No. _____

In the United States Court of Appeals for the Fifth Circuit

IN RE: STATE OF TEXAS,
Petitioner,

On Petition for Writ of Mandamus to the United States District Court
for the Southern District of Texas, Corpus Christi Division
Cases No. 2:13-CV-193 (lead case), 2:13-CV-263 and 2:13-CV-291 (consolidated)

PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, EMERGENCY MOTION TO STAY FINAL JUDGMENT PENDING APPEAL AND MOTION FOR EXPEDITED CONSIDERATION

FILED UNDER SEAL

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

J. REED CLAY, JR.
Senior Counsel to the Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700

JONATHAN F. MITCHELL
Solicitor General

JAMES D. BLACKLOCK
Deputy Attorney General
for Legal Counsel

ADAM W. ASTON
Deputy Solicitor General

ARTHUR C. D'ANDREA
Assistant Solicitor General

Counsel for Petitioners

Certificate of Interested Persons

Counsel of record certifies that the following persons and entities as described in the fourth sentence of Fifth Circuit 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.

Respondents	Respondents' Counsel
• Marc Veasey • Jane Hamilton • Sergio DeLeon • Floyd Carrier • Anna Burns • Michael Montez • Penny Pope • Oscar Ortiz • Koby Ozias • John Mellor-Crumley • Dallas County, Texas • League of United Latin America Citizens	Chad W. Dunn Kembel Scott Brazil Brazil & Dunn Joshua James Bone Campaign Legal Center J Gerald Hebert Armand Derfner Neil G Baron Luis Roberto Vera, Jr.

• United States of America	Anna Baldwin Bradley E. Heard Elizabeth S. Westfall Richard Dellheim Robert S. Berman Avner Michael Shapiro Daniel J. Freeman Meredith Bell-Platts Jennifer L. Maranzano Bruce I. Gear U.S. Department of Justice John Alert Smith, III Office of the U.S. Attorney

• Mexican American Legislative Caucus • Texas House of Representatives • Texas State Conference of NAACP Branches • Estela Garcia Espinosa • Lionel Estrada • La Union Del Pueblo Entero, Inc. • Margarito Martinez Lara • Maximina Martinez Lara • Eulalio Mendez, Jr. • Sgt Lenard Taylor	Ezra D. Rosenberg Lindsey Beth Cohan Amy Lynne Rudd Michelle Yeary DECHERT LLP Jennifer Clark Myrna Perez Vishal Agraharkar Wendy Weiser BRENNAN CENTER FOR JUSTICE Daniel Gavin Covich COVICH LAW FIRM LLC Erandi Zamora Mark A. Posner LAWYERS' COMMITTEE OF CIVIL RIGHTS UNDER LAW Jose Garza LAW OFFICE OF JOSE GARZA Kathryn Trenholm Newell Marinda Van Dalen Priscilla Noriega Robert W. Doggett TEXAS RIO GRANDE LEGAL AID INC.

• Texas League of Young Voters Education Fund • Imani Clark • Texas Association of Hispanic County Judges and County Commissioners • Hidalgo County	Christina A. Swarns Leah Aden Natasha Korgaonkar Ryan Haygood Deuel Ross NAACP Legal Defense and Educational Fund, Inc. Danielle Conley Jonathan E. Paikin Kelly Dunbar Sonya Lebsack Richard F. Shordt Tania C. Faransso Gerard J. Sinzdak Lynn Eisenberg Wilmer Cutler Pickering, et al Rolando L. Rios Preston Edward Henrichson

Petitioners	**Petitioners' Counsel**

• Rick Perry in his Official Capacity as Governor of Texas • John Steen in his Official Capacity as Texas Secretary of State • State of Texas • Steve McGraw	Arthur D'Andrea John Barret Scott Adam Warren Aston Gregory David Whitley Jennifer Marie Roscetti Lindsey Elizabeth Wolf Stephen Ronald Keister Stephen Lyle Tatum, Jr. John Reed Clay, Jr. Jonathan F. Mitchell James D. Blacklock OFFICE OF THE ATTORNEY GENERAL Ben Addison Donnell DONNELL ABERNETHY KIESCHNICK

Third Party Defendants	**Third Party Defendants' Counsel**
• Third Party Legislators • Texas Health and Human Services Commission	John Barret Scott Arthur D'Andrea OFFICE OF THE ATTORNEY GENERAL

Third Party Movants	**Third Party Movants' Counsel**

• Bipartisan Legal Advisory Group of the United States House of Representatives • Kirk P. Watson • Rodney Ellis • Juan Hinojosa • Jose Rodriguez • Carlos Uresti • Royce West • John Whitmire • Judith Zaffirini • Lon Burnam • Yvonne Davis • Jessica Farrar • Helen Giddings • Roland Gutierrez • Borris Miles • Sergio Munoz, Jr. • Ron Reynolds • Chris Turner • Armando Walle	Kerry W. Kircher OFFICE OF THE GENERAL COUNSEL U.S. HOUSE OF REPRESENTATIVES Alice London BISHOP LONDON & DODDS James B. Eccles OFFICE OF THE ATTORNEY GENERAL

Interested Third Party	Pro Se
• Robert M. Allensworth • C. Richard Quade	Robert M. Allensworth, Pro Se C. Richard Quade, Pro Se

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Petitioners

Relief Sought

In *Purcell v. Gonzalez*, the Supreme Court unanimously reversed a Ninth Circuit decision that had enjoined a voter-ID law only a few weeks before an election, and cautioned that court-ordered changes to state election procedures may cause "voter confusion and consequent incentive to remain away from the polls" when issued weeks before an election begins. 549 U.S. 1, 4-5 (2006) (per curiam). The district court in *Veasey v. Perry*, No. 2:13-cv-193, and the consolidated cases issued an "opinion" only eleven days before the start of early voting stating that Texas's voter-identification law, Senate Bill 14 (SB 14), is invalid. The State of Texas respectfully asks this Court to issue a writ of mandamus instructing the district court to declare that Texas's voter-identification law will remain in effect for the November 2014 election cycle.

Issue Presented

On Thursday, October 9, 2014, the district court issued an "opinion" stating that SB 14 was invalid on multiple independent grounds, and announced the court's intention to issue an injunction. But the district court declined to actually issue an injunction or final judgment that the State could appeal. On Friday, October 10, 2014, the State asked the district court to issue an appealable injunction or judgment, but the district court refused to do so and gave no indication on when an injunction or judgment might issue. It appears that the earliest possible date on which an injunction or judgment might reasonably be expected is Tuesday, October 14, 2014 (Monday is a federal holiday). But early voting is scheduled to start on October 20, 2014, and the State must seek relief from this Court (or the Supreme

Court) to ensure that it can enforce its law for that election. The issue is whether the district court was correct to disapprove SB 14 as illegal and unconstitutional—and to do so in an "opinion" that sows confusion and uncertainty on the eve of an election.

Factual Background

In 2011, the Texas Legislature enacted Senate Bill 14 (SB 14), which requires voters to present government-issued photo identification when voting at the polls. The law took effect on June 25, 2013, and Texas has since held three statewide elections, five special elections, and countless local elections under this law. There were no reports of disenfranchisement. And Republican and Democratic state and county officials testified that the number of complaints and incidents of voters turned away from the polls were "vanishingly small." Ingram Dep. 53:25-54:2.

On Thursday, October 9, 2014, at 7:16 P.M.—only 11 days before early voting starts on October 20, 2014—the district court issued an "opinion" stating that SB14 violates the Fourteenth Amendment, violates section 2 of the Voting Rights Act, was enacted with an racially discriminatory purpose, and constitutes a "poll tax" in violation of the Twenty-Fourth Amendment. Appendix Tab A (opinion). But the district court did not enter an injunction or final judgment, stating only that they were "to be entered" in the future. *Id.* (opinion at 143). This led to understandable confusion with the parties, the public, and the press. *See, e.g.*, Greg Abbott seeks guidance on Texas voter ID ruling, available at http://www.statesman.com/news/news/greg-abbott-seeks-guidance-on-texas-

voter-id-rulin/nhgPD/ (noting that "[t]he judge concluded her opinion by saying that an injunction will be issued barring enforcement of the law, but she didn't specify when the injunction would be issued"). And it left some to speculate that an injunction might not be entered until after the November election.

