IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARC VEASEY; JANE HAMILTON; SERGIO DELEON; FLOYD CARRIER; ANNA BURNS; MICHAEL MONTEZ; PENNY POPE; OSCAR ORTIZ; KOBY OZIAS; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; JOHN MELLOR-CRUMMEY; DALLAS COUNTY, TEXAS; GORDON BENJAMIN; KEN GANDY; EVELYN BRICKNER,

Plaintiffs-Appellees

v.

GREG ABBOTT, in his Official Capacity as Governor of Texas; ROLANDO PABLOS, in his Official Capacity as Texas Secretary of State; STATE OF TEXAS; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety,

Defendants-Appellants

UNITED STATES OF AMERICA,

Plaintiff-Appellee

IMANI CLARK,

Intervenor Plaintiff-Appellee

v.

STATE OF TEXAS; ROLANDO PABLOS, in his Official Capacity as Texas Secretary of State; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety,

Defendants-Appellants

TEXAS STATE CONFERENCE OF NAACP BRANCHES; MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES,

Plaintiffs-Appellees

v.

ROLANDO PABLOS, in his Official Capacity as Texas Secretary of State; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety,

Defendants-Appellants

(*See inside cover for continuation of caption*)

(*Continuation of caption*)

LENARD TAYLOR; EULALIO MENDEZ, JR.; LIONEL ESTRADA; ESTELA GARCIA ESPINOSA; MAXIMINA MARTINEZ LARA; LA UNION DEL PUEBLO ENTERO, INCORPORATED,

Plaintiffs-Appellees

v.

STATE OF TEXAS; ROLANDO PABLOS, in his Official Capacity as Texas Secretary of State; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety,

Defendants-Appellants

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

RESPONSE OF THE UNITED STATES TO PRIVATE PLAINTIFFS-APPELLEES' MOTION TO LIFT STAY

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LEGISLATIVE HISTORY:

The United States opposes private plaintiffs-appellees' motion to lift the stay pending appeal that the motions panel entered on September 5, 2017. The parties' merits briefs and oral argument before this Court only reinforce the strong likelihood that Texas will succeed in showing that the district court legally erred and abused its discretion in permanently enjoining Senate Bill 5 (S.B. 5), the State's amended photo ID law. The balance of equities and the public interest also strongly favor leaving the stay in place. Accordingly, this Court should deny the motion.

ARGUMENT

For a stay to properly issue, the motions panel had to consider four factors: (1) whether Texas made a "strong showing" of likelihood of success on the merits; (2) whether Texas would be irreparably injured absent a stay; (3) whether issuance of a stay would substantially injure other parties; and (4) where the public interest rested. See *Nken* v. *Holder*, 556 U.S. 418, 425-426, 434 (2009); *Veasey* v. *Perry*, 769 F.3d 890, 892 (5th Cir. 2014). Upon considering those factors, the motions panel properly exercised its discretion to grant the State's request for a stay of the district court's permanent injunction and further proceedings below pending appeal. See *Veasey* v. *Abbott*, 870 F.3d 387, 391-392 (5th Cir. 2017). In so doing, the motions panel also expedited the appeal in light of upcoming elections. See *id.*

at 392. The parties subsequently filed their briefs on the merits and this Court heard oral argument on December 5, 2017.

Although the decision of the motions panel is non-binding and subject to reconsideration on the merits, see *Veasey*, 870 F.3d at 392, no basis exists to disturb the stay pending a final decision on appeal. Texas has a strong likelihood of success on the merits and the balance of equities and public interest favor retaining the stay. Indeed, preserving the stay enables this Court to "bring considered judgment to bear on the matter before it" and to "fulfill [its] role in the judicial process," *Nken*, 556 U.S. at 427, while respecting the State's legitimate policy choice for a photo-ID law, see *Veasey* v. *Abbott*, 830 F.3d 216, 269 (5th Cir. 2016) (en banc), cert. denied, 137 S. Ct. 612 (2017).

