No. 17-40884

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-CRUMLEY; KEN GANDY; GORDON BENJAMIN; EVELYN BRICKNER, Plaintiffs-Appellees, TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS, Intervenor Plaintiffs-Appellees,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS; ROLANDO B. 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 B. 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 B. 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.

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

v.

STATE OF TEXAS; ROLANDO B. 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, Corpus Christi Division, Nos. 2:13-cv-193, 2:13-cv-263, 2:13-cv-291, and 2:13-cv-348

PRIVATE APPELLEES' RESPONSE TO APPELLANTS' EMERGENCY MOTION TO STAY PENDING APPEAL DISTRICT COURT ORDER GRANTING PERMANENT INJUNCTION

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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INTRODUCTION

A judicial stay is an "'intrusion into the ordinary processes of administration and judicial review,' and accordingly 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citation omitted). A party seeking a stay of a court's order thus bears the burden of showing that (1) it is likely to succeed on the merits; (2) it will suffer irreparable harm absent a stay; (3) a stay will not substantially harm other parties; and (4) a stay serves the public interest. *Patino v. City of Pasadena*, 677 F. App'x 950, 951 (5th Cir. 2017). Texas does not meet these stringent standards, and has no right to this extraordinary relief.

First, there is no "emergency" here. And by claiming that there is, Texas's motion abuses this Court's emergency procedures, which are designed to be used under limited circumstances. Texas admits that it has ample time to comply with the district court's order prior to any statutory deadline for making changes in voter registration cards, and there are no imminent general elections that warrant a stay. Thus, this situation is entirely different from that which came before this Court in 2014, when the district court entered an injunction weeks before early voting was scheduled to begin in the general elections. Moreover, Texas

failed to alert the district court of this "emergency" prior to filing its motion with this Court—apparently to bypass the district court's proper role in these matters and expedite a merits appeal. These maneuvers should not be rewarded with an unsupported stay.

Second, given this Court's prior findings and Rule 52's deferential standard, Texas cannot make out a reasonable claim of likelihood of success on the merits. *See* FED. R. CIV. P. 52. This Court has already ruled that there was sufficient evidence in the record to support a finding that SB14 was enacted with discriminatory intent, even absent the evidence this Court ruled was infirm. *Veasey v. Abbott,* 830 F.3d 216, 234-43 (5th Cir. 2016) ("*Veasey II*"). The district court carefully considered the record, stripped of the infirm evidence, and its reaffirmation of its intentional discrimination finding cannot be disturbed under proper application of Rule 52—and certainly not because Texas's lawyers disagree as to what inferences should have been drawn from the record.

Similarly, Texas does not have a likelihood of success on its challenge to the district court's order enjoining SB5. Texas cannot show that the district court abused its discretion in issuing that order, nor

can it upend the district court's sound findings of fact supporting the injunction. *See Aransas Project v. Shaw*, 775 F.3d 641, 663 (5th Cir. 2014). Texas's argument that the district court erred in not deferring to the legislative judgments embodied in SB5 disregards the overarching principle that, when there is a finding of intentional discrimination, the remedy calls for invalidation of the entire statute, because it has "no legitimacy at all." *Veasey II*, 830 F.3d at 268 (quotations omitted).[1] When the discriminating jurisdiction's so-called remedy intentionally incorporates and perpetuates intentionally discriminatory choices, as was the case here, legislative deference is no longer appropriate. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 US. 252, 265-66 (1977).[2]

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[1] Texas's reliance on *Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 407 (5th Cir. 1991), for the proposition that the district court improperly required the State to prove that SB5 cured SB14's discriminatory intent, is misplaced. Mot. to Stay at 4. The excerpts from *Operation Push* upon which Texas rely deal solely with the evidence for a Section 2 *results* violation. Later in that opinion, this Court expressly discusses deference in the context of *intentional* discrimination:

> The redistricting cases do contain one exception to this rule of deference which we must apply to this case. A legislative plan cannot remedy a violation of the Voting Rights Act if the plan itself is racially motivated. A remedy for a § 2 violation must not itself grow out of a discriminatory intent.