Confusion over when the district court's promised injunction against SB 14 will issue is not acceptable on the eve of early voting. Thus, shortly before noon on Friday, October 10, 2014, Texas filed an advisory with the district court explaining the confusion caused by her decision to issue an "opinion" without an injunction or judgment, and requesting that the district court enter a judgment by the end of the day. Appendix Tab F (Defendants' Advisory). The plaintiffs, however, were content to allow the confusion to linger through the upcoming holiday weekend, and they responded that the district court need not issue a judgment or an injunction until "an appropriate time." Appendix Tab G (Plaintiffs' Response). Remarkably, the district court informed the parties that no judgment would be entered on Friday—and did not indicate when an injunction or judgment will issue. *See* Appendix Tab H (e-mail from the court). That means the earliest possible date on which the State could expect an injunction or judgment from the district court is Tuesday, October 14, 2014, (Monday, October 13, 2014 is a federal holiday)—even though the "opinion" came out on Thursday, October 9, 2014.

The State cannot file a notice of appeal (or seek a stay of the district court's ruling pending appeal) until an injunction or judgment has issued. Moreover, state officials remain obligated to obey SB 14 in the absence of an injunction or final judgment. Mere district-court "opinions" that have not been memorialized in an in-

junction or final judgment have no legal effect. And it is a criminal offense under state law for an election official to allow a voter to cast a ballot in violation of SB 14. Yet the newspapers are all reporting that SB 14 has been struck down, leading election officials to believe that they cannot enforce SB 14 (even though they must), and leading voters to believe that they need not bring photo identification when early voting starts on Monday, October 20, 2014. The district court's refusal to issue an injunction or judgment is indefensible, and it appears calculated to thwart the State's ability to obtain timely appellate relief before the start of early voting.

Because the State is not yet able to appeal what the district court has done, we are not (yet) able to ask for an emergency stay pending appeal. But because the situation created by the district court will lead to ever-expanding confusion as long as it is unremedied, and because the district court's opinion is so riddled with errors that it would warrant a stay if it were accompanied by an injunction or final judgment, we have filed this document as a petition for writ of mandamus. We respectfully ask this Court to order the district court to declare that SB 14 remains in effect, and that the State will be allowed to enforce SB 14 for the November general elections. That will serve as the functional equivalent of a stay pending appeal, and it will prevent the district court from depriving the State of its appellate remedies after announcing in an "opinion" that its voter-identification law is invalid.

If the district court issues an injunction or judgment over the weekend, or before the Court rules on the mandamus request, then we respectfully ask the Court to convert this filing into an emergency motion for stay of that injunction or judgment pending appeal—and to stay that injunction or judgment. If the injunction or

judgment presents new issues for the State to address, then we will file a supplemental brief with the Court. Finally, if the district court ever issues an injunction or judgment for the State to appeal from, the State respectfully asks the Court to set an expedited briefing schedule that will allow the Court to decide the merits of this appeal at the earliest possible sitting. As for timing, we respectfully ask the Court to issue mandamus (or a stay) as soon as possible, but no later than 5:00 P.M. on Monday, October 13.

REASONS THE WRIT SHOULD ISSUE

I. THE DISTRICT COURT'S "OPINION" VIOLATES THE SUPREME COURT'S INSTRUCTIONS BY INTRODUCING CONFUSION AND CHAOS ONLY 11 DAYS BEFORE THE START OF EARLY VOTING IN TEXAS

Emergency relief from this Court is warranted for many reasons. To begin, the district court's efforts to alter state election procedures only 11 days before the start of early voting cannot stand. See, *e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (instructing that courts are to refrain from making last-minute changes that may cause "voter confusion and consequent incentive to remain away from the polls"); *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968); *see also* Appendix Tab C (*Frank*, slip. op. at 7 (Williams J., dissenting from the denial of rehearing en banc) (admonishing her colleagues that they "should not have altered the status quo in Wisconsin so soon before its elections. And that is true whatever one's view on the merits of the case.")). Worse, the district court's opinion injects doubt where for fifteen months, and three statewide elections, there had been certainty: Texas vot-

ers have understood that they are required to show up to the polls with photo IDs, and Texas poll workers have understood the requirement to check for them.

The district court's flagrant disregard for the Supreme Court's admonition that courts are not to disturb the status quo during an election compels emergency relief. In *Purcell v. Gonzalez*, for example, the Supreme Court unanimously reversed a last-minute Ninth Circuit decision that had enjoined a voter-ID law, and cautioned that court-ordered changes to state election procedures may cause "voter confusion and consequent incentive to remain away from the polls" when issued a few weeks before an election begins. 549 U.S. 1, 4-5 (2006) (per curiam); *see also, e.g.*, *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968) (denying immediate relief, even after finding that a state statute violated the Constitution, because "the confusion that would attend such a last-minute change poses a risk of interference with the rights of other Ohio citizens" and "relief cannot be granted without serious disruption of [the] election process").

SB 14 *is* the status quo in Texas; it has been the status quo for 15 months and has governed numerous statewide and local elections. Worse, the district court's order upends the status quo for an election *that is already well underway*. The Secretary of State has already published and distributed training manuals for the upcoming election, and county officials have already trained approximately 25,000 poll workers how to check for certain types of ID, how to ask the voter to submit a "substantially similar name" affidavit, and how to accept a provisional ballot. Trial Tr. 322:2-6 (Sept. 10, 2014) (Ingram); *see also* DEF 0456 at 279–342 (Qualifying Voters on Election Day, Handbook for Election Judges and Clerks, 2014). These

activities, and more, have already taken place to prepare the State for the first day of early voting on October 20, 2014. "[W]here an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

The district court's eleventh-hour "opinion" is aggravated by the fact that the United States never asked the district court to enjoin SB 14 before the November 2014 election. The United States, along with every private plaintiff group except one, asked the district court for a trial date in March 2015. The district court preferred an earlier trial date and denied the request, but the United States was so unconcerned about the November 2014 election that it filed a motion for reconsideration, again urging the trial court to delay the trial until 2015.

Moreover, nearly one year ago, the State advised the district court that a trial held during September 2014—after Texas's election machinery had already begun to operate—was sure to cause confusion among voters and poll workers, and the State offered the district court options for reviewing the plaintiffs' claims in a manner that would not disrupt the 2014 election calendar. Texas explained that that the district court could conduct a PI hearing in July 2014, well in advance of the election. Texas's Advisory, ECF # 76 (Nov. 19, 2013); Tran. Civil Initial Conference, 29:22–30:13 (Nov. 15, 2013). Plaintiffs rejected the option of seeking a PI. Tran. Civil Initial Conference, 31:19–33:10 (Nov. 15, 2013). Texas then suggested that the Court hold trial in July 2014, rather than on the eve of early voting, Tran. Status Hearing, 4:24–5:15 (Nov. 22, 2013). Plaintiffs rejected that option, *id.* 6:21–7:23;

9:5–17, and the district court chose the September trial date. Thus, the present electoral chaos was both avoidable (as Texas demonstrated to the district court nearly a year ago) and seems to be exactly what the plaintiffs' lawyers intended to cause.

Once the trial date was set, and it was clear that the trial would end only a few weeks before early voting began, none of the plaintiffs ever asked for a preliminary injunction, which would have provided the appropriate mechanism for plaintiffs to seek relief in advance of the November 2014 elections. *See*, *e.g.*, United States Response Regarding the September 2014 Trial Date at 2–3 (Nov. 21, 2013) (ECF #85) (recognizing that private plaintiffs seeking an adjudication prior to the November 2014 election "could file a motion for preliminary relief").

