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; DALLAS COUNTY, TEXAS; GORDON BENJAMIN; 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,

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

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 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

APPELLANTS' RESPONSE TO PETITION FOR HEARING EN BANC

Counsel listed on inside cover

KEN PAXTON
Attorney General

JEFFREY C. MATEER
First Assistant Attorney General

SCOTT A. KELLER
Solicitor General

J. CAMPBELL BARKER
MATTHEW H. FREDERICK
Deputy Solicitors General

JASON R. LAFOND
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697
scott.keller@oag.texas.gov

Counsel for Appellants

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.

Defendants-Appellants:
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

Counsel for Defendants-Appellants:
Scott A. Keller (lead counsel)
J. Campbell Barker
Matthew H. Frederick
Jason R. LaFond
Angela V. Colmenero
Office of the Attorney General

Plaintiffs-Appellees:
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; United States of America; Texas League of Young Voters Education Fund; Imani Clark; Texas State Conference of NAACP Branches; Mexican American Legislative Caucus; Texas House Representatives; Lenard Taylor; Eulalio Mendez, Jr.; Lionel Estrada; Estela Garcia Espinoza; Margarito Martinez Lara; Maxima Martinez Lara; La Union Del Pueblo Entero, Incorporated

Counsel for Plaintiffs-Appellees:

Chad Wilson Dunn, Esq. chad@brazilanddunn.com	Ryan Paul Haygood rhaygood@naacpldf.org
J. Gerald Hebert, Esq. hebert@voterlaw.com	Leah Camille Aden laden@naacpldf.org

Erin Helene Flynn, Esq.
erin.flynn@usdoj.gov

Anna Baldwin
anna.baldwin@usdoj.gov

Diana Katherine Flynn
diana.k.flynn@usdoj.gov

Robert Acheson Koch
Robert.Koch@usdoj.gov

Christine Anne Monta
christine.monta@usdoj.gov

John Albert Smith, III
john.a.smith@usdoj.gov

Vishal Agraharkar
vishal.agraharkar@nyu.edu

Jennifer Clark
jenniferl.clark@nyu.edu

Amy Lynne Rudd
amy.rudd@dechert.com

Lindsey Beth Cohan
lindsey.cohan@dechert.com

Robert Wayne Doggett
rdoggett@trla.org

Jose Garza
jgarza@trla.org

Counsel for Plaintiffs-Appellees

Natasha M. Korgaonkar
nkorgaonkar@naacpldf.org

Sonya Ludmilla Lebsack
sonya.lebsack@wilmerhale.com

Deuel Ross
dross@naacpldf.org

Christina A. Swarns
cswarns@naacpldf.org

Amy Lynne Rudd
amy.rudd@dechert.com

Lindsey Beth Cohan
lindsey.cohan@dechert.com

Preston Edward Henrichson
preston@henrichsonlaw.com

Rolando Leo Rios, I
rrios@rolandorioslaw.com

Counsel for Intervenor Plaintiffs-Appellees

/s/ Scott A. Keller
Scott A. Keller
Counsel of Record for Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

RULE 35(b) STATEMENT

This appeal does not warrant initial en banc review. It involves a fundamentally changed Texas voter-ID law compared to the law this Court considered en banc last year. This is therefore "a new appeal for another day." *Veasey v. Abbott*, 830 F.3d 216, 271 (5th Cir. 2016) (en banc).

After this Court held that Texas's 2011 photo-voter-ID law—Senate Bill 14 (SB14)—resulted in a prohibited effect on "voters who do not have SB 14 ID or are unable to reasonably obtain such identification," *id.* at 271, the State resolved to fix that effect. Within days of this Court's decision, the State followed the Court's suggestion and made a reasonable-impediment exception the centerpiece of an agreed interim remedy for the November 2016 election. D.E.895. That exception *waives* the photo-ID requirement for voters who cannot reasonably obtain qualifying ID. The Texas Legislature then enacted Senate Bill 5 (SB5), which similarly permits voters without photo ID to cast a regular ballot through a reasonable-impediment exception. Exh. 1. This ameliorative legislation fully remedies the prohibited effect found by this Court: the seven reasonable impediments enumerated in SB5 alleviate every burden alleged by the 14 named plaintiffs and their 13 testifying witnesses. Exh. 2.

