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; KEN GANDY; EVELYN BRICKNER, Plaintiffs-Appellees,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS; ROLANDO PABLOS, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; STATE OF TEXAS; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, Defendants-Appellants.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

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 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

RESPONSE TO PRIVATE PLAINTIFFS' MOTION TO LIFT STAY

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INTRODUCTION

Plaintiffs' motion to lift the stay that the State obtained months ago is notable for what it does not say. Most importantly, it does not allege that the stay threatens the individual plaintiffs' own voting rights, nor could it. At every stage of this appeal, the State has provided record citations demonstrating that under SB5, as under the interim remedy, every single plaintiff can cast a regular, in-person ballot at the polls, even if they cannot reasonably obtain a qualifying photo ID. Appellants' Br. 19-23; Emergency Mot. to Stay 4 & Exh. 6. As the motions panel correctly concluded, "each of the 27 voters identified—whose testimony the plaintiffs used to support their discriminatory-effect claim—can vote without impediment under SB 5." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam).

Despite filing what amounts to a post-argument brief, plaintiffs still offer no response to this dispositive point. Their continued silence confirms that they face no threat of irreparable injury—and no Article III injury—from Texas's photo-voter-ID law. With nothing new to offer, plaintiffs provide no basis to collaterally attack and second-guess the motions panel's order staying the district court's injunction pending appeal.

What plaintiffs' motion does say merely confirms that nothing has changed regarding the stay pending appeal. Their attempt to vacate the stay rests on an unfounded claim that the circumstances justifying a stay no longer exist. They assert that the motions panel's decision was based solely on "then-upcoming 2017 local elections," and since those elections have passed, the

stay is no longer necessary. Mot. 8. But upcoming local elections were not the only basis of the motion panel's decision, and they were certainly not the only reason for the stay. The State moved for a stay pending appeal that would allow SB5 to take effect on January 1, 2018—and the motions panel granted it—because the district court's wholesale injunction of the State's voter-ID law blocked a duly enacted statute and threatened to disrupt the 2018 elections. *See Veasey*, 870 F.3d at 390 (motions panel noting approaching deadlines for voter-registration certificates to be used in 2018 elections); Emergency Mot. to Stay 3-4 (citing internal deadlines to finalize voter-registration certificates and statutory deadlines to issue certificates to voters before 2018 elections).

Plaintiffs provide no compelling reason to second-guess the motions panel's decision now. The circumstances have not changed. The stay pending appeal should remain in place.

ARGUMENT

I. Plaintiffs' Motion Is Procedurally Improper.

Plaintiffs' motion should be denied, regardless of its lack of merit, because it amounts to an untimely request for reconsideration of the motion panel's order. On September 5, 2017, this Court stayed the district court's injunction pending resolution of this appeal. *Veasey*, 870 F.3d at 392. The Court did so because the "State has made a strong showing that it is likely to succeed on the merits," and the "State has also made an adequate showing as to the other factors considered in determining a stay pending appeal"—namely that "the State necessarily suffers the irreparable harm of denying the public interest in

the enforcement of its laws," and the "State has already spent $2.5 million . . . to educate voters about the availability of the SB 5 reasonable-impediment procedures." *Id.* at 391. Now, plaintiffs seek to vacate the stay, arguing that the State has neither made a strong showing on the merits nor will suffer irreparable injury if SB5 is enjoined. Mot. 14-18. Thus, plaintiffs' request for relief depends on overruling the earlier decision of this Court.

But plaintiffs had 45 days, or until October 20, 2017, to seek reconsideration of the Court's stay order. *See* Fed. R. App. P. 40(a)(1); Practitioner's Guide to the United States Court of Appeals for the Fifth Circuit 57 ("A reconsideration of action on a motion must be filed within 14 days unless the United States is a party in a civil case, see 5TH CIR. R. 27.1."). Instead of seeking reconsideration, plaintiffs petitioned for rehearing en banc of the motions panel's decision on September 8, 2017. But the Court rejected that en banc petition as procedurally improper. *See* Order 2 (Sept. 11, 2017) ("request for rehearing en banc of the order granting the stay . . . is not allowed on a non-dispositive administrative order"). Plaintiffs then waited to file the current motion until December 15, 2017—nearly two months too late.[1]

[1] The motion also does not comply with this Court's rules, which provide: "***All motions must state that the movant has contacted or attempted to contact all other parties and must indicate whether an opposition will be filed.***" 5th Cir. R. 27.4. Plaintiffs did not contact the State before filing.