Operation Push, 932 F.2d at 407-08 (citation omitted).

[2] Throughout its papers, Texas argues that SB5 is presumptively valid because it is patterned after the interim remedy. *See, e.g.*, Mot. to Stay at 1. This argument is

ARGUMENT

I. TEXAS'S MOTION PRESENTS NO EMERGENCY AND FLOUTS ORDINARY JUDICIAL PROCESSES

Texas makes no credible claim of an emergency or irreparable injury. Texas fails to meet its burden of proving an irreparable injury and demonstrating an emergency, *see* 5TH CIR. R. 27.3, devoting less than a page to describing its alleged "emergency." Indeed, Texas's need for emergent relief is belied by its own admission that it has time to comply with the court's order: "The district court enjoined SB14 and SB5 just seven calendar days *before* the Secretary of State's August 30, 2017 deadline to finalize language on voter-registration certificates . . . ." Appellant's Emergency Motion to Stay at 3, Doc. 00514132325 ("Mot. to Stay") (emphasis added).

The injunctions against enforcement of SB14 and SB5 present no "emergency." SB14 has not been in effect for a year, and SB5 is not due to take effect until 2018. The district court's August 23 order simply

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misplaced. First, as the district court recognized, the interim remedy was negotiated under extreme time pressures, solely as a stop-gap measure, to deal with *only* a discriminatory *results* violation. *Veasey v. Abbott,* No. 2:13-cv-193, 2017 WL 3620639, at *1 (S.D. Tex. Aug. 23, 2017). The interim remedy is irrelevant to the appropriate remedy for a discriminatory *intent* violation. *See Veasey II,* 830 F.3d at 242 (recognizing the appropriateness of distinct remedies for discriminatory purpose and results violations). Moreover, the district court held that SB5 subjects voters to disproportionate burdens that are more onerous than under the protocol of the interim remedy. *Veasey v. Abbott*, 2017 WL 3620639, **6-11.

replaces its own Interim Remedial Order with a final remedial order. There are a few local elections taking place on August 26 and September 9 for which early voting had already commenced when the district court issued its order. Although Texas did not raise concerns regarding those elections prior to the filing of this "emergency" motion, Private Plaintiffs consented to a limited stay of the August 23 order for those elections only, which was granted on August 30, 2017. *See* Briefing and Order on Texas's Advisory Regarding Upcoming Elections, Docs. 1074-1077. There is simply no credible argument that Texas cannot comply with the district court's August 23 order in upcoming elections. Indeed, last year, the interim remedy went into effect approximately three months prior to a *national* election. Reverting to a previously used protocol about the same distance in time in advance of a limited number of *non-federal, non-statewide* elections does not constitute an "emergency."[3]

[3] Contrary to Texas's assertions, *Purcell v. Gonzalez*, 549 U.S. 1 (2006), supports denial of the "emergency" motion. There, the Supreme Court stayed an *interlocutory* injunction against implementation of a new voter ID law, issued by the Court of Appeals, without explanation, only a month before a congressional election. The stay was premised on the failure of the Court of Appeals to defer to the district court. The injunction issued in this case is final and permanent. This Court has already affirmed the district court's findings as to discriminatory effect and has already found that there is sufficient evidence in the record to support a finding of discriminatory intent. There is no danger of confusion to voters, any more

Rather than presenting an emergency, Texas's motion is a blatant attempt to usurp the ordinary judicial process to expedite its desired results. On August 24, Texas filed a motion for a stay with the district court—and the very next day, filed the instant motion alleging an "emergency" that it did not even mention in its motion with the district court. The instant motion also presents new arguments not presented to the district court. Contrary to the Federal Rules of Appellate Procedure, Texas did not "show that moving first in the district court would be impracticable," or that, "a motion having been made, the district court denied the motion or failed to afford the relief requested." FED. R. APP. P. 8(a)(2)(A). Texas finally advised the district court of its September deadlines on August 28, in a reply in support of their advisory regarding upcoming elections, but without advising the district court that it considered the matter an emergency or that it has applied

