No. 17-40884

In the United States Court of Appeals for the Fifth Circuit

Marc Veasey; Jane Hamilton; Sergio DeLeon; Floyd Carrier; Anna Burns; Michael Montez; Penny Pope; Oscar Ortiz; Koby Ozias; League of United Latin American Citizens; John Mellor-Crumley; Ken Gandy; Gordon Benjamin; Evelyn Brickner; Dallas County, Plaintiffs-Appellees,
Texas Association of Hispanic County Judges and County Commissioners, Intervenor Plaintiffs-Appellees,

v.

Greg Abbott, in his official capacity as Governor of Texas; Rolando B. Pablos, in his official capacity as Texas Secretary of State; State of Texas; Steve McCraw, in his official capacity as Director of the Texas Department of Public Safety, Defendants-Appellants.

United States of America, Plaintiff-Appellee, Imani Clark, Intervenor Plaintiff-Appellee,

v.

State of Texas; Rolando B. Pablos, in his official capacity as Texas Secretary of State; Steve McCraw in his official capacity as Director of the Texas Department of Public Safety, Defendants-Appellants.

Texas State Conference of NAACP Branches; Mexican American Legislative Caucus, Texas House of Representatives, Plaintiffs-Appellees,

v.

Rolando B. Pablos, in his official capacity as Texas Secretary of State; Steve McCraw, in his official capacity as Director of the Texas Department of Public Safety,
Defendants-Appellants.

Lenard Taylor; Eulalio Mendez, Jr., Lionel Estrada; Estela Garcia Espinoza; Maximina Martinez Lara; La Union Del Pueblo Entero, Incorporated, Plaintiffs-Appellees,

v.

State of Texas; Rolando B. Pablos, in his official capacity as Texas Secretary of State; Steve McCraw in his official capacity as Director of the Texas Department of Public Safety,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Texas, Corpus Christi Division, Civ. No. 2:13-cv-00193

PRIVATE APPELLEES' PETITION FOR INITIAL HEARING *EN BANC* AND REHEARING *EN BANC* OF MOTIONS PANEL'S STAY DECISION

Counsel Listed on Inside Cover

Paul M. Smith
J. Gerald Hebert
Danielle M. Lang*
Mark P. Gaber
Campaign Legal Center
1411 K Street NW, Ste. 1400
Washington, DC 20005
**Admitted in New York and California Courts only; Practice limited to U.S. Courts and federal agencies*

Chad W. Dunn
K. Scott Brazil
4201 Cypress Creek Pkwy., Ste. 530
Houston, TX 77068

Armand G. Derfner
Derfner & Altman
575 King St., Ste. B
Charleston, SC 29043

Neil G. Baron
Law Office of Neil G. Baron
914 FM 517 W, Ste. 242
Dickinson, TX 77539

David Richards
Richards, Rodriguez & Skeith, LLP
816 Congress Ave., Ste. 1200
Austin, TX 78701

Counsel for Plaintiffs-Appellees Marc Veasey, et al. & LULAC

Jon M. Greenbaum
Ezra D. Rosenberg
Brendan B. Downes
Lawyers' Committee for Civil Rights Under Law
1401 New York Ave., NW, Ste. 400
Washington, DC 20005

Wendy Weiser
Myrna Perez
The Brennan Center for Justice at NYU Law School
120 Broadway, Ste. 1750
New York, NY 10271

Sidney S. Rosdeitcher
Paul, Weiss, Rifkind, Wharton & Garrison, LLP
1285 Avenue of the Americas
New York, NY 10019

Victor Goode
NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215

Robert Notzon
The Law Office of Robert Notzon
1502 West Ave.
Austin, TX 78701

Amy L. Rudd
Lindsey B. Cohan
Dechert LLP
500 W. 6th St., Ste. 2010
Austin, TX 78701

Neil Steiner
Dechert LLP
1095 Avenue of the Americas
New York, NY 10036

Jose Garza
Law Office of Jose Garza
7414 Robin Rest Drive
San Antonio, TX 98209

Daniel Gavin Covich
Covich Law Firm LLC
Frost Bank Plaza
802 N Carancahua, Ste. 2100
Corpus Christi, TX 78401

Gary Bledsoe
Potter Bledsoe, LLP
316 W. 12th St., Ste. 307
Austin, TX 78701

Counsel for Plaintiffs-Appellees the Texas State Conference of NAACP Branches and the Mexican American Legislative Caucus of the Texas House of Representatives

