No. 17-40884

In The United States Court of Appeals for the Fifth Circuit

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

v.

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

UNITED STATES OF AMERICA, Plaintiff-Appellee,
TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND, IMANI CLARK, Intervenor Plaintiffs-Appellees,

v.

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

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

v.

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

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

v.

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

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

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

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STATEMENT REGARDING ORAL ARGUMENT

This matter is currently scheduled for oral argument before the Court on Tuesday, December 5, 2017. Private Plaintiffs-Appellees agree that this case warrants oral argument.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES x
INTRODUCTION 1
COUNTER-STATEMENT OF JURISDICTION 4
COUNTER-STATEMENT OF THE ISSUES 4
STANDARD OF REVIEW 4
STATEMENT OF THE CASE 5
SUMMARY OF ARGUMENT 8

I. THE DISTRICT COURT'S DISCRIMINATORY INTENT FINDING SCRUPULOUSLY COMPLIED WITH THIS COURT'S DIRECTIONS AND SHOULD BE AFFIRMED UNDER RULE 52 11

A. The District Court Did Not Commit Legal Error On Remand 12

1. The district court correctly construed this Court's decision 13
2. This Court did not direct the district court to retry all its prior findings of fact 14
3. The district court followed this Court's instructions 15
4. Discriminatory intent need be only one purpose of the action and judicial deference to the Legislature is not due 17
5. The district court was not required to await legislative action before rendering its opinion on discriminatory intent 19

6. Texas's claim that SB14's spillover effects on some white voters defeat Plaintiffs' discriminatory purpose claim has been waived and is frivolous 21

B. The District Court's Findings Of Fact On Intentional Discrimination Are Not Clearly Erroneous 23

1. Discriminatory intent is an issue of fact 23

2. The district court properly applied the *Arlington Heights* factors................................... 24

i. SB14 disparately impacted Black and Latino voters 25

ii. Seismic demographic changes coupled with racially polarized voting, led to SB14 26

iii. The Legislature knew of the probable disparate impact of SB14 28

iv. The Legislature justified the bill with pretext... 32

v. The legislative history of SB14 provides substantial evidence of discriminatory intent................................ 36

(a) The proponents of SB14 used unprecedented measures to achieve their goal.............................. 37

(b) SB14's passage was marked by substantive departures..................... 42

(c) SB14's proponents rejected ameliorative amendments 45

(d) Contemporaneous statements—and silence—by legislators provide evidence of discriminatory intent 47

(e) Texas's new legislative history theory is improper and further proof of pretext 48

vi. Texas has a recent history of discrimination in voting............................ 51

vii. Texas has not met its burden of proving it would have enacted SB14 absent discriminatory purpose 52

II. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S REMEDIAL ORDER 54

A. Standard Of Review 54

B. The District Court's Remedial Order Was Sound, Supported, And Within Its Equitable Discretion 54

1. Unlawful intentional discrimination requires a meaningful and complete remedy.. 57

2. SB5 perpetuates SB14's discriminatory features... 59

3. SB5 subjects victims of intentional discrimination to additional unnecessary procedures to vote 64

4. Viewed in its proper context, SB5 does not remedy the violations.. 69

C. Texas And The United States Have Identified No Abuse Of Discretion In The District Court's Remedy 70

III. THIS CASE IS NOT MOOT.. 83

A. Private Plaintiffs Are Entitled To Additional Remedies 84

1. Private Plaintiffs have a concrete, live interest in a finding that SB14 is intentionally discriminatory 85

2. Plaintiffs have a live, concrete interest in a full remedy to discriminatory results 87

B. The Adoption of SB5 in 2017 Does Not by Itself Automatically Moot This Case 88

C. Texas's Cessation Of Its Enforcement Of SB14 Cannot Moot This Case 91

D. The District Court's Decision Should Not Be Vacated 93

IV. SB14 DID HAVE RACIALLY DISCRIMINATORY RESULTS 96

CONCLUSION 96

TABLE OF AUTHORITIES

Page(s)

Cases:

Abie State Bank v. Weaver,
282 U.S. 765 (1931) 89

Alvarez v. Smith,
558 U.S. 87 (2009) 94

Am. Fed'n of State, City And Mun. Emps. v. City of Benton,
513 F.3d 874 (8th Cir. 2008) 54

Anderson v. City of Bessemer City,
470 U.S. 564 (1985) 5, 23

Ansell v. Green Acres Contracting Co.,
347 F.3d 515 (3rd Cir. 2003) 20

Arizona v. California,
460 U.S. 605 (1983) 13

Ayotte v. Planned Parenthood of N. New England,
546 U.S. 320 (2006) 71

Bethune-Hill v. Va. State Bd. Of Elections,
137 S. Ct. 788 (2017) 50

Blackmoon v. Charles Mix Cnty.,
505 F. Supp. 2d 585 (D.S.D. 2007) 86

Brooks v. United States,
757 F.2d 734 (5th Cir. 1985) 21, 49

Brown v. Plata,
563 U.S. 493 (2011) 54

Bursztajn v. United States,
367 F.3d 485 (5th Cir. 2004) 23

Cane v. Worcester Cnty.,
35 F.3d 921 (4th Cir. 1994) 69

Chapman v. NASA,
736 F.2d 238 (5th Cir. 1984) 14

City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,
538 U.S. 188 (2003) 41

City of Mobile, Ala. v. Bolden,
446 U.S. 55 (1980) 19

City of Port Arthur v. United States,
459 U.S. 159 (1982) 69

City of Richmond v. United States,
422 U.S. 358 (1975) 57, 71

Coggeshall v. United States,
69 U.S. 383 (1864) 25

Columbus Bd. of Educ. v. Penick,
443 U.S. 449 (1979) 28-29

Common Cause/Georgia v. Billups,
406 F. Supp. 2d 1326 (N.D. Ga. 2005) 67

Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,
447 U.S. 102 (1980) 21

Cooper v. Harris,
137 S. Ct. 1455 (2017) 18

Cooper v. McBeath,
11 F.3d 547 (5th Cir. 1994) 90

Covington v. North Carolina,
No. 1:15CV399, 2017 WL 4162335 (M.D.N.C. Sept. 19, 2017) 70

Crawford v. Marion County,
553 U.S. 181 (2008) 34, 71

Davis v. Abbott,
781 F.3d 207 (5th Cir. 2015) 90

Davis v. Dep't of Labor & Indus. of Wash.,
317 U.S. 249 (1942) 19

Dep't of Labor v. Triplett,
494 U.S. 715 (1990) 19

Diffenderfer v. Cent. Baptist Church,
404 U.S. 412 (1972) 88

Dillard v. Baldwin Cnty. Comm'n,
694 F. Supp. 836 (M.D. Ala. 1988) 63, 70, 75

Doe ex rel. Doe v. Lower Merion Sch. Dist.,
665 F.3d 524 (3d Cir. 2011) 22

Easley v. Cromartie,
532 U.S. 234 (2001) 18

Ellis v. Ry. Clerks,
466 U.S. 435 (1984) 84

Fairley v. Hattiesburg, Miss.,
584 F.3d 660 (5th Cir. 2009) 5

Foster v. Chatman,
136 S. Ct. 1737 (2016) 50

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000) 91, 92

Gates v. Cook,
376 F.3d 323 (5th Cir. 2004) 54

Gen. Elec. Co. v. Joiner,
522 U.S. 136 (1997) 54

Green v. Cnty. Sch. Bd.,
391 U.S. 430 (1968) 57, 76, 78

Hall v. Bd. Of Sch. Comm'rs,
656 F.2d 999 (5th Cir. Unit B Sept. 1981) 92

Harris v. Siegelman,
695 F. Supp. 517 (M.D. Ala. 1988) 67

Hopwood v. Texas,
236 F.3d 256 (5th Cir. 2000) 5

Houston Chronicle Pub. Co. v. City of League City,
488 F.3d 613 (5th Cir. 2007) 94

Hunter v. Underwood,
471 U.S. 222 (1985) .... *passim*

Hutto v. Finney,
437 U.S. 678 (1978) 54

In re Corrugated Container Grand Jury,
659 F.2d 1330 (5th Cir. Unit A Oct. 1981) 89

Karcher v. May,
484 U.S. 72 (1987) 94

Kirksey v. Bd. of Supervisors,
554 F.2d 139 (5th Cir. 1977) 64

Knox v. Serv. Emps. Int'l Union, Local 1000,
132 S. Ct. 2277 (2012) 84, 89

Koch v. United States,
857 F.3d 267 (5th Cir. 2017) 4, 23

Kramer v. Union Free Sch. Dist. No. 15,
395 U.S. 621 19

Kremens v. Bartley,
431 U.S. 119 (1977) 89

Lane v. Wilson,
307 U.S. 268 (1939) 61

Lewis v. Cont'l Bank Corp.,
494 U.S. 472 (1990) 89

Louisiana v. United States,
380 U.S. 145 (1965) 58, 69

LULAC v. Perry,
548 U.S. 399 (2006) 14, 26, 85

Massachusetts v. Oakes,
491 U.S. 576 (1989) 89

Matter of Complaint of Luhr Bros., Inc.,
157 F.3d 333 (5th Cir. 1998) 23

McCleskey v. Kemp,
481 U.S. 279 (1987) 19

McDonald v. Bd. of Election Comm'rs,
394 U.S. 802 (1969) 19

McIntosh Cnty. Branch of the NAACP v. City of Darien,
605 F.2d 753 (5th Cir. 1979) 67

McKinley v. Abbott,
643 F.3d 403 (5th Cir. 2011) 86, 87

Med. Ctr. Pharmacy v. Holder,
634 F.3d 830 (5th Cir. 2011) 13

Miller v. Johnson,
515 U.S. 900 (1977) 18

Miss. State Chapter, Operation Push v. Allain,
674 F. Supp. 1245 (N.D. Miss. 1987) 86

Miss. State Chapter, Operation Push, Inc. v. Mabus,
932 F.2d 400 (5th Cir. 1991) .... *passim*

N.C. State Conference of NAACP v. McCrory,
831 F.3d 204 (4th Cir. 2016), *cert. denied*,
137 S. Ct. 1399 (2017) .... *passim*

Ne Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville,
508 U.S. 656 (1993) 89, 91

Pac. Shores Props., LLC v. City of Newport Beach,
730 F.3d 1142 (9th Cir. 2013) 35, 39

Perez v. Abbott,
253 F. Supp. 3d 864 (W.D. Tex. 2017) 87, 90

Perez v. Texas,
891 F. Supp. 2d 808 (W.D. Tex. 2012) 27

Perez v. Texas,
970 F. Supp. 2d 593 (W.D. Tex. 2013) 93

Perkins v. City of West Helena,
675 F.2d 201 (8th Cir. 1982) 40

Pers. Adm'r of Mass. v. Feeney,
442 U.S. 256 (1979) 24

Princeton Univ. v. Schmid,
455 U.S. 100 (1982) 89

Pullman-Standard v. Swint,
456 U.S. 273 (1982) 5, 13, 24

Reeves v. Sanderson Plumbing Prods., Inc.,
530 U.S. 133 (2000) 36

Regan v. Time, Inc.,
468 U.S. 641 (1984) 71

Resident Advisory Bd. v. Rizzo,
564 F.2d 126 (3d Cir. 1977) 39

Reynolds v. Sims,
377 U.S. 533 (1964) 69

Richardson v. City and County of Honolulu,
124 F.3d 1150 (9th Cir. 1997) 23

Rogers v. Lodge,
458 U.S. 613 (1982) 5, 24

Salazar v. Buono,
559 U.S. 700 (2010) 72, 73

Shaw v. Reno,
509 U.S. 630 (1993) 31

Sierra Club v. Glickman,
156 F.3d 606 (5th Cir. 1998) 94

Sossamon v. Lone Star State of Texas,
560 F.3d 316 (5th Cir. 2009) 91, 92, 93

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 83

South Carolina v. United States,
898 F. Supp. 2d 30 (D.D.C. 2012) 66, 81, 82

St. Mary's Honor Ctr. v. Hicks,
509 U.S. 502 (1993) 36

Staley v. Harris Cnty.,
485 F.3d 305 (5th Cir. 2007) 95

State Indus., Inc. v. Mor-Flo Indus., Inc.,
948 F.2d 1573 (Fed. Cir. 1991) 14

Staten v. New Palace Casino, LLC,
187 Fed. App'x 350 (5th Cir. 2006) 36

Sunday Lake Iron Co. v. Wakefield Twp.,
247 U.S. 350 (1918) 19

Swann v. Charlotte-Mecklenburg Bd. of Educ.,
402 U.S. 1 (1971) 71

Trinity Lutheran Church of Columbia, Inc. v. Comer,
137 S. Ct. 2012 (2017) 92

U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship,
513 U.S. 18 (1994) 94, 95

United States v. Brown,
561 F.3d 420 (5th Cir. 2009) .... *passim*

United States v. Chem. Found.,
272 U.S. 1 (1926) 19

United States v. Gregory-Portland Indep. Sch. Dist.,
654 F.2d 989 (5th Cir. Unit A Aug. 1981) 22

United States v. Munsingwear,
340 U.S. 36 (1950) 93-94

United States v. Osamor,
271 Fed. App'x 409 (5th Cir. 2008) 21, 49

United States v. Schaffer,
600 F.2d 1120 (5th Cir. 1979) 32

United States v. Texas,
457 F.3d 472 (5th Cir. 2006) 22

United States v. Thomas,
167 F.3d 299 (6th Cir. 1999) 13

United States v. U.S. Gypsum Co.,
333 U.S. 364 (1948) 4

United States v. Vargas-Ocampo,
747 F.3d 299 (5th Cir. 2014) 25

United States v. Virginia,
518 U.S. 515 (1996) 58, 64, 76, 86

Veasey v. Abbott,
830 F.3d 216 (5th Cir. 2016) .... *passim*

Veasey v. Perry,
71 F. Supp. 3d 627 (S.D. Tex. 2014)..................................... *passim*

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,
429 U.S. 252 (1977) .... *passim*

Washington v. Seattle Sch. Dist. No. 1,
458 U.S. 457 (1982) 71

Westwego Citizens for Better Gov't v. City of Westwego,
946 F.2d 1109 (5th Cir. 1991) 73

Williams v. City of Dothan,
818 F.2d 755 (11th Cir. 1987) 22

Wise v. Lipscomb,
437 U.S. 535 (1978) 73

Wiseman v. New Breed Logistics, Inc.,
72 F. Supp. 3d 672 (N.D. Miss. 2014) 50

Young v. Fordice,
520 U.S. 273 (1997) 83

Statutes & Other Authorities:

28 U.S.C. § 1291 3
28 U.S.C. § 1292 3
28 U.S.C. § 1331 4
28 U.S.C. § 1343 4
28 U.S.C. § 1345 4
52 U.S.C. § 10302 .... 85, 86
52 U.S.C. § 10308 4
FED. R. CIV. P. 52 .... *passim*
H.R. Rep. No. 89-439 (1965) 84
S. Rep. No. 97-417 (1982) 47, 58
TEX. ELEC. CODE § 64.012 (2003) 44
TEX. PENAL CODE § 12.34 (2003) 44
Voting Rights Act § 2 .... *passim*
Voting Rights Act § 3 .... *passim*
WRIGHT & MILLER, FED. PRAC. & PROC. § 3533 89

INTRODUCTION

At the heart of this appeal is the district court's well-founded finding of intentional discrimination. That finding is based on a record that this Court, sitting en banc, concluded could support a finding of intentional discrimination, even shorn of the evidence this Court found infirm. Meticulously following this Court's directive to determine whether the absence of the infirm evidence affected the outcome of its original calculus, the district court reaffirmed its prior findings that the Texas Legislature, controlled by a majority party aware of the political threat of an increasing minority population, strong-armed to passage the strictest voter ID law in the country—SB14—with the intent that the law's requirements would disproportionately impact the voting rights of Black and Latino voters. The district court based this conclusion on abundant record evidence, including the surgical precision with which SB14's proponents selected photo IDs that Blacks and Latinos were least likely to possess and omitted several secure but less discriminatory forms of ID, and the Legislature's use of an unprecedented combination of procedural maneuvers that shortcut debate and rejected—usually without explanation—scores of ameliorative amendments, all the while supporting the bill with a series of pretextual rationales, most notably that the law was intended to prevent non-existent in-person voter fraud. And the district court found that SB14 produced its intended effect: Black and Latino Texas voters are two to three times less likely to possess

the limited forms of ID that SB14 requires and two to three times more likely than Anglo Texas voters to be burdened in getting the IDs.

Texas's criticisms of the district court's findings are largely quibbles with the court's factual inferences—not evidence of the clear error that must be shown to reverse those findings. The district court's findings, based entirely on factual conclusions that this Court has already found to be supported by record evidence, easily pass muster under Rule 52.

Because SB14 was enacted with discriminatory intent, the district court properly enjoined not only SB14, but also the recently enacted SB5, because the latter perpetuated almost all of SB14's discriminatory features, and thereby subjects the victims of intentional discrimination, disproportionately Black and Latino voters, to further burdens—including the threat of prosecution for felony perjury—before their votes can be counted. Although Texas and, now, the United States argue that SB5 largely codifies the interim remedial order agreed to by the parties as a "stop-gap" before the 2016 election and is no different than the laws of many other states, the district court made findings of fact to the contrary in support of its order on remedies. More important, what Texas and the United States assiduously ignore is that neither the interim remedial order nor the laws of these other states were put in place after a finding of intentional discrimination. That finding distinguishes this case and, as discussed below, is dispositive on all issues raised by Texas.

Texas argues that a jurisdiction's attempt to remediate—even if only in part—a discriminatory results violation concerning a law also found to intentionally discriminate based on race automatically ends the entire case, bars the district court from ordering a complete remedy for proven intentional racial discrimination, and wipes from the books judicial findings of discriminatory intent. No court has ever ruled as Texas demands.

