IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JARROD STRINGER, *et al.*, *Plaintiffs,*	§	
V.	§	NO. 5:16-CV-00257-OLG
ROLANDO PABLOS, *et al.*, *Defendants.*	§	

DEFENDANTS' OPPOSED MOTION FOR A STAY PENDING APPEAL

On May 21, 2018, the Court entered a final judgment and order mandating changes to how Defendants handle online driver license renewals and changes of address, to be implemented within 45 days. Doc. 109. Defendants seek a stay during the pendency of their appeal to the United States Court of Appeals for the Fifth Circuit. Doc. 110. Defendants request that the Court rule on this motion to stay by 1 PM on May 25, 2018. *See* FED. R. APP. P. 8(a)(1)(A). If no stay issues by this date and time, Defendants intend to file a motion to stay in the Court of Appeals.

ARGUMENT & AUTHORITY

Federal Rule of Civil Procedure 62 permits the trial court, in its discretion, to suspend an injunction and stay proceedings to enforce a judgment during the pendency of an appeal. When considering whether to grant a stay pending appeal, courts consider four factors: (1) applicant's likely success on the merits, (2) applicant's irreparable harm, (3) harm to other parties, and (4) the public interest. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013). These factors are not applied in a "rigid" or "mechanical" faction—where

"a serious legal question is involved and . . . the balance of equities weighs heavily in favor of granting the stay[,]" the applicant need only present a "substantial case on the merits," as opposed to demonstrating a likelihood of success on the merits. *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983) (per curiam) (citation and quotation marks omitted). Where 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) (citation omitted). The relevant factors favor issuing the requested stay pending resolution of all appellate proceedings.

I. Defendants are likely to prevail on appeal, or at a minimum, have established a substantial case that they might do so.

As Defendants have briefed, Plaintiffs lack standing.[1] The Court rejected those arguments, so Defendants incorporate by reference but do not belabor them here. Nevertheless, given the burden the injunction will impose (*see infra*, Part II) and the support for Defendants' jurisdictional arguments, the Court of Appeals should have an opportunity to consider those arguments before Defendants must implement the injunction. Indeed, this case presents "serious legal questions" involving jurisdiction under the NVRA's specific remedial scheme for private parties, *e.g.,* Doc. 86 at 5, and the balance of equities strongly favors issuing a stay, *see infra*, Parts II, III; *Veasey v. Abbott*, 870 F.3d at 391. Defendants' substantial jurisdictional arguments, therefore, merit entry of a stay. *See Baylor Univ. Med. Ctr.*, 711 F.2d at 39.

Defendant's appeal of the injunction's substance also presents independent bases upon which the Fifth Circuit may find in their favor. Federal Rule of Civil

[1] *See, e.g.,* Docs. 80 at 12-19, 86 at 4-12, 89 at 1-6.

Procedure 65(d) requires that an injunction be "specific in terms; [and] describe in reasonable detail, and not be reference to the complaint or other document, the act or acts sought to be restrained." This requires "that an ordinary person reading the court's order should be able to ascertain from the document itself *exactly* what conduct is proscribed." *United States Steel Corp. v. United Mine Workers of Am.*, 519 F.2d 1236, 1246 n. 20 (5th Cir. 1975) (emphasis added). And, the scope of relief is limited to the legal violation found. "Thus, an injunction is vague if it does not comply with the specificity requirements in in Rule 65(d), and is overbroad if it is not 'narrowly tailor[ed] . . . to remedy the specific action which gives rise to the order' as determined by the substantive law at issue." *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016) (per curiam) (citation omitted). On appeal, Defendants are likely to prevail on their arguments that the injunction is both overbroad and impermissibly vague.

A. The injunction is overbroad.

The injunction is overbroad because it exceeds the violations that the Court found, and because it is not limited to the least intrusive means of remedying those violations. The Court concluded that Defendants "violated the NVRA, 52 U.S.C. §§ 20503(a)(l), 20504(a), (c), (d), and (e), and 20507(a)(l)(A), and the Equal Protection Clause, U.S. Const. amend. XIV, § 1, by failing to permit simultaneous voter registration with online driver's license renewal and change-of-address transactions[.]" Doc. 109 at 1. While the NVRA permits declaratory and injunctive relief to individuals "aggrieved by violations" thereof, 52 U.S.C. §20510(b)(2), the injunction does not simply redress the violations identified. It imposes requirements

that go beyond those violations, and requires additional steps that the NVRA does not. This is improper under both Rule 65, and in the context of voter registration.

Indeed, the Constitution gives states the authority to choose the time, place, and manner of elections, absent federal law expressly to the contrary. U.S. CONST. art. I, §4, cl. 1. As relevant here, Texas retains the authority to regulate its own voter-registration processes to the extent those procedures are not mandated by the NVRA or other federal law. The injunction intrudes on Texas's authority to develop its own NVRA-compliant system and fails to display the "adequate sensitivity to the principles of federalism" required in the Elections Clause context. *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).