Luis Roberto Vera, Jr.
Law Office of Luis Roberto Vera, Jr.
111 Soledad, Ste. 1325
San Antonio, TX 78205

Counsel for LULAC

Rolando L. Rios
115 E. Travis, STe. 1645
San Antonio, TX 78205

Counsel for Texas Association of Hispanic County Judges and County Commissioners

Robert W. Doggett
Shoshanna Krieger
Texas RioGrande Legal Aid
4920 N. IH-35
Austin, TX 78751

Jose Garza
Texas RioGrande Legal Aid
1111 N. Main Ave.
San Antonio, TX 78212

Counsel for Plaintiffs-Appellees Lenard Taylor, et al.

Janai S. Nelson
Leah C. Aden
Deuel Ross
NAACP Legal Defense and Educational Fund, Inc.
40 Rector Street, 5th Floor
New York, NY 10006

Jonathan Paikin
Kelly P. Dunbar
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

Counsel for Plaintiff-Appellee Imani Clark

CERTIFICATE OF INTERESTED PARTIES

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.

Plaintiffs-Appellees	**Counsel**
• Marc Veasey • Jane Hamilton • Sergio DeLeon • Floyd Carrier • Anna Burns • Michael Montez • Penny Pope • Oscar Ortiz • Koby Ozias • John Mellor-Crumley • Ken Gandy • Gordon Benjamin • Evelyn Brickner • Dallas County, Texas • League of United Latin American Citizens	• Neil G. Baron • Brazil & Dunn • Kembel Scott Brazil • Campaign Legal Center • Armand Derfner • Chad W. Dunn • Paul M. Smith • J. Gerald Hebert • Danielle M. Lang • Mark P. Gaber • David Richards • Richards, Rodriguez & Skeith, LLP • Luis Roberto Vera, Jr.
• United States of America	• Richard Dellheim • Daniel J. Freeman • John M. Gore • T. Christian Herren, Jr. • Abe Martinez • U.S. Department of Justice
• Mexican American Legislative Caucus, Texas House of Representatives • Texas State Conference of NAACP Branches	• Brendan B. Downes • Brennan Center for Justice • Lindsey B. Cohan • Gary Bledsoe • Covich Law Firm LLC • Dechert LLP • Daniel Gavin Covich

Plaintiffs-Appellees	Counsel
	• Jose Garza • Victor Goode • John M. Greenbaum • Law Office of Jose Garza • Law Office of Robert Notzon • Lawyers' Committee of Civil Rights Under Law • Robert Notzon • NAACP • Myrna Perez • Paul, Weiss, Rifkind, Wharton & Garrison LLP • Potter Bledsoe, LLP • Sidney S. Rosdeitcher • Ezra D. Rosenberg • Amy L. Rudd • Neil Steiner • Wendy Weiser
• Estela Garcia Espinosa • Lionel Estrada • La Union Del Pueblo Entero, Inc. • Maximina Martinez Lara • Eulalio Mendez, Jr. • Lenard Taylor	• Jose Garza • Robert W. Doggett • Shoshanna Krieger • Texas Rio Grande Legal Aid, Inc.
• Imani Clark	• Leah C. Aden • Kelly Dunbar • Janai S. Nelson • NAACP Legal Defense and Educational Fund, Inc. • Jonathan E. Paikin • Deuel Ross • Wilmer Cutler Pickering Hale and Dorr LLP
• Texas Association of Hispanic County Judges and County Commissioners	• Rolando L. Rios

Defendants-Appellants	**Counsel**
• Greg Abbott, in his official capacity as Governor of Texas • Roland Pablos, in his official capacity as Texas Secretary of State • State of Texas • Steve McGraw, in his official capacity as Director of the Texas Department of Public Safety	• J. Campbell Barker • Angela V. Colmenero • Matthew H. Frederick • Scott A. Keller • Jason R. LaFond • Jeffrey C. Mateer • Office of the Attorney General • Ken Paxton

/s/ Paul M. Smith
Paul M. Smith
Counsel for Plaintiffs-Appellees Marc Veasey, et al./LULAC

STATEMENT REGARDING INITIAL HEARING *EN BANC* AND REHEARING *EN BANC* OF MOTIONS PANEL'S STAY DECISION

1. The Court should initially hear this appeal *en banc* because it raises questions of exceptional importance regarding the appropriate judicial response to remedial legislation that fails to eliminate discriminatory features of a law. Likewise, *en banc* review is needed to guide future legislatures so they can simultaneously protect their federalism interests *and* protect individuals' federal constitutional rights when enacting remedial legislation. Equally important, initial *en banc* review will ensure fidelity to this Court's prior *en banc* opinion in this case and facilitate speedy final resolution to ensure the fundamental right to vote is not unlawfully restricted for another election cycle.