A. Texas Has A Strong Likelihood Of Success On The Merits

This Court has carefully reviewed the parties' briefs and heard oral argument on the merits. The United States will not fully repeat here its explanation of how the district court legally erred and abused its discretion in evaluating the adequacy of the Legislature's chosen remedy and reinstating the non-photo ID law that Texas enforced before Senate Bill 14 (S.B. 14). Suffice it to say, Texas has made a strong showing of likelihood of success on the merits, one of the two "most critical" stay factors. *Nken*, 556 U.S. at 434. Indeed, the Texas Legislature enacted its remedy, S.B. 5, at the en banc Court's invitation, see *Veasey*, 830 F.3d

at 270-271, and that legislative remedy largely tracks the district court's interim remedy, which all parties agree cured S.B. 14's discriminatory effect for the 2016 general election in which nearly nine million Texans voted (ROA.67876-67881, 69973-69996).

In all events, under binding precedent, the district court should have deferred to the State's legislative fix absent any showing that S.B. 5 violated Section 2 of the Voting Rights Act (VRA), 52 U.S.C. 10301, or the Constitution. See, *e.g.*, *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978); *Westwego Citizens for Better Gov't* v. *City of Westwego*, 946 F.2d 1109, 1123-1124 (5th Cir. 1991); *Mississippi State Chapter, Operation PUSH, Inc.* v. *Mabus*, 932 F.2d 400, 406-407 & n.5 (5th Cir. 1991). Because the district court never found—and could not reasonably find on this record—that the Legislature's chosen remedy violates Section 2 of the VRA or the Constitution, the court should have permitted S.B. 5 to take effect as scheduled on January 1, 2018. The district court reversibly erred in failing to do so.

1. The record here compels the conclusion that Texas's amended photo ID law is valid, nondiscriminatory remedial legislation that materially alters S.B. 14 and fully cures the alleged harms related to that law's enforcement. Under S.B. 14, in-person voters had to present one of several forms of government-issued photo ID in order to cast a regular ballot. Voters who showed up to the polls without such ID could cast a provisional ballot that would be counted only if they

presented S.B. 14 ID to their county registrar within six days of the election. This Court, sitting en banc, found that, of the limited subset of registered voters who did not already possess S.B. 14 ID (*i.e.*, approximately 4.5% of registered voters), minority voters faced disproportionate and material burdens to obtaining S.B. 14 ID based on five categories of impediments. Those categories were: lack of transportation to an S.B. 14 ID-issuing location; lack of underlying documents; work schedule; disability; and lost or stolen ID. See generally *Veasey*, 830 F.3d at 225-226, 250-256.

In response to the en banc Court's invitation to adopt a legislative cure for SB14's discriminatory result, the Texas Legislature enacted S.B. 5. That law creates a broad exception to S.B. 14 that permits in-person voters who do not possess and cannot reasonably obtain S.B. 14 ID to cast a *regular ballot* upon claiming a reasonable impediment to presenting such ID, completing an accompanying declaration, and producing non-photo ID. See S.B. 5, §§ 2 and 5. Significantly, the declaration accounts for each of the five categories of impediments supported by the record evidence and identified by the en banc Court and even includes three additional categories of impediments—namely, family responsibilities, S.B. 14 ID applied for but not yet received, and illness—that go beyond the record evidence. See S.B. 5, § 2. Thus, in enacting S.B. 5, the Legislature cast a wider net than the record below demanded.

By ensuring that voters who do not possess and cannot reasonably obtain S.B. 14 ID can cast a regular ballot at the polls, S.B. 5 cures the discriminatory burden that this Court found S.B. 14 imposed on minority voters. Indeed, nothing in the pre-S.B. 5 record—and private plaintiffs adduced no evidence following S.B. 5—supports a conclusion that Texas's new photo-ID procedures impose significant and disparate burdens upon anyone. In fact, all of the evidence points to the opposite conclusion.

