No. 14-41126

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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.

On Emergency Application To Stay Final Judgment Pending Appeal from the United States District Court for the Southern District of Texas, Corpus Christi, Case No. 2:13-cv-193

OPPOSITION OF THE TEXAS LEAGUE OF YOUNG VOTERS ET AL. TO EMERGENCY APPLICATION TO STAY FINAL JUDGMENT PENDING APPEAL

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On October 11, 2014, the U.S. District Court for the Southern District of Texas issued a final judgment and permanent injunction barring the enforcement of Texas Senate Bill 14 (SB 14) in any election, including the upcoming November 4, 2014 election because SB 14 "creates an unconstitutional burden on the right to vote, has an impermissible discriminatory effect against Hispanics and African-Americans, … was imposed with an unconstitutional discriminatory purpose … [and] constitutes an unconstitutional poll tax." TX App. A (Op. 2). That judgment, which was rendered after a two-week bench trial, is undeniably correct and should be immediately enforced to prevent the disfranchisement of hundreds of thousands of Texas voters, disproportionally voters of color, this November.

Texas has moved in this Court for emergency relief, but it cannot meet the high standard required to secure such relief. Although that is so for many reasons, this brief focuses on two discrete but important issues. First, this brief will address the merits of the so-called "right to vote" or *Anderson/Burdick* claim, as applied by the Supreme Court in *Crawford v. Marion County Election Board*. 533 U.S. 181 (2008), showing that Texas cannot succeed on the merits of its challenge to that claim. Second, this brief addresses the alleged "uncertainty" and "confusion" to which Texas points, and argues that *Purcell v. Gonzales* does not, as Texas insists, bar the injunction. For reasons set forth here and in the briefs of other Plaintiff-Respondents (which we adopt), Texas's motion to stay should be denied.

I. TEXAS CANNOT SHOW A LIKELIHOOD OF SUCCESS ON APPEAL

Texas has not made a "strong showing" that it is likely to succeed in challenging the district court's holding that SB 14 creates an unconstitutional burden on the right to vote, as it must to secure a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009); *see Ruiz v. Estelle (Ruiz II)*, 666 F.2d 854, 856-857 (5th Cir.1982) ("[l]ikelihood of success remains a prerequisite in the usual case").[1] Indeed, Texas's argument—that the decision below "overrul[es]" *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), *see* TX App. A (Op. 9)—misstates the legal reasoning of both the decision below and *Crawford*. The State also fails to acknowledge, much less address, the bulk of the district court's thorough analysis of a thick factual record developed over two weeks of trial, and nowhere does the State demonstrate a strong likelihood that it will be able to show the district-court's critical *factual* findings are clearly erroneous—a standard that it must meet to prevail on the merits, *United States v. Brown*, 561 F.3d 420, 432 (5th Cir. 2009).

At bottom, Texas's legal argument—crafted to circumvent the district court's reasoned findings and conclusions in their entirety—is that *Crawford* permits States to adopt photo voter ID laws under *any* circumstances, no matter the

[1] For all the reasons discussed here, and in other respondents' briefs being filed today with the Court, Texas cannot show that "'the balance of equities … [is] *heavily tilted* in [its] favor,'" such that only a demonstration of a "substantial case on the merits" is required, *Ruiz II*, 666 F.2d at 856, 857 (emphasis added). Indeed, Texas does not even suggest that standard applies.

specifics of the law and no matter the record developed demonstrating the law's slight benefits and its substantial harm. *Crawford* does no such thing.

Specifically, Texas faults the district court for "limit[ing] [*Crawford*'s] holding to the specific law—and the specific appellate record—in that case." TX Pet. 13. But *Crawford* itself prevents a categorical reading of its holding: "*[O]n the basis of the record that has been made in this litigation*, we cannot conclude that the statute imposes 'excessively burdensome requirements' on any one class of voters." 553 U.S. at 202 (plurality) (emphasis added).[2] Indeed, the plurality acknowledged that the Indiana law under review (challenged only in a facial posture) might have a heavier burden on a "limited number of persons"—including those for whom obtaining an ID would be "economic[ally]" or practically difficult—but that the thin record before it did not permit a "quantif[ication]" of "the magnitude of the burden" sufficient to support the challenge brought. *Id.* at 199-200; *see id*. at 201 ("*From this limited evidence* we do not know the magnitude of the impact [the voter ID law] will have on indigent voters in Indiana." (emphasis added)). Indeed, even the Seventh Circuit—on which Texas relies—recognized that *Crawford* is not "dispositive" of the merits because district courts necessarily

[2] Moreover, *Crawford* did not involve any race-based claims under the Voting Rights Act. It neither sanctioned state voter ID laws that have a racially discriminatory result nor laws that were enacted with a racially discriminatory purpose, both of which are the case here, and either of which independently supports the injunction entered by the district court.

"ma[ke] findings of fact different from those that the Supreme Court … had before [it]." *Frank v. Walker*, No. 14-2058, 2014 WL 4827118, at *1 (7th Cir. Sept. 26, 2014).

