

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

OPERATION RAINBOW-PUSH, INC.,)
G.A. HARDAWAY, and CLEO GRAY,)
)
Plaintiffs,)
)
v.) No. 06-2451 M1/V
)
SHELBY COUNTY ELECTION)
COMMISSION and CITY OF MEMPHIS,)
MEMPHIS CITY COUNCIL,)
)
Defendants.)

ORDER FOLLOWING HEARING ON PLAINTIFFS' MOTION FOR EMERGENCY
HEARING AND INJUNCTIVE RELIEF

Before the Court is Plaintiffs' Motion for Emergency Hearing and Injunctive Relief, filed July 24, 2006. The Court held a hearing in this cause on July 24, 2006, and at that time ordered further briefing on the issue of the appropriateness of preliminary injunctive relief. The Intervenor, Fred Davis, filed a Motion to Dismiss for Lack of Standing on July 27, 2006. Plaintiffs filed a Memorandum of Law in Support of Motion for Injunctive Relief on July 28, 2006. Also on July 28, 2006, Defendants filed a (1) Response to Plaintiffs' Request for Expedited Relief, (2) Response to Plaintiffs' Memorandum in Support of Injunctive Relief, and (3) Motion to Dismiss Plaintiffs' Amended Petition for Writ of Mandamus and Action for Declaratory Judgment. For the following reasons, Plaintiffs'

motion for injunctive relief is DENIED.¹

I. BACKGROUND

This case arises out of the upcoming election for members of the Charter Commission for the City of Memphis. The election also includes elections for County Mayor, Sheriff, Attorney General, County Commissioners, Shelby County judges, various court clerks, as well as State and Federal Democratic and Republic primaries. The election is scheduled to take place on Thursday, August 3, 2006. Voters were able to vote in advance from July 14 through July 28, 2006. Defendants estimate that as of July 26, 2006, 55,888 people voted early. (Aff. James Johnson ¶ 5.)

In 1966, pursuant to the Home Rule Amendment, Ordinance No. 1952, the City of Memphis adopted its current charter. As a home rule jurisdiction, Tenn. Const. Art XI § 9 requires that the City of Memphis have a charter commission, that the commission consist of seven members, and that those members be "chosen at large" in a municipal election. Pursuant to the adoption of home rule, Defendants initially established a system of voting for City officers whereby certain officers were elected to numbered posts by voters of the entire city, or at-large, and that all candidates had to win a majority of the votes in order to be elected. However, in 1995 in Muhammad v. City of Memphis, this

¹ For purposes of this order, the Court assumes without deciding that Plaintiffs have standing to bring this challenge.

Court found that the municipal elections in the City of Memphis violated Section 2 of the Voting Rights Act. (Order on Mots. for Partial Summ. J. and Cross-Mot. For Summ. J., Apr. 25, 1995, W.D. Tenn. Case No. 88-2899.) The Court found that this method of electing City officers had denied black citizens the same opportunity as white citizens to elect representatives of their choice. The Court entered a Permanent Injunction and Final Judgment against the City of Memphis on January 30, 1997. The injunction prohibited the City of Memphis from "enforcing a majority vote requirement in municipal elections for city-wide offices of the City of Memphis." (Permanent Inj. and Final J., Jan. 30, 1997, Muhammad v. City of Memphis, W.D. Tenn. Case Nos. 88-2899, 90-2093, 91-2139.)

Following the issuance of the permanent injunction, in the fall of 2004, the Memphis City Council adopted Ordinance No. 5079 to establish a system for municipal elections that would comply with the Tennessee Constitution's at-large requirement while eliminating majority voting. The ordinance established seven positions on the Charter Commission, one for each district. In order to qualify for a particular seat, the candidate must currently reside in the district and must have resided there for not less than six months preceding the election. (Ordinance No. 5079, Ex. 1, Aff. Lisa Geater.) All Charter Commissioners are elected at large. (Id.) That is, all municipal voters may vote for each seat.