To date, private plaintiffs never have argued that the interim remedy that the district court imposed to eliminate S.B. 14's discriminatory effect—namely, a reasonable impediment exception—was inadequate to cure the Section 2 results violation. See Mot. 1-19; ROA.69973-69996. Nor is there evidence to support any assertion that the interim remedy imposed a discriminatory burden on any voter. Significantly, like the interim remedy, S.B. 5 allows in-person voters to cast a regular ballot at the polls even though they lack S.B. 14 ID, so long as they do two things: (1) assert that they cannot reasonably obtain S.B. 14 ID for one of the broad categories of reasons enumerated in the declaration; and (2) present an acceptable form of non-photo ID. See S.B. 5, §§ 2 and 5; ROA.67876-67878, 67881-67882. In addition to other forms of readily available non-photo ID, Texas accepts voter registration certificates, which are mailed to voters free of charge upon their initial registration and reissued to them by mail every two years. See

Tex. Elec. Code Ann. §§ 13.142, 13.144, 14.001-14.002 (West 2017); S.B. 5, § 5(b). Like the interim remedy, Texas's amended photo ID law fully excuses the requirement that in-person voters who do not possess and cannot reasonably obtain S.B. 14 ID nevertheless present such ID for their ballot to count, thereby eliminating any ongoing Section 2 results violation.

Moreover, because S.B. 5's reasonable-impediment procedure does not have a disproportionate impact on minority voters, it cannot have been enacted with an unlawful discriminatory purpose. A discriminatory-purpose claim under the Constitution or Section 2 of the VRA requires a showing of both discriminatory intent and discriminatory effect. See, *e.g.*, *Hunter* v. *Underwood*, 471 U.S. 222, 233 (1985); *Cotton* v. *Fordice*, 157 F.3d 388, 391-392 & n.9 (5th Cir. 1998). Where a law produces no disparate impact, it cannot have been enacted "*because of*" that impact. *Veasey*, 830 F.3d at 231; see also *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (stating that an official action's impact provides an "important starting point" for the purpose inquiry). Nor would any reasonable factfinder infer discriminatory intent where the Legislature, in its first regular session following the issuance of the en banc opinion, amended S.B. 14 by adopting what this Court suggested might be an "appropriate amendment[]" to cure S.B. 14's infirmities. *Veasey*, 830 F.3d at 270. Again, absent any finding that S.B. 5 was enacted for a discriminatory purpose, the

district court had no valid basis for supplanting Texas's preferred remedy with sweeping injunctive relief. Thus, the court reversibly erred in permanently enjoining S.B. 5 and reinstating Texas's pre-S.B. 14 non-photo ID system.

2. In arguing that this Court should lift the September 5, 2017, stay pending appeal, private plaintiffs all but ignore S.B. 5's reasonable impediment procedure and the en banc Court's invitation that the State adopt a legislative remedy. Instead, they argue (Mot. 2-3, 9-10, 14-15) as though Texas seeks to enforce S.B. 14 unaltered, repeatedly invoking cases like *City of Richmond* v. *United States*, 422 U.S. 358 (1975), and *Arlington Heights* for the basic proposition that an official action taken for a discriminatory purpose has no legitimacy and is entitled to no deference. See, *e.g.*, Mot. 5 (citing *City of Richmond*, 422 U.S. at 378); Mot. 9 (citing *Arlington Heights*, 429 U.S. at 265). But no one contests that a district court may act appropriately by striking down a law that purposefully discriminates on the basis of race; indeed, this Court recognized as much in its en banc opinion. See *Veasey*, 830 F.3d at 268.

