No. _____

In the

Supreme Court of the United States

MARC VEASEY, et al.,
Applicants,
V.
GREG ABBOTT, et al.,
Respondents.

APPLICATION TO VACATE FIFTH CIRCUIT STAY OF PERMANENT INJUNCTION

Directed to the Honorable Clarence Thomas, Associate Justice of the United States Supreme Court and Circuit Justice for the Fifth Circuit

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(all Defendants in their official capacities)

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Pursuant to Supreme Court Rule 29.6, the undersigned states that none of the Applicants has a parent corporation, and no publicly held corporation holds 10 percent or more of any Applicants' stock.

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Application to Vacate Stay

To the Honorable Clarence Thomas, Associate Justice of the United States Supreme Court and Circuit Justice for the Fifth Circuit:

Applicants respectfully request an order vacating an interim Court of Appeals stay that was entered in October 2014 solely because of the imminence of the 2014 Texas elections, but which has now extended for nearly a year and a half, has injured Texas voters in two more statewide election cycles in 2015 and 2016, and, unless vacated, will very likely cause further injury by allowing enforcement of an invalid state law again during the 2016 Texas general elections, including the election for President of the United States.

The order which Applicants ask this Court to vacate is the October 14, 2014, order of the United States Court of Appeals for the Fifth Circuit that stayed the District Court's permanent injunction of Texas's voter photo ID law, Senate Bill 14 of 2011 ("SB 14"). The District Court held, among other things, that SB 14 was adopted with a racially discriminatory purpose and produces a racially discriminatory result. *Veasey v. Perry*, 71 F. Supp. 3d 627, 633 (S.D. Tex. 2014). The stay was premised on the "extremely fast-approaching" 2014 elections, *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014),[1] and should not have extended further than the 2014 election cycle.

Since then, however, Fifth Circuit delay and denial of interim relief have unwarrantedly kept the stay in effect and caused SB 14 to be enforced in 2015 and

[1] On October 15, 2014, these Applicants and others, including the United States, applied to this Court to vacate the stay. That application was denied, with three Justices dissenting. *Veasey v. Perry*, 135 S. Ct. 9 (2014).

2016 elections, causing irreparable harm to Texas voters, and disproportionately harming minority voters. Specifically, on August 5, 2015, the Court of Appeals unanimously upheld the finding of a racially discriminatory result and ordered relief, urging the parties to work cooperatively to implement relief prior to the November 2015 elections. *Veasey v. Abbott*, 796 F.3d 487, 519 (5th Cir. 2015). Instead, when the Texas defendants filed a petition for rehearing en banc, the Court of Appeals suspended any relief by withholding even a limited mandate, without explanation, while taking six months to decide whether or not to grant rehearing en banc (during which time the statute was enforced twice more in statewide elections). Rehearing en banc was granted on March 9, 2016.

On March 18, 2016, Applicants filed an emergency motion with the Fifth Circuit to vacate the stay in order to ensure relief for the 2016 general election. Within hours, the Fifth Circuit effectively denied Applicants' emergency motion in a one sentence order "carrying [the emergency motion] with the case," thus stating that it will not consider relief prior to the conclusion of the en banc proceedings—which are not scheduled to be argued until the end of May.[2] Meanwhile, Texas has alleged that it begins election preparations for the November election, including preparation of voter ID procedures, as early as June.

Every judge who has considered SB 14 has agreed that SB 14 has an

[2] Since the emergency motion specifically requested, and indeed only requested, that the stay be vacated prior to the conclusion of the en banc proceedings, the Fifth Circuit's order unambiguously denied the requested relief. This is the judgment that Applicants ask the Court to review and reverse, pursuant to Rule 23 of the Supreme Court of the United States.

impermissible discriminatory effect on minority voters. The Fifth Circuit's order fails to address the reasons for the ongoing stay. Because the 2014 stay was issued solely because of the imminent 2014 election, without finding that the Texas defendants had met *any* of the factors normally required for a stay, and because the stay has remained in effect without any further showing at any time of its appropriateness, Texas has *never* shown—and the Court of Appeals has *never* found—a single one of the factors normally required for a stay: not a strong likelihood of success, not injury to the State from denying the stay, not lack of injury to the voter-plaintiffs from granting the stay, and assuredly not that a stay is in the public interest.