On July 18, 2006, Plaintiffs filed the instant lawsuit in state court. The case was removed to federal court on July 21, 2006. Plaintiffs allege that the current method for electing Charter Commissioners dilutes black and minority voting power in violation of Article XI § 9 of the Tennessee Constitution, Tenn. Code Ann. § 6-53-1-5, and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. (Am. Petition ¶ 13.) Plaintiffs also contend that Defendants are required to obtain pre-clearance of any changes in voting mechanisms under sections 2 and 5 of the Voting Rights Act of 1965. (Id. ¶ 17.) Plaintiffs move for injunctive relief to halt the election on August 3, 2006.²

II. ANALYSIS

An injunction is an equitable remedy granted by the Court only when the grounds for such relief are clear. Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18, Int'l Typographical Union, 471 F.2d 872, 876 (6th Cir. 1972). "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981). A preliminary injunction is "an extraordinary remedy

² It is unclear whether Plaintiffs have withdrawn their request for injunctive relief. Plaintiffs' Amended Petition for Writ of Mandamus and Action for Declaratory Judgment, filed on July 25, 2006, seeks only declaratory relief and a writ of mandamus. However, Plaintiffs subsequently filed a Memorandum of Law in Support of Motion for Injunctive Relief. Accordingly, the Court will consider whether preliminary injunctive relief is warranted in this case.

which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." Overstreet v. Lexington-Fayette Urban County Gov't, 305 F.3d 566, 573 (6th Cir. 2002). When deciding whether to grant preliminary injunctive relief, courts must consider the following factors: (1) the likelihood of the movant's success on the merits; (2) the irreparable harm to the movant that could result if the injunction is not issued; (3) the impact on the public interest; and (4) the possibility of substantial harm to others. Basicomputer Corp. v. Scott, 973 F.2d 507, 511 (6th Cir. 1992). "[T]he four factors are not prerequisites to be met, but rather must be balanced as part of a decision to grant or deny injunctive relief." Performance Unlimited, Inc. v. Questar Publishers, Inc., 52 F.3d 1373, 1381 (6th Cir. 1995) (citing In re DeLorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985)). The Court will consider each factor in turn.

A. Likelihood of Success on the Merits

1. Tennessee Constitutional Claims

Article XI section 9 of the Tennessee Constitution requires that Charter Commission members be "chosen at large." Plaintiffs contend that requiring candidates to qualify and run from a particular district for a particular seat on the Commission violates the constitutional requirements of Art. XI § 9, because there is no qualifying requirement in the constitutional provision. (Mem. Law in Support Mot. Injunctive Relief 5.) It

is true that Art. XI § 9 does not set forth all of the qualifications for candidates and members of a charter commission. However, the Tennessee Supreme Court has held that the local legislative body of a home rule municipality has the discretion and power to establish such qualifications.

Washington County Election Cmm'n v. City of Johnson, 350 S.W.2d 601, 605 (Tenn. 1961). Plaintiffs do not explain how the current system violates the requirements of the Tennessee Constitution and point to no evidence in support of their proposition. The Court notes that the current system explicitly requires at-large voting, and that there is no provision in the Tennessee Constitution that requires at-large candidacy. Accordingly, the Court finds that Plaintiffs have not established a likelihood that their Tennessee Constitutional claim would succeed on the merits.

2. Section 5 of the Voting Rights Act

Section 5 of the Voting Rights Act requires that certain states or subdivisions conducting an election get clearance from the United States Department of Justice or a United States District Court before implementing changes in voting procedures. 42 U.S.C. § 1973c. Section 5 applies only to certain specified jurisdictions. See South Carolina v. Katzenbach, 383 U.S. 301, 315-16 (1966); 42 U.S.C. § 1973b. Tennessee is not a jurisdiction covered by Section 5 of the Voting Rights Act, nor

are any of its counties or cities. See 28 C.F.R. Part 51, Appendix. Accordingly, because Memphis and Shelby County are not subject to the provisions of section 5, Plaintiffs have failed to demonstrate a likelihood of success on the merits of this claim.

3. Section 2 of the Voting Rights Act

Section 2 of the Voting Rights Act provides as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973. The Supreme Court has long recognized that at-large voting schemes may violate the Voting Rights Act because "where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters."

Thornburg v. Gingles, 478 U.S. 30, 48 (1986). Nonetheless, the Gingles Court noted that at-large election schemes "are not per se violative of minority voters' rights." Id.

Plaintiffs allege that the current scheme violates section 2 of the Voting Rights Act because it dilutes the black vote. In order to prove a violation of section 2, a plaintiff must show its discriminatory effect. Mixon v. Ohio, 193 F.3d 389, 407 (6th Cir. 1999). Thus, to prevail on their claim, Plaintiffs must demonstrate that "in the particular situation, the practice operated to deny the minority plaintiff[s] an equal opportunity to participate and to elect candidates of their [sic] choice." S. Rep. No. 417, 97th Cong., 2d Sess. (1982), reprinted in 1982 U.S.C.C.A.N. 177, 207. This requires that Plaintiffs first make a threshold showing as delineated by the Supreme Court in Gingles:

1. The plaintiffs must demonstrate that the protected group is sufficiently large and geographically compact that it could constitute an effective majority in a single-member district.
2. The plaintiffs must show that the protected group is politically cohesive.
3. The plaintiffs must show that the majority votes sufficiently as a bloc to enable it usually to defeat the protected group's preferred candidate.

