

No. 11-5349

**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' UNOPPOSED EMERGENCY MOTION
TO ASSIGN THIS APPEAL TO THE MERITS PANEL HEARING
SHELBY COUNTY V. HOLDER, No. 11-5256**

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INTRODUCTION

Appellants respectfully move this Court to assign this appeal to the merits panel hearing *Shelby County v. Holder*, No. 11-5256 (oral argument scheduled for Jan. 19, 2012). Both cases present facial challenges to the constitutionality of Section 5 of the Voting Rights Act, as reauthorized and amended in 2006, 42 U.S.C. § 1973c. For two reasons, the interests of judicial economy and consistency weigh strongly in favor of the same panel hearing both cases.

First, the Appellants here and in *Shelby* are both claiming that the simple reauthorization of Section 5 in 2006 was facially unconstitutional. Given that the district court judge here repeatedly relied on his 151-page decision in *Shelby* when rejecting this threshold contention, the *Shelby* panel will already be thoroughly familiar with that complex issue. (Plus, two of those judges also heard an earlier appeal in this case.) *Second*, Appellants here, unlike in *Shelby*, are *additionally* claiming that the 2006 amendments render Section 5 facially unconstitutional. Given that the *Shelby* panel is adjudicating that appeal on an expedited basis due to the compelling public interest in a prompt and definitive resolution of Section 5's facial validity during the upcoming election year, that panel should be afforded the opportunity to resolve Appellants' additional contention contemporaneously with *Shelby*. (Accordingly, Appellants are also filing today a separate motion to expedite this appeal.)

This motion requires expeditious consideration because argument in *Shelby* will be heard on January 19, 2012, and because Appellants here are proposing that their opening brief be filed on January 6, 2012. Appellants have conferred with counsel for the Defendant and the Defendant-Intervenors, and we are authorized to state that those parties do not oppose this motion.

BACKGROUND

In November of 2008, the voters of Kinston, North Carolina, overwhelmingly enacted a referendum to amend the city charter to switch from partisan to nonpartisan municipal elections. *LaRoque* Mem. Op., D.D.C. Dkt. No. 70, at 1, 9-10. But because the City of Kinston is covered by Section 5, it is preempted from implementing its validly enacted referendum absent federal preclearance. *Id.* at 10. The City requested administrative preclearance, but the Attorney General objected because eliminating partisan elections in overwhelmingly Democratic Kinston would harm black-preferred candidates; the City then declined to seek judicial preclearance. *Id.*

To end Section 5's preemption of Kinston's nonpartisan-elections referendum, Appellants—four citizens of Kinston and a private membership association—brought this lawsuit challenging the facial constitutionality of Section 5. *Id.* at 11-12. They argued that Section 5, as reauthorized *and amended* in 2006, exceeds Congress' enforcement authority under the Constitution's Reconstruction

Amendments (Count I), and that the 2006 amendments to Section 5 also violate the Constitution's nondiscrimination guarantees (Count II). *Id.* at 2, 14-16.

In December of 2010, the district court dismissed Appellants' claims for lack of standing. *Id.* at 2. This Court, however, reversed on Count I and vacated on Count II. *Id.*; *see also LaRoque v. Holder*, 650 F.3d 777, 780 (D.C. Cir. 2011).

On September 21, 2011, while the parties' cross-motions for summary judgment were pending on remand, the same district court judge decided a facial challenge to Section 5's constitutionality brought by Shelby County, Alabama. *Shelby* JA, D.C. Cir. Doc. No. 1339376, at 481-631. In a 151-page opinion, the court concluded that Congress did not exceed its enforcement powers when reauthorizing Section 5's preclearance procedure in 2006. *Id.* at 483-84. Shelby County filed an unopposed motion to expedite its appeal—emphasizing the importance of a prompt and definitive resolution of Section 5's facial constitutionality during the upcoming election year—and this Court granted that motion and scheduled oral argument for January 19, 2012. *Shelby* Scheduling Order, D.C. Cir. Doc. No. 1333740.

Subsequently, on December 22, 2011, the district court in this case granted summary judgment for the defendants. *LaRoque* Mem. Op., D.D.C. Dkt. No. 70, at 93. In a 93-page opinion upholding the facial constitutionality of Section 5, the court explained that *Shelby* “resolves *part* of plaintiffs' Count I claim here,” *id.* at

2 (emphasis added), but does not resolve “[t]wo of plaintiffs’ remaining contentions, [which] raise significant issues that have not been addressed in any other decision on Section 5 and the Voting Rights Act,” *id.* at 3. In particular, the 2006 amendments to Section 5’s preclearance standard (42 U.S.C. § 1973(b)-(d)) are “an integral part of Section 5 as enacted in 2006,” *id.* at 16, but *Shelby* did not resolve whether “the 2006 amendments exceed Congress’s enforcement powers” or whether “the amendments violate ... equal protection” principles, *id.* at 3. Deciding those questions against Appellants, the district court upheld the facial constitutionality of Section 5. *Id.* at 3-4, 93.¹

ARGUMENT

“[T]he interest[s] of judicial economy and consistency of decisions” strongly weigh in favor of assigning this appeal to the panel that is scheduled to hear oral argument in *Shelby County v. Holder*, No. 11-5256, on January 19, 2012. D.C. Cir. Handbook of Practice & Internal Procedures at 47 (Dec. 2011) (explaining that these interests guide the determination whether a panel to which a previous case has been assigned will hear a related case).

