IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 14-41126
USDC No. 2:13-cv-00193

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IN RE: STATE OF TEXAS, RICK PERRY, in his Official Capacity as Governor of Texas, JOHN STEEN, in his Official Capacity as Texas Secretary of State, STEVE MCGRAW

Petitioners

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# OPPOSITION OF THE UNITED STATES TO EMERGENCY APPLICATION TO STAY FINAL JUDGMENT PENDING APPEAL

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This Court should reject the State's request for relief in light of the district court's determination, after a nine-day trial and based on extensive findings of fact, see Pet. App. A at 3-100, that Texas Senate Bill 14 (S.B. 14) violates Section 2 of the Voting Rights Act (VRA), 52 U.S.C. 10301, both because it was enacted with a discriminatory purpose and because it has a prohibited discriminatory result.

The court's permanent injunction prevents the potential disenfranchisement of over 600,000 registered Texas voters, a disproportionate number of whom are African-American and Hispanic. At the same time, it permits Texas to use the duly enacted voter ID procedures it relied on for a decade, including in the State's five most recent Federal general elections.[1] Those procedures will adequately serve the State's legitimate interest in fraud prevention and election integrity. *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006), does not command a different result.

**ARGUMENT**

For a stay pending appeal, this Court is required to consider four factors: (1) whether the stay applicant has made a "strong showing" that it 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

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[1] Notwithstanding its passage in 2011, S.B. 14 did not take effect until 2013 and has never been enforced in a federal general election in Texas. Rather, it has only been in force statewide for three low-participation elections in which voter turnout ranged from 1.48% (May 2014 Democratic Party Runoff Election) to 9.98% (March 2014 Republican Party Primary Election). See http://www.sos.state.tx.us/elections/historical/70-92.shtml.

in the proceedings; and (4) where the public interest lies. *Nken* v. *Holder*, 556 U.S. 418, 425-426, 434 (2009). A stay applicant "bears the burden of showing that the circumstances justify an exercise of [judicial] discretion." *Id.* at 434; see also *Villas at Parkside Partners* v. *City of Farmers Branch*, 726 F.3d 524, 528 (5th Cir. 2013) (en banc) (permanent injunction reviewed for abuse of discretion). In this case, Texas has not met its burden with regard to any of the four factors.

*A. Texas Has Not Shown A Strong Likelihood Of Success On The Merits*

A stay applicant must make a "strong showing" of likelihood of success; "more than a mere possibility of relief is required." *Nken*, 556 U.S. at 434-435. Under the applicable standard of review on appeal in Section 2 cases, Texas cannot meet that burden. This Court has recognized that the ultimate finding of a Section 2 violation, whether based on intent or a discriminatory result, is reviewed for clear error. See *United States* v. *Brown*, 561 F.3d 420, 432 (5th Cir. 2009).

The district court's finding of a Section 2 violation rests on multiple credibility assessments and a series of factual findings laid out in great detail. Although Texas's 42-page filing adopts its preferred view of the record, the Court is not free to disregard the findings below. Moreover, the State's legal arguments regarding the district court's Section 2 determinations rest on flawed premises.

*1. The Supreme Court's Decision in* Crawford *Does Not Insulate Voter ID Laws From Section 2 Of The VRA*

*Crawford* v. *Marion County Elections Board*, 553 U.S. 181 (2008), presented only a facial challenge to Indiana's photo ID law under the Fourteenth Amendment; it did not involve statutory claims of racial discrimination under Section 2 of the VRA or any other allegations that the law had a racially discriminatory purpose. *Crawford* also addressed only Indiana's photo ID law, which differs in material respects from S.B. 14 and applies in a state with a different geography, different demographics, different history, and different political reality than Texas. Yet, Section 2 demands that district courts perform "an intensely local appraisal of the design and impact of the contested electoral mechanism." *Thornburg* v. *Gingles*, 478 U.S. 30, 79 (1986) (internal quotation marks omitted). Thus, *Crawford* is of only limited utility in analyzing Texas's law under Section 2 because *Crawford* applied a different legal standard to a less stringent law than the one Texas seeks to reinstate here.

In particular, *Crawford*'s acceptance of Indiana's asserted justifications for its photo ID law as "sufficient" had to do with the facial constitutional challenge plaintiffs raised, as well as their failure to present sufficient evidence. By contrast, the Section 2 inquiry and factual record developed in this case, much of which was undisputed, is far different. The district court here examined whether passage of S.B. 14 was in fact motivated by an intent to discriminate against minority voters and whether the law produced an impermissible discriminatory result. Contrary to

the State's assertion, *Crawford* does not bar courts from finding, as the district court did here, that the ostensible justifications for a voter ID law are tenuous in light of the substantial and disproportionate burdens the law places on minority voters who bear the effects of past and present racial discrimination.