(Muhammad v. City of Memphis, W.D. Tenn., Case No. 88-2899, Order on Motions for Partial Summary Judgment and Cross-Motion for Summary Judgment, Apr. 25, 1995, at 9-10)(footnotes

omitted)(citing Gingles, 478 U.S. at 50).

Plaintiffs have not demonstrated that they meet the Gingles preconditions. The evidence demonstrates that African-Americans constitute the majority in four of the seven districts involved in the Charter Commission elections, meeting the first Gingles precondition. However, even assuming that Plaintiffs have met the second precondition and that African-Americans are politically cohesive, Plaintiffs have put forward no evidence to demonstrate that the white majority votes sufficiently as a bloc to defeat the black minority's preferred candidate.

Even if Plaintiffs had made this threshold showing, they would then be required to prove that, given the "totality of the circumstances," Ordinance No. 5079 will dilute the electoral strength of black voters and deny them a fair opportunity to elect representatives of their choice to the Charter Commission. See Rural West Tenn. African-American Affairs Council v. Sundquist, 209 F.3d 835, 841 (6th Cir. 2000).³ Plaintiffs have

³ In considering the totality of the circumstances, courts consider the factors set forth in the Senate Report which accompanied the 1982 amendments to the Voting Rights Act. The Senate Report factors include:

[T]he history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against

put forward no evidence to demonstrate that the current ordinance would deny them an opportunity to elect representatives of their choice. Defendants have put forward substantial evidence demonstrating that African-Americans are the majority population in Memphis, the majority voting population, and that they constituted the majority of voters in the most recent municipal election. Defendants note that, as of the 2000 Census, black citizens made up 58.9% of the total Memphis population, 54% of the voting age population, and 57% of the voters who actually voted in the last Memphis Municipal Election in October of 2003. (Resp. Pls.' Request for Expedited Relief 10.) Additionally, Defendants note that the number of black citizens who voted in the last three municipal elections, which occurred in 1995, 1999, and 2003, exceeded the number of white citizens who voted, and that a black mayor was elected in 1991, 1995, 1999, and 2003 as a result of an at-large vote in the City of Memphis. (Id.) Finally, Defendants point out that there is a black candidate for each seat for the Charter Commission. (Aff. James Johnson ¶ 7.) Plaintiffs have put forward no evidence to demonstrate how an at-

bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

large election would dilute the votes of the African-American population, which is the voting majority. Without more, Plaintiffs have failed to demonstrate that there is a likelihood that they would succeed on the merits on their section 2 claim.⁴

4. Equal Protection

Finally, Plaintiffs contend that the voting scheme operates to deny the black population of Memphis equal protection under the law because it impairs their right to vote. However, as noted above, Plaintiffs have failed to put forward any evidence to demonstrate how the current system for electing Charter Commissioners might impair the right of black Memphians to vote. Further, in order to prevail on an Equal Protection Clause or Fifteenth Amendment claim, the plaintiffs must prove discriminatory intent. Mixon, 193 F.3d at 407. "Where facially neutral legislation is challenged on the grounds that it discriminates on the basis of race, the enactment will be

⁴ In Plaintiffs' brief in support of injunctive relief, Plaintiffs for the first time raise the argument that Ordinance No. 5079 dilutes the vote of the Hispanic population. (Mem. Law in Support of Mot. Injunctive Relief 5.) Reserving the question of whether Plaintiffs have standing to raise a claim of dilution of the Hispanic vote, Plaintiffs have failed to meet any of the Gingles preconditions. The statistics cited by Defendants indicate that a challenge regarding dilution of the Hispanic vote would fail to meet the first precondition, as the entire Hispanic population in the City of Memphis was only 20,057 as of the 2000 census. That number would not constitute a majority of voters in a single district, even if the entire Hispanic population lived in only one district. (Resp. Pls.' Mem. Support Injunctive Relief 3.)

required to withstand strict scrutiny only if the plaintiff can prove that it was motivated by a racial purpose or object, or is unexplainable on grounds other than race." Moore v. Detroit Sch. Reform Bd., 293 F.3d 352, 369 (6th Cir. 2002).