¹ Technically, although the district court squarely ruled on the merits of the “ability to elect” amendments in § 1973c(b), (d), it held that Appellants lacked standing to challenge the “discriminatory purpose” amendment in § 1973c(c). *LaRoque* Mem. Op., D.D.C. Dkt. No. 70, at 28. But because “time is of the essence in this case” and “in order to obviate any possible need for another remand,” the court nevertheless fully “explain[ed] how it would rule on the merits of subsection (c),” so that this Court will “be able to address the merits immediately” if it again “disagree[s] with [the district court’s] conclusion on standing.” *Id.* at 29.

First, the present appeal is “intimately connected” (*Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1094 n.8 (D.C. Cir. 1981)) with the *Shelby* appeal. Both cases were decided by the same district court judge and addressed many of the same issues concerning the facial constitutionality of Congress’ threshold decision to reauthorize Section 5 in 2006. Indeed, in ruling upon that question here, the district court repeatedly cross-referenced its 151-page *Shelby* ruling on such critical issues as the standard of review, the record of Congressional findings concerning intentional discrimination in the jurisdictions covered by Section 5, and the ultimate validity of the reauthorization decision standing alone.² Because the two cases are so closely intertwined, and because of the complex and controversial legal and factual issues involved, assigning this appeal to the *Shelby* panel will

² *E.g.*, *LaRoque* Mem. Op., D.D.C. Dkt. No. 70, at 31 (“For the reasons given [in *Shelby County*], the Court will review plaintiffs’ claims under *Boerne*’s ‘congruence and proportionality’ test.”); *id.* at 37-38 (“The bulk of the opinion in *Shelby County*—some seventy pages—was devoted to reviewing what direct and circumstantial evidence of purposeful discrimination Congress had amassed.... The Court will incorporate that discussion by reference rather than repeating it here.”); *id.* at 2 (“This Court concluded in *Shelby County* that Congress did not exceed its enforcement powers in reauthorizing Section 5’s preclearance procedure in 2006. That decision resolves part of plaintiffs’ Count I claim here.”); *id.* at 16 (“This Court will not revisit its conclusion in *Shelby County* that long-standing, state-sponsored, intentional discrimination in voting justified the reauthorization of Section 5’s general preclearance procedure.”); *id.* at 73 (“[A]s explained in *Shelby County*, [the general preclearance regime] is justified by the persistent, purposeful discrimination aimed at minorities attempting to exercise their core constitutional voting rights.... Hence, the only question here is whether the [2006] amendments represent an intrusion beyond that imposed by the general preclearance regime.”).

save substantial judicial resources and avoid a significant risk of inconsistent outcomes. (Moreover, two of the judges on the *Shelby* panel—Judges Tatel and Griffith—heard the prior standing appeal in this case earlier this year, *see LaRoque*, 650 F.3d at 780, and thus they are already familiar with the issues presented, including especially standing issues that again will be presented, *see supra* at 4 n.1.)

Second, unless the *Shelby* panel adjudicates this appeal contemporaneously, it will be unable to satisfy its goal of ensuring a prompt and definitive resolution of Section 5’s facial constitutionality. That is because Appellants are advancing a unique and substantial attack on the 2006 version of Section 5. Specifically, as even the district court below acknowledged in its 93-page opinion, while *Shelby* “resolves [the] part of plaintiffs’ Count I claim” that focuses on the 2006 reauthorization standing alone, it does not resolve “[Appellants’] remaining contentions” bringing a “facial challenge” to Section 5 based on the “2006 amendments,” which “raise significant issues that have not been addressed in any other decision on Section 5 and the Voting Rights Act.” *LaRoque* Mem. Op., D.D.C. Dkt. No. 70, at 2-3.

Particularly with an election year upcoming, it would clearly undermine interests of judicial economy and consistency if one panel were to reject the arguments made in *Shelby* and thus purportedly uphold Section 5, only then to

have a separate panel later invalidate Section 5 once Appellants' additional arguments are considered. Moreover, much like the district court below, any separate panel would find itself in an "odd position" if, when considering whether the 2006 amendments render Section 5 facially unconstitutional, it had to labor in the shadow of an opinion by the *Shelby* panel purporting to uphold the facial constitutionality of Section 5. *Id.* at 16. These inefficiencies can be eliminated by assigning this appeal to the *Shelby* panel (and also granting Appellants' separate motion to expedite the appeal so that it can ultimately be decided contemporaneously with *Shelby*).

CONCLUSION

Appellants' unopposed motion to assign this appeal to the merits panel hearing *Shelby County v. Holder*, No. 11-5256, should be granted.

December 28, 2011

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that, on December 28, 2011, I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system, and I also caused four copies of the foregoing document to be filed with the clerk of this Court by hand delivery.

I further certify that, on December 28, 2011, I caused the foregoing document to be served on the following counsel for Appellees at their designated electronic mail addresses, by using the CM/ECF system (with one exception):

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December 28, 2011

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