportionate impact the statute's touchstone even if there is no competent evidence that the voting requirement will impair anyone's ability to freely vote—would overstep Congress's authority to enforce the Fourteenth and Fifteenth Amendments.

The "Senate Factors" do not solve the problem. Those circumstances may help explain why minorities might disproportionately lack SB14-compliant identification. In that way, the Senate Factors might establish a correlation between socioeconomic status, for example, and race. At most, then, those factors might support an argument that a voting rule causing minority disenfranchisement meets Section 2's command that the result be "on account of race." But that is the second step of the statutory inquiry; it comes *after* the plaintiffs have established that the

law denies them a fair and reasonable opportunity to exercise the franchise. Factors that support an argument as to why minorities are disproportionately impacted by a particular voting requirement is not proof that the impact leads to impairment of the underlying right that Section 2 protects.

For purposes of Section 2, therefore, the fundamental issue is not whether minorities disproportionally lack voter-IDs and need to obtain them before voting. The issue is whether Texas makes it unreasonably difficult for minorities to obtain voter-IDs. On this score, there is *no* evidence in support of plaintiffs' challenge to SB14. Texas does not make it needlessly difficult for any voter or class of voters to obtain a voter-ID. Certain classes of voters, such as those with religious objections, those lacking identification because of a natural disaster, and disabled voters, are exempted from the requirement. Individuals who are 65 or older can vote by mail without a photo ID. And, any other voters lacking SB14-compliant ID may obtain one free of charge by presenting one (or a combination) of over 30 different forms of identification. In short, SB14 does not deny any citizen of a fair and reasonable opportunity to vote.

The evidence on the ground confirms what should be clear on the face of the statute. There is no evidence that Texas has denied any voter the opportunity to vote. That the plaintiffs cannot point to anyone who is disenfranchised should be conclusive proof. But the many elections that Texas has held since SB14 took

effect without any evidence of vote denial, numerous academic studies, and the lack of any record evidence supporting plaintiffs' claims provides confirmation that Texas has not violated Section 2. Accordingly, the district court's decision should be reversed.

ARGUMENT

I. A State Voter-ID Law Only Violates The "Results" Prong Of Section 2 Of The Voting Rights Act If It Denies Minority Voters A Fair And Reasonable Opportunity To Cast A Ballot.

A. Congress may only enforce those voting rights that the Fourteenth and Fifteenth Amendments protect.

Section 2 is constitutional only to the extent it enforces the Fourteenth and Fifteenth Amendments. "[A]s broad as the congressional enforcement power is, it is not unlimited." *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (citation and quotations omitted). "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States." *Id*. (citation and quotations omitted). But the Constitution's meaning is fixed; Congress may not alter it under the guise of enforcement. *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970). Thus, for Section 2 to be "appropriate" enforcement legislation, there "must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520.

The Fourteenth and Fifteenth Amendments have been interpreted to protect the right to vote in two ways: vote denial and vote dilution. *Shaw v. Reno,* 509 U.S. 630, 640 (1993) ("'The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.'") (quoting *Allen v. State Bd. of Elections,* 393 U.S. 544, 569 (1969)). Vote denial claims, quite naturally, allege that access to the ballot box has been impaired on a prohibited basis. "Vote denial cases" historically challenged "practices such as literacy tests, poll taxes, white primaries, and English-only ballots." *Simmons v. Galvin*, 575 F.3d 24, 29 (1st Cir. 2009). "By contrast, vote dilution challenges involve practices that diminish minorities' political influence, such as at-large elections and redistricting plans that either weaken or keep minorities' voting strength weak." *Id*. (citations and quotation omitted). In determining the Constitution's sweep, it therefore is always necessary to distinguish between state laws "that pertain to registration and access to the ballot" and those "that might 'dilute' the force of minority votes that were duly cast and counted." *Holder v. Hall*, 512 U.S. 874, 895-96 (1994) (Thomas, J., concurring in the judgment).

