No. 15A999

In the Supreme Court of the United States

MARC VEASEY, ET AL.,
Applicants,

v.

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

On Application to Vacate the Stay of the
United States Court of Appeals for the Fifth Circuit

RESPONDENTS' OPPOSITION TO APPLICATION TO VACATE FIFTH CIRCUIT STAY OF PERMANENT INJUNCTION

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INTRODUCTION

One set of plaintiffs (the Veasey-LULAC plaintiffs, or "Applicants") asks this Court to vacate the Fifth Circuit's stay of a facial injunction of Texas's voter-ID law (Senate Bill 14, or "SB14"). The remaining plaintiffs—including the United States—did not join this application. Applicants base their request on the claim that "[t]here has been no explanation given by the Court of Appeals showing the ruling and findings of the District Court to be incorrect." Appl. 19–20. That statement is demonstrably false.

A three-judge panel of the Fifth Circuit issued a published opinion holding that the district court erred in finding that SB14 was enacted for a racially discriminatory purpose and in ruling that SB14 constitutes a poll tax. *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015). The Applicants' discussion of the stay factors does not even acknowledge that the Fifth Circuit issued an opinion on the merits. *Cf.* Appl. 17–22. The Fifth Circuit then granted *the State's* petition for rehearing en banc, which raised serious textual and constitutional defects with the district court's erroneous ruling that SB14 has a discriminatory effect under §2 of the Voting Rights Act. *Veasey v. Abbott*, No. 14-41127, 2016 WL 929405 (5th Cir. Mar. 9, 2016). The State has thus made the strongest possible showing of likely success on the merits: it has already succeeded on multiple

claims raised in the application, and the en banc Fifth Circuit will reconsider the §2 discriminatory-effect claim at *the State's* request.

The State's success in overturning the district court's discriminatory-purpose finding demonstrates that this claim is meritless. Both this Court and the Carter-Baker Commission have recognized that voter-ID laws are legitimate means to combat election fraud and safeguard voter confidence. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196–97 (2008). And here, as the Fifth Circuit three-judge panel noted, the district court granted plaintiffs "extensive discovery of legislators' private materials," *Veasey*, 796 F.3d at 503, eviscerating the legislative privilege to give the plaintiffs unlimited access to the documents and compelled testimony of legislators supporting SB14. Legislators, staff members, and the Lieutenant Governor produced thousands of documents containing their confidential communications and impressions concerning SB14. They were also forced to sit for depositions, where the United States and private plaintiffs asked about their conversations with other legislators, their mental impressions, and their motives for passing

SB14.[1] The district court based its abrogation of the legislative privilege on the need for "an accurate factual record." App'x C, ROA.6508.

Yet, as the Fifth Circuit panel concluded, this "extensive discovery of legislators' private materials . . . yielded *no discriminatory evidence*." *Veasey*, 796 F.3d at 503 (emphasis added). Rather, it confirmed that the Texas Legislature enacted SB14 to prevent voter fraud and safeguard voter confidence. Having allowed that unprecedented amount of discovery, the district court should have held plaintiffs to what it showed—no evidence of discriminatory purpose. The Fifth Circuit correctly vacated the district court's judgment, and there is no reason to believe that the en banc court will do otherwise.

Furthermore, the Fifth Circuit granted rehearing en banc to reevaluate the discriminatory-effect finding, as the district court's rationale for liability ignores the text of VRA §2 and would render that statute unconstitutional. Plaintiffs submitted no evidence of depressed voter turnout or registration—much less that any such

[1] *See* App'x A, ROA.7143 (opposing subpoenas to current and former legislators, noting that Texas "produced thousands of legislatively privileged documents to the Department of Justice"); App'x B, ROA.8049 (explaining that the plaintiffs obtained "hundreds of privileged documents and emails from personal and work accounts of Governor Perry, Lt. Governor Dewhurst, Speaker Straus, former Speaker Craddick, SB 14's author in the Senate, SB 14's sponsor in the House, and every single member of the relevant House Committee").

effect on voting was caused by SB14. That is what the text of §2 requires. *See* 52 U.S.C. § 10301(a) ("No voting qualification . . . shall be imposed or applied by any State or political subdivision in a manner which *results in* a denial or abridgment of the right of any citizen of the United States *to vote* on account of race or color . . . .") (emphases added). Without showing any effect *on voting*, a §2 vote-denial claim cannot be sustained.

If §2 were interpreted to sweep that broadly, it would be unconstitutional as neither congruent nor proportional to the right *to vote* protected by the Fifteenth Amendment—a crucial point noted by various jurists, including Judges Kozinski, Easterbrook, and Walker. As these judges have recognized, an interpretation of §2 like the district court's would threaten numerous legitimate election laws, such as voter-registration requirements, Tuesday elections, and even in-person voting. Congress could not possibly have intended this.

In contrast to the State's proven likelihood of success, the Applicants do not even allege a specific injury from the stay pending appeal. *Cf.* Appl. 15–16. Their failure to claim injury, let alone prove it, comes as no surprise. The record demonstrates that SB14 will not prevent any of the Applicants, or any other plaintiffs, from casting a ballot.

