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-CRUMMEY; 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,

TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND; IMANI CLARK, Intervenor 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.

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; MARGARITO MARTINEZ LARA; 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 U.S. 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

REPLY IN SUPPORT OF APPELLANTS' EMERGENCY MOTION TO STAY PENDING APPEAL

I. Imminent Election Deadlines and the Threat of Irreparable Harm Justify Emergency Relief.

Plaintiffs do not dispute that imminent election deadlines are fast approaching. That justifies an expedited stay to maintain the status quo. The issue is not whether the State "cannot comply" with the district court's injunction. Resp. 5. If impossibility of compliance were the standard, courts could seldom if ever issue stays pending appeal. The issue is whether the State will suffer irreparable injury if forced to comply without the chance to seek appellate review. There is no question that it will. The district court's injunction forces the State to revert on short notice to a voter-identification system that has not been in effect for years.

1. The Secretary of State faces an internal deadline of August 30 to finalize voter-registration-card language explaining which voter-ID laws are in effect for the 2018 election cycle. Stay App. Exh. 13 at 2. Defendants informed the district court of that deadline months ago, on June 12, 2017. Docket Entry (D.E.) 1039 at 2-4. By working on an expedited basis, the Secretary of State's office could move that deadline back to September 14. Stay App. Exh. 13 at 2. But voter-registration cards must be finalized in two weeks. Training for poll workers and election officials "needs to be available immediately in order to be prepared for any election in 2017." Stay App. Exh. 14 at 2. And the State has already spent $2.5 million educating voters about the reasonable-impediment-declaration exception. The fact that "SB5 is not due to take effect until 2018," Resp. 4, does not change the need for immediate relief.

2. Local elections in Texas were already underway when the district court issued its permanent injunction. Resp. 5. The State notified the district court of pending local elections as soon as it became aware of them. D.E. 1074. Recognizing the need for immediate relief, the district court granted a partial stay, but only for those elections. D.E. 1078. The following counties will soon conduct tax elections for local school districts: Wichita County (September 26, early voting begins September 11); Hopkins County (October 6, early voting begins September 19); Nacogdoches County (October 3); and Brazos County (October 10). This confirms the need for immediate clarification on which elections laws will be in effect.[1]

3. The district court nevertheless ordered plaintiffs to respond to defendants' stay motion within the general 21-day deadline under local rules. *Id.* Under the circumstances, this effectively denies the stay motion.

II. SB5 Precludes Injunctive Relief Because It Cures Every Alleged Burden from SB14.

Private plaintiffs' argument that SB5 "fails specifically to remove or meaningfully modify any of the offending voting identification provisions of SB14" is meritless. Resp. 16. SB5 *wholly waives* SB14's photo-ID requirement for those with a reasonable impediment to obtaining SB14-compliant ID. Defendants are therefore likely to succeed on the merits, and plaintiffs face no irreparable injury from a stay.

1. Both the district court and plaintiffs refuse to even acknowledge that SB5's reasonable-impediment-declaration exception (like the interim remedy) alleviates

[1] Defendants certify that the facts supporting emergency consideration stated in this reply and the motion to stay are true and complete. 5th Cir. R. 27.3.

every single burden alleged by the 14 named plaintiff voters and their 13 voter witnesses. The State's stay motion, just like its district-court remedial briefing, attached a chart with record citations showing exactly how the seven reasonable impediments in SB5 wholly waive the photo-ID requirement for each of these 27 individuals. That same chart is again attached to this reply. The testimony from these 27 individuals formed the basis for this Court's holding that SB14 had a discriminatory effect. For that reason alone, this Court should grant the stay, as SB5 cured the discriminatory effect with a mechanism that wholly waives—and thus fundamentally modifies—SB14's photo-ID requirement.

Plaintiffs' argument that SB5 does not place them "in the position they would have occupied in the absence of discrimination," Resp. 17, is disproven by the record. The specific burdens imposed by SB14 related to difficulty in obtaining SB14-compliant ID, obtaining the documents necessary to get one, traveling to a location to obtain one, or voting absentee. *See Veasey v. Abbott*, 830 F.3d 216, 254 (5th Cir. 2016) (en banc). Without SB14, plaintiffs argued, individuals would be able to vote in person without the need to overcome specific burdens to obtain an SB14-compliant ID. SB5 puts them in exactly that position.

2. Without even acknowledging that evidence, plaintiffs focus on the "Other" box (excluded from SB5, but in the interim remedy). Tellingly, plaintiffs *do not mention any named plaintiff or witness* whose ability to vote would be affected by the lack of an "Other" box. Instead, they rely on outside-the-record declarations on which different voters, who did not provide any record evidence, checked the "Other" box.

But plaintiffs fail to address the fact that each of the 12 explanations on these declarations were either covered by one of SB5's seven enumerated reasonable impediments or were not reasonable impediments at all. *See* Mot. 7-8. Furthermore, plaintiffs now admit that those declaration are *not even evidence* that voters needed the "Other" box, because they were not offered to show "whether what was said was true or false." Resp. 19 n.11. Plaintiffs therefore defeat their own argument that "voters used the 'Other' box for legitimate reasons." *Id.* at 19.