It is common ground that this challenge to Texas's voter-ID law sounds in vote denial. The Fourteenth and Fifteenth Amendments protect against vote denial in different ways. The Fifteenth Amendment expressly provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United

States or by any State on account of race, color, or previous condition of servitude." The Fifteenth Amendment thus ensures equal treatment; it prohibits intentional discrimination on the basis of race with respect to registration and voting. The Fourteenth Amendment, by contrast, has been interpreted to bar laws that excessively burden the right to vote. *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi,* 504 U.S. 428 (1992). Its focus, in other words, is on the severity of the burden itself—not disparate treatment of groups of voters. *Crawford*, 553 U.S. at 205-06 (Scalia, J., concurring in the judgment).

The Supreme Court has been careful to keep these lines of precedent separate. Invalidating ballot-access rules (absent intentional racial discrimination) as too burdensome without a compelling showing would make it impossible to run elections. "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick*, 504 U.S. at 433 (citation and quotations omitted). After all, States "may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Every aspect of a State's election code "inevitably affects—at least to some degree—the individual's right

to vote and his right to associate with others for political ends." *Anderson*, 460 U.S. at 788.

Accordingly, no citizen has a Fourteenth or Fifteenth Amendment right to be free from "the usual burdens of voting." *Crawford*, 553 U.S. at 198 (Stevens, J.). A ballot-access measure imposed on voters of one race but not another violates the Fifteenth Amendment. And, a racially-neutral measure that imposes "excessively burdensome requirements" on all voters will violate the Fourteenth Amendment. But "reasonable, nondiscriminatory restrictions," *Anderson*, 460 U.S. at 788, on access to the ballot box are not unconstitutional because, as alleged here, they disproportionately impact minority voters.

B. Section 2 ensures ballot-access rules do not deprive minorities of a fair and reasonable opportunity to vote.

Section 2 provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language-minority group. 52 U.S.C. § 10301(a). The term "vote" includes "all action necessary to make a vote effective …. including, but not limited to, registration … or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast." *Id.* § 10310(c). Section 2's text, accordingly,

makes plain that it is designed to protect the right to vote and any preliminary step necessary to cast that vote. If enforcement of Texas's voter-ID statute "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language-minority group, it violates Section 2. *Id.* § 10301(a).

Section 2 further provides that "a violation … is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [Section 2] 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). According to the United States, this provisions requires "a fact-based, totality-of-the-circumstances analysis," U.S. Panel Br. 15, and shows that "Section 2 does not require that a challenged practice deprive minority voters completely of the ability to vote," U.S. Panel Br. 13. Even so, that does not mean that Texas's voter-ID law violates Section 2 if statistical evidence establishes that the requirement "bears more heavily on minority voters" than other groups. U.S. Panel Br. 15. Interpreting Section 2 that expansively unmoors it from statutory text and deviates too far from the Constitution to be appropriate enforcement legislation.

Under a proper interpretation of Section 2, minorities "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" in a vote-denial case when the ballot-access measure deprives them of a fair and reasonable opportunity to register and vote. If the rule does not materially impair minorities from exercising the franchise, in no sense can it be said that "the political processes leading to nomination or election in the State or political subdivision are not equally open" to them. But if the rule erects an unfair or unreasonable obstacle to exercising the franchise, then the Court must decide whether the burden is imposed on account of race or membership in a language-minority group. *See infra* at 16-20.

Indeed, the fundamental purpose of the VRA is to guarantee the "effective exercise of the electoral franchise" for minority voters. *Beer v. United States*, 425 U.S. 130, 141 (1976). That is why the opportunity to register and cast a ballot is Section 2's touchstone in vote-denial cases. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 425-26 (2006) (explaining that "the statutory text directs us to consider the 'totality of circumstances' to determine whether members of a racial group have less opportunity than do other members of the electorate"). The issue, then, is *not* whether minorities are disparately impacted by a voting rule. It is whether that disparate impact translates into "less *opportunity* than other members of the electorate to participate" in the election. 52 U.S.C. § 10301(b). Unless a

State has made it "*needlessly* hard" to register and vote, "it has not denied anything to any voter." *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014).

The hypothetical from Justice Scalia's dissent in *Chisom v. Roemer*, 501 U.S. 380 (1991), offers an apt illustration. As he explained, if "a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity '*to participate* in the political process' than whites, and [Section] 2 would therefore be violated." *Id*. at 408 (Scalia, J., dissenting). If, however, that county allowed voter registration 7 days a week for 8 hours a day, and then changed its law to allow registration one less hour each day, Section 2 would not be violated—even if it could be shown that the statutory amendment had a disparate impact on minority voters (because, for example, minority voters tended to use the eliminated registration hour more than other voters). That change would not violate Section 2 because, quite plainly, it did not unfairly or unreasonably deny minority voters the opportunity to register to vote.