The United States does not question a State's legitimate interest in protecting against voter fraud and ensuring the integrity of its elections. But States may not enact racially discriminatory laws in violation of Section 2 merely by invoking that interest. Rather, when presented with evidence of a challenged voting practice's disproportionate and discriminatory result on minority voters, a court evaluating a Section 2 claim must assess the State's asserted justifications as part of its totality of circumstances analysis. See *LULAC* v. *Clements*, 99 F.2d 831, 869-871 (5th Cir. 1993) (en banc).

*2. S.B. 14 Was Enacted With A Racially Discriminatory Purpose*

The Supreme Court long ago confirmed that an election law enacted or maintained for racially discriminatory purposes cannot survive simply because the law might otherwise satisfy other Fourteenth Amendment standards. See *Hunter* v. *Underwood*, 471 U.S. 222, 233 (1985).

The State challenges the district court's finding that the Texas Legislature enacted S.B. 14 at least in part because of its detrimental effect on minority voters. But Texas has not shown that the court clearly erred in its examination of relevant

factors supporting an inference of discriminatory intent. See *Brown*, 561 F.3d at 433; *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-268 (1977). Indeed, it ignores the "great weight" the court gave to expert findings that the "combination" of "demographic trends and polarized voting patterns" gave the Texas Legislature and Governor a powerful incentive to "gain partisan advantage by suppressing" the "votes of African-Americans and Latinos." Pet. App. A at 128; accord Pet. App. A at 40,48. Cf. *LULAC* v. *Perry*, 548 U.S. 399, 438-442 (2006) (Texas Legislature's "troubling blend of politics and race" in response to "growing" minority participation was suspect). Texas concedes that the district court could properly enjoin S.B. 14 based upon a finding that S.B. 14 intentionally discriminates against the State's minority voters.

*3. The District Court Properly Applied Section 2's Results Test*

Texas argues the court erred in finding a Section 2 violation absent proof it would be impossible for any Texan to obtain photo ID. But under Section 2(b), a discriminatory result is established where, "based on the totality of circumstances," minority voters have "less opportunity" relative to other voters to participate in the political process and elect candidates of their choice. 52 U.S.C. 10301(b). Section 2 thus does not require showing a complete denial of the right to vote.

Texas also argues that the methods plaintiffs' experts used to determine the number and race of registered Texas voters who lack an acceptable form of photo

ID are unreliable. Yet, Texas disregards the district court's detailed findings that those experts used scientifically valid methods and that the results of those methods reinforced each other and were uncontested by the State's own expert. Pet. App. 50-59. Nor did the district court find that S.B. 14 violates Section 2 simply because of its disparate impact. Rather, the court employed a fact-based, totality-of-circumstances analysis to determine that S.B. 14 "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed" by minority voters relative to Anglo voters. *Gingles*, 478 U.S. at 47; Pet App. A at 118-126.

*B. Texas Has Not Shown Irreparable Injury*

The district court's permanent injunction restores voter ID procedures that the State itself enacted and under which its asserted interests will be adequately served. Thus, the State's argument essentially collapses into the claim that complying with the court's injunction is irreparable harm because it enjoins a duly enacted statute. To be sure, a state's inability to enforce a *lawful* statute can constitute irreparable harm. See *Voting for America*, 488 F. App'x at 904. As we have already explained, Texas has not made a strong showing that the court erred in its final Section 2 determination. Moreover, the district court's finding that in-person voter fraud is rare, combined with its reinstatement of Texas' prior voter ID law, foreclose the possibility of irreparable harm. At most, then, Texas has shown

some remote chance of a harm, but "[s]imply showing some possibility of irreparable injury fails to satisfy the second factor." *Nken*, 556 U.S. at 434-435.

Texas further argues that the district court's order will inject confusion into the upcoming election because poll worker training is already underway. But training poll workers on the State's own prior practices cannot constitute irreparable harm. As for any voter confusion, each registered Texas voter was issued a registration certificate upon approval of his or her registration application; thus, all registered voters already possess sufficient identification to cast an in-person ballot under the preexisting practice. In any event, registered voters who show up at the polls with only a form of S.B. 14 photo ID can, consistent with prior practice, cast a regular ballot.[2]

*C. The Balance Of Harms And The Public Interest Weigh Against A Stay*

The absence of irreparable harm to the State stands in stark contrast to the substantial injury that will result if this Court reinstates S.B. 14. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964). Indeed, the Supreme Court has long described the right to vote as "preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886).