Accordingly, Texas's contention that the district court's decision "defies" *Crawford*, TX. Pet. at 12, 15—which is premised on the faulty notion that *Crawford* stands for blanket, isolated propositions, such as "inconveniences associated with obtaining photo identification are constitutionally permissible" or a "State's interest[] in preventing voter fraud [is] []sufficient to justify a photo-identification requirement," *id.* at 14, 15—is unavailing. As the district court explained—and as *Crawford*, relying on *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), requires—the issue is ultimately one of a case-specific, and record-specific balancing:

> ***whether the State's interests***, including detecting and preventing voter fraud, preventing non-citizen voting, and fostering public confidence in election integrity, ***justify the specific burdens*** that are imposed on voters who are required to produce one of the limited SB 14-qualified photo IDs in order to vote in person at the polls.

TX App. A (Op. 102-103) (emphasis added). Texas's argument that *Crawford* decided that balance once and for all in every case is unfounded.

Indeed, that the Court in *Crawford* accepted Indiana's claimed interests as "sufficient," 553 U.S. at 202 on the basis of that particular record, does not short-circuit this fact-intensive inquiry. The determination in *Crawford* was driven by a

failure to provide the Court with sufficient burden-related evidence to weigh against the State's claimed interests. *See id.* Thus, *Crawford* upheld Indiana's law on the basis of the record before it. *Id.* The holding does not provide States a license to insulate every assertion of a "legitimate" interest from review in light of a fulsome, factually developed record. Here, the district court received and properly credited trial evidence that demonstrated overwhelmingly that hundreds of thousands of registered voters would no longer be able to vote or would encounter significant obstacles in order to vote due to SB 14. TX App. A (Op. 104-105). The court also examined thoroughly both the terms of SB 14 and the State's asserted interests for enacting it, *id.* 112-116, before determining that "*[t]he record in this case* does not support the legislature's specific choices in … allowing the fewest types of ID and providing no safe harbor for indigents." *Id.* 116 (emphasis added). "SB 14's restrictions go too far and do not line up with the proffered State interests." *Id.*

In brief, the district court properly made findings of fact regarding the significant burdens SB 14 imposes on particular groups of eligible voters who lack qualifying ID and properly analyzed whether the State's claimed interests in enacting a restrictive voter ID law justified those burdens.[3] Because the district court applied

[3] Texas claims that the district court "overrul[ed] *Crawford*," because the court allegedly determined that "multiple"—that is *four*, TX App. A (Op. 113)—instances of voter fraud were "insufficient evidence of voter impersonation,"

the correct legal standard and found Plaintiffs' evidence credible, Texas cannot make the likelihood-of-success showing required to justify this Court's intrusion into the ordinary processes of administration and judicial review.

Separate from its overbroad legal reading of *Crawford*, Texas improperly attempts to rewrite the factual findings, arguing that SB 14 does not, in fact, burden *anyone*. This argument ignores the overwhelming evidence developed during two weeks of trial, and the testimony of multiple affected individuals and experts. Texas incorrectly argues, for example, that Plaintiffs have not identified a single Texas voter who will be impacted by SB 14. As an initial matter, Texas's argument assumes that it must be *impossible* for an individual to obtain an ID in order for that individual to be burdened by a photo ID law—a suggestion that finds no support in *Crawford*, the law, or common sense. Moreover, this argument is contradicted by the evidence adduced, and credited by the district court, at trial. *More*

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whereas *Crawford* had required "no[ne]," *Crawford*, 553 U.S. at 194. TX Pet. 9-10. That misunderstands both decisions. As the district court acknowledged, "the State is not required to prove specific instances of fraud in order to have some interest in protecting against it." Tex App. A (Op. 113). The issue is weighing that interest against the substantial "and perhaps insurmountable" burdens associated with obtaining SB 14-compliant ID. TX App. A (Op. 93); *see also id*. 113-114. The court thus did not overrule *Crawford* in any respect, TX Pet. 9, by concluding that SB 14's "extreme limitation on the type of photo IDs that would qualify does not justify the burden that it engenders." TX App. A (Op. 113-114). Although Texas attempts to bootstrap other types of voter fraud onto its argument, TX Pet. 15, Texas points to no evidence demonstrating that SB 14 deters, and even acknowledges that SB 14 "would not prevent," such fraud, *id*.

than a dozen individuals testified that SB 14 either will deny them the right to vote or impose a substantial burden on their exercise of the right. For example:

> Imani Clark, an undergraduate at Prairie View A&M, can no longer vote with her student ID card (as she has in the past) under SB 14, does not possess SB 14-compliant ID, and faces burdens in traveling to obtain an SB 14 ID because she relies on public transportation. TX App. A (Op. 67, 77), Trial Tr. 185-186 (Day 6) (Clark).
>
> Eulalio Mendez does not have an SB 14 ID and is unable to vote in person because he does not possess a birth certificate necessary to obtain an EIC. TX App. A (Op. 75). He testified that his family's finances were so dire that they struggled to put food on the table each month and the cost of paying for a birth certificate was a burden. *Id.*
>
> Naomi Eagleton, who is over age 65, does not have an SB 14 ID or a birth certificate, and desires to vote in person because she "needs help with the logistics of casting a ballot, [and] poll workers are there to assist" when voting in person. TX App. A (Op. 108-109).