Plaintiffs ignore SB5's fundamental change to Texas law following *Veasey*, repeatedly suggesting that this case will "affect hundreds of thousands of Texans" waiting "to exercise their fundamental right to vote." Pet. 1, 7. Plaintiffs have not identified a single person with a reasonable impediment to obtaining ID who will not

be able to vote under SB5. The appeal can be fully resolved on that basis and in the normal course of a panel appellate proceeding.

STATEMENT OF PROCEEDINGS

A. Last year, this Court held that SB14 resulted in an unlawful disparate impact on voting rights under VRA §2. *Veasey*, 830 F.3d at 243-68. But the Court vacated the district court's judgment that SB14 was passed with a racially discriminatory purpose, holding that the district court relied on a series of "infirm," "unreliable," and "speculati[ve]" categories of evidence. *Id.* at 229-34.

The Court ordered 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 the Court directed the district court to "*reevaluate* the evidence"—the "circumstantial *totality* of [the] evidence"—to "*determine anew* whether the Legislature acted with a discriminatory intent in enacting SB 14." *Id.* at 237, 243, 272 (emphases added).

B. On remand, the district court instructed the parties to submit new proposed factual findings and conclusions of law and responses. D.E.922. Meanwhile, the district court entered an interim remedy agreed to by all parties. D.E.895.

The interim remedy retained SB14's photo-ID requirement, but—following the suggestion of this Court, *Veasey*, 830 F.3d at 270—it provided for a reasonable-impediment exception waiving the photo-ID requirement, D.E.895 at 1-2. Voters claiming a reasonable impediment to obtaining SB14-compliant ID could vote—by *regular* ballot—if they completed two steps. First, the voter had to complete a sworn

declaration, which listed seven possible impediments: lack of transportation, lack of documents necessary to obtain acceptable ID, work schedule, lost or stolen ID, disability or illness, family responsibility, or ID applied for but not yet received. *Id.* at 5-6. The declaration also included an "other" box, which allowed the voter to write *anything* in a blank space and be able to vote. *Id.* at 6. No one could challenge a voter's claimed impediment or its reasonableness, *id.* at 5, although anyone who intentionally lied on the declaration would be guilty of perjury, D.E.895 at 6; Tex. Penal Code § 37.02(a), and tampering with a governmental record, Tex. Penal Code § 37.10. Second, the voter had to provide one of the following documents: a valid voter registration certificate, a certified birth certificate, a copy or original of a current utility bill, bank statement, government check, paycheck, or other government document that shows the voter's name and an address. D.E.895 at 5, 7.

Shortly after the agreed interim remedy was entered, the district court was informed that Governor Abbott would "support legislation during the 2017 legislative session to adjust SB14 to comply with the Fifth Circuit's decision." D.E.921 at 1. The State alerted the district court when this legislation was filed in February 2017, D.E.995, and when it passed the Senate in March 2017, D.E.1021. Both DOJ and the State repeatedly requested that the district court abide by this Court's precedent and give the Legislature the first opportunity to fix the disparate impact found by this Court. D.E.995 at 2-3; D.E.1001 at 2-4; D.E.1015 at 21-26; D.E.1018 at 2-4.

Instead, on April 3, 2017, the district court responded by announcing its intent "to issue its new opinion" on discriminatory purpose "at its earliest convenience." D.E.1022 at 7. On April 10, before the end of the legislative session, the court entered

a 10-page order again finding that SB14 was enacted with a discriminatory purpose. D.E.1023. Despite receiving hundreds of pages of briefing (334 pages from the State alone) addressing thousands of pages of evidence—much of it not analyzed in the district court's original, vacated ruling—the court simply adopted its prior findings, failing to even refer to the parties' briefs on remand except to note their existence.

The Legislature then passed SB5, and the Governor signed the bill into law on May 31, 2017. Exh. 1 at 9. SB5 is set to take effect on January 1, 2018. *Id.* at 8. The law tracks the interim remedy ordered by the district court and agreed to by all parties: among other things, it provides a reasonable-impediment exception waiving SB14's photo-ID requirement, expands the list of acceptable forms of identification, and extends the period within which an expired form of identification may still be accepted for voting. *Id.* at 2-6. Like the interim remedy, SB5 requires voters to attest under penalty of perjury that they have a reasonable impediment preventing them from obtaining compliant photo ID. *Id.* at 3.

