

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

HANCOCK COUNTY BOARD OF SUPERVISORS	§	
	§	
v.	§	1:10CV564 LG-RHW
RUHR	§	

This document pertains to the following civil action consolidated with the above lead case:

NAACP, et al	§	
v.	§	4:11CV33 HTW-LRA
WAYNE COUNTY BOARD OF SUPERVISORS	§	
	§	

**WAYNE COUNTY DEFENDANTS' MEMORANDUM OF AUTHORITIES IN
SUPPORT OF MOTION TO DISMISS BASED ON MOOTNESS**

Wayne County, Mississippi, by and through the Wayne County, Mississippi, Board of Supervisors and Rose Bingham, in her official capacity as Circuit Clerk of Wayne County, Mississippi (hereinafter "Wayne County"), submit their Memorandum of Authorities in Support of Motion to Dismiss pursuant to Rule 12(b)(6) on the ground that this Court, as an Article III Court, no longer has before it an actual, ongoing controversy with respect to Plaintiffs' "one person, one vote" cause of action, and thus lacks subject matter jurisdiction by reason of mootness. Specifically, Plaintiffs' "one person, one vote" cause of action is moot by reason of the holding of the 2011 primary and general elections. These Defendants submit herewith their Memorandum of Authorities in support of the instant Motion.

1. This case is moot because the 2011 primary elections and general elections have already been held, whereby the very relief sought by the Plaintiffs - enjoining the

enforcement of state law relating to qualification deadlines and extending the date for the elections - is no longer available. The timing issue in 2011 was a critical factor, compounded by the need for Wayne County and other counties in these consolidated cases to comply with the preclearance requirements of Section 5 of the Voting Rights Act of 1965, as amended, extended and reauthorized in 2006.

2. Plaintiffs cannot salvage their “one person, one vote” cause of action from the mootness doctrine by reliance upon the “capable of repetition, yet evading review” exception, in the absence of any evidence creating a reasonable expectation or demonstrated probability that the same concurrence of the release of decennial census data in the same year as the quadrennial elections on the county level will be repeated. Any conclusory assertions by Plaintiffs that such actions are capable of repetition are legally insufficient under the applicable *Weinstein* test, which requires “a reasonable expectation that the same complaining party would be subjected to the same action again.” *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350, 353 (1975).
3. The inapplicability of the capable-of-repetition exception to the mootness doctrine in the instant case is based on four considerations: (a) application of the capable-of-repetition exception would call for speculation and conjecture about whether this kind of perfect storm is likely to recur in twenty years, (b) the Voting Rights Act Reauthorization and Amendments Act of 2006 expires by its own terms 25 years from July 2006 and Section 5 of the VRA is presently before the U.S. Supreme Court in *Shelby County v Holder*, a constitutional challenge that may well lead to its invalidation, (c) the assumption that Wayne County in 2030 will undergo population

changes sufficient to trigger a “one person, one vote” violation is pure speculation and does not rise to the level of a reasonable likelihood, and (d) even assuming that Plaintiffs’ present Complaint could be stretched to include, as it indeed does not, an implied demand for post-election relief, such relief is unavailable in the absence of deliberate misconduct such as an egregious violation of the Voting Rights Act.

Mootness as Corollary to Article III Requirement of Case or Controversy

“[A] federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.” *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (internal quotation marks omitted). “[T]o qualify as a case for federal court adjudication, a case or controversy must exist at all stages of the litigation, not just at the time the suit was filed.” *Bayou Liberty Ass’n*, 217 F.3d at 396.

In order to satisfy Article III, a plaintiff must demonstrate that a case or controversy exists at all stages of the litigation. See *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477–78 (1990); see also *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (“[T]hroughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.” (internal quotation marks omitted)). “Even where litigation poses a live controversy when filed, the [mootness] doctrine requires a federal court to refrain from deciding it if events have so transpired that the decision will neither presently affect the parties’ rights nor have a more-than-speculative chance of affecting them in the future.” *Clarke v. United States*, 915 F.2d 699, 701 (D.C.Cir.1990) (en banc). The doctrine of mootness is a logical corollary to Article III’s case-or-controversy requirement: if subsequent events make it impossible for the court to grant any effectual relief to the prevailing party, “any

opinion as to the legality of the challenged action would be advisory.” *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000); see *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969) (“Simply stated, a case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.”).

