IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-41127

MARC VEASEY, *et al.*,

Plaintiffs-Appellees

v.

GREG ABBOTT, in his Official Capacity as Governor of Texas, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

OPPOSITION OF THE UNITED STATES TO APPELLANTS' MOTION TO STAY THE MANDATE PENDING A PETITION FOR CERTIORARI

VANITA GUPTA
Principal Deputy Assistant
Attorney General

DIANA K. FLYNN
ERIN H. FLYNN
CHRISTINE A. MONTA
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-2195

This Court should deny appellants' motion to stay the mandate pending a petition for certiorari and issue the mandate forthwith. As explained below, the State has failed to show "that the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A).

RELEVANT BACKGROUND

1. Section 2 of the Voting Rights Act (VRA) imposes a "permanent, nationwide ban on racial discrimination in voting." *Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612, 2631 (2013). It prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement" of the right to vote "on account of race or color." 52 U.S.C. 10301(a). The terms "vote" and "voting" encompass "all action necessary to make a vote effective," including "casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast." 52 U.S.C. 10310(c)(1). In 1982, Congress amended Section 2 to make clear that a statutory violation can be established by showing discriminatory intent, a discriminatory result, or both. See *Thornburg* v. *Gingles*, 478 U.S. 30, 34-37, 43-45 & nn.8-9 (1986); 52 U.S.C. 10301(a) and (b); S. Rep. No. 417, 97th Cong., 2d Sess. (1982) (Senate Report).

To establish a discriminatory result under Section 2, a plaintiff must show that, "based on the totality of circumstances," a challenged voting practice results in members of a protected class having "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(b). The "essence" of a Section 2 results claim is that a challenged practice "interacts with social and historical conditions" linked to race discrimination "to cause an inequality in the [electoral] opportunities enjoyed by [minority] and white voters." *Gingles*, 478 U.S. at 47.

Section 2 requires an "intensely local appraisal of the design and impact of the contested electoral mechanisms" in light of a jurisdiction's "past and present reality." *Gingles*, 478 U.S. at 78-79 (citations omitted). To that end, courts evaluating the "totality of circumstances" rely on a non-exhaustive list of objective factors to examine social, historical, and political conditions within the jurisdiction. See Senate Report 28-29 (delineating "typical" factors); *LULAC* v. *Perry*, 548 U.S. 399, 426 (2006); *Gingles*, 478 U.S. at 44-45, 79; *Mississippi State Chapter, Operation PUSH, Inc.* v. *Mabus*, 932 F.2d 400, 405-406 (5th Cir. 1991).

2. a. SB14 generally requires in-person voters to present one of six specified government-issued photo ID. For voters who lack qualifying ID, Texas makes Election Identification Certificates (EIC) available to individuals who travel to a Texas Department of Public Safety office and present designated proof of citizenship and identity. Among voters who lack SB14 ID, the documentation and eligibility requirements for obtaining an EIC, the onerous distances to ID-issuing locations that are often inaccessible by public transit, and the lack of SB14-specific

voter education disproportionately burden African Americans and Hispanics. See *Veasey* v. *Perry*, 71 F. Supp. 3d 627, 641-645, 664-676 (S.D. Tex. 2014).

b. From May 2011 until June 2013, Texas was unable to enforce SB14 under Section 5 of the VRA, 52 U.S.C. 10304, due to its failure to show that the law had neither a discriminatory purpose nor a discriminatory effect. See *Texas* v. *Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012), vacated and remanded on other grounds, 133 S. Ct. 2886 (2013). In June 2013, the Supreme Court decided *Shelby County* v. *Holder*, *supra*, holding that Section 4(b) of the VRA could no longer serve as a basis to impose Section 5 preclearance. Within hours of the *Shelby County* decision, Texas announced its intent to enforce SB14 as enacted.

The United States and private plaintiffs filed separate challenges to SB14, each raising claims under Section 2; the cases were consolidated and placed on an expedited schedule. See *Veasey*, 71 F. Supp. 3d at 632-633 & n.3; ROA.97550-97564. Pending trial, Texas enforced SB14 statewide in three low-participation elections. See Texas Sec'y of State, *Turnout and Voter Registration Figures* (1970-current), available at http://tinyurl.com/68pz4x (data for Texas's November 2013, March 2014, and May 2014 elections).

