IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 10-5433

STEPHEN LAROQUE, ANTHONY CUOMO, JOHN NIX, KLAY NORTHRUP, LEE RAYNOR, and KINSTON CITIZENS FOR NON-PARTISAN VOTING,

Plaintiff-Appellants

v.

ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ATTORNEY GENERAL'S RESPONSE TO APPELLANTS' MOTION TO EXPEDITE

Appellants have moved to expedite this appeal, and propose the following briefing schedule: appellants' opening brief would be due 21 days after this court rules on their motion; appellees' brief would be due 21 days thereafter; and appellants' reply brief would be due 10 days thereafter. For the reasons set forth below, the Attorney General does not believe it is necessary to expedite the appeal. Even if the appeal is expedited, the Attorney General respectfully requests the

usual 30 days after appellants' brief is filed to file his brief as appellee. See F.R.A.P. 31(a)(1).

This case presents a challenge to the constitutionality of Section 5 of the Voting Rights Act (VRA). 42 U.S.C. 1973c. Section 5 requires covered jurisdictions to obtain preclearance from the Attorney General or the United States District Court for the District of Columbia before implementing changes in any "standard, practice, or procedure with respect to voting." *Ibid.* This preclearance requirement has been in place since the enactment of the VRA in 1965. Voting Rights Act of 1965, Pub. Law No. 89-110, § 5, 79 Stat. 437, 439-440. Congress has reauthorized Section 5 four times, most recently in 2006.[1] And the Supreme Court repeatedly has upheld its constitutionality. See *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *Georgia* v. *United States*, 411 U.S. 526, 535 (1973); *City of Rome* v. *United States*, 446 U.S. 156, 172-182 (1980); *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282-285 (1999).

Following the 2006 Reauthorization, a three-judge panel once again affirmed the constitutionality of the statute. *Northwest Austin Mun. Util. Dist. No. One* v. *Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008). The Supreme Court reversed

[1] See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314-315; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §4, 120 Stat. 580 (2006 Reauthorization).

the judgment. *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 129 S. Ct. 2504 (2009) (*Northwest Austin II*). Because the Court resolved the case on statutory grounds, however, it did not reach the constitutional issue. *Id.* at 2514, 2516-2517. While the Court stated that the 2006 Reauthorization of Section 5 "raises serious constitutional questions," *id.* at 2513, the Court also acknowledged that Section 5 preclearance may still be warranted if it is "justified by current needs." *Id.* at 2511-2512. To that end, the Court observed that "[t]he Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it" and that "Congress amassed a sizable record in support of its decision to extend the preclearance requirements." *Id*. at 2513.

The instant case is one of three pending actions challenging the constitutionality of Section 5. Unlike this case, which was filed by private citizens, the other actions, *Shelby County* v. *Holder*, No. 1:10-cv-00651 (D.D.C.), and *State of Georgia* v. *Holder*, 1:10-cv-01970 (D.D.C.), were brought by jurisdictions that are covered by, and therefore subject to the requirements of Section 5. [2] The parties in *Shelby County* have filed cross motions for summary judgment and the

[2] The *Georgia* action, filed November 15, 2010, seeks preclearance of a voting change and includes an alternative claim that Section 5 is unconstitutional. The Attorney General's answer to the complaint is due February 20, 2011. The State of Georgia initiated an earlier action that also sought preclearance of a voting change and included an alternative constitutional claim. *State of Georgia* v. *Holder*, 1:10-cv-01062 (D.D.C.). That action was voluntarily dismissed as moot.

district court is moving forward to resolve that case on the merits expeditiously: final briefs are due January 14, 2011; oral argument will be heard February 2, 2011; and the district judge has stated that he expects to rule on the merits by March 2011.

Appellants first contend that this appeal should be expedited because it is necessary to obtain "a prompt and definitive judicial resolution" of the constitutionality of Section 5 before the 2011-2012 redistricting cycle is completed. Appellant's Motion 7. Of course, there will be no *definitive* resolution of the constitutional question until the Supreme Court decides the issue. And, even if this appeal is expedited, it is unlikely that the Supreme Court would resolve the constitutional issue in this case before the end of 2012. Thus, there will be uncertainty regarding the question throughout the redistricting cycle, whether or not this appeal is expedited.

Moreover, appellants' insistence that the "entire nation" (Appellants' Motion 7), or at least all the jurisdictions covered by Section 5, have a compelling and urgent need to have the constitutional question resolved is belied by the fact that only two jurisdictions have brought actions challenging the constitutionality of Section 5 since *Northwest Austin II*. Indeed, no jurisdictions even filed amicus briefs on behalf of either appellants' or Shelby County's motions for summary judgment in the district court. Cf. *South Carolina*, 383 U.S. at 307 n.2 (noting that

a majority of the states submitted briefs on the constitutionality of the Act). It appears that the covered jurisdictions are content either to continue complying with Section 5, to allow the judicial process to resolve the question through the *Shelby County* litigation, or to await the outcome of the preclearance process with respect to their own redistricting plans before deciding whether to challenge the constitutionality of Section 5.[3]

Nor is there any reason that the constitutional question must be resolved *before* redistricting plans are developed. Except for the pre-enforcement challenge in *South Carolina*, each of the Supreme Court decisions upholding Section 5 arose either after private parties or the Attorney General sought to enforce the Section 5 preclearance requirement, see *Georgia*, 411 U.S. at 527-528; *Lopez*, 525 U.S. at 273-274; or after the jurisdiction sought a declaratory judgment that a voting change should be precleared, see *City of Rome*, 446 U.S. at 159-162. Similarly, in the absence of a constitutional claim, jurisdictions have successfully challenged both administrative and judicial refusals to preclear voting changes, including redistricting plans, on numerous occasions. See, *e.g.*, *Beer* v. *United States*, 425

[3] Indeed, numerous covered jurisdictions filed or joined briefs in the Supreme Court *supporting* the constitutionality of Section 5 in *Northwest Austin II*. See Brief for the States of North Carolina, Arizona, California, Louisiana, Mississippi and New York as Amici Curiae in Support of Eric H. Holder, Jr., et al., *Northwest Austin II* (Mar. 25, 2009) (No. 08-322); Brief for Appellee Travis County (Mar. 18, 2009) (No. 08-322).