II. Plaintiffs Provide No Valid Reason to Vacate the Stay.

Even if plaintiffs' motion were not procedurally improper, it should be denied because it is meritless. As the moving parties, plaintiffs bear the burden to show their entitlement to the extraordinary relief they seek. *See, e.g.*, *W. Airlines, Inc. v. Int'l Brotherhood of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (vacatur of stay requires proof that the rights of the parties "may be seriously and irreparably injured by the stay, and . . . that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay") (quoting *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)). Plaintiffs cannot shift that burden by acting as though a stay had not been entered, *cf.* Mot. 8 (discussing the burden on a party requesting a stay), nor can they bear their burden. Unlike the State, plaintiffs face no possibility of irreparable harm. And as this Court has already recognized, the State is likely to succeed on the merits of its appeal.

A. Plaintiffs Face No Threat of Injury Under the Stay.

Plaintiffs' claim that this Court's stay inflicts irreparable injury on them is specious. Instead of identifying an actual threat of harm to their voting rights, Plaintiffs make vague references to a desire for "complete relief." Mot. 12, 14. But like the interim remedy, SB5 provides "complete relief" because it eliminates any possible injury to Plaintiffs' voting rights. *See Veasey*, 870 F.3d at 391 ("The State has made a strong showing that [SB5's] reasonable-impediment procedure remedies plaintiffs' alleged harm and thus forecloses plaintiffs' injunctive relief.").

Plaintiffs do not even allege that any individual plaintiff will suffer a burden on his or her right to vote under SB5. On the contrary, every plaintiff can cast a regular ballot, in person, at the polling place, even if they cannot reasonably obtain a qualifying photo ID. The State has demonstrated this repeatedly. *See* Appellants' Br. 19-23; Emergency Mot. to Stay 4 & Exh. 6. And again, plaintiffs have no response.

Indeed, because SB5 eliminates any burden on plaintiffs' voting rights, and because the State, in June of this year, agreed to operate under the interim remedy until SB5's effective date, plaintiffs' claims no longer present a live case or controversy under Article III. *See infra*, pp. 7-11. But whether plaintiffs' claims are live or moot (they are moot), there is no basis to lift this Court's stay of the district court's sweeping injunction. The district court was required to accept the Legislature's remedy in SB5 absent proof that SB5 was itself discriminatory in purpose or effect—as this Court made clear in *Mississippi State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 406-07 (5th Cir. 1991). There is no such proof in the record. On the contrary, the evidence shows that SB5 eliminates any threat to plaintiffs' voting rights under the State's voter-ID law.

B. Vacating the Stay Will Result in Irreparable Injury to the State.

Without a stay, the State will suffer irreparable injury—not only because the district court's injunction prevents it from enforcing its voter-ID law, but

because the wholesale injunction effectively requires the State to recreate voting procedures that have not been in effect for years, not to mention educate voters and election officials about those procedures. It is easy for plaintiffs to dismiss that substantial burden with the facile assurance that the State will have "plenty of time to take necessary steps to prepare to enforce the pre-SB14 voter ID law and to educate voters and election officials about the new requirements." Mot. 11. Plaintiffs have no responsibility to formulate or implement voting procedures, nor do they have any responsibility to educate the public or election officials. But they will assuredly charge the State with misconduct when "plenty of time" turns out to be not nearly enough. The task imposed by the district court's sweeping injunction against the State's voter-ID law constitutes irreparable injury.

