

No. 11-5349

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

STEPHEN LAROCHE, 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 EXPEDITE THE APPEAL AND
TO EXPAND THE WORD LIMITS FOR BRIEFING**

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INTRODUCTION

Appellants respectfully move this Court to expedite this appeal and expand the word limits for briefing. Appellees support the word-limit expansion and do not oppose expedition, though they propose a slightly less expedited briefing schedule than Appellants do. Expeditious consideration of this motion is required, given that, under either proposed schedule, Appellants' opening brief would be due on Friday of the upcoming week.

I. Appellants respectfully move this Court to expedite this appeal, which presents a facial challenge to the constitutionality of Section 5 of the Voting Rights Act, as reauthorized and amended in 2006, 42 U.S.C. § 1973c. This Court has already expedited a similar challenge in *Shelby County v. Holder*, No. 11-5256 (oral argument scheduled for Jan. 19, 2012), and the same basic reason militates in favor of expediting briefing and argument here: (1) the public has a compelling interest in a prompt and definitive resolution of Section 5's facial constitutionality during the upcoming election year; but (2) this Court will be unable to ensure satisfaction of that interest unless this appeal is decided contemporaneously with *Shelby*, because Appellants here are raising substantial arguments against Section 5's facial constitutionality that are not being pressed in *Shelby*.

To be sure, it is realistically unavoidable that briefing and argument here will extend beyond the imminent argument date in *Shelby*. That said, by granting

Appellants' proposed schedule below—and also granting their motion separately filed today to assign this appeal to the *Shelby* panel—this Court can ensure that the *Shelby* panel will at least be able *to decide* the cases contemporaneously, even if they are argued separately. Appellants believe that the proposed schedule is more than fair to both parties, since Appellants will be filing their opening brief a mere fifteen days after judgment was entered on December 22, 2011—notwithstanding conflicting obligations in other cases and the intervening holidays—while Appellees will have thirty-eight days to file their response brief. In particular, Appellants propose the following schedule:

Opening Brief of Appellants	January 6, 2012
Response Brief of Appellees	February 13, 2012
Reply Brief of Appellants	February 27, 2012
Oral Argument	As soon as practicable, if needed, and except for March 26-30, 2012 ¹

This motion requires expeditious consideration because Appellants are proposing that their opening brief be filed on January 6, 2012, and because argument in *Shelby* will be heard on January 19, 2012. Appellants have conferred

¹ If hearing argument would delay resolution of this appeal and the panel would not find it necessary, Appellants are willing to waive argument. If argument is heard, Appellants respectfully request that it not be scheduled the week of March 26, 2012, as the principal counsel for Appellants will be participating in the three-day argument that the Supreme Court has scheduled to decide the validity of the recent federal healthcare legislation.

with counsel for the Defendant and the Defendant-Intervenors, and we are authorized to state that those parties do not oppose expedition, but they do propose a slightly less expedited briefing schedule.

In particular, due to conflicting obligations in other cases, counsel for the Attorney General and for the Intervenors will require more time than Appellants propose for the preparation and internal review of the Appellee briefs. In addition, Appellees disagree that resolution of this case is so urgent as to require the schedule Appellants propose. Appellees thus propose the following schedule:

Opening Brief of Appellants	January 6, 2012
Response Brief of Appellees	February 21, 2012
Reply Brief of Appellants	March 6, 2012

II. Appellants also respectfully move this Court to expand the word limits for briefing. Again, this Court has already granted that request in *Shelby*, due to the complexity and importance of the constitutional question and the size and scope of the legislative and judicial record. Those factors are exacerbated here—given Appellants’ additional arguments against Section 5 and Appellees’ additional arguments regarding standing and ripeness, which took the district court 93 pages to resolve after having already devoted 151 pages in *Shelby*. Appellants therefore request an expansion from Fed. R. App. P. 32(a)(7)(B) and propose the following word limits:

Opening Brief of Appellants	20,000 words
Response Brief of Appellees	20,000 words
Reply Brief of Appellants	10,000 words

Again, this motion requires expeditious consideration because Appellants 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 support 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. This Court also granted Shelby County's unopposed motion for a 25% expansion of the word limits in Fed. R. App. P. 32(a)(7)(B). *Shelby* Briefing Order, D.C. Cir. Doc. No. 1339162.

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, 93.²

² 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.

ARGUMENT

I. THIS APPEAL SHOULD BE EXPEDITED

There exists “good cause” to expedite this appeal under D.C. Cir. R. 2, because “the public” has “an unusual interest in [its] prompt disposition” that is “strongly compelling.” D.C. Cir. Handbook of Practice & Internal Procedures at 33 (Dec. 2011). Indeed, this Court has already so recognized when it expedited the appeal in *Shelby*.

As Shelby County previously explained, Section 5 will have a sweeping effect on the 2012 election cycle, because it will affect redistricting, voter-identification laws, polling-place locations, early-voting hours, and any other voting change in covered jurisdictions in 16 wholly or partly covered States. It is thus imperative that the judiciary provide a prompt and definitive resolution of Section 5’s facial constitutionality, so that electoral ground rules are clear and election results are untainted.

But unless this appeal is adjudicated contemporaneously with *Shelby*, a prompt and definitive resolution of Section 5’s facial constitutionality cannot be ensured. 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, the public has a strongly compelling interest in avoiding a possible scenario where this Court first rejects the arguments made in *Shelby* and thus purportedly upholds Section 5, only then to later invalidate Section 5 once Appellants’ additional arguments are considered. Moreover, much like the district court below, this Court 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 earlier opinion in *Shelby* purporting to uphold the facial constitutionality of Section 5. *Id.* at 16. These difficulties can be eliminated by adopting Appellants’ proposal for expediting this appeal (and also granting Appellants’ separate motion to assign this appeal to the *Shelby* panel)—even though this appeal will be argued later than *Shelby*, it at least can be *decided* contemporaneously.

Finally, expediting review would also enable this Court to give timely guidance on the scope of the 2006 amendments (if they survive), to the numerous three-judge district courts currently hearing preclearance actions.

II. THE WORD LIMITS FOR BRIEFING SHOULD BE EXPANDED

Although this Court understandably “disfavors” word-limit extensions, this is the rare case that presents “extraordinarily compelling reasons” for granting such an extension. D.C. Cir. R. 28(e)(1). Again, this Court has already so recognized when it granted an extension in *Shelby*.

The modest expansion of the limits in Fed. R. App. P. 32(a)(7)(B) was justified in *Shelby* given the magnitude of the question whether the 2006 reauthorization alone was facially unconstitutional, both in terms of importance and difficulty—as underscored by the 151-page district court opinion. A somewhat greater expansion is justified here, given that this appeal presents the same issue *plus the additional* “significant issue[]” whether the 2006 amendments render Section 5 facially unconstitutional, *LaRoque* Mem. Op., D.D.C. Dkt. No. 70, at 3, as well as standing and ripeness issues—all of which took the district court another 93 pages to analyze.

CONCLUSION

Appellants’ unopposed motion to expedite this appeal and expand the word limits for briefing should be granted. Specifically, this Court should enter either the briefing schedule proposed by the Appellants or that proposed by the Appellees. *See supra* at 2-3. And this Court should order the expanded word limits agreed to by the parties. *See supra* at 4.

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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