SB5's reasonable-impediment exception has the same seven enumerated reasonable impediments listed in the interim remedy. *Id.* at 3-4. Every single burden alleged by the 27 voters in this case is covered by (five of) these seven enumerated reasonable impediments. *See* Exh. 2. In contrast to the interim remedy, SB5 does not permit a person to vote without qualifying photo ID after merely selecting an "other" box and filling in a blank space with any reason whatsoever. SB5 excluded this open-ended "other" option because it was abused by voters during the November 2016 election. *E.g.*, D.E.1049-2 at 18, 20 ("Have procrastinated") ("because I didn't bring it").

The district court refused to reconsider its April 10 purpose finding in light of SB5's enactment. *See* D.E.1071 at 27.

C. In its August 23, 2017 remedial order, the district court permanently enjoined the State from using *any* type of photo-voter-ID requirement—even the State's new law—and ordered the commencement of a "VRA §3(c)" preclearance bail-in hearing. D.E.1071 at 27. The district court did not address—or even acknowledge—the record evidence that the State pointed to showing that SB5's reasonable-impediment exception eliminated any burden from SB14's photo-ID requirement for all 27 voters in this case. Exh. 2. Instead, the court engaged in pure speculation to hold that Texas's new SB5 law would disparately impact minorities. D.E.1071 at 10-19. The district court further accused the State of trying to intimidate voters by giving notice that intentionally lying on a reasonable-impediment declaration is a punishable crime (even though the interim remedy ordered by the court similarly told voters they were swearing "under penalty of perjury"). *Id.* at 19; D.E.895 at 6. Finally, the district court refused to accept SB5 as a remedy for its finding of discriminatory purpose because "the Court's finding of discriminatory intent strongly favors a wholesale injunction against the enforcement of any vestige of the voter photo ID law" and SB5 "is built upon the 'architecture' of SB 14." D.E.1071 at 10 n.10, 23.

D. The State immediately appealed and moved for a stay of the district-court injunction. On September 5, 2017, this Court granted the stay, observing that the State "has made a strong showing that th[e] reasonable-impediment procedure remedies plaintiffs' alleged harm and thus forecloses plaintiffs' injunctive relief." Stay Order at 4. In particular, the Court recognized: "As the State explains, each of the

27 voters identified—whose testimony the plaintiffs used to support their discriminatory-effect claim—can vote without impediment under SB 5." *Id.*

ARGUMENT: INITIAL EN BANC REVIEW IS UNWARRANTED.

Initial en banc hearing of an appeal "is not favored" and "ordinarily will not be ordered." Fed. R. App. P. 35(a). Across the circuits, it has occurred only "about two dozen [times] over the last three decades." Josh Blackman, *Initial En Banc*, http://joshblackman.com/blog/2017/03/27/initial-en-banc/. Initial en banc review is not "necessary to secure or maintain uniformity of the court's decisions." Fed. R. App. P. 35(a)(1). SB5 fundamentally changed Texas's voter-ID law, and it remedies all of Plaintiffs' claims. The appeal can be resolved on that basis alone, thus circuit uniformity is not at risk. To the extent it is even necessary to review the district court's finding that SB14 was enacted with discriminatory intent, a panel of this Court is fully capable of complying with *Veasey*'s mandate.

A. SB5 Fundamentally Changed Texas's Voter-ID Law and SB5's Reasonable-Impediment Exception Remedies All of Plaintiffs' Claims.

This case is a challenge to Texas's photo-voter-ID requirement as enacted by SB14, but the law has fundamentally changed since the Court considered it last year. In response to this Court's *Veasey* decision regarding the effect of SB14's requirement, the Texas Legislature enacted SB5 as ameliorative legislation—the precise reasonable-impediment-exception remedy suggested by this Court to eliminate any

disparate impact. *Veasey*, 830 F.3d at 270; *see also id.* at 279 (Higginson, J., concurring). A panel can address this new law—and the following issues raised by SB5—in the normal course.

1. SB5 eliminates any potential harm threatened by SB14's photo-ID requirement by creating an exception that *waives* the requirement, allowing voters to cast regular ballots by showing proof of name and address (as required before SB14), and executing a declaration that they face a reasonable impediment to obtaining qualifying photo ID. Exh. 1. Although only five of the declaration's seven listed impediments were needed to cover every burden alleged in the record here, the State included two more reasonable impediments (for a total of seven), in an abundance of caution and to track the interim remedy. *See id*; *cf.* D.E.895 at 6. Voters do not need training in the law to understand the nature of the enumerated impediments, *cf.* Pet. 6, which include justifications like "lack of transportation" and "disability or illness," *supra* p. 3. Those categories cover *every burden* alleged by plaintiffs' 27 voter witnesses. *See* Exh. 2.

