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

(*See inside cover for continuation of caption*)

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

RESPONSE OF THE UNITED STATES TO PRIVATE APPELLEES' PETITION FOR INITIAL HEARING EN BANC

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(*Continuation of caption*)

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 ESPINOSA; 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

Case No. 17-40884

Marc Veasey, et al. v.
Greg Abbott, in his Official Capacity as Governor of Texas, et al.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel certifies that, in addition to the persons and entities identified in Private Appellees' Petition for Initial Hearing *En Banc* and Rehearing *En Banc* of Motions Panel's Stay Decision filed on September 8, 2017, the following listed persons as described in the fourth sentence of Rule 28.2.1 may 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.

1. Chandler, Thomas E., United States Department of Justice, Civil Rights Division, counsel for the United States as appellee;

2. Flynn, Diana K., United States Department of Justice, Civil Rights Division, counsel for the United States as appellee;

3. Friel, Gregory B., United States Department of Justice, Civil Rights Division, counsel for the United States as appellee; and

4. Gore, John M., United States Department of Justice, Civil Rights Division, counsel for the United States as appellee.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney

Date: September 18, 2017

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On September 11, 2017, this Court called for a response to private appellees' petition for initial hearing en banc. Because the petition fails to meet the stringent standards of Federal Rule of Appellate Procedure 35(a) and Fifth Circuit Rule 35.1, the petition should be denied.

STATEMENT

1. In May 2011, Texas enacted Senate Bill 14 (S.B. 14[1]), which replaced Texas's existing voter-identification (voter ID) practices with new requirements for in-person voting. The law required in-person voters to present one of five forms of preexisting photo ID and also created a new form of photo ID—the election identification certificate (EIC)—available to voters who lacked qualifying ID. Under S.B. 14, in-person voters who did not present acceptable ID could cast a provisional ballot that would be counted if the voter, within six days of the election, appeared before the county registrar and presented S.B. 14 ID or executed an affidavit attesting to a religious objection to being photographed or to the loss of S.B. 14 ID in a recent natural disaster. As enacted, S.B. 14 included no mechanism by which an in-person voter who lacked S.B. 14 ID could cast a regular ballot at the polls or a provisional ballot that necessarily would be counted.

2. As relevant here, the United States and private plaintiffs filed separate lawsuits alleging that S.B. 14's photo-ID requirements violated Section 2 of the

[1] Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws 619.

Voting Rights Act (VRA), 52 U.S.C. 10301, both because they were intentionally discriminatory and because they had a discriminatory result. See *Veasey* v. *Perry*, 71 F. Supp. 3d 627, 632, 694 n.502, 698 n.524 (S.D. Tex. 2014). After trial, the district court determined that S.B. 14 provided African-American and Hispanic voters less opportunity relative to Anglo voters to participate in the political process and elect their candidates of choice, thereby producing a discriminatory result in violation of Section 2. The court also found that the Texas Legislature had enacted S.B. 14 at least in part because of its adverse effect on minority voters. The court determined that Texas did not show that the Legislature would have enacted S.B. 14 absent that discriminatory intent. As a remedy, the court enjoined S.B. 14's photo-ID provisions and reinstated Texas's preexisting voter-ID law. See *id.* at 694-703, 707.

Texas sought an emergency stay pending appeal, which this Court granted, *Veasey* v. *Perry*, 769 F.3d 890 (5th Cir. 2014), and the Supreme Court declined to vacate, 135 S. Ct. 9 (2014). Accordingly, Texas applied S.B. 14 in federal, state, and local elections pending appeal to this Court.