There is good reason for this. To agree with Texas would undermine the constitutional and statutory prohibitions against intentional discrimination. Jurisdictions could engage in purposefully discriminatory acts, with the assurance that, if caught, all they need do is alter the law to reduce its discriminatory results, and then never be required to remedy their pernicious intent. This is not the law.

Rather, the law is that intentional discrimination requires a remedy broader than one addressing discriminatory results only. It requires a remedy that follows the settled principle that all vestiges of discriminatory intent must be eliminated "root and branch." These remedies are prophylactic in nature, including declaratory and injunctive relief, and, in the voting rights context, relief under Section 3(c) of the Voting Rights Act ("VRA"). Private Plaintiffs are entitled to pursue those remedies even after the passage of SB5.

COUNTER-STATEMENT OF JURISDICTION

This Court has appellate jurisdiction under 28 U.S.C. §§ 1291-1292.

Plaintiffs' claims are not moot. The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), and 1345, 52 U.S.C. § 10308(f), and this Court's mandate, *see Veasey v. Abbott*, 830 F.3d 216, 272 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017) ("*Veasey II*").

COUNTER-STATEMENT OF THE ISSUES

1. Whether the district court clearly erred in finding that SB14 had a discriminatory purpose in violation of Section 2 of the VRA, and the Fourteenth and Fifteenth Amendments to the U.S. Constitution?

2. Whether the district court abused its discretion in permanently enjoining SB5?

3. Whether the Section 2 results claim and/or the Section 2 and constitutional intentional discrimination claims are moot and subject to vacatur?

STANDARD OF REVIEW

The district court's "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous." FED. R. CIV. P. 52(a); *see Koch v. United States*, 857 F.3d 267, 275-76 (5th Cir. 2017). A finding of fact is clearly erroneous only if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

The district court's finding of discriminatory intent is a finding of fact. *See Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273, 290 (1982); *Veasey II*, 830 F.3d at 229. If the district court's finding of discriminatory intent "is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74 (1985).

This Court reviews the district court's choice of remedy for abuse of discretion. *See United States v. Brown*, 561 F.3d 420, 435 (5th Cir. 2009); *Hopwood v. Texas*, 236 F.3d 256, 276 (5th Cir. 2000).

This Court reviews the district court's conclusions of law de novo. *See Fairley v. Hattiesburg, Miss.*, 584 F.3d 660, 675 (5th Cir. 2009).

STATEMENT OF THE CASE

Private Plaintiffs dispute the Statement of the Case as presented by Texas, with respect to at least several points.

The purpose of the remand was to determine whether the absence of the infirm evidence changed the outcome of the district court's original calculus, not to revisit findings unaffected by infirm evidence. Indeed, this Court directed that no new evidence be considered. *Veasey II*, 830 F.3d at 242. Texas also wrongly argues that this Court directed the district court to consider legislative action in reassessing the

intentional discrimination finding, which, as explained *infra*, is an incorrect reading of this Court's opinion.

On remand, the District Court entered an Interim Remedial Order, which was negotiated by the parties in the context of a results violation only in the "short timeframe" before the approaching November election, pursuant to this Court's directive. *Veasey II*, 830 F.3d at 269. Plaintiffs never asserted that the Declaration of Reasonable Impediment ("DRI") provided in the Interim Remedial Order constituted all relief to which they would be entitled on their results or intent claims. To the contrary, all parties "preserve[d] their rights to seek or oppose future relief." ROA.67879.

The district court reweighed its discriminatory intent finding, pursuant to the timeline suggested by this Court, delaying any determination and remedy until after the November 2016 election. *Veasey II*, 830 F.3d at 272; ROA.69764–73; ROA.70430–56.

Briefing on the intent issue was completed on December 16, 2016. Texas submitted proposed findings of fact based on a new, over-arching theory, never before offered to the district court or this Court, *i.e.*, that SB14 was the culmination of Texas's decades-long attempt to modernize its election laws. ROA.68784–951.

This is why "much of it [was] not analyzed in the court's original" ruling.[1] Br. for Appellants, Doc. 00514199432 ("Tex. Br."), at 26.[2] Contrary to the order of this Court, Texas asked the district court to accept new evidence in support of this new theory.

The District Court issued its decision finding that Texas passed SB14 in 2011 with a discriminatory intent on April 10, 2017, followed by a hearing on remedy procedures. ROA.69764–73; ROA.74949–79. Both Texas and the United States argued that an evidentiary hearing was not necessary. ROA.74965–68. Private Plaintiffs suggested that the district court address the legal issues surrounding SB5's sufficiency to remedy SB14's harms first, as this could obviate the need for an evidentiary hearing. ROA.69831–45. Private Plaintiffs preserved their request for an evidentiary hearing if the district court determined that SB5 did not fail as a matter of law to remedy SB14's harms. *Id*. The parties later agreed to rely on the existing record. ROA.70432.

SB5 requires voters to attest under penalty of perjury to the specific impediment they face, but removes the "other" box that was included on the DRI under the interim order. ROA.69813–15. SB5 also increases the penalty for a false

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[1] As discussed *infra*, even if the district court considered this purported justification, the record evidence overwhelmingly supports a finding of intentional discrimination.

[2] All cites to ECF documents are made to the ECF page number.

statement on a reasonable impediment declaration to a "state jail felony," and requires that the DRI include "a notice that a person is subject to prosecution for perjury . . . for a false statement or false information." ROA.69814–15.

Although Texas relies heavily on the interim order as evidence that SB5 is curative of the results violation, SB5 differs materially from the interim remedy in important respects. This Court did not opine on the specifics of a reasonable impediment process, including whether it should permit voters to provide a reasonable impediment other than those specifically delineated on the DRI, and whether voters should be subject to criminal prosecution related to the DRI, or the appropriate scope of any affirmation under penalty of perjury.

Private Plaintiffs have a live case or controversy after SB5 for the reasons discussed in Part III, *infra*. Private Plaintiffs also dispute Texas's partial description of the district court's Order on Remedies as not providing the district court's complete reasoning for its ruling.

SUMMARY OF ARGUMENT

The district court meticulously followed the directives of this Court on remand. This Court found that several pieces of evidence upon which the district court originally relied were infirm, and, recognizing that it was the exclusive province of the district court to assess the impact of that evidence on its original decision, remanded the issue of intentional discrimination to the district court for

that purpose, not to revisit findings untouched by the infirm evidence. This Court directed that the district court entertain no new evidence.

In its opinion on remand, the district court carefully explained the extent to which the infirm evidence had factored into its original decision and, after removing that evidence, again concluded that SB14 had been enacted with discriminatory intent.

Texas's claimed legal errors in the district court's decision are meritless. There is no indication that the decision on remand was based on any infirm evidence and the district court specifically disclaimed that it was relying on any infirm evidence. Nothing in this Court's opinion directed the district court to withhold decision on intentional discrimination until the legislature passed a new voter ID law, and any subsequent legislation (including SB5) cannot erase the original discriminatory intent behind SB14. Texas's argument that, because a comparable absolute number of white and combined Black and Latino voters were burdened by SB14, there could not be a Section 2 violation, has already been rejected by this Court as waived; raising the issue for the first time on remand does not resuscitate it. Further, in a racial discrimination case, it is the *disproportionate* impact on minority populations—not the relative absolute numbers—that is at issue.

Texas's challenges to the district court's factual determination of intentional discrimination amount to nothing more than an argument that the district court drew

different inferences from the record evidence than those Texas would prefer. This is not evidence of clear error under Rule 52. Additionally, Texas bases its factual challenge on new theories presented for the first time on remand. These arguments are waived.

The district court's injunction against SB5 was within its sound discretion. It is within the district court's province to determine whether proposed remedial legislative action fully cures the discriminatory results and intent violations. After finding Texas liable for intentional discrimination, the district court properly placed the burden on Texas to prove that SB5 provides a complete remedy. SB5 does not fully cure the intentional discrimination violation because it does not eliminate the intentional discrimination "root and branch." Instead, it subjects Black and Latino Texans to the requirement of the same discriminatory list of photo IDs to vote in person, fails to provide for an adequate educational program, and subjects those discriminated against because they lack one of the strict photo IDs to a second process to vote by reasonable impediment affidavit, which carries with it the intimidating threat of perjury prosecution.

For similar reasons, the case is not moot. The passage of SB5 in 2017 did not cure Private Plaintiffs' injuries for past intentional discrimination or results. Private Plaintiffs are still entitled to declaratory relief (which has special prophylactic value in race discrimination cases), complete vitiation of SB14, and potential relief under

Section 3(c) of the VRA. To hold this case moot would mean that a jurisdiction could escape judicial opprobrium for racial discrimination simply by amending its laws—even just partially—*after* being found liable. The voluntary cessation doctrine does not shield Texas, because Texas cannot carry the burden of showing that it will not repeat its discriminatory conduct. Indeed, Texas enacted SB5 only after several courts, including this Court, had held that Texas engaged in racial discrimination.

I. THE DISTRICT COURT'S DISCRIMINATORY INTENT FINDING SCRUPULOUSLY COMPLIED WITH THIS COURT'S DIRECTIONS AND SHOULD BE AFFIRMED UNDER RULE 52

In *Veasey II*, this Court found that specific pieces of evidence the district court cited in reaching its finding of discriminatory intent were infirm. But the Court concluded that, independent of the infirm evidence, "the record also contained evidence that could support a finding of discriminatory intent." 830 F.3d at 234–35. Noting that, while it could "simply affirm" the district court's decision, this Court instead remanded the issue to the district court in whose "exclusive province" it lay, to assess "how much the evidence found infirm weighed in [its] calculus." *Id.* at 238 n.22, 241. This Court made it clear that the district court was not required to conduct a retrial of the other evidence that was the basis for its original finding of intent, and that its remand was not an occasion for submission of new evidence or new theories. *Id.* at 242 ("[T]he district court should not take additional evidence."). The district

court meticulously followed those directions, despite Texas's attempt to interject new facts and factual theories into the case.

After excluding from consideration the infirm evidence, the district court found that the remaining evidence in the record supported its original finding of intent as set forth in its initial 147-page opinion. Texas's primary challenge to those findings is that the district court failed to draw the inferences that Texas prefers. However, as this Court has repeatedly advised, where "multiple inferences could reasonably be drawn from the record evidence, . . . we must leave the drawing of those inferences to the district court." *Id.* at 238 n.22. Here, looking at the totality of the evidence, the district court found that the complete mosaic exposed a discriminatory motive: a group of legislators, acting against the backdrop of a major demographic shift in which minority voters were gaining political power, steamrolled the most stringent voter ID bill in the country through the Legislature, using an unprecedented combination of tactics, all the while justifying their actions with spurious reasons and knowing that the specific criteria they carefully drafted into law would disparately impact Black and Latino voters. Rule 52 compels affirmance of the district court's decision.

A. The District Court Did Not Commit Legal Error On Remand

Texas posits a series of quibbles with the district court's decision on remand, which it characterizes as legal error. They can be disposed of summarily.

1. The district court correctly construed this Court's decision.

Texas claims that the district court "erroneously read this Court's opinion to hold that 'there was sufficient evidence to sustain a conclusion that . . . SB 14[] was passed with a discriminatory purpose.'" Tex. Br. at 68 (quoting ROA.69764). But that is precisely what this Court held: "[T]he record also contained evidence that could support a finding of discriminatory intent." *Veasey II*, 830 F.3d at 234–35. In fact, an express finding that there was sufficient record evidence that could support the district court's original decision (even absent the infirm evidence) was essential to this Court's conclusion under *Pullman-Standard* that remand was required because the record "does not 'permit[] only one resolution of the factual issue.'" *Veasey II*, 830 F.3d at 230 (quoting *Pullman-Standard*, 456 U.S. at 292).[3] Thus, this Court acknowledged record support for specific findings at the heart of the purpose inquiry. *See Veasey II*, 830 F.3d at 236–41.

Further, in affirming the district court's discriminatory results finding under the clear error rule, this Court made a series of rulings which can no longer be

[3] This Court's rulings are the law of the case. When a court decides a rule of law, "that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983); *Med. Ctr. Pharmacy v. Holder*, 634 F.3d 830, 834 (5th Cir. 2011). The doctrine extends to findings of fact: "Disturbing findings from earlier [stages of] litigation requires more than a litigant's assertion that the previous findings were 'just wrong.'" *United States v. Thomas*, 167 F.3d 299, 307 (6th Cir. 1999); *see also Arizona v. California*, 460 U.S. at 619 (refusing to reexamine factual findings under the "general principles of finality and repose"). Texas's argument to the contrary, (Tex. Br. at 68), is based on

questioned by Texas in this case, including the history of recent discrimination in voting, the existence of racially polarized voting, and, most important for purposes of the intent claim, the tenuousness of the rationales provided by SB14's proponents. *See id.* at 257–64. As this Court found, "the provisions of SB 14 fail to correspond in any meaningful way to the legitimate interests the State claims to have been advancing through SB 14." *Id.* at 263.

2. This Court did not direct the district court to retry all its prior findings of fact.

Texas argues that this Court instructed the district court, on remand, to reconsider intentional discrimination on a blank slate. Tex. Br. at 22–23. But this is not true. This Court remanded the discriminatory intent claim to the district court because it found some fault in the district court's original reasoning, and wanted to ensure that the district court's conclusion was not infected by those faults.[4] This

inapposite authority. *Chapman v. NASA*, 736 F.2d 238 (5th Cir. 1984), stands for the unremarkable proposition that "[a] factual issue, of course, could become the law of the case, but only if previously appealed and affirmed as not being clearly erroneous." *Id.* at 242 n.2. In *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 948 F.2d 1573 (Fed. Cir. 1991), the issue was whether the *trial* court's findings of fact that had been vacated on appeal as inadequate were the law of the case. *Id.* at 1576–77.

[4] Specifically, this Court ruled that the district court should not have relied on evidence of state-sponsored discrimination "dating back hundreds of years," evidence of "reprehensible actions" in a single county, "post-enactment speculation by opponents," and "stray statements made by a few individual legislators voting for SB 14." *Veasey II*, 830 F.3d at 231–34. This Court also limited the relative weight of *Bush v. Vera* and *LULAC v. Perry*. *Id.* at 232–33.

Court did not instruct the district court to reassess the intentional discrimination claim from scratch. To the contrary, the issue on remand was limited: this Court instructed the district court to assess "how much the evidence found infirm weighed in the district court's calculus." *Veasey II*, 830 F.3d at 241. This Court directed the district court "to reweigh the factors" without the infirm evidence and without "tak[ing] additional evidence" and potentially even without "entertain[ing] additional oral argument." *Id.* at 235, 242. If a finding of fact made by this Court did not implicate infirm evidence, there was no basis for the district court to revisit, let alone change, it.

3. The district court followed this Court's instructions.

In its opinion, the district court carefully analyzed each category of evidence, indicated with precision whether the infirm evidence factored into its decision-making, and then reweighed the evidence, as a whole, exclusive of the infirm evidence. *See* ROA.69764–73. In this context, Texas's dismissive description of the district court's opinion on remand as "cursory," (Tex. Br. at 18, 67), is inaccurate and insulting. The district court spent months scouring the record after the two-week trial in 2014. Moreover, the district court, on its own initiative, permitted the parties to submit extensive findings of fact and conclusions of law and briefs on remand, held oral argument, and issued an opinion over four months after the filing of the last written submission, and six weeks after oral argument. In that opinion, the

district court incorporated virtually all of its previous 147-page opinion, carefully noting, however, where it was not now assigning weight to any evidence this Court had deemed "infirm," and explaining that such evidence did not impact its ultimate findings.[5] Accordingly, it reevaluated the remaining evidence, as this Court instructed, and determined anew that the Legislature acted with a discriminatory purpose.

Texas claims that the district court incorporated infirm evidence in its opinion, because it "adopted its reasoning from Part IV(A) of its original ruling," "part" of which relied on the expert report of Dr. Alan Lichtman, who, "in turn, relied" on some infirm evidence, and that Part IV(A) also relied on statements by SB14's opponents. Tex. Br. at 69. Texas purposefully misreads the district court's opinion. The district court carefully described the extent to which it was reaffirming the findings in Part IV(A) of its prior opinion, and never incorporated all of Part IV(A). ROA.69771–72 (incorporating Part IV(A)'s findings regarding departures from normal practices; Part IV(A)(4)'s findings regarding the lack of consistency of

[5] The district court specified that it assigned no weight to anecdotal evidence relating to racial appeals in political campaigns, (ROA.69767); that its reference to older history of Texas's discriminatory practices "was for context only," and it was not assigning "distant history any weight in the discriminatory purpose analysis," (ROA.69768–69); that it was not relying on Waller County officials' efforts to suppress minority votes and the redistricting cases, (ROA.69770); and that it was not assigning any weight to evidence offered regarding legislator observations of the political and legislative environment at the time SB14 was passed, except for a statement by Senator Fraser, upon which this Court itself had relied, (ROA.69772).

legislative decisions with the State's alleged interest in preventing voter fraud; Part IVA(6)'s findings regarding the pretextual justifications for SB14; and Part IVA(3)'s finding regarding the questionable fiscal note attached to SB14). All of these incorporated findings, as noted by the district court, were discussed with approval by this Court. The district court specifically said that it was giving "no weight" whatsoever to evidence of contemporaneous statements of legislators deemed infirm by this Court. ROA.69772. Nothing about the district court's decision on remand is based on any infirm evidence.

4. Discriminatory intent need be only one purpose of the action and judicial deference to the Legislature is not due.

Texas also misstates the appropriate standards of proof applicable to intentional discrimination cases. First, it posits that "Plaintiffs have the demanding burden to show that some desire by the Texas Legislature to harm individuals because of their race was a 'but-for' motivation for the enactment of the SB14 voter-ID law." Tex. Br. at 64 (internal quotations and citations omitted). That is not the law. As this Court recognized, "'[r]acial discrimination need only be *one* purpose, and not even a primary purpose' of an official action for a violation to occur." *Veasey II*, 830 F.3d at 230 (quoting *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009)) (emphasis added). Any additional purpose "would not render nugatory the purpose to discriminate." *Hunter v. Underwood*, 471 U.S. 222, 232 (1985).

