United States Court of Appeal
for the Eighth Circuit

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| Missouri State Conference of the National Association for the Advancement of Colored People, et al., | ) | |
| Plaintiffs-Appellees, | ) | |
| v. | ) | No. 16-4511 |
| Ferguson-Florissant School District, | ) | |
| Defendants-Appellant, | ) | |
| St. Louis County Board of Election Commissioners, | ) | |
| Defendant. | ) | |

**PLAINTIFF-APPELEES' EMERGENCY MOTION TO VACATE STAY, OR IN THE ALTERNATE, TO EXPEDITE APPEAL**

## INTRODUCTION

Plaintiff-Appellees bring this emergency motion to vacate the District Court's order granting a stay of the injunctions in this case. Emergency relief is necessary to prevent the Defendant Ferguson-Florissant School District ("FFSD") from conducting elections for its Board in April 2017 under a system that the District Court has determined violates Section 2 of the Voting Rights Act, 52 U.SC. § 10301 ("Section 2").

On August 22, 2016, the District Court issued an opinion finding that, under the current at-large method of election for the seven-member FFSD Board, "African American residents of FFSD have less opportunity than other members of the electorate

to participate in the political process and elect candidates of their choice," in violation of Section 2, and enjoined further use of that system. ECF No. 185 ("Liability Op.") at 84. On November 21, the District Court ordered a remedy that changes the method of elections for the FFSD Board to "correct the Section 2 violation" and finally afford African-American voters an opportunity to elect candidates of their choice in the upcoming April 4, 2017 School Board elections. ECF No. 212 (the "Remedial Order") at 25. The candidate filing period opened on December 13, and several candidates have already filed.

Almost four months after it was enjoined from holding elections under its old at-large system, nearly one month after the remedial order was entered, and a week after the opening of the candidate filing, Defendant FFSD suddenly sought a stay of the District Court's injunctions via an oral motion on December 19, followed by a written motion on December 20. And, inexplicably, the District Court granted the stay the following day. It did so without applying the factors governing the extraordinary relief of a stay pending appeal, or making any findings as to those factors, which by itself constitutes error warranting immediate dissolution of the stay. And the District Court's stay all but ensures that an election will take place in April under a system that the District Court has found violates the Voting Rights Act and deprives African-American voters of an equal opportunity to participate in the political process.

Finally, in the event that this Court is inclined to leave the stay in place, Plaintiffs respectfully request that this appeal be expedited so that it may be resolved before the upcoming April 2017 FFSD Board elections. Leaving the stay in place without

expediting the appeal will consign Plaintiffs and other African-American voters in the School District to certain deprivation of their rights under the VRA in April.

## FACTUAL AND PROCEDURAL BACKGROUND

This litigation was initiated over two years ago, on December 18, 2014. Trial in this case was held nearly one year ago, over six days in January 2016. Four months ago, on August 22, 2016, the District Court issued a 119-page opinion finding that the current method of elections for FFSD Board violates Section 2, and immediately "enjoin[ed] Defendants from conducting any elections for the District's Board until a new system may be properly implemented." Liability Op. at 118. Neither defendant sought a stay at that time.

Specifically, the District Court found that Plaintiffs "have established by a preponderance of the evidence that, under the totality of the circumstances, the political processes for electing Board members in the Ferguson-Florissant School District deprives African American voters of an equal opportunity to elect representatives of their choice in violation of § 2 of the Voting Rights Act." Liability Op. at 118. In particular, the District Court found that

> there is a history of officially sanctioned discrimination in the region and the District, and that history is not just a distant memory. Plaintiffs have established that African Americans in FFSD "bear the effects of discrimination in such areas as education, employment and health," among other areas, "which hinder their ability to participate effectively in the political process."

*Id*. at 100 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 37 (1986)). *See also id.* at 117 ("[A] number of other factors hinder African American electoral success, such as an absence of meaningful access to endorsements, and subtle racial campaign appeals").

The Court further found "stark levels of racially polarized voting seen in Board elections and the failure of white voters to support candidates from the African American community." *Id.* at 117.