Early voting offers another example. Many States have reduced early-voting days because of budgetary and staffing constraints. Under the United States' theory of the case, if the reduction of early voting days has a disproportionate effect on minority voters, it violates Section 2. But a proper Section 2 inquiry must focus on whether reducing early-voting days makes it needlessly difficult for minority

voters to exercise the franchise. It would be unacceptable to conclude that a State's reduction of early voting from 14 days to 12 days, for instance, has the result of denying *anyone* the opportunity to vote, especially when the State offers in-person Election Day voting and robust absentee voting. *See, e.g.*, *Brown v. Detzner*, 895 F. Supp. 2d 1236, 1249-55 (M.D. Fla. 2012).

Making disproportionate effect the governing standard would lead to other untenable results. States have widely varying electoral systems. New York and Pennsylvania, for example, permit regular ballots to be cast on Election Day only and require an excuse to use an absentee ballot;[2] Florida offers no-excuse absentee voting and early voting of regular ballots (*i.e.*, immediate tabulation of the ballot just like on Election Day);[3] New Jersey offers no-excuse absentee voting but no early voting of regular ballots;[4] Georgia offers no-excuse absentee voting and 21 days of in-person absentee voting;[5] Kentucky allows mail-in absentee voting with an excuse, and machine voting for voters with a valid excuse during the 12

[2] *Absentee Voting,* New York Board of Elections, http://goo.gl/Nk151S; *Voting by Absentee Ballot*, Pennsylvania Secretary of State, http://goo.gl/YOmYeY.

[3] *Voting*, Fl. Div. of Elections, Florida Secretary of State, http://goo.gl/aARBMz.

[4] *Register to Vote!*, New Jersey Department of State, http://goo.gl/PBiSRf.

[5] *Don't Wait on Iowa, Georgians Can Vote Now*, Georgia Secretary of State, http://goo.gl/eydCJb.

business days immediately preceding Election Day;[6] Michigan generally allows mail-in absentee voting with an excuse;[7] Tennessee allows in-person voting prior to Election Day (ending five days before Election Day), and absentee voting by mail is only available with an excuse;[8] and, finally, Oregon generally conducts its elections by mail.[9] *See also* State Voter Information Directory, U.S. Vote Foundation, https://goo.gl/mnbhe2.

Under the approach the United States proposes, States may need to alter any or all of these regimes. Plaintiffs would only need to show that an electoral system offers minorities "'less opportunity' to participate relative to other voters." U.S. Panel Br. 13. If an alternative regime would offer minorities more opportunities relative to other voters, the State would be required to newly offer the requested means of voting or eliminate the contested means of voting—*even if no minority voter was being deprived of a fair and reasonable opportunity to exercise the franchise*. There is no indication in the statute's text, purpose, or legislative history that Congress intended for Section 2 to sweep this broadly.

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[6] *Kentucky 2015 General Election Guide*, Kentucky Secretary of State (2015), http://goo.gl/GjVUQU.

[7] *Obtaining an Absent Voter Ballot*, Michigan Dept. of State, http://goo.gl/I6S14D.

[8] *Voter Information*, Tennessee Secretary of State, http://goo.gl/UdWqaY.

[9] *Voting in Oregon*, Oregon Secretary of State, http://goo.gl/i3abey.

These concerns are not exaggerated. The United States argues that "absentee voting exacerbates SB14's racial impact because Anglo voters are significantly more likely than minority voters to be over the age of 65 and to vote absentee." U.S. Panel Br. 30-31 (internal citations omitted). Presumably, then, Section 2 would prohibit Texas from making it *easier* for elderly citizens to exercise the franchise or to otherwise liberalize absentee voting. Expanding voting opportunities for the elderly would, according to the United States, necessarily provide minorities with "'less opportunity' to participate *relative to other voters*." U.S. Panel Br. 13 (emphasis added). It simply cannot be that Section 2 forbids States from making voting easier and more accessible if the new procedures are somehow relatively more popular among non-minority voters. But that is the inevitable consequence of adopting the United States' position.