3.a. A panel of this Court affirmed the district court's finding that S.B. 14 violated Section 2 of the VRA based on its discriminatory result and vacated the finding that S.B. 14 was enacted at least in part for a discriminatory purpose. The

panel remanded for further proceedings and for consideration of a remedy. See *Veasey* v. *Abbott*, 796 F.3d 487, 493, 498-513, 517-520 (5th Cir. 2015).

b. After granting rehearing en banc, this Court issued an opinion that affirmed the finding that S.B. 14 had a prohibited discriminatory result. See *Veasey* v. *Abbott*, 830 F.3d 216, 265 (5th Cir. 2016) (en banc). After identifying legal errors that rendered some of the district court's findings infirm, this Court vacated the discriminatory-purpose finding and remanded for further consideration of that claim. See *id.* at 229-243.

Given the impending November 2016 election, this Court placed on the district court the "unwelcome obligation" of devising a remedy "pending later legislative action." *Veasey* v. *Abbott*, 830 F.3d at 270 (citations omitted). This Court directed the district court to "take special care" to honor the State's policy preferences to implement a photo-ID system. *Id.* at 269. "[T]hose who have SB 14 ID must show it to vote"; thus, any remedy "must be tailored to rectify only the discriminatory effect on those voters who do not have SB 14 ID or are unable to reasonably obtain such identification." *Id.* at 271. The Court explained that "[i]n sum, the district court's immediate responsibility is to ensure the implementation of an interim remedy for SB 14's discriminatory effect that disrupts voter identification rules for the 2016 election season as little as possible, yet eliminates the Section 2 discriminatory effect violation." *Id.* at 272.

This Court invited Texas to enact a legislative remedy to S.B. 14. See *Veasey*, 830 F.3d at 269-270. The Court noted that "[b]ased on suggestions in oral argument, appropriate amendments might include a reasonable impediment * * * exception." *Id.* at 270. The Court made clear that "should a later Legislature again address the issue of voter identification, any new law would present a new circumstance not addressed here" and "concerns about a new bill would be the subject of a new appeal for another day." *Id.* at 271. As for further liability proceedings, the district court was to "reexamine the discriminatory purpose claim * * * bearing in mind the effect any interim legislative action taken with respect to SB 14 may have." *Id.* at 272.

4.a. On remand, the parties worked together to develop an interim remedy. Doc. 895.[2] Under that remedy, in-person voters who lacked S.B. 14 ID could cast a regular ballot upon presenting a state-specified non-photo-ID such as their voter registration certificate, current utility bill, or paycheck and completing and signing a reasonable-impediment declaration. In conjunction with these procedures, Texas developed a detailed voter education plan that included at least $2.5 million in funds. Texas also committed to educating voters and election officials in

[2] "Doc. ___" refers to the docket entry number and relevant pages in *Veasey* v. *Abbott*, No. 2:13-cv-193 (S.D. Tex.).

subsequent elections regarding S.B. 14's requirements and the opportunity for voters who could not reasonably obtain such ID to cast a regular ballot. Doc. 895.

The district court entered the agreed-upon interim remedy as a court order—acknowledging later that the relief "was formulated in conformity with the powers and parameters of a VRA Section 2 discriminatory 'results' claim" (Pet. App. 13)—and that remedy was used for the November 2016 election. Doc. 895.

b. When the Texas Legislature convened in 2017 for its regular session, it accepted this Court's invitation to consider a legislative remedy to cure any S.B. 14-related violations. Despite that action and the joint request of Texas and the United States to postpone further liability proceedings until the end of the legislative session (Doc. 995), the district court proceeded to reweigh the evidence of discriminatory intent. In response to the court's refusal to await anticipated legislative action (Doc. 997) and in recognition of the Legislature's primary responsibility to remedy alleged infirmities with its law, the United States voluntarily dismissed its purpose claim without prejudice pending Texas's adoption of what this Court called an "appropriate amendment[]," such as "a reasonable impediment or indigency exception." Doc. 1001, at 1-2 (brackets in original; quoting *Veasey*, 830 F.3d at 270). Upon reconsidering the record, the district court issued a 10-page opinion again finding that S.B. 14 was motivated, at least in part, by discriminatory intent. Pet. App. 39-48. The court declined to

consider any judicial remedies regarding Texas's photo-ID law until after the close of the legislative session. Doc. 1044.