2. This Court should rehear *en banc* the 2-1 decision of the motions panel granting a stay of the district court's permanent injunction of SB14 and SB5 pending appeal in order to maintain uniformity of this Circuit's precedent and compliance with Supreme Court precedent. The panel's decision conflicts with this Court's decisions in (1) *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618 (5th Cir. 1985), regarding the appropriate standard and depth of analysis for determining likelihood of success on the merits, and (2) this Court's *en banc* decision in this case, *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016), regarding the district court's mandate and discretion to remedy findings of intentional discrimination. The motions panel's decision also conflicts with the Supreme

Court's decision in *City of Richmond v. United States*, 422 U.S. 358 (1975), regarding the appropriate remedy for intentional discrimination.

/s/ Paul M. Smith
Paul M. Smith
Counsel for Plaintiffs-Appellees Marc Veasey, et al./LULAC

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STATEMENT OF ISSUES SUPPORTING HEARING *EN BANC*

Appellees respectfully request that the Court grant initial hearing *en banc* on the merits and grant rehearing *en banc* of the motions panel's divided decision to grant Texas's emergency motion for a stay.[1] *See* Fed. R. App. P. 35.

The merits of this appeal raise questions of exceptional importance regarding the determination of unlawful discriminatory intent, review of intent findings, and the appropriate remedy where a state amends an intentionally discriminatory law but maintains its core discriminatory features and continues to impose burdens on the targets of its discrimination. The outcome of this case will affect hundreds of thousands of Texans, disproportionately Black and Latino, who have waited years despite repeated success in the district court and this Court, to exercise their fundamental right to vote free from unlawful racial discrimination and intimidation.

The decision granting Texas's stay should be reheard *en banc*. First, the panel engages in no meaningful review of Texas's likelihood of success on the merits, devoting three sentences to the question, with no discussion of the district court's fact finding or the governing law.

[1] This Court should follow the default rule that granting a petition for rehearing *en banc* vacates the panel decision, lifting the stay on the district court's order. 5th Cir. R. 41.3.

Second, the panel's cursory merits review fails. As the district court found, SB5 perpetuates SB14's discriminatory purpose and results by continuing the discriminatory picking and choosing of acceptable IDs under SB14 and subjecting those "who lack SB14 photo ID . . . to separate voting obstacles and procedures," including the threat of criminal prosecution. App. 23. Thus, the panel's decision directly contradicts precedent of the Supreme Court, this Court, and other circuits that intentional discrimination must be eliminated root and branch and remedies for intentional discrimination must place victims of discrimination "in the position they would have occupied in the absence of discrimination." *United States v. Virginia*, 518 U.S. 515, 547 (1996) (quotations omitted).

Third, the panel's interpretation of the *en banc* Court's mandate is wrong. Fourth, the panel's holding that the state automatically satisfies its burden to show irreparable harm whenever a state statute is enjoined is misguided and erroneous. And fifth, the panel improperly endorses Texas's strategy to label nearly every day of the calendar an "emergency" "deadline," which would warrant perpetual stays of judgments affecting election laws.

The last time that a motions panel of this Court granted a stay in this case, Texas voters endured two years of elections conducted pursuant to a law that this Court ultimately concluded was unlawful and racially discriminatory. If this stay is not lifted, Texas voters will once again be forced to attempt to exercise a

fundamental right within a racially discriminatory voting scheme until this case is resolved. Oral argument is scheduled for December.[2] As such, the stay threatens the possibility of a complete remedy before the 2018 statewide primaries.