The district court's "opinion" creates additional confusion because state officials will be bound by the eventual injunction while county officials (who were not parties to this lawsuit and cannot be subject to the injunction) remain bound by state law. A district court judgment has no precedential effect and binds only the parties to the judgment. *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case. . . . Otherwise said, district court decisions—unlike those from the courts of appeals—do not necessarily settle constitutional standards") (internal quotation marks omitted). The plaintiffs sued state officials, but neglected to sue any county officials. Whether this was intentional or an oversight, the result will be a disorderly election, with county officials legally bound to check for photo ID (and

subject to criminal penalties if they do not) and state officials legally bound not to enforce SB 14.

II. The District Court's Opinion Is Legally Indefensible, And Its Eventual Injunction Or Judgment Will Likely Be Reversed On Appeal.

Emergency relief is also warranted because the district court's legal analysis is indefensible—and the State is likely to succeed on its appeal of the eventual injunction or judgment. The district court disapproved SB 14 despite the Supreme Court's ruling in *Crawford* that voter-ID laws do not violate the Fourteenth Amendment; despite the fact that *SB 14 will not prevent a single one of the 17 voters who testified at trial* from voting; and despite the district court's recognition that "Plaintiffs have not demonstrated that any particular voter absolutely cannot get the necessary ID or vote by absentee ballot under SB 14," Appendix Tab A (opinion at 104).

The district court's errors are numerous and manifest. They include:

(1) overruling *Crawford* by holding that "the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph," *does* "qualify as a substantial burden on the right to vote [and] represent[s] a significant increase over the usual burdens of voting,"—even though *Crawford* specifically holds that it *doesn't*. *Compare* Appendix Tab A (district court opinion at 100-17) with *Crawford*, at 198.

(2) overruling *Crawford* by holding that there was insufficient evidence of voter impersonation in Texas to justify a voter-ID law—even though *Crawford* specifical-

ly holds that voter-ID requirements serve as legitimate fraud-prevention devices even in States with *zero* episodes of voter impersonation. *Compare* Appendix Tab A (opinion at 13-16, 39), *with Crawford*, at 194-95.

(3) declaring that SB 14 was enacted with a racially discriminatory purpose without *any* evidence that *anyone* who voted for or supported SB14 acted out of racist or racially discriminatory motives. Instead, the court relied on self-serving conjecture from legislators who voted against SB 14, *see, e.g.*, Appendix Tab A (opinion at 39–45), and offered a review of long-past history of the sort that the Supreme Court recently explained fails to take into account that "things have changed dramatically" in the south. *Compare Shelby County v. Holder*, 133 S. Ct. 2612, 2622, 2624-26, 2629 (2013) *with* Appendix Tab A (opinion at 3-8, 121-23).

(4) asserting that SB 14 will "result" in a "denial or abridgement" of the right to vote "on account of race or color"—even though the district court recognized that "Plaintiffs have not demonstrated that any particular voter absolutely cannot get the necessary ID or vote by absentee ballot under SB 14." Appendix Tab A (opinion at 104). In the absence of any evidence that anyone is unable to vote on account of SB 14, the district court tried to establish that blacks and Hispanics are less likely than whites to possess photo identification by relying on a "database matching" process that is so riddled with problems that it cannot generate reliable data.

(5) declaring that any voting law with a disparate impact on the poor—or on any group disproportionately composed of racial minorities—has a racially dispar-

ate impact under section 2 of the Voting Rights Act. *See* Appendix Tab A (opinion at 60–66).

(6) holding that SB 14 is an unconstitutional "poll tax" because Texas charges a $2 fee to obtain a birth certificate and voters who lack *both* photo ID *and* a birth certificate will pay this fee to obtain the necessary ID. Appendix Tab A (opinion at 134-141).

(7) relying upon the judgment and findings of an unconstitutional "preclearance" proceeding held in the district court for the District of Columbia—even though these findings and judgment were vacated in their entirety by the Supreme Court. *Compare* Appendix Tab A (opinion at 99–100), *with United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013) (noting that when a district-court decision is vacated on appeal, "its ruling and guidance" are erased."). The district court misleadingly asserts that its ruling was based "solely on the record developed at the trial of this case," Appendix Tab A (opinion at 100 n.434), when the district court erroneously admitted into evidence—at the pretrial conference (a mere six days before trial) and after the close of discovery—trial testimony and depositions from the section 5 proceeding, Pretrial Conference Tran. 16:8–27:12 (August 27, 2014).

(8) promising to enjoin SB 14's application to every voter in the State despite a severability clause declaring that "every provision in this Act and *every application of the provisions in this Act* are severable from each other." SB 14, § 25. Even in plaintiffs' worst-case-scenario view, more than 95.5% of registered voters in Texas already have an acceptable photo ID, and there is no conceivable basis for enjoining SB 14's application against the more than 95.5% of registered voters who have pho-

to identification. *See Leavitt v. Jane L.*, 518 U.S. 137, 138 (1996); *Voting for America, Inc. v. Steen*, 732 F.3d 382, 398 (5th Cir. 2013).

(9) promising to enjoin SB 14 wholesale even though the court insisted that this was an "as-applied challenge," *see, e.g.*, Appendix Tab A (opinion at 90, 96, 142–43), brought, not as a class action, but by fewer than two dozen Texas voters, even though Fifth Circuit precedent makes clear that relief in an as-applied challenge may not extend beyond the named parties to the lawsuit. *See, e.g.*, *Jackson Women's Health Organization v. Currier*, 760 F.3d 448, 458 (5th Cir. 2014).

(10) purporting to re-enact Texas laws that have been replaced and re-instituting a preclearance regime (at least on a limited basis) similar to the one Texas operated under prior to *Shelby County*: "Texas shall return to enforcing the voter identification requirements for in-person voting in effect immediately prior to the enactment and implementation of SB 14. Should the Texas Legislature enact a different remedy for the statutory and constitutional violations, this Court retains jurisdiction to review the legislation to determine whether it properly remedies the violations. Any remedial enactment by the Texas Legislature, as well as any remedial changes by Texas's administrative agencies, must come to the Court for approval, both as to the substance of the proposed remedy and the timing of implementation of the proposed remedy." Appendix Tab A (opinion at 143).

A. The District Court's Decision Defies The Supreme Court's Decision In *Crawford*.

Crawford holds that any inconvenience associated with obtaining photo identification is no more significant than "the usual burdens of voting." *See Crawford v.*

Marion Cty. Election Bd., 553 U.S. 181, 198 (2008) (opinion of Stevens, J.) ("[T]he inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."); *id.* at 209 (Scalia, J. concurring in the judgment) ("The universally applicable requirements of Indiana's voter-identification law are eminently reasonable. The burden of acquiring, possessing, and showing a free photo identification is simply not severe, because it does not even represent a significant increase over the usual burdens of voting.") (internal citations omitted). The trial court acknowledges *Crawford* but sought to limit its holding to the specific law—and the specific appellate record—in that case. The district court's efforts to escape *Crawford* are unavailing.

As the Seventh Circuit recently observed, *Crawford*'s specific holding that the process of obtaining photo identification "surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting" is a ruling that "hold[s] for Wisconsin as well as for Indiana"—and it holds for Texas as well. *See* Appendix Tab E (*Frank v. Walker* slip op. at 3). The district court thought it could ignore *Crawford* because Indiana accepted more forms of photo identification that Texas, and because Indiana accepts an "indigency affidavit" in lieu of photo identification. *See* Appendix Tab A (Opinion at 90-91). None of these observations, however, changes the fact that the process of obtaining a photo identification is not a "a significant increase over the usual burdens of voting"—and the district court said *nothing* to show that the process of obtaining

identification is more burdensome in Texas than it is in Indiana. If anything, the process is *less* burdensome in Texas because Texas charges only $2 for birth certificates, while Indiana charged between $3 and $12. See *Crawford*, 553 U.S. at 198 n.7.

