IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-41127

MARC VEASEY, *et al.*,

Plaintiffs-Appellees

v.

GREG ABBOTT, in his Official Capacity as Governor of Texas, *et al.*,

Defendants-Appellants

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

REPLY TO APPELLANTS' OPPOSITION TO MOTION FOR A LIMITED REMAND DIRECTING THE DISTRICT COURT TO ENTER INTERIM RELIEF CONSISTENT WITH THIS COURT'S AUGUST 5, 2015, OPINION

Following this Court's issuance of an opinion and judgment affirming that SB14 violates the discriminatory results standard of Section 2 of the Voting Rights Act (VRA), 52 U.S.C. 10301, the United States moved for a limited remand directing the district court to enter interim relief consistent with this Court's opinion. Texas's opposition is clear: absent an order from this Court, it will continue to enforce SB14 as enacted. This is so despite repeated merits rulings, including the recent holding by this Court, that SB14 discriminates against African

Americans and Hispanics in violation of the VRA. See *Veasey* v. *Abbott*, No. 14-41127, 2015 WL 4645642, at *10-17 (5th Cir. Aug. 5, 2015) (Op. *___); *Veasey* v. *Perry*, 71 F. Supp. 3d 627, 694-703 (S.D. Tex. 2014); *Texas* v. *Holder*, 888 F. Supp. 2d 113, 115, 138 (D.D.C. 2012), vacated and remanded on other grounds, 133 S. Ct. 2886 (2013). And this is so despite this Court's identification of specific remedial measures tailored to SB14's shortcomings. See Op. *21.

Texas does not contend that it cannot implement interim relief in time for the November 2015 elections. Rather, it merely seeks to enforce SB14 until it has exhausted all available review. The State's petition for rehearing en banc and motion to stay the mandate pending a petition for certiorari make clear that Texas intends to enforce SB14 not only for the November 2015 state elections, but also for the March 2016 federal primary elections. This Court should reject Texas's continued efforts to impose SB14 as enacted pending issuance of the mandate and should order interim relief consistent with this Court's August 5, 2015, opinion.

1. Pending Issuance Of The Mandate And Further Proceedings Below, This Court Should Exercise Its Discretion To Issue Equitable Relief To Protect The Rights Of Voters Who Lack SB14 ID In Upcoming Elections

Texas argues that, because it has now filed a petition for rehearing en banc and a motion to stay the mandate pending a petition for certiorari, "no sound basis" exists for "short-circuiting the normal process of appellate review." Tex. Opp'n 1. Yet this Court expedited this case in order to allow for a merits determination in

time to apply to upcoming elections. Having now affirmed the district court's decision that SB14 violates Section 2 of the VRA, this Court should not permit Texas to continue to enforce SB14 as enacted in upcoming elections.

a. The Supreme Court has "often reiterated" that "voting is of the most fundamental significance under our constitutional structure." *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979). And the Court long ago recognized in the apportionment context that "it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1962). "In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." *Ibid.*; see *Veasey* v. *Perry*, 769 F.3d 890, 892-893 (5th Cir. 2014) (citing *Reynolds* v. *Sims*, *supra*, and granting a stay of the judgment pending appeal based "primarily on" the imminence of the November 2014 election). Here, equitable principles favor the entry of interim relief at this time.

The United States' motion seeks a limited remand directing the district court to enter interim relief consistent with this Court's opinion. See 28 U.S.C. 2106[1];

[1] Section 2106 states that courts of appellate jurisdiction "may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court

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see, *e.g.*, *Mahan* v. *Howell*, 410 U.S. 315, 332 (1973) ("Application of interim remedial techniques in voting rights cases has largely been left to the district courts."). The Supreme Court has stated that the "ability to grant interim relief" is "not simply '[a]n historic procedure for preserving rights during the pendency of an appeal,' * * * but also a means of ensuring that appellate courts can responsibly fulfill their role in the judicial process." *Nken* v. *Holder*, 556 U.S. 418, 427 (2009). This Court's role includes its exercise of equitable discretion to enter interim relief to protect affected voters pending final resolution of a case.