There are myriad examples. Texas Supp. Br. 44-46. Ultimately, though, the limit on Congress's enforcement authority forecloses such a troublesome interpretation Section 2. The Supreme Court has not yet confronted whether Section 2, "as interpreted in *Thornburg v. Gingles,* 478 U.S. 30 (1986), is consistent with the requirements of the United States Constitution." *Chisom*, 501 U.S. at 418 (Kennedy, J., dissenting); *Bush v. Vera*, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring) ("In the 14 years since the enactment of § 2(b), we have interpreted and enforced the obligations that it places on States in a succession of

cases, assuming but never directly addressing its constitutionality."). Section 2 already "tests the outer boundaries" of Congress's enforcement authority under the Reconstruction Amendments, *Nw. Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193, 216 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part), by prophylactically "proscribing practices that are discriminatory in effect, if not in intent," *Tennessee v. Lane*, 541 U.S. 509, 520 (2004). It is settled law that "discriminatory intent" is a necessary element "under the Fourteenth and Fifteenth Amendments." *Rogers v. Lodge*, 458 U.S. 613, 621 (1982).

Adopting this "'less opportunity' to participate relative to other voters" test would push Section 2 beyond the breaking point. "Congress does not enforce a constitutional right by changing what the right is." *Boerne*, 521 U.S. at 519. Yet that is what adopting this interpretation would do. In practice, it would specially protect minorities from "the usual burdens of voting," *Crawford*, 553 U.S. at 198 (Stevens, J.), and make race the dominant focus in drafting ballot-access rules, Texas Supp. Br. 48-49. In each instance, the State would have to ensure that a given voting rule does not burden minorities more than other voters—irrespective of whether it impairs their ability to register and vote. The State also would need to scour its election architecture to ensure that existing rules do not run afoul of this

standard. In no sense, then, would Section 2 be enforcing the right to vote that the Fourteenth and Fifteenth Amendments protect.

C. The "Senate Factors" have no bearing on whether Texas's voter-ID law deprives minorities of a fair and reasonable opportunity to cast a ballot.

Even assuming the evidence shows that minorities disproportionately lack voter identification, *but see* Texas Supp. Br. 35-36, the challengers still must show that Texas made it unfairly or unreasonably difficult for that class of voters to obtain it. The United States turns to the "Senate Factors" in an attempt to bridge the gap between its disproportionate-effect test and impairment of the right to vote. U.S. Panel Br. 33-36. The United States claims, in particular, these factors prove "how SB14 hinders minority voters from participating effectively in the political process." U.S. Panel Br. 33. That argument fails for several reasons.

Principally, the United States confuses different stages of its own two-part test. Following the lead of the United States and two other circuits, the panel held that a Section 2 claim under the "results" test involves a two-step inquiry. First, "the challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Veasey v. Abbott*, 796 F.3d 487, 504 (5th Cir. 2015) (citations, quotations, and alterations omitted).

Second, "that burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *Id*. (citations, quotations, and alterations omitted). The panel, like the Fourth and Sixth Circuits, employed the Senate Factors to analyze that second question. *See id*. at 509-12

Even assuming that the Senate Factors have *any* pertinence in a vote-denial case, *but see* Texas Supp. Br. 41, the panel reasonably determined that those factors could only have purchase *after* the plaintiffs have demonstrated that they have been denied the ability to participate in the electoral process. *Veasey*, 796 F.3d at 505-09. At most, in other words, the Senate Factors might assist the Court in evaluating whether the right to vote has been denied or abridged "on account of race" or membership in a language-minority group. But whether factors such as poverty, which may correlate with race, constitute discrimination on account of race is a thorny question. As the Supreme Court has explained, "the ordinary meaning of 'because of'" is "by reason of" or "on account of." *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2527 (2013) (citations omitted). It is far from obvious that, if a citizen's right to vote is impaired "because of" a factor that has a correlation with race or language-minority status (e.g., socioeconomic status), the discriminatory result is "because of" the individual's race or language-minority status. Texas Supp. Br. 40-44.

