No. 10-5433

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

STEPHEN LAROQUE, ET AL.,

Appellants,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (NO. 10-561 (JDB))

APPELLANTS' REPLY IN SUPPORT OF MOTION TO EXPEDITE THE APPEAL

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INTRODUCTION

Without expedition of this appeal, Appellees do not dispute that it will be nearly impossible to adjudicate the facial constitutionality of Section 5 in this case before the statute forces upon candidates Nix and Northrup monetary ballot-access costs (as well as strategic electoral disadvantages) in the November 2011 Kinston City Council election, and before it interferes with the 2011-2012 redistricting cycle nationwide. *See* App. Mot. at 7-12. Instead, Appellees contend that: (1) expediting this appeal is *futile*, because this Court purportedly is incapable of deciding it quickly enough to prevent the occurrence of those electoral harms; and (2) declining to expedite this appeal is *unimportant*, because the electoral harms supposedly are not that serious and a different pending suit might resolve Section 5's facial validity. This Court, however, should grant the motion to expedite, because both of Appellees' contentions are patently erroneous and Appellees do not even attempt to refute the fundamental defects that Appellants identified in the district court's unprecedented justiciability holding. *See id.* at 12-20.

ARGUMENT

I. EXPEDITING REVIEW OF THIS APPEAL IS NOT FUTILE

The Government and the intervenors contend that the expedited schedule proposed by Appellants will be futile, because, even if Appellants prevail here, the further proceedings on the merits of Section 5 will, as a practical matter, not be finished until after the conclusion of Kinston's 2011 City Council election and the

nationwide 2011-2012 redistricting cycle. *See* U.S. Resp. at 4; Inter. Resp. at 3-5, 9. As a threshold matter, if this Court were to agree with Appellees' empirical prediction, then it should adopt an even more expedited schedule, rather than, as Appellees suggest, simply giving up and permitting Section 5 to harm the candidacies of Nix and Northrup as well as to taint the electoral landscape for the next decade absent chaotic mid-decade redistricting. Happily, however, this Court need not adopt a stricter schedule than the one proposed by Appellants, as there is no basis for Appellees' self-serving assertions that the proposed schedule is too protracted to subsequently enable timely prevention of the ill effects of Section 5.

A. The intervenors protest that, regardless of whether this appeal is expedited, it is "simply incomprehensible" that Kinston's nonpartisan-elections referendum will be implemented in time to benefit candidates Nix and Northrup in the November 2011 City Council election: they reason that, even if this Court expeditiously resolves this justiciability appeal before the Summer of 2011, there still must be "a decision on the merits" on remand followed by resolution of "the appeals process." *See* Inter. Resp. at 9. But their premise is flawed, for a *final appellate adjudication* of the merits is not a necessary prerequisite for Nix and Northrup to receive relief from Section 5 in time to benefit their candidacies.

The candidates could receive relief if the *district court* on remand resolved the merits in advance of the November 2011 election. Most obviously, if Judge

Bates ruled in favor of the candidates and facially invalidated Section 5, the referendum would immediately go into effect notwithstanding a subsequent appeal by the Government (absent a stay). *See* App. Mot. at 12-13. And conversely, if Judge Bates ruled against the candidates, they at least could seek an emergency injunction pending appeal from this Court. *See* Fed. R. App. P. 8(a)(1)(c), (a)(2).[1]

Notably, it is quite likely that the district court would, in fact, resolve the merits of this case on remand well in advance of the November 2011 election. As the Government itself notes, Judge Bates expedited his resolution of *Shelby Cnty. v. Holder*, No. 10-651 (D.D.C.), and intends to rule by late March of 2011, *see* U.S. Resp. at 3-4, and thus the only additional ruling that might be necessary in this case would be on Appellants' supplemental argument concerning the substantive preclearance standard, which Judge Bates likewise could and would promptly consider, as he previously indicated, *see* App. Mot. at 9-10.

B. The Government likewise asserts that, regardless of whether this appeal is expedited, Section 5 will necessarily govern "the 2011-2012 redistricting cycle," because "there will be no *definitive* resolution of the constitutional question until the Supreme Court decides the issue," which it believes "is unlikely" to

[1] Likewise, even if Judge Bates for some reason did not finally resolve the merits on remand before the November 2011 election, the candidates could move for *preliminary* injunctive relief against Section 5 and, if necessary, take an expedited appeal of the issue. *See* 28 U.S.C. § 1657(a); D.C. Cir. R. 47.2(a).

happen "in this case before the end of 2012." *See* U.S. Resp. at 4; *see also* Inter. Resp. at 3-5. That temporal prediction, however, is unfounded.