c. The Texas Legislature shortly thereafter adopted a legislative remedy to cure any S.B. 14-related violations. In addition to making EIC-issuing locations more readily available, Texas Senate Bill 5 (S.B. 5[3]) codifies a reasonable-impediment procedure that largely tracks the parties' agreed-upon interim remedy. In particular, the amended law ensures that voters who do not have and cannot reasonably obtain a form of S.B. 14 ID for the broad reasons outlined under S.B. 5 can cast a regular ballot at the polls. In order to educate voters about the photo-ID requirements and the opportunity to claim a reasonable impediment to producing S.B. 14 ID, Texas committed, among other things, to providing written notice of the new requirements to all active registered voters by the end of 2017 and to spending $4 million over two years on voter information and outreach efforts. Doc. 1039, at 1-2.

d. Private appellees did not seek leave to amend their complaint to plead any claims regarding S.B. 5. Nor did they allege that S.B. 5 was enacted with a discriminatory purpose or that its reasonable-impediment procedure has a discriminatory result. Docs. 1051, 1059. Private appellees also declined the district court's express invitation to submit evidence regarding S.B. 5 (Pet. App.

[3] Act of June 1, 2017, 85th Leg., R.S., 2017 Tex. Sess. Laws, ch. 410.

14) and, thus, never adduced any evidence that Texas's new photo ID law, as amended by S.B. 5, is discriminatory in purpose or effect. The court recognized that "there is no pending claim" challenging S.B. 5 and that it was therefore "premature to try to evaluate SB 5 as the existing voter ID law in Texas." Pet. App. 20 n.9. Thus, the court never addressed whether Texas's photo-ID law, as amended by S.B. 5, violates Section 2 of the VRA or the Constitution.

Nonetheless, on August 23, 2017, the court entered a remedial order enjoining S.B. 14, enjoining S.B. 5, vacating the interim remedy, and returning Texas to its preexisting ID law that did not require photo ID. Pet. App. 12-38. Rather than defer to the State's chosen remedy absent any showing that S.B. 5 violated Section 2 or the Constitution or was otherwise invalid, the court placed the burden on Texas to show that S.B. 5 adequately cured the S.B. 14-related discriminatory-purpose and discriminatory-results violations. Pet. App. 17-20.

Even though S.B. 5 largely tracked the agreed-upon interim remedy and provided in-person voters who do not have and cannot reasonably obtain S.B. 14 ID the opportunity to cast a regular ballot upon claiming a reasonable impediment and presenting a specified form of non-photo ID, the court concluded that Texas failed to show that S.B. 5 "fully ameliorates the discriminatory purpose or result of SB 14." Pet. App. 33. Significantly, the court did not find that S.B. 5 imposes disproportionate and material burdens on minority voters that could give rise to an

independent Section 2 results violation. Nor did it find that S.B. 5 was enacted with discriminatory intent. See Pet. App. 20 n.9. Nevertheless, the court entered sweeping injunctive relief. Pet. App. 38.

ARGUMENT

En banc consideration is "not favored" and ordinarily will be ordered only where "necessary to secure or maintain uniformity of the court's decisions" or where "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). This Court has described the standards for cases warranting initial en banc consideration as "stringent." *United States* v. *Salinas Rivera*, 48 F. App'x 103 (5th Cir. 2002). Indeed, hearing en banc is an "extraordinary" procedure that imposes "a serious call on limited judicial resources." 5th Cir. R. 35.1. Because this second appeal does not warrant reconvening the en banc Court for an initial hearing, the petition should be denied.