The process of casting a ballot always imposes *some* small costs on voters—that is one reason why many people choose not to vote in elections. Traveling to the polls requires voters to spend money on gasoline or public transportation, and incur the opportunity costs of time away from work. Yet the Fourteenth Amendment does not require States to abolish in-person voting and allow everyone to vote by mail (as Oregon has done), nor does it require States to abolish Tuesday voting and allow everyone to vote on weekends or holidays. Registering to vote also involves inconveniences that might be described as "costs"; that is one reason why many do not register. But none of these laws "den[y]" or "abridg[e]" the right to vote of persons who *choose* not to incur these costs. Appendix Tab C (*Frank v. Walker*, Nos. 14-2058 & 14-2059, slip. op. at 6 (7th Cir. Sept. 30, 2014) ("We do not apply the label 'disfranchised' to someone who has elected not to register, even though that step also requires an investment of time.")). These minor inconveniences are constitutionally permissible—and *Crawford* holds that the minor inconveniences associated with obtaining photo identification are constitutionally permissible as well. A district court cannot hold a factual trial and declare that the Supreme Court was wrong to equate the burdens of obtaining photo identification with the usual inconveniences associated with voting.

Worse, the district court held that the State's interest in deterring and detecting voter fraud was insufficient to justify SB14 because "voter impersonation fraud" is "very rare." Appendix Tab A (Opinion at 113). Yet *Crawford* specifically holds that voter-identification laws are legitimate fraud-prevention devices *even in States with zero recorded incidents of voter impersonation*. *See Crawford*, 553 U.S. at 194-95. Texas has had multiple recorded incidents of voter impersonation—which is more than Indiana had—and even the plaintiffs' own experts opined that there is always fraud that goes undetected. Indeed, other types of fraud prevalent in Texas—such as voter-registration fraud and voter harvesting—present opportunities for in-person voter fraud. PL054 at 281 (identifying voter-registration fraud as a problem); Trial Tr. 220:17-221:19 (September 3, 2014) (observing that vote harvesting is prevalent in Texas and hard to catch). It is therefore reasonable to believe (as the Texas legislature did) that SB 14 would also deter these other types of fraud even if it would not prevent it directly. Trial Tr. 159:4-9 (September 8, 2014) (plaintiffs' expert recalls that concerns that voter-registration fraud can lead to fraudulent ballots was raised before the legislature during the debate over Voter ID). What's more, Texas's voter-identification law deters other types of fraud, because undocumented immigrants who register to vote cannot obtain driver's licenses, and persons under 18 who fraudulently register must present identification that shows they are too young to vote. The district court defied *Crawford* by holding that the State's interests in preventing voter fraud were insufficient to justify a photo-identification requirement.

The district court's actions are even more egregious in light of the plaintiffs' failure to identify even a single voter who will be unable to vote on account of SB 14. Since *Crawford* was decided six years ago, opponents of voter-ID laws have been preparing their case, searching for individuals disenfranchised by such laws, and they have come up short. The present dispute over Texas's voter-ID law, for example, is nearly three years old. *See* Complaint, *Texas v. Holder*, No. 12-cv-128 (D.D.C. Jan. 24, 2012). The United States has spared no expense in mounting an attack on SB 14. Lawyers from the Department of Justice have crisscrossed Texas, traveling to homeless shelters with a microphone in hand, searching in vain for voters "disenfranchised" by SB 14. Trial Tr. 143:24–145:9 (Sept. 3, 2014) (Mora) (testifying that a lawyer from the Voting Section of the Civil Rights Division searched for disenfranchised voters with a microphone at her homeless shelter). The United States also spared no expense with experts, hiring six testifying experts in this case alone. *See generally, e.g.*, Davidson Depo. (Dr. Chandler Davidson, a Sociology professor at Rice University, charged the United States over $250,000 to opine on the history of racial discrimination in Texas, and he never even testified at trial.). LULAC, MALC, NAACP, TLYVEF, and LUPE also searched the State for disenfranchised voters, but they could not identify by name any such voters. *Compare* Trial Tr. 249:20-250:4 (Sept. 3, 2014) (TLYVEF describing its efforts to register voters all over the state), *with id.* at 267:7-17 (TLYVEF not being able to identify a single person who is unable to vote because of SB 14); *see also* ECF # 550 (Stipulation of Facts Regarding La Union Del Pueblo Entero, providing that LUPE was not relying on any alleged injury to their members for standing purposes); ECF # 545

(Stipulation of Facts Regarding TLYVEF); ECF # 547 (Stipulation of Facts Regarding LULAC); Lydia Depo. at 129:9–14 (Plaintiff NAACP was not aware of the identity of any member of the organization who has been or would be injured by SB 14.).

And while the plaintiffs brought over a dozen voters to testify at trial—including a voter who refused to get an ID "out of principle," and voters who preferred to vote in-person rather than by mail—they failed to produce a single individual unable to vote on account of SB 14. *See* Appendix Tab B (demonstrating the ability of all 17 testifying witnesses to vote). And the plaintiffs' well-paid experts could not identify *any* evidence that *any* Texan will be prevented from voting.

And this is hardly surprising in light of the extensive steps Texas took to mitigate the already minor inconveniences associated with securing photo identicication. Texas mitigated these inconveniences by offering election identification certificates free of charge, *see* Tex. Transp. Code § 521A.001; allowing voters to cast provisional ballots if they appear at the polls without photo identification, *see* Tex. Elec. Code § 63.001(g); allowing voters who are 65 or older to vote by mail without a photo ID, Tex. Elec. Code § 82.003; allowing disabled voters to vote by mail without a photo ID simply by checking a box indicating that they are disabled, Tex. Elec. Code § 82.002; and allowing voters determined to have a disability by the United States Social Security Administration or determined to have a disability rating of at least 50 percent by the U.S. Department of Veterans Affairs to vote in-person without a photo ID, Tex. Elec. Code § 13.002(i).

Texas also took steps to make the free EICs easy to obtain. The Texas Department of Public Safety currently has 225 driver's license offices. Trial Tr. 149:23-150:7 (Sept. 9, 2014) (Peters); PX352. Approximately 98.7% of the Texas population live within 25 miles of a DPS office, and approximately 99.95% live within 50 miles of a DPS office. DEF1170; Trial Tr. 214:4-215:10 (Sept. 9, 2014) (Rodriguez); Trial Tr. 335:5-25 (Sept. 4, 2014) (Burden). Free election identification certificates are available at every DPS driver's license office. *Id.* And DPS has a "homebound program" to issue IDs to people with disabilities. Trial Tr. 162:18-163:22 (Sept. 9, 2014) (Peters). The Secretary of State's office, the Department of Public Safety, and the Counties themselves have implemented a program to issue EICs on a full-time basis in counties that do not have a DPS office, and "mobile EIC units" are being made available in targeted areas in the weeks leading up to the 2014 election. Trial Tr. 146:4-146:8 (Sept. 9, 2014) (Peters); Trial Tr. 220:8-222:12 (Sept. 9, 2014) (Rodriguez); Ingram Depo. 47:1-48:13; Cesinger Depo. 15:13-19; DEF2738 (County Locations Issuing EICs). Because of these efforts, every county in the State has had a physical location where a voter could obtain an EIC free of charge. *Id.*; DEF2739 (EIC State and County Participation Map); Trial Tr. 263:6-21 (Sept. 9, 2014) (Rodriguez). And as a result, the percentage of Texans living within 25 miles on an EIC-issuing office is greater than 98.7%. By contrast to all of this, Wisconsin's DMV offices are generally open only two days per week. Appendix Tab C (*Frank*, slip. op. at 8 (Williams, J., dissenting from the denial of rehearing en banc)).

The district court complains that Texas has issued only a few hundred EICs. Appendix Tab A (opinion at 106). But it is unclear what to make of that fact. It is possible that very few registered voters lacked ID to begin with, so the demand for EICs is low.[1] It is likely that many people without IDs chose to obtain a Texas Driver's License or ID card, instead of a free EIC, because those cards can be used for other purposes in addition to voting.[2] [redacted]

[1] Support for this possibility can be found in the fact that since the implementation of SB 14, approximately 22,000 of the registered voters that plaintiffs claim do not have a photo ID have voted in at least one election. Amended Second Supplemental Rebuttal Decl. of M.V. Hood III at 7 (DEF2758).