Plaintiffs-Appellees therefore respectfully request that this Court grant an initial hearing *en banc* on the merits of this appeal and rehear the panel's stay decision.[3]

STATEMENT OF THE PROCEEDINGS

Just over a year ago, this Court, sitting *en banc*, issued a 9-6 decision affirming the district court's holding that Texas's strict voter photo ID law, SB14, had discriminatory results in violation of Section 2 of the Voting Rights Act and remanding the issue of discriminatory intent. *Veasey v. Abbott* ("*Veasey II*"), 830 F.3d 216 (5th Cir. 2016). While the *en banc* opinion held that there were legal errors in the district court's initial intent analysis, it stressed that there was sufficient record evidence to support a finding of discriminatory intent on remand. *Veasey II*, 830 F.3d at 241 ("[T]here remains evidence to support a finding that the cloak of ballot

[2] This case was initially set for oral argument for November 2017. The clerk later informed the parties that, after conferring with counsel for Texas only, the oral argument was postponed to December based on counsel for Texas's representation that additional time was needed to transcribe hearings and files. Despite Plaintiffs-Appellees' clarification that all transcripts have been transcribed and most, if not all, were already filed with the Court, the argument remains delayed. Plaintiffs-Appellees ask that this case be set for argument during the first available *en banc* panel.

[3] Regardless of this Court's determination on Plaintiffs-Appellees' petition for initial hearing *en banc*, Plaintiffs-Appellees urge the *en banc* court to rehear the panel's stay decision.

integrity could be hiding a more invidious purpose."). The *en banc* court cited, as some of the evidence of intent: the Legislature's awareness of the disproportionate impact of SB14;[4] the rejection of ameliorative amendments without explanation;[5] SB14's tenuous relation to preventing voter fraud and Texas's shifting rationales for SB14;[6] Texas's history of using "ballot integrity" to justify voter suppression;[7] and the radical procedural departures that the Legislature took to address the "almost nonexistent problem" of in-person voter fraud.[8] Texas's petition for certiorari was denied.

On remand, pursuant to this Court's instructions, the district court entered an interim remedy for the Section 2 *results* violations only, ECF No. 895, allowing voters without one of the limited forms of SB14 ID to vote a regular ballot only after signing a "declaration of reasonable impediment" ("DRI") indicating their obstacle to obtaining the ID. *Id.* This remedy was a "stop-gap measure" for the impending presidential election and formulated to address only the results violation. App.26.

Concurrently, the district court proceeded on remand of the discriminatory intent claim. After briefing and oral argument, the district court reweighed the evidence and, carefully tracking this Court's guidance, found that SB14 has a

[4] *Veasey II*, 830 F.3d at 236.
[5] *Id.* at 237, 239, 241.
[6] *Id.* at 237, 240-41.
[7] *Id.* at 237.
[8] *Id.* at 239.

discriminatory purpose. App.40. The district court assigned no weight to the intent evidence that the *en banc* majority viewed as problematic. App.44, 47-48. Based on the same evidence that the *en banc* court held *could* support a discriminatory purpose finding, the district court found discriminatory intent.

On June 1, 2017, the Legislature passed SB5. SB5 did not repeal SB14 or remove its core discriminatory elements. It maintained the limited and discriminatory categories of SB14 ID and subjected those without it—who, by design, are disproportionately Black and Latino voters—to additional obstacles. SB5 added a DRI process for those who lack SB14 ID but made that process more burdensome than the interim remedy. SB5 *eliminated* the "other" category, which gave voters without SB14 ID an opportunity to identify their basis for lacking the ID in their own words, *increased* the criminal penalties for perjury on DRIs, and required those penalties to be listed on the DRI form. App.27-28.

On August 23, the district court issued an order holding that SB5 was an insufficient remedy for both SB14's intentional discrimination and discriminatory results. App.32. It found that SB5 failed to "meaningfully expand the types of photo IDs that can qualify," did not meaningfully expand access to SB14 ID, and failed to provide for *any* additional voter education programming or funding. App.23-25, 32-33. The district court noted that the DRI process in the interim order was never considered an appropriate intent remedy and that SB5's changes to the interim order

worked in tandem to impose additional burdens on minority voters: "Listing a limited number of reasons for lack of SB14 is problematic because persons untrained in the law and who are subjecting themselves to penalties of perjury may take a restrictive view of the listed reasons." App.28. The district court noted that there was no record support for "[r]equiring a voter to address more issues than necessary," including a voter's specific impediment to SB14 ID, "under penalty of perjury and enhancing that threat by making the crime a state jail felony appears to be efforts at voter intimidation." App.30.

As such, the district court found that SB5 unlawfully continued burdens on the minority voters targeted by SB14, trading "one obstacle to voting with another," replacing the disenfranchisement of SB14 with "an overreaching affidavit threatening severe penalties for perjury." App.32. Therefore, the district court held that "the only appropriate remedy for SB14's discriminatory purpose or discriminatory result is an injunction against the enforcement of that law and SB5, which perpetuates SB14's discriminat[ion]." App.34.