The District Court then observed that the "2011–2015 election data shows that Black-preferred candidates were usually not elected. In the past five years, two out of eight Black-preferred candidates were successful (25%)." *Id.* at 78. Overall, "[s]ince 2004, twenty-three white candidates and nineteen African American candidates have run for a seat on the Board in contested races…. White candidates' success rate was 69.6%, while African Americans' success rate was 10.5%." *Id.* at 86. As recently as "the 2013-2014 term… there were *no African American Board members*." *Id.* (emphasis added). And while the School District pointed to a few recent elections in which Black-preferred candidates had been elected, the District Court found that such "recent successes of African American candidates are not representative of the community's ability to be elected to the Board." *Id.*.

On September 1, 2016, FFSD moved for an interlocutory appeal of the liability order, and identified four supposed issues for appeal, but still did not seek a stay. On September 27, 2016, the District Court declined to certify the case for interlocutory appeal, holding that "[n]one of the four questions the School District seeks to have certified for interlocutory appeal present questions of controlling law as to which there can be substantial ground for difference of opinion and that will materially advance the ultimate termination of this litigation." ECF No. 200 (the "Order on Interlocutory

Appeal") at 17. On October 25, 2016, this Court denied interlocutory appeal for lack of jurisdiction. *See* ECF No. 207.

After further briefing, on November 21, 2016, the District Court entered its remedial order, directing the defendants to implement a system of cumulative voting. ECF No. 212 (the "Remedial Order"), consistent with other recent decisions in Section 2 cases. *See United States v. Village of Port Chester*, 704 F.Supp.2d 411 (S.D.N.Y. 2010); *United States v. Euclid City School Bd.*, 632 F.Supp.2d 740 (N.D. Ohio 2009). The at-large cumulative voting system maintains the general at-large structure of elections and gives voters as many votes as there are seats available (two or three depending on the year), but offers voters a choice of casting their School Board votes for different candidates, or to aggregate multiple votes for a single candidate. After considering expert testimony on both sides, the District Court found that such a system would remedy the School District's Voting Rights Act violation, by enabling African-American voters to concentrate their voting power on particular candidates, thus providing them with "a genuine opportunity to exercise an electoral power that is commensurate with its population and will correct the Section 2 violation." Remedial Order at 15 (quotation marks and citations omitted). The Court also noted that this remedy accommodates the School District's "prefer[erence] to keep using an at-large system," which "gives deference to state policy judgments and helps preserve the School District's priorities." *Id.* at 25. Neither the School District nor the Election Board sought a stay of this Court's orders at that time.

The next School Board election is a little over three months away, on April 4,

2017. Candidate filing commenced on December 13.[1] Several candidates "have already filed for office," and they "have done so on the basis and in reliance on the order stating that there would be cumulative voting." ECF No. 233 ("Tr. of Dec. 19 Hearing") at pp. 5, 7.

On December 14, 2016, FFSD filed a notice of appeal, ECF No. 229, but neither defendant sought a stay of the Court's orders at that time. It was not until December 19, 2016 – more than four months after the Liability Decision, almost a month after the Remedial Order, and a week into the candidate filing period – that FFSD made an oral motion to stay *both* the Liability Decision and the Remedial Order. Tr. of Dec, 19 Hearing at p. 3. A written motion followed on December 20, 2016, *see* ECF No. 234 ("Defs.' Br."). On the following day, December 21, 2016, the District Court formally granted the motion. The order reads,

> As I explained on the record at the December 19, 2016 hearing after argument by all the parties, and for the reasons stated on the record, after careful consideration of these factors, I will stay the judgment and injunction entered in this case pending resolution of the Defendants' appeal to the Eighth Circuit Court of Appeals.

ECF No. 242 ("Order Granting Stay") at 3. No further explanation was provided.

## LEGAL STANDARD

To issue a stay, courts must consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure

[1] The first day of candidate filing for the April 4, 2017 election was December 13, 2016. The final day is January 17, 2017. *See* https://www.sos.mo.gov/elections/calendar/2017cal.

the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). The court "consider[s] the same factors in determining a stay pending appeal as [it] considers for a preliminary injunction." *Brady v. Nat'l Football League*, 640 F.3d 785, 794 (8th Cir. 2011) (citing *S & M Constructors, Inc. v. Foley Co.*, 959 F.2d 97, 98 (8th Cir.1992) (per curiam)). "The first two factors" *i.e.*, likelihood of success and irreparable injury to the movant, "are the most critical." *Nken*, 556 U.S. at 434.