Fifth Circuit’s Remand Instructions: Determine Mootness

With these jurisdictional cornerstones in mind, the Fifth Circuit in the instant consolidated cases provided the following guidance for this Court in its remand decision, *Hancock County v Ruhr*, Slip Op. at 21:

Based on the record before us, however, we are unable to determine whether this controversy is live. To illustrate, because the district court has not evaluated mootness in the first instance, we lack access to factual findings with which to determine whether the “capable of repetition, yet evading review” exception to mootness is applicable to this case. Although we could assume that this controversy will reoccur every twenty years when the election cycle and census publication coincide, we decline the invitation to engage in such speculation. Cf. *Libertarian Party v. Dardenne*, 595 F.3d 215, 217–19 (5th Cir. 2010) (relying on evidence developed in district court to affirm district court's order that rejected applicability of “capable of repetition, yet evading review” exception and that dismissed case as moot); *Osborne v. Coleman Co., Inc.*, 592 F.2d 1239, 1241 (5th Cir.1979) (remanding for mootness determination because “the court below has never considered the effect” of the arguably moot event “upon the instant appeal”); 13C Charles Alan Wright & Arthur R. Miller et al., *Federal Practice & Procedure* § 3533.10.3 (3d ed. 2012) (“If the appellate court is unsure of the facts,

it is common to remand for consideration of mootness by the lower courts.”). Indeed, the district court has had no opportunity to consider this case in its post-election posture. See *Barrie v. Intervoice–Brite, Inc.*, 397 F.3d 249, 263 (5th Cir.2005) (noting that “the normal procedure where the lower court has not considered a pertinent issue is to remand a case”); *Boire v. Miami Herald Pub. Co.*, 343 F.2d 17, 25 (5th Cir.1965) (noting the principle that “a reviewing court should remand a case to the district court for consideration of a question not previously considered there”). In an abundance of caution, and because more factual development is needed, we remand this consolidated case to the district court so that it can determine whether this controversy is moot or is live. If the district court determines that this controversy is moot, the court must dismiss the case. If the district court determines that this controversy is live, the court must proceed to determine whether appellants' complaints—after allowing for proper amendments—adequately state a claim upon which post-election relief can be granted. Of course, new pleadings will be necessary; we do not forbid new counts. But if the district court determines that the appellants' complaints have failed to state a claim for post-election relief, the court must dismiss the case.

Capable of Repetition, yet Evading Review

The mootness doctrine has an exception for claims that challenge practices or conduct of a governmental entity that “no longer directly affect the attacking party, but are ‘capable of repetition’ while ‘evading review.’ ” *Alvarez v. Smith*, ---U.S. ---, 130 S.Ct. 576, 581, --- L.Ed.2d ---, 2009 WL 4573274, *4 (2009) (citing *Fed. Election Comm'n v. Wis. Right to Life*,

Inc., 551 U.S. 449, 462, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007); *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310 (1911)).

The two-prong exception to the mootness doctrine as set forth in *Weinstein v. Bradford*, 423 U. S. 147, 423 U. S. 149 (1975), “applies only in exceptional situations.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). To invoke the exception, a party must show that “(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.” *Wis. Right to Life*, 551 U.S. at 462, 127 S.Ct. 2652. Plaintiffs bear the burden of proving both prongs of this narrowly applied exception to the mootness doctrine.

Plaintiffs have failed to demonstrate that the action they challenged in 2011, namely, the August 2011 primary elections, was too short in duration for their claims as asserted in their Complaint filed against the Wayne County Defendants to be fully litigated on the merits prior to the holding of those elections. They have made no effort to prove the first prong of this exception to the mootness doctrine. Plaintiffs’ attempt to fit their claims with the first prong of the mootness exception misses the mark. While Plaintiffs ostensibly argue that Defendants’ conduct was too short in its duration to be fully litigated, the real challenged action here is the fact that the qualifying deadline came so soon after the issuance of the 2010 census data. It is not Defendants’ conduct that is too short to be litigated, and Plaintiffs have thus failed to prove the first prong of this exception to the mootness doctrine.

In election cases, moreover, the second prong may be satisfied upon a showing that other individuals would be affected by or subject to the same action again. Such a showing in this case requires a prediction of events that may or may not take place in 2031, the next occasion for the convergence of the release of decennial census data and the quadrennial elections in Mississippi.

Cf. Kucinich v. Tex. Democratic Party, 563 F.3d 161, 164 (5th Cir.2009). The second prong can only be satisfied, however, if the effects of the practice or conduct at issue “*will persist as the [restrictions] are applied in future elections.*” *Kucinich*, supra at 165, citing *Storer v Brown*, 415 U.S. at 737 n. 8, 94 S.Ct. 1274). Plaintiffs cannot make such a showing as a demonstrated probability.