In the first place, initial en banc hearing is not required to secure or maintain uniformity of the Court's decisions. Indeed, private appellees hardly argue as much. Rather, they ask for initial hearing en banc to ensure that the decision in this second appeal "conform[s] with this Court's *en banc* opinion." Pet. 8. But the merits panel must apply the en banc opinion as the law of the case to evaluate any claimed errors on remand related to issues this Court sitting en banc implicitly or explicitly decided. See *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d

16, 19-20 (5th Cir. 1974) (law-of-the-case rule applies to the decision of a merits panel hearing a subsequent appeal in a case earlier heard en banc); *Gene & Gene L.L.C.* v. *BioPay, L.L.C.*, 624 F.3d 698, 702 (5th Cir. 2010) (describing the rule). Indeed, adopting private appellees' argument would mean that this Court would have to reconvene en banc for each subsequent appeal in every case previously heard en banc. Surely that is not the "stringent" standard that a petitioner must satisfy for en banc consideration. Because the circumstances here do not require the full Court's attention to reconcile otherwise "irreconciliable voices" in conflicting opinions, *Point Landing, Inc.* v. *Omni Capital Int'l, Ltd.*, 795 F.2d 415, 419 (5th Cir. 1986) (en banc) (citation omitted), private appellees fail to satisfy Rule 35(a)(1)'s stringent standard for granting a hearing en banc.[4]

Nor are the questions presented here ones of "exceptional importance," Rule 35(a)(2), meriting initial hearing en banc. Rather, proper resolution of this appeal should involve a straightforward application of settled law—a task that a panel of this Court is well-equipped to handle. Initial hearing en banc is hardly necessary to resolve "the appropriate judicial response to remedial legislation" (Pet. iv) where

[4] To the extent private appellees argue that the motions panel's stay order creates a conflict with this Court's precedent or the en banc opinion in this case (Pet. iv-v, 8-9), that order is neither binding on the merits panel nor a basis for hearing en banc under Rule 35(a)(1). Indeed, the motions panel stated that it had "addressed only the issues necessary to rule on the [stay] motion" and that "[its] determinations are for that purpose [only] and do not bind the merits panel." Pet. App. 6.

the law already is clear that federal courts should defer to legislatively enacted remedies unless those remedies are themselves invalid. Although the district court legally erred in enjoining S.B. 5 and ordering Texas to reinstate the non-photo-ID law that it last enforced in 2013, this appeal in its current posture does not raise questions warranting en banc consideration. Indeed, settled precedent only highlights private appellees' error in arguing (Pet. 9-10)—and the district court's error in determining (Pet. App. 33-35)—that the only adequate remedy in this case was to permanently enjoin S.B. 14 and S.B. 5.[5]

First, absent a showing that S.B. 5 was legally invalid, the district court should have treated S.B. 5's enactment as an intervening act that remedied the statutory and constitutional violations related to S.B. 14. "[C]ourts clearly defer to the legislature in the first instance to undertake remedies for violations of [Section 2]." *Mississippi State Chapter, Operation PUSH, Inc.* v. *Mabus*, 932 F.2d 400, 406 & n.5 (5th Cir. 1991). Thus, a court "must accept a plan offered by the

[5] To be sure, a finding of discriminatory intent can justify a broader remedy than might otherwise be appropriate to cure a Section 2 results violation. See *Veasey*, 830 F.3d at 268 & n.66. But a finding of discriminatory intent does not necessarily warrant striking down a statute in every instance. To so hold would mean that a legislative amendment—even one with an entirely curative effect—could never remedy a statute that a court has found to be tainted with discriminatory intent. Yet this would require courts, in contravention of binding precedent, to substitute their judgment for an otherwise constitutionally and legally valid legislative remedy and would inject the judiciary into quintessentially legislative functions.