[2] Indeed, many of plaintiffs' witnesses testified that they were taking steps to obtain photo IDs other than an EIC in order to use the ID for additional things. Trial Tr. 88:17-24 (Sept. 2, 2014) (F.Carrier); Trial Tr. 7:12-18 (Sept. 2, 2014) (Bates Video Deposition) (Bates Depo. 31:9-16); Trial Tr. 112:5-10 (Sept. 3, 2014) (Bingham Video Deposition) (Bingham Depo. 67:13-68:5) (testimony implies she wants her driver's license to be able to drive); Trial Tr. 299:10-13 (Sept. 3, 2014) (Washington Video Deposition) (Washington Depo. 48:13-16); Trial Tr. 141:21-22 (Sept. 4, 2014) (Estrada); Trial Tr. 238:22-23 (Sept. 5, 2014) (Maximina Lara) (plans to renew her driver's license implying she uses it for purposes of driving); Trial Tr. 357:14-15 (Sept. 8, 2014) (Trotter Video Deposition) (Trotter Depo. 79:11-20 & 87:10-88:5) [redacted]

As if *Crawford* were not enough to show that the district court is wrong, empirical studies demonstrate that voter-identification laws prevent no one from voting and do not reduce minority turnout. Two of the United States' own experts — lead expert Dr. Ansolabehere as well as Dr. Minnite—have published academic papers reporting no connection between voter ID laws and reduced minority turnout. Dr. Ansolabehere concluded that "the actual denials of the vote in these two surveys suggest that photo-ID laws may prevent almost no one from voting." *See* Rebuttal Declaration of M.V. Hood at 11 (DEF 0007) (citing Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, 42 PS: Pol. Sci. & Pol. 127, 129 (2009) (DEF 0034)). Dr. Ansolabehere concludes:

> Voter ID does not appear to present a significant barrier to voting . . . . Although the debate over this issue is often draped in the language of civil and voting rights movements, voter ID appears to present no real barrier to access.

Id. at 129. Dr. Lorraine Minnite published an academic study concluding that even though her "sympathies lie with the plaintiffs in voter ID cases," "[w]e should be wary of claims—from all sides of the controversy—regarding turnout effects from voter ID laws . . . . [T]he data are not up to the task of making a compelling statistical argument." Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification—Voter Turnout Debate*, 8 Elec. L. J. 85, 98 (2009) (DEF 2480).

These critical concessions from the United States' own experts were made when their academic reputations were on the line, not when they were being paid to testify. These concessions are confirmed by voter turnout statistics in both Indiana

and Georgia, showing that turnout did not decrease—and instead happened to increase—after those States' photo ID laws were implemented. *See* Rebuttal Declaration of M.V. Hood at 10 (citing Jason D. Mycoff, et al., *The Empirical Effects of Voter-ID Laws: Present or Absent?*, 42 PS: Pol. Sci. & Pol. 121 (2009) (DEF 0025)); Rebuttal Declaration of Milyo 32-35 (DEF 0009); Rebuttal Declaration of Jeffrey Milyo at 32 (DEF 0009) (citing The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis, Institute of Public Policy, University of Missouri (Nov. 2007) (DEF 0024)).

The Texas Legislators relied on these empirical studies and others in passing SB 14. *See, e.g.*, Trial Tr. 24:1-10 (Sept. 10, 2014) (Lt. Gov. Dewhurst) ("All the empirical data that I have seen has shown that there is no — no example that I am aware of where any jurisdiction with a photo voter ID requirement that individuals have not been able to obtain access to acceptable documents."); McCoy Depo. 76:12-17.

Texas's experience in the three statewide elections and numerous local and special elections under SB 14 coincides with the concessions by the United States' experts and the empirical studies from Georgia and Indiana. A representative from the Secretary of State testified that reports of voters being unable to present ID or experiencing other problems have been "vanishingly small." Ingram Depo. 53:25-54:2; Trial Tr. 309:17-18 (Sept. 10, 2014) (Ingram). As Keith Ingram explained:

> We have realtime feedback from the public, and we get thousands of phone calls every month, and there have been absolutely almost no phone calls, emails, problems related to lack of an ID. The few we have had primarily related to elderly folks who have been using an ex-

> pired driver license but don't drive anymore. That has been — we've had maybe three or four of those who have been unable to have an ID, and obviously they can vote by mail. But as far as a pattern of people who said, 'I don't have an ID, I don't know what to do, how can I get one,' doesn't exist. *Thousands of phone calls every month. We've got a public hotline that is on the back of every voter registration card, and we get all kinds of calls. We get calls because my name doesn't match. We get calls for lots of reasons. But not that I don't have an ID.*

Ingram Depo. 55:8-24 (emphasis added). Texas Legislators reported a similar lack of complaints over the rollout of SB 14:

> When voters aren't happy, you hear from them. They call your office. They find a reporter. They show up on a news station. And, again, there may have been a report somewhere, or a news story — or, you know, somewhere, but I'm just not aware of any. And, again, we're talking about millions of people.

Trial Tr. 255:11-21 (Sept. 10, 2014) (Patrick); *see also id.* at 253:19-254:22; 256:10-259:23; Patrick Depo. 253:3-254:5; Trial Tr. 335:10-336:1 (Sept. 10, 2014) (Ingram).

County election officials also testified to almost no complaints whatsoever. *See, e.g.*, Newman Depo. 33:14-15 (Jasper County) ("Q. Have you ever had complaints from constituents about the photo ID law? A. No."); Guidry Depo. 127:10-131:10 (Jefferson County); Stanart Depo. 109:19-24 (Harris County). Jefferson County, Texas, for example, is a diverse county whose seat is in Beaumont. Its population is over 10 percent Latino and over 30 percent African American. The county clerk was elected to office as "a Democrat," Trial Tr. 139:4 (Sept. 11, 2014) (Guidry), and testified that she was formerly "a union official" who was "very, very involved" in politics and political campaigns from "a very, very young age." *Id.*

139:5-13. Her office is responsible for administering elections, and if something goes wrong, she is often the first to know. *Id.* 139:17-141:25. Yet Guidry reported that she received only one complaint about the implementation of SB 14, and it concerned an election worker's *failure* to check someone's photo ID:

> Q. Alright, now did you hear any complaints from anyone that they were not allowed to vote in the March 2014 primary because of a similar name issue?
>
> A. No, sir.
>
> Q. And I guess it would be more a dissimilar name.
>
> A. Right.
>
> Q. Did anyone complain to you, "Hey, I was not allowed to vote because my name did not match my ID"?
>
> A. No, no.
>
> Q. Okay. Did anyone complain to anyone in your office that they were not allowed to vote in the March 21, 2014 primary because the name on the voter roll did not match exactly the name on their -- the ID that they presented?
>
> A. No.
>
> Q. Okay. Did anyone complain to you after the 2014 March primary that for any reason S.B. 14 prevented them from being able to vote?
>
> A. No, sir.
>
> * * *
>
> Q. Okay. So that letter is the only complaint you're aware of in March for the 2014 primary related to S.B. 14, correct?

> A. Yes.
>
> Q. And the gentleman who made that complaint was not complaining that he was not allowed to vote because of the photographic requirement, correct?
>
> A. No, he was allowed to vote. He was complaining why was he not asked for his photo ID.

Trial Tr. 156:18-158:19 (Guidry); *see also id*. Guidry Depo. at 72:6-16; 73:4-11. Guidry also testified that she attends the county commissioners meetings every Monday, Guidry Depo. at 11:22-25, where no citizen has ever complained about SB 14's requirements, *id.* at 112:3-12.

B. The District Court's Conclusion That SB 14 Violates The "Results" Prong Of Section 2 Is Likely To Be Reversed.

SB 14 does not violate section 2 of the VRA, which prohibits "denial or abridgement of the right . . . to vote on account of race or color":

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .
>
> (b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that . . . . members [of protected racial minorities] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301 (emphasis added). To begin, SB 14 does not even "deny" or "abridge" the right to vote, given *Crawford*'s holding that the inconveniences as-

sociated with obtaining photo identification are "no more significant than the usual burdens of voting." And the plaintiffs were unable to locate *anyone* who is unable to vote on account of SB14. So the plaintiffs attempted to establish, via statistical guesses, that a disproportionate number of registered voters who lack photo ID are black or Hispanic—even though registered voters who lack photo ID can easily obtain that identification.