Texas immediately appealed the district court's remedial order and filed a stay motion with the district court. The next day, Texas filed an "emergency" motion for a stay with this Court, alleging an "emergency" related to a vendor printing schedule that it had not presented to the district court. On September 5, a divided motions panel granted that emergency stay.

ARGUMENT

I. The Merits Appeal Raises Exceptionally Important Questions Regarding Discriminatory Intent Standards and Remedies.

Initial hearing *en banc* is authorized in cases of exceptional importance. *See* Fed. R. App. P. 35(a) (providing that a case may be "heard or reheard by the court of appeals en banc"). This rule has been invoked to hear important cases *en banc* in the first instance. *See Int'l Refugee Assistance Project v. Trump*, No. 17-1351 (4th Cir. April 10, 2017) (*sua sponte* ordering initial hearing *en banc* in challenge to executive order banning entry from predominantly Muslim nations); *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. May 1, 2016) (*sua sponte* ordering initial hearing *en banc* in challenge to presidential Clean Power Plan); *Hobby Lobby Stores, Inc. v. Sebelius,* 723 F.3d 1114, 1125 (10th Cir. 2013) (initial hearing *en banc*, on motion, of challenge to contraceptive-coverage requirement under ACA); *Gratz v. Bollinger*, 277 F.3d 803 (6th Cir. 2001) (granting petition for initial hearing *en banc* in affirmative action challenge).

This case challenges the strictest voter ID law in the nation, affecting hundreds of thousands of Texas voters. This Court already took this case *en banc* last year, generating an 86-page majority decision. Given the exceptional importance of this case and the need to ensure proper application of the *en banc* opinion, this Court should hear this appeal *en banc* now and answer all the important questions, however misguided, that Texas intends to raise on appeal.

First, Texas's stay motion indicates that it intends to ask this Court to ignore Rule 52 and this Court's *en banc* opinion on the deference due the district court's fact-findings on discriminatory intent. Texas argues that the district court failed to give SB14 the requisite "strong presumption of validity" that is due to "[f]acially neutral laws." Stay Mot. at 9. This is just a rephrasing of Texas's previously rejected "clearest proof" standard for discriminatory intent. *Veasey II*, 830 F.3d at 230 n.12. Similarly, Texas rehashes its argument, also rejected by this Court's *en banc* opinion, that the absolute number of minority and non-minority voters affected is the appropriate standard. Stay Mot. at 10; *Veasey II*, 830 F.3d at 252 n.45. Texas also intends to ask this Court to reweigh the evidence in Texas's favor, in violation of Rule 52, and find that the record evidence could not support a finding of discriminatory intent, a holding directly contrary to this Court's *en banc* opinion. Stay Mot. at 12-18; *Veasey II*, 830 F.3d at 241. Initial *en banc* review will ensure conformity with this Court's *en banc* opinion.

With respect to SB5, this appeal raises at least two important questions. First, Texas apparently intends to raise the merits argument that the district court was *required* to find that the Legislature's passage of SB5 cancelled out any discriminatory purpose underlying SB14. Stay Mot. at 11. Second, the motions panel held, as a matter of remedy, that the district court was not entitled to enjoin SB5 to

ensure a complete remedy for SB14's discriminatory purpose. App.3-4. Both of these positions should be rejected by the *en banc* Court.

First, subsequent legislation passed in response to a finding of discriminating intent does not erase a prior law's discriminatory purpose. Second, the district court's broad discretion to remedy intentional discrimination cannot be circumvented by intervening legislation that maintains and perpetuates the original law's discriminatory features. To hold otherwise would also require plaintiffs to start new litigation to uproot discrimination at great time and expense to receive full and complete relief. This well-worn strategy is what prompted a bipartisan Congress to require preclearance under the Voting Rights Act in the first place. *Shelby County v. Holder*, 133 S. Ct. 2612, 2619 (2013). It is important that the Court resolve this extraordinary issue *en banc* because of its wide-reaching impact on intentional discrimination jurisprudence.