After an expedited trial, the district court held, *inter alia*, that SB14 violated Section 2 because it was enacted in part with a discriminatory purpose and because SB14 has a discriminatory result. See *Veasey*, 71 F. Supp. 3d at 694-703. As to

SB14's discriminatory result, the court found that, of the over 600,000 registered voters who lack a form of SB14 ID, a highly disproportionate percentage are African American or Hispanic. See *id.* at 659-663. The court further found that, among affected voters, minority voters face greater obstacles to obtaining qualifying ID. See *id.* at 664-667. Upon examining the "totality of circumstances," the court held that SB14 violates Section 2 because it results in less opportunity for minority voters to participate in the political process relative to other voters. See *id.* at 694-698. In order to remedy the Section 2 violation, including SB14's discriminatory purpose, the court enjoined Texas from enforcing SB14 and ordered Texas to reinstate its preexisting voter-ID law. See *id.* at 707.

c. Texas sought an emergency stay of the district court's judgment pending appeal. With only six days to the start of early voting for the November 2014 general election, this Court granted the stay "[b]ased primarily on the extremely fast-approaching election date." *Veasey* v. *Perry*, 769 F.3d 890, 892 (5th Cir. 2014). With a stay order in effect, this Court expedited the merits appeal in light of future scheduled elections. See Order, No. 14-41127 (5th Cir. Dec. 10, 2014).

A unanimous panel of this Court affirmed that SB14 has a discriminatory result. *Veasey* v. *Abbott*, No. 14-41127, 2015 WL 4645642, at *1, *10-17 (Aug. 5, 2015) (Op. *__). The panel looked to Section 2's text and the Supreme Court's decision in *Thornburg* v. *Gingles*, *supra*, to frame the relevant inquiry: whether

SB14 interacts with relevant social and historical conditions to cause an inequality in the opportunities enjoyed by minority voters relative to other voters. Op. *10.

The panel reviewed the district court's largely undisputed findings regarding the "stark" racial disparities in SB14 ID-possession rates, the disproportionate and material burdens the law places on minority voters who must obtain such ID, and the ways in which SB14 interacts with social, political, and historical conditions linked to race discrimination to result in less opportunity for minority voters to participate in the political process relative to other voters. Op. *11-17. The panel held that the district court did not clearly err in finding that SB14 has a prohibited discriminatory result. Op. *17. The panel vacated the district court's finding that SB14 has a discriminatory purpose, explaining that the court had relied too heavily on certain evidence, and remanded on that issue and remedy. Op *5-9, *20-22.

d. Following the panel's decision, the United States and private plaintiffs filed motions seeking a limited remand in order to allow the district court, pending issuance of the mandate and further proceedings below, to enter interim relief in time for Texas's November 3, 2015, statewide elections. Texas opposed the motions, making clear both its refusal to offer any interim relief to affected voters and its intent to enforce SB14 for as long as possible. On the same day, Texas filed a petition for rehearing en banc and this motion for a stay of the mandate pending a petition for certiorari.

ARGUMENT

THIS COURT SHOULD DENY APPELLANTS' MOTION TO STAY THE MANDATE PENDING A PETITION FOR CERTIORARI

A party moving for a stay of the mandate pending a petition for certiorari must show that the petition "would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(2). "[W]ell-established standards" govern such relief: there must be a "reasonable probability" that four members of the Supreme Court "would consider the underlying issue sufficiently meritorious for the grant of certiorari"; there must be "a significant possibility of reversal of the lower court's decision"; and there must be "a likelihood that irreparable harm will result if that decision is not stayed." *Baldwin* v. *Maggio*, 715 F.2d 152, 153 (5th Cir. 1983) (citation omitted); see *Curry* v. *Baker*, 479 U.S. 1301, 1301 (1986) (Powell, J., in chambers). Texas cannot meet its burden here.

A. Texas Raises No "Substantial Question" Meriting Certiorari Review

Texas cannot show a "substantial question," the first requirement for issuance of a stay. The panel decision does not conflict with the Supreme Court's decision in *Crawford* v. *Marion County Election Board*, 553 U.S. 181 (2008), or with the decisions of other federal courts of appeals that have applied Section 2 in this context. Indeed, the fact-intensive nature of the Section 2 inquiry and the interlocutory posture of this case counsel against the grant of any petition for certiorari. In the unlikely event the Supreme Court grants certiorari to address

Section 2's application to States' attempts to enact increasingly restrictive and discriminatory photo-ID laws, there is no significant possibility of reversal based on the extensive record developed below, most of which Texas did not contest.

