No. 16-393

In the Supreme Court of the United States

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

v.

MARC VEASEY, ET AL.

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

REPLY BRIEF FOR PETITIONERS

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Plaintiffs do not dispute that they did not show that Texas' voter-ID law (SB14) caused a racial disparity in voting participation, and the district court acknowledged that "Plaintiffs ha[d] not demonstrated that *any* particular voter . . . cannot get the necessary ID or vote by absentee ballot under SB14." Pet. App. 431a (emphasis added). By finding a violation of VRA §2 despite this undisputed lack of proof, the Fifth Circuit created a split with three circuits.

Plaintiffs fail to engage the serious constitutional issues presented by the Fifth Circuit's decision. Its expansive interpretation of VRA §2 renders the statute incongruent and disproportional to the underlying Fifteenth

Amendment prohibition on purposeful racial discrimination in voting. *See* Congressional Amicus Br. 17-21. And its "totality-of-circumstances" analysis, which expressly relies on decades-old instances of racial discrimination, allows an end run around this Court's holding in *Shelby County* that such dated examples of discrimination cannot justify heavier legal burdens on certain States. *See* States Amicus Br. 12-16.

The procedural posture of the case presents no barrier to review because the remaining proceedings have no bearing on the appropriate standards for liability presented in the petition. Review of these exceptionally important questions is warranted now.

I. Plaintiffs Fail to Refute the Split Created by the Fifth Circuit.

A. There Is a Clear Circuit Split on the Test for VRA §2 Liability.

The Fifth Circuit found a violation of VRA §2 without any proof that Texas' voter-ID law caused a disproportionate reduction in minority political participation. Pet. 12-18. Plaintiffs could not have prevailed on this record in the Sixth, Seventh, or Ninth Circuits, where the failure to prove an effect on voting would preclude any totality-of-circumstances analysis.

1. Plaintiffs cannot evade this split by distinguishing *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014). *Frank* involved an even greater statistical disparity in ID possession than plaintiffs showed in the instant case. Pet. 13-14. But the Seventh Circuit rejected a VRA §2 claim against Wisconsin's photo-voter-ID law because the plaintiffs failed to prove that the ID disparity caused any

effect on actual voting: "If as plaintiffs contend a photo ID requirement especially reduces turnout by minority groups . . . it should be possible to demonstrate that effect." 768 F.3d at 747. That failure to prove an effect on political participation *precluded* a totality-of-circumstances analysis. *Id.* at 755 ("[P]laintiffs . . . fail at the first step, because in Wisconsin everyone has the same opportunity to get a qualifying photo ID."). *Frank* did not "ma[k]e clear that turnout figures alone *are not* dispositive" of a discriminatory-effect claim, as DOJ's selective quotation suggests (DOJ Br. 23). *Frank* stated that turnout figures would not be dispositive of a discriminatory-*purpose* claim, because enacting changes "for the purpose of curtailing black voting . . . would clearly violate §2." *Id.* at 754.[1]

Plaintiffs' reliance on the Fifth Circuit's attempt to distinguish *Frank*, based upon the "lasting effects" of decades-old examples of racial discrimination in Texas, Pet. App. 58a, cannot be squared with *Shelby County v. Holder*. *See* 133 S. Ct. 2612, 2629 (2013); *infra* p.10. Long-past discrimination is not a constitutional basis to subject Texas to a stricter version of §2 than applies to Wisconsin.

2. The Ninth Circuit does not employ the "same analysis" as the Fifth Circuit. *Cf.* DOJ Br. 25. The Ninth Circuit affirmed a district court's denial of a VRA §2 challenge to Arizona's voter-ID law because plaintiffs offered "no proof of a causal relationship between [Arizona's voter-ID law] and any alleged discriminatory impact on

[1] The "ongoing" proceedings in *Frank*, NAACP Br. 22, do not pertain to the VRA §2 claim, *infra* p.8.