SB5's reasonable-impediment exception thus cures any "discriminatory effect on those voters who do not have SB 14 ID or are unable to reasonably obtain such identification." *Veasey*, 830 F.3d at 271. Inability to reasonably obtain such photo identification now *waives* the photo-ID requirement. That is why South Carolina's similar photo-ID law gained VRA §5 preclearance. *South Carolina v. United States*, 898 F. Supp. 2d 30, 35-43 (D.D.C. 2012). Moreover, unlike South Carolina's and North Carolina's reasonable-impediment exceptions, SB5 enables voters to cast *reg-*

ular ballots—not provisional ballots—thus eliminating any possible "lingering burden" caused by inconsistent decisions by provisional-ballot boards about what impediments are "reasonable." *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 240 (4th Cir. 2016). And SB5 makes Texas's voter-ID law more accommodating than the law upheld in *Crawford v. Marion County Election Board*—because Indiana required a second trip to the circuit-court clerk's office to execute an indigency affidavit. 553 U.S. 181, 186 (2008) (plurality op.). Plaintiffs' suggestion that Texas maintains the "strictest voter ID law in the nation," Pet. 7, is unsupportable, and emblematic of their refusal to grapple with SB5's changes to Texas law.

SB5's reasonable-impediment exception forecloses injunctive relief by completely remedying plaintiffs' alleged burdens to voting. *See Veasey*, 830 F.3d at 264. A discriminatory-purpose violation requires "effects as well as motive," meaning that an ongoing purpose violation cannot be found without ongoing discriminatory results. *Cotton v. Fordice*, 157 F.3d 388, 391-92 & n.9 (5th Cir. 1998); *accord, e.g.*, *Palmer v. Thompson*, 403 U.S. 217, 224, 225 (1971). Plaintiffs ignore these governing authorities. 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.*, *e.g.*, *United States v. Virginia*, 518 U.S. 515, 547-56 (1996); *City of Richmond v. United States*, 422 U.S. 358, 378 (1975); *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 437-39 (1968).

Below, the district court maintained that "the record holds no evidence regarding the impact of the interim Declaration of Reasonable Impediment (DRI), either in theory or as applied." D.E.1071 at 10. On that reasoning, injunctive relief should

have been denied because plaintiffs did not satisfy their burden of proof. The district court, however, contradicted Supreme Court and circuit precedent by shifting the burden of proof to the State. *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) ("the *moving party* must satisfy the court that relief is needed") (emphasis added); *Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 407 (5th Cir. 1991).

Regardless, record evidence proves that SB5 completely removed any discriminatory effect from SB14 on *every* voter that plaintiffs identified. The enumerated reasonable impediments in both the interim remedy and SB5's reasonable-impediment exception cover the burdens on voting alleged by these 27 individuals—the individuals whose testimony plaintiffs used to support their discriminatory-effect claim against SB14 in the first place. Exh. 2. That forecloses injunctive relief no matter who bears the burden. Plaintiffs' repeated refrain that the "intervening legislation . . . maintains and perpetuates the original law's discriminatory features," *see*, *e.g.*, Pet. 9, is unexplainable. Texas's response to *Veasey*—to *waive* SB14's photo-ID requirement for those with a reasonable impediment to obtaining compliant ID—demonstrates the *complete opposite* of the "well-worn strategy" from multiple generations ago of cycling through discriminatory measures that prompted the VRA's preclearance regime. *Cf. id.*

2. The district court's finding of a continuing discriminatory effect under SB5 depends on inadmissible, non-probative, and insufficient evidence. In determining that SB5's elimination of an "other" box on the reasonable-impediment declaration

is harmful, the court relied on inadmissible hearsay: 12 reasonable-impediment declarations submitted by various voters in the November 2016 election. D.E.1071 at 17 & n.14. By citing declarations to attack SB5, the district court improperly accepted them for the truth of the matters asserted therein. *See* Fed. R. Evid. 801-02; D.E.1063 at 2-4 (defendants' objection). Defendants had no opportunity to cross-examine any of these voters—to confirm, for instance, that their impediment was already covered by SB5 or was not reasonable.