“Reasonable Expectation” under Second Prong

The second prong of the capable-of-repetition exception to the mootness doctrine requires a showing of a reasonable expectation or demonstrated probability, and more than a hypothetical or theoretical possibility, that a party will be subjected to the same governmental action or conduct in the future.

In *Libertarian Party v. Dardenne*, 595 F. 3d 213 (5th Cir. 2010), the Fifth Circuit affirmed a finding of mootness and rejected the “capable of repetition, but evading review” exception. The Court reasoned that:

[u]nder the exception's “capable of repetition” prong, Appellants “must show either a ‘demonstrated probability’ or a ‘reasonable expectation,’” *Oliver v. Scott*, 276 F.3d 736, 741 (5th Cir.2002), that they will “be subject to the same [unlawful governmental] action again,” *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975). A “mere physical or theoretical possibility” is not sufficient to satisfy this prong of the exception. *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982). The allegedly unlawful governmental action in this case is the Secretary's unilateral establishment of a September 8 filing deadline. Appellants, therefore, must demonstrate that there is

a “reasonable expectation” that the Secretary will again unilaterally change filing deadlines in the future.

Appellants primarily rely on evidence showing that Louisiana frequently encounters hurricanes and tropical storms during presidential qualifying periods to show that there is a reasonable expectation that the Secretary will unilaterally change filing deadlines in the future. At most, Appellants' evidence shows that the Secretary will have an opportunity to act in the same allegedly unlawful manner in the future; however, it does not show a reasonable probability that the Secretary will act in that manner if given the opportunity. By proving opportunity, Appellants *have only demonstrated a “physical or theoretical possibility” that the Secretary may repeat his actions*, and such a demonstration is insufficient to meet their burden under the “capable of repetition” prong. *Murphy*, 455 U.S. at 482, 102 S.Ct. 1181; *McFarlin v. Newport Special Sch. Dist.*, 980 F.2d 1208, 1211 (8th Cir.1992) (finding that *evidence that there would be an opportunity for the unlawful action to occur again was insufficient to show “a reasonable probability that the same” action would occur again*).

Libertarian Party v. Dardenne was followed in *Lopez v. City of Houston*, 617 F.3d 336 (5th Cir. 2010), where the Fifth Circuit held that the Appellants failed to prove such a reasonable expectation. The Court addressed the exception to mootness for claims that are “capable of repetition, yet evading review,” noting that under the second prong, the party invoking jurisdiction must show a “demonstrated probability” or “reasonable expectation,” not merely a “theoretical possibility,” that it will be subject to the same government action. In concluding that Appellants’ claims were moot, the Court reasoned:

The appellants bear the burden of proving both prongs. ... Here, the City has not formed a policy that it will follow in future similar circumstances that are likely to repeat. Rather, in this case, the decennial U.S. Census will report the population of the City before the next city elections on November 8, 2011. See 13 U.S.C. § 141(a) (requiring census figures to be released no later than April 1, 2011). *At that time, one of three things will occur. One, the census may determine that the City's population is less than 2.1 million, in which case the City will determine based on information that is definitively the "best available" that the charter does not require the addition of two new council seats. Two, the census may report that the population has reached 2.1 million and the City will add the new seats pursuant to the charter, in which case the appeal will be moot because the relief requested will be provided. Three, the census might report that the population has reached 2.1 million and the City will choose to violate its own charter and not add the seats, in which case the appellants will have standing to challenge that decision.* However, the City pledged in its briefs before the district court, and before this Court, that it intended to add the seats should the 2010 Census determine that the population reached 2.1 million. In any case, merely showing that the government will "have an opportunity to act in the same allegedly unlawful manner in the future" is not enough to satisfy the second prong of the exception without a reasonable expectation that the government will act in that manner. Libertarian Party, 595 F.3d at 217. Appellants have not shown that there is a reasonable expectation that the City will choose to violate its charter. Any claims based on

the City's failure to redistrict or add new council seats prior to the 2009 election are moot. (emphasis added)

Speculation About the Perfect Storm in 2031

Similarly, in the instant case, Plaintiffs engage in speculation and conjecture about whether this kind of perfect storm that took place in 2011 is likely to recur in twenty years.

Twenty years from 2011 will be 2031. Plaintiffs necessarily assume that Wayne County in 2031 will undergo population changes sufficient to trigger a “one person, one vote” violation and require redistricting which in turn will have to be precleared under Section 5 of the Voting Rights Act before it can be effective as law. As in *Libertarian Party v. Dardenne* and *Lopez v. City of Houston*, such speculation does not rise to the level of a reasonable expectation or demonstrated probability to satisfy the second prong of the capable-of-repetition exception.