Once a discriminatory purpose is shown, "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Id*. at 228.[6]

Next, Texas argues that the district court erred by not applying "a heavy presumption of constitutionality and good faith," and not resolving all doubts in favor of Texas. Tex. Br. at 65, 69–71. Texas's argument is merely a reformulation of its prior argument—already rejected by this Court—that a heightened "clearest proof" standard should replace the *Arlington Heights* standard. *Veasey II*, 830 F.3d at 230 n.12. Legislative deference is not appropriate in cases of discriminatory intent. As the Supreme Court has observed, "[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision . . . judicial deference [to the legislature] is no longer justified." *Arlington Heights*, 429 U.S. at 265–66.[7]

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[6] Texas cites *Easley v. Cromartie*, 532 U.S. 234 (2001), and *Miller v. Johnson*, 515 U.S. 900 (1977), in support of its arguments that plaintiffs in intentional discrimination cases are held to standards much stricter than that in the controlling case of *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). *See* Tex. Br. at 64–65, 69, 73. *Cromartie* and *Miller* are racial gerrymandering cases, where plaintiffs have the analytically distinct burden of proving that race is the predominant motivating factor underlying a redistricting decision, unlike in other intentional discrimination cases. *Compare Cooper v. Harris*, 137 S. Ct 1455, 1479 (2017) (describing burden of proof in racial gerrymandering cases) *with Arlington Heights*, 429 U.S. at 264–68 (describing burden of proof in challenges to invidious racial discrimination).

[7] Texas quotes *Miller* for the proposition that "good faith of a state legislature must be presumed," (Tex. Br. at 65), but omits the preceding clause, which makes clear that the presumption applies only "until a claimant makes a showing sufficient to support [an] allegation" of "race-based decisionmaking." *Miller*, 515 U.S. at 915.

5. The district court was not required to await legislative action before rendering its opinion on discriminatory intent.

Texas complains that the district court failed to account for the pending bill that became SB5 before issuing its decision on the intent behind SB14. Tex. Br. at 66–67. Nothing in this Court's opinion directed the district court to await legislative action before reweighing its discriminatory purpose finding. Indeed, the Court

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In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the language excerpted by Texas was part of the unsurprising principle that a court would "not infer a discriminatory purpose" without evidence. *Id*. at 298–99. Texas's other authorities are not intentional racial discrimination cases. *See Dep't of Labor v. Triplett*, 494 U.S. 715 (1990) (alleging Due Process claims); *Davis v. Dep't of Labor & Indus. of Wash.*, 317 U.S. 249 (1942) (challenging constitutionality of state worker's compensation statute under Article III, Section 2); *United States v. Chem. Found.*, 272 U.S. 1 (1926) (alleging fraud-related claims); *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350 (1918) (alleging Equal Protection claims based on property valuations).

Although Texas argues that, "[t]he presumption applies just as strongly to voting and election laws as to other legislative enactments," (Tex. Br. at 70), none of the cases it cites stands for that proposition. In *City of Mobile, Ala. v. Bolden*, 446 U.S. 55 (1980), the discussion was not about a presumption of constitutionality, but rather about whether ordering proportional representation would turn the Court into a "super-legislature." *Id.* at 76–77. *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802 (1969), dealt with the ability of pre-trial detainees to vote, and the Court expressly stated it was discussing the presumption outside of the right to vote claim. *Id*. at 809. In *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, the case which Texas cites as the "exception that proves the rule," (Tex. Br. at 70), the Court not only ruled that "the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate" in elections, but also emphasized that "if the basis of classification is inherently suspect, such as race, the statute must be subjected to an exacting scrutiny regardless of the subject matter of the legislation." *Kramer*, 395 U.S. at 627, 628 n.9. Although the Court was talking about the facial validity of the statutes in question, its rationale buttresses the case law cited above that there is no deference due the legislature when there is evidence of intentional racial discrimination.

ordered that "the district court should not take additional evidence" and should "make its discriminatory purpose findings based on the record we have." *Veasey II*, 830 F.3d at 242.[8]

In support of its position, Texas argues that subsequent acts by one accused of discrimination may be relevant to intent. Tex. Br. at 66. While in some cases, subsequent acts by an individual may be probative of that person's prior intent, that theory has no place in this case.[9] The issue here is whether the 2011 Legislature passed SB14 with discriminatory intent. That six years later, a different legislature with different legislators might pass a less onerous law in response to a court finding that the prior law was discriminatory, has no bearing on the intent behind the original law. *See Hunter*, 471 U.S. at 232–33 (declining to take into account later

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[8] Texas takes out of context a single sentence from this Court's discussion of "interim relief" that the court was "'to *reexamine* the discriminatory purpose claim in accordance with the proper legal standards we have described, *bearing in mind the effect any interim legislative action taken with respect to SB 14 may have*.'" Tex. Br. at 66 (quoting *Veasey II*, 830 F.3d at 272). The most reasonable reading, when taking this Court's opinion as a whole, is that the district court was instructed to keep in mind the "effect [of] any interim legislative action" at the remedy phase, which the district court did. *See supra* at Part II.B. However, even if meant to apply to the SB14 discriminatory purpose claim, that sentence does not direct the district court to stay its hand on determining intent.

[9] Texas's only support for this proposition is the starkly different case of *Ansell v. Green Acres Contracting Co*., 347 F.3d 515 (3rd Cir. 2003). *Ansell* is an age discrimination case where the court simply found that evidence of an employer's favorable treatment of an over-45 year old employee was probative of the employer's intent when it previously fired the plaintiff, allegedly as part of a broader plan to eliminate older workers. *Id*. at 524. *Ansell* has no relevance here.

ameliorative changes to a discriminatory law when deciding whether the law at issue was passed with a discriminatory intent). Even outside the realm of discrimination cases, the Supreme Court has warned that "the views of a subsequent [legislature] form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (internal quotations omitted). Common sense dictates that the intent of one legislative body cannot be changed after the fact by the acts of a later legislative body.

6. Texas's claim that SB14's spillover effects on some white voters defeat Plaintiffs' discriminatory purpose claim has been waived and is frivolous.

Texas incorrectly argues that "any permissible inference of discriminatory intent" is foreclosed as a matter of law because the number of white voters burdened by SB14 is comparable to the number of Black and Latino voters combined. Tex. Br. at 71–73. This Court already rejected this argument because it was made for the first time on appeal, *Veasey II*, 830 F.3d at 252 n.45, and that rationale still controls. *See United States v. Osamor*, 271 Fed. App'x 409, 410 (5th Cir. 2008) (arguments raised for the first time after remand that could have been raised in first appeal are "deemed abandoned"); *Brooks v. United States*, 757 F.2d 734, 739 (5th Cir. 1985) (deeming argument not "briefed and discussed" in earlier appeal "to have been waived"). Texas claims that it "did raise this *purpose*-based argument below," but its citation is to its proposed findings of fact and conclusions of law on *remand*, not

to its original proposed findings of fact and conclusions of law. Tex. Br. at 71 n.15 (citing ROA.68915–16).

Even had Texas not waived the issue, the argument is frivolous, as this Court recognized in dictum: "Courts have never required the gross number of affected minority voters to exceed the gross number of affected Anglo voters." *Veasey II*, 830 F.3d at 252 n.45. Discriminatory impact is a measure of "racially disproportionate impact." *Arlington Heights*, 429 U.S. at 264–65. Jurisdictions may not justify the disproportionate disenfranchisement of minority voters on the basis that they are disenfranchising an equal number—but a far lesser share—of majority voters as well. *See Hunter*, 471 U.S. at 230–31 (rejecting the defense that a law was intended "to disenfranchise poor whites as well as blacks"); *Williams v. City of Dothan*, 818 F.2d 755, 764 (11th Cir. 1987) ("When considering disparate effect the focus should not be on absolute numbers but rather on whether the challenged requirements operate to disqualify Negroes at a substantially higher rate than white[s]." (internal quotations omitted)).[10]

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[10] None of the cases cited by Texas, (Tex. Br. at 72), deal with whether impact on white individuals is a bar to an intent claim. *United States v. Texas*, 457 F.3d 472 (5th Cir. 2006), does not mention the issue, but simply states that "bare numerical requirements" are insufficient to support an intent finding. *Id*. at 483. Nowhere in *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524 (3d Cir. 2011), where both white and Black students were impacted by a redistricting and school assignment plan, does the court suggest that equality of burden forecloses a discriminatory intent claim. *See also United States v. Gregory-Portland Indep. Sch. Dist.*, 654 F.2d 989, 1004–05 (5th Cir. Unit A Aug. 1981) (construing stray statement about students not

B. The District Court's Findings Of Fact On Intentional Discrimination Are Not Clearly Erroneous

Proper application of Federal Rule of Civil Procedure 52 mandates affirmance of the district court's finding that SB14 was enacted, at least in part, with discriminatory intent.

1. Discriminatory intent is an issue of fact.

Rule 52 provides that "[f]indings of fact . . . must not be set aside unless clearly erroneous" and "due regard" must be given "to the trial court's opportunity to judge the witnesses' credibility." FED. R. CIV. P. 52(a)(6). This Court strictly applies that rule, even where the Court "'is convinced that it would have decided the case differently.'" *Matter of Complaint of Luhr Bros., Inc.*, 157 F.3d 333, 337–38 (5th Cir. 1998) (quoting *Anderson*, 470 U.S. at 573). Additionally, this Court pays strong deference to a district court's weighing of expert testimony. *Bursztajn v. United States*, 367 F.3d 485, 489 (5th Cir. 2004). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574; *accord Koch*, 857 F.3d at 275-76.

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using air conditioning at home as not necessarily referring to Mexican-American students when over 20% of students were white); *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1163 (9th Cir. 1997) (observing that only evidence of intent before district court was that ordinance would harm interests of Native Hawaiians).

These standards apply with particular force here. First, discriminatory intent is a pure question of fact. *See Rogers*, 458 U.S. at 623; *Pullman-Standard*, 456 U.S. at 290. Second, the trial judge's fact-findings were based, at crucial junctures, on her weighing of credibility, specifically on her acceptance of the live testimony of 16 expert witnesses and 30 fact witnesses presented by plaintiffs and her rejection of the single expert presented live by Texas as "unconvincing," and his testimony entitled to "little weight." *Veasey v. Perry*, 71 F. Supp. 3d 627, 663 (S.D. Tex. 2014) ("*Veasey*"). On that basis, the trial judge issued a detailed, fact-laden, record-supported 147-page opinion. And the trial judge has now reweighed the evidence, as per this Court's instructions. Rule 52 mandates acceptance of the trial court's findings, and affirmance of its judgment.

2. The district court properly applied the *Arlington Heights* factors.

Arlington Heights controls the inquiry into whether SB14 was enacted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon [Blacks and Latinos]." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Recognizing that discriminatory motive may hide behind legislation that "appears neutral on its face," *Arlington Heights* "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266.

In undertaking this inquiry, the district court viewed "the totality of legislative actions" before it, *Feeney*, 442 U.S. at 280, including the Senate Factors

set forth in Senate Report No. 97-417, which "supply a source of circumstantial evidence regarding discriminatory intent," *Brown*, 561 F.3d at 433. Evidence of intent that may be inconclusive standing alone can be more than sufficient when viewed as part of the totality of the evidence. *See Coggeshall v. United States*, 69 U.S. 383, 401 (1864) ("Circumstances altogether inconclusive, if separately considered, may, [by] their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof."); *United States v. Vargas-Ocampo*, 747 F.3d 299, 303 (5th Cir. 2014) (same).

i. SB14 disparately impacted Black and Latino voters.

"[A]n important starting point" in the discriminatory intent inquiry is whether SB14 "'bears more heavily'" on minority voters than Anglo voters. *Arlington Heights*, 429 U.S. at 266 (internal quotations omitted). The district court correctly found ample evidence of disparate impact on minorities, attributable both to minority voters' disproportionate lack of SB14 IDs and to disproportionate burdens preventing minority voters from obtaining such IDs. *Veasey*, 71 F. Supp. 3d at 659–77. This Court specifically affirmed that finding, *Veasey II*, 830 F.3d at 264–65, which Texas does not—and cannot—challenge on appeal.

ii. Seismic demographic changes coupled with racially polarized voting, led to SB14.

"The specific sequence of events leading up to the challenged decision also may shed some light" on the purpose behind legislation. *Arlington Heights*, 429 U.S. at 267. SB14 was passed during a dramatic demographic shift in Texas, powered by a growing citizen voting-age Latino population. Within months of Texas becoming a majority-minority state in 2004, the first photo voter ID bill, HB 1706, was introduced in the Legislature. ROA.92245–46; ROA.92296. Over the next several years, the Legislature repeatedly attempted to pass similar legislation, culminating in the successful passage of SB14. ROA.92245-64.

This Court confirmed that there was record evidence that SB14 was passed "in the wake of a 'seismic demographic shift,' as minority populations rapidly increased in Texas, such that . . . the party currently in power [was] 'facing a declining voter base and [could] gain partisan advantage' through a strict voter ID law" and that evidence could support a finding of discriminatory intent. *Veasey II*, 830 F.3d at 241 (quoting *Veasey*, 71 F. Supp. 3d at 700). As this Court recognized, racial discrimination as the means to a partisan end is no less unlawful than racial discrimination for its own sake. *Veasey II*, 830 F.3d at 241 n.30; *LULAC v. Perry*, 548 U.S. 399, 440 (2006) (holding that Texas Legislature's exclusion of some Latino voters from redrawn district because they were likely to vote against incumbent bore "the mark of intentional discrimination"); *N.C. State*

Conference of NAACP v. McCrory, 831 F.3d 204, 233 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017) ("[T]he General Assembly used SL 2013-381 to entrench itself. It did so by targeting voters who, based on race, were unlikely to vote for the majority party. Even if done for partisan ends, that constituted racial discrimination.").

Texas erroneously calls the district court's finding that the demographic shift motivated SB14 "pure speculation." Tex. Br. at 89. This Court, however, recognized the record evidence that political leaders in Texas have a long and consistent history of using racially discriminatory voting schemes to maintain power, regardless of the party in power. *Veasey II*, 830 F.3d at 241 n.30 (quoting Plaintiffs' expert Dr. Vernon Burton's testimony that "every time that African-Americans have . . . been perceived to be increasing their ability to vote and participate in the process there has been State legislation to either deny them the vote or at least dilute the vote or make it much more difficult for them to participate on an equal basis as Whites in . . . Texas").

After the 2010 census, the same legislature that passed SB14 was tasked with redistricting, which, for a covered jurisdiction like Texas, necessarily involved the Legislature's detailed analysis and, therefore, knowledge of minority population growth and candidate preferences. ROA.92244–45; *see also Perez v. Texas*, 891 F. Supp. 2d 808, 812–13 (W.D. Tex. 2012). Thus, the legislative leadership that

rammed SB14 through to passage was fully aware of the disproportionate and rapid growth of the Latino and Black Texan populations (as compared to the Anglo population) and the existence of racially polarized voting, and the consequential threat to their power. Moreover, the existence of racially polarized voting in Texas is the law of the case. It was not contested by Texas before the district court, and was confirmed under Rule 52 by this Court. *Veasey II*, 830 F.3d at 258.

Because Latino and Black voters overwhelmingly supported candidates who did not belong to the party in power, it was a fair inference for the district court to conclude that the majority party had a strong motivation—maintaining its own political power—to erect barriers to voting for eligible Latino and Black voters. *See McCrory*, 831 F.3d at 214 ("[P]olarization renders minority voters uniquely vulnerable to the inevitable tendency of elected officials to entrench themselves by targeting groups unlikely to vote for them."); *Brown,* 561 F.3d at 434 ("[T]he racial polarization of elections in Noxubee County indicates that the goal of placing more black candidates in elected positions may be accomplished by obtaining additional black votes and invalidating white votes.").

iii. <u>The Legislature knew of the probable disparate impact of SB14.</u>

In assessing intent, courts also consider anticipated impact, or the "normal inferences to be drawn from the foreseeability" of policymakers' actions. *Brown*, 561 F.3d at 433 (internal quotations omitted); *see also Columbus Bd. of Educ. v.*

Penick, 443 U.S. 449, 464 (1979) ("[A]ctions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose."). As this Court has already recognized, there was record evidence to support the district court's finding that Texas lawmakers knew that SB14 was likely to have a discriminatory impact on the rights of minority voters: "The record shows that drafters and proponents of SB 14 were aware of the likely disproportionate effect of the law on minorities . . . ." *Veasey II*, 830 F.3d at 236; *see also id.* at 261–62 ("The evidence supports the district court's finding that 'the legislature knew that minorities would be most affected by the voter ID law.'" (quoting *Veasey*, 71 F. Supp. 3d at 657–58)).

Despite this Court's clear ruling to the contrary, Texas argues that "[a]ll of the probative evidence" before the Legislature suggested that SB14 would not have a disparate impact and that there was no contrary evidence before the Legislature when it considered SB14. Tex. Br. at 83. This is untrue. In response to every photo ID law proposed in Texas since 2005, members of the public and legislators representing districts with significant numbers of minority constituents testified contemporaneously with debate on those bills that the legislation as written would severely burden many Latino and Black Texan voters. ROA.68634–36. During the debate on SB14, the Legislature heard testimony that Black voters are three times as likely as Anglos to lack the required photo ID; that

minority voters face up to 150-mile trips to the nearest Department of Public Safety ("DPS") office because there are many Texas counties with no or only part-time DPS offices; that there are long wait times in many busy urban DPS locations; and that minority voters would face particular difficulties if forced to travel to a county office within the six-day cure period for votes cast without the required ID. *Id*. Legislators raising these serious concerns received only non-responsive answers from bill proponents. As this Court noted, "[w]hen other legislators asked Senator Fraser questions about the possible disparate impact of SB 14, he simply replied 'I am not advised.'" *Veasey II*, 830 F.3d at 237 (internal quotations omitted). Moreover, Bryan Hebert, the Lieutenant Governor's counsel, expressed concern to Senator Fraser's chief of staff that SB14 would not be approved under the VRA because of its probable disparate impact, (ROA.87099–100), an event specifically cited by this Court as evidence of discriminatory intent. *Veasey II*, 830 F.3d at 236 n.21. Senator Estes, another of SB14's proponents, expressed a similar concern. ROA.86850.[11]

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[11] Texas cites to statements by plaintiffs' experts, taken out of context, supposedly showing that the disparate effect of SB14 was not "obvious" to legislators. Tex. Br. at 85. None of these excerpts have anything to do with photo ID possession rates. Rather, as is the case with the "multiple studies and the experiences of other States," (*id*.), each of the statements concerns whether and to what extent photo ID laws in other states affected voter *turnout*. *See* ROA.42980; ROA.72556–59; ROA.73152–53. This Court has already ruled that evidence of decreased turnout "is not required to prove a Section 2 claim of vote denial or abridgement." *Veasey II*, 830 F.3d at 261.