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than was occasioned by Texas's insistence in implementing SB14 the day the Supreme Court issued *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), despite a federal court's judgment in the Section 5 Voting Rights Act proceedings that the law was discriminatory. *See Texas v. Holder*, 888 F. Supp. 2d 113, 144-45 (D.D.C. 2012), *vacated on other grounds*, 133 S. Ct. 2886 (2013). Returning to the status quo ante SB14 leads to a simpler process for both voters and election officials by eliminating the reasonable impediment process and applying the same straightforward rules to all voters.

for relief to this Court. Texas cannot usurp the district court's authority in this matter simply because it would prefer to expedite its appeal.[4]

II. TEXAS IS NOT LIKELY TO SUCCEED ON THE MERITS

A. The District Court Applied The Correct Standards In Determining Whether SB14 Was Enacted With A Discriminatory Purpose

In an attempt to circumvent Rule 52, Texas tries to manufacture "significant legal errors" in the district court's opinion. Mot. to Stay at 9. Relying on inapposite cases,[5] Texas argues that the district court failed to give SB14 the requisite "strong presumption of validity" that is due to "[f]acially neutral laws." *Id.* Texas's argument is merely a

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[4] The "emergency" motion filed with this Court contains other procedural faults. It did not "contain a brief account of the prior actions" of the district court to which a similar motion was submitted. 5TH CIR. R. 8.4. Nor does it "[c]ertify that the facts supporting emergency consideration of the motion are true and complete." 5TH CIR. R. 27.3.

[5] In *Dep't of Labor v. Triplett*, 494 U.S. 715 (1990), the issue was the constitutionality of a prohibition against attorneys' fee awards in claims brought under the Black Lung Benefit Act. In *Davis v. Dep't of Labor & Indus. of Wash.*, 317 U.S. 249 (1942), the issue was the constitutionality of a state workmen's compensation statute as applied to employees operating in navigable waters. In *Vacco v. Quill*, 521 U.S. 793 (1997), the Court applied a presumption of validity because New York's assisted suicide laws "neither infringe fundamental rights nor involve suspect classifications." *Id.* at 800. In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the issue was whether Georgia's death penalty law was unconstitutional, and the Court indicated that it would "not infer a discriminatory purpose" without evidence. *Id.* at 298-99. Finally, in *Miller v. Johnson*, 515 U.S. 900 (1995), the Court's discussion about presumption of good faith was in the context of the "serious intrusion on the most vital local function[]" of apportionment. *Id.* at 915. Moreover, the Court indicated that the presumption of good faith would dissipate when "a claimant makes a showing sufficient to support that allegation," as the district court found here. *Id.*

different slant on the argument—already rejected by this Court—that a heightened "clearest proof" standard should replace the *Arlington Heights* standard. *Veasey II,* 830 F.3d at 230 n.12. In fact, the stated purpose of *Arlington Heights*' delineation of circumstantial factors to prove intentional discrimination was that a discriminatory motive may hide behind legislation that "appears neutral on its face." 429 U.S. at 266.

B. The District Court Properly Evaluated The Evidence In Accordance With This Court's Decision

The purpose of the remand was limited to determining "how much the evidence [this Court] found infirm weighed in the district court's calculus." *Veasey II,* 830 F.3d at 241. Judge Ramos followed that command assiduously. Judge Ramos's decision on remand, far from being "cursory," (*see* Mot. to Stay at 3), carefully analyzes each category of evidence, indicates with precision whether the infirm facts factored into her decision, and then reweighs the evidence. *See generally Veasey v. Abbott,* 2017 WL 3620639. The district court fully complied with this Court's order, and Judge Ramos's fact-finding is entitled to the deference required by Rule 52.

C. The District Court Considered All Relevant Evidence

1. The district court did not err in failing to consider the impact of SB14 on white voters.

Texas argues that the district court improperly failed to consider that more white voters were impacted, in absolute numbers, than Black and Hispanic voters combined. Mot. to Stay at 12. This frivolous argument was rejected by this Court not only because it was made for the first time on appeal, but also in dictum because it failed in substance: "Courts have never required the gross number of affected minority voters to exceed the gross number of affected Anglo voters." *Veasey II,* 830 F.3d at 252 n.45.