The "party requesting a stay bears the burden of showing that the circumstances justify" a stay. *Nken*, 556 U.S. at 434. As FFSD concedes, this Court has made clear that "[t]he party seeking a stay pending appeal *must* show" the presence of each of these factors in order to obtain a stay. Defs.' Br. at 2 (quoting *James River Flood Control Ass'n. v. Watt*, 680 F.2d 543, 544 (8th Cir. 1982)).

**ARGUMENT**

The District Court plainly erred in granting a stay pending appeal. Although the order granting a stay recites the legal factors governing a stay pending appeal, *see* Order Granting Stay at 3, the Court did not actually apply that standard. In fact, while the order makes reference to "the reasons stated on the record" at a December 19, 2016 hearing, a review of the transcript of that hearing reveals no actual findings as to the requisite stay factors, or even any reasoning that could support a finding that FFSD had satisfied those factors. The District Court's utter failure to apply the governing legal standard for a stay pending appeal constitutes error, warranting vacatur.

It is unsurprising that FFSD has failed to carry its burden. It has not even articulated any possible legal or factual errors in the District Court's liability and remedial decisions that could form the basis for the requisite strong showing of a likelihood of success on the merits. Nor has it identified any way in which it will be harmed by the District Court's orders, which maintain FFSD's preference for an at-large electoral arrangement. By contrast, Plaintiffs will be irreparably harmed by the stay, which will permit an election to go forward in April under a system that the District Court has found after a trial will deprive African-American voters of an equal opportunity to elect their preferred candidates, in violation the Voting Rights Act. The public interest cannot possibly be served by such a result.

Finally, in the alternate, Plaintiffs request that this appeal be expedited and resolved, so that the District Court's stay may be lifted in time before the April election, which would ensure that no further violations of the Voting Rights Act occur.

## I. The District Court's Conclusory Order Did Not Apply the Standard Governing a Stay Pending Appeal

While the District Court's order granting a stay recites the stay factors, it did not actually apply them. In particular, its failure to find the "most critical" factors – *i.e.*, irreparable harm to the movant and a likelihood of success on the merits, *Nken*, 556 U.S. at 434—constitute plain error. With respect to irreparable harm, the District Court's stay order made no finding that the FFSD would be harmed *in any way* by the injunctions in this case. And while the stay order refers to "the reasons stated on the record" during a

December 19 hearing, the District Court *never even uttered the phrase* "irreparable harm" during that hearing. *See* ECF 233.

Nor did the Court find that FFSD had made the requisite "strong showing" that it is likely to succeed on the merits. *Nken*, 556 U.S. at 434. That is unsurprising, given the District Court's previous ruling that, in seeking interlocutory appeal, FFSD had failed to "present questions of controlling law as to which there can be substantial ground for difference of opinion." Order on Interlocutory Appeal at 17. Indeed, during the hearing, the District Court expressed confidence that it "firmly believe[s] there is a [VRA] violation here," and while the Court described the case as "a close call," that is a far cry from the requisite "strong showing" of a likelihood of success by the movant. Tr. of Dec. 19 Hearing at 9, 11.

Nevertheless, the Court stated that it would grant a stay because the public interest favors "predictability and certainty" in the upcoming election. *Id.* at 11. But even assuming that the District Court had weighed the public interest correctly—which, as explained below, it did not—that is insufficient. In granting a stay despite failing to find that the "most critical" factors of irreparable harm or a likelihood of success weighed in favor of FFSD, the District Court failed to apply the governing standard for a stay, a legal error that warrants immediate vacatur.

## II. FFSD Did Not Satisfy Its Burden of Establishing that Any of the Factors Governing a Stay Application Were Satisfied Here

Even if the District Court had actually applied the stay factors and concluded that a stay was warranted, such a decision would have been plainly erroneous under the facts of this case.

### A. FFSD Did Not Make a Strong Showing of Likelihood of Success

FFSD raised three arguments which it asserts demonstrate a likelihood of success. None are availing.