Further, Texas argues—and the stay panel held—that SB5 remedies SB14's *intentional* discrimination simply because it no longer *results* in the complete disenfranchisement of victims of discrimination. This is not the law and should by corrected by this Court. In its *en banc* opinion, this Court noted that remedies for discriminatory intent differ from those for discriminatory results only. *Veasey* II, 830 F.3d at 230 n. 11 (quoting *City of Richmond v. United States*, 422 U.S. 358, 378 (1975) ("An official action ... taken for the purpose of discriminating ... on account

of ... race has no legitimacy at all.")); *see also id.* at 242. The Supreme Court has held that intentional discrimination must be eliminated "root and branch," *Green v. County School Board,* 391 U.S. 430, 438 (1968), and the victims of intentional discrimination must be placed "in the position they would have occupied in the absence of discrimination." *Virginia*, 518 U.S. at 547 (quotations omitted). This Court should hold *en banc* that SB5 fails that stringent standard.

II. The Motions Panel's Stay Decision Should Be Reheard *En Banc* and Vacated.

The motions panel's decision staying the injunction of SB14 and SB5 pending appeal should be reheard *en banc* for at least five reasons.

First, the panel's "assessment" of Texas's likelihood of success—which spans *three sentences*—is woefully inconsistent with this Court's requirement that "[t]o evaluate [a party's] likelihood of success we determine what is the proper standard to be applied in evaluating plaintiff's claims, and then we apply that standard to the facts presented in the record." *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 622 (5th Cir. 1985).

The district court issued a carefully considered 27-page opinion, expanding on and incorporating parts of its prior 147-page opinion, in which it concluded that "the provisions of SB5 fall far short of mitigating the discriminatory provisions of SB14," explaining that "SB5 on its face embodies some of the indicia of discriminatory purpose—particularly with respect to the enhancement of the threat

of prosecution for perjury regarding a crime unrelated to the state purpose of preventing in-person voter impersonation fraud." App.15. To reach that conclusion, the district court analyzed the proper legal standard, *see* App.15-20, and then discussed each of the five discriminatory features of SB14 in turn, analyzing how—if at all—SB5 affected those features, App.21-33. The court then explored the governing case law on fashioning an appropriate remedy, and concluded—within its sound discretion—that SB14 and SB5 must be enjoined, App.33-38.

In sharp contrast, the motions panel concluded that Texas made a "strong showing that it is likely to succeed on the merits" because

> SB5 allows voters without qualifying photo ID to cast regular ballots by executing a declaration that they face a reasonable impediment to obtaining qualifying photo ID. This declaration is made under penalty of perjury. 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 SB5.

App.4. There was no citation to the governing case law, no analysis under clear error review—or even *mention* of the district court's fact-findings regarding SB14's discriminatory purpose—no analysis of the provisions of SB5 and how they remove or continue SB14's discriminatory features, and no discussion of the district court's discretion to fashion remedies or the applicable abuse of discretion standard.

The "likelihood of success" consideration is "[t]he most important factor" in a stay decision. *Woodfox v. Cain*, 789 F.3d 565, 569 (5th Cir. 2015). Such a threadbare analysis cannot support staying a district court's considered judgment.

The panel's merits analysis cannot be permitted to stand as precedent for an appropriate level of inquiry into the merits of a case on a stay motion.

Second, the panel's cursory merits review fails as a matter of law. The decision rests on a conclusory sentence about discriminatory *effects*, despite the district court's conclusion that SB5 also failed to remedy SB14's discriminatory *purpose*. As Judge Graves explained in dissent, the failure of the panel to confront the discriminatory purpose finding puts the panel's decision in conflict with the Fourth Circuit's decision in *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017), in which an amendment providing for a reasonable impediment procedure was found to be insufficient to remedy the statute's discriminatory purpose.

The panel failed to consider that SB5 is built on the precise elements of SB14 that had been found to be intentionally discriminatory. As the district court found, SB5 perpetuates the discriminatory picking and choosing of acceptable IDs under SB14, fails to expand access to those IDs for minority voters, lacks funding for vital voter education, and continues to burden those who are the victims of the discriminatory *intent* with a process that includes the threat of criminal prosecution for checking the wrong "impediment" box. App.22-33. Thus, SB5 does not eliminate the intentional discrimination of SB14 "root and branch," *Green*, 391 U.S. at 438, or place the victims of discrimination "in the position they would have occupied in

the absence of discrimination." *Virginia*, 518 U.S. at 547 (quotations omitted), and thus conflicts with well-established precedent. *See, e.g.*, *City of Richmond v. United States*, 422 U.S. 358, 378 (1975) (holding that "[a]n official action . . . taken for the purpose of discriminating . . . on account of . . . race has no legitimacy at all"); *McCrory*, 831 F.3d at 241 ("On its face, this amendment does not fully eliminate the burden imposed by the photo ID requirement. . . [I]t requires voters to take affirmative steps to justify to the state why they failed to comply with a provision that we have declared was enacted with racially discriminatory intent.").

