**No. 14-41127**

# In the United States Court of Appeals for the Fifth Circuit

MARC VEASEY; JANE HAMILTON; SERGIO DELEON; FLOYD CARRIER; ANNA BURNS; MICHAEL MONTEZ; PENNY POPE; OSCAR ORTIZ; KOBY OZIAS; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; JOHN MELLOR-CRUMMEY; KEN GANDY; GORDON BENJAMIN; EVELYN BRICKNER, 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; CARLOS CASCOS, 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.

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UNITED STATES OF AMERICA, Plaintiff-Appellee,

TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND; IMANI CLARK, Intervenor Plaintiffs-Appellees,

*v.*

STATE OF TEXAS; CARLOS CASCOS, 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.

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TEXAS STATE CONFERENCE OF NAACP BRANCHES; MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES, Plaintiffs-Appellees,

*v.*

CARLOS CASCOS, 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.

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LENARD TAYLOR; EULALIO MENDEZ, JR.; LIONEL ESTRADA; ESTELA GARCIA ESPINOZA; MARGARITO MARTINEZ LARA; MAXIMINA MARTINEZ LARA; LA UNION DEL PUEBLO ENTERO, INCORPORATED, Plaintiffs-Appellees,

*v.*

STATE OF TEXAS; CARLOS CASCOS, 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.

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On Appeal from the U.S. District Court for the Southern District of Texas, Corpus Christi Division, Nos. 2:13-cv-193, 2:13-cv-263, 2:13-cv-291, and 2:13-cv-348

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## APPELLANTS' OPPOSITION TO APPELLEES' MOTIONS FOR LIMITED REMAND

## Introduction

Plaintiffs' motions for a limited remand should be denied, as there is no need to deviate from the normal course of appellate review, which includes en banc and certiorari proceedings. Indeed, defendants have now filed (well before the deadline) a petition for rehearing en banc, accompanied by a motion to stay the mandate pending a certiorari petition in the Supreme Court. Those filings show the substantial basis for pursuing further appellate review of the panel's decision, as its expansive theory of liability under §2 of the Voting Rights Act jeopardizes many state election laws and creates multiple intra- and inter-circuit splits.

The Court should consider that further review in due course without the expense, further litigation, and complications caused by the extraordinary step of remand before a final appellate decision. Plaintiffs' motions for a limited remand give no sound basis for short-circuiting the normal process of appellate review, which affords defendants an opportunity to pursue en banc review of important questions of law and decisions that conflict with circuit and Supreme Court precedent. Imposing an interim remedy at this stage would unnecessarily confuse and complicate the proceedings—especially since the district court's judgment was stayed pending appeal. Indeed, the panel itself directed a remand without departing from normal procedures and expediting issuance of the mandate. Nothing relevant has changed since the panel issued its opinion and judgment, which are consistent with permitting the en banc and certiorari process to unfold. Contrary to plaintiffs' arguments, there is no exigent need to change the status quo and implement an interim remedy before the November 2015 state-constitutional-amendment election.

## Background

The United States and private plaintiffs challenged Texas's photo voter-ID law, known as SB14. Following a bench trial, the district court entered a final judgment holding that SB14 is a poll tax, unconstitutionally burdens the right to vote, has a discriminatory effect under VRA §2, and was enacted with a racially discriminatory purpose. *See Veasey v. Perry*, 71 F. Supp. 3d 627, 633 (S.D. Tex. 2014). This Court stayed the district court's judgment pending appeal. *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014). The Supreme Court denied an application to vacate the stay. *Veasey v. Perry*, 135 S. Ct. 9 (2014).

During the pendency of the appeal, on May 27, 2015, Texas Governor Abbott signed into law SB983, which took effect immediately and eliminated all fees for obtaining Texas records used as supporting documentation to get a free Texas photo voter ID (an election-identification certificate or "EIC") under SB14. *Veasey v. Abbott*, No. 14-41127, 2015 WL 4645642, at *2, 4 (5th Cir. Aug. 5, 2015) (cited herein as "Op.*p*" based on Westlaw pagination). SB983 ensures that individuals who seek a birth certificate or other supporting documents to obtain a free voter ID will not pay any fees for that documentation (including the $2-$3 fee previously imposed by provisions separate from SB14 for birth certificate copies). Op.4.