As explained below, even though the 2016 general election seems still far away, the process of returning the case to the District Court, fashioning an interim remedy, and implementing that relief in time for the November 2016 election means that time is of the essence and further delay, even of two or three months, is perilous to obtaining any relief for the November 2016 election. This Court should vacate the stay and reinstate the District Court's permanent injunction or restore limited jurisdiction to the District Court to enter another appropriate injunction.[3]

[3] Applicants here accept that it is likely too late to obtain proper relief for the May 2016 runoff primary elections in Texas. This does not, however, mean that relief can be postponed until after the en banc proceedings. Indeed, the fact that Applicants must concede, two months prior, that relief for the May 2016 runoff elections is likely impossible emphasizes the need to implement relief for the November 2016 election as soon as possible. As discussed in greater detail below, Texas has already asserted that changes in election administration must be made as early as June for the November election. Thus, time is of the essence. The relief sought here is the reinstatement of an injunction for all forthcoming elections after the May 2016 runoffs so that Applicants will not forfeit their right to vote in any further elections as this case proceeds.

Background

SB 14, enacted by Texas in May 2011, is the strictest voter ID law in the country. *See Veasey*, 71 F. Supp. 3d at 642. The law was initially blocked under Section 5 of the Voting Rights Act, when a three-judge District Court unanimously held that the law would have a prohibited discriminatory effect on minority voters. *Texas v. Holder*, 888 F. Supp. 2d 113, 115, 138 (D.D.C. 2012). After that decision was vacated, 133 S. Ct. 2886 (2013), based on this Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), this and related affirmative suits were filed in Texas, alleging that SB 14 violates the United States Constitution and Section 2 of the Voting Rights Act.

a. District Court Opinion

After a two-week trial, and before SB 14 could be enforced in any high turnout state or federal election, the District Court rendered a detailed 147 page opinion finding that the law: (1) was adopted with a discriminatory purpose in violation of the Fourteenth and Fifteenth Amendments and the purpose prong of Section 2 of the Voting Rights Act, (2) results in racial discrimination in violation of the results prong of Section 2 of the Voting Rights Act, and (3) creates an unconstitutional burden on the right to vote.[4] *Veasey*, 71 F. Supp. 3d at 633.

The District Court found—and there was essentially no contradictory evidence from the State—that more than 600,000 lawfully registered Texas voters did not have any of the limited forms of government-issued photo ID required

[4] The District Court also found that the statutory scheme, amended since that time, amounted to an unconstitutional poll tax. *Id.*

under SB 14 and face substantial burdens to obtaining such ID. *Id.* at 659, 668-677. The burdens were built into the law, which sharply reduced the number and location of ID-issuing offices by replacing voter registration offices (one or more in every county) with the far fewer offices of the Department of Public Safety (non-existent in many counties). Indeed, "more than 400,000 eligible voters face round-trip travel times of three hours or more to the nearest DPS office." *Veasey v. Perry*, 135 S. Ct. 9, 11 (2014) (Ginsburg, J., dissenting).

The District Court held, based on "virtually unchallenged" evidence, that SB 14 "bear[s] more heavily on Hispanics and African-Americans." *Veasey*, 71 F. Supp. 3d at 702. There was uncontradicted evidence that, in the picking and choosing of which IDs would be valid and which would not, the Legislature repeatedly made choices that would favor white or Anglo voters and disfavor minority voters. Moreover, despite awareness of SB 14's disproportionate effects on minority voters, the Legislature rejected a "litany of ameliorative amendments that would have redressed some of the bill's discriminatory effects." *Id.* at 702. After a careful review of the *Arlington Heights* factors, the District Court concluded that proponents of SB 14 were motivated "*because of* and not merely *in spite of*" SB 14's discriminatory effects on African-American and Latino voters. *Id.* at 703.