The district court's decision to enjoin SB5 was within its broad equitable powers. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("[T]he scope of a district court's equitable powers to remedy past wrongs is broad."). Courts have the power to "enjoin the defendant from renewing [an unlawful] practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Here, the district court concluded that an injunction of SB5 was necessary because "SB5's methodology remains discriminatory because it imposes burdens disproportionately on Black and Latinos." App.23. It found that the elimination of the "Other" category on the DRI, coupled with its increased criminal penalties, would "caus[e] qualified voters to forfeit the franchise out of fear, misunderstanding, or both." App.29. This chilling effect would fall disproportionately on Black and Latino Texans, because SB5 "does not meaningfully expand the types of photo IDs

that can qualify." App.23. The court's formulation of the remedy, subject to review under the abuse of discretion standard (incorporating the clear error rule), was entitled to deference by the panel, which was not given, and therefore warrants *en banc* review.

Third, the panel's decision conflicts with this Court's prior *en banc* decision by holding that the district court exceeded its mandate on remand by enjoining SB5. App.3-4. This Court instructed that, on remand, "if the district court concludes that SB14 was passed with a discriminatory intent, the district court should fashion an appropriate remedy in accord with its findings," *Veasey II*, 830 F.3d at 243, and that it should "bear[] in mind the effect any interim legislative action taken with respect to SB14 may have," *id.* at 272. The district court did just that, reviewing SB5's provisions and, "bearing in mind the effect" SB5 had "with respect to SB14," *Veasey II*, 830 F.3d at 272, concluded that SB5 perpetuates SB14's discriminatory purpose because SB5's "features do not function without the discriminatory features it perpetuates," App.36.

The panel rested its contrary conclusion on a single sentence from this Court's opinion: "Any concerns about a new bill would be the subject of a new appeal for another day." *Veasey II*, 830 F.3d at 271; *see* App.3-4. That statement was preceded by this: "[n]either our ruling here nor any ruling of the district court on remand should prevent the Legislature from acting to ameliorate the issues raised in this

opinion." *Veasey II*, 830 F.3d at 271. These statements do not limit the district court's power to enjoin SB5, they support it. The Legislature was not *prevented* from acting—rather, its actions raised significant concerns, which are now "the subject of a new appeal." *Id.* The panel's decision to grant the stay rests on an improper interpretation of this Court's mandate, and should be reviewed *en banc*.

Fourth, the panel's decision directly conflicts with other circuits' precedent, and is inconsistent with recent Supreme Court precedent, by presuming that, any time a state statute is enjoined, the irreparable harm factors weighs in favor of a stay. App.4-5. The single-Justice opinion on which the panel relies, *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers), does not support this conclusion, as Judge Graves explains in dissent, App.10. As the *en banc* Fourth Circuit has held, "the Government is in no way harmed by issuance of a preliminary injunction which prevents [it] from enforcing restrictions likely to be found unconstitutional." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 603 (4th Cir. 2017) (*en banc*) (quotations omitted). Although the Supreme Court granted *certiorari* in *Refugee Assistance*, *see* 137 S. Ct. 2080 (2017) (*per curiam*), the Court issued an opinion granting a stay of the injunction *in part*, *id.* at 2089. In considering the potential for irreparable harm to the Government, the Supreme Court never suggested that the Government, *because* it was the Government, was necessarily irreparably harmed by the injunction against the Executive Order.

Fifth, the panel's decision warrants *en banc* review because it allows Texas to declare an "emergency" in voting cases every year, all year. App.5. SB5 does not take effect until January 2018. The primary elections are in March 2018. The statewide general election is in November 2018. Texas's "emergency," endorsed by the panel, is that it needs to coordinate with third-party printing vendors by September 18, 2017 for elections happening in March 2018. App.3. If this constitutes an emergency warranting a stay, then the word "emergency" is meaningless. It cannot be that *any* "deadline" related to Texas's elections precludes an injunction. Nor can impending local elections—which happen throughout the year—continually support implementation of an intentionally discriminatory law. Under the panel's reasoning, stays pending appeal will be granted in *all circumstances*, rather than only in "extraordinary" ones. *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). "A stay is not a matter of right, even if irreparable injury might otherwise result." *Indiana State Police Pension Trust v. Chrysler LLC*, 556 US. 960, 861 (2009) (quotations omitted). E*n banc* review should be ordered.

