IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-41127

MARC VEASEY, *et al.*,

Plaintiffs-Appellees

v.

RICK PERRY, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

RESPONSE OF THE UNITED STATES TO VEASEY-LULAC APPELLEES' MOTION TO EXPEDITE APPEAL

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CERTIFICATE OF INTERESTED PERSONS
No. 14-41127

MARC VEASEY, *et al.*,

Plaintiffs-Appellees

v.

RICK PERRY, *et al.*,

Defendants-Appellants

In addition to those persons identified in the Veasey-LULAC appellees' Certificate of Interested Persons, the undersigned counsel certifies that the following persons have an interest in the outcome of this appeal:

Gregory B. Friel, Deputy Assistant Attorney General, Civil Rights Division, U.S. Department of Justice

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s/ Erin H. Flynn
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INTRODUCTION

This appeal concerns four consolidated challenges to Texas Senate Bill 14 (S.B. 14), which sets forth Texas's photographic voter identification requirements for in-person voters, under Section 2 of the Voting Rights Act (VRA), 52 U.S.C. 10301, and the United States Constitution. After a full trial on the merits, the district court determined that S.B. 14's photo-identification requirements violate Section 2 of the VRA and the United States Constitution and accordingly issued a permanent and final injunction barring Texas's enforcement of those requirements. See R.628; R.633.[1] Based primarily on the imminence of the November 2014 election, this Court granted the State's emergency motion for a stay pending appeal. See Opinion, *Veasey* v. *Perry*, No. 14-41127 (5th Cir. Oct. 14, 2014) (Slip Op.).

On November 26, 2014, the Veasey-LULAC appellees filed a motion to expedite this appeal. In general, the United States agrees that good cause exists to expedite this Court's consideration of this case. But for reasons explained more fully below, the United States respectfully requests that this Court refrain from entering an abbreviated briefing schedule. Rather, we would urge this Court to direct the Clerk to issue a regular briefing schedule upon receipt of the electronic

[1] "R. __" refers to the docket entry number in *Veasey* v. *Perry*, No. 2:13-cv-193 (S.D. Tex. 2013).

record on appeal and to grant this case special calendaring priority so that it is scheduled for the next reasonably available oral argument date once fully briefed.

BACKGROUND

On May 27, 2011, the Texas Legislature enacted S.B. 14, which imposed stricter requirements for in-person voting than the preexisting voter identification requirements that Texas had enforced since 2003. Among other things, S.B. 14 requires all in-person voters, including early voters, to present one of a limited number of government-issued photo identification documents in order to cast a ballot that will be counted. Certain in-person voters with disabilities may obtain an exemption from S.B. 14's photo-identification requirements, but only after completing a documentation process.

At the time S.B. 14 was enacted, Texas was a covered jurisdiction subject to the requirements of Section 5 of the VRA, 52 U.S.C. 10304, and therefore could not enforce the law unless and until it showed that S.B. 14 had neither a racially discriminatory purpose nor a racially discriminatory effect. Both the Attorney General and a three-judge district court in the District of Columbia concluded that Texas failed to satisfy that requirement. See generally *Texas* v. *Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012), vacated and remanded on other grounds, 133 S. Ct. 2886 (2013). Thus, Texas remained prohibited from implementing S.B. 14 until June 2013, when the Supreme Court held that Section 4(b) of the VRA could not

serve as the basis for subjecting jurisdictions to Section 5 preclearance. See *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013).

Immediately following *Shelby County*, Texas decided to enforce S.B. 14 as enacted. Shortly thereafter, four separate challenges to S.B. 14, including one by the United States, were filed in the United States District Court for the Southern District of Texas and consolidated before the same judge.[2] All plaintiffs alleged that S.B. 14's photo-identification requirements for in-person voters violate Section 2 of the VRA, 52 U.S.C. 10301, both because they were motivated at least in part by a discriminatory purpose and because they have a prohibited discriminatory result. Certain private plaintiffs and plaintiff-intervenors further alleged that S.B. 14 violates the Fourteenth Amendment, both because it is intentionally discriminatory and because it imposes an undue burden on the right to vote, and that the law violates the Twenty-Fourth Amendment because it functions as a poll tax.