The plaintiffs' experts compared the list of registered voters with the names listed in databases of persons with SB14-acceptable ID. Registered voters who could not be found in those databases were placed on a "no-match" list. But there is no way to know the race or ethnicity of these voters because Texas does not record the race of registered voters. So the plaintiffs' experts tried to guess the voter's race by deploying an algorithm from Catalist LLC, which attempts to discern race from a person's name and address. The plaintiffs' experts estimated that at least 2.0% of registered non-Hispanic white voters, 8.1% of black registered voters, and 5.9% of Hispanic registered voters appeared on their "no-match" list.[3] See Notice of Filing of Corrected Supplemental Expert Report of Stephen Ansolabehere, ECF 600, 600.1.

The district court's "ID-disparity" theory is woefully insufficient to establish a violation of section 2. First, any registered voter on the "no match" list who lacks

[3] The actual ID disparity is but a few percentage points, yet the district court manipulates these statistics to claim that "African-American registered voters were 305% more likely and Hispanic registered voters 195% more likely than Anglo registered voters to lack SB 14-qualified ID." *E.g.*, Appendix Tab A (opinion at 120). But of course, that is "a misuse of data" designed to inflate the purported impact of SB 14 and that "produces a number of little relevance to the problem. . . . That's why we don't divide percentages." Appendix Tab E (*Frank*, slip. op. at 16 n. 3).

identification can obtain one. Many voting-age citizens of Texas, for example, are not registered to vote—and they must register before they can cast a ballot. Texas would not be violating section 2 if it were revealed that the voting-age citizens who are not registered are disproportionately black and Hispanic, because anyone in that situation can register. In like manner, anyone who lacks photo identification can obtain one—and the State offers election identification certificates free of charge. Persons who are *capable* of obtaining photo identification—but who *choose* not to do so—have not had their right to vote "denied" or "abridged," any more than an unregistered voting-age citizen who *chooses* not to register. *See Crawford*, 553 U.S. at 188. The plaintiffs' experts made no effort to determine the voters on their "no-match" list who have *chosen* not to obtain identification, or who have decided that they no longer want to vote. The racial makeup of the plaintiffs' "no-match" list is simply irrelevant.

Second, the database-matching process is not reliable. It is nearly impossible to know the race of a registered voter because the Secretary of State does not inquire about voters' race when they register. Trial Tr. 146:4-9 (Sept. 2, 2014). And it is difficult to determine whether a registered voter possesses a valid photo ID because neither the voter rolls nor the drivers' license database contains full social security numbers. *Id.* at. 141:10-142:25. On top of that, voter-registration lists have become inflated with deceased voters and persons who have moved, and the National Voter Registration Act imposes strict limits on state and local officials' ability to remove persons from their voter registration lists. As a result, many individuals will appear on the "no-match" list even though they have died or no longer live in Texas, and

the plaintiffs' experts had no way of knowing whether a registered voter on the "no-match" list is currently eligible to vote in Texas—even if they were eligible to vote in the past. It is not credible to suggest that 608,470 registered *and eligible* voters in Texas lack government-issued photo identification—as the district court found—a finding that would mean that 608,470 Texans who have registered to vote cannot drive a car, board an airplane, cash a check, open a bank account, or enter a courthouse to serve as a juror.

Finally, section 2 will exceed Congress's authority to enforce the Fifteenth Amendment if it means that Texas cannot enact a voter-identification law unless whites, blacks, and Hispanics possess photo identification in equal numbers. At the very least, the district court's construction of the Voting Rights Act's "results" prong presents grave constitutional questions that courts must avoid under the canon of constitutional doubt. The Fourteenth and Fifteenth Amendments prohibit only *purposeful* racial discrimination. *See City of Mobile v. Bolden*, 446 U.S. 55 (1980). They do not prohibit States from enacting laws with a mere disparate impact on racial groups. *See id.*; *Washington v. Davis*, 426 U.S. 229, 242 (1976). The district court's construction of section 2 sweeps far beyond what is needed to "enforce" the Fourteenth and Fifteenth Amendments. *See Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting) (suggesting that section 2 of the VRA is unconstitutional if it reaches too far beyond intentional discrimination). Moreover, the States hold a constitutionally protected prerogative to establish the qualifications for voting in state and federal elections. *See* U.S. Const. art. I, § 2, cl. 1; *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253-54 (2013). That in-

cludes the right to require voters to obtain and present photo identification when appearing to vote at the polls. The district court's construction of section 2 pushes constitutional boundaries by depriving the States of their entitlement to determine the qualifications of their voters, and it must be rejected under the canon of constitutional avoidance.

C. There Is No Evidence Whatsoever That SB 14 Was Enacted With A Racially Discriminatory Purpose

SB 14 was not enacted with a racially discriminatory purpose, and the plaintiffs have the documents to prove it. The district court improvidently gave Plaintiffs unprecedented access to the privileged and confidential papers and communications of dozens of Republican legislators who voted for SB 14.[4] The district court ordered discovery of the legislators' office files, bill books, and personal correspondence concerning SB 14. The district court also ordered electronic discovery of these Republican legislators' work e-mail accounts, private e-mail accounts, home e-mail accounts, and the e-mail accounts maintained by the businesses that employ the legislators when they are not in session. The district court even ordered discovery of confidential e-mail communications between legislators and their lawyers at the Texas Legislative Council. These discovery orders included legislative staff's files and e-mail accounts, and the files and e-mail accounts of Lieutenant Governor Dewhurst. As a result, these Republican legislators, their staff, and the Lieutenant Governor produced to the plaintiffs thousands of documents containing

[4] The Court denied the State's analogous request for discovery of Democratic legislators' files.

their confidential communications and impressions concerning SB 14. The plaintiffs who received these once-privileged documents included not only the United States, but numerous Democratic legislators who had opposed SB 14, along with counsel for the Texas Democratic Party. For the price of a filing fee, the district court allowed these partisan opponents of the Republican legislators to rummage through every one of their political opponents' office files and e-mail accounts.

The discovery did not end there. Many Republican legislators and their staffs, including Senator Dan Patrick and Lieutenant Governor Dewhurst, were forced to testify under oath in seven-hour depositions, where the United States and private plaintiffs asked about their conversations with other legislators, their mental impressions, and their motives for passing SB 14. All of this should have been foreclosed by the Supreme Court's admonition that legislative privilege will, in except the most extraordinary instances, block testimony from legislative members. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977) (holding that "extraordinary" circumstances must exist for a district court to sweep aside the state legislative privilege and that plaintiffs instead should prove illicit purpose with circumstantial evidence only).

This discovery turned up nothing whatsoever. After producing thousands of privileged documents and weeks of intrusive depositions, the plaintiffs did not offer into evidence *a single document or statement* from a legislator or staffer even suggesting that SB 14 was enacted for the purpose of suppressing the minority vote or yielding a partisan advantage. Moreover, when the Republican legislators fought the district court's discovery orders in an effort to preserve the legislative privilege,

the plaintiffs' lawyers repeatedly insisted that their entire case on illicit purpose turned on gaining access into these privileged matters and that such discovery would be dispositive. *See, e.g.*, Hr'g of February 12, 2014, at 29:19-22) (ECF # 168) (Ms. Baldwin: "… and also the legislative documents, which are documents that are at the heart of the United States' claim that this law was passed in part based on a discriminatory intent"); Hr'g of May 1, 2014, at 28:4-10 (ECF #263) ("Mr. Rosenberg: [T]hat evidence is going to be very, very important in this case dealing with the intent behind S.B. 14 itself."); U.S. Opp'n to Mtn to Quash, at 1 (ECF # 254) (demanding this "vital discovery from current and former legislators"). Perhaps most telling is that plaintiffs never even provided, nor asked their so-called purpose experts to review, these documents. And DOJ didn't even call its purpose expert to the stand to testify.

