No. 99-11145-GG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

_____

DEAN BUTCH WILSON, et al.,

Plaintiffs-Appellees

v.

JOHN W. JONES, JR., et al.,

Defendants-Appellants

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

_____

REPLY BRIEF FOR THE UNITED STATES

_____

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1. Appellees suggest the Court does not have jurisdiction of the district court's order dissolving the injunction this Court ordered as a remedy for the Section 2 violation in United States v. Dallas County Commission, 850 F.2d 1430, 1432 (11th Cir. 1988), cert. denied, 490 U.S. 1030 (1989). Under the specific terms of 28 U.S.C. 1292(a)(1), this Court has jurisdiction of appeals from "[i]nterlocutory orders of the district courts * * * granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where direct review may be had in the Supreme Court." Even if appellees correctly characterized the district court order vacating the prior injunction this Court ordered as simply "modifying" an injunction, this Court has jurisdiction to

review such interlocutory orders under 28 U.S.C. 1292(a)(1). National Union Fire Ins. Co. v. Sahlen, 999 F.2d 1532, 1535 (11th Cir. 1993).

Appellees cite Lucas v. Bolivar Co., 756 F.2d 1230, 1233-1234 (5th Cir. 1985) (Wilson App. Br. xi [1]), in which the court in a voting rights case considered the appealability of an order finding a proposed plan constitutional and directing that it be submitted for preclearance under 42 U.S.C. 1973c. Because the court could order the final plan into effect only after preclearance, and had made "no final determination of the rights of the parties," the earlier order was not appealable as a final order. 756 F.2d at 1234. The order also was not an appealable interlocutory order because it neither granted nor denied an injunction. 756 F.2d at 1235.

No one is contending that the order on appeal here is a final judgment. Rather, it is an interlocutory order subject to appeal under 28 U.S.C. 1292(a)(1) because the order explicitly vacated the injunction that this Court ordered in another case and enjoined elections under the existing plan (R7-137). It thus clearly qualifies as an appealable interlocutory order.

2. Appellees also mischaracterize the United States'

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[1] References to "R_-_-_" are to volume number, docket entry number, and (where applicable) the page number of the original record. When citing to the transcripts,"R_-_(name)" refers to the volume number and page number only, as the trial transcripts do not have docket entry numbers. References to "Def. Exh. _" are to defendants' trial exhibits. References to "Br. _" are to the Brief for the United States as Appellant. References to "Wilson App. Br. _" are to the Brief of Plaintiffs-Appellees Dean Butch Wilson and Johnny Middlebrooks.

argument with respect to appellees' right to challenge the remedy this Court ordered in United States v. Dallas County Commission, 850 F.2d at 1430 (see Wilson App. Br. 9-11). This case is not governed by Martin v. Wilks, 490 U.S. 755 (1989). In Martin, the Court held that a third party has a right to bring a separate federal action if a local government, in implementing a remedy entered in another lawsuit, violates the third party's individual federal rights, such as the right to equal protection under the Fourteenth Amendment. No case of which we are aware has held that the Tenth Amendment affords an individual a right to assert a cause of action in federal court to challenge the scope of another federal court's remedy. While there may be a cause of action under the Tenth Amendment to challenge congressionally-enacted legislation, see Seniors Civil Liberties Ass'n v. Kemp, 965 F.2d 1030 (11th Cir. 1992), the Tenth Amendment does not afford a third party a personal right to mount an independent action whenever he believes that a federal court has gone too far in ordering a remedy. The implications of holding to the contrary are staggering, with the result that every citizen would have a federal cause of action to challenge any remedy in any federal case involving a state defendant.

As we explained in our main brief (Br. 17), appellees have not asserted a claim cognizable under the Tenth Amendment. Appellees do not suggest that electing all members of the Dallas County Commission from single-member districts violates the Tenth Amendment, and the district court made no finding of such a

violation. Plaintiffs thus have no right to assert their claims in a federal action different from the action in which the remedy was entered. At most, they are asserting that the Dallas County Commission's current structure is inconsistent with state law, a claim not cognizable in federal court. To the extent they seek to challenge the remedy as exceeding this Court's authority under Section 2, they must do so in the Section 2 case in which the injunction was entered. See Hines v. Rapides Parish Sch. Bd., 479 F.2d 762, 765 (5th Cir. 1973) (parental groups seeking to challenge desegregation implementation orders must intervene in the case in which the orders were entered).