This is not an issue that the Court needs to resolve in this case, however. Plaintiffs must first prove that minorities' "ability or inability to obtain or possess identification for voting purposes (whether or not interacting with the history of discrimination and racially polarized voting) resulted in [minorities] having less opportunity to participate in the political process and to elect representatives of their choice." *Gonzalez v. Arizona*, 677 F.3d 383, 407 (9th Cir. 2012) (en banc). As explained, that first step, properly understood, requires the plaintiffs to show that the voter-ID law materially interferes with the ability of minorities to cast a ballot. *See supra* at 8-15. Unless the plaintiffs can demonstrate this "causal relationship," the Court need not advance to the second step, *viz.*, whether SB14's "requirements interact with the social and historical climate of discrimination" in a sufficiently direct manner that it "results in discrimination 'on account of race or color.'" *Gonzalez*, 677 F.3d at 406. The Senate Factors have no bearing on whether Section 2 plaintiffs can "prove causation." *Id*. at 407.

A "history of official discrimination in the state or political subdivision" sheds no light on whether *this law* deprives "the minority group" of the ability to fairly "register, to vote, or otherwise to participate in the democratic process." *Gingles*, 478 U.S. at 36-37 (citations and quotations omitted). Specifically, whether "voting in the elections of the state or political subdivision is racially polarized," "whether political campaigns have been characterized by overt or subtle racial

appeals," or whether "members of the minority group have been elected to public office in the jurisdiction" offers no insight into whether SB14 provides minority voters with a fair and reasonable opportunity to obtain proper identification. *Id*. at 37. Factors such as whether "unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group" have been used in the past, whether "there is a candidate slating process," or "whether the members of the minority group have been denied access to that process" are equally irrelevant. *Id*. And, "the extent to which members of the minority group … bear the effects of discrimination in such areas as education, employment and health," says nothing about whether SB14 makes it needlessly burdensome to obtain voter identification. *Id.*

Evaluating whether SB14 denies minorities a fair and reasonable opportunity to vote requires the kind of detailed, case-specific analysis that the United States and the district court were unwilling (or unable) to undertake. It requires competent evidence that SB14 makes it needlessly difficult to secure identification; it requires competent evidence that SB14's substantive requirements are needlessly difficult to satisfy; it requires competent evidence that Texas does not offer reasonable and fair alternatives for voters reasonably unable to obtain proper identification. Absent such evidence, Plaintiffs cannot carry their burden to prove that their right to vote

has been violated. Generalized studies about social and historical conditions are not a viable substitute.

II. Texas's Voter-ID Law Does Not Deprive Minority Voters Of A Fair And Reasonable Opportunity To Cast A Ballot.

Under the proper analysis, the outcome here is straightforward. Plaintiffs failed to show that SB14 deprives minority voters of a fair and reasonable opportunity to cast a ballot. Texas requires that any individual seeking to vote in-person must present a valid photo ID. Acceptable IDs include: (1) a Texas driver's license issued by the Texas Department of Public Safety ("DPS"); (2) a Texas Election Identification Certificate ("EIC") issued by DPS; (3) a Texas personal ID card issued by DPS; (4) a Texas concealed handgun license issued by DPS; (5) a U.S. military identification card containing the person's photograph; or (6) a U.S. passport. Tex. Elec. Code § 63.0101.

Certain individuals, however, may vote without presenting a photo ID. Individuals who have a religious objection to being photographed, persons who lack ID because of a natural disaster, and disabled voters all can vote in-person without a photo ID. *Id*. § 65.054(b)(2)(B)-(C); *id*. § 13.002(i); *id*. § 63.001(h); *see also id*. § 82.002. In addition, voters who are 65 or older can vote by mail without providing a photo ID. *Id*. § 82.003.

Individuals lacking any accepted form of photo ID can obtain a free Election Identification Certificate ("EIC") from DPS. Tex. Transp. Code. § 521A.001(a)-