That said, the mere fact that broad relief may be available where there is an intentional discrimination finding does not mean that the district court in this case properly enjoined *both* S.B. 14 *and* S.B. 5. Rather, binding precedent in the voting context makes clear that before rejecting the Legislature's chosen remedy in favor of court-ordered relief, the district court had to find that S.B. 5—and not simply

S.B. 14—violated Section 2 of the VRA or the Constitution. See *Wise*, 437 U.S. at 540; *Westwego Citizens for Better Gov't*, 946 F.2d at 1123-1124; *Operation PUSH, Inc.*, 932 F.2d at 406-407 & n.5.

That precedent does not hold that a court is permitted, much less required, to override a valid legislative remedy and permanently enjoin a new law based upon a finding of a defect in the law that it superseded. Rather, a judicial remedy must strike out all *discrimination* "root and branch," *Green* v. *County School Board*, 391 U.S. 430, 437-438 (1968), not strike down a *new law* that was enacted as a legislative remedy and has not even been challenged, let alone shown to be invalid. See ROA.69701 & n.13, 69703. Indeed, even in the redistricting context where legislatures typically preserve district cores and otherwise retain the features of the prior plan, any legislative remedy "will then be the governing law unless it, too, is challenged and found to violate the Constitution." *Wise*, 437 U.S. at 540. Private plaintiffs cite no cases to the contrary. Because the district court never found that S.B. 5 is legally invalid, and because the record does not support such a finding, see pp. 3-7, *supra*, this Court should not give effect to the district court's permanent injunction.

Having failed to identify evidence of any burden that S.B. 5 imposes on Texas voters, let alone a discriminatory burden, private plaintiffs rely on a Fourth Circuit decision examining North Carolina's reasonable impediment affidavit to

argue that S.B. 5 imposes a "lingering burden" on minority voters. Mot. 16 (quoting *North Carolina State Conf. of NAACP* v. *McCrory*, 831 F.3d 204, 219, 240 (4th Cir. 2016), cert. denied, 137 S. Ct. 1399 (2017)). In *McCrory*, which involved a challenge to omnibus voting legislation, the state legislature amended the photo-ID provision pre-trial to include a reasonable-impediment exception that permitted voters to cast a provisional ballot. See 831 F.3d at 219. After finding that the provisions of the omnibus voting law, when taken together, evinced a discriminatory purpose, the Fourth Circuit enjoined them in their entirety but split 2-1 on whether to remand the case to the district court to determine whether the amendment to the State's photo-ID requirements rendered an injunction of that provision unnecessary. See *id.* at 231-233, 239-240.

The panel majority in *McCrory* found that North Carolina's reasonable-impediment exception imposed a "lingering burden" on African-American voters in part because it permitted them to cast only a *provisional* ballot subject to challenge by any registered voter in the county. 831 F.3d at 240-241. But that holding is immaterial here where the Texas Legislature, at the invitation of the en banc Court, created a reasonable-impediment procedure by which voters can cast a *regular* ballot. See S.B. 5, § 2.

Moreover, the Fourth Circuit majority's reasoning has no application to Texas's new voter ID law. Under S.B. 5, voters face *alternative* burdens and must

either obtain an S.B. 14 ID or use the reasonable-impediment procedure in order to vote in person. See S.B. 5, § 2. Voters using the reasonable-impediment procedure bear the burdens of that procedure but are excused from the different—and on the record of this case, *higher*—burden of obtaining an S.B. 14 ID. See S.B. 5, § 2. Accordingly, voters using S.B. 5's reasonable-impediment procedure face a *lesser* burden than other voters, not a "lingering" discriminatory burden. *Veasey*, 830 F.3d at 271-272; cf. *McCrory*, 831 F.3d 240-241.