Specifically, the injunction is overly broad in violation of Rule 65's narrow tailoring requirement, and exceeds the NVRA's mandates, insofar as it:

- Mandates language and processes for driver license transactions, rather than allowing Texas to develop its own, Doc. 109 ¶4(a)-(d);
- Orders DPS to "track, record, and retain" responses to voter registration questions in a particular manner, Doc. 109 ¶4(e); *see also* Gipson Decl. ¶4;
- Orders DPS to transmit individual responses to voter registration questions and a physical signature electronically captured to the SOS—even when a customer chooses not to register, Doc. 109 ¶4 (f);
- Orders Defendants to develop a public education campaign, Doc. 109 ¶6 & n.2;
- Orders Defendants to submit reports to Plaintiff's counsel, Doc. 109 ¶7(b);
- Orders Defendants to conduct "quality control tests" and report the results to Plaintiffs' counsel, Doc. 109 ¶7(c).

These requirements—which appear nowhere in the NVRA provisions allegedly being violated—can hardly be said to "achieve the federal law's ends in the lease obtrusive possible manner," as narrow tailoring and federalism require. *United States v. Louisiana*, 196 F. Supp. 3d 612, 677 (M.D. La. July 26, 2016) (finding that Louisiana was violating the NVRA but denying request for monitoring and reporting to ensure compliance) (vacated by settlement).[2] Instead, orders aimed at bringing states into compliance with the NVRA must "impose no burdens on the state not authorized by the [NVRA] which would impair the State['s] retained power to conduct its state elections as it sees fit." *Wilson*, 60 F.3d at 1416. Since the provisions above do not meet this standard, Defendants will likely succeed on the merits on appeal.

The injunction also "permits Plaintiffs to initiate an enforcement action against Defendants in this Court…if Defendants fail to comply with this Judgment at any time after the two-year deadline." Doc. 109 at ¶8. Retaining jurisdiction is not merited by the facts or supported by the NVRA. Indeed, "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." *Edgar*, 56 F.3d at 798.

B. The injunction is impermissibly vague.

In addition to the requirement of narrow tailoring under Rule 65(d)(1)(C), Rule 65(d)(1)(B) requires an injunction to be "sufficiently specific to give notice of its

[2] *See also Scott*, 826 F.3d at 214 (in challenge to in-person registration, "district court must make plain that the injunction's scope is limited to [] enforcement of the NVRA as to in-person transactions").

terms." *Scott v. Schedler*, 826 F.3d at 211. Failure to comply with this requirement renders an injunction impermissibly vague. *Id.* Courts have found that "catch-all" provisions violate this requirement, as they "do not clearly define the policies, procedures, and directives that" the enjoined party is "to maintain in force." *Id.* at 212, 213–14; *see also, e.g., Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 50-52 (2d Cir. 1996) (vacating injunction's requirement that appellant "take all other reasonable needful actions to facilitate" a desired result.)

The injunction is impermissibly vague insofar as it "ENJOINS Defendants…from continuing to violate the NVRA and Equal Protection Clause by," in the Court's words, "failing to," "refusing to," or "requiring (others to)" engage in certain behavior. Doc. 109 ¶2 (capitalization original). In reaching the conclusions in Paragraph 2, however, the injunction does not explain how the facts established in the record violate any provision of the NVRA. This is similar to the injunction invalidated for vagueness in *Scott v. Schedler*, which "directed" the Louisiana Secretary of State to "to maintain in force and effect his or her policies, procedures, and directives, as revised, relative to the implementation of the [NVRA] with respect to coordination of the [Act]." 826 F.3d at 211. This injunction was impermissibly vague because it "refer[ed] generally to the defendant's policies without defining what those policies are or how they c[ould] be identified" and "lack[ed] the requisite specificity and detail because it d[id] not clearly define the policies, procedures, and directives that it order[ed] Schedler to maintain in force." *Id.* at 212, 213–14. Thus,

in order to avoid impermissible vagueness, a particular explanation of where, exactly, Texas's current process goes wrong is needed. It is missing from Paragraph 2.

The injunction is also impermissibly vague insofar as it "ENJOINS Defendants, their agents and successors in office, and all persons working in concert with them, from implementing practices and procedures that violate §§20503, 20504, and/or 20507 of the NVRA," Doc. 109 ¶3 (capitalization original). Such orders violate the specificity requirement [of FED. R. CIV. P. 65(d).]" Wright & Miller, 11A Fed. Prac. & Pro. Civ. §2955 (3d ed.). This is because, "[a] general injunction which in essence orders a defendant to obey the law is not permitted." *Meyer v. Brown & Root Construction Co.*, 661 F.2d 369, 373 (5th Cir. 1981). Rather, "[a]n injunction must simply be framed so that those enjoined will know what conduct the court has prohibited." *Id. See also, e.g., OCA-Greater Houston v. Texas*, 867 F.3d 604, 615 (5th Cir. 2017) (vacating as overbroad injunction that provided "[t]o the extent the provisions of the Texas Election code are inconsistent with the Voting Rights Act, the Court ENJOINS the Defendants, their employees, agents, and successors in office, and all persons acting in concert with them, from enforcement of those provisions"). Paragraph 3 of the Judgment does not meet this standard.

