IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

DAWN PAGE, et al.,

Plaintiffs,

v. Civil Action No. 3:13cv678

VIRGINIA STATE BOARD OF ELECTIONS, et al.,

Defendants.

ORDER

Before the Court is the Motion of Interested Parties Virginia House of Delegates and Virginia Senate For an Extension of Time to Comply With this Court's June 5, 2015 Order.

After considering the Motion and the briefs submitted, the Court finds that the Interested Parties are not entitled to the relief sought. The Court concludes that the Interested Parties have failed to show that (1) the Intervenor-Defendants are likely to succeed in the appeal pending before the Supreme Court, or (2) they will suffer irreparable injury or prejudice by adhering to the Court's September 1, 2015 for adopting a new redistricting plan.

Accordingly, the Motion is DENIED.

It is so ORDERED.

/s/
Albert Diaz
United States Circuit Judge

/s/
Liam O'Grady
United States District Judge

Richmond, Virginia
Date: August 5, 2015

PAYNE, Senior District Judge, dissenting

I would grant the requested extension of the compliance date for several reasons. First, the Intervenor-Defendants' appeal to the Supreme Court of the United States causes the posture of the case now to be the same now as it was when we previously granted an extension of the compliance date (Memorandum Opinion, Docket No. 137).[1] The only difference is that the Supreme Court has now decided Alabama Legilsative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015). In Alabama, the Supreme Court made clear that use of a fixed black voting age population ("BVAP") in creating districts was strong evidence of racial predominance. But, the Supreme Court did not hold that use of a fixed BVAP was sufficient to prove racial predominance and, in fact, remanded the case for a decision on that point. A significant issue in this case is the use of a 55% BVAP figure to satisfy Section 5 of the Voting Rights Act. Thus, this appeal presents the issue left open in Alabama. I think it appropriate to know whether the Supreme Court will note probable jurisdiction on that issue in the Intervenor-Defendants' appeal before requiring the General Assembly to undertake the redistricting.

[1] Given that the Court involved the General Assembly in this case, I have no doubt that the Interested Parties (the houses of the Virginia General Assembly) are before the Court and have standing to seek the relief requested in the motion for extension of time in which to comply with our Order (Docket No. 171).

If the Supreme Court summarily affirms our decision, there will be time to effect a redistricting before the 2016 elections. If the Supreme Court takes the appeal, then we and the General Assembly will be better informed about how to proceed.

I recognize that, if the Supreme Court decides to take the case, and if the plaintiffs then prevail, there could be time pressure in effecting a redistricting in time for the 2016 election. That, of course, is attributable to the plaintiffs' delay in bringing this case (the redistricting was effected in January 2012; this case was not filed until October 2013). Neither that delay, nor its potential consequences, is, in my view, sufficient reason to deprive the General Assembly or this Court of an orderly resolution of this case informed by the decision of the Supreme Court.

Second, the Interested Parties posit that there is a significant risk that enactment of a new redistricting statute could moot the pending appeal. Neither the Plaintiffs nor the Defendants contend otherwise, but, in the Plaintiffs' view, the issue is irrelevant. Thus, like the Interested Parties, I see the risk as a real one. And, it is one that I am unwilling to undertake where, as here, there is no prejudice to the Plaintiffs or the Defendants in awaiting action by the Supreme Court on whether to take the pending appeal.

Relatedly, there is a difference of opinion whether the mooting of an appeal constitutes irreparable injury. I conclude that mooting of the appeal would be irreparable injury, at least in the

context of the unsettled law and the significant fact disputes that are involved in the Intervenor-Defendants' appeal. And, when the risk of irreparable injury from mooting the appeal is measured against the lack of prejudice from granting the motion, the result is a circumstance favoring a brief extension of the compliance date.

The risk of mooting the appeal might be eliminated if the General Assembly could made the redistricting statute conditional upon the result of the appeal. That, however, is quite speculative, and does not eliminate the risk.

Finally, the issues presented in this case are of great importance to the public. In my view, the public interest will be best served by not requiring the redistricting to occur until after we know whether the Supreme Court intends to review our decision. In that regard, I do not consider the cost of special sessions to be an important factor. Rather, I think that the redistricting should be done in a way that assures the public that the General Assembly will be acting in accord with the certainty that comes from knowing whether the Supreme Court upholds our decision or thinks that it requires review.

For the foregoing reasons, I would extend the compliance date, but not until November 16, 2015. Any extension ought to be linked to action taken by the Supreme Court on the pending appeal. If our decision is summarily affirmed, a redistricting date would be set for thirty days thereafter. If the Supreme Court notes probable

jurisdiction, the parties and the Interested Parties should be heard then about how to proceed.

/s/
Robert E. Payne
Senior United States District Court

Richmond, Virginia
Date: August 5, 2015