That the district court's order enjoins the State's voter-ID law is itself sufficient to establish irreparable injury because a State suffers an irreparable injury when it cannot enforce its own duly enacted laws. Plaintiffs dismiss that principle as a mere "stray statement" from *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers). Mot. 17. But this Court has consistently recognized that enjoining a state statute is among the most serious actions that a court can take, which by definition inflicts an irreparable injury on the State. *See Veasey*, 870 F.3d at 391; *Whole Woman's Health v. Lakey*, 769 F.3d 285, 305 (5th Cir. 2014); *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013); *City of El Cenizo v. Texas*, No. 17-50762, 2017 WL

4250186, *2 (5th Cir. Sept. 25, 2017) (per curiam); *Voting for Am. v. Andrade*, 488 Fed. Appx. 890, 904 (5th Cir. 2012) (per curiam).[2] That does not mean that a State is automatically entitled to a stay whenever a statute is enjoined. *Cf.* Mot. 17-18. But it does mean that the State satisfies the irreparable-injury element, and plaintiffs opposing a stay bear a heavy burden to prove that they will suffer an even greater harm absent the injunction. Plaintiffs failed to make that showing before the motions panel, and they fail to make it now.

C. Plaintiffs Have Not Made a Strong Showing of Likelihood of Success on the Merits.

The motions panel concluded that "*[t]he State* has made a *strong* showing that it is likely to succeed on the merits." *Veasey*, 870 F.3d at 391 (emphases added). Rather than offer new arguments or evidence to rebut that conclusion, plaintiffs merely repeat the same arguments already rejected by the motions panel. Plaintiffs offer nothing to undermine the strong showing already made by the State.

1. Plaintiffs, for example, offer nothing to overcome the State's showing that the enactment of SB5 mooted this case. As the State has shown, Appellants' Br. 24-35; Reply Br. 3-17, this case was mooted, at the latest, on June 28, 2017, following enactment of SB5, when the State committed to operate

[2] The Supreme Court's refusal to find irreparable injury in a different context—not involving injunction of a state statute—has no bearing on that settled principle. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (refusing to find that alien's removal from country inflicted irreparable injury where petition for review would be processed notwithstanding removal), *cited in* Mot. 18.

under the district court's interim remedy until SB5's January 1, 2018 effective date. From that date forward, there was no possibility that SB14 would govern another election, so there was nothing left to plaintiffs' challenge to SB14. *See Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414 (1972) (per curiam); *see also Massachusetts v. Oakes*, 491 U.S. 576, 582-84 (1989) (plurality op.) (law enacted in response to adverse judgment mooted case); *U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galioto*, 477 U.S. 556, 559-60 (1986) (same); *Kremens v. Bartley*, 431 U.S. 119, 128-29 (1977) (same); *Fusari v. Steinberg*, 419 U.S. 379, 387-89 (1975) (same).

This Court's decision in *Operation Push* confirms that the district court was bound to accept SB5 as a legislative remedy unless SB5 itself had a discriminatory purpose or effect. 932 F.2d at 405-09. SB5 had neither, as it wholly remedied the burdens alleged by plaintiffs' 27 voter witnesses. *See supra* p. 1.

Furthermore, *Operation Push*'s single sentence regarding mootness in the peculiar circumstances of that case does not control here; the instant case is moot. In *Operation Push*, the district court found that Mississippi's registration law had an impermissible effect under VRA §2. 932 F.2d at 404. Then, as part of its remedial proceedings, the district court instructed Mississippi to enact a remedy with certain features, which Mississippi did. *Id.* After the district court approved of the new legislation, the plaintiffs appealed the remedy ruling and Mississippi cross-appealed the earlier ruling regarding the effects of the old law. *Id.* Before addressing Mississippi's cross-appeal, this Court

said, in a single sentence, that the question of the old law's effect was "not moot because the decision under the 1988 Act was the remedy decision growing out of the holding under the 1984 Act." *Id.* at 409.