Ordinance No. 5079 is facially neutral, and Plaintiffs make no allegation of discriminatory intent. Further, Defendants note that Ordinance No. 5079 was passed unanimously by six black members of the City Council and four white members. Given that the ordinance was passed by a majority of black councilmembers and that there is no indication that any of the councilmembers were motivated by discriminatory intent, the Court cannot find that Plaintiffs have established a likelihood of success on the merits of their Equal Protection argument.

Plaintiffs have failed to demonstrate a likelihood that they would succeed on the merits of their claims under any of the above four theories. Accordingly, this factor does not support the imposition of preliminary injunctive relief.

B. Irreparable Harm to Plaintiffs

Plaintiffs have not put forward evidence to demonstrate that they would suffer irreparable harm if the election for Charter Commissioners proceeds as scheduled. As noted above, the evidence supports Defendants' contention that the majority of voters in Memphis municipal elections are black voters. Even accepting Plaintiffs' contentions that voting in Memphis is

racially polarized, this evidence does not support the inference that the black vote would be diluted. As Plaintiffs have not demonstrated how they will be harmed if the at-large voting goes forward, this factor goes against the imposition of a preliminary injunction.

C. Impact on Public Interest

The Sixth Circuit has noted that there is a strong public interest against interfering with the electoral process immediately before an election. Summit County Democratic Central & Executive Comm. v. Blackwell, 388 F.3d 547, 551 (6th Cir. 2004). "There is a strong public interest in allowing every registered voter to vote freely. . . . [T]here is a strong public interest in smooth and effective administration of the voting laws that militates against changing the rules in the hours immediately preceding the election." Id. (finding that "the public interest weighs against the granting of the preliminary injunction"). In addition, there is a strong public policy against disenfranchising voters after they have already voted.

Plaintiffs filed their petition challenging the election on July 18, 2006. Public notice that the election would be held was given on March 27, 2006. However, Plaintiffs did not file their challenge until almost four months after public notice was given, and four days after the start of early voting. Currently, approximately 55,888 voters have participated in early voting.

(Aff. Johnson ¶ 5.) In addition, the regular election is scheduled to take place in just a few days. Plaintiffs have not demonstrated how an injunction would serve the public interest in light of the strong public policy against disenfranchising voters and interfering with elections. Summit County Democratic Central & Executive Comm., 388 F.3d at 551. Further, the Court notes that Defendants have submitted evidence that there is no way to remove only the Charter Commission candidates from the ballot; to do so, the Election Commission would have to remove the entire ballot and cancel the elections. (Aff. Johnson ¶ 6.) Accordingly, the Court finds that the public interest weighs heavily against the granting of an injunction.

D. Possibility of Substantial Harm to Others

The final factor to consider when weighing the appropriateness of preliminary injunctive relief is the possibility of substantial harm to others. The Court finds that this factor weighs against the imposition of a preliminary injunction.

As the Intervenor notes in his brief, the candidates have already spent considerable sums of money to promote their candidacy for this election. The candidates for Charter Commission have been campaigning for many months. The candidates have budgeted their funds under the assumption that their campaigns would conclude on Thursday, August 3, 2006. If

injunctive relief is granted,⁵ these candidates are faced with the prospect of having to raise money for additional campaigning for a rescheduled election at least months, if not years, in the future. Moreover, as the Intervenor points out, this burden inevitably would fall more heavily on some candidates than others.

As already noted, there would be no way to remove the charter commissioners from the ballot without removing the entire ballot. (Aff. Johnson ¶ 6.) Therefore, enjoining the election for Charter Commission would effectively enjoin the entire election, and would require all of the candidates, including those for County Mayor, Sheriff, Attorney General, United States Senate and House of Representatives, to continue their campaigns until the election was allowed to proceed. Finally, the City has gone to considerable expense to prepare the ballots and administer this election. Accordingly, the Court finds that there is a significant risk of substantial harm to others, and finds that this factor weighs against the granting of injunctive relief.

⁵ The Court notes that elections for Charter Commission are required to take place during a municipal election (Tenn. Const. Art. XI § 9), and there is no municipal election scheduled in November.

III. CONCLUSION

Plaintiffs have failed to demonstrate that the extraordinary remedy of preliminary injunctive relief is warranted in this case. Accordingly, Plaintiffs' motion for preliminary injunctive relief is DENIED. The Court makes no ruling as to the two pending motions to dismiss.

So ORDERED this 1st day of August, 2006.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT JUDGE