CONCLUSION

Plaintiffs-Appellees ask this Court to grant initial hearing *en banc* of this appeal and grant rehearing *en banc* of the motions panel's stay decision.

/s/ Paul M. Smith
Paul M. Smith
J. Gerald Hebert
Danielle M. Lang*
Mark P. Gaber
Campaign Legal Center
1411 K Street NW, Ste. 1400
Washington, DC 20005

Chad W. Dunn
K. Scott Brazil
4201 Cypress Creek Pkwy., Ste. 530
Houston, TX 77068

Armand G. Derfner
Derfner & Altman
575 King St., Ste. B
Charleston, SC 29043

Neil G. Baron
Law Office of Neil G. Baron
914 FM 517 W, Ste. 242
Dickinson, TX 77539

David Richards
Richards, Rodriguez & Skeith, LLP
816 Congress Ave., Ste. 1200
Austin, TX 78701

Counsel for Plaintiffs-Appellees Marc Veasey, et al. & LULAC

/s/ Lindsey B. Cohen
Jon M. Greenbaum
Ezra D. Rosenberg
Brendan B. Downes
Lawyers' Committee for Civil Rights Under Law
1401 New York Ave., NW, Ste. 400
Washington, DC 20005

Wendy Weiser
Myrna Perez
The Brennan Center for Justice at NYU Law School
120 Broadway, Ste. 1750
New York, NY 10271

Sidney S. Rosdeitcher
Paul, Weiss, Rifkind, Wharton & Garrison, LLP
1285 Avenue of the Americas
New York, NY 10019

Victor Goode
NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215

Robert Notzon
The Law Office of Robert Notzon
1502 West Ave.
Austin, TX 78701

Amy L. Rudd
Lindsey B. Cohan
Dechert LLP
500 W. 6th St., Ste. 2010
Austin, TX 78701

Neil Steiner
Dechert LLP
1095 Avenue of the Americas
New York, NY 10036

Jose Garza
Law Office of Jose Garza
7414 Robin Rest Drive
San Antonio, TX 98209

Daniel Gavin Covich
Covich Law Firm LLC
Frost Bank Plaza
802 N Carancahua, Ste. 2100
Corpus Christi, TX 78401

Gary Bledsoe
Potter Bledsoe, LLP
316 W. 12th St., Ste. 307
Austin, TX 78701

Counsel for Plaintiffs-Appellees the Texas State Conference of NAACP Branches and the Mexican American Legislative Caucus of the Texas House of Representatives

/s/ Luis Roberto Vera, Jr.
Luis Roberto Vera, Jr.
Law Office of Luis Roberto Vera, Jr.
111 Soledad, Ste. 1325
San Antonio, TX 78205

Counsel for LULAC

/s/ Rolando L. Rios
Rolando L. Rios
115 E. Travis, STe. 1645
San Antonio, TX 78205

Counsel for Texas Association of Hispanic County Judges and County Commissioners

Robert W. Doggett
Shoshanna Krieger
Texas RioGrande Legal Aid
4920 N. IH-35
Austin, TX 78751

/s/ Jose Garza
Jose Garza
Texas RioGrande Legal Aid
1111 N. Main Ave.
San Antonio, TX 78212

Counsel for Plaintiffs-Appellees Lenard Taylor, et al.

/s/ Leah C. Aden
Janai S, Nelson
Leah C. Aden
Deuel Ross
NAACP Legal Defense and Educational Fund, Inc.
40 Rector Street, 5th Floor
New York, NY 10006

Jonathan Paikin
Kelly P. Dunbar
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

Counsel for Plaintiff-Appellee Imani Clark

**Admitted in New York and California; Practice limited to U.S. Courts and federal agencies.*

Dated: September 8, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Paul M. Smith
Paul M. Smith
Counsel for Plaintiffs-Appellants
Marc Veasey, et al./LULAC

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/s/ Paul M. Smith
Paul M. Smith
Counsel for Plaintiffs-Appellants
Marc Veasey, et al./LULAC

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Dated: September 8, 2017

/s/ Paul M. Smith
Paul M. Smith
Counsel for Plaintiffs-Appellees
Marc Veasey, et al./LULAC