*First*, FFSD argued that "[t]he fact that the African American and white voting age populations in the District are at near parity distinguishes it from most other Section 2 cases." Defs.' Br. at 3. But the fact that this case is different from "most other Section 2 cases" does not amount to a strong showing of a likelihood of success on the merits. And the premise of the School District's argument is incorrect, both factually and legally. As a factual matter, the District Court found that "African Americans are neither a majority nor a plurality of the total [voting-age population] of the [School] District.," Op. at 30, and that they suffer from "a range of ongoing disparities [that] hinder African Americans' present ability to participate equally in school board elections," *id.* at 41. These factual findings are among the reasons why at-large elections in the school district deny African Americans an equal opportunity to elect their candidates of choice.

Moreover, as a legal matter, the mere fact that African-American and white voting age populations of the School District are comparable is by itself irrelevant. Even if African Americans were a majority of the District—which they are not—they could still

make a claim. The Supreme Court has made clear that "it may be possible for a citizen voting-age majority to lack real electoral opportunity." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006). Consistent with this guidance, four Courts of Appeals (the Second, Fifth, Eleventh, and D.C. Circuits) have rejected a *per se* rule prohibiting vote dilution claims where a racial minority constitutes a numerical majority.[2]

*Second*, FFSD notes that it "was required to conduct at-large elections pursuant to Missouri law and therefore had no intent whatsoever to violate any law." Defs.' Br. at 3. But that is irrelevant. Intentional discrimination is not an element of a violation of Section 2 of the VRA. *See Gingles*, 478 U.S. at 35-37. Rather, Section 2 is "clear that certain practices and procedures that *result* in the denial or abridgment of the right to vote are forbidden even though the absence of proof of discriminatory intent protects them from constitutional challenge." *Chisom v. Roemer*, 501 U.S. 380, 383–84 (1991).

*Third*, the School District argued that "the District's at-large elections produced three African American board members." Defs.' Br. at 3. But the District Court found that "African Americans' representation on the Board during the last fifteen years is disproportionately low compared to their share of the FFSD population," Liability Op. at 85. Moreover, as this Court has made clear, even "proportional or near proportional

[2] *See Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1041 (D.C. Cir. 2003); *Monroe v. City of Woodville*, 881 F.2d 1327, 1332-33 (5th Cir. 1989), *cert. denied*, 498 U.S. 822 (1990); *Meek v. Metro. Dade Cty.*, 908 F.2d 1540, 1545-46 (11th Cir. 1990); *Pope v. Cty. of Albany*, 687 F.3d 565, 575 n.8 (2d Cir. 2012). Only the Fourth Circuit, in a 23 years-old decision that predates the Supreme Court's guidance in *LULAC*, has applied a *per se* rule precluding a § 2 claim by a numerical majority. *See Smith v. Brunswick Cty. Bd. of Supervisors*, 984 F.2d 1393, 1401 (4th Cir. 1993).

representation of the black population on the school board … does not provide an absolute safe harbor in which a defendant can seek refuge from the totality of the circumstances." *Harvell v. Blytheville Sch. Dist. No. 1*, 71 F.3d 1382, 1388 (8th Cir. 1995). And here, the District Court found that "the more recent successes of African American candidates are not representative of the community's ability to be elected to the Board," given that African Americans in the School District have long suffered from substantial underrepresentation on the School Board. Liability Op. at 86.

### B. The School District Has Not Established that it Will Suffer Irreparable Injury

For a stay to be granted, "[t]he movant *must show* that it will suffer irreparable injury unless a stay is granted." *Brady*, 640 F.3d at 789 (emphasis added). "Failure to show irreparable harm is an independently sufficient ground upon which to deny a preliminary injunction." *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir.2003).

Here, FFSD has raised *no argument* that it would be irreparably injured absent a stay. Instead, Defendant raised arguments as to why *other parties* – namely, (1) African Americans in the District, and (2) candidates and voters – would supposedly be injured absent a stay. Defs.' Br. at 3. But these assertions – which, as demonstrated below, are erroneous – do not establish *injury to FFSD*, and therefore are insufficient to establish the mandatory factor of irreparable harm to the *movant*. On that basis alone, the stay should be vacated.

