

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40884
USDC Nos. 2:13-cv-193, 2:13-cv-263, 2:13-cv-291, 2:13-cv-348

MARC VEASEY, *et al.*,

Plaintiffs-Appellees

v.

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

Defendants-Appellants

RESPONSE OF THE UNITED STATES TO APPELLANTS'
EMERGENCY MOTION TO STAY PENDING APPEAL
DISTRICT COURT ORDER GRANTING PERMANENT INJUNCTION

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Case No. 17-40884

*Marc Veasey, et al. v.
Greg Abbott, in his Official Capacity as Governor of Texas, et al.*

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rules 27.4 and 28.2.1, the undersigned counsel certifies that, in addition to the persons and entities identified in Private Appellees' Response to Appellants' Emergency Motion to Stay Pending Appeal District Court Order Granting Permanent Injunction filed on August 31, 2017, the following listed persons as described in the fourth sentence of Rule 28.2.1 may have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Chandler, Thomas E., United States Department of Justice, Civil Rights Division, counsel for the United States as appellee;
2. Flynn, Diana K., United States Department of Justice, Civil Rights Division, counsel for the United States as appellee; and
3. Friel, Gregory B., United States Department of Justice, Civil Rights Division, counsel for the United States as appellee.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney

Date: August 31, 2017

On August 28, 2017, this Court called for a response to “Appellants’ Emergency Motion to Stay Pending Appeal District Court Order Granting Permanent Injunction,” which Texas filed on August 25, 2017. As Texas indicated in its motion, the United States consents to a stay pending appeal. Granting the requested stay comports with the equities presented in this case, and further recognizes the strong likelihood that the State will succeed in demonstrating that Senate Bill 5 (S.B. 5)—enacted by the Texas Legislature during its 2017 legislative session—adequately cures any violation under Section 2 of the Voting Rights Act (VRA), 52 U.S.C. 10301, with respect to Senate Bill 14 (S.B. 14). See *Nken v. Holder*, 556 U.S. 418, 425-426, 434 (2009) (listing factors a court must consider before granting a stay); *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014) (same).

First, the stay is appropriate here because it would retain procedures already endorsed by the parties and the district court and, thus, avoid confusion among voters and election officials. See *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam) (“Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.”). In accordance with this Court’s July 20, 2016 en banc opinion, the parties worked cooperatively on remand to craft interim voter-identification procedures that remedied the Section 2 results violation that this Court affirmed on appeal. See *Veasey v. Abbott*, 830 F.3d 216, 269-272 (5th Cir. 2016) (en banc)

(directing the district court to adopt an interim remedy in time for the November 2016 election that remedied the Section 2 results violation while disrupting as little as possible the State’s voter-identification requirements). Those procedures included a “reasonable impediment” procedure that allows voters to vote in person if they lack S.B. 14 identification and cannot reasonably obtain it. Doc. 895.¹ On August 10, 2016, the district court entered the parties’ agreed-upon interim relief in advance of the November 2016 election and pending further proceedings. Doc. 895, at 1-7. Beginning with tax ratification elections in August 2016 and until the district court’s entry of permanent injunctive relief on August 23, 2017, election administrators in Texas have applied the agreed-upon interim remedy, including for the November 2016 presidential election. Docs. 889, 895. S.B. 5 codifies a “reasonable impediment” procedure that largely tracks the procedure in the agreed-upon interim remedy. See S.B. 5; Docs. 1052, 1060.

Texas has represented that local election officials have already been trained to conduct elections under both sets of reasonable impediment procedures (Doc. 1039, at 1-2)—procedures that voters already are familiar with given their use in the November 2016 presidential election and local elections this year. Retaining the interim remedy for upcoming elections in November 2017 and ultimately

¹ “Doc. ____” refers to the docket entry number and relevant pages in the consolidated action below. See *Veasey v. Abbott*, No. 2:13-cv-193 (S.D. Tex.).

allowing S.B. 5 to take effect beginning with elections in 2018 minimizes confusion by ensuring that any notices sent to voters about voter-identification requirements—including information printed on voter registration certificates that will be reissued under state law in coming months (Appellants’ Mot. 3-4)—reflect the State’s policy preference for a photo-identification law, which this Court is extremely likely to honor on appeal. See *Veasey*, 830 F.3d at 296 (citing *Perry v. Perez*, 565 U.S. 388, 393-394 (2012)).²