Latinos"—that is, proof that the law operated "to *impact Latino voting*." *Gonzalez v. Arizona*, 677 F.3d 383, 406 (9th Cir. 2012) (en banc), *aff'd on other grounds sub nom. Arizona v. InterTribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013) (emphasis added). That result stood even though plaintiffs *had* shown that Latinos "suffered a history of discrimination in Arizona," "that there were socioeconomic disparities between Latinos and whites in Arizona," and that "Arizona continues to have some degree of racially polarized voting." *Id.*

3. The Sixth Circuit requires a similar showing of diminished political participation. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 631 (6th Cir. 2016). Plaintiffs only highlight the conflicting standards by insisting that a small disparity in ID possession is "substantial statistical evidence 'that SB14 disparately impacts African-American and Hispanic registered voters.'" DOJ Br. 23 (quoting Pet. App. 63a). The same type of evidence was insufficient to establish liability in *Ohio Democratic Party*. 834 F.3d at 631 (rejecting "evidence that African-American voters may use early in-person voting at higher rates than other voters" without evidence that Ohio's reduction in early voting affected participation rates). Like the Seventh and Ninth Circuits, the Sixth Circuit held that plaintiffs could not establish a VRA §2 violation because they "failed to establish a cognizable disparate impact" on voting participation, making the

"second step" totality-of-circumstances inquiry "immaterial." *Id.* at 640.[2] The Fifth Circuit required no such showing. Instead, it concluded that the disparity in ID possession *itself* sufficed to show an unequal opportunity to vote under VRA §2. Pet. App. 61a-65a.

Plaintiffs note that in *Ohio Democratic Party*, the defendant State (Ohio) offered statistical evidence that reducing early voting did not affect registration and turnout. DOJ Br. 22-23; NAACP Br. 20. But that hardly negates the circuit split on the standard for VRA §2 liability, as the §2 burden of proof "is on the plaintiff." *Voinovich v. Quilter*, 507 U.S. 146, 155-56 (1993). Plaintiffs here did not even attempt to prove the necessary element of reduced voter turnout or registration.

B. The Fifth Circuit Imposed VRA §2 Liability Without Finding that SB14 Affects Minority Political Participation.

1. Excusing plaintiffs from their burden to prove that SB14 actually diminished minority political participation, the Fifth Circuit relied on a statistical disparity in rates of existing ID possession as a gateway to an unfocused survey of the "totality of circumstances." Pet. 19-26. But "totality-of-circumstances" is not a standard of

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[2] *Michigan State A. Philip Randolph Institute v. Johnson*, 833 F.3d 656 (6th Cir. 2016), did not hold that any increase in waiting times caused by Michigan's elimination of straight-party voting would "likely . . . violate [VRA §2]." NAACP Br. 20. Rather, the Sixth Circuit denied the State's motion to stay a preliminary injunction pending appeal based on the court's conclusion that plaintiffs were likely to prevail on their equal-protection claim. 833 F.3d at 669.

liability; it is an invitation to invalidate voting laws because a court considers them "unnecessary." *See* NAACP Br. 23.

Rates of ID possession cannot support the inference that SB14 had a "sharply disproportionate" effect on minority voters. *Cf.* DOJ Br. 5; NAACP Br. 10. That disparity was small: The district court determined that 96.4% of registered non-Hispanic white voters, 92.5% of registered African-American voters, and 94.2% of registered Hispanic voters had SB14-compliant IDs at the time of trial. R.43320. The courts below did not determine, and plaintiffs certainly did not prove, that this ID disparity resulted in any impact on political participation. Plaintiffs did not even attempt to prove that registered voters without ID—roughly half of whom were white—also lacked the documents or resources necessary to obtain it. Pet. 6, 21.

Rates of preexisting ID possession do not prove "abridgement" any more than they prove vote "denial." *Cf.* NAACP Br. 15-16. Voter turnout may change for various reasons over the course of different elections. DOJ Br. 16-17; NAACP Br. 17. But that does not eliminate plaintiffs' burden to prove that SB14 diminishes voting participation and curtails plaintiffs' "opportunity . . . to participate in the political process and to elect representatives of their choice." 52 U.S.C. §10301(b); *see Frank*, 768 F.3d at 753.

Plaintiffs can bring pre-election challenges. *Cf.* DOJ Br. 17; NAACP Br. 17. But they must show what any plaintiff seeking a pre-enforcement injunction of any law must show: that a prohibited result (here, a decrease in minority political participation) would likely occur in the

future if the challenged law were to be enforced. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). And if a State closed every polling place near minority voters—which could suggest discriminatory purpose—plaintiffs could prove a discriminatory effect if the closures actually resulted in reduced political participation. *Cf. Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting).