[2] Such voters would be required to execute an affidavit stating they do not have their voter registration certificate and to present their S.B. 14 photo ID, which qualifies as an acceptable alternate form of identification under preexisting practice.

Under the facts of this case, over 600,000 registered Texas voters face being denied their right to cast a ballot that will be counted.

The public interest also weighs against granting a stay. Both this Court and the Supreme Court have recognized that the "injury to the other parties" and "public interest" factors "merge when the Government is the opposing party." *United States* v. *Transocean Deepwater Drilling, Inc.*, 537 F. App'x 358, 364 (5th Cir. 2013) (quoting *Nken*, 556 U.S. at 435), as it does here. The district court's injunction ensures no qualified voter is turned away from the polls simply because of his or her inability to comply with S.B. 14's strict requirements, while also allowing those voters who arrive to the polls with only S.B. 14 photo ID to cast a regular ballot. In addition, the court's permanent injunction ensures the State's elections are not administered under a racially discriminatory law.

*D.* Purcell *Does Not Require That This Court Issue Emergency Relief*

Texas places heavy emphasis on the Supreme Court's per curiam opinion in *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006) (per curiam). But nothing in that decision requires a stay here.

In *Purcell*, the district court declined to issue a preliminary injunction prohibiting Arizona from imposing its recently enacted voter-identification law. Despite the district court's conclusion that it could not "say that at this stage" the plaintiffs had "shown a strong likelihood" of success on the merits, 549 U.S. at 3, a

two-judge motions panel of the Ninth Circuit nonetheless issued an "interlocutory injunction," *id.* at 2. In deciding whether to vacate the stay, the Supreme Court recognized that although "[a] State indisputably has a compelling interest in preserving the integrity of its election process," plaintiffs likewise have a "strong interest in exercising the fundamental political right to vote." *Id.* at 4. Thus, the Court instructed that the "possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs' challenges." *Ibid.*

The Supreme Court's decision to vacate the Ninth Circuit's interlocutory relief reiterated that appellate courts must "give deference to the discretion of the [d]istrict [c]ourt" where there is no showing that its rulings and findings are incorrect. 549 U.S. at 7-8. And it emphasized that its decision – which restored the district court's initial decision – responded to both "the imminence of the election and the inadequate time to resolve the factual disputes," which the Court described as "hotly contested." *Id.* at 5-6.

Thus, *Purcell* does not stand for the proposition that a State is never required to modify governing procedures for a quickly approaching election. Indeed, the Supreme Court's statements regarding the importance of the exercise of the right to vote and ensuring qualified voters are not turned away at the polls counsel against such an expansive reading of *Purcell*. Rather, *Purcell* is more properly understood

as requiring appellate courts to weigh the risk of voter confusion in light of the state of the record and the district court's assessment regarding the balance of harms. See *Frank* v. *Walker*, No. 14A352 (Oct. 9, 2014) (staying implementation of a photo voter ID law that the district court in Wisconsin determined violated Section 2 and that the district court here found less restrictive than Texas's law).

This case differs materially from *Purcell*. First, the district court made detailed findings and conclusions issued after a lengthy and extensive trial on the merits. And the court issued a permanent injunction. For voters to again be subject to S.B. 14, the State must show on appeal that the court clearly erred in determining S.B. 14 violates Section 2 both because it has a racially discriminatory purpose and prohibited discriminatory result. Second, the risk of voter confusion in this case cuts against permitting Texas to reinstate S.B. 14. The court's detailed findings make clear that voter education regarding S.B. 14 has been "woefully lacking," Pet. App. A at 20, and that registered minority voters have been and would be turned away from the polls. Contrary to Texas' assertion, the court's injunction here will in fact *reduce* voter confusion. The court's order simply requires Texas to reinstate procedures it had itself imposed for ten years preceding S.B. 14's implementation and that applied in all recent Federal general elections.

## CONCLUSION

The emergency application for a stay pending appeal should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on October 12, 2014, in accordance with this Court's order, I caused the foregoing response to be filed by electronic mail with the Clerk. At the same time, all case participants were served by electronic mail.

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney

## CERTIFICATE OF COMPLIANCE

I certify that the attached response:

(1) complies with the page limitation of Federal Rule of Appellate Procedure 27(d)(2) and further complies with this Court's order dated October 11, 2014;

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

s/ Erin H. Flynn
ERIN H. FLYNN
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Date: October 12, 2014