For these reasons, S.B. 5 places voters who cannot reasonably obtain an S.B. 14 ID in "the position they would have occupied in the absence of" the discrimination the district court found in S.B. 14. *United States* v. *Virginia*, 518 U.S. 515, 547 (1996); see also ROA.70239-70240. Private plaintiffs assume that, but for any discriminatory effect or purpose in S.B. 14, the Texas Legislature would not have adopted a photo-ID law at all. But the record demonstrates that, in the but-for world, Texas would have adopted a *nondiscriminatory* photo-ID law rather than *no* photo-ID law. ROA.70239-70240. Indeed, the Texas Legislature was deeply committed to adopting a photo-ID law in 2011—and when it revisited its photo-ID law with the benefit of the en banc Court's ruling earlier this year, it chose to adopt the nondiscriminatory S.B. 5 rather than abandon its photo-ID policy. ROA.70239-70240. Thus, because voters who do not possess and cannot reasonably obtain S.B. 14 ID may cast a regular ballot by satisfying S.B. 5's lesser

burdens, they occupy the same position they would have occupied absent any discriminatory effect or purpose. As such, private plaintiffs cannot defeat the State's appeal by simply invoking the district court's finding that S.B. 14 was passed in 2011 with a discriminatory purpose.

B. The Balance Of Equities And Public Interest Favor Preserving The Stay Pending Appeal

The remaining stay factors similarly favor preserving the stay pending a final decision on appeal. Apart from likelihood of success on the merits, the other "most critical" stay factor is whether the movant will be irreparably injured absent a stay. *Nken*, 556 U.S. at 434. As private plaintiffs concede (Mot. 16), that injury merges with the public interest where the State is the stay applicant. See *id.* at 435. Here, Texas and its citizens will suffer irreparable harm if the State is not permitted to enforce its chosen remedy for the upcoming 2018 election cycle. The balance of equities and substantial risk of voter confusion further counsel against disturbing the September 5, 2017, stay.

A government experiences irreparable harm whenever its duly enacted statutes are enjoined. See, *e.g.*, *Maryland* v. *King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (citing *New Motor Vehicle Bd.* v. *Orrin W. Fox. Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Private plaintiffs nonetheless seek to have this Court reinstate a district court injunction that completely removes Texas's ability to require photo ID from any voter, even though over 95% of voters

already possess a form of S.B. 14 ID and face no impediment to presenting it. See *Veasey*, 830 F.3d at 250. Private plaintiffs seek this sweeping relief despite the Legislature's enactment of S.B. 5, which provides a broad mechanism by which voters who cannot reasonably obtain S.B. 14 ID still can cast a regular ballot. Remarkably, private plaintiffs ask this Court to disregard the Legislature's legitimate policy choices without citing any evidence whatsoever that S.B. 5 prevents any voter who cannot reasonably obtain S.B. 14 ID from casting a ballot. Indeed, private plaintiffs' only claim of irreparable harm is that the district court found *S.B. 14* to be intentionally discriminatory (Mot. 9), not that S.B. 5 precludes any individual from voting.

In addition to the readily apparent harm to the State in having a duly enacted law enjoined, the public interest suffers when courts intrude unnecessarily on the legislature's province and prevent States from enforcing the will of the people through valid legislation. See *Nken*, 556 U.S. at 435. Special public interest considerations apply in the voting context, where ever-changing rules can sow voter confusion and undermine confidence in the electoral process. See *Purcell* v. *Gonzalez*, 549 U.S. 1, 4-5 (2006). Here, those special considerations further support preserving the stay pending appeal.

As an initial matter, election officials and voters in Texas are familiar with the State's photo-ID system. For over four years, since mid-2013, in-person voters

in Texas have been required to present S.B. 14 ID. And for over one year, since August 2016 and including for the November 2016 presidential election, in-person voters who do not possess and cannot reasonably obtain S.B. 14 ID have been able to cast a regular ballot under the district court's order adopting the parties' agreed-upon interim remedy. S.B. 5 expands upon that reasonable impediment exception by codifying the interim remedy's two-step procedure of executing a declaration and presenting an acceptable form of non-photo ID, removing altogether the S.B. 14 ID expiration period for voters 70 years of age and older, and increasing the availability of election identification certificates (a free form of S.B. 14 ID). See S.B. 5, §§ 1-2 and 5.