There was no citation accompanying that sentence, and its precise meaning is not clear. What is clear, however, is that the Court could not have meant that a change in law precipitated by an adverse court ruling does not moot a case. After all, such a holding would be contrary to earlier precedent of this Court. *See, e.g.*, *New Left Educ. Project v. Bd. of Regents of Univ. of Tex. Sys.*, 472 F.2d 218, 219-20 (5th Cir. 1973) (holding that the Board of Regents' amendment of rules previously found unconstitutional mooted the case), *vacated on other grounds*, 414 U.S. 807 (1973).[3] And it would contravene significant subsequent precedent. *See, e.g.*, *Davis v. Abbott*, 781 F.3d 207, 216-17 (5th Cir. 2015); *McKinley v. Abbott*, 643 F.3d 403, 406-07 (5th Cir. 2011); *McCorvey v. Hill*, 385 F.3d 846, 848-49 (5th Cir. 2004); *AT&T Commc'ns of Sw., Inc. v. City of Austin*, 235 F.3d 241, 243 (5th Cir. 2000). Accordingly, the fact that

[3] If this is what *Operation Push* meant, it cannot be followed: "This circuit's rule of orderliness . . . provides that one panel of [the] court may not overturn another panel's decision, absent an intervening change in the law." *Austin v. Davis*, No. 13-70024, --- F.3d ----, 2017 WL 5899164, at *11 (5th Cir. Nov. 30, 2017) (quotation marks and citations omitted). Accordingly, "[b]ecause [this panel is] bound by this circuit's rule of orderliness, . . . the earlier panel decision [in *New Left*] controls." *Id.* Even under this reading of *Operation Push*, however, vacatur of the district court's discriminatory-purpose finding would still be required because the Legislature took up SB5 before any adverse ruling on plaintiffs' discriminatory-purpose claim. *See* Appellants' Br. 9.

the State enacted SB5 in response to this Court's 2016 en banc opinion cannot prevent mootness.

It is also clear that *Operation Push* could not have meant that a district court can create Article III jurisdiction by issuing a remedial order in a case that has already become moot, which is what happened here. Although the district court's appealable order was "the remedy decision growing out of the holding under" SB14, *Operation Push*, 932 F.2d at 409, the district court never should have issued that decision because the case was already moot. *See* Appellants' Br. 24-35; Reply Br. 3-17. Because "[t]he district court has no power to decide moot causes," *New Left*, 472 F.2d at 220, *a fortiori*, it cannot revive a moot cause by deciding it.

In light of this preexisting circuit precedent, the only possible space left for *Operation Push*'s statement on mootness to occupy is at most the particular procedural circumstance of that case. In other words, *Operation Push* can stand only for the proposition that a subsequent amendment or repeal of a law will not moot a case only if that amendment or repeal was already ordered by the district court as part of a judicial remedial proceeding and the government had not already begun steps to amend or repeal that law.[4] Anything broader would contradict prior—and subsequent—circuit precedent. Because the Texas

[4] Even this narrow holding would seem to conflict with established Supreme Court precedent and the holdings from multiple other circuits on the question of Article III mootness in light of a legislative amendment. *See* Appellants' Br. 26-30; Reply Br. 7-10.

Legislature did not enact SB5 in the context of a district court directing the Legislature to engage in remedial proceedings, and because the Texas Legislature had already taken steps to introduce and consider SB5 before the district court issued its discriminatory-purpose finding, *Operation Push*'s single sentence regarding mootness does not control this case.

Because plaintiffs' claims are moot, the district court's orders should be vacated. Vacatur is automatic when claims become moot in an interlocutory, pre-final-judgment posture—which is the case here. *See Goldin v. Bartholow*, 166 F.3d 710, 718 (5th Cir. 1999) ("If mootness occurred prior to the rendering of final judgment by the district court, *vacatur* and dismissal is automatic."), *discussed in In re Scruggs*, 392 F.3d 124, 129 (5th Cir. 2004) (per curiam); *see* Appellants' Br. 35-36. In any event, other circuits agree that mootness in light of a legislative amendment requires vacatur. *See* Reply Br. 9-10, 17-21.

2. The arguments plaintiffs do offer provide no basis for questioning the State's likelihood of success. Plaintiffs continue, for example, to rely on *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), *cited in* Mot. 16. But they still fail to address the myriad distinctions the State has identified between that case and this one. *See* Appellants' Br. 23-24, 67-68; Reply Br. 12. And they continue to invoke the specter of "harm to countless Texas voters," Mot. 10, while still failing to rebut the State's showing that plaintiffs face no threat of harm to their voting rights under SB5.

