No. 18-50428

In the United States Court of Appeals for the Fifth Circuit

JARROD STRINGER, BENJAMIN HERNANDEZ, and JOHN WOODS,
Plaintiffs-Appellees,

v.

ROLANDO PABLOS, in his official capacity as the Texas Secretary of State; and STEVEN C. MCCRAW, in his official capacity as the Director of the Texas Department of Public Safety,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division

DEFENDANTS' OPPOSED EMERGENCY MOTION TO STAY INJUNCTION PENDING APPEAL AND, ALTERNATIVELY, FOR A TEMPORARY ADMINISTRATIVE STAY PENDING CONSIDERATION OF THIS MOTION

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney 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 A. KELLER
Solicitor General
scott.keller@oag.texas.gov

MATTHEW H. FREDERICK
Deputy Solicitor General

BETH KLUSMANN
Assistant Solicitor General

Counsel for Appellants

Certificate of Interested Persons

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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:

- Rolando Pablos,[1] *in his official capacity as Texas Secretary of State*
- Steven C. McCraw, *in his official capacity as Director of the Texas Department of Public Safety*

Counsel for Defendants-Appellants:

Ken Paxton
Jeffrey C. Mateer
Scott A. Keller (lead counsel)
Matthew H. Frederick
Beth Klusmann
Anne Marie Mackin
Esteban S.M. Soto
Office of the Attorney General

[1] Rolando Pablos succeeded Carlos H. Cascos as Texas's Secretary of State and was substituted by rule. *See* Fed. R. Civ. P. 25(d).

Plaintiffs-Appellees:

- Jarrod Stringer
- Benjamin Hernandez
- John Woods

Counsel for Plaintiffs-Appellees:

Peter A. Kraus
Charles S. Siegel
Caitlyn E. Silhan
Rachel A. Gross
Waters & Kraus, LLP

Mimi M.D. Marziani
Rebecca Harrison Stevens
Hani Mirza
Cassandra Champion
Ryan V. Cox
The Texas Civil Rights Project

Former Plaintiff:

- Totysa Watkins

/s/ Scott A. Keller
SCOTT A. KELLER
Counsel of Record for Defendants-Appellants

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Introduction and Nature of the Emergency

The district court on May 18, 2018 entered a permanent injunction ordering the State to take costly steps to alter its voter-registration procedures under pressing deadlines. The court ordered the State to create—*within 45 days*—an online voter-registration system for individuals who use the Department of Public Safety's (DPS) online driver's-license-renewal and change-of-address system. The injunction also orders the State to create—*within 14 days*—a statewide public-education plan, subject to approval by Plaintiffs' counsel, to inform the public about how the judgment "changes the voter registration process," at a potential cost of at least hundreds of thousands of dollars. App.632, 652-53.[1]

Defendants respectfully request an emergency stay of the district court's injunction for two primary reasons: (1) Plaintiffs lack standing; and (2) the injunction goes well beyond simply enjoining the alleged violations of the National Voter Registration Act and Equal Protection Clause found by the district court.

First, Plaintiffs do not have standing because they were registered to vote at the time they filed their lawsuit, and they did not put on evidence that they would interact with the online DPS system in the future by either moving to a new county or registering to vote (given that they are currently registered). Consequently, Plaintiffs have never had a cognizable Article III injury at any time during this lawsuit.

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[1] App.*X* refers to the Appendix and its consecutively-numbered page filed with this motion.

Second, even if the district court had Article III jurisdiction, the terms of its injunction are not warranted by its findings that the NVRA and the Equal Protection Clause require Defendants to treat online driver's-license-renewal and change-of-address requests as voter-registration applications. The injunction goes much further, requiring Defendants to create a statewide public-education and marketing campaign within 14 days, abide by detailed compliance provisions that Congress left to the States, and submit to wholly unnecessary monitoring and reporting provisions empowering *Plaintiffs' counsel* to commandeer this online voter-registration process for the next 3 years. And as multiple declarations from State officials make clear, it is not feasible for Defendants to comply with the district court's wide-ranging injunction in the short timeline provided. App.647-58.

Thus, a stay pending appeal is warranted to maintain the status quo while this Court reviews the district court's ruling. Given the pressing June 1, 2018 (14-day) deadline imposed by the district court, Defendants respectfully request a ruling on this stay motion by June 1. Alternatively, Defendants request that the Court issue a temporary administrative stay, should the Court need additional time to rule on this motion for a stay pending appeal.

BACKGROUND

I. The National Voter Registration Act

The U.S. Constitution guarantees to the States the right to choose the time, place, and manner of elections, unless Congress intervenes. U.S. Const. art. I, §4, cl. 1. The NVRA, 52 U.S.C. §§20501-11, requires States to offer voter-registration

applications simultaneously with driver's-license applications in certain circumstances. Under 52 U.S.C. §20504(a)(1), "[e]ach State motor vehicle driver's license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law shall serve as an application for voter registration with respect to elections for Federal office . . . ."

Section 20504(d) creates a similar rule for change-of-address forms: "[a]ny change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of change of address for voter registration with respect to elections for Federal office . . . ." Relatedly, §20504(c) generally prohibits States from requiring duplicate information on the voter-registration portion of a driver's-license application, but subsection (c)(2)(C)(iii) requires the voter-registration portion to include a signature. The NVRA also prescribes the time in which a voter-registration application accepted by a motor-vehicle authority (here, DPS) must be transmitted to the State election official (here, the Secretary of State) and processed. *Id.* §§20504(e), 20507(a)(1)(A).

The NVRA creates a private right of action for individuals aggrieved by violations of its provisions. An aggrieved person must provide written notice to the chief election official of the State. *Id.* §20510(b)(1). The State typically has 90 days to correct the violation. *Id.* §20510(b)(2). If the violation is not corrected, the aggrieved person may bring a civil action for declaratory or injunctive relief. *Id.*

II. Texas Voter Registration

Texas statutes governing voter registration require a voter-registration application to have a written signature. *E.g.*, Tex. Elec. Code §13.002(b) ("A registration

application must be in writing and signed by the applicant."); *id.* §15.021 (same for voter-registration-information changes). The only exception to the signature requirement is when a voter moves within a single county; in that case, Texas law permits the voter to change his voter-registration address online. *Id.* §15.021(d). If, however, the voter moves between counties, he must fill out a written voter-registration form and sign it. *Id.* §15.021(a).[2] Signatures on voter-registration applications may then be used to investigate voter fraud or identity theft, consider absentee ballots, or address problems with electronically captured signatures. App.235, 446, 456-57.

Texas's *paper* applications for driver's licenses, renewal of driver's licenses, and changes of address—all of which require signatures—provide for simultaneous voter registration or change of address. App.206-13; Tex. Elec. Code §20.062. When a person initially applies for a driver's license, the applicant provides one signature on the paperwork and a second signature on an electronic screen that captures the image of the signature. App.459-60. The electronically-captured signature is sent to the Secretary of State for voter-registration purposes. App.206-10; Tex. Elec. Code §§20.066(a), 63.002(d).

In contrast to those *paper* applications, the allegations here arise from *online* renewal of driver's licenses and changes of address. Texas permits individuals to renew their driver's licenses or change their addresses through DPS's online system. App.296. The online system asks the individual whether he would like to register to

[2] This is because Texas uses a county-based voter-registration system. *See* Tex. Elec. Code §12.001; *id.* §§13.071, 13.101 (explaining duties of county registrar).

vote. App.299. Next to the box marked "Yes," the website states "This does not register you to vote," but instead explains that "You will receive a link to a voter application on your receipt page." App.299. When the individual completes his online transaction, a notice in red appears at the top of the webpage stating, "You are not registered to vote until you have filled out the online application, printed it, and mailed it to your local County Voter Registrar." App.302. The notice also contains a link to download a voter-registration application. App.302.[3]

III. Procedural History

Plaintiffs are three Texas residents who, between 2013 and 2015, moved between counties in Texas and changed their addresses through DPS's online system. App.11-12. All three were registered to vote at their previous Texas addresses, but none of them printed out and mailed in a voter-registration form as instructed by the DPS system. App.571. When they attempted to vote in the next election, they were told that they were not registered in the county to which they had moved. App.317, 336-37, 355-57.

Plaintiffs' counsel notified Defendants of these alleged violations of the NVRA, App.570, and Defendants offered to assist Plaintiffs in updating their voter-registration information. App.572. By the end of 2015, all three Plaintiffs were registered to vote at their current (new) addresses. App.374, 395, 409.[4]

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[3] A prior version of this system contained similar instructions. App.288-89.

[4] The timing of each registration is available in a sealed exhibit that may be found at District Court Docket No. 78 (using the "EDR" (Effective Date of Registration) field).

Even though Plaintiffs were registered to vote at their current addresses by the end of 2015, Plaintiffs nevertheless filed suit in March 2016; Plaintiffs alleged that (1) Defendants violated the NVRA by failing to permit individuals to register to vote or change their registration address online when submitting driver's-license-renewal or change-of-address requests online, 52 U.S.C. §20504(a), (d); and (2) Defendants' conduct also violated the Equal Protection Clause. App.1-19.[5] Defendants are the Secretary of State and the Director of DPS.

The district court denied Defendants' motion to dismiss, App.83-103, and the parties filed cross-motions for summary judgment. Defendants' motion included evidence that all three Plaintiffs were already registered to vote at their current addresses at the time suit was filed. App.374, 395, 409. And, although each Plaintiff claimed they would use DPS's online system in the future, App.502-10, Plaintiffs offered no evidence that they would (1) move to a new county in the future, or (2) need to register to vote in the future (given that they were already registered).

The district court granted Plaintiffs' summary-judgment motion and denied Defendants' motion. The court rejected the standing and mootness arguments raised by Defendants, App.593-603, and found that Defendants' conduct violated the NVRA because Defendants could use the electronically-captured signatures already on file to permit online voter registration and changes of address for driver's-license-renewal or change-of-address requests. App.605-11. The court also determined that

[5] Plaintiffs also raised NVRA claims under 52 U.S.C. §§20503, 20504(c), 20504(e), and 20507(a)(1)(A). As explained below, these claims are derivative of Plaintiffs' claims under §20504(a) and (d). *See infra* p.12.

the Equal Protection Clause required Defendants to allow online voter registration for individuals who use the online DPS renewal or change-of-address system. App.621-26.

The district court then entered a sweeping permanent injunction. Instead of tailoring its injunction to simply require the State to treat online driver's-license-renewal and change-of-address requests as sufficient voter-registration applications, the district court also (1) required Defendants to create a statewide public-education campaign in 14 days—to be reviewed and approved by Plaintiffs' counsel;[6] (2) mandated precise details of Defendants' compliance; (3) required Defendants to collect and transmit to Plaintiffs' counsel a wide range of information related to online voter registration for the next 3 years; and (4) retained continuing jurisdiction for 2 years. App.628-34.

Defendants appealed and moved for a stay in district court on May 23, explaining that they would seek relief from this Court absent a ruling by 1:00pm on May 25. App.635-58. That deadline has passed without an order from the district court. Because Defendants must begin complying by June 1 and in order to give this Court a full week to consider this motion, Defendants now respectfully request from this Court a stay pending appeal or, alternatively, a temporary administrative stay while the Court considers this motion.

[6] If the parties cannot agree on a plan, they must submit their proposals to the court within 25 days. App.632.

ARGUMENT

Defendants satisfy all four stay factors: (1) likelihood of success on the merits, (2) irreparable harm, (3) no substantial harm to other parties, and (4) the public interest. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013).

I. Defendants Are Likely to Prevail on Appeal Because Plaintiffs Lack Standing and the District Court's Injunction Is Drastically Overbroad.

Plaintiffs were registered to vote at the time they filed their lawsuit. Therefore, there was no concrete injury presenting a live case or controversy between the parties at any time during this lawsuit. The district court thus lacked Article III jurisdiction over Plaintiffs' lawsuit.

The district court's injunction is also significantly overbroad. The district court ordered remedies that go far beyond the requirements of the NVRA and Equal Protection Clause, placing unnecessary burdens on Defendants that are not warranted by the liability findings.

A. Plaintiffs lack standing because they were already registered to vote when they filed this lawsuit.

Here, the three Plaintiffs claim to have experienced—*in the past*—the inability to register to vote at their current addresses (and thus an alleged violation of the NVRA and the Equal Protection Clause caused by the DPS online system). But subsequent to that alleged injury, they became registered to vote at their current addresses, and they were so registered before they filed this lawsuit. As this Court's precedent makes clear, simply experiencing an alleged violation of law in the past

does not confer standing to seek future injunctive relief. *Machete Prods. v. Page*, 809 F.3d 281, 288 (5th Cir. 2015). Instead, a plaintiff must put on evidence that a violation of his rights—that is, an Article III concrete injury—is impending. *Deutsch v. Annis Enters., Inc.*, 882 F.3d 169, 173 (5th Cir. 2018) (per curiam). And here, there is no evidence any Plaintiff will interact with the DPS online system in the future by either (1) moving to a new county and changing his address, or (2) registering to vote while renewing his driver's license (given that Plaintiffs are already registered to vote).

Consequently, Plaintiffs lacked standing to file their lawsuit because they never had an Article III concrete injury during this lawsuit that is redressable by the prospective injunctive relief they seek. *See, e.g.*, *Moore v. Bryant*, 853 F.3d 245, 248-49 (5th Cir. 2017) (elements of standing). Alternatively, this lawsuit was moot before it was ever filed. Either way, no Article III jurisdiction exists.

1. Plaintiffs do not—and cannot—seek retrospective relief.

The only past violation of law Plaintiffs allege is that, between 2013 and 2015, they were unable to change their voter-registration addresses online simultaneously with their driver's-license addresses. App.11-12. But at the time Plaintiffs filed suit in 2016, any possible injury had already dissipated: Plaintiffs were registered to vote at their new addresses. App.374, 395, 409. Any of Plaintiffs' alleged injuries in the past (from a possible NVRA or equal-protection violation) have been remedied, and the district court did not order any relief for such injuries. App.628-34.

No law provides for such retrospective relief in any event. The NVRA permits only declaratory and injunctive relief. 52 U.S.C. §20510(b). And sovereign immunity

bars Plaintiffs from seeking anything other than prospective injunctive relief against State officials for alleged equal-protection violations. *See Edelman v. Jordan*, 415 U.S. 651, 677 (1974).

2. Plaintiffs lack standing to seek relief for hypothetical future harms.

The only possible injury remaining to Plaintiffs is a hypothetical future one—Plaintiffs could encounter the online DPS system by (1) moving to a new county and changing their address, or (2) becoming unregistered to vote and then seeking to re-register when renewing their driver's licenses. But Plaintiffs presented no evidence that either scenario is likely to occur. And hypothetical injuries are insufficient to establish Article III jurisdiction. *Moore*, 853 F.3d at 248.

To obtain prospective relief, a plaintiff has the burden to establish standing by putting on evidence that the "threatened injury is certainly impending" or that there is a "'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 414 n.5 (2013)). The Supreme Court has "repeatedly reiterated" that "[a]llegations of *possible* future injury are not sufficient." *Clapper*, 568 U.S. at 409.

This Court has held on multiple occasions, including earlier this year, that a past injury is not sufficient to confer standing to seek future injunctive relief. In *Deutsch*, the Court held that a wheelchair-bound plaintiff lacked standing to seek injunctive relief under the Americans with Disabilities Act after he encountered physical obstacles at a women's hair salon, as he failed to produce evidence that he ever intended to visit the salon again. 882 F.3d at 174. As the Court stated, "[m]erely having suffered an injury in the past is not enough; the plaintiff must show a 'real or immediate

threat that the plaintiff will be wronged again.'" *Id.* at 173 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). This echoes the Court's holding in *Machete Productions*: "In the context of prospective injunctive and declaratory relief, past exposure to illegal conduct, by itself, does not evince a present case or controversy and thus cannot establish standing." 809 F.3d at 288 (dismissing, for lack of standing, a First Amendment challenge to a Texas film grant program); *accord O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974).

That Plaintiffs allegedly experienced a violation of the NVRA or the Equal Protection Clause in the past that has been cured does not give them standing—absent evidence that there is a substantial risk that they will be injured in the future. They failed to put on that evidence.

Each Plaintiff asserts that he intends to "continue transacting online with Department of Public Safety ('DPS') in the future whenever I am required to renew or change the address on my driver's license and am eligible to do so." App.502-10. But there is no evidence that any Plaintiff will need to use the online DPS system in the future to change his voting information. No Plaintiff put on evidence of an intent to move to a new county, so no Plaintiff has shown a substantial risk that he will experience a violation of 52 U.S.C. §20504(d) by being unable to change his voter-registration address online. Likewise, no Plaintiff put on evidence that he will become unregistered to vote and need to re-register when renewing his driver's license. App.572 (Plaintiffs are currently registered to vote). So there is no evidence that Plaintiffs will experience a violation of 52 U.S.C. §20504(a), which applies only when an individual seeks to register to vote while renewing his driver's license.

The remainder of Plaintiffs' NVRA claims all stem from the same alleged injuries that Plaintiffs are unlikely to experience—the inability to register to vote online when renewing a driver's license or change a registration address online when changing a driver's-license address. First, §20504(c) prohibits requiring duplicative information in a voter-registration application when it is part of a driver's-license application, so Plaintiffs will not be harmed unless they seek to register to vote while renewing their driver's license—which they have not shown they will do. Similarly, §20504(e) and §20507(a)(1)(A) concern the transmission and processing of voter-registration applications. If Plaintiffs do not intend to register to vote online (because they are already registered, App.572, or do not intend to move to a new county), then they will not be harmed by alleged violations of those sections, either. Finally, §20503 requires simultaneous applications "pursuant to section 20504," so there can be no violation of §20503 without a violation of §20504.

Likewise, there is no evidence that Plaintiffs will experience any future equal-protection violation. Plaintiffs' equal-protection claim is analogous to their NVRA claim, as the district court held that the inability to register to vote or change a registration address online while submitting an online driver's-license-renewal or change-of-address request unconstitutionally burdens the right to vote. App.621-26. But, again, there is no evidence that any Plaintiff will need to register to vote and change his address to a new county online in the future.

3. The district court's reasoning is erroneous.

The district court erroneously relied on the "capable of repetition" exception to mootness. App.598-99. The capable-of-repetition-yet-evading-review exception

to mootness does not apply here because Plaintiffs never had standing to begin with when they filed their lawsuit: "[I]f a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000); *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998) ("'the mootness exception for disputes capable of repetition yet evading review . . . will not revive a dispute which became moot before the action commenced'").

Regardless, this doctrine's elements are not met here. Live disputes about Texas's online driver's-license system will not "evade review." Any Texan who plans to move to a new county or intends to register to vote when renewing his driver's license could bring the same claims that Plaintiffs brought. The district court relied on cases in which mootness hinged on the election cycle, leaving little time to complete litigation. App.598-99 (citing *Storer v. Brown*, 415 U.S. 724 (1974); *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006)). That is not the case here: Any mootness of Plaintiffs' claims was not caused by an election, but by the fact that Plaintiffs are now registered to vote. There is no reason to believe that other possible plaintiffs with actual live disputes (or even these same Plaintiffs if they actually were to move to a new county or become unregistered in the future) will lack sufficient time to litigate these issues.

The district court also erroneously allowed Plaintiffs to seek to vindicate the rights of third parties. App.88 (reasoning that "[o]ther individuals will certainly be

affected"); App.598 (referring to "Plaintiffs (or others)" when discussing continuing harm). But Plaintiffs cannot assert the rights of others without showing a "close relationship" with particular individuals who will encounter DPS's online system or that those individuals are somehow hindered from bringing suit themselves. *Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004). Plaintiffs have not made such a showing and cannot rely on alleged harms to third parties for standing.

B. The district court's injunction is significantly overbroad.

The district court's injunction goes far beyond simply requiring Defendants to treat online driver's-license-renewal or change-of-address requests as sufficient voter-registration applications—the bases for the NVRA and equal-protection violations found by the court. Instead, the district court also (1) required a public-education campaign on 2-weeks' notice, (2) mandated unnecessary details of Defendants' compliance, (3) gave Plaintiffs' counsel authority to monitor Defendants for 3 years, and (4) retained continuing jurisdiction for the next 2 years. App.628-34. The district court's findings do not warrant any of these overbroad injunctive provisions, which are thus an abuse of discretion. *See, e.g.*, *Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 703 (5th Cir. 2011) ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."). Moreover, Defendants cannot comply with the terms of the injunction under the 14- and 45-day deadlines set by the district court.

1. The scope of the injunction is not tailored to the violations found by the district court.

a. The Constitution gives States the authority to regulate their own voter-registration processes to the extent those procedures are not mandated by Congress. U.S. Const. art. I, §4, cl. 1. Accordingly, this Court has cautioned that an NVRA injunction "may not encompass more conduct than was requested or exceed the legal basis of the lawsuit." *Scott v. Schedler*, 826 F.3d 207, 214 (5th Cir. 2016) (per curiam). There, the Court instructed the district court to "make plain that the injunction's scope is limited to [the defendant]'s enforcement of the NVRA" with respect to the violations shown. *Id.*

The Seventh and Ninth Circuits agree with this Court: An NVRA injunction must accord an "adequate sensitivity to the principle of federalism." *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1416 (9th Cir. 1995); *Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 798 (7th Cir. 1995). The Seventh Circuit sua sponte struck a portion of a district court's judgment that went beyond a "simple injunction" preventing the NVRA violation. *Edgar*, 56 F.3d at 796-98. Even though the language used in the district court's order was similar to that found in the NVRA, the Seventh Circuit found the differences harmful and, in some cases, "well beyond" the NVRA. *Id.* at 797-98. As the Seventh Circuit recognized, "federal judicial decrees that bristle with interpretive difficulties and invite protracted federal judicial supervision of functions that the Constitution assigns to state and local government are to be reserved for extreme cases of demonstrated noncompliance with milder measures. They are last resorts, not first." *Id.* at 798. The Ninth Circuit, likewise,

has warned that NVRA injunctions should not be overbroad—by "direct[ing] the district court on remand to impose no burdens on the state not authorized by the [NVRA] which would impair the State of California's retained power to conduct its state elections as it sees fit." *Wilson*, 60 F.3d at 1416.

b. Many provisions of the district court's order are abuses of discretion, as they go far beyond simply ordering Defendants to accept online driver's-license-renewal and change-of-address requests as sufficient voter-registration applications—the bases upon which the district court found NVRA and equal-protection violations.

Public-education and marketing campaign. The district court has ordered Defendants to propose to Plaintiffs' counsel—within a mere 14 days—a statewide public-education campaign, using multiple media venues (television, radio, internet, social media, or government websites) to educate Texans about its judgment and the changes it will bring. App.632. Plaintiffs presented no evidence that a statewide public-education or marketing campaign is needed to redress Plaintiffs' alleged injuries (to the extent they have not already been redressed, *see supra* p.9-10). Yet the judgment requires Defendants and third-party vendors (who are not parties to this litigation) to engage in a 2-year marketing program to promote online voter registration. App.632. And this judgment gives Plaintiffs the authority to approve Defendants' efforts. App.632.

This type of relief is nowhere mentioned in the NVRA, which permits only appropriate declaratory and injunctive relief to individuals who have been aggrieved by violations of the NVRA. 52 U.S.C. §20510(b)(2). It does not give federal courts carte blanche to order a State to do anything the district court believes may be beneficial,

let alone compel the expenditure of public funds. And the costs to the State here could potentially amount to several hundreds of thousands of dollars, depending on what Plaintiffs or the district court demand. *See* App.652-53.

Mandating the details of Texas's online system. As the Seventh Circuit recognized, the NVRA does not permit courts to micromanage the details of an NVRA injunction. *Edgar*, 56 F.3d at 797-98; *cf. Horne v. Flores*, 557 U.S. 433, 448 (2009). While paragraph 2 of the Court's order attempts to track the language of the NVRA (but fails to do so exactly), paragraph 4 removes any discretion the State has to determine how best to comply with the NVRA, setting the exact language to be used and the precise procedures to be followed. App.629-32. As explained in the affidavits attached to Defendants' motion to stay filed in the district court, by mandating specific details of Defendant's actions, the district court has made it more difficult for Defendants to comply with the NVRA. App.654-55, 657-58 (explaining that the tracking requirements will require significant reprogramming of Texas's system).

Monitoring by Plaintiffs' counsel. The district court's injunction also requires Defendants to compile vaguely defined reports, statistics, policies, and correspondence with customers and provide them to Plaintiffs' counsel for the next 3 years. App.633-34. Defendants must also perform monthly quality-control tests and report the results to Plaintiffs' counsel. App.634. None of this remedies any injury suffered by Plaintiffs. As the Seventh Court has held, "until it appears that the state will not comply with such an injunction, there is no occasion for the entry of a complicated decree that treats the state as an outlaw and requires it to do even more than the 'motor voter' law requires." *Edgar*, 56 F.3d at 798.

Retaining jurisdiction for 2 years. A district court generally has jurisdiction to enforce its judgments. *See Peacock v. Thomas*, 516 U.S. 349, 356 (1996). But the district court retained jurisdiction not just over its judgment, but over undefined "obligations under the NVRA [and] the Equal Protection Clause," and gave Plaintiffs indefinite enforcement authority. App.634. There is no basis for the district court to retain jurisdiction over such a broad range of conduct by Defendants.

2. Defendants cannot comply with the judgment on the schedule set by the district court.

As explained in the motion to stay filed in the district court, it is not feasible for Defendants to meet the 14- and 45-day deadlines in the court's judgment. App.635-58. The Secretary of State lacks the funds for an effective statewide media campaign, and the process of procuring vendors alone can take 45 days. App.652-54. The 45-day deadline to reprogram the online DPS system is not feasible because (1) the court-mandated tracking represents a new and unforeseen requirement, App.654-55, 657-58; and (2) in March 2018, the State made the wholly legitimate decision to switch vendors for Texas.gov, effective September 1, 2018. App.647-48. Because of this transition, the current and new vendors, who are not parties, cannot meet the 45-day deadline to make the court-mandated changes and will have significant difficulty meeting a 90-day deadline, putting other State online systems at risk. App.649-50.

II. The State Will Suffer Irreparable Harm If the Injunction Is Not Stayed Pending Appeal.

The improper scope of the injunction creates irreparable harm, *see supra* p.14-18, and because Defendants are likely to prevail on the merits of their standing argument, they will suffer irreparable harm if forced to spend State resources to comply with any portion of the injunction. *See supra* p.18. Defendants also face the threat of sanctions if their third-party vendor cannot complete the mandated changes in the 45 days allotted.

When, as here, there is no mechanism for the State "to recover the compliance costs they will incur if the [injunction] is invalidated on the merits," an injury is irreparable. *Texas v. EPA*, 829 F.3d 405, 434 (5th Cir. 2016); *see Ledbetter v. Baldwin*, 479 U.S. 1309, 1910 (1986) (Powell, J., in chambers) (finding irreparable harm when a state was unlikely to recover "the administrative costs of changing its system to comply with the District Court's order"). In addition, if the injunction is vacated and online registration is not mandated, the statewide public-education campaign will have served only to confuse voters about what they are able to do online.

This Court has also recognized that a State suffers an "institutional injury" from the "inversion of . . . federalism principles . . . ." *Texas*, 829 F.3d at 434; *see Moore v. Tangipahoa Par. Sch. Bd.*, 507 F. App'x 389, 399 (5th Cir. 2013) (per curiam) (finding that a State suffers irreparable harm when an injunction "would frustrate the State's program" and "deprive[] the State of the opportunity to implement its own legislature's decisions"). That is precisely what occurred here. *See supra* p.14-18.

III. The Remaining Stay Factors Favor the State.

A. A stay will not injure Plaintiffs, who are already registered to vote. As described above, *see supra* p.10-12, Plaintiffs have not shown that they will ever encounter the allegedly unlawful online DPS system again by either changing their address to a new county or registering to vote while renewing their driver's license.

B. A stay is in the public interest. When, as here, the State seeks a stay pending appeal, "its interest and harm merge with that of the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). The proper expenditure of state funds and implementation of state programs is a matter of public interest. *E.g.*, *Hamer v. Brown*, 831 F.2d 1398, 1402 (8th Cir. 1987). The efficient administration of government programs is also in the public interest. *See*, *e.g.*, *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 381 (1992). Requiring the State to abide by the costly and intrusive injunction pending appeal is not in the public interest.

Conclusion

The Court should stay the district court's injunction pending appeal, and alternatively, enter a temporary administrative stay while it considers this motion.

Respectfully submitted.

/s/ Scott A. Keller
Scott A. Keller
Solicitor General
scott.keller@oag.texas.gov

Matthew H. Frederick
Deputy Solicitor General

Beth Klusmann
Assistant Solicitor General

Counsel for Appellants

Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Certificate of Conference

On May 25, 2018, Beth Klusmann, counsel for Defendants conferred by telephone with Ryan V. Cox, counsel for Plaintiffs, who stated that Plaintiffs will oppose the relief requested in this motion.

/s/ Scott A. Keller
Scott A. Keller

CERTIFICATE OF COMPLIANCE

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,194 words, excluding the parts exempted by Rule 27(a)(2)(B); and (2) the typeface and type style requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the program used for the word count).

/s/ Scott A. Keller
SCOTT A. KELLER

CERTIFICATE OF COMPLIANCE WITH RULE 27.3

I certify the following in compliance with Fifth Circuit Rule 27.3:

- Before filing this motion, counsel for Defendants contacted the clerk's office and opposing counsel to advise them of Defendants' intent to file this motion.

- The facts stated herein supporting emergency consideration of this motion are true and complete.

- The Court's review of this motion is requested by June 1, 2018, or alternatively, Defendants request a temporary administrative stay pending that review at the earliest possible date.

- True and correct copies of relevant orders and other documents are attached in the Appendix to this motion, filed separately.

- This motion is being served at the same time it is being filed.

/s/ Scott A. Keller
SCOTT A. KELLER

Certificate of Service

On May 25, 2018, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Scott A. Keller
Scott A. Keller