U.S. 130, 133-134, 142-143 (1976); *Georgia* v. *Ashcroft*, 539 U.S. 461, 471, 491 (2003).

Further, litigation of the *Shelby County* case is proceeding apace. Briefing is nearly completed, oral argument is imminent, and the district court is likely to resolve the constitutional challenge in that case by March of 2011 – before this appeal is likely to be decided, even on an expedited basis. See Appellant's Motion 2 (seeking resolution of this appeal "*before the Summer of 2011 (if not sooner*)"). Of course, this appeal will resolve only the question of the district court's subject matter jurisdiction to adjudicate appellants' claims. Thus, the best appellants can expect (assuming a favorable decision for appellants in this appeal and no further review) is to have this case remanded to the district court at the same time the district court's decision on the merits in *Shelby County* has been appealed by the losing party and the constitutional issue is before this Court. Expediting appellant's case thus would not advance the resolution of the underlying constitutional issue at all.

Appellants contend that expedition of this appeal is nonetheless necessary because they have raised a constitutional challenge that is not presented in *Shelby County*. See Appellants' Motion 8-10. In addition to reauthorizing Section 5 in 2006, Congress also amended the statute because it concluded that two Supreme Court decisions had "misconstrued Congress' original intent in enacting the Voting

Rights Act of 1965," "narrowed the protections afforded by section 5," and "significantly weakened" the Act's effectiveness. 2006 Reauthorization, § 2(b)(6), 120 Stat. 578 (citing *Ashcroft* and *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320, (2000)). Appellants contend that these amendments "render[] Section 5 impermissible enforcement legislation and violate[] the Constitution's nondiscrimination guarantees." Appellant's Motion 9-10. But, far from "adopt[ing] a more stringent standard in 2006 than it originally did in 1965" (*id*. at 10), Congress amended the statute to restore its original intent. In any event, appellants are not the only – let alone the best – parties who could press these issues. Shelby County might have raised this argument, but did not. And other jurisdictions covered by Section 5 – and thus with standing to challenge the statute's constitutionality – are free to bring such a challenge. The mere fact that appellants believe that they have mounted a better constitutional argument does not require expedition of their appeal.

Appellants next argue that expedition of the appeal is necessary because appellants Nix and Northrup will be irreparably harmed, as candidates for the Kinston City Council in 2011, if the appeal is not expedited. The harms that Nix and Northrup assert as candidates, however, are simply not legally cognizable. See Memorandum Opinion 31-39. Appellants ground their claims of harm in the Attorney General's objection to the implementation of a referendum that would

have replaced the City of Kinston's current partisan elections with non-partisan elections. See Memorandum Opinion 1-2, 4-6. The candidate-plaintiffs contend that they are harmed by the objection, and hence by Section 5, because they allege that partisan elections make it more difficult to have their names placed on the ballot and reduce their chances of winning office. Appellants' Motion 11-12.

The Supreme Court has made clear, however, that no candidate is guaranteed his or her ideal, or even preferred, electoral system. See, *e.g.*, *Burdick* v. *Takushi*, 504 U.S. 428, 438 (1992) (upholding ban on write-in candidacies); *Bullock* v. *Carter*, 405 U.S. 134, 144-145 (1972) (upholding limits on the number of candidates on the ballot); *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971) (upholding requirement that candidate who does not win a party primary may have his name on the ballot only if he obtains signatures of at least 5% of the electorate). The mere fact that one facially valid electoral system is chosen over another, thus affecting the competitive environment or the burdens associated with running for electoral office, does not alone impair any legally protected interest. As the district court correctly noted, courts have recognized candidates' standing to challenge election practices that allegedly benefit their opponents, but "to establish standing based on such a competitive injury, Nix and Northup would need to show not only that they 'personally compete[] in the same arena with the same party to whom the government has bestowed . . . [a] benefit,' but also that this benefit is 'assertedly

illegal.'" Memorandum Opinion 34 (quoting *Gottlieb* v. *FEC*, 143 F.3d 618, 622 (D.C. Cir. 1998)). Notably, appellants have not alleged that Kinston's existing partisan election procedures are illegal, only that they would benefit from a change to nonpartisan elections.

Appellants also attack the merits of the district court's decision. Appellants' Motion 12-20. But a motion to expedite is not the place to litigate the merits of the decision below. The Attorney General will vigorously defend the district court's ruling in his brief on the merits in this appeal.

Finally, if the appeal is expedited, the Attorney General objects to appellants' proposed briefing schedule, which would allow the appellees only 21 days to respond to appellants' brief. See Appellants' Motion 3, 20. Preparation of the Attorney General's brief, including adequate time for internal review within the Department of Justice, will require more than the proposed 21 days. For that reason, the Attorney General requests that, even if the appeal is expedited, the appellees be permitted at least 30 days to respond to appellants' brief.

CONCLUSION

Expedition of this appeal is not necessary. But if the appeal is expedited, the appellees should be given at least 30 days to respond to appellants' brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2011, the foregoing ATTORNEY GENERAL'S RESPONSE TO APPELLANTS' MOTION TO EXPEDITE was filed electronically with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

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