On appeal, this Court unanimously affirmed that SB14 violates Section 2 of the VRA. Despite this Court's merits determination, Texas had made clear that, absent an order from this Court, it will persist in enforcing SB14 as enacted. In light of the State's request for further review and the timing of upcoming elections, interim relief is necessary now to protect voters who lack qualifying photo ID, a disproportionate number of whom are African American or Hispanic, from an abridgment of their voting rights by a photo-ID law that has been found to be discriminatory. Such relief also avoids "election eve uncertainties and emergencies" (Op. *21) by affording ample notice to both voters and election

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lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. 2106.

officials regarding the photo-ID procedures that will be in place pending issuance of the mandate and further proceedings below. Because this Court is not divested of jurisdiction pending the entry of interim relief, granting this motion does not prejudice the State's ability to seek further review.[2]

b. Texas does not contend that the proposed interim relief is impracticable; instead, it simply threatens further litigation over any interim order that the district court might enter. Tex. Opp'n 6. To ensure that Texas does not waste valuable time challenging the terms of any limited relief, this Court could exercise its discretion to issue an injunction pending appeal pursuant to the All Writs Act. See 28 U.S.C. 1651(a) (courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"). This Court has explained that Section 1651 "empowers a federal court to employ procedures necessary to promote the resolution of issues in a case properly before it." *ITT Cmty. Dev. Corp.* v. *Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978). "This power is limited, however, to the facilitation of the court's effort to manage the case to judgment," *ibid.*, and is "to be used 'sparingly and only in the most critical and exigent circumstances,'" *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (citation omitted).

[2] Consistent with this Court's rules and recent order, the United States will file responses next week to the State's motion to stay the mandate and petition for rehearing en banc.

In cases in which States have persisted in taking discriminatory action to the detriment of plaintiffs' rights, this Court has relied on its equitable power under the All Writs Act, 28 U.S.C. 1651, to frame the terms of an injunction and direct the district court to enter such injunction pending this Court's final determination on appeal. See, *e.g.*, *Stell* v. *Savannah-Chatham Cnty. Bd. of Educ.*, 318 F.2d 425, 427-428 (5th Cir. 1963); *Armstrong* v. *Board of Educ.*, 323 F.2d 333, 338-339 (5th Cir. 1963). This Court has recognized that Section 1651(a) enables it "to grant any necessary relief to prevent irreparable damage to * * * substantial rights," *Harris* v. *Gibson*, 322 F.2d 780, 781-782 (5th Cir. 1962), including temporary injunctions in voting-rights cases, see *United States* v. *Lynd*, 301 F.2d 818, 823 (5th Cir. 1962). Notably, in each of the above cases, this Court granted interim relief pending an appeal on the merits. Here, this Court already has issued a unanimous decision holding that SB14 has a prohibited discriminatory result.

The unique circumstances in this case justify the exercise of this Court's discretion to issue equitable relief. From May 2011 until June 2013, SB14 was stayed under Section 5 of the VRA based on Texas's failure to establish that SB14 had neither a discriminatory purpose nor a discriminatory effect. See *Texas* v. *Holder*, *supra*. In June 2013, the Supreme Court rendered its decision in *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), which held that Section 4(b) of the VRA could no longer be used to determine which jurisdictions were subject to Section 5

preclearance. Within hours of the *Shelby County* decision, Texas announced its intent to begin enforcing SB14's photo-ID requirements. Following the State's announcement, private plaintiffs and the United States challenged SB14's photo-ID requirements under Section 2 of the VRA. Pending trial, SB14 was in effect for the November 2013, March 2014, and May 2014 elections.

After an expedited trial on the merits, the district court, *inter alia*, held that SB14 violated Section 2 of the VRA and enjoined SB14's enforcement. Texas sought an emergency stay of the district court's judgment pending appeal. With only six days to the start of early voting for the November 2014 general election, this Court granted the stay "[b]ased primarily on the extremely fast-approaching election date." ROA.27377. With a stay order in effect, this Court expedited the appeal in order to render a merits decision in time to apply to upcoming elections.

On appeal, this Court unanimously affirmed that SB14 has a prohibited discriminatory result. Yet absent a grant of interim relief, registered voters who lack SB14 ID will again be deterred from going to the polls or rendered unable to cast a ballot that will be counted. The issuance of interim relief will protect the fundamental rights of African-American and Hispanic voters who face disproportionate and material burdens in obtaining a form of SB14 ID.[3] Early

[3] Texas touts the Legislature's enactment of SB983, passed after oral argument in this case. Tex. Opp'n 2. But as we previously explained, SB983 does (continued…)

voting for the November 3, 2015, elections does not begin until October 19, 2015. Accordingly, the State has sufficient time to implement the limited relief requested. The balance of harms and the public interest in having non-discriminatory elections favor the entry of interim relief pending issuance of the mandate and further proceedings below.