On August 5, 2015, a panel of this Court issued an opinion. The panel concluded that SB14 is not a poll tax, and it reversed and rendered judgment for the State on that claim. Op.18-20. The panel vacated the discriminatory-purpose finding and remanded for further proceedings on that claim. Op.21.

The panel affirmed the district court's finding that SB14 results in discrimination on account of race in violation of VRA §2, and it directed a remand on that claim for the district court to enter a tailored remedy. On that §2 claim, the panel found liability on the reasoning that SB14 "burdens Texans living in poverty" and "a disproportionate number of Texans living in poverty are African-Americans and Hispanics." Op.17. Regarding the possible remedy for the §2 holding, the Court instructed the district court to "tak[e] account of any impact of SB 983," Op.22, and "refer to the policies underlying SB 14 in fashioning a remedy," Op.21. The panel then vacated the finding of an undue burden on the right to vote under constitutional-avoidance principles. Op.1, 22.

## Argument

The Court should deny plaintiffs' motions because a limited remand and imposition of an interim remedy constitutes an extraordinary departure from principles of appellate review and is not appropriate case management.

### I. A Petition to Vacate the Panel's Opinion and Rehear the Case En Banc Is Currently Pending Before the Court.

Remand for imposition of an interim remedy assumes the correctness of the panel's theory of liability under VRA §2 before duly-invoked appellate remedies are exhausted. A petition to rehear the case en banc—which if granted would vacate the panel's opinion—has now been filed. As an integral part of the appellate process afforded litigants, the filing of a petition requesting en banc review stays the mandate until "7 days after entry of an order denying" the petition, absent a contrary order. Fed. R. App. P. 41(b).[1] And the Court does not reach a final decision in the appeal until the mandate issues.

[1] *See* Fed. R. App. P. 41(d)(1) (providing that timely filing of petition for en banc review "stays the mandate until disposition of the petition . . . , unless the court orders otherwise").

*See*, *e.g.*, *Charpentier v. Ortco Contractors*, 480 F.3d 710, 713 (5th Cir. 2007) ("[O]ur decision is not final until we issue a mandate."). It is the issuance of that appellate mandate that returns jurisdiction over the case to the district court.[2]

Because plaintiffs' motions are based on the conclusions of a nonfinal panel opinion, the Court should deny the motions and allow the appellate process to continue. Plaintiffs' motions essentially seek departure from the regular process at this stage of appellate proceedings. Contrary to plaintiffs' assertions, there is no exigent need for a limited remand to impose interim relief before the November 2015 state-constitutional-amendment election. Plaintiffs point to no person, and certainly no named plaintiff, whose right to vote will be denied or even substantially burdened by maintaining the status quo while the en banc and certiorari processes continue.[3]

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[2] *See, e.g.*, *Newball v. Offshore Logistics Int'l*, 803 F.2d 821, 826 (5th Cir. 1986) (issuance of appellate mandate is how district court reacquires jurisdiction over the case); *United States v. Dozier*, 707 F.2d 862, 864 n.2 (5th Cir. 1983) (citing *United States v. Cook*, 592 F.2d 877, 880 (5th Cir. 1979)); *see also* DOJ Mot. 5 ("Consistent with this court's rules and internal operating procedures, . . . the mandate pull date [is] September 28, 2015. Thus, until at least September 29, 2015, the district court is divested of jurisdiction to conduct further proceedings consistent with this Court's opinion.").

[3] The district court noted that, of fourteen named plaintiffs alleging an undue burden on their right to vote, 71 F. Supp. 3d at 667, "[n]ine of the fourteen Plaintiffs are eligible to vote by mail" without photo ID, *id.* at 677. None of the other five named plaintiffs faced a substantial obstacle to voting. For example, one chose to get a California driver's license because she would likely move back there after she graduates and, when she got that license, knew that a Texas license would satisfy SB14. ROA.100538-44. Another admitted he could afford a personal ID card, sufficient under SB14. ROA.99375. The remaining three plaintiffs, all of whom had SB14-compliant identification, *Veasey*, 71 F. Supp. 3d at 674, did not allege that their right to vote would be abridged or denied on account of race or that they were ever prevented from voting. Two simply expressed concern that their right to vote might be denied if the name on their SB14 ID were deemed not to be "substantially similar" to the name on their voter-registration card. *See* ROA.26705, 26709-10. The third, a transgendered individual, was also never unable to vote and did not show any race-based denial; instead, he expressed concern that he might be turned away "because his appearance does not really match his photograph and there are people who do not like transgender people." ROA.26712.

