IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 03-2111; 03-2112

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CHARLESTON COUNTY, SOUTH CAROLINA, ET AL.,

Defendants-Appellants

and

LEE H. MOULTRIE, ET AL.,

Plaintiffs-Appellees

v.

CHARLESTON COUNTY COUNCIL, ET AL.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

RESPONSE OF THE UNITED STATES TO APPELLANTS' MOTION TO STAY IMPLEMENTATION OF FINAL JUDGMENT

On December 29, 2003, appellants Charleston County, et al., filed a Motion To Stay Implementation Of Final Judgment. Appellants initially included a purported "Motion to Stay" within the body of their Reply Brief (pp. 17-18), and the later-filed Motion apparently was intended to replace that purported motion.

For the following reasons, the Motion should be denied.

1. Appellants failed to comply with the requirements of Rule 8, Fed. R. App. P., concerning motions for stay pending appeal. Rule 8 provides that a party "must ordinarily move first in the district court" for a stay of the judgment pending appeal. See *SEC* v. *Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001) (under Rule 8, the moving party "must either move first in the district court for stay relief or show that moving in the district court would be impracticable."). Appellants did not move for a stay of the remedial order in the district court, and their contention (Motion at 6-7) that "moving first in the district court would be impracticable," see Rule 8(a)(2)(A)(i), is unsupported by any evidence.

First, there is still sufficient time for appellants to file this request in the district court. The fact that they may believe the court is likely to deny the motion is not a basis for skipping that step. The cases appellants cite (Motion at 6) provide no support for their contention that they are excused from filing in the district court. Indeed, in *Ruiz* v. *Estelle*, 650 F.2d 555, 567 (5th Cir. 1981), cert. denied, 460 U.S. 1042 (1983), where a motion to stay had already been made to and denied by the district court, the court of appeals stated that Rule 8(a) is intended to provide the district court "the opportunity to rule on the reasons and evidence presented in support of a stay." As this Court has stated, it "cannot properly ignore" an unjustified failure to move for a stay first in the district court. *Dunlap*, 253 F.3d at 774.

In support of their impracticability contention, appellants rely on statements

the district court made in an entirely different context. The statements appellants quote from the court's August 14, 2003, order (Motion at 6-7) concerned the necessity for prompt relief once the at-large election had been found to violate Section 2; the comments did not in any way address the standards applicable to granting a motion for stay pending appeal. In its August 14 order, the district court was rejecting the timetable proposed by appellants for implementation of the remedial plan that would have had the "effect of postponing elections for two of the three majority-minority districts until the 2006 elections" and of "postponing a full and complete remedy nearly six years from the filing of this lawsuit." J.A. 258. The district court noted that it denied plaintiffs' motions for preliminary injunction and allowed the 2002 primary and general elections to go forward because "Defendants had not yet had their full day in court." J.A. 259. But, the court stated, once it held that the plan under which those councilmembers were elected violated Section 2, there was no basis for permitting them to serve their full terms, especially where defendants had "nowhere articulated what legislative judgments are embodied in their proposed implementation schedule." *Ibid.*[1]

2 . In considering a motion for stay pending appeal, this Court applies the

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[1] In addition to the requirements for motions set out in Rule 27, Fed. R. App. P., this Court requires all motions to "contain a statement by [moving] counsel that counsel for the other parties to the appeal have been informed of the intended filing of the motion," and to indicate "whether the other parties consent to the granting of the motion, or intend to file responses in opposition." Local Rule 27(a). Appellants did not seek the position of the United States on this issue prior to filing either the purported "motion" within its reply brief or the present separately-filed motion. Thus, appellants also failed to comply with the requirements of Local Rule 27.

test first developed by the D.C. Circuit in *Virginia Petroleum Jobbers Association* v. *Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958). The Court considers the following factors:

> (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal?
> (2) Has the petitioner shown that without such relief it will be irreparably injured?
> (3) Would the issuance of a stay substantially harm other parties interested in the proceeding?
> (4) Where lies the public interest?

Airport Comm'n of Forsyth County, N. C. v. *C. A. B.*, 296 F.2d 95, 96 (4th Cir. 1961), quoting *Virginia Petroleum Jobbers Ass'n*, 259 F.2d at 925.

A. Likelihood of Success. Appellants argue that there is a "substantial likelihood that this Court will conclude that the prior electoral system was erroneously invalidated by the lower court." See Motion at 3, 4-6.