2. The Relief Requested Mitigates SB14's Discriminatory Result, Respects Texas's Stated Goals, And Can Be Implemented Prior To The Next Election

Texas argues that an interim order requiring it to accept voter registration certificates on an interim basis "would effectively gut SB14's creation of a photo voter-ID law and return Texas law to its pre-SB14 state." Tex. Opp'n 6. Not so. This Court recognized that permitting voters who lack SB14 ID to vote by regular ballot upon presentation of a voter registration certificate would respect the State's policy choice to "reduce the risk of in-person voter fraud by strengthening the forms of identification presented for voting." Op. *21. Moreover, an order requiring the acceptance of such certificates on an interim basis does not mean that

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not address SB14's overly restrictive list of acceptable ID; the significant travel burdens and logistical hurdles associated with obtaining an election identification certificate (EIC); the lack of SB14 voter education and funding; and the lack of meaningful mitigating measures for those features. Even after SB983, affected voters still generally must visit at least two government agencies to obtain an EIC. And SB983 does not require the Department of Public Safety, Secretary of State, or county clerks to inform eligible applicants of their entitlement to no-cost records, nor does it assist voters born outside of Texas. See United States' Response to Texas's 28(j) Letter to this Court (5th Cir. May 29, 2015).

the vast majority of voters would no longer have to present SB14 ID. Rather, poll workers still could request that the voter present a form of SB14 ID; if the voter lacked such ID, the election official then would inquire whether the voter possessed a valid voter registration certificate. Alternately, this Court or the district court could decree that, "upon execution of an affidavit that a person does not have an acceptable form of photo identification, that person must be allowed to vote with their voter registration [certificate]." Op. *21.

Texas does not contend that it would be unable to comply with an interim order permitting voters who lack SB14 ID to rely on valid voter registration certificates for voting-related purposes. County registrars have continued to issue initial registration certificates, and renewal registration certificates are mailed to voters every two years in accordance with state law. Tex. Elec. Code §§ 13.142, 14.001 (2013). In addition, replacement registration certificates are freely available to registered voters who seek them and whose registration certificates are lost or destroyed. Tex. Elec. Code § 15.004 (2013). Moreover, because voter registration certificates contain precinct information and a voter's party affiliation, and can establish that the person is a duly registered voter, Texas advises in-person voters to bring such certificates to the polls in addition to their SB14 ID. See VoteTexas.Gov, *FAQ*, available at http://tinyurl.com/nnx9fay. Like other forms of SB14 ID, the certificates are state-issued, uniform in appearance, and familiar to

election officials and poll workers. Finally, because in-person voters and poll workers are familiar with such certificates, and because voters are encouraged to bring the certificates to the polls, any possibility for voter confusion, and the costs associated with implementing an interim order permitting voters who lack SB14 ID to rely on valid registration certificates for voting-related purposes is minimal.

Nor does Texas argue that it lacks sufficient time to implement the proposed relief. In fact, evidence from the November 2013 elections indicates that the Secretary of State provides PowerPoint presentations and PDF links to county officials for training and election administration purposes, and that poll workers do not receive training until shortly before the start of early voting. See ROA.46324-46391. Thus, none of the obstacles that Texas complained of when it sought an emergency stay for the November 2014 election exist here.

WHEREFORE, the United States respectfully requests that this Court issue a limited remand directing the district court to enter interim relief consistent with this Court's August 5, 2015, opinion. In the alternative, we request that this Court enter an injunction directing Texas (a) to accept valid voter registration certificates from voters who lack SB14 ID as sufficient for all voting-related purposes, and (b) to provide notice and education to voters consistent with the terms of the interim relief. To the extent this Court must modify its October 14, 2014, stay order in order to grant the relief sought, we respectfully request that it do so.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 2, 2015, I electronically filed the foregoing REPLY 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 September 2, 2015, I served a copy of the foregoing REPLY on the following counsel by certified U.S. mail, postage prepaid:

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