Moreover, during the pendency of this case, SB14 has been in effect for—to use DOJ's words—"three low-participation elections in November 2013, March 2014, and May 2014." DOJ Appellee's Br. 8. The upcoming November 2015 election would be a similar "low-participation election" under DOJ's reasoning, and it no more necessitates upsetting the status quo during the ongoing litigation than did the previous three elections. That is particularly true given that the most significant recent development in the case is the panel's overruling of many aspects of the district court's decision. The Court should permit the appellate process to unfold in the normal course: a panel opinion has legal effect authorizing district-court action only after the full Court has had a chance to review issues of exceptional importance and issues creating intra- and inter-circuit conflicts.

Defendants' petition for rehearing en banc explains why this case presents such issues; reasonable jurists should at least agree that the legal issues are substantial and important. And if the motions panel concludes that resolution of plaintiffs' remand motions requires additional exploration of the likelihood of further review, the motions panel should refer those motions to the full Court for consideration along with the en banc petition or hold the motions in abeyance until the Court rules on the en banc petition and on defendants' motion to stay the mandate pending a certiorari petition.

## II. Imposition of Interim Relief Will Only Further Compound the Litigation and Confuse the Situation.

Plaintiffs' request for an "interim" remand should also be denied because, if granted, it would only generate more confusion and potential further appellate litigation over the "interim" remedy, all while appellate litigation of the original judgment is still

ongoing. The prospect of some kind of temporary remedy entered upon a limited remand would likely cause the following issues and complications to arise: (1) the feasibility of determining and implementing an appropriate interim remedy on a compressed timeline; (2) the status of this Court's preexisting order staying the district court's judgment pending appeal; (3) the possible costs associated with imposing an interim remedy that may later be dissolved or altered, including possible voter confusion as well as monetary costs; (4) the propriety of directing state election officials to adopt and implement new policies and procedures pursuant to an order on temporary relief derived from a nonfinal decision of issues still subject to appellate litigation; (5) the status of any interim remedy during the pendency of appellate proceedings challenging that interim remedy itself; (6) whether the propriety of that interim remedy would be reviewed by a panel or the en banc Court if the petition for rehearing en banc is granted in the meantime; and (7) the ultimate appropriateness on the merits of any interim relief ordered while appellate litigation is ongoing.

The concern about further litigation and confusion resulting from plaintiffs' proposed course of action is heightened by DOJ's suggestion that interim relief could be entered that would effectively gut SB14's creation of a photo voter-ID law and return Texas law to its pre-SB14 state. DOJ contemplates a remedy that permits a non-photo ID to serve for all voting-related purposes. *See* DOJ Mot. 6 (suggesting that "voter registration certificates (i.e., Texas's equivalent of voter registration cards) be added to the list of forms of identification provided in SB14 as sufficient for all voting-related purposes"). But the panel's opinion instructs that any remedy under VRA §2 should be tailored to the cause of the alleged violation and account for the purposes of SB14 and

for SB983, which already significantly mitigates burdens lower-income voters might face by eliminating all fees for searching for and providing a record used as supporting documentation to obtain a free photo voter ID.[4] DOJ's suggested remedy of reinstating voter registration cards as acceptable voter ID does not sufficiently take either of those considerations into account.

## Conclusion

Defendants respectfully request that the Court deny plaintiffs' motions for an early remand.

[4] Those same reasons make it improper to alter the existing stay pending appeal; that alteration would restore a judgment already held to be infirm, as well as cause all of the complications and issues noted above.

Respectfully submitted.

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## Certificate of Service

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## Certificate of Compliance

I certify that, on August 28, 2015, this document was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit via the Court's CM/ECF document filing system.

I certify that (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the electronic submission has been scanned with the most recent version of commercial virus-scanning software and was reported free of viruses.

I certify that this response complies with the type-volume limitation of Rule 27(d)(2) because it is not more than 20 pages, and complies with the typeface and style requirements of Rule 32(a)(5) and (a)(6) because it was prepared in Microsoft Word using 14-point Garamond typeface.

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