Like the district court, plaintiffs indulge the unsubstantiated assumption that "there will undoubtedly be voters" who "need the 'Other' alternative," *id.* at 19 n.11, and those voters will "undoubtedly" be racial minorities. Plaintiffs concede that there is no such evidence, so they have to resort to calling the district court's conclusion "common sense." *Id.* That conclusion is clearly erroneous.

3. The complete dearth of evidence precludes injunctive relief against SB5 (and SB14, as modified by SB5). But the district court also erred by shifting the burden of proof to defendants. And by shifting the burden, the district court reimposed a de facto preclearance requirement—one that effectively saddled defendants with the burden of proving the absence of any burden on any voter.

Plaintiffs' own response proves the point. They argue that defendants did not adequately "answer" the district court's concern that the reasonable-impediment declaration "could have a 'chilling effect, causing qualified voters to forfeit the franchise out of fear, misunderstanding, or both.'" Resp. 18 (quoting Order (Stay App. Exh. 1) 17-18). By attacking SB5's requirement that voters execute the reasonable-

impediment declaration under penalty of perjury, plaintiffs reveal that their argument (and the district court's order) would prohibit *any* voter-identification requirement. The district court went so far as to state: "There is no legitimate reason in the record to require voters to state such impediments under penalty of perjury . . . ." Resp. 20 (quoting Order 19). In the district court's view, any penalty for perjury in voting procedures constitutes an "effort[] at voter intimidation." Order 19.

Under this reasoning, all sorts of election laws (federal and state) would be invalidated. If governments cannot enforce penalties for providing false information on an official form, then multiple existing election laws throughout the Nation are invalid—not just voter-ID laws.

4. Plaintiffs' argument that "[a]n intentionally discriminatory statute is entitled to no deference whatsoever," Resp. 21, only begs the question and highlights the district court's error in denying the Legislature an opportunity to address this Court's finding of discriminatory effect.

Without proof—from plaintiffs—that SB5 itself was motivated by an impermissible purpose, the district court should have allowed the Legislature to provide its own remedy. *Operation Push* does not support plaintiffs' argument to the contrary. Their claim that *Operation Push* distinguishes results claims from purpose claims, Resp. 3 n.1 (citing *Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 407-08 (5th Cir. 1991)), badly misreads the cited passage. At no point did this Court limit its reasoning to the type of violation being remedied. It merely recognized that if *the remedial legislation itself* had a discriminatory purpose, it could not remedy a § 2 violation: "A remedy for a § 2 violation must not itself grow out of a discriminatory

intent." 932 F.2d at 408; *see Salazar v. Buono*, 559 U.S. 700, 714-15 (2010) (plurality op.) (rejecting injunction of statute intended to remedy a law enacted for an alleged illicit purpose absent a showing that the remedial statute was itself unconstitutional).

Crucially, this Court confirmed that the burden is on *plaintiffs* to prove that remedial legislation had a discriminatory purpose. 932 F.2d at 408 ("PUSH has not succeeded in establishing that the Mississippi Legislature adopted [the remedial legislation] for a racially discriminatory purpose."). Moreover, by requiring plaintiffs to show that the remedial legislation was itself enacted for a discriminatory purpose, *Operation Push* confirms that the district court was wrong to invalidate SB5 on the specious premise that it is "is built upon the 'architecture' of SB 14." Stay App. Exh. 1 at 10 n.10.

5. Nor does *McCrory* support the district court's injunction. The Fourth Circuit's decision is distinguishable on numerous bases:

- Texas did not propose a photo-voter-ID law "on the day after . . . *Shelby County*¸" *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016);
- SB14 was not an "omnibus" election law restricting voting "in five different ways," *id.*;
- the Texas Legislature did not "request[] data on the use, by race, of a number of voting practices," *id.*;
- SB14 did not "target African Americans with almost surgical precision," *id.*, by enacting voting restrictions that the requested data showed were disproportionately used by minorities while "exempt[ing] absentee voting" based

on data showing absentee voting was disproportionately used by whites, *id.* at 230;

- SB14 was the culmination of six years of debate that took the entire 2011 legislative session from January to May, whereas North Carolina's law was "released" publicly on "July 23[, 2013,]" *id.* at 227, and signed into law less than three weeks later to "avoid in-depth scrutiny," *id.* at 228;
- the Texas House and Senate did have an "opportunity to offer [their] own amendments," *id.*; and
- the record here contains an enormous amount of "testimony as to the purpose of [the] challenged legislation" even though it was subject to "[legislative] privilege," *id.* at 229.