None of the fourteen plaintiffs who claimed that SB14 would affect their right to vote face anything close to a substantial obstacle to voting. Texas law permits nine of the individual plaintiffs—including Applicants Floyd Carrier, Gordon Benjamin, Ken Gandy, and Evelyn Brickner—to vote by mail without a photo ID "because they are over the age of 65 and/or are disabled." *Veasey v. Perry*, 71 F. Supp. 3d 627, 677 (S.D. Tex. 2014); *see* Tex. Elec. Code § 82.003. The five remaining individual plaintiffs either have an SB14-compliant ID or could easily get one; indeed, the three Applicants not eligible to vote by mail (Anna Burns, John Mellor-Crummey, and Koby Ozias) already possess SB14-compliant ID. 71 F. Supp. 3d at 674 (district-court finding).[2] None of these three Applicants allege that their right to vote would be denied on account of race or that they have ever been prevented from voting. Burns and Mellor-Crummey were concerned that their right to vote *might* be denied if the name on their photo ID were deemed not to be "substantially similar" to the name on their voter-registration card. *See id.* Ozias

[2] The other two plaintiffs not eligible to vote by mail could easily obtain a qualifying photo ID. One has the documents necessary to obtain a Texas ID but chose to get a California driver's license instead because she plans to return to California after college graduation. App'x D, ROA.100543–44. The other admitted that he can obtain a personal ID card, which would satisfy SB14. App'x E, ROA.99375.

speculated that he *might* be turned away because he is transgendered. *Id.*

The plaintiffs' failure to find a single person who cannot vote because of SB14 does not reflect a lack of opportunity or effort. The plaintiffs include statewide organizations, elected officials, and the United States.[3] They have had years to comb the State for individuals whom SB14 will prevent from voting, and they have done so. For example, Department of Justice lawyers crisscrossed Texas, traveling to homeless shelters with a microphone in hand, searching for voters "disenfranchised" by SB14. App'x J, ROA.99076–77. But in spite of their exhaustive efforts, the plaintiffs found nobody who would face a substantial obstacle to voting. That should have precluded any finding that SB14 has a discriminatory effect or imposes a substantial burden on the right to vote.

The Applicants do not even address the likelihood that this Court will review the en banc Fifth Circuit's decision. That is a sufficient ground to deny their application. The Applicants could not

[3] The organizational plaintiffs either did not allege or could not prove that any of their members lacked SB14-compliant ID. App'x F, ROA.99199 (Texas League of Young Voters not able to identify any constituent unable to vote because of SB14); App'x G, ROA.24741 (stipulation that LUPE does not allege that any member is injured by SB14); App'x H, ROA.24727 (stipulation that LULAC cannot identify any member who lacks SB14 ID); App'x I, ROA.64201 (NAACP witness not aware of any member registered to vote but not in possession of SB14 ID).

make the required showing in any event. If the en banc Fifth Circuit rules for the State on the VRA §2 claim, then no circuit split will exist because Fifth Circuit law will be in accord with *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015), and *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc), *aff'd on other grounds sub nom. Arizona v. InterTribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013). And the fact that the Fifth Circuit granted the State's en banc petition, which focused on the panel's §2 holding, signals that the Fifth Circuit will fix the circuit split caused by the panel's interpretation of §2.

Thus, there is no need for this Court to upset the status quo while the court of appeals' regular en banc process goes forward. The Court denied the Applicants' previous application to vacate the stay in this case, 135 S. Ct. 9 (2014), and it should do so again here.

STATEMENT OF THE CASE

1. By 2011, this Court had endorsed photo voter-ID laws as legitimate means of deterring fraud and boosting public confidence in elections. *Crawford*, 553 U.S. at 191–97. The Commission on Federal Election Reform, chaired by former President Jimmy Carter and former Secretary of State James Baker, agreed: "The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." App'x K,

ROA.77850. An overwhelming majority of Texans supported a photo-ID law. *See* App'x L.

2. Accordingly, the Texas Legislature enacted SB14,[4] which generally requires voters to present certain government-issued photo ID when voting in person. The acceptable forms of photo ID include a Texas driver's license; a free Texas election identification certificate; a Texas personal identification card; a Texas concealed-handgun license; a U.S. military identification card; a U.S. citizenship certificate; and a U.S. passport. Tex. Elec. Code §63.0101; Tex. Transp. Code §521A.001(b).

To accommodate voters who do not already have a qualifying photo ID, the Texas Legislature in SB14 directed agencies to provide free election identification certificates (EICs) that satisfy its photo ID requirements: the Department of Public Safety "may not collect a fee for an election identification certificate or a duplicate election identification certificate issued under this section." *Id.* In conformance with its intent to provide free voter IDs, in 2015, the Legislature passed Senate Bill 983, which eliminated all fees for obtaining supporting documents used to get a free EIC, including the $2–3 fee for a certified copy of a birth certificate—which had been imposed by a statutory provision separate from SB14. Tex.