1. The Panel Decision Does Not Conflict With Supreme Court Precedent Or Expand Liability Under Section 2

a. Texas argues that the panel's decision directly conflicts with *Crawford* v. *Marion County Election Board*, *supra*. Tex. Mot. 15. But *Crawford* was rendered under a different legal standard and entirely outside of the Section 2 context. The *Crawford* decision does not preclude a finding, weighed as part of Section 2's totality-of-circumstances analysis, that the policies underlying SB14 are tenuous.

Crawford held that Indiana's legitimate interests in fraud prevention and electoral integrity were sufficient to defeat a constitutional challenge to its photo-ID law. See 553 U.S. at 189, 203. But *Crawford*'s acceptance of Indiana's asserted justifications came in the context of a facial challenge, as well as the absence of a strong evidentiary record. See *id.* at 187-188, 199-203. Though *Crawford* upheld Indiana's law, it rejected the view that voter-ID laws are per se constitutional and left the door open to statutory and as-applied constitutional challenges. See 553 U.S. at 200-204.[1]

[1] In *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), the Court rejected a constitutional challenge to an Indiana county's use of multi-member districts. Two years later, in *White* v. *Regester*, 412 U.S. 755, 765-770 (1973), the Court struck down the use of such districts in two Texas counties because they caused unequal participation opportunities for minority voters. The (continued…)

Unlike in *Crawford*, plaintiffs here challenged Texas's photo-ID law under Section 2 of the VRA. Consistent with Section 2's text, Supreme Court precedent, and this Court's decisions, plaintiffs developed an extensive record that showed how SB14's specific features interact with social and historical conditions tied to race to result in unequal participation opportunities for African-American and Hispanic voters relative to other voters in Texas. Given the well-settled statutory standard, the panel properly recognized that the district court, when presented with evidence of SB14's disproportionate and discriminatory effect on minority voters, had to assess, as part of the totality of circumstances, whether the means Texas used to advance its interests justified SB14's discriminatory result. Op. *16. The panel accepted Texas's interests as legitimate under *Crawford*, but concluded that the district court did not err in relying on the poor fit between Texas's stated goals and the law it enacted to determine that SB14 violates Section 2. Op. *16-17.

The panel's reliance on the district court's tenuousness finding follows this Court's Section 2 analysis in *LULAC, Council No. 4434* v. *Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc). *Clements* stated that even interests deemed legitimate as a matter of law do not preclude Section 2 liability. See *id.* at 869-871. Rather, a

---

(…continued)
Supreme Court applied the same legal analysis, but concluded based on the facts of each case and the social and historical conditions linked to race discrimination in each jurisdiction, that the practice was valid in Indiana but invalid in Texas. Here, *Crawford* upheld Indiana's law, but did so in the context of a facial attack that raised no race-based claims. But even if *Crawford* were rendered in the Section 2 context, it would not dictate a victory for Texas.

State's interest in maintaining a challenged practice must be weighed among the totality of circumstances to determine whether a Section 2 violation exists. *Ibid.*

b. In an attempt to show that the panel expanded liability under Section 2, Texas argues that the panel found liability "without evidence that SB14 caused any disparate reduction in minority registration or turnout." Tex. Mot. 8. But Section 2 imposes no such prerequisite to a finding of liability. Texas's proffered standard conflicts with Section 2's text, and finds no support in the case law. Op. *11 n.21.

By its terms, Section 2 requires plaintiffs to show only that, as a result of a challenged practice, minority voters have "less opportunity" to participate relative to other voters, not that they have "no" such opportunity. 52 U.S.C. 10301(b); see 52 U.S.C. 10301(a) (prohibiting a "denial or abridgement" of voting rights); Senate Report 30 (plaintiffs must show only that the law "result[s] in the denial of equal access to any phase of the electoral process for minority group members"). That overall turnout could theoretically increase despite SB14 does not negate the fact that SB14 provides minority voters with less opportunity to cast a regular ballot relative to other voters because of the increased rates at which they lack SB14 ID and the disproportionate and material burdens they face in obtaining such ID Although decreased participation rates can demonstrate a discriminatory result, see, *e.g.*, *Operation PUSH*, 932 F.2d at 402-405, the VRA does not *require* plaintiffs to endure a discriminatory practice for multiple elections in order to show

any further effect on already depressed participation levels. See 52 U.S.C. 10308(d) (authorizing "preventive relief," including a permanent injunction, where reasonable grounds exist to believe a practice violates Section 2).