[jurisdiction] if it does not violate statutory provisions or the Constitution." *Id.* at 407; see *Westwego Citizens for Better Gov't* v. *City of Westwego*, 946 F.2d 1109, 1123-1124 (5th Cir. 1991). Yet rather than defer to the Legislature's chosen remedy, which implemented this Court's remedial guidance and largely tracked the parties' agreed-upon interim relief, the district court focused myopically on S.B. 14. Pet. App. 21-33. Indeed, despite clear precedent to the contrary, the court treated the statutory and constitutional violations that it found with respect to S.B. 14 as a basis to disregard the deference normally owed to a legislature when devising a remedy in the voting context. Pet. App. 17-19.

But the original discriminatory intent should not have been carried over to the remedial statute. Indeed, the Court has cautioned that, because intervening legislation "with meaningful alterations may render the current law valid" despite any "discriminatory intent of the original drafter," "the state of mind of the [subsequent legislative] body must also be considered." *Chen* v. *City of Houst.*, 206 F.3d 502, 521 (5th Cir. 2000). See also *Cotton* v. *Fordice*, 157 F.3d 388, 391-392 (5th Cir. 1998) (stating that subsequent legislative amendments can remove the discriminatory taint of an original enactment). Nor should the district court have presumed a failure to cure S.B. 14's discriminatory result simply because the Legislature retained many of S.B. 14's features. Rather, the court should have considered whether Texas's amended photo-ID procedures—which provide that

in-person voters who do not have and cannot reasonably obtain S.B. 14 ID will be able to cast a regular ballot upon presenting generally available non-photo ID and completing a reasonable-impediment declaration—either (a) impose disproportionate and material burdens on minority voters that could give rise to a Section 2 results violation, see *Veasey*, 830 F.3d at 243-245, or (b) were enacted with discriminatory intent, see *id.* at 230-231.

Second—and relatedly—in analyzing whether Texas's amended photo-ID procedures are legally valid, the district court incorrectly placed the burden on the State to show that S.B. 5 was an adequate remedy, as opposed to requiring the challengers to establish that the legislative amendment was inadequate. Pet. App. 19-20. Where a law's challengers object to a legislative remedy, this Court has stated that they must "offer objective proof" that the remedy fails to cure the underlying discrimination and therefore results in an ongoing violation. *Operation PUSH*, 932 F.2d at 407; see *id.* at 401-404 (demonstrating that the court below placed the burden on plaintiffs to show the remedial legislation was inadequate); *id.* at 407-408 (stating that the plaintiffs also had the burden to show that the legislative remedy "gr[ew] out of a discriminatory intent" and "itself is racially motivated"). And the Supreme Court, in the reapportionment context, has stated that a legislatively enacted remedy "will then be the governing law unless it, too, *is challenged and found to violate* the Constitution." *Wise* v. *Lipscomb*, 437 U.S.

535, 540 (1978) (emphasis added). The placement of the burden on plaintiffs to show that a legislative remedy is invalid is particularly appropriate where, as here, the legislative fix (1) was enacted at the express invitation of this Court, (2) included a remedy of the type that this Court suggested might be appropriate (*i.e.*, a reasonable-impediment exception), and (3) largely tracked an interim remedy to which all parties had agreed and which the district court had imposed in response to this Court's direction to eliminate S.B. 14's "discriminatory effect."[6] *Veasey*, 830 F.3d at 272.

Significantly, had the district court undertaken the proper analyses and placed the burden on private appellees, it would have concluded that they failed to show that S.B. 5 is legally invalid. Private appellees specifically chose not to introduce any new evidence during the remedial proceedings. Pet. App. 3. Nor did they use the preexisting trial record to establish that S.B. 5 imposes a discriminatory burden that could give rise to a Section 2 results violation, or has a disparate impact on minority voters that could give rise to an inference of discriminatory intent. Because private appellees bore the burden of showing that S.B. 5 was inadequate to cure S.B. 14's infirmities and failed to satisfy that burden,

[6] Indeed, even where the court placed the burden on Texas, many of these same factors should have led the court to conclude that Texas in fact met its burden here.

the district court erred in permanently enjoining Texas's amended photo-ID procedures.