Even assuming that FFSD's arguments in this regard were on point, they are unavailing. *First*, FFSD argued that District Court's injunction would "revers[e] the

momentous gains for African American representation achieved under the current at-large system." Defs.' Br. at 3. But, as the District Court noted, the "School District d[id] not contest that a [remedial] cumulative voting system would give African Americans an equal opportunity to elect their candidates of choice," Remedial Order at 13, and "agree[d] that cumulative voting is effective in cases where minority voters have been entirely unable to elect their candidates of choice," *id.* at 20. Having conceded the efficacy of cumulative voting, FFSD cannot now argue that such a system will harm African-American representation in the District.

In any event, the premise of FFSD's argument is plainly contradicted by the District Court's thorough findings on this matter. As noted, the District Court engaged in thorough findings establishing that the existing electoral system yielded a long pattern of underrepresentation of African Americans on the School Board, which the District Court concluded "results in a Section 2 violation," and "is legally unacceptable on its face." Remedial Order at 7. The District Court further found that, by contrast, a remedial system of "at-large cumulative voting system will afford African American voters in Ferguson-Florissant School District a genuine opportunity to exercise an electoral power that is commensurate with its population and will correct the Section 2 violation." *Id.* at 15 (quoting, *inter alia*, *Port Chester*, 704 F.Supp.2d at 449).

*Second*, FFSD argued that a stay is necessary to prevent "confusion among candidates that have already filed for office and among voters." Defs,' Br. at 4. But FFSD submitted no evidence that candidates or voters were confused by the District Court's remedial order, or that it would cause any logistical difficulties for elections

administration. In fact, the Defendant Election Board "did not object" to the remedial cumulative voting plan, "indicated it can accommodate" the remedy, did not argue that candidates or voters would be confused by the remedy, and did not join the School District's motion for a stay. Remedial Order at 2.

If anything, the stay will cause candidate and voter confusion. As noted, the District Court enjoined the School District from holding elections under its old at-large system on August 22, and issued its remedial decision on November 21; no stay was sought at either time. The candidate filing had already opened before a stay was requested, and several candidates had already filed with the understanding that cumulative voting would be used in the next election. And while the District Court found that "[r]egistration and turnout rates often improve once a court finds and remedies [a] Section 2 violation," Remedial Order at 15, the stay threatens to stymie that potential progress, by returning the FFSD to an election system that has been enjoined as violative of Section 2, disrupting the status quo expectations of the candidates and voters, and contravening FFSD's professed interest in preventing voter confusion. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.")

### C. Permitting the Stay to Remain in Place Will Cause Irreparable Injury to Plaintiffs

FFSD has not carried its burden of showing that Plaintiffs will not be harmed absent a stay. In fact, the stay will maintain a system under which "African American

residents of FFSD have less opportunity than other members of the electorate to participate in the political process and elect candidates of their choice." Liability Op. at 84. That clearly constitutes irreparable harm to Plaintiffs and other African-American voters. As the Supreme Court has made clear, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). *See also Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("[A]ny illegal impediment on the right to vote is an irreparable injury.").

In particular, discriminatory voting procedures are "the kind of serious violation of the Constitution and the Voting Rights Act for which courts have granted *immediate* relief." *United States v. City of Cambridge*, 799 F.2d 137, 140 (4th Cir.1986) (emphasis added). Simply put, a stay permits the defendants to continue to hold elections under a system that the District Court has found to violate Section 2 of the Voting Rights Act. That is irreparable harm. The "Voting Rights Act protects the public interest in the due observance of all constitutional guarantees and the individual's right to vote." *Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 692 (7th Cir. 1986). Courts thus routinely find that violations of Section 2 of the VRA constitute irreparable harm to plaintiffs and minority voters warranting immediate relief. *See, e.g.*, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("*LWVNC*"), *cert. denied*, 135 S. Ct. 1735

(2015); *Michigan State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016).

Here, the District Court found that the existing system has resulted in years of severe underrepresentation for African Americans, and that "more recent successes of African American candidates are not representative of the community's ability to be elected to the Board." Op. at 86. Permitting that system to continue for the April 2017 election, in which nearly half of the board (3 of 7 members) will be elected and will remain in office for a three-year term, will threaten to continue to deprive African Americans of their rights under the VRA. And there will be no way to undo the results; the taint of that unlawful election will linger for the next three years.