II. Defendants will suffer irreparable harm absent a stay.

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." *Moore v. Tangipahoa Parish Sch. Bd.*, 507 F. App'x 389, 399 (5th Cir. 2013) (per curiam). Irreparable harm also exists where "the denial of a stay

will utterly destroy the status quo," *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979), and "this harm cannot be undone," *Grutter v. Bollinger*, 247 F.3d 631, 633 (6th Cir. 2001) (order). When 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).

These factors exist here. The injunction requires Texas to change its handling of voter registration in driver license transactions (which Texas law already provides for),[3] depriving it of the opportunity to implement its legislature's decisions. Enjoining State officials from carrying out validly enacted laws imposes irreparable harm. *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[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.").

Moreover, implementing the injunction will alter the status quo at significant, unrecoverable cost. The injunction requires dedicating finite vendor resources to reprogramming Texas.gov—and calls for this reprogramming to be done at a breakneck pace unfeasible under current circumstances. As reflected in affidavits from DPS and the Department of Information Resources (DIR), Defendants cannot independently reprogram Texas.gov, but must work through DIR's third-party vendor. Gipson Decl. ¶¶2, 3. The vendor contracted to operate Texas.gov—which hosts various online services for Texans—will change from NIC to Deloitte effective

[3] *See, e.g.,* Doc. 86 at 1-4; Doc. 89 at 7; and authorities cited therein.

September 1, 2018. Buaas Decl. ¶2-5. DIR and DPS can begin work reprogramming Texas.gov to implement the injunction before September 1, 2018, but cannot complete the project before the vendor change. Buaas Decl. ¶¶5-7, Gipson Decl. ¶3. And, any reprogramming must be done at the expense of other vendor services to maintain, operate, and improve Texas.gov. Buaas Decl. ¶7. The injunction imposes new operating costs on SOS, too, by requiring it to "track, record, and retain" new information (which the NVRA does not require). Ingram Decl. ¶7. Once expended, these resources cannot be recovered.

The two-year public education campaign will also take time and resources to devise and implement. For example, where SOS had a statutory charge (and attendant legislative appropriation) to conduct a public education campaign, it cost $4 million for each biennium. Ingram Decl. ¶4. SOS worked with third party vendors to develop and implement the campaign, within the requirements of State contract procurement. Ingram Decl. ¶¶4-6. Any program that could be developed and proposed within 14 days would have to be handled in house, because there is insufficient time to procure a third-party vendor. Ingram Decl. ¶6. SOS does not have surplus funds in its budget for this purpose. Ingram Decl. ¶5. It would also be challenging to develop educational materials about changes to Texas.gov before the vendor reprograms those changes. *See* Buaas Decl. ¶¶5-7; Gipson Decl. ¶4. And, should the Fifth Circuit vacate or modify the injunction, it could render expenditures on the campaign useless (or worse, result in confusion among Texans about how to register to vote—a result that neither the parties nor the Court desires).

Given the irreparable harm the Defendants and the State will suffer if forced to implement the terms of the injunction, a stay pending appeal is appropriate. *See Ruiz v. Estelle*, 650 F.2d 555, 571 (5th Cir. 1981) (per curiam) (staying portions of district court order that imposed "burden[s] upon [the state agency] in terms of time, expense, and administrative red tape"); *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 381 (1992) (recognizing the public's interest in the "sound and efficient operation" of government programs).

III. A stay will serve the public interest without injuring Plaintiffs.

When 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) (citation omitted). Indeed, 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). Thus, the burdens and costs the injunction will impose upon State resources—not to mention the infeasible timeline and the fact that the Fifth Circuit might vacate or modify the injunction—show that a stay is in the public's interest. *See supra*, Part II. Balanced against the interests of the Plaintiffs, all of whom are registered to vote, a stay pending appeal is appropriate. Finally, requiring the State to create an online voter registration program for individuals who interact with DPS online when the Texas Legislature has not adopted online voter registration generally removes the constitutionally-granted control over elections from the State. U.S. CONST. art. I, §4.

This, too, undermines the public's interest in enforcement of its legislature's duly enacted laws.

CONCLUSION

The Court should stay the Final Judgment and Order granting permanent injunctive relief pending resolution of Defendants' appeal.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

ANGELA V. COLMENERO
Chief, General Litigation Division

/s/Anne Marie Mackin
ANNE MARIE MACKIN
Texas Bar No. 24078898
ESTEBAN S.M. SOTO
Texas Bar. No. 24052284
Assistant Attorneys General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 475-4074
(512) 320-0667 FAX
anna.mackin@oag.texas.gov
esteban.soto@oag.texas.gov

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF CONFERENCE

I certify that on the 21st day of May, 2018, I conferred by email with Caitlyn Silhan, counsel for Plaintiffs, regarding the contents of this motion. Ms. Silhan indicated that Plaintiffs OPPOSE the relief sought herein.

/s/Anne Marie Mackin
ANNE MARIE MACKIN
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on this the 23rd day of May, 2018 a true and correct copy of the foregoing was filed electronically using the Court's CM/ECF system, causing electronic service on all counsel of record.

/s/Anne Marie Mackin
ANNE MARIE MACKIN
Assistant Attorney General