As set out more fully in the Brief for the United States as Appellee, appellants have not made "a strong showing that [they] are likely to prevail on the merits of [their] appeal." Instead, appellants merely challenge the district court's factual findings without demonstrating that there is a strong likelihood that they will be able to show that these findings are clearly erroneous. Motion at 4-5. First, the district court conducted a thorough and searching analysis prior to entering the findings of fact that demonstrated that the United States had proven

the three *Gingles* preconditions, thereby establishing a presumption that the at-large method of electing council members violated Section 2 of the Voting Rights Act. *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). Appellants did not challenge the experts' findings that white voters in Charleston County usually voted as a bloc to defeat the candidate of choice of minority voters – evidence going toward the third *Gingles* precondition. Further, appellants fail to explain how the district court's faithful application of this Court's decision in *Lewis* v. *Alamance County*, 99 F.3d 600, 615 (4th Cir. 1996), cert. denied, 520 U.S. 1229 (1997), in declining to consider causation evidence at the precondition stage of the analysis, was error.

Second, appellants do not, either in this Motion or in their briefs, make a "strong showing" that the district court's analysis under the totality of circumstances operating in Charleston County elections was clearly erroneous. Again, they merely challenge the district court's factual findings without showing why these findings were clearly erroneous. For example, appellants incorrectly assert that the district court failed to consider evidence of minority-preferred candidate success in some County Council elections. Motion at 4. As explained more fully in our Brief, however, the court considered evidence from all elections for which reliable statistical evidence was available, and in most cases relied on the evidence provided by the county's own expert. U.S. Brief at 34-35.

Based on the evidence before it, the district court found that the at-large electoral scheme "interacts with social and historical conditions" in Charleston County, "caus[ing] an inequality in the opportunities enjoyed by [minority Charleston County voters] * * * to elect their preferred representatives." *Gingles*, 478 U.S. at 47. The court based its findings on, *inter alia*, the severe voting polarization present in Charleston County Council elections, minimal minority electoral success, an uncommonly large voting district, and past discrimination touching the right to vote. The district court properly applied well-established legal principles to largely uncontested facts in finding that a majority of the Senate factors supported a finding of unlawful vote dilution.

Finally, appellants argue that partisanship, more so than race, best explains the racially divergent voting patterns in Charleston County Council elections. Again, appellants fail to make a strong showing that the district court's rejection of this argument was clearly wrong, and instead merely assert that the district court gave improper weight to certain evidence. Motion at 4-5. As explained more fully in our Brief, the district court's findings were not in error because appellants did not rebut the United States' evidence that race, more so than partisanship, affects voting patterns in Charleston County; nor did appellants provide a causation analysis that could support its partisanship defense. The

district court held that appellants' anecdotal evidence did not prove its case. Indeed, even appellants' expert conceded that the evidence necessary to show that partisanship, rather than race, dictated voting patterns was simply not available. See U.S. Brief at 51.

In a case such as this, where a "judicial * * * body has already passed upon the merits of a question," this Court requires that a "strong showing of probable success on appeal be made, for otherwise there is no justification for the (appellate) court's intrusion into the ordinary processes of * * * judicial review." *Blackwelder Furniture Co.* v. *Seilig Mfg. Co.*, 550 F.2d 189, 194 (4th Cir. 1977). Thus, unlike a situation where an appellate court is asked to enter preliminary injunctive relief, the merits have been fully litigated before the district court and the district court's decision arrives in this Court with a presumption of correctness. Appellants offer nothing by way of their Motion or their opening or reply briefs to show, strongly or otherwise, that the district court's well-reasoned and thorough opinion is wrong or that the court's findings of fact are clearly erroneous. As such, appellants have not shown a strong likelihood of success on the merits.

B. Balance of Harm. Appellants have not demonstrated that without a stay they will be irreparably injured, or that the balance of harm favors granting a stay of the remedial order. Appellants claim that voters and candidates will suffer

irreparable harm under the plan appellants themselves devised. Motion at 7-8. Appellants, however, assert only in cursory fashion that, because this Court is likely to overturn the district court's decision, plaintiffs will suffer no significant likelihood of harm or prejudice and that the public interest will be served. Motion at 8.

It appears that this appeal probably will not be decided prior to the commencement of the election process for the June 2004 primary. Although, at appellants' request, this Court expedited the appeal in September and set argument for December 2003, that schedule was set aside to accommodate counsel for appellants. The timing of final resolution of this case, therefore, was affected in some respect by the fact that the appellants asked to continue the oral argument. That delay should, in our view, be considered when appellants now seek a stay. While the Court stated at the time it vacated the briefing and argument schedule that argument in this case would be held during the week of January 20, 2004, the United States was informed by the clerk's office that the case is not currently scheduled for argument that week. At this point, therefore, there is a question as to whether this appeal can be argued and decided prior to the candidate qualifying period for the June 2004 primary, which begins in mid-March. S.C. Code Ann. § 7-11-15. It is also possible that the June 2004 primary will be held before this

case can be decided. That does not mean, however, that appellants are entitled to a stay.

First, appellants' suggestion appears to be that, because the lower court's decision has been challenged on appeal, it would cause irreparable harm to implement the remedial plan until appellate review is complete. Were that the law, then no remedial electoral plan could ever be used until full appellate review, including Supreme Court review, is final. There is simply no support for that position.