In November 2013, the district court placed the cases on an expedited schedule and set a trial date for September 2014. This schedule enabled the district court to render a decision in time to apply to the November 2014 election while

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[2] The lead action in the consolidated cases below is *Veasey* v. *Perry*, No. 2:13-cv-193 (S.D. Tex. June 26, 2013). The others are *United States* v. *Texas*, No. 2:13-cv-263 (S.D. Tex. Aug. 22, 2013); *Texas State Conf. of NAACP Branches* v. *Steen*, No. 2:13-cv-291 (S.D. Tex. Sept. 17, 2013); and *Ortiz* v. *Texas*, No. 2:13-cv-348 (S.D. Tex. Nov. 5, 2013).

also providing the maximum amount of time for expedited discovery in what all parties agreed would be an extremely fact-intensive case. Meanwhile, Texas enforced S.B. 14 statewide for three low-participation elections. In September 2014, the district court held a nine-day bench trial, during which it heard live testimony from over 40 witnesses, including 17 experts. In addition, the court received deposition excerpts from more than 20 additional witnesses and video-deposition testimony from another seven witnesses. The court also received tens of thousands of pages of exhibits, including over two dozen expert reports.

On October 9, 2014, in an exhaustive 147-page opinion, the district court issued detailed findings of fact and conclusions of law. R.628. Among other things, the court found that more than 600,000 registered Texas voters lacked an acceptable form of identification required for in-person voting under S.B. 14, and that a sharply disproportionate number of those voters are African American or Hispanic. The court found that, among voters who lack S.B. 14-compliant identification, social and historical conditions linked to race mean that African-American and Hispanic voters in Texas would find it more difficult than Anglo voters to obtain such identification. Thus, the court concluded that S.B. 14 interacts with those conditions to provide minority voters with less opportunity than Anglo voters to participate in the political process. The district court further found that this result was not accidental. Rather, the Texas Legislature was

motivated to enact S.B. 14's particular requirements at least in part because of their detrimental effect on African-American and Hispanic voters.

In addition to holding that S.B. 14 violates Section 2 of the VRA, both because of its racially discriminatory purpose and because of its prohibited discriminatory result, the district court further held that S.B. 14 violates both the Fourteenth and Twenty-Fourth Amendments of the United States Constitution. On October 11, 2014, the court accordingly issued a permanent and final injunction barring the State from enforcing Sections 1 through 15 and 17 through 22 of S.B. 14 and ordering Texas to reinstate the preexisting voter identification practices that the State had enforced from 2003 until 2013. R.633. In accordance with S.B. 14's severability clause, the court left in place all other parts of the law.

On October 10, 2014, following the district court's issuance of its liability determinations but prior to its entry of the permanent injunction, Texas sought emergency relief from this Court in the form of a 42-page mandamus petition. See Pet. for Writ of Mandamus, *In re Rick Perry*, No. 14-41126 (5th Cir. Oct. 10, 2014). After the district court entered the permanent injunction and the State filed its notice of appeal, this Court converted Texas's mandamus petition into an emergency application for a stay pending appeal and ordered plaintiffs to respond within 24 hours in no more than ten pages. See Order, *In re Rick Perry*, No. 14-41126 (5th Cir. Oct. 11, 2014).

On October 14, 2014, this Court granted Texas's request for a stay of the district court's permanent injunction pending appeal. It did so based "primarily on the extremely fast-approaching election date." Slip Op. 3. This Court did not identify any clearly erroneous factual finding or incorrect legal conclusion that the district court had made. Rather, as to the ultimate merits of plaintiffs' Section 2 and constitutional claims, this Court conceded that those questions were "significantly harder to decide," given the "voluminous record," the "lengthy district court opinion," and this Court's "necessarily expedited review." *Id.* at 9. Although Judge Costa agreed to grant the stay based on the imminence of the election, he stated that this Court "should be extremely reluctant to have an election take place under a law that a district court has found, and that our court may find, is discriminatory." *Id.* at 12 (Costa, J., concurring).