The District Court entered final judgment on these matters and issued an injunction requiring the State to apply the pre-SB 14 voter identification law, which had been in effect for a decade, and under which all registered voters may

vote by presenting one of a number of forms of photo- and non-photo identification, including a voter registration card.

b. Initial Stay of District Court Injunction

A panel of the Fifth Circuit Court of Appeals issued a stay of the District Court's injunction on October 14, 2014. *Veasey v. Perry*, 769 F.3d 890 (5th Cir. 2014). The stay was premised "primarily on the extremely fast-approaching" 2014 elections, *id.* at 892, and expressly disclaimed any finding that Texas had a likelihood of success on the merits (let alone a strong likelihood), except as to the timing of the 2014 election, *id.* at 895. Indeed, the proximity of the 2014 elections was the essence of the Fifth Circuit panel's analysis of every factor, *id.* at 895, not only the merits, *id.*, but also irreparable harm, *id.* at 896, and the public interest, *id.*

In other words, there has never been any showing by Texas of entitlement to a stay beyond the 2014 elections.

On October 15, 2014, Applicants, other Plaintiffs, and the United States sought emergency relief from this Court. On October 18, 2014, this Court denied the applications to vacate the Fifth Circuit stay. Justice Ginsburg, joined by Justice Sotomayor and Justice Kagan, dissented, noting that "[t]he greatest threat to public confidence in elections in this case is the prospect of enforcing a purposefully discriminatory law, one that . . . risks denying the right to vote to hundreds of thousands of eligible voters." *Veasey*, 135 S. Ct. at 12 (Ginsburg, J., dissenting). The only thing that has changed since that time is that Texas

continues to hold elections under a law found to be purposefully discriminatory.

c. Continued Deferral of Relief in 2015 and 2016

Even though the substance and logic of the Fifth Circuit stay of the District Court's injunction was limited to the 2014 election, that stay has remained in effect since October 2014 and thus has allowed the continued enforcement of SB 14 during not only the November 2014 general election, but also the November 2015 general election, the March 2016 primary election, and other state and local elections.

Upon motion, a panel of the Fifth Circuit expedited consideration of Texas' appeal and heard oral argument on April 28, 2015. On August 5, 2015, the panel unanimously found that SB 14 illegally results in racial discrimination against African-American and Latino voters in violation of Section 2 of the Voting Rights Act and directed the District Court to enter an appropriate remedy. *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015). The panel "urge[d] the parties to work cooperatively . . . to avoid election eve uncertainties and emergencies." *Id.* at 519.

In pursuit of efficacious relief prior to the November 2015 election, the Applicants and other Appellees petitioned the Fifth Circuit to: (1) expedite issuance of the mandate, and (2) to issue a limited mandate instructing the District Court to consider, in light of the panel opinion and in light of Texas's ongoing elections schedule, remedial orders necessary in order to conduct elections lawfully. On August 28, 2015, the Texas Appellants filed a rehearing petition seeking en banc review of the panel's decision. On September 2, 2015, the

Fifth Circuit panel denied the motion to expedite the issuance of a mandate, and ordered that the motion for limited mandate be "carried with this case, pending determination of the petition for rehearing en banc."

The Fifth Circuit took no action on the petition for rehearing en banc, or the requests for interim relief, for over six months. During that time SB 14 was enforced in Texas's November 2015 election and March 2016 primary election, blocking eligible Texas voters' access to the ballot. In December 2015, the Applicants herein, as well as other Appellees (including the United States) filed Rule 28(j) letters advising the Fifth Circuit of the upcoming March primary and the urgent need for interim relief; but again the Fifth Circuit took no action.