Second, the district court, in adopting the remedial plan, tried to implement state electoral standards to the greatest degree possible in the context of a single-member plan. Appellants have not convincingly stated how conducting an election under the single-member district plan that they devised will cause any irreparable injury to Charleston County. Indeed, appellants represented to the district court that the single-member district plan that was devised by the County and ultimately adopted by the district court "is most consistent with" Charleston County's policy choices and districting principles. See Defendants' Submission of Remedial Plan 3B-Modified, p. 2. Appellants' schedule for implementation of the remedial plan proposed that elections be held in only four districts (District Nos. 3, 4, 6 & 7) in 2004. J.A. 257. In its August 14, 2003, order, the district court

rejected appellants' schedule for implementation because it would have delayed relief in two of the three majority-minority districts (District Nos. 5 & 8) until 2006. The court gave appellants a choice: they could either hold elections in all nine districts in 2004, or implement staggered elections, as appellants had proposed, "so long as all three majority-minority districts (District Nos. 4, 5, & 8) are open for election in 2004." J.A. 259-260. Appellants chose to maintain the staggered election schedule in reliance upon their understanding of state law. Thus, the 2004 elections are scheduled to be held in six of the nine districts (District Nos. 3, 4, 5, 6, 7 & 8), and the staggered electoral system is maintained to the degree practicable.

Appellants also maintain that "three elected members of the Charleston County Council who reside in majority-minority districts and whose terms were not to expire for at least two more years will otherwise be required to stand for election in 2004, forcing each of them in rapid succession to run the full gamut of the election process." Motion at 8. That assertion is factually inaccurate, however, because District 4, one of the majority-minority districts, would have been up for election in 2004 even in the absence of a remedial plan. Moreover, the fact that the terms of office of those elected in Districts 5 and 8 will be truncated by court order does not constitute irreparable injury. Courts have routinely

approved the shortening of terms of office as a remedy for a Section 2 violation. See, *e.g.*, *Keller* v. *Gilliam*, 454 F.2d 55, 57-58 (5th Cir. 1972).

Most importantly, appellants do not address their burden of demonstrating the remaining factors in the standard, *i.e.*, whether the issuance of a stay will substantially harm other parties, and where the public interest lies. Indeed, appellants simply appear to dismiss these important questions as irrelevant because, in appellants' view, the "challenged [at-large] electoral system has been erroneously invalidated." Motion at 8.

First, this incomplete treatment of the balance of harm fails to take into account the purpose of the Voting Rights Act. In *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964), the Supreme Court recognized the pivotal nature of voting rights in stating that the "right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." The Court has also recognized that the drafters of the Voting Rights Act intended to provide *prompt* and effective remedies for voting discrimination, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966), and to "eradicate the blight of voting discrimination with all possible speed." *Briscoe* v. *Bell*, 432 U.S. 404, 410 (1977). Granting a stay would unnecessarily subject the voters of Charleston County to another election administered in a manner that the district court has found, after a full trial,

to be unlawful. Moreover, the public interest requires that elections for County Council take place under an election system that complies with an important federal law.

Finally, appellants fail to show that they will necessarily suffer more harm than plaintiffs in the absence of a stay. Indeed, both sides would suffer the same sort of harm if an election is held under a plan this Court ultimately determines should not have been used. If the elections proceed under the remedial plan the district court ordered, and this Court ultimately reverses the district court's judgment and holds that the at-large plan does not violate Section 2, the County has suffered harm and a strong argument can be made for holding a special election under the at-large plan. Conversely, if this Court grants a stay, elections proceed under the at-large system, and this Court ultimately upholds the district court's determination that the at-large system violates Section 2, private plaintiffs and the United States have suffered similar harm, and private plaintiffs and the United States would be equally entitled to a special election under the district court's remedial plan. Either way, voters, candidates, future officeholders and County officials are basically in the same circumstance, and the balance of harm to the County, and to the plaintiffs, is essentially in equipoise.

In addition, to the extent that any candidates have made expenditures or

otherwise begun to campaign, those efforts necessarily have been based on the court's remedial plan – the only legal plan in effect. Thus, to the extent any efforts have been made thus far, the balance of harm favors denying the stay.

* * * * *

In sum, appellants have failed to establish either a likelihood of success on the merits or that the balance of harm favors the stay. That, as well as the important principles embodied in the Voting Rights Act, *see Blackwelder Furniture Company*, 550 F.2d at 197 (presence of a federal statute embodying an important public policy "aligns [appellees], if only provisionally, on the side of the public interest"), tips the scale firmly in favor of denying the stay. The upcoming elections should be permitted to take place under the remedial plan ordered by the district court.

CONCLUSION

The motion for stay should be denied.

Respectfully submitted,

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