Circumstantial evidence also indicates that the Texas Legislature did not pass SB 14 with the intent to discriminate against racial minorities. *Arlington Heights*, 429 U.S. at 268. At the time of SB 14 passage, the Supreme Court had endorsed voter ID laws as lawful means for preventing fraud and boosting public confidence in the election process. *See Crawford*, 553 U.S. at 195-96 (discussing the United States' extensive history of voter fraud). Congress too had agreed "that photo identification is one effective method of establishing a voter's qualification to vote and that the integrity of elections is enhanced through improved technology." *Id.* at 193. And prominent veterans of the Executive Branch had publically endorsed photo ID laws. The Commission on Federal Election Reform chaired by

former President Jimmy Carter and former Secretary of State James A. Baker III, concludes as follows:

> A good registration list will ensure that citizens are only registered in one place, but election officials still need to make sure that the person arriving at a polling site is the same one that is named on the registration list. In the old days and in small towns where everyone knows each other, voters did not need to identify themselves. But in the United States, where 40 million people move each year, and in urban areas where some people do not even know the people living in their own apartment building let alone their precinct, some form of identification is needed.
>
> There is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election. *The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo identification cards currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.*

Building Confidence in U.S. Elections § 2.5 (Sept. 2005) (Carter–Baker Report) (DEF 0003) (emphasis added). And, perhaps more importantly, an overwhelming majority of Texas voters support a voter ID law. A few months before SB 14's passage, a poll conducted by the University of Texas and the Texas Tribune revealed that an overwhelming 75 percent of Texas voters (including 63 percent of black respondents and 68 percent of Hispanic respondents) agreed that voters should be required to present a government-issued photo ID to vote. *See* University of Texas / Texas Tribune, Texas Statewide Survey (Feb. 11-17, 2011) (DEF 0723). Legislators often cited these polls as a reason they voted for SB 14. *See, e.g.*, Trial Tr. 276:4-8 (Sept. 10, 2014) (Patrick) ("[I]t seems to me I remember a number where 96 percent of the Republicans and 74 percent of Democrats supported photo voter

ID."); McCoy Depo. 37:14-39:18; Dewhurst Depo. 55:11-22; Trial Tr. 245:10-246:5; Trial Tr. 399:21-402:24 (Sept. 10, 2014) (Fraser).

The legislature's stated purpose in enacting SB14 was to detect and deter voter fraud and enhance public confidence in elections. Courts are not permitted to second-guess a legislature's stated purposes absent clear and compelling evidence to the contrary. *See Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) ("[W]e ordinarily defer to the legislature's stated intent."); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) ("[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground of [improper legislative motive]."); *Whole Woman's Health v. Lakey*, 2014 WL 4930907, *6 (5th Cir.) ("Courts are not permitted to second-guess a legislature's stated purposes absent clear and compelling evidence to the contrary."). The district court's opinion contains *nothing*—let alone "clear and compelling evidence"—to show an improper motive on the part of the Texas legislature. The legislature enacted SB 14 because voter identification laws are popular: that explains the "departures from normal practice" and the rejection of amendments designed to water down the bill—which the district court somehow thought could be deemed evidence of racism. Opinion at 129-32. And *Shelby County* precludes courts from relying on decades-old incidents of official racism to impugn current officeholders in southern States. See Shelby County, 133 S. Ct. at 2612, 2622, 2624-26. The district court's insistence on finding racism where no evidence of racism exists can only reflect a determination to return Texas to the preclearance that *Shelby County* had invalidated.

D. The District Court's "Poll Tax" Holding Is Likely To Be Reversed.

The district court ruled that SB 14 violates the Twenty-Fourth and Fourteenth Amendments by imposing a "poll tax," because some voters will lack *both* photo identification *and* a birth certificate—and those voters will have to pay $2.00 to obtain the birth certificate needed to obtain photo identification. Op. at 134-41. The Ninth Circuit's opinion in *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012), *aff'd on other grounds*, 133 S. Ct. 2247 (2013), cogently explains why the district court erred.

The plaintiffs in *Gonzalez* challenged an Arizona law requiring voters to present proof of citizenship when they register to vote, and they made the argument that the district court made here: "[B]ecause some voters do not possess the identification required under Proposition 200, those voters will be required to spend money to obtain the requisite documentation, and that this payment is indirectly equivalent to a tax on the right to vote." *Gonzalez*, 677 F.3d at 407. The Ninth Circuit rejected this argument out of hand: "Although obtaining the identification required under § 16–579 may have a cost, it is neither a poll tax itself (that is, it is not a fee imposed on voters as a prerequisite for voting), nor is it a burden imposed on voters who refuse to pay a poll tax." The Ninth Circuit's subsequent discussion of the Twenty-Fourth and Fourteenth Amendments is instructive and equally applicable here.

Even apart from *Gonzalez*, the district court's analysis is untenable. A tax or fee that is charged for something that a small subset of the voting population needs to

vote is simply not a "poll tax" under any reasonable understanding of that term. A tax on gasoline is not a "poll tax"—even though nearly every voter must spend money on gasoline (or pay for transportation from someone who must buy gasoline) to travel to the polls.

And even if the district court's "poll tax" analysis were correct (and it isn't), it cannot support a blanket, permanent injunction against the enforcement of SB 14. It would still be constitutional for the State to enforce SB 14 if it repeals the $2.00 fee charged for birth certificates, or at least repeals that fee as applied to those who need a birth certificate to vote. Any judicial remedy on this "poll tax" claim must be limited to an injunction against the $2 fee for birth certificates. At the very least, the remedy it must allow for the State to resume enforcement of SB 14 if the $2.00 fee were ever to be waived or repealed.

E. The Remedy Promised In The District Court's Opinion Is Unlawful.

Remarkably, the district court has refused to issue an injunction or judgment. But its opinion tells us what that eventual injunction or judgment will look like. The district court intends to "enter a permanent and final injunction against enforcement" of the challenged provisions of SB 14. It will also order Texas to "return to enforcing the voter identification requirements for in-person voting in effect immediately prior to the enactment and implementation of SB 14," and *require Texas to seek prior approval from the district court* if the legislature or any state agency alters these pre-SB 14 procedures in any respect. This remedy is patently unlawful.

First, the district court repeatedly claimed that it was resolving only an "as-applied challenge" to SB 14—and not a "facial" challenge. Appendix Tab A (opinion at 90, 96, 142-43). Yet the law is clear that in an as-applied challenge, a district court may not extend relief beyond the named plaintiffs to the lawsuit. As this Court explained in *Jackson Women's Health Organization v. Currier*:

> [T]his case is an as-applied challenge to H.B. 1390. The district court's judgment granting the preliminary injunction enjoined "any and all forms of enforcement of the Admitting Privileges Requirement of the Act during the pendency of this litigation." To the extent that this language extends the preliminary injunction to actions by the State against parties other than JWHO and the other plaintiffs, it was an overly broad remedy in an as-applied challenge.

760 F.3d 448, 458 (5th Cir. 2014). *See also Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) ("[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs …"). Yet the district court's opinion promises to enjoin the State from enforcing SB 14 against *anyone*, regardless of whether they are named parties to this lawsuit. But this lawsuit was not brought as a class action, and a statewide remedy of that sort is impermissible in an as-applied challenge.

Second, SB 14 contains a severability clause that requires courts to sever not only the discrete statutory provisions of SB 14, but also the statute's *applications to individual voters*:

> Every provision in this Act and every application of the provisions in this Act are severable from each other. If any application of any provision in this Act to any person or group of persons or circumstances is found by a court to be invalid, the remainder of this Act and the application of the Act's provisions to all other persons and circumstances

> may not be affected. All constitutionally valid applications of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this Act invalid in a large or substantial fraction or relevant cases, the remaining valid applications shall be severed and allowed to remain in force.