On March 9, 2016, the Fifth Circuit issued an order granting rehearing en banc in this matter, thus vacating the panel opinion. 5th Cir. R. 41.3. Therefore, the standing opinion on review is the District Court's opinion. Oral argument in the Fifth Circuit is scheduled for May 24, 2016.

On March 18, 2016, Applicants filed an emergency motion in the Fifth Circuit to vacate the stay, in order to ensure relief to Texas voters in the upcoming 2016 general election. In their motion, Applicants explicitly requested relief *prior* to the conclusion of the en banc proceedings in order to "avoid a scenario when another election is held under SB 14 simply because Texas claims that it does not have enough time to conduct elections lawfully." Just hours later, the Fifth Circuit effectively denied the requested relief in an order "carrying [the emergency motion] with the case," indicating that it will not grant relief prior to

the conclusion of the en banc proceedings.

Reasons to Vacate the Stay

This Court, or a Circuit Justice, may vacate a stay "where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed [by this Court] upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue a stay." *W. Airlines v. Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (quoting *Coleman v. Paccar Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)); *see also Hollingsworth v. Perry*, 130 S. Ct. 705, 709–10 (2010).

Thus, in order to prevail, Applicants must demonstrate (1) that they will be irreparably injured by the continued stay and (2) that the continued stay is not justified under this Court's standards. These two points are addressed below. In considering these issues, since the Fifth Circuit "fail[ed] to provide . . . any reasoning" for its maintenance of the stay pending the en banc process, this Court must evaluate the continued stay "in light of the District Court's ultimate findings." *Purcell v. Gonzalez*, 549 U.S. 1, 7, 8 (2006).

This Court should vacate the stay and reinstate the District Court's permanent injunction or restore limited jurisdiction to the District Court to enter another appropriate injunction.

I. Maintenance of the Stay Irreparably Injures Texas Voters

As this Court indicated in *Purcell*, courts must "carefully consider the importance of preserving the status quo on the eve of an election." *Veasey*, 769 F.3d at 893. It is not clear when and under what circumstances a court order may be too close to an election. But this Court has made clear that "[a]s an election draws closer, [the] risk [of voter confusion] will increase." *Purcell*, 549 U.S. at 7. Therefore, Applicants must secure a remedy before the gears of election administration begin to turn in order to safeguard effective relief. This is the logical extension of this Court's reasoning in *Purcell* and other similar cases: When an election change may be necessary to protect voters' rights, it should be done as soon as possible in order to avoid the possibility of either electoral confusion or unnecessarily delayed relief.

En banc oral argument is now scheduled for May 24, 2016. Therefore, the earliest possible en banc opinion will not be issued until at least June or July 2016. More likely, it will not be decided until much later.

The obvious question is why do Applicants seek this relief now when the en banc hearing is two months away, and relief may be available soon thereafter. On its face, this may not seem problematic—a decision could be rendered (at the earliest) about four months before early voting begins—but in fact it seriously imperils any relief for the November 2016 election. There is an entire election administration apparatus that must be prepared prior to any election, including the training of approximately 25,000 poll workers. *Veasey*, 769 F.3d at 893; *see*

also Texas Petition for Writ of Mandamus (filed in the Fifth Circuit Oct. 11, 2014), at 6. Texas has already alleged that, after this process begins, it cannot easily double back to accommodate a change in election procedures. *Id.* Texas has also taken the position that the wheels of election administration for the general election in November, including the enforcement of SB 14, go into motion as soon as early June. *See* Exh. A, Affidavit of Keith Ingram, Doc. 40-1, *Texas v. Holder*, No. 1:12-CV-00128 (D.D.C.). As the November election approaches, the State will no doubt argue that *Purcell* protects against any injunctive action once the election process begins. In other words, according to Texas, any injunction of SB 14 must be put into place no later than June in order to be effective for the November 2016 election.[5]

Given the schedule, that is simply not possible. Applicants and other voters have already been the victims of delayed relief again and again and cannot risk it happening yet another time, especially when choosing the President. If the process of determining the precise relief, should this Court order the entry of a different remedy, and beginning the machinery for implementation does not even begin until sometime after the en banc hearing, that is a further delay of several more months. Waiting those several months could be fatal. Texas voters should not be forced to forfeit their right to vote in yet another election.

