IN THE SUPREME COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

KONOU and LEHMAN,

Plaintiffs,

v.

KILUWE (as CEO) and KAWAKAMI (as AAG),

Defendants.

H.C. Civil Action No. 2019-069

ORDER DENYING MOTION FOR RECONSIDERATION

ON RECONSIDERATION BEFORE: CADRA, Chief Justice; SEABRIGHT,* and SEEBORG,** Associate Justices.

CADRA, C.J. and SEEBORG, AJ:

I. INTRODUCTION

On October 18, 2019, plaintiffs, Evelyn Konou and Anna Lehman, filed an "Emergency Motion for Rehearing/Reconsideration" of the Court's "Opinion on Removed Question." In their motion, plaintiffs request this Court to remove its decision of "prospective application of the finding of unconstitutionality of P.L. 2016-028." Plaintiffs also seek an order directing the High Court, "on an urgent basis, to compel testimony of the Chief Electoral Officer on the Electoral Administration's printing and ballot mailing capabilities," as well as directing the High Court to make certain specific orders which include the "printing and mailing of ballots to realistically enable return by November 25, 2019"; "acceptance of all registered voters' postal

* The Honorable J. Michael Seabright, Chief U.S. District Judge, District of Hawaii, sitting by designation of the Cabinet.

** The Honorable Richard Seeborg, U.S. District Judge, Northern District of California, sitting by designation of the Cabinet.

ballot applications"; and requiring "acceptance of all registered voters' postal ballot applications; and if necessary, delay of the election to provide full participation by all eligible voters."

We have reconsidered our opinion granting prospective application of our decision finding P.L. 2018-028 unconstitutional and DENY plaintiffs' requested relief.

II. DISCUSSION

A. This Court Has Authority To Give Prospective Effect To Its Decision

The clear legal principle stated in *Reynolds v. Sims*, 377 U.S. 533 (1964), is that a court can take into consideration the proximity of an election and "reasonably endeavor to avoid a disruption of the election process." *Id.* at 585. *Reynolds* has been consistently followed by United States courts when confronted with challenges to election laws brought on the verge of an election.[1]

[1] *See, e.g.*, *Chisom v. Roemer*, 853 F.2d 1186 (5th Cir. 1988) (the court concluding that state and local authorities, including the state legislature, should first be given a chance to correct the problem caused by the constitutional infirmity stating "a federal court should jealously guard and sparingly use its awesome powers . . ." where plaintiffs had asked the court to set aside long-standing statutes and intervene in state elections. *Id.* at 1189. In *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (en banc), the Ninth Circuit refused to postpone a California recall election noting "[t]he decision to enjoin an impending election is so serious that the Supreme Court has allowed elections to go forward even in the face of an *undisputed constitutional violation.*" *Id.* at 918 (citing *Ely v. Klahr*, 403 U.S. 108, 113, 115 (1972); *Whitcomb v. Chavis*, 396 U.S. 1055 and 396 U.S. 1064 (1970); *Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967) (emphasis added)); *see also Simpson v. Graves*, 1990 WL 182377, (U.S. Dist. Ct., D. Kansas, 10/30/90) (the court, despite finding the challenged statutes were unconstitutional denied immediate injunctive relief; rather, it granted prospective relief commenting on plaintiffs' bringing their claims in an untimely fashion and stating "[t]he core value of the law and its implementing judicial system is stability - the ability reasonably to anticipate the results of actions and proceedings by individuals and by legal institutions) (citation omitted). For this court to attempt to modify the election process as requested by the plaintiffs for the upcoming November 6, 1990, election would be to undermine that stability." As a general rule, last minute injunctions changing election procedures are strongly disfavored. *Purcell v. Gonzalez*, 548 U.S. 1, 4-5 (2006) ("Court orders affecting elections . . . can themselves result in voter confusion . . . As an election draws closer; that risk will increase."; *Ne. Coal. For the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006) ("[T]here is a strong public interest in smooth and effective administration of the voting laws that militates against changing

Plaintiffs argue *Reynolds* is distinguishable and, therefore, inapplicable to the instant case because *Reynolds* dealt with a reapportionment or redistricting issue whereas the instant case does not.[2] Plaintiffs' argument is unpersuasive.