[4] Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws 619.

Health & Safety Code §191.0046(e); 25 Tex. Admin. Code §181.22(c), (t); *see* 37 Tex. Admin. Code §15.182.

Texas law also provides exceptions allowing certain groups of voters to vote without a photo ID. Voters who are 65 or older, or disabled, can vote by mail, which does not require photo ID. Tex. Elec. Code §§82.002, 82.003. The disabled, religious objectors, and individuals lacking ID due to natural disasters can vote in person without showing photo ID. *Id.* §§63.001(h), 65.054(b)(2)(B)–(C). In-person voters who do not present qualifying photo ID can cast a provisional ballot that will count if they present acceptable ID within six days after the election. *Id.* §§63.001(g), 63.011(a), 65.0541.

3. Various groups of individuals and organizations brought lawsuits challenging SB14 as a violation of the Fourteenth Amendment and VRA §2. The Applicants brought an additional claim, alleging that SB14 constituted an unconstitutional poll tax. The private plaintiffs' cases were ultimately consolidated with a lawsuit brought by the United States.

4. After a nine-day bench trial, the district court conceded that "Plaintiffs have not demonstrated that any particular voter absolutely cannot get the necessary ID or vote by absentee ballot under SB 14." 71 F. Supp. 3d at 686 (erroneously characterizing such a showing as "an extreme burden . . . not necessary in an as-applied

challenge"). The district court nevertheless held that SB14 constitutes a poll tax, that it unconstitutionally burdens the right to vote, that it results in the denial or abridgement of the right to vote on account of race in violation of VRA §2, and that it was enacted with a racially discriminatory purpose. *See id.* at 633. The Fifth Circuit granted a stay pending appeal. *Veasey v. Perry*, 769 F.3d 890 (5th Cir. 2014). This Court denied a previous application to vacate that stay. 135 S. Ct. 9 (2014).

5. A three-judge panel of the Fifth Circuit reversed and rendered judgment for the State on the poll-tax claim, vacated the district court's judgment on the discriminatory-purpose claim, and vacated the judgment that SB14 imposed an undue burden on the right to vote, but affirmed the judgment that SB14 caused a discriminatory effect under VRA §2. *Veasey*, 796 F.3d at 519–20. Rather than render judgment on the discriminatory-purpose claim, however, the panel remanded for further consideration of the discriminatory-purpose claim based on the remaining evidence. *Id.* at 517–18.

6. The State filed a petition for rehearing en banc urging reconsideration of the VRA §2 claim and the panel's decision to remand the discriminatory-purpose claim rather than render judgment for the State. The Fifth Circuit granted the State's en banc petition on March 9, 2016.

7. On March 18, the Applicants filed an emergency motion in the Fifth Circuit to vacate its stay pending appeal. The Fifth Circuit issued an order carrying the motion to vacate with its en banc consideration of the appeal. On March 25, the Applicants filed the instant application in this Court.

ARGUMENT

To vacate the Fifth Circuit's stay, the Applicants must make three showings. First, they must show that their rights "may be seriously and irreparably injured by the stay." *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers). Second, they must show that the Fifth Circuit was "demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Id.* Third, they must show that the case "could and very likely would be reviewed here upon final disposition in the court of appeals." *Id.* The application fails to make any of these required showings.

I. The Applicants Face No Threat of Serious or Irreparable Injury from the Stay Pending Appeal.

The Applicants do not even allege that they face a personal threat of injury—that is, a substantial obstacle to voting—from the stay pending appeal. The record explains why, as all of the individual Applicants can either vote by mail without a photo ID or already have sufficient ID:

- Floyd Carrier is eligible to vote by mail without photo ID. App'x M, ROA.98722–23.

- Ken Gandy is eligible to vote by mail without photo ID, and he has done so since SB14 took effect. App'x N, ROA.99824, 99827 (Gandy filled out the mail ballot "at the County Clerk's Office and handed it to them right there")).

- Gordon Benjamin is eligible to vote by mail without photo ID, and he also has a birth certificate that he can use to obtain a photo ID. App'x O, ROA.99224.

- Evelyn Brickner is eligible to vote by mail without photo ID, 71 F. Supp. 3d at 677 & n.376, and she has an SB14-compliant ID, *id.* at 674.

- The remaining Applicants who claimed an injury to their right to vote—Anna Burns, John Mellor-Crummey, and Koby Ozias—already have an SB14-compliant ID. *Id.*

Thus, even if they had made an effort, the Applicants could not show that their rights "may be seriously and irreparably injured by the stay." *W. Airlines, Inc. v. Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers).

II. The Court of Appeals Was Not Demonstrably Wrong in its Application of Accepted Standards.

The Applicants have failed to demonstrate that the Fifth Circuit's stay is demonstrably wrong under the governing standard. Courts consider four factors to decide a motion for stay pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the

> applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 426 (2009). "A stay pending appeal 'simply suspends judicial alteration of the status quo.'" *Veasey*, 769 F.3d at 892 (quoting *Nken*, 556 U.S. at 429). In this case, the status quo is that SB14 is in effect, and all of the stay factors continue to weigh in favor of maintaining the status quo pending appeal of the district court's judgment.