2. The district court was not required to wait for legislative action before determining the legislative intent behind SB14.

Texas argues that the district court erred by not waiting to rule on the discriminatory intent behind SB14 until such time when, and if, the Texas legislature passed another voter ID bill. Mot. to Stay at 13. Nothing in this Court's opinion directed the district court to await legislative action to reweigh its discriminatory purpose finding. Indeed, this Court acknowledged that the district court could make its new findings on intent prior to the November 2016 election, with the only

limitation being that no remedy be imposed until after that election. *Veasey II*, 830 F.3d at 272.[6] None of the cases relied upon by Texas suggest otherwise.[7]

3. The district court did not rely on infirm evidence.

Texas claims that the district court "actually incorporated" infirm evidence in its opinion, because it "expressly adopts Part IV(A) of its original opinion," which relied on the expert report of Alan Lichtman, who, "in turn, relied" on infirm evidence, and that Part IV(A) also relied on statements by SB14's opponents. Mot. to Stay at 14. Texas purposefully misreads the district court's opinion. The district court carefully described the extent to which it was reaffirming the findings

[6] Texas takes out of context a single sentence from this Court's discussion of "interim relief" that the court was "to reexamine the discriminatory purpose claim in accordance with the proper legal standards we have described, bearing in mind the effect any interim legislative action taken with respect to SB14 may have." Mot. to Stay at 13 (quoting *Veasey II*, 830 F.3d at 272). Even if meant to apply to the discriminatory purpose claim, that sentence does not direct the district court to stay its hand on determining intent.

[7] In *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109 (5th Cir. 1991), this Court's discussion about giving the "first opportunity" to the government was in the context of *remedy after* a finding of Section 2 liability in a vote dilution claim. *Id.* at 1124. *Seastruck v. Burns*, 772 F.2d 143 (5th Cir. 1985), has nothing to do with deferring to the legislature on assessing liability for intentional discrimination until the legislature acts, but about general deference, notably, "absent a choice that is either unconstitutional or otherwise illegal . . . ." *Id.* at 151. *Ansell v. Green Acres Contracting Co., Inc.*, 347 F.3d 515 (3d Cir. 2003), is an employment discrimination case, which stands for the irrelevant proposition that an employer's subsequent acts may be relevant to prior intent if the acts are not remote in time.

in Part IV(A) of its prior opinion, and never incorporated all of Part IV(A). *See Veasey v. Abbott*, No. 2:13-cv-193, 2017 WL 1315593, at *4 (S.D. Tex. Apr. 10, 2017) (incorporating Part IV(A)'s findings regarding departures from normal practices; Part IV(A)(4)'s findings regarding the lack of consistency of legislative decisions with the State's alleged interest in preventing voter fraud; Part IVA(6)'s findings regarding the pretextual justifications for SB14; and Part IVA(3)'s finding regarding the questionable fiscal note attached to SB14). All of these incorporated findings, as noted by the district court, were discussed with approval by this Court. *See Veasey II*, 830 F.3d at 235-42. Finally, the district court made crystal clear that it was giving "no weight" whatsoever to any of the evidence deemed infirm by this Court, including contemporaneous statements of legislators. *Veasey v. Abbott*, 2017 WL 1315593, at *5. There is no indication that the court's decision on remand is based on any infirm evidence.

4. The district court's findings were not clearly erroneous.

Texas's merits argument relies on the flawed premise that the district court was required to revisit its original factual findings even where this Court did not find them infirm and draw inferences in Texas's favor. Texas misunderstands this Court's en banc opinion and

the clear error standard. This Court remanded the issue of intentional discrimination for the district court to assess "how much the evidence found infirm weighed in the district court's calculus." *Veasey II*, 830 F.3d at 241. If a finding of fact made by the district court did not implicate "infirm" evidence, there was no basis for the district court to deviate from its original finding and no obligation of the district court to discuss that finding at all.[8]

None of Texas's criticisms about the district court's credibility and evidentiary determinations raise valid appellate issues.