As for any discriminatory result, the reasonable-impediment exception acts as an important safe harbor that provides that in-person voters can cast a regular ballot even though they lack S.B. 14 ID and cannot reasonably obtain such ID for one of the broad categories of reasons enumerated in the declaration. Indeed, the parties' choice and the district court's entry of a similar procedure as an interim remedy demonstrates that such an exception imposes only a limited burden, if any, on voters who lack S.B. 14 ID and suffices to cure S.B. 14's discriminatory result. Because private appellees did not show that Texas's amended photo-ID procedures impose disproportionate and material burdens on minority voters, there is no discriminatory burden for purposes of proving an ongoing results violation.

Similarly, because private appellees did not show that S.B. 5's reasonable-impediment procedure has a disproportionate impact on minority voters, they could not establish that S.B. 5 was passed with an unlawful discriminatory purpose. "[T]he impact of the official action" and whether "it bears more heavily on one race than another" is "an important starting point" in evaluating whether a law was motivated by a discriminatory purpose. *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). Where a law produces no disparate impact, it cannot have been passed discriminatorily "*because of*" that

impact. *Veasey*, 830 F.3d at 231 (citation omitted). Even apart from the lack of any disparate impact, private appellees could not demonstrate discriminatory intent here, where the Legislature, in its first regular session following the issuance of this Court's opinion, amended its photo-ID procedures by adopting what this Court suggested would 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 with an unlawful discriminatory purpose, there was no basis for the district court to supplant Texas's chosen remedy with injunctive relief.[7]

Finally, this Court already has indicated that the policy choices of the State's Legislature "should be respected," to the extent possible, "even when some aspect of the underlying law is unenforceable." *Veasey*, 830 F.3d at 269 (citing *Perez* v. *Perry*, 132 S. Ct. 941 (2012)); see also *Cook* v. *Luckett*, 735 F.2d 912, 918 (5th Cir. 1984). Thus, in addition to its legal errors, the district court abused its

[7] Two examples illustrate how misplacing the burden affected the ruling below. First, the court treated as material S.B. 5's elimination of the "other" box from the reasonable-impediment declaration used under the interim remedy and placed the burden on Texas to justify its elimination. Pet. App. 27-30. Private appellees, however, produced no evidence that voters who used the "other" box would not have checked another impediment had they not been able to self-describe their impediment. Nor did they show that minority voters disproportionately relied on the "other" box or would forgo voting without such an option because of "ignorance, a lack of confidence, or poor literacy." Pet. App. 28. The court also asserted that the enhanced criminal penalties under S.B. 5 "appear to be efforts at voter intimidation." Pet. App. 30. But private appellees produced no such evidence.

discretion when it failed to honor Texas's overarching preference for a photo-ID law and instead returned the State to a non-photo-ID regime. Pet. App. 33-34, 38. In so doing, the court disregarded Texas's legitimate "policy objectives," *Veasey*, 830 F.3d at 269, in adopting a photo-ID law. Regardless of the existence of broader remedies, the "[r]easonable choice" to adopt this remedy belonged to "the legislature not the courts." *Operation PUSH*, 932 F.2d at 409. Even in the case of an "objectively superior" judicial remedy, courts may not "substitute[e]" their judgment for an "otherwise constitutionally and legally valid" remedy "enacted by the appropriate state governmental unit." *Id.* at 406-407 (citation omitted). Accordingly, the district court erred in supplanting the State's policy choices with those of private appellees.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 18, 2017, I electronically filed the foregoing RESPONSE OF THE UNITED STATES TO PRIVATE APPELLEES' PETITION FOR INITIAL HEARING EN BANC with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that on September 18, 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 Rules of Appellate Procedure 35(b)(2)(A) and 35(e) and Fifth Circuit Rule 35.5 because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), it contains 3899 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.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
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Date: September 18, 2017