

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-40884

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; DALLAS COUNTY, TEXAS; GORDON BENJAMIN;
KEN GANDY; EVELYN BRICKNER,

Plaintiffs - Appellees

v.

GREG ABBOTT, in his Official Capacity as Governor of Texas; ROLANDO
PABLOS, 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

UNITED STATES OF AMERICA,

Plaintiff - Appellee

TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND; IMANI
CLARK,

Intervenor Plaintiffs - Appellees

v.

STATE OF TEXAS; ROLANDO PABLOS, 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

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

Plaintiffs - Appellees

v.

ROLANDO PABLOS, 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

LENARD TAYLOR; EULALIO MENDEZ, JR.; LIONEL ESTRADA; ESTELA
GARCIA ESPINOSA; MAXIMINA MARTINEZ LARA; LA UNION DEL
PUEBLO ENTERO, INCORPORATED,

Plaintiffs - Appellees

v.

STATE OF TEXAS; ROLANDO PABLOS, 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

Appeal from the United States District Court
Southern District of Texas

ORDER:

A member of the court in active service having requested a poll on the Petition for Initial En Banc, based on 28 U.S.C. 46(c), FRAP 35(a),(f), and Court Policy 7E, and a majority of the judges in active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Cir. R. 35), hearing en banc is DENIED.

In the en banc poll, four judges voted in favor of hearing (Judges Jones, Smith, Dennis, and Elrod), and ten judges voted against (Chief Judge Stewart and Judges Jolly, Clement, Prado, Owen, Southwick, Haynes, Graves, Higginson, and Costa).

ENTERED FOR THE COURT:

/s/ Carl E. Stewart
UNITED STATES CIRCUIT JUDGE

JERRY E. SMITH, Circuit Judge, dissenting from the denial of initial hearing en banc:

The plaintiffs resourcefully petition for initial en banc hearing. The court imprudently denies that request, which the state and the United States oppose. I respectfully dissent.

A petition for initial en banc review is unusual and is rarely granted.¹ Even aside from the practical limitations on the en banc court because of volume, a three-judge panel reliably serves as the first, and usually the last, appellate arbiter by distilling the issues so that the full court can decide whether en banc rehearing should follow.

That “business as usual” approach is undoubtedly the primary basis for this decision to deny initial en banc hearing. The majority’s intent is benign, its result unfortunate. The elephant in the room is Texas’s 2018 election schedule, which includes statewide primaries on March 6 (with early voting beginning February 20), municipal elections May 5 (early voting April 22), primary runoffs May 22 (early voting May 14), and the general election November 6 (early voting October 22).²

The lopsided vote to deny en banc hearing shows that the court has little appetite for disposing of this important case in advance of the beginning of the 2018 election cycle. This court regularly schedules, at most, only three en banc sessions, widely spread through the calendar year. After a panel hears this case and eventually renders a decision, the losing side predictably will petition

¹ But the procedure has its proper role. *See United States v. Escalante-Reyes*, 675 F.3d 832 (5th Cir. 2012) (per curiam) (en banc) (announcing *sua sponte* decision “to initially consider this case en banc”).

² In this very case, the Supreme Court “recognize[d] the time constraints the parties confront in light of the scheduled elections in November, 2016.” *Veasey v. Abbott*, 136 S. Ct. 1823, 1823 (2016) (per curiam) (order denying motion to vacate stay).

for en banc rehearing. If that is granted (as it was in the first appeal), the procedural steps will consume enough time that it is impossible for a decision to be issued before some, if not all, of the 2018 elections are history.³ That would not necessarily be so if initial en banc hearing were to be granted now, bypassing the need for a panel.

Every judge is commendably dedicated to giving this significant case a full hearing and rendering a fair result. The process of deciding how best to go about that is an art, not a science. Albeit with good intentions, a healthy majority of the en banc court has missed the mark. I respectfully dissent.

³ This glum assessment takes no account of further delay from a petition for certiorari or motion for stay. *See Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (per curiam) (statement by Roberts, C.J., respecting the denial of certiorari) (noting that “[t]he issues will be better suited for certiorari review” at a later time).

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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NEW ORLEANS, LA 70130

October 10, 2017

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 17-40884 Marc Veasey, et al v. Greg Abbott, et al
USDC No. 2:13-CV-193
USDC No. 2:13-CV-263
USDC No. 2:13-CV-291
USDC No. 2:13-CV-348

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
James deMontluzin, Deputy Clerk
504-310-7679

Ms. Leah Camille Aden
Ms. Anna Marks Baldwin
Mr. J. Campbell Barker
Mr. Neil G. Baron
Mr. Thomas Evans Chandler
Ms. Jennifer Clark
Ms. Lindsey Beth Cohan
Mrs. Angela Veronica Colmenero
Mr. Daniel Gavin Covich
Mr. Armand G. Derfner
Mr. Kelly Patrick Dunbar
Mr. Chad Wilson Dunn
Ms. Tania Faransso
Ms. Diana Katherine Flynn
Mr. Matthew Hamilton Frederick
Mr. Gregory Bryan Friel
Mr. Mark P. Gaber
Mr. Jose Garza
Mr. Bruce I. Gear
Mr. John Matthew Gore
Mr. Jon Marshall Greenbaum
Mr. J. Gerald Hebert
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Ms. Shoshana J. Krieger

Mr. Jason R. LaFond
Ms. Danielle Marie Lang
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Ms. Coty Rae Montag
Ms. Janai S. Nelson
Ms. Priscilla Noriega
Mr. Jonathan Edward Paikin
Ms. Myrna Perez
Mr. Sidney Samuel Rosdeitcher I
Mr. Ezra D. Rosenberg
Mr. Deuel Ross
Mr. John Albert Smith III
Mr. Paul March Smith
Mr. Neil A. Steiner
Mr. Luis Roberto Vera Jr.
Ms. Michelle Yeary