The next day, plaintiffs filed emergency applications requesting that the Supreme Court vacate this Court's stay pending appeal. The Court denied the requests, with three justices dissenting. See Nos. 14A393, 14A402, 14A404 (S. Ct. Oct. 18, 2014). Thus, Texas enforced S.B. 14 for the November 2014 election. The Veasey-LULAC appellees have now filed a motion to expedite this appeal.

ARGUMENT

THIS COURT SHOULD GRANT THE MOTION TO EXPEDITE ONLY TO THE EXTENT IT SEEKS SPECIAL CALENDARING PRIORITY

It is well-established that this Court may expedite an appeal "for good cause." See 28 U.S.C. 1657(a); Fed. R. App. P. 45(b); 5th Cir. R. 27.5, 34.5, and 47.7. The United States agrees with the Veasey-LULAC appellees that both the important statutory and constitutional rights involved in this case and the numerous upcoming elections for which S.B. 14 remains in effect establish "good cause" for this Court's expedited consideration of this appeal. We therefore support the issuance of an order directing the Clerk to give special calendaring priority to this case. But given the nature of the claims presented, the breadth of the State's likely arguments on appeal, and the voluminous record below, the United States would urge this Court to retain a normal briefing schedule.

This case involved a lengthy trial on the merits of several distinct legal theories. After that trial, the district court determined that S.B. 14's photo-identification requirements violate Section 2 on two independent grounds, violate the Fourteenth Amendment on two independent grounds, and constitute an impermissible poll tax. In resolving plaintiffs' claims, the district court heard testimony from over 40 live witnesses and received written or video deposition testimony from at least 27 more witnesses. Accordingly, the trial transcripts in this case amount to almost 3000 pages. The court also admitted tens of thousands of

pages of exhibits, some of which were filed under seal, and received 27 expert reports.

In light of the numerous claims presented and the voluminous record below, the full briefing period normally allotted to civil cases is necessary for the United States to respond fully to Texas's arguments on appeal and to identify the extensive support in the record for the district court's rulings. In addition, while Texas presumably has begun to prepare its opening brief, appellees can only anticipate what arguments the State will make on appeal. The issuance of an expedited briefing schedule in a case as involved and fact-intensive as this one has the potential to prejudice appellees' ability to respond fully to the State's arguments. Moreover, although the United States will of course comply with any order this Court issues, the Department's multi-layered review process reflects the time provided by the regular briefing schedule.

Currently, the parties anticipate that the record on appeal will be filed this week. Thus, if the Clerk promptly issues a regular briefing schedule, this case could be fully briefed by March 2015. According this case special calendaring priority would enable this Court to consider the merits as soon as practicable thereafter.[3]

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[3] There is no realistic briefing and argument schedule that will produce a final merits determination by this Court and the Supreme Court in time to govern

(continued…)

CONCLUSION

This Court should direct the Clerk to issue a regular briefing schedule upon receipt of the electronic record on appeal and to grant this case special priority so that it is calendared for the next reasonably available oral argument date once fully briefed.

Respectfully submitted,

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(…continued)
the May 9, 2015 local elections. Directing the Clerk to grant this case special calendaring priority, however, will allow this Court to take the case under advisement as soon as practicable, thereby increasing the likelihood that a final merits determination will be rendered in time to apply to other upcoming elections. Moreover, upon consideration of the merits, this Court could decide to vacate the pending stay order *sua sponte* or in response to a motion by one of the parties.

CERTIFICATE OF SERVICE

I certify that on December 2, 2014, I electronically filed the foregoing RESPONSE OF THE UNITED STATES TO VEASEY-LULAC APPELLEES' MOTION TO EXPEDITE APPEAL with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that on December 2, 2014, I served a copy of the foregoing response on the following counsel by certified U.S. mail, postage prepaid:

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