1. Texas argues that the record confirms that SB14 "was passed for its stated neutral purpose—not as a pretext to disadvantage individuals based on race." Mot. to Stay at 15. But this Court already credited significant evidence that "many rationales were given for a

[8] The bulk of Texas's argument that the district court failed to draw the inferences Texas wants is based on new theories of the facts that Texas presented to the district court for the first time after remand. Indeed, Texas repeatedly cites to its Proposed Findings of Fact submitted, not after trial, but on remand. In that submission, for the first time in the litigation, Texas offered new spins on the meaning of the legislative history of SB14, never before offered to the district court. Texas repeats that tactic now. Its shifting rationales at the remand stage of the litigation are nothing more than additional post-hoc justifications to mask discriminatory intent, and the district court rightly ignored those arguments. *See Bethune-Hill v. Va. State Bd. Of Elections*, 137 S. Ct. 788, 799 (2017) (the inquiry into legislative intent turns on "the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications the legislature in theory could have used but in reality did not").

voter identification law, which shifted as they were challenged or disproven by opponents," and "that the Legislature's race-neutral reason of ballot integrity offered by the State is pretextual." *Veasey II*, 830 F.3d at 237, 240-41.

2. Texas criticizes the district court for rejecting evidence of polls showing support of photo ID laws. Mot. to Stay at 15-16. But, as the district court explained, the polls did not address any of the specific features of SB14, the most stringent voter photo ID law in the country. *See Veasey v. Perry*, 71 F. Supp. 3d 627, 656 (S.D. Tex. 2014). Thus, the district court was justified in its conclusions about the weight of that evidence and Texas cannot establish clear error simply because it disagrees.

3. Texas argues that the district court failed to credit contemporaneous statements by SB14's supporters, which provided "legitimate reasons for rejecting various amendments." Mot. to Stay at 16. But as this Court already observed, "[i]n this day and age we rarely have legislators announcing an intent to discriminate based upon race," *Veasey II*, 830 F.3d at 235, and the district court was well within its

rights to take statements by SB14's proponents with a grain of salt in making its credibility determinations.

4. Texas argues, without support, that the district court "ignored substantial contrary evidence when it readopted its conclusion that SB14 was motivated by demographic changes." Mot. to Stay at 17. Specifically, Texas argues that the district court ignored that, as the minority population grew, "Republicans achieved greater electoral success." *Id.* That fact is not only irrelevant to the court's decision, but also misleading, in light of the recent spate of cases indicating that the Republican majority has for years intentionally gerrymandered districts so as to curtail the growing political power of Hispanics. *See Perez v. Abbott*, No. SA-11-cv-360, 2017 WL 3668115 (W.D. Tex. Aug. 24, 2017); *Perez v. Abbott*, No. SA-11-cv-00360, 2017 WL 3495922 (W.D. Tex. Aug. 15, 2017); *Perez v. Abbott*, No. SA-11-cv-360, 2017 WL 1787454 (W.D. Tex. May 2, 2017); *Perez v. Abbott*, No. SA-11-cv-00360, 2017 WL 1450121 (W.D. Tex. Apr. 20, 2017).

5. This Court has also rejected Texas's argument that the factual record does not support the notion that the deviations from normal legislative procedures were indicative of intentional

discrimination. *See* Mot. to Stay at 17-19. This Court, in fact, detailed the mountain of evidence that "SB 14 was subject to numerous and radical procedural departures that may lend credence to an inference of discriminatory intent." *Veasey II,* 830 F.3d at 238.

6. Similarly, Texas's critiques of the negative inferences drawn by the district court from the drafting history of SB14, (*see* Mot. to Stay at 19-21), were already rejected by this Court:

> The record shows that drafters and proponents of SB 14 were aware of the likely disproportionate effect of the law on minorities, and that they nonetheless passed the bill without adopting a number of proposed ameliorative measures that might have lessened this impact. . . .
>
> The bill did nothing to combat mail-in ballot fraud, although record evidence shows that the potential and reality of fraud is much greater in the mail-in ballot context than with in-person voting.