Based on this and other evidence of the burdens that SB 14 places on registered voters, the district court properly rejected Texas' speculation that individuals without a required ID simply "choose not to" have one. As the court explained: "Defendants fail to appreciate that those living in poverty may be unable to pay costs associated with obtaining SB 14 ID. The poor should not be denied the right to vote because they have 'chosen' to spend their money to feed their family, instead of spending it to obtain SB 14 ID." TX App. A (Op. 84).[4]

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[4] The district court properly rejected Texas's argument that mail-in ballots are a sufficient alternative to voting in person. TX App. A (Op. 84-86). As the district court determined, there are procedural hurdles associated with absentee voting and some voters—such as the seven individual plaintiffs who testified that they have

And although Texas argues that it took "extensive steps" to mitigate what it describes as "minor inconveniences" of obtaining SB 14-qualified ID, TX Pet. 17, the district court determined on a robust record that none of those steps mitigates the burden SB 14 imposes on affected voters. The court, for example, rejected Texas's claim that it has made EICs "easy to obtain," *id*. 18. TX App. A (Op. 105), as the costs incurred in traveling to obtain an EIC place a significant burden on voters who lack SB 14-qualified ID—particularly low-income voters, for whom the costs of travel can be prohibitive. *Id*. 76-78 ("For some communities…, the nearest permanent DPS office is between 100 and 125 miles away"), 105, 139 & n.570.

As for the mobile EIC units, the district court found that "there are too few and their schedules are too erratic to make a real difference." TX App. A (Op. 106) The district court also found that Texas's provisional ballot process does not lessen SB 14's burdens, noting that it "does nothing for voters who are not informed of the procedure, who do not have SB 14-qualified ID already available and do not have an original or certified copy of their birth certificate or other necessary proof of identity at the ready, or who do not have necessary transportation." *Id*. at 106-

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strong reservations about casting their vote by mail, *id*. 85—should not be deprived of their right to cast their ballot in person. *See id*. 107-111. The record thus amply supports the conclusion that "[e]lderly and disabled voters … should not be required to vote by mail, while most others continue to vote in person, merely to avoid the obstacles created by the State." *See id*. 111.

107. And as the district court recognized, the fact that Texas allows voters over 65 years of age to vote by mail without a photo ID simply "does not excuse the significant burdens placed on those voters by the State." *Id.* at 111.

Texas's proffer of its own version of the facts does not remotely demonstrate that the district court's fact-findings here are clearly erroneous. And the State's implicit argument that these facts simply do not matter because of *Crawford* is, for all of the reasons discussed above, wholly misplaced. In sum, the district court properly followed the tests set forth in *Anderson* and *Burdick*, and concluded that the State's stated justifications for SB 14 were not supported by the factual record and did not justify the burdens imposed by such a restrictive photo ID law.

II. *PURCELL* DOES NOT WEIGH IN FAVOR OF A STAY

Citing a specter of voter confusion, Texas argues that "the district court's judgment defies *Purcell v. Gonzales* by refusing to postpone its injunctive relief until after the November 2014 elections." TX Adv. 1. Texas is wrong.

As a threshold matter, Texas misstates the grounds upon which the Supreme Court vacated the Ninth Circuit's decision in *Purcell v. Gonzales*, 549 U.S. 1, 3 (2006). The Ninth Circuit had enjoined enforcement of Arizona's voter identification law after the district court denied plaintiffs' request for a preliminary injunction. The Ninth Circuit issued its order without the benefit of the district court's findings of fact—issued one week after the date of the injunction, and without of-

fering its own justification for enjoining the law. *Id.* The Supreme Court, vacating the order, explained that it was necessary, "as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court," and that the failure to do so constituted error. *Id.* at 5. And, by providing no reasoning of its own, the Ninth Circuit left the Supreme Court "in the position of evaluating the Court of Appeals' bare order in light of the District Court's ultimate findings." *Id.* It was the "conflicting orders" of the Ninth Circuit and the district court, in other words, that caused the "confusion" with which the Supreme Court was concerned in *Purcell*. *Id.* at 4. *Purcell* in no way bars the district court from issuing its injunction, particularly where the injunction is amply supported by factual findings—findings that are, as the Supreme Court emphasized in *Purcell*, entitled to deference. *See id.* at 5. That is particularly so given that, if a stay were issued, it would result in an unprecedented circumstance in which millions of Texas voters would cast their ballots this November under a voter ID law that the district court has found was enacted, at least in part, with the intent to discriminate against Black and Latino voters in Texas.

CONCLUSION

Texas's motion for a stay of the district court's judgment pending appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this document has been filed with the Clerk of the Court and served by email on October 12, 2014, upon counsel of record in this case.

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