Despite this knowledge, the Legislature made a series of choices to accept only a limited number of photo IDs, each of which was less likely to be held by Black and Latino voters and more likely to be held by Anglo voters in Texas; and to reject a large number of photo IDs, such as government employee and public college student IDs, each of which was more likely to be held by Black and Latino voters than by Anglo voters in Texas. ROA.68664–69. Moreover, data regarding these disparate rates of ID possession were publicly available at the time the Legislature considered SB14. ROA.72673–81. Dr. Lichtman's report contained numerous tables showing the particular statistics and the public sources of the data from which those statistics were drawn, including Census reports and reports from Texas state agencies like the DPS (handgun possession data by race) and the Texas Higher Education Coordinating Board (student enrollment data by race and ethnicity). ROA.92992; ROA.92999. The notion that the Legislature was not "aware" of these data cannot be seriously credited. Lawmakers may be presumed to be familiar with the demographics and socioeconomics of their state. *See Shaw v. Reno*, 509 U.S. 630, 646 (1993) ("[T]he legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors.").

Representative Todd Smith, Chairman of the Texas House Elections Committee and a major supporter of strict photo ID laws, including SB14, later

called it "common sense" that minority voters would be disproportionately harmed by a strict photo ID bill. *Veasey II*, 830 F.3d at 236 & n.21, 262. Willful avoidance of inconvenient information does not preclude knowledge of such facts, particularly when they are a matter of "common sense." *See United States v. Schaffer*, 600 F.2d 1120, 1122 (5th Cir. 1979) ("[D]eliberate ignorance is the equivalent of knowledge."). Texas cannot now disclaim the Legislature's advance knowledge of SB14's disparate impact simply because bill proponents sought to avoid putting available evidence into the record of what the legislators already knew to be true.

Despite this knowledge of likely disparate impact, the legislators designed SB14 to be not merely "not like other photo-voter-ID laws," (Tex. Br. at 94), but the strictest in the country. It was much stricter than those of Georgia and Indiana, upon which it supposedly was modeled, and much stricter than prior versions the Legislature considered in 2005, 2007, and 2009. *Veasey II*, 830 F.3d at 263; ROA.92986–87; ROA.93004–09. Its drafters could not explain why. ROA.30926–28; ROA.30967–68; ROA.30995.

iv. The Legislature justified the bill with pretext.

As this Court explained, the district court's finding that the Legislature's "'stated policies behind SB 14 are only tenuously related to its provisions'" was supported by evidence that "the provisions of SB 14 fail to correspond in any meaningful way to the legitimate interests the State claims to have been advancing

through SB 14." *Veasey II*, 830 F.3d at 263 (internal quotations omitted). Citing the district court's findings, this Court held that evidence of the "many rationales [that] were given for a voter identification law, which shifted as they were challenged or disproven by opponents," is probative of the question of whether the Legislature had a discriminatory purpose in enacting SB14. *Id*. at 240-41.[12]

The principal legislative purpose asserted by SB14's proponents was protection against voter fraud. ROA.86887; ROA.102423. The undisputed record shows that in-person voter impersonation, the only sort of fraud that SB14 could possibly prevent is exceedingly rare both in Texas and generally. *Veasey II*, 830 F.3d at 238. In the ten years before SB14, there were only two credible claims of voter impersonation fraud in Texas out of more than 20 million votes cast. *Id.*

After more than four years litigating this case, Texas has finally given up the pretext of any discernible amount of in-person voter fraud in the state. It does not even debate the issue in its brief.[13] It argues only that the district court should have

[12] Texas bristles at the word "shifting" to describe the different rationales used by SB14 proponents, arguing that they stated different reasons simultaneously. Tex. Br. at 95. But the evidence did show shifting and pretextual rationales. For example, during the 2011 session, the Lieutenant Governor's office was coaching the proponents about how to describe the purpose behind SB14–even instructing Senators to no longer rely on the previously stated rationale that SB14 was intended to reduce non-citizen voting. ROA.86868.

[13] Texas cites without explanation to an Advisory it filed on the subject, together with some DOJ fraud files. Tex. Br. at 91 (citing ROA.69416-19; ROA.118623–35). Nothing in those documents refutes the testimony of Texas's own head of voter fraud enforcement, Lt. Forest Mitchell, who testified that there were only two

given the benefit of the doubt to the proponents of SB14, when they said they believed that SB14 would reduce in-person voter fraud, even though there was no evidence before them of its actual existence, and abundant evidence before them of its non-existence. Tex. Br. at 95.[14] As this Court advised, the district court need not "simply accept that legislators were really so concerned with this almost nonexistent problem" of in-person voter impersonation. *Veasey II*, 830 F.3d at 239.[15]

Texas also does not try to justify SB14's proponents' claims that the bill would prevent noncitizen persons from voting, as there was scant evidence of noncitizen voting in Texas. Moreover, at least driver's licenses and concealed handgun licenses, "two forms of identification approved under SB 14[,] are available

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instances of such fraud in ten years, testimony that was corroborated by plaintiffs' experts Minnite and Wood. ROA.72127–28; ROA.73125–26; ROA.73160–62. Texas provided the court with no analysis of the DOJ data, and the rest of its submission focuses on anecdotal hearsay.

[14] To the extent that Texas argues that *Crawford v. Marion County*, 553 U.S. 181 (2008), provides it with justification to deal with voter fraud prophylactically, (Tex. Br. at 94), that argument has been rejected by this Court. *Veasey II*, 830 F.3d at 248–49. The issue is not whether Texas has an interest in combatting voter fraud, but whether its claim to be fighting a non-existent form of voter fraud is pretextual when used to justify specific laws that have been proven to discriminatorily impact Black and Latino voters.

[15] During debate on SB14, the Senate and House sponsors both stated that they were "not advised" about the extent of in-person voter impersonation in Texas, and the House sponsor testified that, even though in-person voter fraud was the only legislative purpose for SB14 that she remembered, she could not recall whether she even believed that in-person voter fraud was a problem in Texas. ROA.30908; ROA.30921–22; ROA.75970; ROA.77366.

to noncitizens." *Id.* at 241. Even the legislator who gave the House closing speech later conceded under oath that noncitizen voting is neither a significant problem nor addressed by SB14. ROA.68642.

Proponents also claimed that SB14 and its predecessor bills would promote voter confidence. ROA.86887; ROA.102423. Yet the Legislature conducted no analysis indicating whether concerns about election fraud actually affected voter turnout, and the bill's proponents were unaware of any external analysis supporting that proposition; nor could they identify anyone who had not voted due to concerns about in-person voter fraud. ROA.30929; ROA.74178. Instead, SB14's proponents claimed to have relied upon polls regarding support for voter ID. ROA.30744; ROA.30756–57. But those polls provided no specifics about SB14's restrictive provisions and were conducted only after members of the majority political party made widespread, false allegations that voter fraud is epidemic in Texas. ROA.68626–27. Thus, polls showing general support for photo voter ID requirements, or even non-photo voter ID requirements, do not establish broad support for SB14's much harsher provisions. *See Veasey II*, 830 F.3d at 263–64. As this Court accurately summarized, "[h]ere, too, there is evidence that could support a finding that the Legislature's race-neutral reason of ballot integrity offered by the State is pretextual." *Id.* at 237; *see also Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1164 & n.28 (9th Cir. 2013) (holding that legislative reliance

on public opinion surveys rather than "objective measures" is a "notable" irregularity).

When, as here, a decision-maker "offers inconsistent explanations for its . . . decision at different times," the factfinder "may infer" that the "proffered reasons are pretextual." *Staten v. New Palace Casino, LLC*, 187 Fed. App'x 350, 359 (5th Cir. 2006). Such pretext can be "quite persuasive" evidence of intentional discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 147 (2000); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.").

The district court properly inferred pretext from the record evidence, and that pretext was strong evidence of discriminatory intent.

v. The legislative history of SB14 provides substantial evidence of discriminatory intent.

Legislative history is "highly relevant" to determining purpose. *Arlington Heights*, 429 U.S. at 268. As the district court held, and this Court acknowledged, the legislative history of SB14 contains several significant indicia of discriminatory purpose. Voter ID bills became increasingly strict over four consecutive Texas legislative sessions, culminating in the strictest photo ID requirement in the country. ROA.68596–97; ROA.68609–10; ROA.86617–19. There was no attempt to

compromise with opponents. To the contrary, the more opponents objected to the provisions of the proposed legislation because of their disproportionate impact on minorities, the stricter and more discriminatory those provisions became. At every turn, where SB14's proponents had a choice between designing the law in a way that would increase disproportionate burdens on minorities or minimize the disparate impact, they chose the former. *See Veasey II*, 830 F.3d at 237. After three failures, legislative leadership simply ignored opposition concerns over minority disenfranchisement, concerns that voter ID proponents privately conceded were valid. ROA.68636–43.

(a) The proponents of SB14 used unprecedented measures to achieve their goal.

"Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." *Arlington Heights*, 429 U.S. at 267. As this Court observed, to pass SB14, the Legislature used "numerous and radical procedural departures," each of which was highly unusual, and, when combined, were "virtually unprecedented," providing "one potential link in the circumstantial totality of evidence the district court must consider." *Veasey II*, 830 F.3d at 237–38. The machinations in this case precluded debate and prevented the dissemination of information about and investigation into the major changes in SB14 from earlier bills. The district court's findings on this issue did not implicate

any of the evidence found infirm by this Court and the district court's inferences from these procedural departures are due deference under Rule 52.[16]

In 2011, the Legislature fast-tracked SB14, a bill that eliminated non-photo identification entirely and further narrowed the set of acceptable photo identification as compared to prior bills. After it was initially filed, the bill was re-classified with a lower number to ensure that it would be heard earlier in the legislative session. ROA.74166–67. Soon thereafter, then-Governor Rick Perry designated it as "emergency legislation," guaranteeing that it would be considered in the first 60 days of the session, despite that neither the bill's proponents nor Texas election officials could identify any emergency warranting this treatment. ROA.73267–68; ROA.75420. SB14's proponents then used radical procedural maneuvers to short-circuit debate, including: suspending the century-old two-thirds rule in the Senate for bringing up legislation, (ROA.72450–51);[17] passing SB14 through the Committee of the Whole, and then raising and passing the bill by simple majority votes, (ROA.30948); and bypassing the ordinary committee process in the House and Senate and sending the bill to a special " fast track" House committee hand-

[16] This Court specifically rejected the argument that testimony of legislators could not be used to explain the irregularity of these procedures. *Veasey II*, 830 F.3d at 238 n.22.

[17] Although Texas calls suspension of the two-thirds rule a "common tactic," witnesses from both parties described it as "highly unusual" and "not how the Texas Senate operates" in the ordinary course of business." ROA.72451–53.

picked by SB14 supporters, (ROA.71736–37; *see Pac. Shores Props., LLC*, 730 F.3d at 1164 (holding that passage through a unique, ad hoc committee may constitute a procedural deviation under *Arlington Heights*)). Then, the Conference Committee went "outside the bounds" of reconciling the Senate or House bills and amended the bill substantively by crafting the EIC program, eliminating the opportunity for debate or refinement. ROA.72967–68; *see also Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 144 (3d Cir. 1977) (holding that bypassing a mechanism that requires discussion is a "striking" procedural departure). Finally, SB14 was taken up and passed despite its $2 million fiscal note, even though the Legislature was operating with a $27 million budget shortfall and with strict instructions not to advance any legislation with a fiscal note. ROA.72626–27; ROA.78505–08.[18]

Outside of the public process, the Office of the Secretary of State provided an impact analysis to the Office of the Lieutenant Governor and then withheld it from other legislators. At the request of Senator Williams, the Office of the Secretary of State engaged in a database matching analysis between the Texas voter registration

[18] Texas criticizes the district court for referring to the addition of $2 million to the already large budget shortfall, arguing that the money was already in the agency's possession. Tex. Br. at 96. The district court's main points were the admitted deviation from the rule that no bill be advanced with a fiscal note, and the State's willingness to spend so much money on a non-existent problem despite the State's financial distress. The district court also noted the record evidence as to the insufficiency of the funds to accomplish the purpose of educating the public. *Veasey*, 71 F. Supp. 3d at 649.

database and the database containing records of individuals with a Texas driver's license or personal ID. ROA.73275–77. This analysis identified between 678,560 and 844,713 registered voters who did not match an identification record, and the Lieutenant Governor received a briefing on this analysis, including the estimate. ROA.73828–33; ROA.88154–56. Nonetheless, the Office of the Secretary of State declined to provide the data to most legislators and, during the expedited legislative process, misrepresented that the analysis was not yet complete. ROA.73292–94. The Office of the Secretary of State routinely uses Spanish surname data, (ROA.73249–50), and if bill opponents had been informed that an impact analysis existed, they could have requested an estimate of the share of voters without Texas identification who are Hispanic. Instead, the Office of the Secretary of State embargoed the impact analysis and allowed proponents of SB14 to respond that they were "not advised" concerning the bill's discriminatory impact, even though proponents recognized the predictable impact to be "common sense." ROA.68640–41; ROA.73292–94; ROA.73336–37; *see also Perkins v. City of West Helena*, 675 F.2d 201, 213 (8th Cir. 1982) (acknowledging that withholding guidance until after a vote constitutes a "departure[] from the normal procedural process" and "evidence of a discriminatory purpose"). Despite all of this, Texas characterizes the procedural deviations as "enabl[ing] public debate to take place," and demonstrating a

"devotion to democracy." Tex. Br. at 74 (quoting *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S 188, 196 (2003)).[19]

Texas improperly views these procedural deviations in isolation, rather than acknowledging that their combination was without precedent. As the Fifth Circuit noted with respect to the very issue of procedural irregularities, "context matters." *Veasey II*, 830 F.3d at 237.

Texas also tries to downplay the extreme measures taken to pass the bill by blaming bill opponents for blocking voter ID bills in the past. Tex. Br. at 74–77. This argument is unavailing. As Texas points out, it was able to take these radical and unprecedented procedural steps to pass the most stringent voter ID bill in the country only after winning "overwhelming majorities in both the Texas House and Senate." Tex. Br. at 76. In short, Texas proves nothing more than that the proponents of SB14 were unable to pass a less discriminatory bill when they had less political power, and were able to pass a more discriminatory bill when they had more political power.[20]

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[19] Texas curiously relies on *Cuyahoga Falls* for such an important proposition. *Cuyahoga* did not discuss the *Arlington Heights* procedural deviation factor, and, there, the jurisdiction had "adher[ed] to charter procedures," not deviated from them. *Cuyahoga Falls*, 538 U.S. at 196.

[20] Similarly, that the 2007 Senate leaders may have provided a courtesy to opponents of the voter ID then under consideration, (Tex. Br. at 75), does not give the 2011 Senate leaders a free pass to steamroll SB14 to passage.

Finally, Texas also argues that the district court was wrong to infer that SB14 was enacted with "unnatural speed" because the Legislature had debated previous voter ID bills. Tex. Br. at 74, 77–78 (quoting *Veasey*, 71 F. Supp. 3d at 700). However, this case is about SB14, and, as discussed, *supra*, SB14 is decidedly more stringent, and more discriminatory, than prior bills. Discussions on prior bills are therefore of limited relevance.

As this Court emphasized, no other issue that the 2011 Legislature faced—not the $27 million budget shortfall, not transportation funding, nothing—was designated as a legislative emergency, got its own select committee, or was passed with an exception to the two-thirds rule. *Veasey II*, 830 F.3d at 238. These drastic procedural departures that cut off meaningful debate are alone strong evidence that the bill was passed with a discriminatory intent, and are even moreso given the complete lack of evidence that the problems the bill purported to address even exist.

(b) SB14's passage was marked by substantive departures.

"Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Arlington Heights*, 429 U.S. at 267. As found by the district court, the Legislature's decisions regarding SB14 make sense only when viewed through the lens of discriminatory motive. ROA.69770–72.

When advocating for SB14's passage, bill proponents "cloak[ed] themselves in the mantle of following Indiana's voter ID law," but, significantly, "the proponents of SB 14 took out all the ameliorative provisions of the Indiana law." *Veasey II*, 830 F.3d at 239. The same is true with respect to SB14's relationship to Georgia's voter ID law. *See id.* at 263.[21] SB14 was far more restrictive than both. ROA.72683–89. Senator Fraser, who authored SB14, conceded that SB14 permits fewer photo IDs than Indiana and that he was unaware of whether the Indiana law permitted use of student IDs. ROA.75454; ROA.75477–78. Senator Fraser's chief of staff, SB14's principal drafter, testified that she never even reviewed the Indiana or Georgia laws while drafting SB14. ROA.31129.[22]

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[21] Indiana and Georgia accept a broad range of documents issued by the United States or the state—including an employee or student ID—and accept ID that has been expired for a longer period. ROA.68613–14. Indiana also allows voters without ID to cast a ballot that will count after completing an indigency affidavit, and Georgia allows voters to present ID issued by Georgia, its counties, its municipalities, native tribes, and even ID from all 50 states, as well as ensuring that no-fee voter identification is available in every county with minimal underlying documentation requirements. *Id.*

[22] Particularly relevant to the question of a voter ID law's intended impact on minority citizens, Georgia does not charge for one of the compliant IDs, for which the underlying documents also do not cost anything. ROA.68613. Indiana provides an indigency exception. ROA.68614. Both states also accept a number of photo IDs, such as public college IDs, that Texas does not, and that SB14 proponents have repeatedly been unable to articulate any reason for excluding. ROA.32143; ROA.68613–14.