3. As we argued (Br. 21), the district court erred as a matter of law in finding that Holder v. Hall, 512 U.S. 874 (1994), permitted it to vacate the remedy this Court ordered in 1988 in United States v. Dallas County Commission, 850 F.2d at 1430. Appellees' description of Holder (Wilson App. Br. 15) is largely correct -- one cannot bring a Section 2 vote dilution challenge to the size of an elected body because there is no benchmark on which to base a dilution comparison. See Holder, 512 U.S. at 887 (O'Connor, J., concurring in part). The district court here found that a corollary to this rule is that a district court cannot remedy a Section 2 violation by changing the size of the elected body. Neither principle is implicated here, however.

In United States v. Dallas County Commission, this Court held that the at-large method of electing the Dallas County Commission violated Section 2 of the Voting Rights Act. At that

time in Dallas County, one of the members of the commission was the probate judge, who served as the commission's chairperson. Because the chairperson performed essentially the same legislative functions as the other commissioners, the Court considered the chairperson to be one of the five commissioners. To remedy the Section 2 violation, this Court, quite properly, ordered that all five members of the commission, including the chairperson, be elected from single-member districts. This Court made no other changes to the structure of the Dallas County government. Put simply, the Dallas County Commission, the governmental body that was the subject of the Section 2 violation, was composed of five members before the injunction and was composed of five members after the injunction. The Court's order involved only a change in the method of election, not an "inherently standardless" change in the size of the elected body. Holder, 512 U.S. at 889 (O'Connor, J., concurring in part). Appellees' repeated assertion that this Court expanded the number of commissioners is simply wrong.

The Court's 1988 order was consistent with its earlier holding in Dillard v. Crenshaw County, 831 F.2d 246 (1987). In Dillard, the Court held that an official acting as chairperson of an Alabama county commission should be considered a member of the commission and not a separate official -- a single-member office holder -- because the chairperson's duties were so closely tied to the legislative work of the commission that there was no real distinction between the chairperson's duties and those of other

members. Thus, in Dillard, because the chairperson's duties included resolving citizen complaints about county services, representing the county on various local and state boards, and generally assuring the execution of commission policies, this Court held that the chairperson must be considered a commission member rather than a single-member office holder for purposes of remedying the Section 2 violation resulting from at-large elections. 831 F.2d at 252, 253. Applying those indicia of commission membership here (see Br. 23-28), the chairperson of the Dallas County Commission was clearly a member of the commission; his at-large election was unjustified because it diluted minority voting strength in violation of Section 2.[2] The Supreme Court's decision in Holder regarding challenges to the size of elected bodies is thus not implicated here.

Importantly, contrary to appellees' claim (Wilson App. Br. 18-19), nothing in this Court's remedial order in United States v. Dallas County Commission, 850 F.2d at 1430, necessarily conveyed full voting power to the chairperson of the commission. Rather, Dallas County chose to make all five members full voting members -- it could just as easily have chosen to have a rotating system under which one of the members would have served as a non-voting chairperson, leaving a system in which only four

[2] Appellees (Wilson App. Br. 20) focus almost exclusively on the fact that the probate judge's authority to vote was limited to breaking ties. In Dillard, this Court made clear that the function of a commission member goes well beyond voting. 831 F.2d at 250-251. Appellees ignore all those responsibilities that the probate judge here clearly exercised when on the commission.

commissioners had full voting power at any one time. The extent of this Court's order was to require that all five members be elected from single-member districts in a manner consistent with Section 2 -- it did not change the method by which the county's affairs were governed. The county is still managed by the commission, and appellees offered no evidence that the remedial order has affected county management or has involved the federal court in questions regarding county management. The method by which the commission chooses its chairman and allocates voting rights to that individual is still left up to the commission, with the only limitation being that its choice cannot violate Section 2. The commission chose not to reinstate a limited voting role for the chairman; that was its choice of management. Accordingly, this Court simply recognized that the at-large election of any member of the county commission, including the probate judge, would violate Section 2. Replacing at-large elections with single-member district elections is a common remedy for legislative bodies. This Court's 1988 order did no more than order a routine Section 2 remedy for the five-member legislative body previously elected at large.