(b). They can obtain an EIC by presenting one "primary" ID, two "secondary" IDs, or one "secondary" ID and two forms of "supporting identification." 37 Tex. Admin. Code §§ 15.181, 15.182(1). A "primary" ID is a Texas driver's license or personal ID card from DPS that has been expired for less than two years. *Id*. § 15.182(2). A "secondary" ID can be a birth certificate, a U.S. Department of State certification of birth, a court order that records a change in name or gender, or citizenship or naturalization papers. *Id.* § 15.182(3). There are 28 forms of "supporting identification," including voter registration cards, insurance policies, school records, military records, Social Security cards, W-2 forms, Medicare or Medicaid cards, immunization records, tribal membership cards, federal inmate ID cards, Veteran's Administration cards, and government agency ID cards. *Id*. § 15.182(4). Importantly, individuals seeking an EIC can obtain any necessary certified records for free from any State or local office in Texas. *See* Tex. Health & Safety Code § 191.0046(e) ("Notwithstanding any other law, the state registrar, a local registrar, or a county clerk shall not charge a fee to an applicant that is associated with searching for or providing a record, including a certified copy of a birth record, if the applicant states that the applicant is requesting the record for the purpose of obtaining an [EIC].").[10]

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[10] Any voter who arrives at a polling place without proper ID can still vote provisionally. Tex. Elec. Code § 63.001(g). The precinct election official must provide the individual with a description of Texas's ID requirement and the

In sum, Texas requires photo ID to cast a ballot in-person, but includes exemptions for vulnerable groups lacking ID, allows voting-by-mail for seniors, removes all financial barriers for those seeking an ID, and offers those individuals wishing to vote but lacking identification to vote provisionally and affords them time to procure ID.

It is no surprise, therefore, that neither the district court nor Plaintiffs could muster *any* evidence of disenfranchisement. Since SB14 took effect, Texas has held three statewide elections, six special elections, and numerous local elections. ROA.64028:55:20-24. Yet the district court cited no evidence that registration and turnout rates—of any race or language group—have declined. Texas Supp. Br. 33; ROA.64028:55:20-24. Despite a herculean investigation, Plaintiffs identified *no* individuals facing a substantial obstacle to voting because of SB14. Texas Supp. Br. 38. DOJ lawyers traversed Texas visiting homeless shelters to search for voters "disenfranchised" by SB14, yet came up empty, ROA.99075-77; the organizational plaintiffs likewise could not identify any of their members who were registered to vote but lacked an SB14-compliant ID, *see* Texas Supp. Br. 38. Indeed, not one of the 14 named individual plaintiffs lacks a fair and reasonable opportunity to vote. Texas Supp. Br. 9, 54. This is not surprising, given that multiple State and county

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procedure for presenting an ID, a map showing where an ID can be presented, and a notice that if these procedures are followed within six days after the election, the person's vote will be counted. *Id*. §§ 63.001(g), 63.011(a), 65.0541.

officials testified that SB14 caused a "vanishingly small" number of complaints or voters turned away from the polls. ROA.64028:53:25-54:2.

Lacking any evidence of decreased minority registration or turnout, the district court relied on Plaintiffs' expert's estimate that minorities lacked SB14-compliant ID at a higher rate than whites. *See* Texas Supp. Br. 36 (3.6% white; 7.5% African American; 5.8% Hispanic). Armed with these findings, the district court found that SB14 resulted in a denial or abridgement of the right to vote on account of race or color or membership in a language-minority group because (1) African Americans and Hispanics lacked a photo ID at a higher rate than whites, and, therefore, (2) African Americans and Hispanics faced a voting burden at a higher rate than whites. *See Veasey v. Perry*, 71 F. Supp. 3d 627, 695, 698 (S.D. Tex. 2014).

These findings are deeply flawed. As an initial matter, Plaintiffs' estimate of the number of individuals lacking SB14-compliant ID appears to be grossly inflated. Texas Supp. Br. 35-36; *see also* Nate Cohn, *Why Voter ID Laws Don't Swing Many Elections*, N.Y. Times, Nov. 19, 2014, at A3 ("[T]he true number of registered voters without photo identification is usually much lower than the statistics on registered voters without identification suggest. The number of voters without photo identification is calculated by matching voter registration files with state ID databases. But perfect matching is impossible, and the effect is to

overestimate the number of voters without identification…. [And] many voters have valid identifications that aren't issued by the states. Passports, student IDs and military IDs are often allowed."). Further, Plaintiffs' estimate of the racial makeup of those individuals is mere guesswork. Because Texas does not record the race of voters, Plaintiffs' experts used an algorithm to predict each individual's race based on his or her name and address; not surprisingly, then, the algorithm did not correctly identify the race of thousands of individuals. Texas Supp. Br. 36. In fact, it correctly guessed the race of only 16 of the 22 *named* plaintiffs. ROA.98845:14-98846:19.