A. The State Is Likely to Succeed on All Claims.

A three-judge panel of the Fifth Circuit issued a published opinion vacating the district court's erroneous findings that SB14 was enacted for a racially discriminatory purpose, that SB14 constitutes a poll tax, and that SB14 imposes a substantial obstacle on the right to vote. *Veasey*, 796 F.3d at 519–20.[5] Yet the Applicants make no effort to show that the panel was wrong or that the en banc court is likely to reach a different conclusion on those claims. Indeed, the Fifth Circuit granted *the State's* en banc petition to reconsider the claim of a discriminatory effect under §2.

[5] The granting of the State's en banc petition to reconsider the separate VRA §2 discriminatory-effect claim, of course, vacated the panel's opinion. *See* 5th Cir. R. 41.3.

The Applicants' discussion of the stay factors does not even acknowledge that the Fifth Circuit panel issued an opinion on the merits. *Cf.* Appl. 17–22. Instead, they trumpet the district court's indefensible finding of a discriminatory purpose, which has already been rejected once on appeal. Their failure to engage the Fifth Circuit panel's analysis is a sufficient ground to deny the application. Even if they had addressed the merits of the panel's decision, the Applicants could not show that they will ultimately prevail on any of their claims.

1. Poll Tax. The Applicants do not even attempt to defend the district court's poll-tax ruling. *See* Appl. 17–20. The Fifth Circuit panel was correct to reverse and render judgment for the State. *See* 796 F.3d at 517.

2. Discriminatory Purpose. The panel's opinion reversing the district court's judgment on the discriminatory-purpose claim demonstrates that the State is likely to prevail on the merits of its appeal. The State's success on that claim eliminates any possible basis for the district court's total invalidation of SB14.[6] There is no

[6] *See, e.g.*, *Veasey*, 796 F.3d at 514 n.28 (noting that the poll-tax claim, "if successful, could potentially merit total invalidation of SB14," whereas a finding of discriminatory effect would require "a severability analysis, giving some deference to legislative choices"); *id.* at 517–18 (explaining that a finding of intentional discrimination could merit a broader remedy than a finding of discriminatory effect). The district court stressed that the plaintiffs brought "an as-applied rather than a facial challenge" to SB14. 71 F. Supp. 3d at 679; *id.*

reason to believe that the en banc court will reinstate the discriminatory-purpose holding.

The Legislature enacted SB14 to safeguard the integrity of elections, deter and detect voting fraud, and promote public confidence in the voting process. *Veasey*, 796 F.3d at 499. There is no question that those are legitimate goals or that those goals are served by requiring voters to prove their identity. *See, e.g.*, *Crawford*, 553 U.S. at 194–97; *Veasey*, 796 F.3d at 499 ("No one questions the legitimacy of these concerns as motives . . . ."); *Veasey*, 71 F. Supp. 3d at 680 ("There is no question these are legitimate legislative interests.").

Given the legitimate purpose behind SB14, plaintiffs had to provide the clearest proof of intentional racial discrimination. *See, e.g.*, *McCleskey v. Kemp*, 481 U.S 279, 298–99 (1987) (holding that if "there [are] legitimate reasons for the . . . Legislature to adopt and maintain" a law, courts "will not infer a discriminatory purpose"); *Smith v. Doe*, 538 U.S. 84, 92 (2003) (courts should "ordinarily defer to the legislature's stated intent" and "only the clearest proof will suffice to override" that consideration) (quotation marks omitted).

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at 682, 686, 707; *cf. 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 . . . .").

Perhaps aware of their heavy burden, plaintiffs insisted that discovery of legislatively privileged material was essential to their effort to uncover the purpose behind SB14.[7] The district court obliged, despite this Court's admonition that "[p]lacing a decisionmaker on the stand" should be avoided because "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977) (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130–31 (1810)).

The district court gave plaintiffs unprecedented access to direct evidence of legislative intent, compelling production of privileged and confidential papers, and forcing legislators and legislative staff to sit for extensive depositions. This discovery included office files, bill books, personal correspondence concerning SB14, email accounts (official and personal), and even confidential email communications between legislators and lawyers at the Texas Legislative

[7] *See, e.g.*, App'x P, ROA.97657:19–22 (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"); App'x Q, ROA.7226 (demanding this "vital discovery from current and former legislators").

Council.[8] *See supra* p.2 n.1. It also included testimony from Lieutenant Governor Dewhurst and dozens of legislators who voted for SB14. The court explained that abrogation of the legislative privilege was necessary to create an "accurate factual record." App'x C, ROA.6508.