4. In the alternative, appellees and the district court assume incorrectly that the imposition of a Section 2 remedy that indirectly results in the creation of an additional elected part-time official is legally indistinguishable from a challenge to the size of the governmental body. According to appellees (Wilson App. Br. 19), Holder, as explained by this Court's

decisions in White v. Alabama, 74 F.3d 1058 (11th Cir. 1996), and Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) (en banc), cert. denied, 514 U.S. 1083 (1995), precludes federal courts from implementing remedies to Section 2 violations that require any modification of state law.

But, as explained above, Holder v. Hall does not generally address the scope of a court's authority to remedy a Section 2 violation and does not address what changes in state law or policies may be required to provide full opportunities to minority voters under the Voting Rights Act. It certainly does not preclude a Section 2 remedy that indirectly results in another elected official, when, as here, there has been no change in the size of the elected body that is the subject of the Section 2 violation. Rather, the question in Holder was whether the size of an elected body, in and of itself, can form the basis of a Section 2 vote dilution claim. A majority of the Court held that it could not because, as Justice O'Connor explained in her concurrence, "the wide range of possibilities [of commission size] makes the choice inherently standardless." 512 U.S. at 889. To imply that Holder's prohibition on basing a Section 2 dilution claim on the size of the elected body precludes the remedy here misinterprets both the holding and the rationale of the Supreme Court's decision. There is no question here of an uncertain or changing benchmark. This Court found that the commission had five members and the remedy retained five members.

This Court's remedy thus does not conflict in any way with Holder.

5. To the extent that appellees cite White v. Alabama, 74 F.3d 1058 (11th Cir. 1996), and Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) (en banc), cert. denied, 514 U.S. 1083 (1995), to argue that this Court's 1988 remedy was unduly intrusive of state law, that argument is wrong. The 1988 injunction, issued pursuant to this Court's specific instruction, see United States v. Dallas County Commission, 850 F.2d at 1432, required the person acting as the fifth member of the commission to be elected from a single-member district rather than at large because an at-large election diluted minority voting strength. This Court did not order the creation of a new commission post, but instead simply recognized that a proper remedial plan would require separating the two jobs the probate judge performed; his legislative duties on the commission and his county-wide duties in his non-legislative capacity as probate judge. The Court's order thus allowed the county to continue to elect the probate judge at large for non-legislative duties. 850 F.2d at 1432 n.1. This Court's decision thus respected to the fullest extent possible the State's interest in electing probate judges at large for non-legislative duties, while fully remedying the Section 2 violation caused by the at-large election of the commission. It did not affect the election of the probate judge position insofar as the probate judge functioned as a single-member office holder for non-legislative purposes.

Because the resulting change in the county government was no more than necessary to remedy the Section 2 violation and did not unduly intrude on state interests, this Court's holdings in the judicial election cases, White v. Alabama, 74 F.3d 1058 (11th Cir. 1996), and Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) (en banc), cert. denied, 514 U.S. 1083 (1995), are inapplicable. In Nipper, this Court found that the state had such a strong policy interest in at-large election of trial judges that there was no viable remedy for any vote dilution caused by at-large elections. See Nipper, 39 F.3d at 1533, 1543-1545. The Court found that "the application of vote dilution principles to judicial elections" creates difficulties "aris[ing] from the transformation of a standard developed in the context of one type of election -- for representatives in multimember legislative bodies -- to a qualitatively different type of election -- for state court judges." 39 F.3d at 1529. In White v. Alabama, the state had agreed to remedy a Section 2 violation by appointing four new judges to the courts of appeals. See 74 F.3d at 1063. The Court held that the proposed increase was inconsistent with Holder v. Hall and that Section 2 did not authorize the appointment of new judges as a remedial measure. 74 F.3d at 1070-1072.

