IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PEARL COTTIER and REBECCA THREE STARS,	)	
Plaintiffs-Appellees,	)	No. 07-1628
v.	)	Appeal from the United States District Court for the District of South Dakota
CITY OF MARTIN, et al.,	)	
Defendants-Appellants.	)	

APPELLEES' RESPONSE TO THE APPELLANTS' PETITION FOR REHEARING EN BANC

Plaintiffs-Appellees Pearl Cottier and Rebecca Three Stars respectfully ask this Court to deny the Defendants-Appellants' petition for rehearing en banc. The petition does not meet the standards for en banc review set forth in the Federal Rules of Appellate Procedure, nor is there any other reason to believe that the panel's decision warrants the attention of the full Court.

I. The petition satisfies none of the established criteria for en banc review.

Very few cases warrant en banc review. The Federal Rules of Appellate Procedure provide that a rehearing en banc "is not favored and ordinarily will not be ordered unless: (1) en banc

consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). This case meets neither of those "rigid standards" and does not merit the attention of the full Court. Fed. R. App. P. 35 advisory committee's note.

The Defendants' assertion that the panel's opinion is "inconsistent" with *Holder v. Hall,* 512 U.S. 874 (1994), and *Stabler v. Thurston County,* 129 F.3d 1015 (8th Cir. 1997), has no merit. (Pet. Reh'g 1.) Neither case addressed the questions at issue here.

In *Holder*, a deeply divided Supreme Court held that a plaintiff could not challenge the size of a governmental body in the absence of some objective standard of comparison. 512 U.S. at 880-81. This case, however, does not challenge the size of Martin's city council. It challenges only the method of electing the city council, which has long been held to be a "standard, practice, or procedure" that can be challenged under the Voting Rights Act. *See, e.g., Thornburg v. Gingles,* 478 U.S. 30 (1986). The panel's decision in this case is therefore not inconsistent with *Holder's* holding.

Stabler, likewise, was not about a court's discretion at the remedial stage of litigation. *Stabler* held, among other things, that the district court did not err when it concluded that the plaintiffs had not satisfied the first of the three preconditions for a finding of liability under Section 2 of the Voting Rights Act. 129 F.3d at 1024-26. In this case, by contrast, the existence of the three preconditions was settled in an earlier appeal. *See Cottier v. City of Martin,* 445 F.3d 1113, 1117-22 (8th Cir. 2006). This Court declined to rehear that decision, and the Defendants chose not to seek further review in the Supreme Court. The prior panel's ruling is now the law of the case, and there is thus no conflict with *Stabler's* rather unremarkable holding that the three preconditions are required to establish liability under Section 2.

The Defendants' petition also fails to raise any question of exceptional importance that would justify en banc review. The panel's rather narrow decision stands merely for the proposition that a district court does not abuse its discretion when it imposes a remedy that this Court has already identified as a permissible option. The panel's decision rests expressly on the prior panel's

idiosyncratic instructions to the district court, which became final when the Defendants chose not to seek further review in the Supreme Court. Because those instructions are so central to the result, the panel's decision will not likely serve as a particularly valuable precedent in this circuit or anywhere else.

Further undermining the Defendants' claim of exceptional importance is the fact that a court-ordered redistricting plan is, by definition, provisional. *See LULAC v. Perry*, 549 U.S. 399, 416 (2005). The Defendants remain free to replace it at any time. *See id.* No intervention by the full Court is necessary or warranted.

Nor does the public interest support rehearing. While the public interest would have been undermined if the panel had reached the *opposite* result—ensuring that non-Indian voters would control all six aldermanic seats in Martin—there is no injustice in a result that provides Indian voters with an opportunity to share in their city's governance.

Finally, prudential considerations counsel against rehearing. Allowing this case to proceed en banc would invite litigants in the most routine appellate cases to petition for rehearing en banc even

in the absence of a truly compelling justification. This Court should reserve en banc review for exceptionally important cases, and this is not one of them.

II. The petition's rhetoric is overblown.

A. Federal courts routinely impose remedies that "violate" state law.

The Defendants claim that this is a case of exceptional importance because the panel's decision upholds a remedy that violates South Dakota law. (Pet. Reh'g 4-10.) South Dakota law does not, in fact, prohibit cumulative voting, but this case would not be exceptional even if it did.

Court-ordered remedies that conflict with state law are unexceptional. When the Supreme Court declared an end to *de jure* segregation, for example, the remedies necessarily violated state laws that mandated segregation. *See, e.g., Brown v. Board of Educ.,* 349 U.S. 294, 300-01 (1955). In the field of voting rights, the Supreme Court has routinely required remedies that technically conflict with state law. *See, e.g., Thornburg v. Gingles,* 478 U.S. 30 (1986) (invalidating a legislative decision to use multi-member districts); *Whitcomb v. Chavis,* 403 U.S. 124, 162 n.42 (1971)

(upholding a court-ordered redistricting plan that violated the state constitution). Indeed, the Eighth Circuit has previously approved a voting-rights remedy that "violated" Arkansas law. *See Harvell v. Blythville Sch. Dist. No. 5,* 126 F.3d 1038, 1039 (8th Cir. 1997) (approving single-member districts despite a state-law requirement to use at-large elections and a majority-vote requirement). As is apparent from these and other cases, a federal court's remedial power is not circumscribed by state law as the Defendants suggest. *See also* U.S. const. art. VI, cl. 2 (Supremacy Clause).