After all that, the district court could not identify *a single document or statement* from a legislator or staffer expressing an intention to suppress minority voting through SB14. Instead, the district court relied on "infirm" and unreliable circumstantial evidence, as the Fifth Circuit panel recognized. First, the district court "relied extensively on Texas's history of enacting racially discriminatory voting measures"—even though "[a]ll of the most pernicious discriminatory measures predate 1965," and the "trio of redistricting cases" offered by the plaintiffs formed "a thin basis for drawing any useful conclusions here." 796 F.3d at 500.[9] Second, the district court relied on speculation by the bill's opponents, but "[c]onjecture by

[8] The district court denied the State's analogous request for discovery of other legislators' files. *See* App'x R.

[9] Those three cases were *Bush v. Vera*, 517 U.S. 952, 959 (1996), which invalidated a Texas redistricting plan because race was the "predominant factor" in creating three *additional* minority-opportunity districts; *LULAC v. Perry*, 548 U.S. 399, 439–40 (2006), which found that one congressional district diluted Hispanic voting strength; and *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated by* 133 S. Ct. 2885 (2013), a VRA §5 preclearance case that was vacated by this Court.

the opponents of SB14 as to the motivations of those legislators supporting the law is not reliable evidence." *Id.* at 502. Third, the district court relied on postenactment statements, "which courts routinely disregard as unreliable." *Id.* And finally, the district court gave undue weight to alleged procedural departures such as "rejection of purportedly ameliorative amendments"—which is not even a procedural departure—and procedural maneuvers that were employed "only after repeated attempts to pass voter identification bills were blocked through countervailing procedural maneuvers." *Id.* at 503.

The Fifth Circuit panel correctly vacated the district court's finding of intentional discrimination as clearly erroneous. *See id.* at 498. The panel recognized that plaintiffs had every opportunity to uncover direct evidence of intentional discrimination, through the unprecedented discovery they were allowed, but their "extensive discovery of legislators' private materials . . . yielded no discriminatory evidence." *Id.* at 503. As the panel noted, it is "unlikely that such a motive would permeate a legislative body and not yield any private memos or e-mails." *Id.* at 503 n.16.[10]

[10] The panel's only misstep with respect to the discriminatory-purpose claim was its decision to remand instead of rendering judgment for the State. "[W]here findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue." *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982). Here, in light of

3. Discriminatory Effect. That the Fifth Circuit panel affirmed the district court's finding of a VRA §2 discriminatory effect does not undermine the State's showing of likely success on the merits. The Fifth Circuit granted *the State's* petition for rehearing en banc, which focused almost entirely on the panel's erroneous interpretation of §2—an interpretation that would render the statute unconstitutional and threaten many legitimate election laws.

As an initial matter, the plaintiffs' failure to identify a single voter who cannot vote because of SB14 precludes §2 liability as a matter of law. *See supra* Part I. The district court's determination that SB14 nevertheless had a racially discriminatory effect creates serious constitutional defects and threatens to have far-reaching, destructive consequences for voting regulations. Given the lack of evidence that SB14 affected any person's ability to vote, together with the untenable consequences of the district court's interpretation of §2, the en banc Fifth Circuit is likely to reverse.

By finding a discriminatory effect under §2 without any evidence that SB14 denied or abridged the right *to vote*, the district court's interpretation of §2 goes far beyond the text of the statute. The plaintiffs submitted no evidence of any effect on voter turnout

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the virtually unlimited access to privileged legislative materials and legislators, the record permits only one conclusion: SB14 was not passed with a discriminatory purpose.

or registration—much less that any such effect was caused by SB14.[11] But that is precisely what the text of §2 requires: "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 abridgment of the right* of any citizen of the United States *to vote* on account of race or color . . . ." 52 U.S.C. §10301(a) (emphases added). The notion that §2 would impose liability without "evidence of decreased participation among minorities" was "decisively rejected by Congress in 1982." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 866 (5th Cir. 1993) (en banc); *see Frank*, 768 F.3d at 752 (holding that §2 requires more than mere proof that "white registered voters are more likely to possess qualifying photo IDs, or the documents necessary to get them"); *Gonzalez*, 677 F.3d at 406 (rejecting discriminatory-effects liability without proof of "a causal connection between [Arizona's voter-ID law] and the observed difference in the voting rates of Latinos").

[11] That evidence is critical to a vote-*denial* claim, which alleges that the challenged practice "prevent[s] people from voting or having their votes counted." *Simmons v. Galvin*, 575 F.3d 24, 29 (1st Cir. 2009). In contrast, vote-*dilution* claims target practices that "operate to minimize or cancel out the voting strength of racial [minorities in] the voting population," by examining the efficacy of votes already cast. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