As noted above, there is every reason to believe that Judge Bates would promptly resolve the merits of this case on remand. *See supra* at 3. Given his substantial head-start in *Shelby County* and his prior scheduling orders, he would likely rule before or in the Summer of 2011. Thus, there would be well more than a year for the case ultimately to be decided by the Supreme Court in advance of the November 2012 elections. Though that is admittedly a shorter amount of time than the usual period after a district-court judgment for reaching a final resolution at the Court, it would certainly be feasible under an expedited schedule given the following unique circumstances: (1) the Court is already extremely familiar with the constitutional question of Section 5's facial validity, as it was exhaustively briefed in *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504 (2009); (2) the Government briefed the question in *Nw. Austin* and will have re-briefed it in light of *Nw. Austin* in *Shelby County*; (3) the foregoing facts, along with "the imperative public importance" of a timely resolution of Section 5's facial validity, supports seeking review directly in the Supreme Court by requesting certiorari before judgment, *see* S. Ct. R. 11; and (4) the appellate process will already be underway in *Shelby County*, *see* U.S. Resp. at 6, such that, at a minimum, Appellants could seek expedited consolidation with that case.

Indeed, in cases of similar public urgency, the Supreme Court has demonstrated its ability to expedite review far more drastically than would be necessary here given the factors listed above. For example, in *McConnell v. FEC*, 540 U.S. 93 (2003), the obvious and significant electoral effects that the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002), would have on the 2004 election season led the Court to decide the case in seven months in 2003, even though that complex and difficult campaign-finance case ultimately necessitated a 252-page opinion. *See McConnell*, 540 U.S. at 93, 114, 133.[2]

II. EXPEDITING REVIEW OF THIS APPEAL IS CRITICAL

Appellees also contend that expediting this appeal is unwarranted even if it could be accomplished in a sufficiently timely fashion. They argue that *Shelby County* is an alternative vehicle for a definitive resolution of Section 5's validity, and they also attempt to minimize the significance of Section 5's imminent electoral effects. These arguments are without merit.

A. The Government asserts that expedition is unnecessary here since a similar facial attack on Section 5 is "proceeding apace" in *Shelby County*. *See* U.S. Resp. at 6-7. Although the Government grudgingly acknowledges that Appellants have pressed an important additional argument for why Section 5 is

[2] To be sure, Supreme Court review probably would not finish before the two earliest States to complete the redistricting process this decade. *See* Inter. Resp. at 5 n.1. But it would complete review before the remaining *fourteen* partially or entirely covered States holding elections in 2012. *See* App. Mot. at 7.

unconstitutional that has not been advanced in *Shelby County*, the Government rejoins that "other jurisdictions covered by Section 5 … are free to bring such a challenge" even though Shelby County "did not." *See id.* at 7. But that willfully ignores the precise reason why Appellants' "better constitutional argument" warrants "expedition of th[is] appeal," *id.*: namely, the electoral uncertainty that already clouds the redistricting process due to Section 5's questionable validity will be greatly exacerbated if the judiciary were to reject the arguments made in *Shelby County* and thus purportedly uphold Section 5, *only later* to invalidate Section 5 based upon Appellants' additional argument (whether in this case or another). *See* App. Mot. at 8-10. And since neither a future hypothetical suit by a covered jurisdiction, nor the alternative constitutional claim in Georgia's recently filed preclearance action, *see* U.S. Resp. at 3 n.2, is as likely to catch up to *Shelby County* as Appellants' suit, this case is the best chance for ensuring that the judiciary can issue a *single, definitive* ruling on Section 5's facial validity.

B. Appellees make two half-hearted attempts to minimize the gravity of the costly ballot-access restrictions and strategic electoral disadvantages that Section 5 imposes on candidates Nix and Northrup in the November 2011 Kinston City Council election. *See* App. Mot. at 3-4, 11-12. Both attempts are meritless.

First, the Government argues that those injuries "are simply not legally cognizable" for standing purposes. *See* U.S. Resp. at 7-9. That response, however,

is a *non sequitor* for this motion to expedite. Whether the court below correctly suggested that these *factually undisputed* electoral harms are not legally cognizable Article III injuries is one of the questions presented on appeal, *see* Mem. App. at 19-20—and the Government has disclaimed any attempt to refute Appellants' arguments on that score, *see* U.S. Resp. at 9. Thus, the relevant question now is whether, *assuming that the court's suggestion was erroneous*, these cognizable injuries would be irreparable if the appeal is not expedited. And they plainly would be, for the election would finish before this Court could reverse.

Second, the intervenors argue that Nix and Northrup are themselves responsible for any such irreparable injury in the election, because they supposedly delayed in bringing this suit by waiting until April of 2010, rather than suing immediately when the referendum was enacted in November of 2008. *See* Inter. Resp. at 3-4. That is patently false. It was *only* in early 2010 that they decided to run for Kinston City Council in November of 2011, and they then promptly sued in April of 2010, which was still more than a year and a half before the election. Indeed, it is quite hypocritical for intervenors to suggest that the candidates should have sued *earlier*, since they persuaded the district court that there were serious concerns that the candidates sued *too early*. *See* Mem. Op. at 28-31.[3]

[3] Wholly apart from the timing of their candidacies, it was perfectly reasonable for Appellants to wait to see whether the City of Kinston would successfully obtain preclearance—even though that was indeed irrelevant to their standing to sue in the

C. Appellees make a scattershot of arguments to mitigate the sweeping effect that Section 5 will have on this decade's redistricting process. *See* App. Mot. at 7-10. They all fail.