SB 14, § 25. Under this severability clause, any relief must be limited to the individual voters or groups of voters whose legal rights have been or will be violated. And the Supreme Court and this Court have held many times that state severability clauses are conclusive and binding on federal district courts. *See Leavitt v. Jane L.*, 518 U.S. 137, 138 (1996) (per curiam) ("Severability is of course a matter of state law."); *Wyoming v. Oklahoma*, 502 U.S. 437, 460–61 (1992) ("Severability clauses may easily be written to provide that if application of a statute to some classes is found unconstitutional, severance of those clauses permits application to the acceptable classes."); *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924) (holding that a state court's "decision as to the severability of a provision is conclusive upon this Court."); *Voting for America, Inc. v. Steen*, 732 F.3d 382, 398 (5th Cir. 2013) ("Texas's strong severability statute, which preserves statutes even if in some "applications" they are unconstitutional, clearly applies to the hypothetical situations Appellees invoked. Tex. Gov't Code Ann. § 311.032(c). Severability is a state law issue that binds federal courts. *See Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996).").

The *only* legal violation found by the district court that could possibly justify a blanket, permanent injunction against SB14 is its "racially discriminatory purpose" finding—which is so transparently meritless that one must wonder whether the dis-

trict court included it only to ensure total invalidation of the law. Every other supposed violation found by the district court requires a remedy that is limited to the individual voters (or groups of voters) who will suffer a violation of their legal rights. They cannot support an injunction that prevents the State from enforcing SB 14 against the more than 95.5% of registered Texas voters who possess photo identification and will not encounter any inconveniences whatsoever on account of this law.

Finally, the district court has no authority to require Texas to "preclear" its voter-identification laws with an unelected federal district court sitting in Corpus Christi. A district court's remedial authority is limited to ending illegal conduct; it has no authority to arrogate to itself a veto power over *future* state laws that have yet to be been enacted. If Texas ever were to enact a new policy on voter identification, it can be challenged in a new lawsuit brought by injured plaintiffs. That mechanism is more than sufficient to ensure that Texas will comply with federal requirements. There is no justification for a district court to *sua sponte* establish a preclearance regime absent findings and evidence that ordinary litigation will be insufficient to remedy federal-law violations committed by state officials.

III. Texas Will Suffer Irreparable Injury Absent Mandamus Relief

The invalidation of a duly enacted statute will always impose irreparable injury on the State. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form

of irreparable injury."). The irreparable injury imposed in this case is greater than usual, because it changes the rules of a statewide election that already is underway, and does so only 11 days before the start of early voting. Training for approximately 25,000 poll workers and election judges is already in progress or completed. Before every election, the Secretary of State trains county officials on the requirements of state and federal election law, including SB 14, and those county officials train the approximately 25,000 poll workers who will enforce the law at 8,000 polling places around the State. Trial Tr. 322:2-6 (Sept. 10, 2014) (Ingram). In June of 2013, the Secretary of State began training county officials on the requirements of SB 14. *Id.* 322:6-25. During the weeks of September 8, 2014, and September 15, 2014, the Counties began training the 25,000 poll workers who will work the November election. *Id.* In addition to this training, the Secretary of State and Counties have been running radio ads, TV commercials, and web-based ads notifying voters on the requirements of SB 14.

The district court's last-minute opinion throws an unexpected wrench in the election. Absent a stay, state and county officials will have to retrain thousands of poll workers and election judges on the fly. Because it is too late to re-print the election manuals that poll workers use for guidance, the election laws governing the November 2014 election will be conveyed by word of mouth alone. And the voting public, who are now used to bringing photo ID to the polls, will be hopelessly confused when they are told by a poll worker that SB 14 is no longer the law — even though the poll worker has nothing in writing to prove it. The district court's order is all the more troubling because Texas made the district court aware of the adverse

consequences of its scheduling decision long ago. *See, e.g.*, Defendants' Advisory Regarding September 2014 Trial Date at 2–6 (ECF # 76); Decl. of B. Keith Ingram (ECF # 76.1).

The district court has aggravated the situation by refusing to issue an injunction or judgment to implement her opinion of Thursday, October 9, 2014. It is now past the close of business on Friday, October 10, 2014—and state and county officials can only wonder when or if the district court will enter an injunction against SB 14 before early voting starts on Monday, October 20. State and local officials *must* obey SB 14 absent an injunction, yet newspaper reports are telling everyone that the SB 14 has been struck down. It is indefensible for the district court to issue that opinion and then leave everyone guessing on whether and when an injunction against the law will ever issue.

IV. The Plaintiffs Will Not Be Substantially Injured By Mandamus Relief

The plaintiffs cannot possibly argue that they will be substantially injured if Texas holds a fourth statewide election under SB 14. The plaintiffs' lawyers have had three years to find someone whose right to vote was "denied" or "abridged" by SB 14, and they have failed to identify a single Texan. The plaintiffs produced 17 witnesses at trial, and SB 14 will not prevent a single one of them from voting. *See* Appendix Tab B.

And even if the plaintiffs could make a plausible claim of substantial injury, they should be estopped from making it. If the plaintiffs really believed that enforcing SB 14 for the 2014 general elections would impose a substantial injury on them,

then they should have sought a preliminary injunction against the law months ago—indeed, they should have sought this relief immediately after filing their lawsuit. That would have provided for the orderly adjudication of their claims in advance of the November election.

On top of that, nearly all of the plaintiffs, including the Department of Justice were content to allow the November election go forward without disruption. Most of the plaintiffs never even asked the district court for a ruling before the November general elections. Nearly all the plaintiffs, including the Department of Justice, sought a trial in March of 2015, and none of the plaintiffs sought preliminary relief. They cannot now claim to be irreparably injured by an election with which they were previously unconcerned. Nor can the organizational plaintiffs claim that they would be suffer an irreparable injury if the State obtains a stay: they have been unable to identify any members who will be disenfranchised, and the only injury the organizations assert on their own behalf is a monetary one arising from a different allocation of their resources under SB 14.

V. The Public Interest Favors Preserving The Status Quo During An Election

We already have explained how the district court's order will confuse the public, create chaos at the polls, undermine the public's confidence in the results of the November election, and undermine the public's confidence in the ability of their elected officials and appointed judges to govern. The Supreme Court has instructed that the district court should have avoided imposing these consequences, especially after the "election machinery is already in progress." *Reynolds*, 377 U.S.

at 585; *see also Purcell*, 549 U.S. at 4-5; *Williams*, 393 U.S. at 34-35. Indeed, even the five Judges on the Seventh Circuit who dissented from the denial of en banc reconsideration in *Frank* agree that the district court here erred: "Our court should not have altered the status quo in Wisconsin so soon before its elections. *And that is true whatever one's view on the merits of the case.*" Appendix Tab C (*Frank*, slip. op. at 7 (Williams, J., dissenting from the denial of rehearing en banc) (emphasis added)).

A stay of the district court's order pending appeal would allow for the orderly resolution of this dispute and allow the Secretary of State and Counties to carry out the statutory policy of the Legislature, which "is in itself a declaration of public interest and policy which should be persuasive." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937); *Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.*, 157 F.3d 500, 503 (7th Cir. 1998) ("[T]he court must consider that all judicial interference with a public program has the cost of diminishing the scope of democratic governance."). This is especially true for voter-identification laws, which States across the country will be permitted to use in the November 2014 election, and which Texas has used successfully in its elections since June 2013.

Conclusion

The petition for writ of mandamus should be granted. If the district court enters an injunction or judgment before this Court rules on the mandamus petition, then the Court should convert this filing into an emergency-stay application and grant the State's motion to stay the judgment pending appeal. The motion for expedited consideration should also be granted.

Respectfully submitted.

Greg Abbott
Attorney General of Texas

Daniel T. Hodge
First Assistant Attorney General

J. Reed Clay, Jr.
Senior Counsel to the Attorney General

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell
Solicitor General

James D. Blacklock
Deputy Attorney General
for Legal Counsel

Adam W. Aston
Deputy Solicitor General

Arthur C. D'Andrea
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700

Counsel for Petitioner

Certificate of Service

I certify that this document has been filed with the clerk of the court and served by ECF or e-mail on October 10, 2014, upon counsel of record in this case.

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell
Counsel for Petitioner

Certificate of Electronic Compliance

Counsel also certifies that on October 10, 2014, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov/.

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell
Counsel for Petitioner