In fact, the district court's interpretation would render §2 unconstitutional. If §2 bars laws that do not have any demonstrable effect on voting behavior, it is not congruent and proportional to the Fifteenth Amendment's ban on intentional racial discrimination in voting. A prohibition on laws with the effect, but not the purpose, of depressing voter turnout or registration already goes one large step beyond what the Fifteenth Amendment itself prohibits (which is only purposeful discrimination). *Cf. Chisom v. Roemer*, 501 U.S. 380, 403 (1991) ("The statute was enacted to protect voting rights that are not adequately protected by the Constitution itself."). If interpreted to extend to another broad, secondary layer of prophylaxis—barring laws that have no effect on voter turnout or registration—then §2 is no longer sufficiently tied to the Fifteenth Amendment's ban on "purposefully discriminatory denial or abridgment by government of the freedom to vote 'on account of race, color, or previous condition of servitude.'" *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (plurality op.); *see Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997). That would exceed Congress's authority to enforce the Fifteenth Amendment because it lacks "congruence and proportionality" to the prohibition of intentional discrimination regarding the right to vote. *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)). Indeed, various courts of appeals have raised

congruence-and-proportionality concerns with a similar expansion of §2 liability. *See, e.g.*, *Hayden v. Pataki*, 449 F.3d 305, 330–37 (2d Cir. 2006) (Walker, C.J., concurring); *Johnson v. Gov. of Fla.*, 405 F.3d 1214, 1229–32 (11th Cir. 2005) (en banc); *Farrakhan v. Washington*, 359 F.3d 1116, 1121–25 (9th Cir. 2004) (Kozinski, J., dissenting from the denial of rehearing en banc).[12]

The district court's interpretation of §2 would invalidate a broad array of nondiscriminatory voting laws. If statistical disparities and general socioeconomic assumptions suffice to prove a racially discriminatory effect, §2 will ban even the most basic voting requirements, including voter registration, as Judge Easterbrook explained for the Seventh Circuit:

> if whites are 2% more likely to register than are blacks, then the registration system top to bottom violates § 2; and if white turnout on election day is 2% higher, then the requirement of in-person voting violates § 2. Motor-voter registration, which makes it simple for people to register by checking a box when they get drivers' licenses, would be invalid,

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[12] The district court's interpretation also puts §2 in conflict with the Fourteenth Amendment because it compels the States to engage in race-based decisionmaking. If States face liability for enacting neutral election laws that have a disparate impact on racial minorities—or any group in which minorities are overrepresented compared to their share of total population—then States will be forced to "subordinate traditional race-neutral . . . principles" to "racial considerations" in violation of the Equal Protection Clause. *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *see Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2524 (2015) (explaining that courts must avoid interpreting statutes "to inject racial considerations" into government decisionmaking).

> because black and Latino citizens are less likely to own cars and therefore less likely to get drivers' licenses.

Frank, 768 F.3d at 754. Similarly, as Judge Kozinski recognized, internet voting would violate Section 2 as long as "[p]laintiffs could show disparities in wealth, leading to disparities in computer ownership and Internet access, leading to disparities in participation on election day." *Farrakhan*, 359 F.3d at 1126 (Kozinski, J., dissenting). And holding elections on weekdays would violate §2 as long as "a plaintiff somewhere can show that minority voters are disproportionately more likely to be hourly wage earners, who are disproportionately less likely to vote because they can't take time off from work." *Id.* Even age limits are vulnerable; certain plaintiffs recently argued that the exclusion of 17-year-olds from primary elections under Ohio's Threshold Voter Law would violate §2 because "African-Americans and Latinos in the State of Ohio are represented in the greatest numbers in younger age cohorts, including the 15- to 17-year-old age cohort, and their opportunity to participate in the political process would be denied or abridged." App'x S at 18.

Reading §2 to invalidate laws based on the predicted effect of poverty, age, or some other characteristic that correlates with race is "implausible," as it would "sweep[] away almost all registration and voting rules." *Frank*, 768 F.3d at 754. As Judge Kozinski has explained, "All sorts of state and local decisions about the time,

place, and manner of elections will be subject to attack by anyone who can show a disparate impact in an area external to voting that translates into a disparate impact on voting." *Farrakhan*, 359 F.3d at 1125–26 (Kozinski, J., dissenting).[13]

By accepting that expansive interpretation of §2, the district court adopted "a novel theory of liability" far outside the "heartland" of VRA §2 claims. *Cf. Inclusive Communities Project*, 135 S. Ct. at 2522. With no evidence that SB14 affected voting behavior, the district court held that SB 14 violated VRA §2 based only on statistical disparities in rates of preexisting ID possession. The district court found that 608,470 registered voters (4.5% of all registered Texas voters) lacked SB14 ID. 71 F. Supp. 3d at 680. The report from which the district court drew that figure concluded that 96.4% of registered non-Hispanic white voters, 92.5% of registered Black voters, and 94.2% of registered Hispanic voters had an SB14-compliant ID. App'x T, ROA.43320. Of the registered voters who could not be matched to an SB14 ID, the report identified 296,156

[13] The Ninth Circuit ultimately adopted Judge Kozinski's view of §2. *See Farrakhan v. Gregoire*, 623 F.3d 990, 992 (9th Cir. 2010) (en banc) (per curiam) (rejecting a claim that Washington's felon-disenfranchisement law violated VRA §2 where the plaintiffs relied on "statistical evidence that there are racial disparities in Washington's criminal justice system"); *see also Gonzalez*, 677 F.3d at 406 (rejecting challenge to Arizona voter-ID law under VRA §2 based on plaintiffs' failure to prove a causal connection between the law and a discriminatory impact, such as a "difference in the voting rates of Latinos").