Nor is aggregate voter turnout particularly indicative of the presence or absence of a discriminatory result. Plaintiffs' experts explained that turnout will not necessarily show a photo-ID law's suppressive or deterrent effect on certain voters. ROA.43655-43657, 43981-43983. A law may prevent individuals who lack qualifying ID from casting a regular ballot, but a host of unrelated factors—such as the type of election, issues involved, candidates running, competitiveness of the election, and hours and locations of polling places—can increase or decrease aggregate turnout. ROA.99560-99564, 99587. These factors can mask a photo-ID law's effect; even where turnout increases, it could have been even higher had individuals who lacked qualifying ID been able to vote. ROA.43656.[2] Turnout also fails to capture the extraordinary efforts some voters make to obtain qualifying ID, as well as the increased resources organizations dedicate to helping affected voters. Thus, turnout will not always reflect the significant burdens a law imposes.

Regardless, plaintiffs presented expert evidence, and the district court found, that firmly rooted political science principles establish that increases to voting

[2] Indeed, Texas's expert agreed that although voter turnout in 2008 appeared to increase under Georgia's photo-ID law, that increase was a response to the historic presidential campaign; his study of turnout in 2012 suggested that the same law resulted in across-the-board suppression of voter turnout, with Hispanics impacted most severely. See *Veasey*, 71 F. Supp. 3d at 655.

costs, both monetary and non-monetary, decrease turnout. See *Veasey*, 71 F. Supp. 3d at 665-666. Texas's expert did not contest this principle (ROA.100883-100900), and the panel properly accepted the district court's finding. Op. *16.

Yet Texas argues that Section 2 plaintiffs must show that a challenged law "reduces voter turnout or registration disproportionately because of race" (Tex. Mot. 9), quoting *Clements* in support of that prerequisite (Tex. Mot. 10). But *Clements* concerned only whether the plaintiffs in that case, relying on Texas's past discrimination and current socioeconomic disparities to support their Section 2 claim, had shown that such discrimination hindered minority participation in the political process. See 999 F.2d at 866-867. *Clements* explained that although Section 2 plaintiffs need not show "a causal nexus between socioeconomic status and depressed participation," they must prove that "participation in the political process is in fact depressed among minority citizens." *Ibid.* (citing Senate Report 29 n.114). *Clements* held that the plaintiffs had offered "no evidence" of reduced levels of voter registration or turnout among minorities, or anything "tending to show that past discrimination has affected their ability to participate in the political process." 999 F.2d at 867.

By contrast, the panel here expressly adopted the district court's finding that minority voter registration and voter turnout in Texas lag far behind that of Anglo voters. Op. *15 & n.26. Thus, plaintiffs here proved that participation in Texas's

political process "is in fact depressed among minority citizens," *Clements*, 999 F.2d at 866-867. "[S]ocioeconomic disparities and a history of discrimination, without more," do not suffice to establish a Section 2 violation, but plaintiffs here offered ample evidence to enable the "intensely local appraisal" of social and historical conditions that Section 2 demands. *Ibid.* (citations omitted). They did not have to further show that *SB14 itself* reduced aggregate voter turnout in Texas.

c. Texas also argues that the panel expanded Section 2 liability in applying the Senate Factors to determine whether SB14 has a prohibited discriminatory result. Tex. Mot. 10. But the plain language of Section 2 directs courts to look at the "totality of circumstances." 52 U.S.C. 10301(b). And *Gingles* makes clear that, in order to do so, courts should rely on the non-exhaustive list of objective Senate Factors. See *Gingles*, 478 U.S. at 43-45; Senate Report 28-30 & n.119. Thus, numerous circuit courts examining Section 2 challenges outside of the vote-dilution context have applied the Senate Factors to determine whether a challenged law interacts with relevant social, historical, and political conditions linked to racial discrimination to cause a discriminatory result.[3]