2. Plaintiffs failed to prove that SB14 creates a substantial obstacle for any voter, much less that it generally burdens minority voters on account of race. In their opposition briefs, plaintiffs point only to five Texas individuals—Carrier, Bates, Benjamin, Clark, and Gandy (who is white, R.1382)—to substantiate their claims. NAACP Br. 11; Veasey Br. 8-10. Plaintiffs completely ignore the record evidence that SB14 will not disenfranchise these individuals or any others:

- Carrier, Benjamin, and Gandy are named plaintiffs who could vote by mail without showing photo ID (nine of the fourteen named plaintiffs could do so). Pet. 5-6; R.98722-23 (Carrier); R.99223-24 (Benjamin); R.99833 (Gandy). The Fifth Circuit erroneously refused to account for mail-in voting when determining the degree of burden imposed by SB14. Pet. App. 74a. This is crucial here, because Texas allows voters age 65 or older, and the disabled, to vote by mail *without photo ID*. Tex. Elec. Code §§82.002, 82.003.

- Of the remaining five named plaintiffs, three already had compliant ID, one could obtain it, and

one—Clark—deliberately chose to get a California driver's license instead of a Texas license. Pet. 6; R.100543:11-44:23.

- Of the thirteen additional testifying witnesses allegedly burdened by SB14, eight could vote by mail without photo ID—including Bates, R.97450. Of the remaining five, two already had compliant ID, and the other three had documentation necessary to obtain it. *See* Defendants' Proposed Findings of Fact & Conclusions of Law ("Proposed FOFCOL") at 16, *Veasey v. Abbott*, No. 2:13-cv-00193, ECF No. 966 (S.D. Tex. Nov. 18, 2016) (citing record).

So instead of proving that SB14 burdens minority voters on account of race, plaintiffs identified a handful of mostly elderly voters—who could vote by mail without ID—but who lacked SB14-compliant ID at the time of trial. At most, that evidence could only possibly support a claim that SB14 substantially burdened the right to vote as applied to a small subset of voters. *Cf. Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 199 (2008) (plurality op.). That is precisely the type of claim that the Seventh Circuit allowed to proceed on remand in *Frank v. Walker*, 819 F.3d 384, 386-87 (7th Cir. 2016). But such an as-applied *Crawford* claim has nothing to do with racial discrimination, and it would not threaten to dismantle countless election laws. In contrast, the Fifth Circuit's test for VRA §2 liability would. Pet. 26-27. That threat, and the resulting conflict in circuit authority, warrants this Court's review.

C. Plaintiffs Largely Ignore the Serious Constitutional Issues Raised by the Fifth Circuit's Expansion of VRA §2 Liability.

Imposing liability for a facially-neutral law that does not affect voting rates—much less minority-group voting rates—strays too far from the Fifteenth Amendment's restriction on purposeful racial discrimination in voting to be a valid exercise of Congress's enforcement powers. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997); *see* Pet. 27-29.

Plaintiffs hardly grapple with this significant constitutional issue. That courts have found VRA §2 constitutional in vote-dilution cases, NAACP Br. 24-25, says nothing about whether the Fifth Circuit's expansive vote-abridgement standard is valid. Interpreting the statute to prohibit a voting prerequisite that has no measurable effect on voting behavior hardly "parrots" the Fifteenth Amendment, NAACP Br. 25—it "alters the meaning" of the Constitution, *City of Boerne*, 521 U.S. at 519.

Without even referring to this Court's congruence-and-proportionality standard, DOJ contends that the totality-of-circumstances test employed by the Fifth Circuit "fits comfortably within Congress's authority under the . . . Fifteenth Amendment[]." DOJ Br. 21. But this "test" has no limiting principle. The Fifth Circuit's analysis could be applied to invalidate any election law that imposes a marginally greater burden on poorer voters, regardless of its effect on minority voting participation. That interpretation of VRA §2 threatens virtually every

voting requirement, Pet. 26-27, and bears little resemblance to the Fifteenth Amendment.

To make matters worse, the Fifth Circuit's totality-of-circumstances analysis rests significantly on decades-old examples of racial discrimination in Texas. Pet. App. 77a-79a. That directly violates *Shelby County*. *See* 133 S. Ct. at 2629 ("The [Fifteenth] Amendment is not designed to punish for the past; its purpose is to ensure a better future."). By restoring "equal sovereignty" to Texas and other States, *Shelby County* ensured that each State's laws would be subject to the same statutory and constitutional standards, unaffected by "decades-old data relevant to decades-old problems." *Id.* at 2624, 2629. Plaintiffs' argument that "court[s] must consider . . . a multitude of factors . . . that are specific to the jurisdiction imposing the [challenged] policy," NAACP Br. 23 n.6, is just an effort to import into VRA §2 what *Shelby County* rejected as unconstitutional, 133 S. Ct. at 2631.