(48.67%) as white non-Hispanic, 127,908 (21.02%) as Black, and 174,715 (28.71%) as Hispanic. *Id.* Based on that estimate of registered voters without ID, the district court concluded that "SB14 disproportionately impacts both African-Americans and Hispanics in Texas," 71 F. Supp. 3d at 663, because "a disproportionate number of African-Americans and Hispanics populate that group of potentially disenfranchised voters" without SB14-compliant ID, *id.* at 659.

The district court held that SB14's "disparate impact" caused a "discriminatory effect," reasoning that voters without ID were more than likely poor and that the poor would more likely be minorities. *Id.* at 664. But the district court did not determine whether the registered voters without an SB14 ID already had the documents necessary to obtain one. Nor did it attempt to determine whether the lack of ID would prevent any of those voters from casting a ballot. Here, Texas provides free voter IDs and supporting documents to get those free voter IDs. Tex. Transp. Code §521A.001; Tex. Health & Safety Code § 191.0046(e). The district court even conceded that "Plaintiffs have not demonstrated that any particular voter absolutely cannot get the necessary ID or vote by absentee ballot." 71 F. Supp. 3d at 686.

At most, the plaintiffs proved that a small percentage of registered Texas voters did not have SB14-compliant ID at the time of

trial, but they did not prove that SB14 will prevent any person—let alone any individual plaintiff—from obtaining sufficient ID or casting a ballot. *Cf. Crawford*, 553 U.S. at 187 (noting that the record contained no evidence of "a single, individual Indiana resident who will be unable to vote as a result of SEA 483"); *Frank*, 768 F.3d at 747 ("If as plaintiffs contend a photo ID requirement especially reduces turnout by minority groups, students, and elderly voters, it should be possible to demonstrate that effect."). The critical distinction—and the flaw in the plaintiffs' case—was candidly summed up by the Applicants' own expert: "I wasn't asked to study who's been deprived of rights to vote. I was asked to study who has IDs." App'x U, ROA.99022:17–18.

4. Substantial Burden on the Right to Vote. Because it found a racially discriminatory effect under §2, the panel did not reach the plaintiffs' claim that SB14 violated the First and Fourteenth Amendments by placing a substantial burden on the right to vote. *See* 796 F.3d at 513–14. Regardless, it does not. The district court's across-the-board invalidation of SB14 as a substantial burden on the right to vote cannot be squared with *Crawford*. The record here cannot even support as-applied relief. As explained above, not one of the fourteen named plaintiffs faces a substantial obstacle to voting. *See supra* pp. 5–6 & n.1.

This Court rejected a facial challenge to Indiana's voter-ID law in *Crawford*, 553 U.S. at 191–202. In applying the *Anderson-Burdick* balancing test, the Court concluded that:

- a photo-ID requirement is an evenhanded restriction that promotes integrity in the election process, *id.* at 189–97;
- a photo-ID requirement, where the government provides free ID to those without it, is not facially unconstitutional as a substantial burden on the right to vote because the statute's broad application to all voters imposes "only a limited burden on voters' rights," *id.* at 203;
- for most voters who need it, the burden of getting free photo ID using supporting documentation that may cost $3 to $12, if not already possessed, does not exceed the usual burdens of voting and "surely" does not qualify as a substantial burden on the right to vote, *id.* at 198–200 & n.17; and
- any heavier burden felt by particular persons in obtaining photo ID is generally mitigated by their ability to cast a provisional vote that will count after curing any defect in ID, *id.* at 199.

Even under the district court's figures, over 95% of eligible Texas voters already have sufficient photo voter ID. 71 F. Supp. 3d at 680. That alone precludes facial invalidation. *See Crawford*, 553 U.S. at 204.[14]

[14] Likewise, a VRA §2 claim could not possibly result in facial invalidation of SB14. *See, e.g.*, *Perry v. Perez*, 132 S. Ct. 934, 941 (2012) (per curiam) (instructing that courts must respect legislative policies "to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act" (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997))).

Crawford specifically criticized the challengers for doing what plaintiffs attempt here: seeking facial invalidation while using a "unique balancing analysis that looks specifically at a small number of voters who may experience a special burden." 553 U.S. at 200. Not only did *Crawford* reject that argument, it explained that such a novel legal development would not gain the plaintiffs anything—their evidence of supposed substantial burdens as applied was lacking. *Id.* at 200–02.

The same is true here. The plaintiffs' claims concern a triply-limited fraction of qualified Texas voters:

- the fraction of qualified voters who lack a driver's license or other sufficient form of ID (less than 5%, even on plaintiffs' numbers), 71 F. Supp. 3d at 659, and then only:
- the fraction of that group that does not have the supporting documentation required by the relevant Texas agency for a free photo ID *and* that cannot simply vote by mail, and then only:
- the fraction of that sub-group for which the cost of getting the (free) documentation required for a free photo ID is either somehow more than the $3–$12 in *Crawford* or for which the burden of getting that free photo ID is substantially heavier than "[f]or most voters," 553 U.S. at 198.