Moreover, as this Court detailed, despite hearing evidence that "the potential and reality of fraud is much greater in the mail-in ballot context than with in-person voting," the Legislature chose to pass SB14, which "did nothing to combat mail-in ballot fraud." *Veasey II*, 830 F.3d at 238–39. The decision not to legislate mail-in voting procedures to address mail-in ballot fraud further corroborates the district court's conclusion that the Legislature enacted SB14 with discriminatory intent. Anglo voters are substantially more likely than Black and Latino voters to qualify to vote by mail on the basis of age and comprise a disproportionate share of absentee voters who vote by mail in Texas. ROA.91820–21; ROA.91853.

Texas's argument, raised for the first time on remand, that it had addressed absentee ballot fraud prior to 2011, and that, therefore, its absence from SB14 is of no moment, (Tex. Br. at 94), is makeweight. Even after the changes to Texas's absentee ballot law in 2003, absentee ballot fraud remained a top security concern of election officials. ROA.92250; ROA.93018; ROA.93082–83. Similarly, that the legislature increased the penalties for absentee ballot fraud in 2011 does not change the fact that Texas already had harsh penalties for in-person impersonation fraud before the passage of SB14 and nonetheless instituted further, burdensome measures to prevent it—despite there being no evidence that it existed. TEX. ELEC. CODE § 64.012 (2003); TEX. PENAL CODE § 12.34 (2003) (up to ten years imprisonment and a fine of up to $10,000).

(c) SB14's proponents rejected ameliorative amendments.

"Against a backdrop of warnings that SB 14 would have a disparate impact on minorities and would likely fail the (then extant) preclearance requirement, amendment after amendment was rejected." *Veasey II*, 830 F.3d at 239. Amendments seeking to introduce additional forms of acceptable photo ID were accepted only if those forms of ID were disproportionately held by Anglo Texans (concealed handgun licenses), and were rejected if those forms of ID were disproportionately held by Black and Latino Texans (government employee IDs and public university IDs). ROA.68646–47. The Legislature also voted to reject or permanently table a whole host of ameliorative amendments, including, among others, amendments that would have: extended the hours of operation at DPS offices to make obtaining IDs more feasible (ROA.76711–12); waived fees for underlying documents so that obtaining a photo ID would not be cost-prohibitive to low-income minority communities (ROA.77478–79); permitted use of expired IDs (ROA.77485–86); and required an impact analysis of the effect of SB14 on minority Texans (ROA.76712–14). Furthermore, the Conference Committee eliminated many important ameliorative features from the bill, including provisions passed by the House and Senate, such as an indigency exception and a provision targeting

education for low-income and minority voters. ROA.78263; ROA.78267.[23] Texas also argues that the proponents of SB14 could not have harbored a discriminatory intent because they also voted for some ameliorative amendments. Tex. Br. at 80. This simply means that the law could have been worse than it is, hardly a defense against discriminatory intent.

Significantly, none of the Conference Committee's changes that increased the burden on minority voters furthered the Legislature's purported goals of preventing voter fraud, deterring noncitizen voting, or increasing voter confidence. And none of the rejected amendments put forward to lighten that burden would have impeded those purported goals. At trial, Texas put on no evidence that a university ID or government employee ID is any easier to forge than a driver's license or that an expired driver's license is any easier to fake than a current driver's license. Expanding DPS hours makes it no more likely that a noncitizen person votes.

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[23] Texas spends pages of its brief arguing that the deletion of the indigency amendment was at the behest of Democratic Representative Anchia. Tex. Br. at 92–93. This is false. While Representative Anchia did criticize the indigency-affidavit procedure, he did so not out of a belief that SB14 was better without the procedure, but to expose how it was contrary to SB14's purported purpose of ballot integrity. ROA.77634–39. Representative Anchia suggested that the Legislature could "come up with a good photo identification bill" by expanding the scope of acceptable IDs and refining the affidavit procedure. ROA.77639–40. But instead of adopting any of Representative Anchia's suggestions, proponents of SB14 simply removed the entire indigency-affidavit procedure from the legislation. ROA.77815–16. Contrary to Texas's claim, Representative Anchia opposed this amendment: his vote was misrecorded as a "yea" and he entered a statement of vote on the record correcting that error. ROA.77492-93.

Educating poor and minority voters about the photo ID requirements would, if anything, increase voter confidence in the electoral system. Rejecting these provisions is not consistent with the stated goals of the bill. It is, however, perfectly consistent with a desire to abridge the right to vote of Black and Latino Texans.

(d) Contemporaneous statements—and silence—by legislators provide evidence of discriminatory intent.

Texas argues that, without legislators' express statements of culpability, the district court should have accepted the legislators' statements that their intent was pure. Tex. Br. at 81. But this Court has already held that "the absence of direct evidence such as a 'let's discriminate' email cannot be and is not dispositive." *Veasey II*, 830 F.3d at 241; *see also id.* at 231 n.13 (holding that the court was "not required to find [that the] lack of a smoking gun supports the State's position"). Requiring direct evidence of intent "would essentially give legislatures free rein to racially discriminate so long as they do not overtly state discrimination as their purpose and so long as they proffer a seemingly neutral reason for their actions." *Id.* at 235–36. Indeed, in amending Section 2 of the VRA, the Senate Judiciary Committee recognized that States may "plant[] a false trail of direct evidence in the form of official resolutions, sponsorship statements and other legislative history eschewing any racial motive, and advancing other governmental objectives." S. Rep. No. 97-417 at 37 (1982).

Here, SB14's proponents' failure to speak at crucial times is highly probative of their discriminatory intent. As this Court explained, "[i]t is likewise relevant that SB 14's proponents refused to answer why they would not allow amendments to ameliorate the expected disparate impact of SB 14." *Veasey II,* 830 F.3d at 241.

For example, Representative Patricia Harless, SB14's House sponsor, could not explain why federal, state, and municipal photo IDs are not acceptable under SB14 while military IDs and U.S. passports are, nor why a separate voter ID bill that she introduced the very same session included forms of ID that were not accepted under SB14. ROA.30926–28. And the Senate sponsor of SB14 responded, "I'm not advised," not once as Texas implies, (Tex. Br. at 80), but *27* times to questions ranging from evidence of in-person fraud to data of the effect of the bill to amelioration of the burdens of the bill. ROA.68640–41. From these statements and non-statements, the district court appropriately drew reasonable inferences about the Legislature's discriminatory intent.

(e) Texas's new legislative history theory is improper and further proof of pretext.

During the remand proceedings, and on this appeal, Texas has introduced a new factual and overarching theory of its case, *i.e.*, that SB14 was simply the last step in a decade-long attempt at modernization of the state's voting laws. This new slant on the evidence permeates its current briefing on intent. *See, e.g.*, Tex. Br. at 73, 90–91. Never in the proceedings leading up to remand did Texas present this

theory of the case: not in the Section 5 trial in 2012, not in the trial before the district court in this case in 2014, not in the appeal to this Court in 2016. Therefore, it has waived that argument. *See Osamor*, 271 Fed. App'x at 410; *Brooks*, 757 F.2d at 739. When Texas complains that "much of [the evidence was] not previously analyzed," (Tex. Br. at 68), it has only itself to blame.

Further, Texas's new narrative is based on facts not in the pre-remand record, contrary to this Court's express directive that "the district court should not take additional evidence." *Veasey II*, 830 F.3d at 242. Texas cited no record evidence in support of its new theory. Rather, for the first time during the remand proceedings, Texas cited legislative history, and requested that the district court take judicial notice of it. ROA.68834–37. The district court stopped accepting evidence on September 22, 2014, the day of closing argument. In the months preceding, the parties had made several motions for the district court to take judicial notice of various facts. Texas never moved for judicial notice of the facts upon which it bases its new theory, and, therefore, the factual premise of its new narrative was precluded by the mandate of this Court.

In fact, the absence of evidence from trial, and the absence of this argument from previous briefing, reflects that this new story of a single, "modernizing" intent—one that purportedly covered every vaguely election-related law over the course of a decade—is only the latest in a series of pretextual rationales for SB14

that, as this Court noted, shift "as they [are] challenged or disproven by opponents." *Veasey II*, 830 F.3d at 240–41. And this latest pretext is either so feeble that Texas chose not to raise it when it could have been tested through discovery and at trial, or of such recent invention that Texas simply had not thought of it yet when SB14 was previously before this Court (and before the three other courts that have heard challenges to SB14).[24] That Texas's "principal reasons" for enacting SB14 continue to "shift[] over time, suggest[s] that those reasons may be pretextual." *Foster v. Chatman*, 136 S. Ct. 1737, 1751 (2016); *see also Wiseman v. New Breed Logistics, Inc*., 72 F. Supp. 3d 672, 683 (N.D. Miss. 2014) ("Justifications . . . provided after litigation has commenced may be sufficient to constitute pretext."). Texas's latest argument is simply another unsupported, post-hoc justification for SB14's intentionally discriminatory enactment. *See Bethune-Hill v. Va. State Bd. Of Elections*, 137 S. Ct. 788, 799 (2017) (finding that the inquiry into legislative intent

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[24] What evidence Texas does cite in support of its new theory is flimsy. Texas cites to no legislator who justified SB14 by pointing to the 2000 election or who compared SB14 to these various other election laws passed since 2001, either during contemporaneous debate or in deposition testimony. Further, the laws that Texas cites in its findings of fact as examples of this "modernization" motive were passed largely to comply with the Help America Vote Act and receive federal funding, and their voter ID provisions were far less burdensome than SB14. ROA.91816. Texas's claim that, in enacting SB14, the Legislature was influenced by the Carter-Baker Commission Report is belied by the Legislature's refusal to adopt safeguards recommended by the Commission to avoid disproportionate burdens on minority voters.

turns on "the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications the legislature in theory could have used but in reality did not").

vi. Texas has a recent history of discrimination in voting.

"The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." *Arlington Heights*, 429 U.S. at 267. Without relying on any infirm evidence, the district court confirmed its prior finding that Texas has a "reasonably contemporaneous history" of racial and ethnic discrimination in voting. ROA.69769-70. The district court supplemented its initial exposition of this post-2000 history of discrimination with additional events from 1975 forward, (*id.*), which this Court found relevant, including the attempted purging of minority voters from the polls, and that Texas "'is the only state with this consistent record of objections'" by DOJ to its statewide redistricting plans, *Veasey II*, 830 F.3d at 239–40. This Court found it notable that "'[i]n every redistricting cycle since 1970, Texas has been found to have violated the [VRA] with racially gerrymandered districts.'" *Id.* at 240 (internal quotations omitted). Indeed, as this Court emphasized, "the same Legislature that passed SB 14 also passed two [different redistricting plans] found to be passed with discriminatory purpose." *Id.*

Texas has not challenged these findings in its brief, and has forfeited its right to do so on this appeal.

vii. Texas has not met its burden of proving it would have enacted SB14 absent discriminatory purpose.

Under the Fourteenth Amendment, once the Court determines that SB14 was enacted, at least in part, with a discriminatory purpose, the burden shifts to Defendants to prove that the specific discriminatory provisions of SB14—not just any voter ID law, but SB14 in particular—would have been enacted absent that discriminatory purpose. *See Hunter*, 471 U.S. at 228. Texas did not meet that burden. As the district court ruled, in findings that this Court credited and are fully supported by the evidence:

> [The State] did not provide evidence that the discriminatory features [of SB14] were necessary to prevent non-citizens from voting. They did not provide any evidence that would link these discriminatory provisions to any increased voter confidence or voter turnout. As the proponents who appeared (only by deposition) testified, they did not know or could not remember why they rejected so many ameliorative amendments, some of which had appeared in prior bills or in the laws of other states. There is an absence of proof that SB 14's discriminatory features were necessary components to a voter ID law.

Veasey, 71 F. Supp. 3d at 702.[25]

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[25] Texas claims that the district court failed to make findings on this point on remand. Tex. Br. at 97–98. In fact, in the remand decision, the district court stated that the infirm evidence did not "tip the scales" on any issue in its original decision,

In this context, Texas's rewriting of SB14's history does not answer the most fundamental questions. Why, when the Legislature finally got the numbers it needed to pass photo ID in 2011, did it make the bill much more stringent than any prior attempt, and much more stringent than Georgia's or Indiana's laws, which SB14 was supposed to model? Why, when faced with even greater opposition to the bill by minority legislators and when informed by the office of the Lieutenant Governor that the bill would disparately impact minority voters, did the Legislature reject ameliorative amendment after ameliorative amendment that would have lessened SB14's discriminatory impact? In the words of the Senate sponsor of SB14, when he was asked these questions, apparently Texas was "not advised." In the words of the House sponsor of SB14, when she was asked these questions, apparently Texas "cannot recall." The simplest, most logical, and truest answer is that discriminatory intent motivated the law's passage, and the bill would not have passed without that intent.

(ROA.69773), and addressed the basis for the original findings on whether Texas met its burden, (ROA.69767–72).

II. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S REMEDIAL ORDER

A. Standard Of Review

Once invoked, "'the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies.'" *Brown v. Plata*, 563 U.S. 493, 538 (2011) (quoting *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978)).

This Court reviews a district court's shaping of equitable remedies for a constitutional violation for abuse of discretion. *Gates v. Cook*, 376 F.3d 323, 333 (5th Cir. 2004). "[D]eference" to the trial court "is the hallmark of abuse-of-discretion review." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 137 (1997); *see also Am. Fed'n of State, City And Mun. Emps. v. City of Benton*, 513 F.3d 874, 883 (8th Cir. 2008) ("We review a district court's findings of fact regarding the remedy under a clearly erroneous standard, and there is a strong presumption that the findings are correct.").

B. The District Court's Remedial Order Was Sound, Supported, And Within Its Equitable Discretion

The district court's remedial order was sound, supported by both precedent and the record, and therefore well within its equitable discretion.[26] Giving Texas an

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[26] First, the district court granted Plaintiffs' request for declaratory relief holding that SB14 violates Section 2 of the VRA and the Fourteenth and Fifteenth Amendments to the United States Constitution. ROA.70434. This was obviously proper given the district court's finding that SB14 was motived, at least in part, by a discriminatory purpose. ROA.69764–73; *Veasey*, 71 F. Supp. 3d at 698-99 (noting that the "rubric for making a determination of a discriminatory purpose is the same"

opportunity to resolve the constitutional infirmities of its voter photo ID law on its own, the district court delayed its remedial proceedings until after the close of the legislative session. *See* ROA.69756–63. The district court then reviewed SB5's amendments to SB14 in the context of its discriminatory purpose and discriminatory results findings. Finding that SB5 fails to provide an adequate and constitutional remedy for the harms of SB14's *intentional* discrimination—and indeed "perpetuates SB14's discriminatory features"—the Court enjoined SB14 as well as SB5's amendments to it. ROA.70452. The district court's well-supported findings should be affirmed.

After exhausting all of its potential judicial options for maintaining SB14 in its prior form, including petitioning for certiorari on this Court's en banc decision, the Legislature adopted SB5 as a last resort on May 31, 2017, after the district court issued its April 10 opinion finding that SB14 was intentionally discriminatory. This was not a new voter identification law untainted by SB14's intentional discrimination. In fact, the Legislature retained most of SB14, including many of the features that led the district court to find it intentionally discriminatory. SB5 did

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under Section 2 of the VRA and the Fourteenth and Fifteenth Amendments). Texas does not dispute the propriety of this order except to argue that it should now be vacated based on the passage of SB5 and its "soon-to-be moot" argument. For reasons described exhaustively (*see infra*, Part I (discussing the merits of the discriminatory intent finding) and *supra*, Part III (discussing mootness)), the declaratory judgment should not be vacated.

not meaningfully change the types of requisite ID, remove the barriers to obtaining the requisite ID, or increase its educational efforts. ROA.70440–43; ROA.70450–51. Therefore, the Black and Latino voters targeted by SB14's discriminatory purpose continue disproportionately to face additional barriers to vote.

Indeed, because the Legislature adopted many of SB14's discriminatory provisions, SB5's implementation hinges on the continuing enforcement of parts of SB14, a law the district court held was designed to discriminate against minority voters, and which it permanently enjoined before SB5's provisions take effect on January 1, 2018, effectively rendering SB5 inoperative. For that reason alone, SB5 fails.

But those were not the only choices the Legislature made. The legislature codified in SB5 several detrimental changes to the reasonable impediment declaration procedure put in place by the interim order. The remedy in the interim order was already a narrow "stop-gap," utilized because the parties were following this Court's order to focus on an interim remedy for what was then only a discriminatory results violation. *See Veasey II*, 830 F.3d at 269–72. The interim order was intended to keep most of SB14 intact and address only the results violation on a temporary basis in time for the 2016 elections. ROA.70444.[27]

[27] Texas and the United States' attempt to bootstrap this negotiated interim remedy into the baseline for any remedy is not only improper but, if adopted by this Court, likely to discourage good faith negotiation and compromise among parties in similar

Thus, Texas's and the United States' argument that SB5—several of whose provisions are even less protective than the interim stop-gap remedy—insulates Texas from any remedial order to cure an intentional discrimination violation, was correctly rejected by the district court.[28]

1. Unlawful intentional discrimination requires a meaningful and complete remedy.

The law on remedies for unconstitutional intentional discrimination is clear and unequivocal. A law passed with discriminatory intent has "no legitimacy at all under our Constitution." *City of Richmond v. United States*, 422 U.S. 358, 378 (1975). Therefore, the legislative choices underlying an intentionally discriminatory law are owed no deference whatsoever. *See Arlington Heights*, 429 U.S. at 265–66. And the racial discrimination of that law must "be eliminated root and branch." *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 437–38 (1968). The benchmark for any remedy for unconstitutional discrimination is whether it "place[s] the victims of discrimination in the position they would have occupied in the absence of

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circumstances involving short timelines for interim relief and thus rush considered judgment of required remedies and waste valuable judicial resources.