[5] Despite having made no showing of likely success on the merits, *infra*, Texas will undoubtedly argue that relief must be delayed until the end of en banc proceedings because, should they succeed and the mandate issues, they need to implement SB 14 accordingly. As explained below in Section II.B, this injunction will not harm Texas and Texas will be free to act appropriately to safeguard its ability to enforce SB 14 in the unlikely event of its success.

II. The Stay Cannot Be Justified Under This Court's Standards

To issue a stay pending appeal, courts must consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). "The first two factors . . . are the most critical," and the "party requesting a stay bears the burden of showing that the circumstances justify" a stay. *Id.* at 434.

A. The State Has Not and Cannot Make a "Strong Showing" of Likely Success on the Merits.

Texas has not established a likelihood of success on the merits. Seven of seven federal judges to consider SB 14 thus far have held that the law has a discriminatory effect on minority voters. Moreover, the initial Fifth Circuit stay drew no conclusions about the substantive merits of the case.

Applicants are likely to prevail on the merits. The District Court's decision, rendered after a two-week trial, rested on settled Supreme Court precedent and well-supported, detailed findings of fact. By picking and choosing between types of photo ID, Texas divided registered voters into two classes: one class already in compliance with SB 14 without having to take any further action, and the other class disfranchised unless they took specific (and burdensome) actions. This was a division into a favored class and a disfavored class, with predictable and

intentional discriminatory effects on racial minorities.

1. Discriminatory Purpose. Carefully reviewing the evidence, the District Court found that every one of the *Arlington Heights* factors was satisfied, *see Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 265-68 (1977), and specifically that the Texas Legislature consistently made choices—for example, the choice of what IDs to include and what IDs to exclude—to benefit Anglo voters and/or disadvantage minority voters. *Veasey*, 71 F. Supp. 3d at 701-02. *See Miller v. Fenton*, 474 U.S. 104, 113 (1985) (finding that an "inquiry into state of mind" constitutes "a question of fact" even if "its resolution is dispositive of the ultimate constitutional question"); *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 534 (1979) (applying clear error standard to District Court finding of intentional discrimination).

2. Section 2 of the Voting Rights Act's "Results Test". The District Court also found conclusively, on largely uncontested evidence that "whether treated as a matter of statistical methods, quantitative analysis, anthropology, political geography, regional planning, field study, common sense, or educated observation . . . SB 14 disproportionately impacts African–American and Hispanic registered voters relative to Anglos in Texas." *Veasey*, 71 F. Supp. 3d at 695. Moreover, the District Court found extensive evidence satisfying all of the relevant Section 2 Senate Factors and concluded that the State knowingly and deliberately made choices benefiting Anglos and hurting minorities, a finding more than sufficient to violate the results standard of Section 2. *Veasey*, 71 F. Supp. 3d at 645-653, 696-

98; Trial Tr. 345:22-346:6 (Sep. 8, 2014) (Rep. Todd Smith, chair of the House Committee and SB 14 sponsor) (calling it a "matter of common sense" that minorities would disproportionately lack SB 14-compliant IDs).

3. Constitutional Right to Vote Claim. In addressing this as-applied claim, the District Court appropriately applied the balancing test under *Anderson v. Celebrezze*, 460 U.S. 780 (1983), *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Crawford v. Marion County*, 553 U.S. 181 (2007). First, it identified the significant evidence of the substantial burdens imposed by SB 14 and its implementation, which sets this case apart from *Crawford*. *Veasey,* 71 F. Supp. 3d at 686-690. It carefully weighed those burdens against each of the state interests and determined that the degree of burden imposed by the unusual strictures of this particular law—not voter ID laws in general—was not necessary or appropriate to advance the state's legitimate interests. *Id.* at 691-93. Therefore, the District Court properly concluded that SB 14 unconstitutionally burdened the fundamental right to vote. *Veasey*, 71 F. Supp. 3d at 693 ("The unconstitutionality of SB 14 lies also in the Texas Legislature's willingness and ability to place unnecessary obstacles in the way of a minority that is least able to overcome them.").