Plaintiffs also rehash their argument that the en banc majority's opinion somehow granted the district court a license to ignore contrary evidence or rubber-stamp its vacated order by deeming the evidence "sufficient to support an overall finding of discriminatory intent." Mot. 15. The en banc majority reached no such conclusion, and it granted no such license to the district court. Unfortunately, the district court accepted Plaintiffs' mistaken interpretation and failed to follow this Court's instruction to "reevaluate the evidence and determine anew whether the Legislature acted with a discriminatory intent." *Veasey v. Abbott*, 830 F.3d 216, 243 (5th Cir. 2016) (en banc). That, among other reasons, is why the State is likely to succeed on the merits.

Plaintiffs put too much stock in the en banc majority's statement that the record contained "evidence that could support a finding of discriminatory intent." *Id.* at 235. That is unremarkable—almost every record contains some evidence that could support a finding one way or the other when viewed in isolation. But the question is whether that evidence is sufficient to overcome contrary evidence in the record. That is why this Court vacated the district court's finding of discriminatory purpose and remanded with instructions to reexamine "the probative evidence underlying Plaintiffs' discriminatory purpose claims weighed against the contrary evidence." *Id.* at 242. Contrary to plaintiffs' suggestion, this Court did not presume to examine the entire record, *see* Mot. 14 (arguing that "this Court has examined the record"); it considered the evidence cited by the district court in its vacated opinion. And this

Court expressly stated that a remand was needed to "be confident of the evidentiary record and the adequacy of the lower court's consideration of it." *Veasey,* 830 F.3d at 242. This holding did not authorize the district court to view evidence favoring plaintiffs in isolation.

Yet as the State has explained, that is exactly what the district court did, and that is one of many reasons why its order cannot stand. *See* Appellants' Br. 51-53; *see generally id.* at 50-81. Adopting plaintiffs' mistaken interpretation, the district court read this Court's prior opinion to "h[o]ld that there was sufficient evidence to sustain a conclusion that [SB14] was passed with a discriminatory purpose." ROA.69764. Instead of weighing evidence supporting plaintiffs' claim against the contrary evidence, which was catalogued by the State in hundreds of pages of briefing on remand, the district court looked solely to "Plaintiffs' probative evidence—that which was left intact after the Fifth Circuit's review." ROA.69773. That was clear error.

Plaintiffs' motion concludes with the bold claim that "there is no reason to allow SB5 to control elections pending resolution of this case." Mot. 18. The State can offer several. First, SB5 is a duly enacted statute entitled to a presumption of constitutionality and good faith. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 915 (1995). Second, SB5 is an ameliorative amendment to the State's voter-ID law that includes the remedy of a reasonable-impediment exception expressly suggested by this Court, 830 F.3d at 270. And this reasonable-impediment exception eliminates any threat of harm to plaintiffs—a point

that plaintiffs have consistently failed to rebut. Third, SB5 has not been challenged; in fact, plaintiffs expressly declined to file claims against it. Finally, there is no evidence that SB5 was motivated by a discriminatory purpose or that it will have a discriminatory effect—a point confirmed by the district court's resort to "prospective conceptualization" about SB5's impact to justify an injunction against the law. ROA.70439-48; *cf.* Mot. 19 (asserting that the district court's admitted speculation resulted in "findings"). Plaintiffs have again failed to provide any valid reason why SB5 should not take effect. Their attempt to disrupt the 2018 election cycle must therefore be rejected.

* * *

The stay should remain in place pending appeal. And in this appeal, the Court should (1) reverse or vacate the district court's discriminatory-purpose finding, (2) vacate the permanent injunction of SB5, and (3) decline to remand the case back to the district court—because plaintiffs face no threat of harm to their voting rights in light of SB5's reasonable-impediment exception.

CONCLUSION

Plaintiffs' motion to lift the stay should be denied.

Respectfully submitted.

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