First, both the intervenors and the Government emphasize that unconstitutional redistricting can be remedied after the fact. *See* Inter. Resp. at 6; U.S. Resp. at 5-6. But, of course, the mere fact that it is *possible* to do so does not change the fact that such mid-decade redistricting will impose substantial additional costs and confusion on candidates, voters, and governments. And so this Court should try its utmost to avoid any need for later judicial invocation of such remedies, particularly given the decades-long saga usually involved in past efforts to remedy unconstitutional redistricting that was affected by Section 5, *see, e.g.*, *Georgia v. Ashcroft*, 539 U.S. 461, 466-69 (2003).

Second, the Government suggests that most covered jurisdictions must not really care about resolving the constitutionality of Section 5 *before* the redistricting cycle ends, since they have not filed their own lawsuits or *amicus* briefs in this case or *Shelby County*. *See* U.S. Resp. at 4-5. Again, however, it is hardly surprising that most jurisdictions—many of whom have serious resource

(continued…)

first place, *see* Inter. Resp. at 4—because preclearance would have *mooted* their suit by *ending* Section 5's presumptive preemption of the referendum and thus *curing* any existing or threatened injury. Thus, they sued shortly after the preclearance process ended in November of 2009. *See* Mem. Op. at 5-6.

constraints—are willing to allow a different jurisdiction to shoulder the burden of litigating a facial challenge in the lower courts, and it in no way suggests that those jurisdictions have a masochistic preference for resolving Section 5's validity *after* redistricting, which needlessly creates a *risk* of a decade of follow-up litigation.

Finally, the intervenors malign the motivations of those jurisdictions that want to redistrict free of Section 5, implying that they must all have a retrogressive intent. *See* Inter. Resp. at 6. That is an unwarranted aspersion. In addition to the wholly legitimate desire to avoid the above-discussed litigation necessary to remedy the unconstitutional taint of Section 5, jurisdictions also have a valid interest in avoiding the Justice Department's coercive use of its preclearance powers. For example, the Department infamously mandated racial quotas under the guise of applying a putative "discriminatory purpose" standard, *see, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 923-27 (1935), yet the 2006 Congress explicitly adopted that very standard despite the Supreme Court's rejection of the standard based in part on the serious constitutional concerns raised by the Justice Department's past practices, *see* Pub. L. No. 109-246, § 2(b)(6), 5(3), 120 Stat. 577, 578, 580-81 (2006) (abrogating *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000)).

III. APPELLEES FAIL TO DEFEND THE DISTRICT COURT'S MANIFESTLY ERRONEOUS DECISION

Neither Appellee even attempts to refute the fundamental legal errors in the district court's opinion. *See* App. Mot. at 12-20. The Government bizarrely claims

that "a motion to expedite is not the place to litigate the merits of the decision below," *see* U.S. Resp. at 9, even though the standard for expediting appeals asks in part whether "the decision under review is subject to substantial challenge," *see* App. Mot. at 1. And while the Intervenors baldly assert that Appellants "cannot point to a single case where their theory of the case would cause them to prevail on the standing and cause of action issues," *see* Inter. Resp. at 11, that assertion completely ignores the substance of Appellants' motion, which demonstrates, without any contradiction by the Intervenors, that black-letter principles and precedent squarely foreclose the district court's holdings on injury, *see* App. Mot. at 19-20, redressability, *see id.* at 14-16, and cause of action, *see id.* at 16-19.

CONCLUSION

Appellants' motion to expedite the appeal should be granted. Appellants respectfully submit that: (1) Appellants' opening brief should be due 21 days after this Court grants this motion; (2) Appellees' response briefs should be due 21 days thereafter; (3) Appellants' reply brief should be due 10 days thereafter; and (4) oral argument should be scheduled as soon thereafter as is practicable.[4]

[4] This Court should reject the Government's alternative request for 30 days to file its brief, *see* U.S. Resp. at 9, given that: (1) the Government has already filed two lengthy briefs below, which the district court largely adopted wholesale, *compare* U.S. MTD Mem. & MTD Reply, Dkt. Nos. 11-1, 14, *with* Mem. Op; and (2) the Government itself argues that the Appellants' proposed scheduled might be too protracted to vindicate the interests protected by expedition, *see* U.S. Resp. at 4.

January 13, 2011

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of January, 2011, I filed four copies of the foregoing document with the clerk of this Court by hand delivery, and I electronically filed the original of the foregoing document before 2:00 p.m. with the clerk of this Court by using the CM/ECF system, which will serve the following counsel for Appellees at their designated electronic mail addresses:

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