[3] See, *e.g.*, *Operation PUSH*, 932 F.2d at 405-406 (dual registration); *Ortiz* v. *City of Phila. Office of the City Comm'rs*, 28 F.3d 306, 308-310 (3d Cir. 1994) (voter-purge statute); *League of Women Voters of N.C.* v. *North Carolina*, 769 F.3d 224 (4th Cir. 2014) (same-day registration and out-of-precinct voting); *Ohio State Conf.* v. *Husted*, 768 F.3d 524, 554-555 (6th Cir.) (early voting), vacated on other grounds, No. 14-3877 (6th Cir. Oct. 1, 2014); *Gonzalez* v. *Arizona*, 677 F.3d 383, 405-406 (9th Cir. 2012) (en banc) (voter ID); *Johnson* v. *Governor of Fla.*, 405 F.3d 1214, 1227 n.26 (11th Cir. 2005) (stating courts in "vote denial" cases examine

(continued…)

The panel decision reflects the appropriate Section 2 analysis. The panel examined whether minority registered voters lack qualifying ID at disproportionate rates and face material and disproportionate burdens to obtaining such ID. The panel then applied the Senate Factors to assess whether SB14's specific features, including the onerous burdens it places on voters who lack qualifying ID, interact with social and historical conditions tied to race discrimination *to cause* unequal participation opportunities for minority voters relative to other voters. Op. *10-17.

d. Finally, Texas argues that the panel decision "threatens to invalidate a wide variety of legitimate voting laws" (Tex. Mot. 12) and raises "serious constitutional questions" (Tex. Mot. 14). Not so. The decision does not rest on "some disparity" and "nominal costs" (Tex. Mot. 13), but rather the specific ways in which SB14's restrictive photo-ID requirements act in concert with the vestiges of race discrimination in Texas to abridge minority voting rights. Op. *17.

Texas's constitutional avoidance argument rests on the mistaken premise that the panel dispensed with a showing of causation, based liability on a simple finding of a racial disparity in ID-possession rates, allowed liability based purely on socioeconomic disparities and historical discrimination, and effectively precluded States from taking steps to protect election integrity. But the panel

(…continued)
relevant factors); cf. *Frank*, 768 F.3d at 752 (voter ID) (finding the *Gingles* preconditions for vote dilution claims "unhelpful in voter-qualification cases" but neither endorsing nor rejecting the applicability of the Senate Factors).

decision did none of these things. In any event, "constitutional avoidance has no role to play" where, as here, a statute's text and history are clear and there is no plausible competing interpretation. *Warger* v. *Shauers*, 135 S. Ct. 521, 529 (2014).

2. The Panel Decision Does Not Conflict With Gonzalez *Or* Frank

Texas claims that the panel decision conflicts with the decisions of the Seventh and Ninth Circuits upholding other voter-ID laws. Tex. Mot. 6-8. Yet those decisions simply reflect the fact-based nature of Section 2's results inquiry.

In *Gonzalez* v. *Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc), plaintiffs challenged Arizona's requirement that election-day voters present one form of federal, state, or local government issued photo ID, or two forms of non-photo ID. *Id.* at 388. Like the panel here, the Ninth Circuit relied on Section 2's plain text, *Gingles*, and the Senate Factors to evaluate plaintiffs' Section 2 claim. *Id.* at 405-406. Based on the scant record in *Gonzalez*—which included "no evidence" that Latinos were less likely to possess qualifying ID, "no proof of a causal relationship between Proposition 200 and any alleged discriminatory impact on Latinos," and no explanation of how the law's "requirements interact with the social and historical climate of discrimination to impact Latino voting in Arizona"—the Ninth Circuit determined that the district court did not clearly err in rejecting plaintiffs' Section 2 challenge. *Id.* at 406-407.

In arguing that the panel decision conflicts with *Gonzalez*, Texas points to *Gonzalez*'s statement that it is "crucial" for Section 2 plaintiffs to prove a "causal connection between the challenged voting practice and a prohibited discriminatory result," 677 F.3d at 405. Tex. Mot. 8.[4] Here, the panel concluded that plaintiffs had made such a showing: they established not only that African-American and Hispanic voters disproportionately lack SB14 ID and face disproportionate and material burdens in obtaining such ID, but also that SB14 interacts with social and historical conditions tied to race *to cause* unequal electoral opportunities for such voters. Op. *11-17. SB14 therefore "results in a denial or abridgement" of the right to vote "on account of race or color." 52 U.S.C. 10301(a).