Yet even assuming the accuracy of Plaintiffs' data, it still falls woefully short of demonstrating that SB14 will "result[] in a denial or abridgement of the right … to vote on account of race or color" or membership in a language-minority group. 52 U.S.C. § 10301(a). *First*, millions of Texans can fully exercise the franchise without ever obtaining an SB14-compliant ID. They can vote in-person without possessing an SB14-compliant ID. *See supra* at 20 (identifying exemptions); *see, e.g.,* U.S. Census Bureau, *Quick Facts: Texas*, http://goo.gl/FL3HO4 (approximately 2.2 million Texans (8.2% of the population) have a disability and are under the age of 65 years old). And they can vote by mail (those 65 and older) without possessing an SB14-compliant ID. *See supra* at 20; *see, e.g.,* U.S. Census Bureau, *supra* (approximately 3.1 million Texans (11.5% of

the population) are over the age of 65). That an individual lacks a photo ID thus says nothing about whether he or she will vote through other means. Indeed, voting by mail is likely the preferred method of voting for tens of thousands of people over the age of 65, as this voting option has been available and popular long before SB14 took effect. *See* Texas Secretary of State, Early Voting Results for the 2012 General Election, http://goo.gl/LPUw2w (219,101 people voted by mail in the 2012 general election); Texas Secretary of State, Early Voting Results for the 2010 General Election, http://goo.gl/jeZl0p (135,496 people voted by mail in the 2010 general election).[11]

Second, that individuals lack an SB-compliant ID says nothing about whether they will have a fair and reasonable opportunity to obtain one. A minor inconvenience that affects one racial group more than another is insufficient to show discriminatory effect. *See supra* at 8-16. At a minimum, then, the district

[11] The district court's conclusion that requiring some citizens (*i.e.*, elderly voters lacking SB14-compliant IDs) to vote by mail is tantamount to disenfranchisement is unsustainable. *Veasey*, 71 F. Supp. 3d at 690. The Constitution and Section 2 protect the right to vote; not the right to vote in a particular method (again, so long as the method offered affords citizens a fair and reasonable opportunity to register and vote). Oregon requires *all* of its citizens to vote by mail. *See supra* at 13. The Constitution and Section 2 likewise do not create a right to vote in a method made available to other voters. *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802 (1969) (upholding a statute allowing some, but not other, citizens to vote absentee). Such laws are valid so long as there is "some rational relationship to a legitimate state end." *Id*. at 809; *see also Biener v. Calio*, 361 F.3d 206, 215 (3d Cir. 2004). It is obviously rational for Texas to require elderly voters lacking SB14-complaint ID to vote by mail.

court needed to identify competent evidence that minority voters who lacked an ID faced a needlessly difficult burden in obtaining it. Yet the district court made no such finding.

Indeed, the district did not even ask the right questions. A far deeper inquiry was needed. For example, of those individuals lacking an SB14-compliant ID, how many already have the documents needed to obtain one? Of those lacking the underlying documents, how many (if any) would have significant trouble obtaining them? And within that even smaller group (those lacking photo ID, lacking the underlying documents necessary to obtain one, *and* facing significant obstacles in obtaining such documents), how many (if any) have voted in the past or have any intention of voting in the future? These were *fundamental questions* that went unanswered. Without answers to them, the district court had no evidentiary foundation for predicting how many individuals (much less their race) would lack a fair and reasonable opportunity to vote as a result of SB14.

That the district court left these important evidentiary questions unanswered is not surprising given the long-documented research into the (non)effects of voter- and photo-ID laws on voter turnout. "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." Samuel Issacharoff, *Ballot Bedlam*, 64 Duke L.J. 1363, 1381-84 (2015).

"Most studies testing a causal relationship between voter-ID laws and turnout have determined the impact of voter-ID laws on overall *and* minority turnout to be minor at best." *Id*.