[28] Indeed, as discussed *supra*, the district court already found, applying the *Arlington Heights* standards, including the disproportionate impact of SB14, that the evidence supports a finding that SB14 was enacted with the intent to discriminate against Black and Latino Texans. That intent does not disappear, even if SB5 remedies the discriminatory results of SB14—which it does not—as discussed below.

discrimination." *United States v. Virginia*, 518 U.S. 515, 565 (1996). Accordingly, this Court has already recognized that the remedy for purposeful discrimination would likely be broader than the remedy for discriminatory results only. *Veasey II*, 830 F.3d at 268.

Where a court finds that the State has acted with unconstitutional discriminatory intent, "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965).[29] Following these basic principles, the district court concluded that SB5, which incorporates much of SB14's discriminatory provisions, fell far short of providing an adequate constitutional remedy for SB14's intentional discrimination against Black and Latino voters.

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[29] The same duty to provide a complete remedy adheres to Section 2 VRA violations. *See* S. Rep. No. 97-417 at 31 (1982) ("The court should exercise its traditional equitable powers to fashion the relief so that it *completely* remedies the prior dilution of minority voting strength and *fully* provides equal opportunity for minority citizens to participate and to elect candidates of their choice." (emphasis added)).

2. SB5 perpetuates SB14's discriminatory features.

First and foremost, SB5 did not meaningfully change the limited list of requisite photo IDs under SB14. ROA.70441 ("SB5 does not meaningfully expand the types of photo IDs that can qualify, even though the Court was clearly critical of Texas having the most restrictive list in the country.").[30] While SB5's expansion of the time during which certain forms of ID can be used after expiration may mitigate some amount of harm, there is no evidence that it would meaningfully reduce the disparate impact of SB14's restrictive list of IDs. ROA.70442. Meanwhile, the removal of any limitation based on expiration for those over 70 will help some seniors but actually exacerbates the disproportionate impact on minority voters since "that class of voters is disproportionately white." *Id.*

The district court found, and this Court affirmed, that Latino and Black Texans are two to three times more likely to lack the narrow category of acceptable SB14 IDs. *Veasey II*, 830 F.3d at 250–56. The Legislature largely accomplished this disparity in SB14 by picking and choosing the "acceptable" IDs that are disproportionately held by Anglo voters and excluding IDs disproportionately held by minority voters. *Veasey,* 71 F. Supp. 3d at 658 ("When the legislatures rejected

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[30] The addition of "passport cards" is of little relevance because "there is no evidence that only passport books were permitted under SB14" and "the requirements for either form of passport" are similar to other forms of SB14 ID and both require a substantial fee. ROA.70441.

student IDs, state government employee IDs, and federal IDs, they rejected IDs that are disproportionately held by African-Americans and Hispanics.").

Indeed, this Court recognized that a relevant piece of evidence of discriminatory intent was the legislators' refusal to accept ameliorative amendments, including ones expanding the types of accepted IDs, in light of SB14's predictable discriminatory impact on minority voters. *Veasey II*, 830 F.3d at 236–37. In order to resolve this discriminatory picking and choosing of acceptable IDs, this Court suggested the reinstatement of the voter registration card as an acceptable form of ID:

> While the registration card does not contain a photo, it is a more secure document than a bank statement or electric bill and, presumably, one not as easily obtained by another person. It is sent in a nondiscriminatory fashion, free of charge, to each registered voter and therefore avoids any cost issues.

Veasey II, 830 F.3d at 271 n.72.

Texas did not take this advice and maintained its current discriminatory list of acceptable ID; requiring all individuals without this form of ID to follow separate additional procedures to vote. ROA.70441 ("Because those who lack SB14 photo ID are subjected to separate voting obstacles and procedures, SB5's methodology remains discriminatory because it imposes burdens disproportionately on Blacks and Latinos."). By the time the legislators considered SB5, their obvious awareness of the disproportionate impact of SB14's initial list of requisite IDs was multiplied by repeated findings and conclusions of several federal courts. Yet, the Legislature left

this discriminatory feature practically untouched. For this reason and others, SB5 "partakes too much of the infirmity of" SB14 "to be able to survive." *Lane v. Wilson*, 307 U.S. 268, 275, 277 (1939) (striking down an Oklahoma registration rule devised after the preceding statute was struck down as racially discriminatory because the rule "operated unfairly against the very class on whose behalf the protection of the Constitution was here successfully invoked").

SB5 also does not appreciably remove the obstacles for many voters to obtain the requisite SB14 ID. The district court held, and this Court affirmed, that SB14's discriminatory impact was caused not only by the Legislature's selection of required IDs that minority voters disproportionately lack, but also by disproportionate obstacles to obtaining the requisite SB14 ID. *Veasey II*, 830 F.3d at 250–56. Among the many obstacles facing voters—and particularly low-income people, who in turn, are disproportionately Black and Latino Texans—the district court noted, and this Court credited, evidence that "hundreds of thousands of voters face round-trip travel times of 90 minutes or more to the nearest location issuing EICs." *Id.* at 251.

Despite both the district court and this Court's concern with disproportionately unequal access to SB14 ID, SB5 did not meaningfully address this problem. Rather, it continued a program that the record evidence showed failed to help voters access the necessary ID: like SB14, SB5 provides for free mobile units to provide election identification certificates that can be used "at special events or at the request of a

constituent group." ROA.69812. As the district court explained, this provision was insufficient to resolve the problems in access to SB14 ID:

> Mobile EIC units were originally offered with SB14. However, the evidence at trial was that they were too few and far-between to make a difference in the rates of qualifying voters. Their mobile nature made notice and duration major factors in their effectiveness . . . . Yet nothing in SB5 addresses the type of advance notice that would be given in order to allow voters to assemble the necessary documentation they might need in time to make use of the units . . . . SB5 contains no provisions regarding the number of mobile EIC units to be furnished or the funding to make them available. Requests for them can be denied for undefined, subjective reasons, placing too much control in the discretion of individuals.

ROA.70442–43. For the same reasons, it is insufficient to resolve the problems in access to SB5 ID.

SB5 also does not address the voter confusion caused by Texas's introduction of a sweeping new voter photo ID system without adequate education. As this Court noted with respect to SB14, "the record is replete with evidence that the State devoted little funding or attention to educating voters about the new voter ID requirements." *Veasey II*, 830 F.3d at 256. Indeed, this Court noted that SB14 was "perhaps [the] most poorly implemented voter ID law in the country." *Id.* at 256 n.52. The district court held, and this Court affirmed, "the State's lackluster education efforts resulted in additional burdens on Texas voters." *Id.* at 256.

Despite this admonition, SB5 does not address public education efforts *at all.* There is no provision for any public education efforts in SB5 and the fiscal notes for

the bill indicate that "[n]o significant fiscal implication to the State is anticipated." Br. for United States as Appellee, Doc. 00514212850 ("USA Br."), at 90–94. Without adequate education, the one ameliorative measure SB5 does provide—the DRI—will go under-utilized.[31] Texas's willingness to ignore clear findings of this Court regarding SB14's failings when devising its supposed remedy for those failings demonstrates a lack of good faith to repair the damage caused by SB14.

Based on the foregoing, the district court correctly held that SB5 would not remedy the disparate impact of SB14's required IDs and that voters who lack compliant ID will continue to be disproportionately Black and Latino. The district court held that the initial disproportionate impact on minority voters was *by design*. Thus, SB5 continues a *purposeful* discriminatory impact on minority voters and must fail. *See Dillard v. Baldwin Cnty. Comm'n*, 694 F. Supp. 836, 843 (M.D. Ala. 1988), *aff'd* 862 F.2d 878 (11th Cir. 1988) (rejecting a state proposed remedy that was "still a product of the legislature's intentional racial discrimination" and holding that

[31] Texas and the United States argued to the district court and suggest to this Court that it should ignore the Legislature's repeated failure to provide for voter education because they have "publicly committed" to spending $4 million dollars on educational efforts. ROA.69826; ROA.69998; USA Br. at 19. Texas and the United States cite no authority for the proposition that the district court was required to credit this "public commitment"—not required by law, not binding on any officials, and not even reduced to sworn testimony—particularly in light of the record evidence of Texas's abysmal failure to properly educate voters in the past. There is no record evidence of how Texas plans to spend these funds, whether the education efforts will reach the most affected communities, or any analysis that $4 million would be sufficient to correct the massive education failures of the past four years.

"deleting just one feature of [a discriminatory] at-large system would [not] delete the invidious taint of this broad legislative scheme"); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139, 142 (5th Cir. 1977) (en banc) (holding that a law is "constitutionally impermissible as racially discriminatory if it is . . . racially motivated . . . or if it perpetuates an existent denial of access by the racial minority to the political process"); *Hunter,* 471 U.S. at 232–33 (striking down racially discriminatory law even after the law's "more blatantly discriminatory" portions were removed).

3. SB5 subjects victims of intentional discrimination to additional unnecessary procedures to vote.

The foregoing describes what SB5 failed to do. What SB5 *does* provide is a separate reasonable impediment declaration procedure for voting for those who lack SB14 ID. This procedure is no doubt a hard-won improvement on SB14, which disenfranchised individuals without the requisite ID outright. But the standard for remedying an intentional discrimination violation is not simply to reduce discriminatory results. Any remedy Texas proposed must "place the victims of discrimination in 'the position they would have occupied in the absence of discrimination.'" *Virginia*, 518 U.S. at 565. On that count, SB fails.

SB5's DRI not only requires voters who may have been the victim of SB14's intentional discrimination to fill out separate paperwork but also to attest under direct threat of a state jail felony (punishable by up to two years of imprisonment) to a subjective and limited number of impediments, without the option to explain a non-

delineated obstacle to obtaining ID in their own words. The district court clearly described the particular problems with requiring voters to swear under penalty of felony charges not just to their name and other objective facts but to one of the seven pre-selected "impediments" to obtaining ID in order to vote:

> Listing a limited number of reasons for lack of SB14 [without an "other" option] is problematic because persons untrained in the law and who are subjecting themselves to penalties perjury may take a restrictive view of the listed reasons. Because of ignorance, a lack of confidence, or poor literacy, they may be unable to claim an impediment to which they are entitled for fear that their opinion on the matter would not comport with a trained prosecutor's legal opinion.

ROA.70446. Indeed, during the 2016 cycle, many voters felt the need to describe their impediment in their own words. ROA.70246–49.[32] However, the Legislature increased the penalty for a false statement on the DRI to a "state jail felony" and required the form itself to include a notice of the potential for prosecution. ROA.69813–17.

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[32] Texas argues that the DRI declarations that Plaintiffs entered into the record are impermissible "hearsay" while arguing that this Court should rely on the DRI declarations it put into the record. Texas cannot have it both ways and the district court was correct to consider all the declarations put into the record. Tex. Br. at 27–28, 61. In any event, Plaintiffs did not introduce the declarations for proof of the underlying voters' circumstances but rather to show that many voters with reasonably stated impediments felt the need to write in their own rather than rely on the seven pre-selected listed impediments that SB5 would only include. ROA.70247–49.

While Texas relies heavily on the preclearance of South Carolina's reasonable impediment declaration procedure, the South Carolina procedure gave voters the option of writing down "any reason" whatsoever for their reasonable impediment and it had to be accepted. *South Carolina v. United States*, 898 F. Supp. 2d 30, 36 (D.D.C. 2012) ("[A]ny reason asserted by the voter on the reasonable impediment affidavit for not having obtained a photo ID must be accepted. . . . [T]he reasonableness of the listed impediment is to be determined by the individual voter. . . . . So long as the reason given by the voter is not a lie, an individual voter may express any one of the many conceivable reasons why he or she has not obtained ID."). Indeed, the court's order in South Carolina *required* the inclusion of an "other" box. *Id.* at 40–41.

Further, to date, Texas has not provided any reason why requiring voters to swear under penalty of perjury to a set of pre-listed impediments serves its interest in preventing fraud or securing election integrity. ROA.70447 ("In the *South Carolina* case, the state was to follow up with voters who did not have qualified ID to assist in getting ID so there was a logical reason to identify the impediment. Texas has offered no reason to identify the voter's reasonable impediment."). There is certainly no evidence that voters that "misused" the other box by not naming a "real impediment" were not who they said they were, or ineligible or unqualified to vote.

Simply put, requiring voters without SB14 ID to attest under penalty of a "state jail felony" to "a particular impediment to possession of qualified ID—information that is subjective, may not always fit into the State's categories, and could easily arise from misinformation or a lack of information from the State itself as to what is required" does not place victims of discrimination in the position they would have been absent SB14's purposeful discrimination.[33] ROA.70449.

The district court's reasoning and analysis mirrored the Fourth Circuit's reasoning under similar circumstances. In *McCrory*, the Fourth Circuit addressed whether a subsequently enacted reasonable impediment affidavit

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[33] This set of provisions is particularly problematic given the district court's findings—supported by contemporary testimony—that "[m]inorities [in Texas] continue to have to overcome fear and intimidation when they vote." *Veasey*, 71 F. Supp. 3d at 636 ("Reverend Johnson testified that there are still Anglos at the polls who demand that minority voters identify themselves, telling them that if they have ever gone to jail, they will go to prison if they vote."); *id.* at 675 ("Fear of law enforcement by [minority voters] is widespread and justified."); ROA.70448 (finding the threat of perjury particularly harmful in light of the record evidence of "threats and intimidation against minorities at the polls—particularly having to do with threats of law enforcement and criminal penalties"); *see also McIntosh Cnty. Branch of the NAACP v. City of Darien*, 605 F.2d 753, 758 (5th Cir. 1979) (remanding for reconsideration of the "intimidat[ion]" and "fear" experienced by some Black voters); *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1369 (N.D. Ga. 2005) (finding that voters without photo ID would be "reluctant" to sign an affidavit that may contain a misstatement); *Harris v. Siegelman*, 695 F. Supp. 517, 525–26 (M.D. Ala. 1988) (finding that provision requiring a disproportionately Black class of undereducated voters to swear to illiteracy created an atmosphere of "intimidation").

procedure adequately remedied North Carolina's intentionally discriminatory voter photo ID law. 831 F.3d at 240. It found that it did not. *Id.* The Court correctly observed, "even if the State were able to demonstrate that the amendment lessens the discriminatory effect of the photo ID requirement, it would not relieve us of our obligation to grant a complete remedy in this case." *Id.* The Fourth Circuit then explained why the reasonable impediment procedure imposed unacceptable lingering burdens on victims of racial discrimination:

> For example, the record shows that under the reasonable impediment exception, if an in-person voter cannot present a qualifying form of photo ID—which African Americans are more likely to lack—the voter must undertake a multi-step process . . . . On its face, this amendment does not fully eliminate the burden imposed by the photo ID requirement. Rather, it requires voters to take affirmative steps to justify to the state why they failed to comply with a provision that we have declared was enacted with racially discriminatory intent and is unconstitutional.

Id. at 240–41 (internal citations and quotations omitted). The only difference here is that the district court engaged in a more detailed and record-based analysis of the remaining burdens SB5's specific reasonable impediment procedure places on minority voters.

4. Viewed in its proper context, SB5 does not remedy the violations.

Ultimately, Texas and the United States ask this Court to view SB5 in isolation because that is the only way it could possibly pass muster. But that would be entirely improper. This procedure must be viewed in light of the fact that those who must use it are disproportionately victims of intentional discrimination.

Despite Texas and the United States' claims to the contrary, district courts have routinely scrutinized state remedial plans and other subsequent legislation to determine whether they adequately remedy adjudicated constitutional violations. *Id.*; *see also City of Port Arthur v. United States*, 459 U.S. 159 (1982) (holding that "in light of the prior findings of discriminatory purpose," the court's elimination of the majority vote requirement in the proposed remedial plan "was a reasonable hedge against the possibility that the [remedial] scheme contained a purposefully discriminatory element"); *Louisiana*, 380 U.S. at 154–155 & n.17 (enjoining an unconstitutional literacy test and a new subsequently enacted test because, even if the new test was non-discriminatory, it perpetuated the discriminatory burdens placed on Black voters by the prior test); *Reynolds v. Sims*, 377 U.S. 533, 586–87 (1964) (holding that the district court acted property in allowing the legislature to craft an interim remedy to address reapportionment, but invalidating it as an inadequate permanent remedy); *Cane v. Worcester Cnty.*, 35 F.3d 921, 927 (4th Cir. 1994) (in remedying a VRA Section 2 violation, "[i]f the legislative body fails to

respond or responds with a legally unacceptable remedy, the responsibility falls on the District Court to exercise its discretion in fashioning a near optimal plan." (internal quotations omitted)); *see also Covington v. North Carolina*, No. 1:15CV399, 2017 WL 4162335, at *15 (M.D.N.C. Sept. 19, 2017) (adopting schedule that provided court with additional time to review legislature's remedial plan so that "if necessary," the court could "impose [its] own remedial plans").

For all the foregoing reasons, the district court was justified in holding that SB5 "fall[s] far short of mitigating the discriminatory provisions of SB 14," (ROA.70433), and enjoining SB14 and SB5's amendments to SB14. ROA.70456. To do anything else would continue to burden victims of intentional discrimination in their access to the right to vote, "this time with the imprimatur of a federal court." *Dillard*, 694 F. Supp. at 844 (internal quotations omitted).

C. Texas And The United States Have Identified No Abuse Of Discretion In The District Court's Remedy

Unable to attack the logic of the district court's opinion, Texas and the United States level five legally baseless attacks on the district court's injunction, none of which comes close to demonstrating an abuse of discretion.