6. Because SB5 remedies the alleged harm underlying plaintiffs' claims, cases dealing with the remedy for discriminatory purpose when a government has *not* made an ameliorative change curing any discriminatory effect do not apply here. *Cf. Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 465-66 (1982); *City of Richmond v. United States*, 422 U.S. 358, 378 (1975); *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 437-39 (1968); *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

This Court has held that when a legislative "amendment superseded the previous provision," it "removed the discriminatory taint associated with the original version." *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998). And in *Chen v. City of Houston*, this Court cited *Cotton* "for the important point that when a plan is reenacted—as opposed to merely remaining on the books like the provision in *Hunter* [*v.*

Underwood, 471 U.S. 222 (1985)]—the state of mind of the reenacting body must also be considered." 206 F.3d 502, 521 (5th Cir. 2000).

Plaintiffs conceded below that SB5 was "remedial legislation." D.E. 1051 at 10. SB5 removes any possible discriminatory taint from SB14. Rather than rushing to beat the Legislature to the punch by ruling (erroneously) on SB14, the district court should have allowed the Legislature to provide its own remedy, and then considered the State's voter-ID law as amended.

III. Discriminatory Purpose Must Be Analyzed In Light of SB5's Reasonable-Impediment Exception.

1. This Court held last year that "should a later Legislature again address the issue of voter identification, any new law would present a new circumstance not addressed here," and "[a]ny concerns about a new bill would be the subject of a new appeal for another day." 830 F.3d at 271. That day has come, with the Texas Legislature enacting SB5's reasonable-impediment exception—which this Court suggested as an "appropriate amendment[]." *Id.* at 270; *accord id.* at 279 (Higginson, J., concurring) (reasonable-impediment exception is "[e]specially significant").

This Court's mandate required the district court "to reexamine the discriminatory purpose claim . . . *bearing in mind the effect any interim legislative action taken* with respect to SB14 may have." *Id.* at 272 (emphasis added). And this Court expressly ordered the district court to "*reevaluate* the evidence"—the "circumstantial *totality* of evidence"—to "*determine anew* whether the Legislature acted with discriminatory intent in enacting SB 14." *Id.* at 237, 243, 272 (emphases added).

Instead, the district court issued a cursory 10-page order that rubber-stamped its prior vacated opinion and completely failed to account for SB5 in assessing discriminatory purpose. Plaintiffs complain about the exhibits to defendants' stay motion, Resp. 16 n.9, but they were necessary to show the 334 pages of briefing by defendants on remand—citing the existing "current record," 830 F.3d at 271—that the district court ignored. The district court's cursory10-page order did not even cite the record. That is the opposite of "reevaluat[ing]," "determin[ing] anew," 830 F.3d at 272, and following this Court's "command assiduously," Resp. 8.

Plaintiffs' claim that defendants somehow waived arguments by presenting "new theories" on remand, Resp. 12 n.8, is doubly wrong. Defendants did not present new theories. Defendants' remand briefing relied on the existing record, and they have consistently maintained that SB14 was not passed with discriminatory purpose. Regardless, they could not have waived any arguments. This Court vacated the district court's original purpose finding and ordered it to "determine anew" the issue. There was no discriminatory-purpose judgment in place on remand. The State was not limited to relying on its prior briefing when the district court was charged with adjudicating plaintiffs' claim from scratch.

2. Like the district court, plaintiffs fail to even acknowledge the Supreme Court's repeated holdings that duly enacted legislation is entitled to a "presumption of constitutionality" and "good faith." *See* Mot. 9-10 (quoting examples). Plaintiffs

try to limit these cases to their various facts, while ignoring the presumption of constitutionality acknowledged in each. *See* Resp. 7 n.5; *id.* at 10 n.7 (same on other legal propositions).[2]

Plaintiffs accuse defendants of raising a "frivolous argument," Resp. 9, by quoting a Supreme Court opinion—which rejected a discriminatory-purpose claim against a statute where "too many [non-minorities] are affected . . . to permit the inference that the statute is but a pretext for preferring [non-minorities] over [minorities]." Mot. 10 (quoting *Feeney*). Plaintiffs then wrongly suggest that this Court rejected that argument as to discriminatory *purpose*—by invoking a portion of this Court's opinion instead addressing discriminatory "impact." 830 F.3d at 252 n.45. *Feeney* rejected a "purpose" claim, 442 U.S. at 281, and its holding forecloses a discriminatory-purpose finding here.

3. At bottom, because the Legislature enacted SB5, which relieves the burdens alleged by the 27 named-plaintiff and voter witnesses, this is the "new circumstance" of a "new appeal for another day." 830 F.3d at 271. The Texas Legislature's enactment of voter-ID laws was not a pretext for purposeful racial discrimination, and the Legislature's adoption of this Court's suggestion to enact a reasonable-impediment exception to address the results holding makes that crystal clear.

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[2] Plaintiffs also rely (Resp. 14) on Texas redistricting opinions from a divided district court—two of which were stayed by the Circuit Justice, and two of which were advisory opinions on moot claims, *see Davis v. Abbott*, 781 F.3d 207, 220 (5th Cir. 2015).

Conclusion

The Court should grant the motion for stay pending appeal.

Respectfully submitted.

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Certificate of Service

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Certificate of Compliance

I certify that, on September 1, 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.

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