Here, unlike in Nipper and White, the district court made no finding that there is a consistent state policy or interest in having probate judges who are elected at large serve as members of county commissions, or that electing members of the commission

from single-member districts caused a fundamental alteration in the county's governmental structure. Single-member district election of legislative bodies is a routine, unexceptional electoral practice and Section 2 remedy. The evidence at trial showed that the number of Alabama counties in which the probate judge served on the county commissions has declined since 1930, so that as of 1995, less than 24% of Alabama county commissions were chaired by the probate judge (Def. Exh. 41). The district court made no finding that county commissions have functioned any less effectively over the years without probate judge participation. Indeed, the probate judge who had served as the chairperson of the Dallas County Commission before the 1988 injunction but was removed from that position opined that he did "not necessarily" think it was detrimental "to the administration of county government for the Probate Judge not to be involved in those [commission] activities" (R8-141 (Jones)). Clearly, the election of the county commissioners from single-member districts, without the probate judge as chairperson, was not a manifest alteration of the governmental structure and is a remedy squarely "within the confines of the state's [legislative] model." Nipper, 39 F.3d at 1531.

Significantly, Nipper and White do not stand for the proposition that a Section 2 remedy may never have some effect on state government structures or the way they operate. And they could not stand for such a proposition because the Voting Rights Act empowers federal courts when necessary to nullify or modify

state laws that deny "equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. No. 417, 97th Cong., 2d Sess. 31 (1982). "The essence of a § 2 claim is that a certain electoral law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Thornburg v. Gingles, 478 U.S. 30, 47 (1986). Because this Court's earlier order did not intrude upon state policies any more than necessary to remedy the Section 2 violation, the district court erred as a matter of law in invalidating the injunction this Court ordered in United States v. Dallas County Commission, 850 F.2d at 1430.

6. Finally, appellees suggest (Wilson App. Br. 29) that there have been changes in the voting population in Dallas County that make it no longer necessary to have all five members of the Dallas County Commission elected from single-member districts, and that the probate judge, elected at large, therefore may be returned to his place on the commission without again diluting minority voting strength. Appellees assert that the minority voting age population in Dallas County has increased since 1988 and so may be able to elect the probate judge at large. That assertion is not supported by the record. In its 1988 opinion in the companion school board case, this Court reviewed similar statistics and concluded that an election under such circumstances would continue to deny minority voters an opportunity to elect candidates of their choice, given conditions

unique to Dallas County. United States v. Dallas County Comm'n, 850 F.2d 1433, 1439-1441 (11th Cir. 1988), cert. denied, 490 U.S. 1030 (1989). And the fact remains that the same probate judge who was elected at large in 1988 in an election characterized by highly-polarized voting still holds that position today (see R8-108-111 (Jones); R10-597-599, 663-664 (Lichtman)). The issue of incumbency is but one of many factors to be considered when the likelihood of minority electoral success is examined. See generally Thornburg v. Gingles, 478 U.S. 30, 79 (1986) ("whether the political process is equally open to minority voters * * * requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms," quoting Rogers v. Lodge, 458 U.S. 613, 622 (1982)).

Absent consideration of all the circumstances surrounding the electoral system in Dallas County, this Court has no basis, and particularly, no findings of fact, on which to find that circumstances have so changed that minority voters would have an opportunity to elect the probate judge at large. The district court specifically refused to make such a finding, noting that the continued existence of a Section 2 violation was not before it (R7-136-26-27), and relied solely on Holder v. Hall to reinstate the probate judge to the county commission.[3] As noted above, the district court had no authority to modify the

[3] According to the district court, "[i]t is the status of the law relating to the limitations on a federal court's power to impose certain remedies * * * and not changed factual circumstances that govern the issue at hand" (R7-136-27).

injunction this Court ordered in another case. If circumstances have changed such that an injunction in a Section 2 case should be modified, the district court must make that determination in the case in which the violation was found and base it on detailed factual findings consistent with the standards the Supreme Court established in Gingles and its progeny. The grounds upon which the district court did base its decision below, on a misinterpretation of Holder v. Hall, are clearly wrong, and the district court's judgment should be reversed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). Based on the word-count in the word-processing system, the brief contains 3,721 words. If the court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word printout.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September 1999, I served by first-class mail two copies of the Reply Brief for the United States to the following counsel of record:

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