First, Texas argues that the district court was required to impose a remedy "as narrow as possible." Tex. Br. at 56.[34] But given the district court's finding of

[34] Critically, the United States concedes that intentional discrimination necessitates a full injunction. USA Br. at 35–36.

intentional racial discrimination, the court could not have crafted narrower relief. "[T]he nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). A full and permanent injunction is the narrowest possible remedy when a court finds that a law was motivated by discriminatory intent, because such laws have "no legitimacy at all under our Constitution." *Richmond*, 422 U.S. at 378; *see also Hunter*, 471 U.S. at 231–33 (affirming invalidation of state constitutional provision adopted with discriminatory intent); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 484–87 (1982) (affirming permanent injunction of state initiative adopted with discriminatory intent).

Texas relies on *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006), and *Regan v. Time, Inc.*, 468 U.S. 641 (1984), but neither case involved intentional racial discrimination, so the "nature of the violation[s]" in those cases may have justified a narrower remedy than here.[35] *Swann*, 402 U.S. at 16. In any event, in *Regan*, the Court held that only certain provisions of a law were unrelated to and therefore severable from the law's invalid provisions, 468 U.S. at 659, an

[35] For this reason, the Court should also reject the suggestion by *Amici* States that it is inappropriate to remedy "individual violation through broad-based facial invalidation." Brief of the States of Indiana, et al., Doc. 00541209170, at 21. Whatever the merits of this argument in cases like *Crawford*, involving only the *effects* of a photo ID law under the analytically distinct *Anderson-Burdick* standard, a law passed with discriminatory *intent* must be invalidated in its entirety.

approach completely consistent with the district court's injunction, which severs section 16 from the rest of SB14. And Texas completely misconstrues the plurality opinion in *Salazar v. Buono*, 559 U.S. 700 (2010), which involved a law enacted for a legitimate, not illicit, purpose. *Id*. at 715–18.

Second, Texas suggests that the district court lacked authority to enjoin SB5 because there is no pending claim against SB5. Tex. Br. at 57–58. Were this true, civil rights plaintiffs would be forced to play a high-stakes game of whack-a-mole, imposing substantial, unnecessary litigation costs and indefinitely delaying the possibility of meaningful relief for even the most odious legal violations. The district court has inherent equitable authority to determine whether an express attempt by the legislature to remediate judicially-determined discrimination cures the discrimination, *see Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 407 (5th Cir. 1991), and this Court specifically directed the district court to consider any intervening legislative action in its determination of remedies, *Veasey II*, 830 F.3d at 271.

Indeed, in *Salazar*, the plurality expressly recognized that courts retain authority to enjoin remedial legislation, even when those new laws were not the target of the original complaint. 559 U.S. at 718. "The relevant question is whether an ongoing exercise of the court's equitable authority is supported by the prior showing of illegality, judged against the claim that changed circumstances have

rendered prospective relief inappropriate." *Id.*; *see also Operation Push*, 932 F.2d at 407 (holding that the court must determine whether a "newly enacted statute" tendered as "a remedy for the violations" itself "violate[s] statutory provisions or the Constitution"). That is what the district court did here.[36]

Unable to prove as a general matter that courts lack authority to enjoin remedial legislation absent newly pled claims, Texas also seems to imply that this Court, in *Veasey II*, preluded the district court from enjoining any remedial legislation on remand. Tex. Br. at 57. But *Veasey II* said nothing of the sort. In the sentence Texas quotes, the Court stated that "[a]ny concerns about a new bill would be the subject of a new appeal for another day." 830 F.3d at 271. That new appeal is this one, and that other day is now. For its part, the United States seems similarly to suggest that this Court's opinion in *Veasey II* already definitively approved a photo ID law with a DRI procedure. USA Br. at 30, 36–37. The Court's mere observation, "[b]ased on suggestions in oral argument [that] appropriate

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[36] Citing the principal opinion in *Wise v. Lipscomb*, 437 U.S. 535 (1978)—which only two justices joined—and *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109 (5th Cir. 1991), Texas and the United States argue that courts, where possible, should allow the legislature to craft remedies, and that a legislative remedy remains "governing law unless it, too, is challenged and found to violate the Constitution." Tex. Br. at 56; USA Br. at 41. But nothing in *Wise* or *Westwego* suggests that any "challenge" to remedial legislation—even in a case involving intentional racial discrimination—must come via a newly filed complaint raising new claims specifically directed at the new law rather than via remedial proceedings in the case challenging the preexisting law.

amendments *might include* a reasonable impediment or indigency exception" is a far cry from holding as a matter of law that SB5's DRI is sufficient on its own to remedy intentional racial discrimination. *Veasey II*, 830 F.3d at 270 (emphasis added).[37]

Texas also cites the opinion of the motions panel that granted a stay of the district court's injunction pending this appeal. Tex. Br. at 57. But that opinion does not bind this merits panel. Moreover, the motions panel was wrong to suggest that the district court lacked authority on remand to enjoin SB5. In *Veasey II*, this Court anticipated that the Legislature might act, but nonetheless authorized the district court to "reevaluate the evidence relevant to discriminatory intent" and "implement any remedy arising from such reevaluation" after the November 2016 election. 830 F.3d at 272. It was perfectly consistent with this mandate for the district court to reject SB5 as an adequate remedy for the intentional racial discrimination infecting SB14.

Third, Texas and the United States complain that the district court "enjoined SB5 without any evidence that SB5 had a discriminatory purpose or effect." Tex. Br. at 57; *see also* USA Br. at 37, 40–41, 53–55. As explained *supra* at Part II.B, however, the district court appropriately recognized that remedial legislation is "in

[37] The reasonable impediment affidavit was one of several suggestions made by this Court. *See Veasey II*, 830 F.3d at 270–71. As noted above, another was the use of the voter registration card mailed to all voters as an alternative to SB14 ID. *Id.* at 271 n.72. Texas did not adopt this suggestion.

part measured by the historical record, in part measured by difference from the old system, and in part measured by prediction," ROA.70438 (quoting *Dillard*, 831 F.2d at 250), and cited extensive record evidence to support its conclusion that SB5 was infected by and perpetuated the same intentional racial discrimination that plagued SB14.

Texas points to the district court's supposed "acknowledge[ment] that 'the record holds no evidence regarding the impact of' SB5's [DRI]," and suggests that "without an ongoing discriminatory effect from SB14, there can be no ongoing discriminatory purpose or any basis to inquire into the legislative motivation behind SB14." Tex. Br. 57–58 (quoting ROA.70439). This argument is both misleading and wrong. It is misleading because, in the sentence Texas quotes, the district court was not "acknowledging" that it lacked any evidentiary basis to evaluate SB5's DRI—the district court was observing the lack of any record evidence suggesting that the interim remedy's DRI fully cured the photo ID law's racially discriminatory effects. ROA.70439. Texas's argument is wrong because SB5 does not fully remove the discriminatory results of SB14. *See supra* at Part II.B. The district court spent seven full pages addressing SB5's DRI in light of the record, ultimately concluding that the DRI was insufficient to cure the law's ills. ROA.70444–50.

Fourth, Texas and the United States maintain that the district court improperly shifted the burden of proof on the validity of SB5 from Private Plaintiffs to the State.

Tex. Br. at 58–60; USA Br. at 48–53. But it is black-letter law that Texas, having been found liable, has the burden of proof on this remedial question. In *United States v. Virginia*, for example, the Court, after invalidating a state policy on grounds of unconstitutional gender discrimination, considered the sufficiency of a remedy proposed by the State. 518 U.S. at 547. "Having violated the Constitution's equal protection requirement," the Court explained, "Virginia was obliged to show that its remedial proposal directly addressed and related to the violation . . . ." *Id.* (internal quotations omitted). The Court held that Virginia had failed to carry this burden. *Id.* at 547–56. At no point did the Court ever contemplate that the burden might instead fall on the plaintiffs to disprove the sufficiency of Virginia's proposed remedy.[38] *See also Green*, 391 U.S. at 439 (following finding of unconstitutional school segregation, burden was on the school board to prove the sufficiency of an implemented remedy).

Texas and the United States lean heavily on *Operation Push*, (Tex. Br. at 59–60; USA Br. at 48–50), but nothing in that case shifted the burden to plaintiffs to

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[38] The United States makes much of the fact that Virginia's proposed remedy also made a suspect sex-based classification, thus perpetuating the constitutional violation plaguing the original policy. USA Br. at 50–52. But that has nothing at all to do with whether the Court, in the first instance, imposed the burden on the plaintiffs to prove liability all over again as if the original policy did not exist, or whether the State instead had the burden to prove that its remedy fully cured the constitutional infirmities plaguing the preexisting policy. Nothing in *Virginia* limits that rule to challenges involving suspect classifications.

prove the insufficiency of remedial legislation—nor could that case have done so, given the binding Supreme Court precedent discussed above. In the sections of *Operation Push* cited by Texas, (Tex. Br. at 59–60), the Court addressed only the timing of remedial relief (*i.e.*, the principle that, where feasible, the legislature should be provided an opportunity to proffer a remedial plan before the Court orders one) and the appropriate legal standard for determining the sufficiency of a legislative remedy (*i.e.*, the principle that remedial legislation is sufficient so long as it appropriately remedies the constitutional harms, even if broader relief might have been conceivable), not the burden of proof on remedial legislation. 932 F.2d at 405–07. The district court's approach here was entirely consistent with both of those principles: the Legislature had the opportunity to proffer a remedial plan (SB5), and the district court rejected that plan because it perpetuated SB14's unconstitutional discriminatory harms.

Indeed, in language Texas and the United States ignore, the Court in *Operation Push* found the remedial legislation sufficient only because the state had carried its burden of showing that the new law "would have a positive effect on voter registration," thus remedying the racially discriminatory results of the earlier law. 932 F.2d at 407. In any event, *Operation Push* did not involve a finding of intentional discrimination; it instead involved a discriminatory results finding. *Id.* 401–02. Even if, contrary to settled law, a plaintiff has the burden of proof on the

sufficiency of remedial legislation for purposes of a discriminatory results claim, the same would not be true of legislation designed to cure intentional discrimination. After all, an intentionally discriminatory law must be "eliminated root and branch." *Green*, 391 U.S. at 437–38. There is no space to allow the state to repackage an intentionally discriminatory law under the guise of a legislative remedy.[39]

Fifth, and finally, Texas and the United States argue that the district court abused its discretion by focusing on two aspects of SB5's DRI: the omission from SB5's DRI of the "other" box that had appeared on the interim remedy's DRI, and language on SB5's DRI emphasizing heightened criminal penalties for false statements. Tex. Br. at 60–63; USA Br. at 37–40. Texas's only answer to the district court's well-reasoned concerns about the removal of the "other" box and the heightened criminal penalty is to point to a few handfuls of DRIs out of

[39] Texas and the United States, (Tex. Br. at 59–60; USA Br. at 48), stress the Court's separate observation that the plaintiffs had "failed to offer objective proof that the new procedures would have inadequate effect on registration rates." *Operation Push*, 932 F.2d at 407. But in context, it is clear that the Court was not suggesting that the plaintiffs had the burden of proving an "inadequate effect on registration rates" absent a sufficient showing by the State that the new law would have a positive remedial effect. *Id.* The United States also points to the holding in *Operation Push* that the plaintiffs "failed to establish that the legislature's decision not to adopt more generous legislation evinced a discriminatory purpose." USA Br. at 49. But of course the plaintiffs in that case had the burden to prove discriminatory purpose in the first instance. Indeed, the district court expressly recognized here that the burden would fall differently if Private Plaintiffs had filed a separate lawsuit raising a new VRA claim against SB5. ROA.70438–39.

approximately 16,000 cast where voters used the "other" box to list arguably questionable reasons or to protest SB14. Tex. Br. at 60–62. Even if, as Texas suggests, a small number of voters may have used the "other" box for improper purposes, the district court hardly abused its discretion by focusing on the thousands of voters who did not. And even if, as Texas also suggests, the reasons stated on at least some of the DRIs submitted by Private Plaintiffs may have fit within an existing SB5 category, (Tex. Br. at 61–62), Texas ignores the district court's reasonable observation that the proper scope of those categories is highly ambiguous—many voters may not have felt comfortable using an existing category, particularly when faced with an overt threat of felony prosecution for making a misstatement. ROA. 70446-47.

The United States—but not Texas—adds the argument that the record failed to substantiate any racially discriminatory effect from elimination of the "other" box. USA Br. at 38–39. But, as explained *supra* at Part II.B, Texas, not Private Plaintiffs, has the burden of proof on the sufficiency of any remedial legislation. Thus, Plaintiffs did not need to prove that every aspect of SB5 has an independent racially discriminatory effect, as the United States seems to suggest. Moreover, the United States misses the point. It will be disproportionately minority voters that have to use the DRI, so its defects will naturally fall disproportionately on those voters. The district court's injunction is sound so long as Texas failed to show that SB5 in its

entirety—including a DRI without the "other" box—failed fully to cure the racial discrimination plaguing SB14.

Nor did the district court abuse its discretion in concluding that "[t]here is no legitimate reason in the record to require voters to state such impediments under penalty of perjury"—heightened to a state jail felony—"and no authority for accepting this as a way to render an unconstitutional requirement constitutional." ROA.70448. Texas points to language on the interim remedy's DRI also referencing the possibility of prosecution for perjury, (Tex. Br. at 62), but Private Plaintiffs never asserted that the DRI provided in the interim remedy constituted all relief to which they would ultimately be entitled. To the contrary, when agreeing to the interim remedy, all parties "preserve[d] their rights to seek or oppose future relief." ROA.67879. Texas also insists that heightened state penalties are merely duplicative of federal penalties for perjury, (Tex. Br. at 63), but, as the district court recognized, the false information subject to perjury under federal law is objective facts such as name, address, and period of residence, not, as SB5 would have it, information that is subjective and may not always fit neatly within Texas's ambiguous categories. ROA.70449. That is also why the United States is wrong to lean on "S.B. 5's intent standard": even if SB5 imposes penalties only for "*intentionally* making a false statement or providing false information," (USA Br. at 40), the district court

reasonably concluded that voters may nonetheless fear that the State will construe their honest answers as misleading and bring charges on this basis. ROA.70446–47.

Texas and the United States rely on *South Carolina v. United States*, (Tex. Br. at 63; USA Br. at 46–47), but that case does not present a comparable situation. There, the court made no finding of intentional discrimination; the court was concerned only with whether South Carolina's photo ID law would have a "discriminatory retrogressive effect" under Section 5 of the VRA. *South Carolina*, 898 F. Supp. 2d at 38–43. And there was substantial evidence in that case suggesting that the new law would not have a retrogressive effect. *Id*. Unlike SB14 and SB5, "the South Carolina voter ID law expanded the types of IDs that could be used, made getting the IDs much easier than . . . prior to the law's enactment . . . and contained detailed provisions for educating voters and poll workers regarding all new requirements." ROA 70447 n.16. Moreover, the court in *South Carolina* emphasized that the DRI procedure allowed a voter to claim any true reason whatsoever in order for his or her vote to be counted; the voter was not limited to a list of set categories. 898 F. Supp. 2d at 34, 40–41.

The United States responds by insisting that South Carolina still has a more restrictive list of acceptable photo IDs than Texas. USA Br. at 46. But, under the Section 5 retrogression standard, the photo ID law's expansion of permissible IDs tended to support preclearance, however restrictive the preexisting baseline.

Moreover, the many other ameliorating features of South Carolina's law—in particular, its DRI procedure—make its law far less strict than Texas's. The United States also emphasizes that a voter in South Carolina who uses the DRI may cast only a provisional ballot, but this argument ignores that the "county board [in South Carolina] shall find [a provisional ballot] valid unless it has grounds to believe the affidavit is false." *South Carolina*, 898 F. Supp. 2d at 34 (internal quotations omitted). In function, then, the provisional ballot operates as a regular ballot.

In sum, Texas and the United States have failed to identify any flaw in the district court's injunctive order barring enforcement of SB14 and SB5's amendments to SB14 and returning the state to the pre-SB14 voter-identification regime. Injunctive relief was the only appropriate remedy in response to the district court's well-supported finding of intentional racial discrimination. To be clear, neither Private Plaintiffs nor the district court have suggested that the Legislature cannot revisit the issue of voter identification and enact a new law changing the voter identification protocols, or that any new law cannot include a photo ID requirement or a reasonable impediment declaration procedure. Indeed, the district court specifically deferred to the Legislature's ability to revisit this issue. ROA.70451–52. What the district court held is that the remedy for SB14's intentional discrimination cannot be a law that perpetuates SB14's precise discriminatory features and then subjects the victims of the discrimination to a procedure that

requires them to attest, under penalty of perjury, to a subjective and irrelevant set of facts, without even allowing those voters to use their own words to do so.

III. THIS CASE IS NOT MOOT

Texas argues that SB5 remedies SB14's discriminatory effects, and thus moots, and results in a vacatur of, the entire case—including this Court's finding of a Section 2 results violation, the district court's finding of a Section 2 and constitutional intentional discrimination violations, and Private Plaintiffs' entitlement to remedies for those violations.