### D. The School District Has Not Established that a Stay Will Further the Public Interest

Finally, FFSD argued—and the District Court apparently believed—that a stay would serve the public interest by preventing the "[i]nject[ion of] uncertainty" into the April election. Defs.' Br. at 4. In fact, as explained, *supra*, the stay will increase rather than decrease uncertainty around the next election. But regardless, assertions of "uncertainty" cannot outweigh the public's interest in ensuring that its elections are conducted in a non-discriminatory manner in conformance with the Voting Rights Act. "While states have a strong interest in their ability to enforce state election law requirements, the public has a strong interest in exercising the fundamental political right to vote." *Obama for Am.*, 697 F.3d. at 436 (internal quotation marks and citations

omitted).[3] In the context of elections, "[t]he public has an interest in seeing that the State … complies with federal law…" *Charles H. Wesley Educ. Found., Inc. v. Cox*, 324 F. Supp. 2d 1358, 1369 (N.D. Ga. 2004), *aff'd*, 408 F.3d 1349 (11th Cir. 2005).

The District Court's ruling provides no logical stopping point. If the mere possibility of reversal on appeal merits a stay, then no plaintiff would ever obtain relief in a voting rights case until after all appeals have been exhausted. But Defendants in voting cases are not entitled to continue holding elections under an unlawful regime through all appeals up until denial of a petition for certiorari. To the contrary, a finding of a violation of the VRA demands immediate relief, because "once [an] election occurs, there can be no do-over and no redress." *LWVNC*, 769 F.3d at 247 (4th Cir. 2014).

Plaintiffs have diligently litigated this case for the last two years, during which two elections for FFSD took place. Having obtained a final judgment after a six-day trial, they and the voting public have waited long enough to see FFSD Board elections conducted in a manner that does not violate the Voting Rights Act.

## III. In the Alternate, Plaintiffs Request that Appeal Be Expedited and Resolved Before the April 2017 Election

If the stay is not vacated, then this appeal should be expedited so that this Court may issue an opinion—or, at least revisit the stay—in time to prevent the April 4, 2017 from being conducted using a method that violates the Voting Rights Act. "On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of [the Federal Rules of Appellate Procedure] in a

[3] The remedy in this case—cumulative voting—is not contrary to state law.

particular case and order proceedings as it directs." Fed. R. App. P. 2. When, as here, a final judgment is stayed pending appeal, it is frequently noted that the appeal is expedited. *See, e.g.*, *San Diegans For Mt. Soledad Nat. War Mem'l v. Paulson*, 548 U.S. 1301, 1303 (2006) (Kennedy, J., in chambers) (granting stay while noting that appeal is expedited); *Doe v. Gonzales*, 546 U.S. 1301, 1308 (2005) (declining to vacate stay while noting that appeal is expedited); *Brady*, 640 F.3d at 793 (granting stay but noting harm minimized because "appeal will be submitted for decision on a highly expedited schedule").

Indeed, expedited appeals are common in voting cases, which often implicate pending elections and require quick resolution. *See, e.g.*, *Fletcher v. Golder*, 959 F.2d 106, 107 (8th Cir. 1992) (district court decision on February 4, followed by expedited appeal and decision on March 19); *Feldman v. Arizona Sec'y of State's Office*, 840 F.3d 1057, 1065 (9th Cir. 2016) (district court decision in VRA case on September 23, followed by expedited appeal and decision on October 28), *reh'g en banc granted*, 841 F.3d 791 (9th Cir. 2016); *LWVNC*, 769 F.3d at 235 (district court decision in VRA case on August 8, followed by expedited appeal and decision on October 1).

The Election Board reported that absentee ballots must be ready for distribution six weeks prior to the election to ensure members of the armed services may participate in the election. Six weeks prior to the April 4, 2017 election is February 21, 2017. The Board would need some time to format and print a paper ballot for the School District's election. Thus, Appellees respectfully propose the following expedited schedule:

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| January 13, 2017 | Appellant's Opening Brief |

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| January 27, 2017 | Appellees' Brief |
| February 3, 2017 | Appellant's Reply Brief |
| Week of February 6, 2017 | Oral Argument. |

While an expedited schedule would necessarily place some burdens on counsel, the burden is mitigated here because the transcripts already have been prepared and the issues have been briefed extensively in the District Court.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing was served by all parties by operation of the Court's e-filing system on December 22, 2016.

/s/ Anthony E. Rothert