In any event, each of the "other" reasons given in these 12 declarations would *already qualify* under one of SB5's seven enumerated reasonable-impediment exceptions—or they were *not reasonable impediments* at all:

- Three expressly correspond to one of the seven enumerated impediments.[1]
- Three invoke financial hardship to obtaining an ID or free EIC,[2] which are covered by the enumerated impediments of "Lack of transportation," "Lack of birth certificate or other documents needed to obtain acceptable photo ID," "Work schedule," or "Family responsibilities."

[1] "[A]ttempted to get Texas EIC but they wanted a long-form birth certificate." D.E.1061-1 at 9 (covered by "Lack of birth certificate" enumerated impediment, which the person appears to have also checked). "[M]other passed away & I cannot locate my SS card & other personal info that she possessed." D.E.1062-1 at 3 (covered by "Lack of birth certificate or other documents needed to obtain acceptable photo ID" enumerated impediment). And "daughter doesn't want him driving at age 85." *Id.* at 4 (covered by "Lack of transportation" enumerated impediment).

[2] "Financial hardship," "Unable to afford TX DL," and "Lack of funds." D.E. 1061-1 at 5-7.

- Three say the voter just moved to Texas without specifying any *impediment* to getting ID (and the enumerated impediments include several reasons that might apply to a new state resident, such as "Photo ID applied for but not received," "Family responsibilities," or "Lack of transportation").[3]
- One said "99 years old no ID," D.E.1062-1 at 5—which does not directly assert an impediment, but could well implicate "Lack of transportation," "Disability or illness," or "Lack of birth certificate or other documents need to obtain acceptable photo ID."
- The remaining two—"student ID Drivers license," *id.* at 2, and "Out of State College Student," D.E.1061-1 at 8—assert no impediment at all, and nonresidents are not permitted to vote in Texas elections. Tex. Elec. Code §§ 1.015, 11.001-02.

3. The district court's newfound concern, D.E.1071 at 20, that the State could prosecute individuals for a state-jail felony for intentionally lying on the reasonable-impediment declaration, is also no reason to enjoin SB5. SB5 makes *no* change to existing law in this respect: it was already a felony to lie on one's impediment-affidavit under the interim remedy. *See* Tex. Penal Code §§ 37.10(a)(1), (c)(1); D.E.895 at 6.

[3] "Just moved here," "Just became resident – don't drive in TX," "Just moved to TX, haven't gotten TX license yet." D.E.1061-1 at 2-4.

Under the court's reasoning, *no* type of reasonable-impediment exception—which surely must be safeguarded with penalties for intentional lying—can ever sufficiently mitigate any burden of a photo-voter-ID law. No other court has ever made such a sweeping holding. Nor could one, particularly when federal law imposes a greater penalty for perjury in connection with registering or voting in a federal election. *See* 52 U.S.C. §§ 10307(c), 20507(a)(5)(B).

4. At bottom, this case bears no resemblance to the "exceptional" cases cited in Plaintiffs' petition that received initial en banc hearings. *See* Pet. 7.[4] Nothing remains of plaintiffs' challenge to a photo-voter-ID law that was fully ameliorated by an existing interim order and SB5, both of which waive the photo-ID requirement for persons who cannot reasonably obtain qualifying ID—including every plaintiff and testifying witness in this case. The State's appeal of the district court injunction blocking Texas officials from using those procedures should be handled by a panel of this Court in the ordinary course.

B. Initial En Banc Consideration Is Not Necessary to Maintain Uniformity with *Veasey*.

Plaintiffs additionally suggest that initial en banc review is necessary to "ensure fidelity to this Court's prior *en banc* opinion in this case" regarding discriminatory purpose. Pet. iv; *accord* Pet. 3-4, 8-10. As discussed above, this appeal can be resolved based upon SB5's complete remedying of any discriminatory effect caused by

[4] Significant cases are regularly heard by three-judge panels. For example, in the challenge to the Affordable Care Act ultimately decided in *NFIB v. Sebelius*, 567 U.S. 519 (2012), the court of appeals denied the plaintiffs' petition for an initial en banc hearing, even though the district court had invalidated the Affordable Care Act in its entirety. *See* Order, *Florida v. Sebelius*, Nos. 11-11021 & 11-11067 (11th Cir. Mar. 31, 2011).

SB14—without the need to even consider evidence pertaining to the Texas Legislature's purpose in enacting SB14. To the extent any basis remains to review whether SB14 was originally passed with a discriminatory purpose, a panel of this Court is equipped to adhere to *Veasey*.