Permitting jurisdictions to moot a case in this manner would undermine the "essential justification" for the VRA which was to reduce "the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in [voting rights] lawsuits." *South Carolina v. Katzenbach*, 383 U.S. 301, 315, 328 (1966). The VRA "attack[ed] the problems of States going from one discriminatory system to another." *Young v. Fordice*, 520 U.S. 273, 285 (1997). Under Texas's mootness theory, however, its legislature could (as it did) intentionally pass and implement a discriminatory law and (as it has been) be found liable of discriminatory results—but then escape its obligation to redress the harms flowing from the law's discriminatory results and intent (including prospective Section 3(c) relief) by amending that law years later purportedly to ameliorate the prior law's discriminatory results. A bipartisan Congress passed the VRA to protect

voters from such attempts by states to perpetually evade liability and the obligation to redress the harms of intentional discrimination in voting by providing only partial ameliorative relief directed at future injuries. *See* H.R. Rep. No. 89-439 at 9–10 (1965) ("[E]ven after apparent defeat resisters seek new ways and means of discriminating."). No court has ever accepted so outrageous a proposition, as it would allow a legislature that has intentionally discriminated against minority groups to escape judicial opprobrium and liability for its pernicious act simply by ameliorating some of the prior law's discriminatory results. No reading of the mootness doctrine permits that result.[40]

A. Private Plaintiffs Are Entitled To Additional Remedies

"A case becomes moot *only* when it is *impossible* for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (internal quotations omitted) (emphasis added); *see also Ellis v. Ry. Clerks*, 466 U.S. 435, 442 (1984) ("[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot."); *Operation Push*, 932 F.2d at 409 (adjudication of a Section 2 claim was "not moot because the decision under the 1988 Act was the remedy decision growing out of the [Section 2 liability] holding under the 1984 Act"). As demonstrated in Part II, *supra*, SB5 fails to remedy either the discriminatory intent

[40] Unlike Texas, the United States does not claim that this case is moot.

or the discriminatory effects violations, and that discussion is incorporated herein. As such, at stake in the outcome of this litigation for Private Plaintiffs is the full relief to which they are entitled.

1. Private Plaintiffs have a concrete, live interest in a finding that SB14 is intentionally discriminatory.

Regardless of whether SB5 is adequate remedy for SB14's intentional discrimination (and it is not), this case is not moot, and this Court should affirm the district court's well-reasoned discriminatory intent finding. This Court has recognized the need for a clear record of past discrimination adjudications in subsequent racial discrimination litigation. *See Veasey II*, 830 F.3d at 232–33 & nn.14–15, 239–40 & nn.27–29. In that context, therefore, Private Plaintiffs are entitled to prophylactic relief in this case because of the finding of intentional discrimination, including: (a) a declaration of intentional discrimination, which, by itself, is a significant prophylactic remedy against future discrimination because it is an important factor in the adjudication of future discrimination claims, *see LULAC*, 548 U.S. at 401 (identifying "the history of voting-related discrimination in the State" as one potential factor that a plaintiff may show in a totality of circumstances analysis to prove a Section 2 claim (internal quotations omitted)); (b) an order striking down SB14; and (c) relief under Section 3(c) of the VRA, which specifically provides for preclearance even when officials are no longer intentionally discriminating, 52 U.S.C. § 10302(c), and which remains available regardless of any

subsequent legislation, *Virginia*, 518 U.S. at 551 (the court must issue a remedial "decree that will 'bar like discrimination in the future'" (quoting *Louisiana,* 380 U.S. at 154)).[41]

Texas argues that "a plaintiff's requested remedy has no bearing on whether an Article III injury persists," and that Private Plaintiffs' request for 3(c) relief "cannot avoid mootness." Tex. Br. at 49–50. However, every court to directly address the issue has held that subsequent ameliorative amendments do not moot voting rights challenges to prior laws where further relief remains available. *See Blackmoon v. Charles Mix Cnty.*, 505 F. Supp. 2d 585, 593 (D.S.D. 2007) (holding plaintiffs' VRA claims not mooted by elimination of challenged districts because of availability of relief under Section 3(a) of the VRA); *Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1247-48 (N.D. Miss. 1987) (noting prior denial of motion to dismiss for mootness, despite amendment of statutes at issue, because amendment "did not completely eliminate" the challenged discriminatory practices).[42] Most recently, a three-judge district court in the Western District of

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[41] Section 3(c) of the VRA allows courts to require jurisdictions to obtain preclearance review of specified voting changes for a certain period of time following a finding that the jurisdiction has violated the Constitution by engaging in intentional discrimination on account of race or color. 52 U.S.C. § 10302(c).

[42] Texas relies on *McKinley v. Abbott*, 643 F.3d 403 (5th Cir. 2011), for the proposition that once a state declares it will not enforce a statute, any pending challenge to that statute becomes moot. Tex. Br. at 41–42. But Texas overstates *McKinley*'s holding and again ignores how the relief sought affects the question of mootness. There, the plaintiff sought only a declaration that the statute was

Texas rejected Texas's argument that the re-drawing of redistricting plans mooted plaintiffs' intentional discrimination claim against the original maps, on the basis that "Plaintiffs are still being harmed by the districts drawn with that intent, and Plaintiffs have potential relief available under § 3(c) for that harm." *Perez v. Abbott*, 253 F. Supp. 3d 864, 875 (W.D. Tex. 2017).

Plaintiffs, thus, have a live, concrete interest in a remedy that fully cures SB14's discriminatory intent.

2. Plaintiffs have a live, concrete interest in a full remedy to discriminatory results.

Texas mischaracterizes Private Plaintiffs' claims as resting solely on the theory "that a photo-ID voting requirement without an accommodation for poorer voters, such as a reasonable-impediment exception, imposes an unlawful burden" on those voters. Tex. Br. at 34. Private Plaintiffs have never argued that SB14 would have been lawful and constitutional if only it had a reasonable-impediment exception. To the contrary, Private Plaintiffs have identified a multitude of sins in SB14, including the deliberate decision by the Legislature to restrict the forms of

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unconstitutional. 643 F.3d at 405. When the State declared that it would not enforce the portion of the statute the plaintiff was challenging because it had been declared unconstitutional more than 15 years prior, the court dismissed the plaintiff's claim as moot. *Id.* at 406–07. As described *supra*, Private Plaintiffs here seek more than declaratory relief, and unlike in *McKinley*, the declaratory relief that Private Plaintiffs do seek has a remedial function beyond simply finding the statute to be unconstitutional—that is, the declaration is a predicate to 3(c) of the VRA and other relief.

acceptable photo IDs to those that are less likely to be possessed by, and more burdensome to obtain for, Black and Latino voters as compared to Anglo voters, as well as SB14's drastically deficient implementation. SB5 corrects none of those sins. *See* Part II.B(3), *supra*. Additionally, and as explained in Part II.B(4), *supra*, the supposed correction Texas heralds, the reasonable-impediment exception, fails to fully ameliorate SB14's discriminatory results. Plaintiffs, thus, have a live, concrete interest in a remedy that fully cures SB14's discriminatory results.

B. The Adoption of SB5 in 2017 Does Not by Itself Automatically Moot This Case

Texas takes its untenable argument a giant step further, baldly asserting that, "the substantial amendment to a challenged law moots a challenge to the old law even if the new law may not completely remedy a plaintiff's claimed injury." Tex. Br. at 44. The cases Texas relies on for this proposition are inapposite. Texas claims that *Diffenderfer v. Cent. Baptist Church*, 404 U.S. 412 (1972), established a "general rule that repeal or substantial amendment moots a challenge to a statute." Tex. Br. at 43. *Diffenderfer* established no such rule. The Court merely held that, where a later statute repealed a prior one and where "[t]he *only relief sought* in the complaint was a declaratory judgment" that the prior law is unconstitutional, the case "lost its character as a present, live controversy." 404 U.S. at 414–15 (internal quotations omitted) (emphasis added). All of the cases Texas cites similarly hold that mootness is always determined by reference to the injuries alleged and the

remedies sought.[43] *See Knox*, 132 S. Ct. at 2287 ("A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." (internal quotations omitted)); *see also In re Corrugated Container Grand Jury*, 659 F.2d 1330, 1331 (5th Cir. Unit A Oct. 1981) ("'Implementation of mootness principles requires a highly individualistic, and usually intuitive, appraisal of the facts of each case.'" (quoting WRIGHT & MILLER, FED. PRAC. & PROC. § 3533)). Here, the mere passage of SB5 has neither extinguished Private Plaintiffs' injuries nor rendered relief impossible.[44]

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[43] In *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), plaintiffs sought only "declaratory and injunctive relief," unlike plaintiffs here—and, in any event, the claims in that suit were held not to be moot. *Id.* at 659, 662–63; *see also Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 478 (1990) (holding that plaintiff's Commerce Clause challenge was mooted by changes to federal law "which make it clear that no matter how the Commerce Clause issues in this suit are resolved the application can constitutionally be denied"); *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989) (finding overbreadth challenge to criminal statute mooted where amendment to challenged statute eliminated "the special concern that animates the overbreadth doctrine"); *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (finding that university's appeal of decision striking down regulation was mooted where lower court's ruling was based on absence of standards governing regulation, and university had since amended regulation to include such standards); *Kremens v. Bartley*, 431 U.S. 119, 128–29 (1977) (finding that where plaintiffs challenged constitutionality of a law, no further remedy was available after the complete repeal of that law).

[44] Courts frequently retain jurisdiction to address challenges to a law even where that law has been repealed or amended. *See Ne. Fla. Chapter of Associated Gen. Contractors*, 508 U.S. at 661–63 (finding action was not rendered moot when city repealed challenged ordinance and enacted a different ordinance, which could still disadvantage challengers even if to a lesser degree); *Abie State Bank v. Weaver*, 282 U.S. 765, 781 (1931) (appeal was not rendered moot by repeal of the challenged statute where the conduct "which was assailed in th[e] suit, is continued in effect"

Davis v. Abbott, 781 F.3d 207 (5th Cir. 2015), is no more helpful to Texas. As the three-judge court in *Perez* pointed out, *Davis* "was not a decision about mootness." 253 F. Supp. 3d at 874. And even Judge Smith's dissent in *Perez*, which emphasized that the case concerned plaintiffs "who have never been, and cannot be, injured by the 2011 plans," *id.* at 981, makes clear why this case is not moot: it involves the potential for 3(c) relief, does not involve Texas's repeal of SB14, and is predicated on findings of discriminatory intent as well as effects. Indeed, here, SB14's intentionally discriminatory core provisions have injured Private Plaintiffs for six years, and various forms of prophylactic and other relief for those injuries remain available. This Court should therefore follow the approach taken in *McCrory*, where the court struck down a voter ID law because it was enacted with racially discriminatory intent, even though the legislature had amended the law to include a reasonable impediment exception. 831 F.3d at 240. The court noted that the exception "falls short of the remedy that the Supreme Court has consistently applied in cases of this nature." *Id.*

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in the new act); *Cooper v. McBeath*, 11 F.3d 547, 551 (5th Cir. 1994) (action not rendered moot when Texas amended challenged residency requirement because amendment did "not prevent the state from later restoring the [previous requirement] if this Court were to find it constitutional").

C. Texas's Cessation Of Its Enforcement Of SB14 Cannot Moot This Case

A case does not become moot simply because a defendant abandons a challenged practice or changes a challenged law where there is a risk that the defendant will repeat its unlawful conduct. *Ne. Fla. Chapter of Associated Gen. Contractors*, 508 U.S. at 661–63. And it is settled law that "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). This is a burden Texas cannot meet.

Texas allegedly abandoned its challenged practice only after the district court and this Court ruled that SB14 had a discriminatory effect on Black and Latino Texans and only after the district court ruled that SB14 was enacted with a discriminatory intent to harm those very Texans. As discussed above, (*supra* Part II.B), Texas has continued its discriminatory conduct with the enactment of SB5. And in any event, nothing in SB5 prevents the Texas Legislature—a body that has already been found to have engaged in intentional racial discrimination—from reverting to its prior unlawful conduct.

Texas cites the Fifth Circuit's general rule that government entities normally bear a "lighter burden" in voluntary cessation cases. Tex. Br. at 48–49 (citing *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 325 (5th Cir. 2009)). But in

Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2107), the Court refused to apply the voluntary-cessation exception because the defendant government entity "ha[d] not carried the 'heavy' burden of making 'absolutely clear' that it could not revert to" its challenged practices. *Id*. at 2019 n.1 (quoting *Laidlaw Envtl. Servs.*, 528 U.S. at 190). The Court's straightforward application of *Laidlaw* to a government entity cannot be reconciled with a "lighter burden" standard.

Even under a "lighter burden" standard, Texas's attempt to moot this case must be viewed "with a jaundiced eye." *Sossamon*, 560 F.3d at 325. In *Sossamon*, the Court noted that it applied a lighter burden in part because the plaintiff "did not obtain relief below," and that Texas's burden might be heavier "[h]ad the trial court granted" relief. *Id.* Texas's vigorous defense of its discriminatory law—in the face of these multiple rulings against it—strongly undercuts any good-faith presumption that it will not resume such conduct. *See Hall v. Bd. Of Sch. Comm'rs*, 656 F.2d 999, 1000 (5th Cir. Unit B Sept. 1981) (concluding that the case was not moot where defendants "disputed the constitutionality of the practice up to the day of trial, when defense counsel for the first time indicated they had no intention of reviving [it]"). Indeed, Texas passed SB14 in 2011 with a discriminatory intent and did not attempt to ameliorate its action until six years later in 2017 when it ran out of litigation options. In this appeal, as an alternative to seeking vacatur based on mootness, Texas preserves its appeal of this Court's finding that SB14 had unlawful discriminatory

results, the finding that led to the passage of SB5. Thus, and in any event, Texas is seeking to free itself from a judicial order that would require it to maintain SB5 and not revert to SB14 in the future. Under these circumstances, Texas should not be accorded the presumption of good faith it seeks in its brief.[45] *See Arlington Heights*, 429 U.S. at 265–66 ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference [to the legislature] is no longer justified.").

D. The District Court's Decision Should Not Be Vacated

If this Court determines that any part of this case is moot due to the Legislature's voluntarily enacting SB5, the appropriate course would be to dismiss the appeal as moot and allow the district court's discriminatory results and discriminatory intent decisions to stand.

Texas places significant weight on its argument that vacatur is the "'established practice' . . . when a case 'becomes moot in its journey through the federal courts.'" Tex. Br. at 52 (quoting *United States v. Munsingwear*, 340 U.S.

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[45] Indeed, this is not a case where Texas deserves "solicitude" for ceasing its enforcement of SB14. *Sossamon*, 560 F.3d at 325. The legislators who passed SB14 were acting not as "public servants," but as "self-interested private parties," *id.*, passing a discriminatory law to counter threats to their personal political power. *Cf. Perez v. Texas*, 970 F. Supp. 2d 593, 602 (W.D. Tex. 2013) (holding that the voluntary cessation exception did not apply because the Texas Legislature—the same Legislature that passed SB14 of 2011—"fail[ed] to meet their burden of demonstrating that the conduct alleged to violate § 2 and the Constitution with regard to the 2011 [redistricting] plans could not reasonably be expected to recur").

36, 39 (1950) and *Karcher v. May*, 484 U.S. 72, 82 (1987)). But while the Fifth Circuit has been clear that vacatur is warranted "where mootness has occurred through happenstance," the Supreme Court has established an exception to the norm of vacatur where "the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994); *see also Houston Chronicle Pub. Co. v. City of League City*, 488 F.3d 613, 619 (5th Cir. 2007) (rejecting defendant's "vacatur-due-to-mootness contention" because "mootness result[ed] from the losing party's voluntary actions"); *Sierra Club v. Glickman*, 156 F.3d 606, 619 (5th Cir. 1998) ("Because this issue has been rendered moot by the USDA's voluntary compliance with the district court's judgment, we decline to direct the district court to vacate its judgment . . . ."). This is particularly true where "a desire to avoid review in th[e] case played [a] role" in that action. *Alvarez v. Smith*, 558 U.S. 87, 97 (2009). Moreover, "[t]he burden is on 'the party seeking relief from the *status quo*'; that party must demonstrate 'equitable entitlement to the extraordinary writ of vacatur.'" *Houston Chronicle*, 488 F.3d at 620 (quoting *U.S. Bancorp.*, 513 U.S. at 26).

Texas has not come close to satisfying its burden here. Texas's strategic passage of SB5, six years after its passage of SB14 in 2011, "did not result from typical progression of events," *Houston Chronicle*, 488 F.3d at 620, or "happenstance," but from the litigation, and, thus, demonstrates that Texas has

"surrender[ed] [its] claim to the equitable remedy of vacatur," *Bancorp*, 513 U.S. at 23, 25.

As already stated, Texas sought to pass SB5 in 2017 only after it was clear that the district court's results holding would stand on appeal. Texas argues without support that there "is no indication that the Texas Legislature enacted SB5, or that the Governor signed it, out of 'a desire to avoid review of this case,'" and attempts to provide as evidence that Texas informed the district court that it was planning on passing SB5 "months" prior to the court's discriminatory intent finding. Tex. Br. at 52. But Texas did not even begin considering an amendment to SB14 until 2017, after an en banc panel of this Court in 2016 (1) upheld the district court's 2014 discriminatory results finding, and (2) acknowledged that the district court could, based on evidence already before it, find that SB14 was passed with a discriminatory intent. *Veasey II*, 830 F.3d at 234–35, 272. Indeed, Texas tried to delay the district court's ruling on the question of intentional discrimination until after SB5's passage, (*see* ROA.69310-15), which certainly suggests that Texas was motivated to pass SB5 at least in part to avoid an unfavorable intent ruling.[46] Texas cannot so easily

[46] To be clear, the Court need not find that Texas passed SB5 with the intent of mooting this case to determine that vacatur is inappropriate here. *See Staley v. Harris Cnty.*, 485 F.3d 305, 312 (5th Cir. 2007) ("Whether a party's voluntary conduct was not done with specific intent to moot the case is certainly one factor we may consider, but the absence of such specific intent does not outweigh other equitable factors.").

erase multiple proper and well-supported findings of discrimination, particularly when those findings in and of themselves serve as a prophylactic against future discrimination by Texas.

IV. SB14 DID HAVE RACIALLY DISCRIMINATORY RESULTS

In response to Texas's preservation of this issue, Private Plaintiffs hereby preserve all arguments in support of this Court's determination that SB14 had a racially discriminatory effect in violation of Section 2 of the VRA.

CONCLUSION

For the reasons set forth above, Private Plaintiffs respectfully request that this Court affirm the district court's Order on Claim of Discriminatory Purpose and Order Granting Section 2 Remedies and Terminating Interim Order.

November 7, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

1. I certify that, on November 7, 2017, this document was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit via the Court's CM/ECF document filing system.

2. I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 24,929 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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

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