Second, issuing a stay pending appeal that retains the interim remedy for the 2017 elections and enables S.B. 5 to take effect as enacted on January 1, 2018, recognizes the likelihood that the State will succeed in demonstrating that S.B. 5 is an adequate remedy to cure any S.B. 14-related statutory and constitutional violations. Indeed, the Texas Legislature did exactly what this Court sitting *en banc* invited it to do: it enacted a legislative remedy that “cure[s] the infirmities” that the Court identified in S.B. 14. *Veasey*, 830 F.3d at 269. Like the agreed-upon interim remedy, S.B. 5’s reasonable impediment procedure ensures that any registered voter who lacks S.B. 14 identification and who cannot reasonably obtain such identification for the broad reasons outlined in S.B. 5 has the opportunity to

² On August 30, the district court entered a limited stay allowing certain local elections—which were already underway at the time the district court entered its permanent injunction and are scheduled to be completed by September 9, 2017—to proceed under the agreed-upon interim remedy. Doc. 1077.

cast a regular, in-person ballot at the polls. As the United States explained below (Docs. 1052, 1060), S.B. 5 thus removes any discriminatory result that S.B. 14 had on registered African-American and Hispanic voters who were precluded from casting a regular, in-person ballot solely because they lacked a required form of photo identification when they appeared at their local polling place. At the same time, S.B. 5 advances Texas's legitimate "policy objectives" in adopting a photo-identification law. *Veasey*, 830 F.2d at 269; see Docs. 1052, 1060.

The State has publicly committed to undertake a comprehensive statewide effort to notify and educate all Texas voters regarding S.B. 5's protections. In the first place, state law requires the State to provide written notice of the new identification requirements with each new or renewal voter registration certificate—and to send renewal certificates to every active registered Texas voter by the end of 2017. See Tex. Elec. Code §§ 14.001(a), 15.005(a). The State also has publicly committed to spend \$4 million over two years—above and beyond the \$2.5 million that Texas expended in 2016 as part of the interim remedy—to "implement voter information and outreach strategies" across "multiple formats." Doc. 1039, at 2. And the State would train county election officials, "update VoteTexas.gov and its training materials for election officials and poll workers to reflect the requirements of S.B. 5," and "continue to make mobile units available" to issue photographic election identification certificates. Doc. 1039, at 1-2.

Because S.B. 5 adequately addresses the statutory and constitutional violations found in this case, the district court erred in supplanting the State’s chosen legislative remedy with a non-photo-identification law that Texas has not enforced in its elections since 2013. See *Mississippi State Chapter, Operation PUSH, Inc. v. Mabus*, 932 F.2d 400, 406-407 (5th Cir. 1991) (recognizing that courts may not “substitut[e]” even an “objectively superior” judicial remedy for an “otherwise constitutionally and legally valid” remedy “enacted by the appropriate state governmental unit”); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (similar). Indeed, reverting to a non-photo-identification law conflicts with the State’s policy preferences for a photo-identification requirement—a preference that this Court has indicated should be respected, even when some aspect of the underlying law is unenforceable. See *Veasey*, 830 F.3d at 296 (citing *Perry*, 565 U.S. at 393-394). Because S.B. 5 is an adequate remedy to cure any violations under Section 2 of the VRA and the Constitution that are related to the State’s enforcement of S.B. 14, this Court should respect the State’s policy preferences, stay the district court’s remedial order, and leave the interim remedy in place. Ultimately, this Court should allow S.B. 5 to go into effect.

CONCLUSION

This Court should grant the emergency motion for a stay pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 31, 2017, I electronically filed the foregoing
RESPONSE OF THE UNITED STATES TO APPELLANTS' EMERGENCY
MOTION TO STAY PENDING APPEAL DISTRICT COURT ORDER
GRANTING PERMANENT INJUNCTION 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 August 31, 2017, I served a copy of the foregoing
response on the following counsel by certified U.S. mail, postage prepaid:

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CERTIFICATE OF COMPLIANCE

I certify that the attached response:

(1) complies with the length limits of Federal Rule of Appellate Procedure 27 because it contains 1203 words;

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

s/ Thomas E. Chandler
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Date: August 31, 2017