Plaintiffs have not identified a single person who falls within that subcategory.[15] That precludes a finding that SB14 unconstitutionally burdens the right to vote as applied to anyone, much less a finding that SB14 is facially invalid. *See, e.g.*, *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009) (plaintiffs "failed to identify a single individual who would be unable to vote").

B. The State Will Suffer Irreparable Injury If the Status Quo Is Altered by Vacating the Stay.

Texas has a substantial interest in deterring fraud and boosting public confidence in elections through SB14. *See Crawford*, 553 U.S. at 196 ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters."). If the stay pending appeal is vacated, the State will suffer the irreparable harm of not being able to enforce its duly enacted law. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (prohibiting a State from "employ[ing] a duly enacted statute to help prevent these injuries constitutes irreparable harm"); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, C.J., in chambers) ("It also seems to me that any

[15] In fact, approximately 22,000 voters that plaintiffs alleged lacked sufficient ID actually voted in at least one election since SB14's implementation. App'x V, ROA.97442.

time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

Plus, SB14 has been in effect for nearly three years and has applied to every election held since November 2013. The State and counties within the State have invested time and money to train election officials, create election materials, and educate the public about SB14. The State has a "significant interest in ensuring the proper and consistent running of its election machinery." *Veasey*, 769 F.3d at 896. Any court-ordered change in election procedures that later proves unwarranted—as any change on the Applicants' behalf would—imposes an irreparable injury on the State.

C. The Stay Does Not Threaten Any Injury to the Plaintiffs.

Maintaining the stay does not threaten injury to any of the Applicants—or any of the plaintiffs who have not moved to vacate the stay. As noted above, the Applicants do not even allege a threat of harm to themselves. *See supra* Part I. The record shows that SB 14 will not prevent any plaintiff from casting a ballot. Of the fourteen named plaintiffs who allege an undue burden on their right to vote, nine are eligible to vote by mail without photo ID. 71 F. Supp. 3d at 677. Of the remaining five named plaintiffs, three already have a

qualifying photo ID. *Id.* at 674. Another has the documents necessary to obtain a Texas ID, but she chose to get a California driver's license instead because she plans to return to California after college graduation. App'x D, ROA.100543–44. And the other individual plaintiff admitted that he can obtain a personal ID card, which would satisfy SB14. App'x E, ROA.99375.

D. Maintaining the Stay Pending Appeal Is Consistent with the Public Interest.

Maintaining the stay pending appeal furthers the public's interest in deterring election fraud and "counting only the votes of eligible voters." *Crawford*, 553 U.S. at 196. It also promotes the public's interest in maintaining "confidence in the integrity of the electoral process," which "encourages citizen participation." *Id.* at 197.

The Applicants offer nothing to counter the public's indisputable interest in enforcing SB14. They also ignore the Fifth Circuit panel's opinion entirely, proclaiming that the courts should not "sanction enforcement of a law found to be racially discriminatory without the clearest showing that the finding would be overturned on appeal." Appl. 22. But the Fifth Circuit panel has already held that the district court's discriminatory-purpose finding was clearly erroneous. *Veasey*, 796 F.3d at 498. The State could not make a clearer showing that the district court's finding is likely to be overturned on appeal.

III. The Applicants Have Not Shown that this Court Is Likely to Review the Case.

The Applicants do not even argue, in their application, that the Court is likely to review this case. At the very least, a request to vacate a court of appeals' stay order should explain why the lower court's ultimate decision is likely to come before this Court. *See Certain Named and Unnamed Non-Citizen Children v. Texas*, 448 U.S. 1327, 1331 (1980) (Powell, J., in chambers) (noting that only in "exceptional" cases will a litigant be able to show, before decision by the court of appeals, that this Court is likely to grant certiorari).

The Applicants could not carry their burden in any event because the existence of a certiorari-worthy issue depends entirely on the outcome of the Fifth Circuit's en banc review. To make this case certiorari-worthy, the en banc court would have to hold that SB14 violates §2 of the Voting Rights Act, thereby creating a conflict with the Seventh Circuit's approval of Wisconsin's voter-ID law in *Frank v. Walker*, 768 F.3d 744, and the Ninth Circuit's approval of Arizona's voter-ID law in *Gonzalez v. Arizona*, 677 F.3d 383. That is not likely, however, because the State's petition for rehearing en banc focused on the standard of liability under §2, and the Fifth Circuit agreed to hear the case en banc. If the Fifth Circuit rules for the State on the §2 claim, no circuit split will exist, thus drastically reducing the chances that this Court would grant certiorari.

CONCLUSION

The Court should deny the application to vacate the stay.

Respectfully submitted.

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v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.,
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On Application to Vacate the Stay of the
United States Court of Appeals for the Fifth Circuit

APPENDIX TO RESPONDENTS' OPPOSITION TO APPLICATION TO VACATE FIFTH CIRCUIT STAY OF PERMANENT INJUNCTION

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