Under law-of-the-case doctrine and the related mandate rule, a district court is prohibited from "reexamining an issue of law or fact previously decided on appeal *and not resubmitted to the trial court on remand*." *United States v. Teel*, 691 F.3d 578, 583 (5th Cir. 2012) (emphasis added; quotation marks omitted). The Court's mandate in this case vacated the district court's "judgment that SB14 was passed with a racially discriminatory purpose" and remanded for the district court "to consider this claim in light of the guidance we have provided in this opinion." *Veasey*, 830 F.3d at 272. In doing so, this Court instructed the district court that it could *not* consider much of the evidence it previously relied upon in finding discriminatory purpose. *Id.* And the Court ordered the district court to "*reevaluate* the evidence relevant to discriminatory intent," and to "determine *anew* whether the Legislature acted with a discriminatory intent in enacting SB 14." *Id.* (emphases added).

In other words, this Court "resubmitted to the trial court," *Teel*, 691 F.3d at 583, factual questions pertaining to discriminatory intent—with direction to the district court *not* to rest on its previous findings and to reexamine all issues and facts pertaining to the discriminatory-purpose claim. If the record had sufficed for a discriminatory-purpose finding, as Plaintiffs claim, *cf.* Pet. 3-4, this Court would have affirmed the district court's judgment on discriminatory purpose. It did not; it vacated. And in remanding the case, the Court did not make *factual* findings for the

district court to "track[]," Pet. 4; it only cited "*evidence* that *could* support a finding of discriminatory intent," *Veasey*, 830 F.3d at 235 (emphases added). *Cf. Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (holding that courts of appeals do not engage in fact-finding); *Chapman v. NASA*, 736 F.2d 238, 242 n.2 (5th Cir. 1984) (per curiam) ("A factual issue . . . could become the law of the case . . . if previously appealed and affirmed as not being clearly erroneous.").

This did not give the district court license to rubber-stamp its previous finding while ignoring the remaining "totality of evidence," *Veasey*, 830 F.3d at 237, much of it not previously analyzed. Simply put, "the law of the case which the trial court was obliged to follow was [this Court's] holding that the findings relating to [discriminatory purpose] were inadequate and required reconsideration. To the extent it is applicable at all, then, law of the case supports precisely the *opposite* of the proposition [plaintiffs] advance[]," *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 948 F.2d 1573, 1577 (Fed. Cir. 1991)—namely, that this Court is bound by factual issues purportedly decided in *Veasey*.[5]

[5] Plaintiffs also argue that the State is attempting to "rephras[e]" its previously rejected "clearest proof" standard for discriminatory purpose. *See* Pet. 8 (citing *Veasey*, 830 F.3d at 230 n.12). To the contrary, plaintiffs simply have no answer for the multiple Supreme Court authorities cited in the State's briefing requiring a "presumption of constitutionality" and "good faith," and the exercise of "extraordinary caution," in analyzing claims of governmental discriminatory purpose. *See* Stay Mot. 9-10. Moreover, *Veasey* did not address the State's argument regarding the number of white voters affected by SB14 as it applies to discriminatory *purpose*. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 275 (1979) ("Too many men are affected . . . to permit the inference that the statute is but a pretext for preferring men over women.").

Even if the Court were going to review the purpose underlying SB14's enactment, nothing in *Veasey* or the law-of-the-case doctrine requires initial en banc consideration to secure uniformity of the Court's decisions. Instead, the Court will be required to review whether the district court correctly applied the discriminatory-purpose legal standards to supportable fact findings—the bread-and-butter of appellate review. A panel of this Court can handle that task in the first instance.

CONCLUSION

The Court should deny plaintiffs' request for initial en banc hearing.

Date: September 18, 2017

Respectfully submitted.

/s/ Scott A. Keller

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

SCOTT A. KELLER
Solicitor General

J. CAMPBELL BARKER
MATTHEW H. FREDERICK
Deputy Solicitors General

JASON R. LAFOND
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697
Scott.keller@oag.texas.gov

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2017, a true and correct copy of the foregoing document was served via the Court's ECF system to all counsel of record.

/s/ Scott A. Keller

CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume, typeface, and type-style requirements because it because it has been prepared in a 14-point proportionally-spaced typeface using Microsoft Word 2016, which reports that the petition contains 3,874 words; and the petition is published into Portable Document File (PDF) format. *See* Fed. Rule App. P. 32, 35; 5th Cir. Rule 31.1.

/s/ Scott A. Keller