Veasey II, 830 F.3d at 236, 238-39.

In sum, nowhere does Texas argue that there was no basis for the district court—or for that matter, this Court—to draw the inferences it drew from the record evidence. At best, Texas's counsel draw their own

contrary inferences from the same evidence. This is not the substance of which a successful Rule 52 challenge is made.[9]

D. The District Court Did Not Abuse Its Discretion in Enjoining SB5

Texas does not have a probability of proving on appeal that the district court abused its discretion in enjoining SB5 because SB5 does not eliminate the intentionally discriminatory choices of SB14 and continues to impose burdens on victims of discrimination. Not only does SB5 fail to repeal SB14 in its entirety, it also fails specifically to remove or meaningfully modify any of the offending voting identification provisions of SB14 that the district court enjoined. SB5 relies upon these same discriminatory provisions to give SB5 full effect. Without those enjoined provisions, SB5 is meaningless. For that reason alone, the injunction against SB5 was proper.

Moreover, as the district court determined, in findings that cannot be overturned absent clear error, SB5 does not fully rectify either the discriminatory results or intent of SB14. Most significantly, the district

[9] Private Plaintiffs note that Texas, on an "emergency" motion for a stay, burdened this Court with a 565-page record comprised largely of its own self-serving proposed findings of fact and conclusions of law, and asked this Court to accept its say-so, without the benefit of the full trial transcript and the hundreds of exhibits that the district court scoured in arriving at its decision.

court found that SB5 did not "meaningfully expand the types of photo IDs that can qualify, even though the Court was clearly critical of Texas having the most restrictive list in the country." *Veasey v. Abbott*, 2017 WL 3620639, at *6. While SB5 permits voters to cast a ballot upon showing other IDs, as the district court found, this is "only through the use of a Declaration of Reasonable Impediment (DRI)." *Id.* The district court held that "[b]ecause those who lack SB 14 photo ID are subjected to separate voting obstacles and procedures, SB 5's methodology remains discriminatory because it imposes burdens disproportionately on Blacks and Latinos." *Id.*[10] This is precisely the reasoning adopted by the Fourth Circuit in *N.C. State Conference of NAACP v. McCrory*, when it ruled that North Carolina's amendment of its photo ID law to include a reasonable impediment process still carried the prior law's discriminatory intent. 831 F.3d 204, 240 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017). SB5 fails because it does not "place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of discrimination." *United*

[10] The few changes that SB5 made in the types of acceptable IDs were of questionable beneficial impact and may have increased the discriminatory effect. The addition of passport cards added another type of costly document not possessed, disproportionately, by Black and Latino voters.

States v. Virginia, 518 U.S. 515, 547 (1996) (quotations omitted). By its terms, SB5 does not "eliminate so far as possible the discriminatory effects of the past and . . . bar like discrimination in the future." *Id.* at 547 (quotations omitted).

The district court found that the DRI procedure deviated in material ways from the interim remedy, which it also found "was never intended to be the final remedy and it did not address the discriminatory purpose finding." *Veasey v. Abbott*, 2017 WL 3620639, *7. Relying on this Court's opinion, Judge Ramos noted that "[t]he breadth of relief available to redress a discriminatory purpose claim is greater than that for a discriminatory results claim." *Id.* at *8.

The district court found most concerning the elimination of the "Other" category as the basis for the voter's lack of SB14 ID, and particularly problematic because of SB5's enhanced criminal penalty for false statements on the DRI. The court explained: "persons untrained in the law[,] who are subjecting themselves to penalties of perjury may take a restrictive view of the listed reasons." *Id.* at *9. This could have a "chilling effect, causing qualified voters to forfeit the franchise out of fear, misunderstanding, or both." *Id.*

Texas's only answer to this is to point to a few handfuls of DRIs out of approximately 16,000 cast where voters used the "Other" box to list questionable reasons or to protest SB14, and to criticize the district court for pointing to a similar number of DRIs submitted by Private Plaintiffs showing that voters used the "Other" box for legitimate reasons.[11] Mot. to Stay at 8-9.