As relevant here, *Frank* v. *Walker*, 768 F.3d 744 (7th Cir. 2014), reversed a judgment that Wisconsin's photo-ID law violated Section 2 of the VRA. Contrary to Texas's claim of a conflict, *Frank* used *the same two-part test* for analyzing Section 2 claims that the panel adopted in this case. Compare *id.* at 754-755, with

[4] Texas contends that *Gonzalez* also requires plaintiffs to show a "disproportionate inability to *obtain or possess* ID," as well as "a resulting disparity in voter turnout or registration." Tex. Mot. 8. But *Gonzalez* does not even discuss turnout. As we have explained, Section 2 requires no showing that the challenged practice has caused decreased turnout. In addition, to the extent Texas suggests that minority voters must be completely unable to obtain qualifying ID before a photo-ID law violates Section 2, *Gonzalez* supports no such proposition. See 677 F.3d at 405-406; cf. *Chisom* v. *Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting) (Section 2 would be violated if a county's voter registration practice "made it *more difficult* for blacks to register than whites") (emphasis added)).

Op. *10.[5] *Frank* reached a different result principally based on the record there, or lack thereof. Although the Seventh Circuit accepted that the plaintiffs had shown a statistical disparity in the rates at which minority voters and white voters possessed qualifying ID, it stated that the plaintiffs could not establish a Section 2 violation because they failed to show both that "Wisconsin makes it *needlessly* hard to get photo ID" and that "differences in economic circumstances are attributable to discrimination by Wisconsin." 768 F.3d at 752-753.

Regardless of whether the Seventh Circuit properly applied Section 2 in *Frank*, the largely undisputed facts in this case comport with the Seventh Circuit's standards. In contrast to the record developed in *Frank*, plaintiffs here produced evidence demonstrating that Texas makes it needlessly hard on minorities to get SB14 ID and that socioeconomic disparities are attributable to official racial discrimination. Op. *11-12; see *Veasey*, 71 F. Supp. 3d at 664-673. The panel squarely addressed *Frank*, stating that the district court in this case "found both historical and contemporary examples of discrimination in both employment and education by the State of Texas, and it attributes SB14's disparate impact, in part, to those effects." Op. *10 n.17; see also *Veasey*, 71 F. Supp. 3d at 682 (addressing the Seventh Circuit's decision in *Frank*).

[5] The Fourth and Sixth Circuits also use this test. See *League of Women Voters of N.C.*, 769 F.3d at 240; *Ohio State Conf.*, 768 F.3d at 554. The Supreme Court denied certiorari in *Frank.* See 135 S. Ct. 1551 (2015).

B. Texas Cannot Show "Good Cause For A Stay"

Apart from showing a "substantial question," Texas also must establish "good cause" for this Court to stay issuance of the mandate. Fed. R. App. P. 41(d)(2). Texas can make no such showing based on the facts of this case.

1. Texas primarily argues that because this case involves the legality of a state statute it should be allowed to enforce SB14 pending the filing of a petition for certiorari. Tex. Mot. 16. To be sure, a state's inability to enforce a *lawful* statute can constitute irreparable harm. See *Voting for America, Inc.* v. *Andrade*, 488 F. App'x 890, 904 (5th Cir. 2012) (recognizing as much in a preliminary injunction appeal in which Texas showed a likelihood of success on the merits). Nor do voter-ID laws per se violate the Constitution or Section 2 of the VRA.

But Texas did not enact just any voter-ID law. Texas enacted the country's strictest photo-ID requirements for in-person voting, requirements that have been found repeatedly, most recently by this Court, to discriminate against minority voters. Texas has no valid interest in continuing to violate the fundamental rights of such voters. Given the rarity of in-person voter impersonation, see *Veasey*, 71 F. Supp. 3d at 639-640, Texas will suffer no concrete harm absent a stay. Cf. *Maryland* v. *King*, 133 S. Ct. 1, 3 (2012) (Roberts, J., in chambers); *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351-1352 (1977) (Rehnquist, J., in chambers).