Reynolds' directive is not limited to constitutional violations caused by reapportionment or redistricting plans.

> "It is now established beyond challenge that upon finding a particular standard, practice, or procedure to be contrary to either a federal constitutional or statutory requirement, the federal court must grant the appropriate state or local authorities an opportunity to correct the deficiencies." *Chison v. Roemer*, 853 F.2d 1186, 1192 (5th Cir. 1988.)

A diminution in the right to vote by districting as in *Reynolds* is as much a constitutional violation as an outright ban on the right to vote as in the instant case.[3] The precise nature of the unconstitutional statute (e.g. reapportionment statute as in *Reynolds* or postal ballot statute as in the instant case) does not change the analysis. If an election statute is declared unconstitutional the court should consider the effect of that declaration on imminently pending elections and give the legislature a reasonable opportunity to cure the constitutional deficiency.

B. The "Factual" Basis For This Court's Prospective Order

Plaintiffs argue this Court's prospective order "is not supported with evidence justifying the application of the 'prospective only' aspect of the opinion"[4] and characterize the issue of

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the rules in the middle of submission of absentee ballots."); *Summit Cty. Democratic Central and Executive Committee v. Blackwell*, 388 F.3d at 547, 551 ("It is particularly harmful to such interests to have rules changed at the last minute.").

[2] *See* Motion, p. 8.

[3] ". . . [T]he 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*, at 506.

[4] Motion, p. 5.

whether the government can comply within the time remaining prior to the November election as an "untested proposition."[5]

Plaintiffs' argument poses the wrong question, ignores the realities of the procedural posture of this case and further ignores foundational principles of separation of powers. We reject plaintiffs' argument.

This Court's opinion declaring P.L. 2016-028 unconstitutional "as applied to plaintiffs and those similarly situated" was issued on October 9, 2019. The election is scheduled for November 18, 2019. There was, thus, approximately six weeks available to the government to choose among various alternatives what method it would employ to comply with the Court's decision.[6] There is even less time available for the government to comply now as the election is approximately three weeks distant.

The issue is not, as intimated by plaintiffs, whether there is sufficient time to print postal ballots.[7] The issue is whether there is sufficient time for the government to choose among various alternatives available to it to bring the law into compliance with our decision. It is not the role of the Courts to tell or dictate to the legislature what choice it must make in that regard. An attempt to do so would raise separation of powers and rule of law issues. Given the proximity of the election, it is simply unrealistic to expect the government to engage the legislative machinery and processes necessary to implement its choice as to how to comply with our decision. This, it seems to us, is a matter of common-sense.

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[5] Motion, p. 2.

[6] Again, as emphasized in our opinion there is no constitutional mandate for postal voting. The government can choose among various alternatives to effectuate the right of universal suffrage.

[7] Motion, pp. 7-8.

III. CONCLUSION

Regardless of the reason for delay in bringing this case before the courts, the fact remains that there is insufficient time for the government to comply with our decision and a prospective order is appropriate. To hold otherwise would encourage tactically delayed filings of lawsuits with the intent of causing last minute disruption or postponement of scheduled elections and/or reverting by default to some prior statute which does not reflect the intent of the legislature and, presumably, the will of the people which the legislature represents.

We DENY plaintiffs' motion for Reconsideration.

Dated: October 28, 2019

/s/ Daniel N. Cadra
Daniel N. Cadra
Chief Justice

Dated: October 28, 2019

/s/ Richard Seeborg
Richard Seeborg
Associate Justice

SEABRIGHT, AJ, concurring:

I concur in the result only.

Dated: October 28, 2019

/s/ J. Michael Seabright
J. Michael Seabright
Associate Justice