Moreover, the State is in the midst of notifying and educating voters statewide about the amended photo-ID requirements. By the end of 2017, local registrars must issue biennial voter registration renewal certificates to all registered voters in Texas. See Tex. Elec. Code Ann. §§ 14.001-14.002 (West 2017). State law mandates that those certificates notify voters of Texas's amended photo-ID requirements and the availability of a reasonable impediment procedure for voters who do not possess and cannot reasonably obtain S.B. 14 ID. See Tex. Elec. Code Ann. § 15.005(a) (West 2017); see also *Veasey*, 870 F.3d at 389 (recognizing a September 18, 2017, printer deadline for voter registration renewal certificates).

In addition to this statewide mailing, the State has publicly committed to spend $4 million over two years—above and beyond the $2.5 million that Texas expended in 2016 as part of the interim remedy—to "implement voter information and outreach strategies" across "multiple formats." ROA.69826; see also ROA.70206. And the State has promised to train county election officials, "update VoteTexas.gov and its training materials for election officials and poll workers to reflect the requirements of S.B. 5," and "continue to make EIC mobile units available" to issue photographic election identification certificates. ROA.69826; see also ROA.70206.

Despite voters' familiarity with the current photo-ID procedures and the State's comprehensive efforts to inform all Texas voters regarding S.B. 5's protections, private plaintiffs ask this Court to lift the stay pending appeal and reinstate the pre-S.B. 14 non-photo ID system that most voters last encountered during the November 2012 presidential election. In so arguing, private plaintiffs simply assert that reverting to such a system will not negatively impact voters because "even if some voters arrive at the polls mistakenly believing that they must present an SB5 ID, those voters would not be turned away." Mot. 11. But that reasoning ignores the practical reality that, if the stay is lifted, some voters who have photo ID may bring it to the polls unnecessarily in the short-term only to leave it at home in the future when that same ID is likely to be necessary.

In fact, the probable timing of this Court's merits decision counsels against lifting the stay, especially where this Court has expedited this case. Dissolving the stay likely would mean that different voter-ID requirements would apply to the 2018 primary and general elections. Notwithstanding private plaintiffs' assertions, giving temporary effect to the district court's injunction pending a final decision on appeal will confuse voters not only now but also later when this Court likely reverses the injunction and voter-ID requirements seesaw once again. For this very reason, the Supreme Court has warned that "[c]ourt orders affecting elections, *especially conflicting orders,* can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5 (emphasis added).

Texas and its voters should not have to endure the significant repercussions that will flow from an order lifting the stay pending appeal. This is especially so where private plaintiffs have not even argued—let alone offered any evidence—that in-person voters who do not possess and cannot reasonably obtain S.B. 14 ID will be unable to cast a regular ballot under S.B. 5. This critical fact, which private plaintiffs repeatedly ignore, eliminates any basis for a finding that S.B. 5 violates Section 2 of the VRA or the Constitution and, thus, any need for court-ordered relief. Because the balance of equities and the State's likelihood of success on the merits so strongly favor the issuance of a stay, this Court should decline to disturb

the motions panel's September 5, 2017, order and permit S.B. 5 to take effect as scheduled on January 1, 2018.

CONCLUSION

Private plaintiffs-appellees' motion to lift the stay should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 21, 2017, I electronically filed the foregoing RESPONSE OF THE UNITED STATES TO PRIVATE PLAINTIFFS-APPELLEES' MOTION TO LIFT STAY 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 December 21, 2017, I served a copy of the foregoing response on the following counsel by certified U.S. mail, postage prepaid:

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CERTIFICATE OF COMPLIANCE

I certify that the attached response:

(1) complies with the length limits of Federal Rule of Appellate Procedure 27 because it contains 3703 words;

(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.

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Date: December 21, 2017