Nor can Texas credibly claim that the public interest suffers from its inability to enforce SB14 as opposed to a different, non-discriminatory voter-ID law. Tex. Mot. 16. The "public support" that Texas refers to did not inform voters of "(1) the low rate of in-person voter impersonation fraud, (2) the limited universe of [qualifying ID] * * *, or (3) the plight of many qualified and registered Texas voters who did not have and could not get such ID without overcoming substantial burdens." *Veasey*, 71 F. Supp. 3d at 656. Texas also mistakenly relies on *Planned Parenthood of Greater Texas Surgical Health Services* v. *Abbott*, 734 F.3d 406, 419 & n.61 (5th Cir. 2013) (citing *Nken* v. *Holder*, 556 U.S. 418 (2009)). Because the United States is the opposing party here, the injury to affected voters and the public interest merge in favor of *denying* the stay. See *Nken*, 556 U.S. at 435-436.

In addition, to the extent the district court enters interim relief for upcoming elections pending further review, Texas will suffer little, if any, harm. The interim relief that appellees requested in their motions to this Court is consistent with the panel's unanimous opinion and leaves SB14 largely intact pending a determination on discriminatory purpose and the appropriate remedy. Texas still can request that in-person voters present a form of SB14 ID; only where voters lack such ID would an interim order allow the voter to present a valid voter registration certificate for all voting-related purposes with or without execution of an affidavit. Such relief

provides a workable safe harbor to protect SB14-affected voters against further injury in upcoming statewide elections in November 2015 and March 2016.

As far as further district court proceedings, the parties still need to consult on next steps and propose a schedule to govern such proceedings. Issuance of the mandate would vest the district court with jurisdiction and enable this case to move forward without unjust delay. Like any other litigant, Texas will be able to avail itself of all available avenues of relief in such proceedings. In the unlikely event the Supreme Court grants Texas's petition, the district court, on the State's motion, could exercise its discretion to stay the case pending the Supreme Court's merits review. This is especially true where interim relief is in place to protect against any further injury to minority voting rights in upcoming elections.

2. The absence of irreparable harm to Texas stands in stark contrast to the injury that will result to voters from allowing SB14 to remain in effect as enacted. "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).

Here, over 608,000 registered voters lack a form of SB14 ID necessary to cast a regular, in-person ballot. Op. *11. Of those, close to 535,000 voters do not qualify for a disability exemption to SB14's requirements. Op. *11. Even assuming contrary to fact that all SB14-affected voters with a qualifying disability

will obtain an exemption to presenting photo ID, and that all affected voters over age 65 will vote by mail, approximately 377,000 registered voters still remain unable to cast a meaningful ballot. Statistically significant racial disparities persist among these voters. See U.S. Appellee Br. 29-31.

That thousands upon thousands of registered minority voters will be deterred from going to the polls or rendered unable to cast a ballot that will be counted is not some meaningless harm, as Texas dismissively suggests (Tex. Mot. 17). Minority voting rights were abridged under SB14 for elections in November 2013, March 2014, and May 2014, while expedited district court proceedings ensued. Despite the district court's merits determination that SB14 violates Section 2, their voting rights were again abridged for the November 2014 general election after Texas sought a stay of the judgment pending appeal. And they were again abridged in special and local elections earlier this year, including in Dallas-Fort Worth, pending this Court's merits ruling. Minority voters who lack qualifying ID are entitled to relief now, not when the Supreme Court denies Texas's petition for certiorari and the mandate issues after yet another round of elections.

CONCLUSION

This Court should deny appellants' motion to stay the mandate pending a petition for certiorari and issue the mandate forthwith.

Respectfully submitted,

VANITA GUPTA
Principal Deputy Assistant
Attorney General

s/ Erin H. Flynn
DIANA K. FLYNN
ERIN H. FLYNN
CHRISTINE A. MONTA
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-2195

CERTIFICATE OF SERVICE

I certify that on September 10, 2015, I electronically filed the foregoing OPPOSITION OF THE UNITED STATES TO APPELLANTS' MOTION TO STAY THE MANDATE PENDING A PETITION FOR CERTIORARI with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that on September 10, 2015, I served a copy of the foregoing OPPOSITION OF THE UNITED STATES TO APPELLANTS' MOTION TO STAY THE MANDATE PENDING A PETITION FOR CERTIORARI on the following counsel by certified U.S. mail, postage prepaid:

Vishal Agraharkar
Jennifer Clark
New York University
Brennan Center for Justice
161 Avenue of the Americas
New York, NY 10013-0000

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney