No. 24-50826

In the United States Court of Appeals for the Fifth Circuit

La Unión del Pueblo Entero et al.,
Plaintiffs-Appellees,

v.

Gregory W. Abbott et al.,
Defendants-Appellants.

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

STATE DEFENDANTS-APPELLANTS' AND INTERVENOR-DEFENDANTS-APPELLANTS' REPLY IN SUPPORT OF MOTION TO STAY DISTRICT COURT ORDER AND PERMANENT INJUNCTION PENDING APPEAL

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The undersigned counsel of record certifies that the following listed persons and entities (other than governmental parties) as described in the fourth sentence of Fifth Circuit 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.

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Mexican American Bar Association of Texas

Texas Hispanics Organized for Political Education

JOLT Action

William C. Velasquez Institute

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Friendship-West Baptist Church

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LULAC Texas

Texas Alliance for Retired Americans

Texas AFT

Voto Latino

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INTRODUCTION

The opposition briefs filed by La Unión del Pueblo Entero, ECF No. 145-1 ("LUPE Br."), and by the Arc of Texas, ECF No. 146 ("Arc Br."), (collectively, "Appellees") confirm that a stay of the district court's order is warranted.

ARGUMENT

State Defendants-Appellants and Intervenor-Defendants-Appellants (collectively, "Appellants") have already explained why this Court should grant a stay pending appeal of the district court's order. ECF No. 70 ("Mot."). None of Appellees' contrary arguments passes muster.

I. Appellants Will Likely Succeed on the Merits.

Appellees lack standing to challenge most of the provisions of S.B. 1 at issue, and §208 of the VRA does not preempt them in any event. Across two briefs in opposition, Appellees try, but fail, to refute those points.

A. Appellees lack standing.

Appellees do not have standing because they lack an injury in fact that is fairly traceable to the defendants' allegedly unlawful conduct. *See California v. Texas*, 593 U.S. 659, 668-69 (2021). They fail on traceability because neither the Attorney General nor the Secretary enforces S.B. 1. Mot. 20. And Appellees cannot show an injury in fact because the purported burden of complying with S.B. 1 bears no resemblance to a traditional cognizable harm. *Id.* at 21-22.

Appellees raise three unconvincing arguments in response. *First*, Appellees try to turn the Attorney General and Secretary's roles in enforcing S.B. 1 into a *factual*

question. Over and over again, Appellees wave the district court's "factual findings" and the "evidentiary record" as a talisman. *E.g.*, LUPE Br. 8. According to Appellees, the fact that the district court "consider[ed] ample evidence" and "found on the record" that the Attorney General and Secretary "have a role in enforcing S.B. 1" is "sufficient to trigger standing"—and, presumably, Appellees would prefer that this Court review such "factual findings" only for clear error. *Id.* at 8-9.

Appellees are mistaken. Whether the Attorney General and Secretary enforce S.B. 1 is a *legal* question, and this Court has already indicated that "[n]either the Secretary of State nor the Attorney General enforces S.B. 1." *La Unión del Pueblo Entero v. Abbott* (*LUPE*), 119 F.4th 404, 409 (5th Cir. 2024). To argue for departure from that understanding, Appellees point only to those officials' general duties to enforce or maintain the operation of Texas's election laws. Arc Br. 8. But "the Secretary's general duties under the Texas Election Code fail to make the Secretary the enforcer of specific election code provisions." *Richardson v. Flores*, 28 F.4th 649, 654 (5th Cir. 2022) (cleaned up); *see also City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019) (explaining that analyses under *Ex parte Young* and Article III are similar).

The same goes for the Attorney General, who must possess "not merely the *general* duty to see that the laws of the state are implemented" but rather "the *particular* duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (internal quotation marks omitted) (emphases added). Appellees make much of the fact that

the Attorney General can investigate election offenses. LUPE Br. 10-11. But the power to investigate does not indicate that the Attorney General has a "particular duty" to enforce an election law without the "independent authority to prosecute election-related criminal offenses." *Ostrewich v. Tatum*, 72 F.4th 94, 101 (5th Cir. 2023). And Appellees admit that "the Attorney General does not himself initiate prosecutions under S.B. 1." LUPE Br. 10.

Because "[t]he general duties referenced by [Appellees] fail to show" that either the Attorney General or Secretary has a "particular duty to enforce [S.B. 1]," *Tex. All. for Retired Ams. v. Scott*, 28 F.4th 669, 674 (5th Cir. 2022), Appellees have failed to show that any injury is even traceable to the defendants they named.

Second, Appellees point to two sources of alleged injury in fact: the delay in in-person voting caused by filling out disclosure forms and the fact that potential voter assistors might no longer aid voters out of fear of prosecution. Neither suffices to establish standing.

Start with delays. Appellees apparently do not dispute that the obligation to provide information on a form is not itself a cognizable injury for Article III purposes. And their attempt to reframe their injury as the *time* it takes to fill out such a form is no more convincing. *See* LUPE Br. 12-13. That filling out a form means it may take a little longer to cast a ballot is nothing more than a "usual burden[] of voting," *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008), and does not interfere with "the right to vote," *contra* LUPE Br. 13. And Appellees do not meaningfully argue that having to wait in line bears any "'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American

courts." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 417 (2021) (citation omitted); Mot. 21-22.

Next, consider Appellees' tired claims of a purported fear of prosecution. In Appellees' view, that some assistors worry that they will be the first to be prosecuted under S.B. 1 is enough to provide standing. LUPE Br. 14; Arc Br. 9-10. But an injury in fact must be "concrete and particularized," "actual or imminent," and—importantly—not "speculative, conjectural, or hypothetical." *Abdullah v. Paxton*, 65 F.4th 204, 208 (5th Cir. 2023) (per curiam) (citations omitted). Maybe Appellees identified someone who feels deterred from voting or assisting others in voting because of fear of prosecution. But "fanciful notions of being charged under" S.B. 1 do not take Appellees' purported injury out of the realm of speculation. *See Tex. State LULAC v. Elfant*, 52 F.4th 248, 256 (5th Cir. 2022) (cleaned up); Mot. 22-23.

Appellees' lack of standing alone demonstrates that Appellants are likely to succeed on the merits.

B. Section 208 does not preempt S.B. 1's voter-assistance provisions.

Under §208, a voter in need of assistance "*may* be given assistance by *a* person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. §10508 (emphases added). Section 208 does not say that a voter *must* be given assistance by *the* or *any* person of the voter's choice. It thus allows States to enact reasonable regulations of voter assistance, including S.B. 1. Mot. 23-28.

Appellees would rather this Court read §208 to allow a voter who requires assistance to choose *any* person, under *any* conditions, to be her assistor. LUPE Br.

14-18; Arc Br. 10-17. That radical reading would result in much more than just preemption of S.B. 1: *Any* law which impedes someone from assisting a voter would be on the chopping block. Suppose that a voter in need of assistance requests that a convicted felon currently serving a life sentence be her assistor. That felon would be, on Appellees' interpretation, a "person of the voter's choice." *See* LUPE Br. 15-16; Arc Br. 12-13. Thus, it is hard to escape the conclusion that, on Appellees' haphazard interpretation, §208 preempts Texas's laws governing imprisonment.

Appellees offer only flimsy counters in response. *First*, they try to dodge the untenable consequences of their position by misdirection. As if it makes a difference, Appellees point out that "[a]n incarcerated person . . . would not be able to assist at the polling place for reasons that are completely unrelated to Texas' elections laws." LUPE Br. 17-18 (alterations omitted) (citing *Ark. United v. Thurston*, 626 F.Supp.3d 1064, 1087 (W.D. Ark. 2022)). Appellants have no disagreement there. But §208 does not preempt only "elections laws"—it preempts *any* state law which conflicts with its commands. And if Appellees are right that §208 expressly gives a near-absolute right to choose *anyone at all under any conditions* to assist in voting, it is difficult to see how Texas's penal laws could survive when an imprisoned person is the requested assistor.

Second, Appellees insist that this Court *already* adopted their interpretation of the phrase "a person of the voter's choice" in *OCA-Greater Hous. v. Texas*, 867 F.3d 604 (5th Cir. 2017). LUPE Br. 16; Arc Br. 11-12. But "the question presented by [that] case [was] how broadly to read the term 'to vote' in Section 208." *OCA-Greater Hous.*, 867 F.3d at 614. It is a gross misstatement to say that "defining 'to

vote' was a step in the reasoning" of *OCA-Greater Houston*, Arc Br. 12, when that was the nub of the *entire* case. And to the extent *OCA-Greater Houston* reached beyond that issue to hint that §208 should be given Appellees' interpretation, any such statement is dictum that does not bind this Court. *See Gochicoa v. Johnson*, 238 F.3d 278, 286 n.11 (5th Cir. 2000).

Third, Appellees repeatedly claim that, because §208 provides two express prohibitions on voter assistance, §208 forbids *any other* restriction on who may assist a voter. LUPE Br. 15; Arc Br. 16-17. As an initial matter, "the *expressio unius* canon is not meant to be mechanically applied," and "[c]ontext may indicate that Congress did not wish for an express provision of one thing to work towards the exclusion of another." *In re Bourgeois*, 902 F.3d 446, 447-48 (5th Cir. 2018). Part of context is "common sense," *Campos-Chaves v. Garland*, 144 S.Ct. 1637, 1648 (2024), and as noted above Appellees' interpretation would mean that §208 overrides even basic state penal statutes if a voter happens to select an imprisoned person as her assistor. It is implausible that Congress "considered" that "unnamed possibility" and included that consequence "by deliberate choice." *United States v. Vargas*, 74 F.4th 673, 686-87 (5th Cir. 2023) (citation omitted); Mot. 26-27.

In any event, even on Appellees' terms, *expressio unius* does not achieve their desired result. Appellees point to the general principle that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." Arc Br. 16 (quoting *Hillman v. Maretta*, 569 U.S. 483, 496 (2013)). But what

"general prohibition" or mandatory command is there in §208, which says only that certain voters "*may* be given assistance by *a* person of the voter's choice"?

That §208 is phrased in permissive terms is important. If a parent told her child that he "shall not have any vehicle other than a Toyota Corolla or a Honda Accord," it is fair to infer that the child cannot have a Ford F-150 or a Land Rover. But if that parent instead told her child that he "may have a vehicle, but not a motorcycle or a Smart Fortwo," it is not fair to infer a promise to buy the child a Maserati. Likewise, when Congress says that a voter "may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union," it indicates that Congress takes undue influence seriously such that those two categories are off the table. It is not an indication that *any other* assistor in *any other* circumstance or position to exercise undue influence must be approved, no matter what state law says. *Priorities USA v. Nessel*, 487 F.Supp.3d 599, 619 (E.D. Mich. 2020), *rev'd and remanded on other grounds*, 860 F.App'x 419 (6th Cir. 2021); Mot. 23-26.

Properly understood, §208 preempts none of S.B. 1's challenged provisions. Those provisions do not conflict with §208 merely because an assistor might refuse to comply with them. An assistor's refusal to aid a voter because of S.B. 1 no more conflicts with §208 than does an assistor's refusal to aid a voter because he is out of the country until the Wednesday after the election. And S.B. 1 certainly does not conflict with §208 because of some undefined (and, thus far, unsubstantiated) fear of prosecution. *See supra* at 4. Appellants are likely to succeed on the merits.

II. The Remaining *Nken* Factors Overwhelmingly Favor a Stay.

A. The State and the public interest will suffer irreparable injury absent a stay.

It is blackletter law that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citation omitted). And when the "State is the appealing party, its interest and harm merge with that of the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam).

Appellees offer no meaningful response to these settled principles. Their main argument is that "neither the State nor the public has any interest in enforcing a regulation that violates federal law." LUPE Br. 23 (alteration omitted) (citation omitted); *see also* Arc Br. 17. But that assumes that S.B. 1 *does* violate §208. If this Court agrees with Appellants that S.B. 1 is consistent with §208, it should give no weight at all to Appellees' argument against irreparable harm.

Indeed, even as Appellees *assume* that S.B. 1 violates §208, they ignore the very real federal violation that the district court's injunction creates. Appellees blithely dismiss Texas's "interest in uniform election laws" on the theory that such an interest "cannot trump federal law." Arc Br. 17. What they miss is that the *federal* Equal Protection Clause *requires* uniform election laws. "[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966). In statewide elections, voters must not be subject

to "arbitrary and disparate treatment" in the exercise of the franchise. *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (per curiam).

Because neither the Attorney General nor the Secretary enforces S.B. 1, "the practical effect" of the district court's injunction is "to prevent enforcement of S.B. 1, but only in certain counties in Texas." *LUPE*, 119 F.4th at 409. Allowing a voter in one county to request any assistor she would like while requiring a voter in another county to comply with reasonable restrictions on that process is definitionally arbitrary-and-disparate treatment. If an "injunction preventing enforcement of [an] unconstitutional statute serves [the] public interest," LUPE Br. 24, staying an unconstitutional injunction that imposes unequal treatment also serves the public interest.

B. Appellees will suffer no lawful injury from a stay.

Finally, Appellees would suffer no meaningful harm from a stay merely reimposing the same election law regime that has been in place for years.

Appellees' only rebuttal on this score is that S.B. 1 causes harm because it is a "restriction[] on fundamental voting rights." LUPE Br. 26 (citation omitted); Arc Br. 19. But S.B. 1 does not implicate voting rights at all. "Even the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of that right." *Vote.Org v. Callanen*, 39 F.4th 297, 305 n.6 (5th Cir. 2022) (citation omitted). If an assistor refuses to comply with S.B. 1—or is too afraid to do so because of some entirely speculative fear of wrongful prosecution—that no more implicates the right to vote

than does the failure to vote of an individual who goes "to the polling place on the wrong day or after the polls have closed." *Id.*

Reinstituting a system that has governed Texas's elections for several cycles does not substantially harm anyone.

Conclusion

The Court should grant a stay pending appeal.

Respectfully submitted.

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