Strikingly, this was the precise basis on which the Fifth Circuit purported to distinguish the Seventh Circuit's *Frank* decision—that Wisconsin did not have similar decades-old examples of racial discrimination like Texas. Pet. App. 58a. This is an end run around *Shelby County* and its "fundamental principle of equal sovereignty among the States." 133 S. Ct. at 2623 (internal quotation marks omitted).

II. Under this Court's Established Precedents, the Record Permits Only a Finding that the Texas Legislature Did Not Act with a Racially Discriminatory Purpose.

Plaintiffs cannot possibly satisfy their burden to show that SB14 is "obvious pretext" for racial discrimination, or that it can be "plausibly . . . explained only as a [race]-based classification" on remand. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272, 275 (1979). Instead, they argue that circumstantial evidence not already discredited by the Fifth Circuit *could* support a finding of discriminatory intent under some nebulous, unarticulated standard. DOJ Br. 27-28; NAACP Br. 28-29; Veasey Br. 17-19. That is wrong for numerous reasons.

Plaintiffs do not dispute that they obtained sweeping discovery of internal legislative materials—thousands of pages of internal legislative documents and hours of legislator depositions. Pet. 33.[3] That treasure trove of evidence contained no proof of discriminatory purpose. Pet. 32. It established that voter-ID bills in Texas were blocked by Democratic legislators in three straight legislative sessions between 2005 and 2009, even with significant public support for voter-ID laws. *See* Pet. 2; Pro-

[3] DOJ cites examples where courts have allowed some discovery into legislative materials. DOJ Br. 29. But DOJ does not dispute that the amount of legislative discovery here was unprecedented. *Compare, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 344-45 (E.D. Va. 2015) (limiting production requirements for internal legislative documents), *with* Pet. 4.

posed FOFCOL at 41-54 (citing record). After Republicans won a supermajority of the Texas Legislature in 2010, however, they were able to pass SB14 to deter voter fraud, safeguard voter confidence, and honor the will of the majority of Texans. Proposed FOFCOL at 54-75 (citing record).

Petitioners are not seeking certiorari to relitigate discovery rulings. *Cf.* DOJ Br. 29-30. Quite the opposite. It is true that in most cases, such invasive discovery will not be allowed, as this Court recognized in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 n.18 (1977). Pet. 34. But given that this sweeping discovery did occur here, plaintiffs should be held to what the internal legislative materials proved: that the Texas Legislature enacted SB14 for the valid reasons of deterring voter fraud and safeguarding voter confidence. Pet. 32. This exceptional scenario warrants the Court's review before proceedings continue in the district court on the wholly unsubstantiated charge that the Texas Legislature acted with a racially discriminatory purpose in passing SB14. *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982) (remand inappropriate where "the record permits only one resolution of the factual issue").

In contrast to *Feeney* and *Arlington Heights*, where the Court considered circumstantial evidence of intent because the decisionmakers in those cases were aware that their challenged actions would cause a disparate impact on particular groups, 442 U.S. at 278-79; 429 U.S. at 270-71, the record here shows the opposite. To the extent the Texas Legislature had evidence of SB14's likely im-

pact, it had reason to believe that the law would *not* prevent any person from voting. Proposed FOFCOL at 115-18 (citing record).

DOJ contests petitioners' argument that SB14's equal effect on the nearly 300,000 white voters on plaintiff's No-Match List precludes a discriminatory-purpose finding premised on circumstantial evidence. DOJ Br. 29 n.5. But *Feeney* holds just that: "Too many men are affected by [the challenged law] to permit the inference that the statute is but a pretext for preferring men over women." 442 U.S. at 275. And the record in *Hunter v. Underwood*, 471 U.S. 222, 229 (1985), contained substantial direct evidence showing that Alabama's felon-disenfranchisement law "was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." Nothing close to that direct evidence of discriminatory purpose exists in this case.

The Fifth Circuit correctly reversed the district court's judgment on plaintiffs' discriminatory-purpose claim, but it should not have remanded for further proceedings on this record. Plaintiffs ignore this Court's governing precedents, which establish that a non-invidious classification like SB14 is constitutional unless its challengers prove that the law is "obvious pretext" and can be "plausibly . . . explained only as a [race]-based classification." *Feeney*, 442 U.S. at 272, 275. Pet. 31-32. Texas' voter-ID law is far from such a law, and the Court should review this question now to reject the grave charge that the Texas Legislature acted with a racially invidious purpose.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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