The district court also rejected Texas's argument that elimination of the "Other" option was necessary because Texas did not have a mechanism for rejecting votes tendered by a voter using a DRI for identification.[12] The district court ruled that:

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[11] Texas objects to the DRIs relied upon by the district court as constituting inadmissible hearsay, a curious objection coming from the party that expressly violated the district court's order (and this Court's directive) by submitting its own cherry-picked DRIs without leave to augment the record. In any event, the DRIs are not inadmissible hearsay—they are being introduced simply to show what was said, not whether what was said was true or false. Moreover, the district court did not need the DRIs submitted by Private Plaintiffs to reach its conclusion. Common sense dictates that there will undoubtedly be voters, who, for the reasons set forth by the district court—poor literacy, fear, or a bona fide reason not otherwise expressly covered—need the "Other" alternative.

[12] As the district court noted, *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012), relied upon by Texas, (Mot. to Stay at 10), does not present a comparable situation. *Veasey v. Abbott*, 2017 WL 3620639, *9. The court in that case emphasized that the DRI procedure allowed for a voter to claim any true reason whatsoever in order for his or her vote to be counted. *Id.* Also, unlike SB5, "the South Carolina voter ID law expanded the types of IDs that could be used, made getting the IDs much easier than . . . prior to the law's enactment, included a wide-open DRI process, and contained detailed provisions for educating voters and poll workers regarding all new requirements." *Id.* at *9 n.16.

> There is no legitimate reason in the record to require voters to state such impediments under penalty of perjury and no authority for accepting this as a way to render an unconstitutional requirement constitutional.
>
> Requiring a voter to address more issues than necessary under penalty of perjury and enhancing that threat by making the crime a state jail felony appear to be efforts at voter intimidation. The record reflects historical evidence of the use of many kinds of threats and intimidation against minorities at the polls—particularly having to do with threats of law enforcement and criminal penalties.

Veasey v. Abbott, 2017 WL 3620639, *9 (internal citation omitted).

The district court also rejected Texas's argument, made here, that "federal law imposes a greater penalty for perjury in connection with registering or voting in a federal election." Mot. to Stay at 10. As the district court correctly observed, the false information subject to perjury under federal law are objective facts such as name, address, and period of residence, not, as SB5 would have it, information that is subjective and may not always fit neatly in Texas's categories. *Veasey v. Abbott,* 2017 WL 3620639, *10.

The district court clearly did not abuse its discretion in finding that SB5 replaces the lack of qualified photo ID "with an overreaching affidavit threatening severe penalties for perjury," which, when coupled with "the history of voter intimidation counsels against accepting SB 5's

solution as an appropriate or complete remedy to the purposeful discrimination SB 14 represents." *Id.* Texas has no probability of success on the merits on this issue.

III. OTHER FACTORS FAVOR DENIAL OF THE MOTION

Again relying on inapposite cases,[13] Texas presses the injury to the State when its statutes are enjoined. However, the counter-argument on behalf of Private Plaintiffs is much stronger. "[R]acial discrimination is not just another competing consideration." *Arlington Heights*, 429 U.S. at 265. An intentionally discriminatory statute is entitled to no deference whatsoever.

That Texas has already spent money educating voters about the requirements of a procedure that was established prior to the ruling that SB14 was enacted with discriminatory intent does not buy Texas a perpetual license to enforce a discriminatory law. It certainly does not give Texas the right to enforce a discriminatory law that is not due to be effective until 2018.

[13] *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323 (1984), stayed an injunction against enforcement of a prohibition on fees for attorneys representing claimants for veterans' disability benefits. *Maryland v. King*, 133 S. Ct. 1 (2012), concerned a stay of judgment overturning a conviction on the grounds that the state's DNA collection statute violated the Fourth Amendment.

CONCLUSION

For the reasons set forth above, Texas's Emergency Motion to Stay should be denied.

August 31, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

1. I certify that, on August 31, 2017, this document was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit via the Court's CM/ECF document filing system.

2. I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,178 words.

3. I certify that this brief 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word using 14-point Century Schoolbook typeface.

Date: August 31, 2017

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