Each of these holdings was well-supported both by the voluminous factual record and established Supreme Court precedent. Texas has failed to establish that SB 14 does not have an impermissible discriminatory effect on minority voters three times over. Since "[t]here has been no explanation given by the Court

of Appeals showing the ruling and findings of the District Court to be incorrect," this Court must evaluate the ongoing stay in light of the District Court's uncontradicted findings. *Purcell*, 549 U.S. at 7-8. Texas has not made a "strong showing," or indeed any showing, of likely success on the merits.

B. The State Will Suffer No Irreparable Injury If the Stay is Vacated.

In its 2014 petition for a stay, Texas asserted irreparable injury on the basis of the closeness of the impending 2014 election. Now, Applicants are not seeking relief for any election that is already underway. To the contrary, it is this Application that is seeking, proactively, to avoid voter confusion and eleventh-hour election changes.

Texas will not be harmed by removing the stay. Absent relief from this Court, Texas will not take the steps necessary to prepare for an election without SB 14 and thus, this relief is absolutely necessary to protect Applicants and Texas voters. But, conversely, nothing in the relief sought prevents Texas from taking whatever additional steps it deems necessary to remain flexible and capable of implementing SB 14 in the unlikely event SB 14 is ultimately upheld.

Finally, Texas has no cognizable interest in enforcing a discriminatory and unconstitutional law. *See City of Richmond v. United States*, 422 U.S. 358, 378 (1975) (holding that racially discriminatory laws "have no credentials whatsoever"). Therefore, regardless of any justification for the initial stay in 2014, Texas has not and cannot establish any irreparable injury justifying a continued stay of the District Court's injunction pending further proceedings.

C. The Ongoing Stay Injures Applicants and Texas Voters.

As discussed above, the ongoing stay prevents the beginning of work necessary to prepare for an orderly general election pursuant to the District Court's Order.

The Fifth Circuit opinion granting the stay takes no issue with the District Court's finding that over 600,000 registered Texan voters lack SB 14 ID. *Veasey*, 71 F. Supp. 3d at 659. The District Court found that the State has imposed substantial, unnecessary, and discriminatory burdens on voters seeking to come into compliance with SB 14. *Id.* at 668-677, 691-93, 695-98. In granting the stay, the Fifth Circuit acknowledged that Texas voters will be harmed by the stay—*Veasey*, 769 F.3d at 896 ("The individual voter plaintiffs may be harmed by the issuance of this stay.")—but concluded that the other factors outweighed this harm. As discussed above, those factors no longer support, and actually counsel against, a continued stay under present circumstances.

D. The Public Interest Favors Vacating the Stay.

Nothing offends the Constitution more than state-sanctioned intentional racial discrimination. Governmental acts motivated even in part by a racially discriminatory purpose "have no credentials whatsoever." *City of Richmond v. United States*, 422 U.S. 358, 378 (1975). Enforcing an abhorrent act of racial discrimination injures not only the Applicants and the entire public, but also the State of Texas itself. For this reason, a stay pending appeal in a case, where purposeful racial discrimination has been found in a final judgment after a full

trial, is virtually unheard-of. None of the voter ID cases and none of the orders recently issued by this Court in other voting cases involved findings of racially discriminatory purpose.

A court should thus hesitate to sanction enforcement of a law found to be racially discriminatory without the clearest showing that the finding would be overturned on appeal. No such showing has been made.

Conclusion

This Court should vacate the Fifth Circuit's October 14, 2014 stay and reinstate the permanent injunction or restore limited and jurisdiction should be restored to the District Court to reinstate its injunction or enter another appropriate injunction.

March 25, 2016

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