In this very case, moreover, no one seriously questions the district court's power to impose single-member wards, or some combination of single-member and dual-member wards, as the remedy even though South Dakota law does not authorize single-member wards in municipal elections. *See Cottier v. City of Martin,* ___ F.3d ____, 2008 WL 5215007 at *14 (Colloton, J., dissenting) (opining that the "proper remedy" would have been a single-member ward); *see also* S.D.C.L. §§ 9-8-4, 9-9-1 (prescribing the two authorized forms of municipal government). The fact that the panel's decision approves a provisional remedy not authorized by

state law therefore does not make this case exceptionally important.

B. Cumulative voting does not violate the one-person-one-vote doctrine or the Voting Rights Act.

The Defendants also claim that this case is exceptionally important because the district court's provisional remedy violates the Fourteenth Amendment and the Voting Rights Act itself. (Pet. Reh'g 10-12.) It does no such thing.

Cumulative voting, like all other at-large election systems, complies fully with the one-person-one-vote principle embodied in the Equal Protection Clause of the Fourteenth Amendment. *See generally,* Richard A. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States,* 1995 U. Chi. Legal F. 241, 282-84. As long as each person has equal voting power, the number of votes available to each voter does not raise equal-protection concerns.

Nor is there any credible argument here that cumulative voting affirmatively violates the Voting Rights Act by denying or abridging anyone's right to vote. Rather, what the Defendants seem to be suggesting is that cumulative voting is never a permissible remedy under the Voting Rights Act. That argument finds no

support in the text of the Act, and, as Justices O'Connor and Thomas noted in their concurring opinion in *Branch v. Smith,* 538 U.S. 254, 309-10 (2003), "a court could design an at-large election plan that awards seats on a cumulative basis, or by some other method that would result in a plan that satisfies the Voting Rights Act." *See also Holder v. Hall,* 512 U.S. 874, 910 (1994) (Thomas, J., concurring).

The Defendants' reliance on *Cousin v. Sundquist,* 145 F.3d 818 (6th Cir. 1998), and *Mallory v. Ohio,* 38 F. Supp. 2d 525 (S.D. Ohio 1997), *aff'd* 713 F.3d 377 (6th Cir. 1999), is overdone. The discussion of remedies in those cases is dictum because both courts held that the plaintiffs had not established the three preconditions for liability under the Voting Rights Act. And, to the extent that those cases suggest that a court may never use cumulative voting as a remedy, that dictum is irreconcilable with the later discussion of cumulative voting in *Branch.*

Finally, the Defendants are mistaken when they assert that "[n]o appeals court in the nation has allowed cumulative voting to be imposed as a remedy to a § 2 violation until this Court's panel."

(Pet. Reh'g 10.) In fact, the 11th Circuit recently did just that, and the Supreme Court subsequently denied review. *See Dillard v. Chilton County Comm'n,* 495 F.3d 1324, 1335 (11th Cir. 2007) (reversing a district court's order that had vacated a cumulative-voting remedy), *cert. denied sub nom. Green v. Chilton County Comm'n,* 128 S. Ct. 2961 (2008) (mem.). Although cumulative-voting remedies may not be widely used, *Dillard* makes clear that this case is not as exceptional as the Defendants suggest.

C. The panel's decision will not open any floodgates.

The Defendants lastly complain that the panel's decision will open the floodgates to litigation: "If this decision is allowed to stand, governmental bodies across this circuit will face the situation of being sued to change their forms of government, even though those governmental bodies cannot comply with the plaintiffs' demands as state law forbids it." (Pet. Reh'g 13.) This complaint lacks foundation, however, because jurisdictions can already be sued to change their "form of government," that is, the method of electing members of their governing bodies.

There have been hundreds of such lawsuits under the Voting Rights Act. *See* Ellen Katz et al., *Documenting Discrimination in Voting Under Section 2 of the Voting Rights Act Since 1982,* 39 U. Mich. J.L. Reform 643, 656 (2006); *see generally, Quiet Revolution in the South* (Chandler Davidson & Bernard Grofman eds., 1994). Most of these lawsuits have challenged at-large election systems, and most of these have occurred in the South. *See, e.g., Rogers v. Lodge,* 458 U.S. 613 (1982). This case would be exceptional indeed if the full Court were to hold that such suits are impermissible under the Voting Rights Act.

In reality, the panel's decision does not open any floodgates. It does *not* stand for the proposition that cumulative voting can be used to establish liability under the Voting Rights Act but only that a district court has the discretion, upon a finding of liability, to impose a remedy that the Court of Appeals previously identified as a permissible option. Voting-rights cases are difficult enough already, and the panel's decision makes them no easier.

CONCLUSION

This Court should deny the petition for rehearing en banc.

I verify that the original of this pleading has been signed and that I will maintain the pleading in accordance with 8th Circuit R. 25A(a).

Dated: January 15, 2009.

Respectfully submitted,

/s/Bryan Sells
BRYAN SELLS
LAUGHLIN MCDONALD
American Civil Liberties Union
Foundation, Inc.
230 Peachtree Street NW
Suite 1440
Atlanta, Georgia 30303
(404) 523-2721
(404) 653-0331 (fax)

PATRICK DUFFY
Patrick K. Duffy, LLC
P.O. Box 8027
629 Quincy Street, Suite 105
Rapid City, SD 57709-8027
(605) 342-1963

ATTORNEYS FOR THE
PLAINTIFFS-APPELLEES

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/Bryan Sells