For example, before this litigation, Plaintiffs' own expert, Professor Steven Ansolabehere, did a nationwide study examining the effect of voter-ID laws on voting. Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day,* PS: Pol. Sci. & Pol., Jan. 2009, at 127, 129. Ansolabehere concluded that "[v]oter ID does not appear to present a significant barrier to voting." *Id*. "Although poll workers widely request ID, such requests rarely result in voters denied the franchise," and "very few people chose not [to] vote in the 2008 primaries for lack of identification." *Id.* "Although the debate over this issue is often draped in the language of the civil and voting rights movements, voter ID appears to present no real barrier to access." *Id.*; *see also* Stephen Ansolabehere, *Access Versus Integrity in Voter Identification Requirements*, 63 N.Y.U. Ann. Surv. Am. L. 613, 626 (2008) ("Voter identification is the controversy that isn't. Almost no one is excluded by this requirement, and when problems arise, there is now a reasonable fail-safe mechanism in the form of provisional ballots…. These findings undercut much of the heated rhetoric that has inflated the debate over voter ID requirements in the United States.").

Ansolabehere's conclusions are supported by numerous additional studies finding no decrease in turnout as a result of voter-ID laws. *See, e.g.,* Jason D. Mycoff, et al., *The Empirical Effects of Voter-ID Laws: Present or Absent?*, PS: Pol. Sci. & Pol. 121, 125 (Jan. 2009) ("Using multiple data sources, we explored whether strict voter-ID laws affect voter turnout at both the aggregate (state) and individual level. We find that voter-ID laws do not affect voter turnout, and as a result we fail to reject the null hypothesis of no effects…. Until there is systematic, empirical evidence of discrimination in the *administration* or *availability* of required forms of identification, there is little reason to suspect voter-ID laws will significantly affect turnout."); Jeffrey Milyo, *The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis*, Report 10-2007, Inst. Pub. Pol'y, Univ. Mo. (Nov. 2007) (examining the change in voter turnout across Indiana counties before and after implementation of photo ID requirements and concluding that "statewide turnout increased by about two percentage points after photo ID" and "there is no consistent evidence that counties that have higher percentages of minority, poor, elderly or less-educated population suffer any reduction in voter turnout relative to other counties"); Jason D. Mycoff, et al., *The Effect of Voter Identification Laws on Aggregate and Individual Level Turnout*, Am. Pol. Sci. Ass'n, Ann. Meeting Paper at 1, 3 (Aug. 2007) ("In this article we … measure the effect of new voter identification laws at the aggregate

and individual levels using multiple data sets across four elections (2000, 2002, 2004, and 2006). Ultimately, we find that the voter identification laws do not meaningfully affect voter turnout.").

This is no doubt why opponents of voter-ID laws have been able to produce only a handful of individuals across the nation claiming to be "disenfranchised." Texas Supp. Br. 33-34; *see also* Issacharoff, *supra*, at 1382 ("[I]t is striking that relatively few persons have actually been identified as impeded by voter-ID requirements in litigation thus far."); Ansolabehere, *supra*, at 625 ("It is rare in survey data that a true zero arises. The number of people who said they were excluded from the polls as a result of voter ID requirements, however, approaches that limit.… It is just that rare of a phenomenon."). The vast majority of people have valid IDs; of the few that that do not, myriad avenues exist to obtain such ID; and any (minor) burdens imposed usually fall on those who had no intention of voting in the first place. Issacharoff, *supra*, at 1832 ("It is easy to imagine that persons sufficiently distant from institutional arrangements providing or independently requiring a photo ID would also be more likely not to vote."); M.V. Hood III & Charles S. Bullock III, *Worth a Thousand Words? An Analysis of Georgia's Voter Identification Statute*, 36 Am. Pol. Res. 555, 573 (2008) (finding that even without strict voter-ID laws, "those [registered voters] who lack driver's

licenses are generally less engaged politically" and thus less likely to vote even before a strict voter-ID law is applied).

In the end, the district court was forced to rely on generic statistics about poverty, class, and possession of ID because of the crucial evidence it lacked—namely, *any* evidence that SB14 would result in *anyone* being denied a fair and reasonable opportunity to cast a ballot. This lack of evidence dooms Plaintiffs' claims. *See supra* at 8-16.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the district court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), undersigned counsel certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point).

Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief contains 6,798 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2013) used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April 2016, copies of the foregoing were filed with the Court's CM/ECF filing system and served electronically on all parties.

/s/ William S. Consovoy

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