Plaintiffs’ speculation does not end with its conjectural guesswork about population changes that may or may not take place by 2031. Indeed, Plaintiffs necessarily assume that Section 5 of the Voting Rights Act will be in effect and enforceable in 2030 at the time of the next recurrence of the perfect storm of census data released during the year of a quadrennial election. Section 5 continuing vitality is now under attack in a pending constitutional challenge in *Shelby County v. Holder*, which may well lead to its invalidation. Even if Section 5 survives that challenge, the Voting Rights Act Reauthorization and Amendments Act of 2006 expires by its own terms 25 years from July 2006. The second prong of the ‘capable of repetition’ exception to the mootness doctrine requires “*a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party.*” *Wis. Right to Life*, 551 U.S. at 463 (internal quotation marks omitted). In determining whether such a reasonable

expectation exists in the instant case, the Court must consider *whether the “legal wrong complained of by the plaintiff”—rather than the precise factual scenario alleged—is “reasonably likely to recur.”* *Del Monte*, 570 F.3d at 324. Even in the electoral context, Plaintiffs are not able to show that others similarly situated are reasonably likely to suffer a comparable harm in the future.

In the instant case, Plaintiffs have made no showing of the reasonable likelihood of similar events transpiring in 2031 that allows them to meet their burden under the capable-of-repetition exception, and their “one person, one vote” claim must be dismissed as moot.

The two-prong exception to the mootness doctrine was applied in *Smith v. Winter*, 782 F.2d 508 (5th Cir. 1986), a decision that provides clear guidance on this issue. There, the Fifth Circuit upheld dismissal of a complaint brought by three members of the Claiborne County Board of Education for declaratory relief. The plaintiffs alleged that they were wrongfully subjected to a recall election. Applying the two-prong exception to mootness for claims “capable of repetition, yet evading review”, the Court found that the second prong:

does not apply because there is *no allegation or showing otherwise that appellants will be subjected to another recall petition*. Although all public officials are subject to recall under the Mississippi statute, *there is no reason to believe from the record that appellants are more likely to face a recall election today than are any other public officials*. See *O’Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) (*injury or threat of injury must be both “real and immediate,” not “abstract,” “conjectural,” or “hypothetical”*).

No Basis for Finding “Demonstrated Probability” or “Reasonable Expectation”

In *Wilson v. Birnberg*, 667 F.3d 591 (5th Cir. 2012), a prospective candidate who filed application to run for county office sought declaratory and injunctive relief against the county and state officials when his name was not placed on the primary election ballot, alleging denial of ballot access and deprivation of due process and equal protection rights. The prospective candidate’s request for injunctive relief in the form of an order requiring that his name be placed on the ballot for the upcoming election was dismissed on grounds of mootness after the election was held.

In a decision by Judge Leslie Southwick, the Court in *Birnberg* noted that generally a request for an injunction is moot upon the “happening of the event sought to be enjoined,” citing *Harris v. City of Houston*, 151 F.3d 186, 189 (5th Cir.1998), and held that the requested injunctive relief included orders that would have affected the November 2010 election, such as placing the prospective candidate’s name on the ballot. Since that was now impossible, “[c]laims solely supporting that remedy are moot.”

Turning to the prospective candidate’s equal protection claim and whether all relevant issues for declaratory and injunctive relief were moot now that the election had passed, the Court in *Birnberg* addressed the applicability of capable-of-repetition, yet evading-review exception to mootness.

As in *Birnberg*, Plaintiffs can point to no ‘reasonable expectation’ or a ‘demonstrated probability’ that the same controversy as took place in 2011 will recur. *Murphy v. Hunt*, 455 U.S. 478, 482 102 S. Ct. 1181, 71 L.Ed.2d 353

(1982), nor have Plaintiffs shown any basis upon which to find that other members of the public will experience or be affected by the same controversy.

Finally, just as the plaintiffs in *Birnberg*, Plaintiffs in this case run afoul of the principle that “[a] court will only invalidate an election in exceptional circumstances, usually when there has been egregious defiance of the Voting Rights Act.” *Lopez v. City of Houston*, 617 F.3d 336, 340 (5th Cir. 2010). As in *Birnberg*, Plaintiff’s claims with respect to the 2011 elections – the claims set forth in Plaintiff’s original Complaint – do not warrant that extraordinary remedy, and they have failed to show that equitable relief is appropriate because the relief is now moot.

Plaintiffs’ Demand for Invalidation of Past Elections

Even when an election has passed, invalidation of a past election can be an appropriate and viable remedy in certain instances that will save a claim from mootness, as in *NAACP v. Hampton Cnty. Election Comm’n*, 470 U.S. 166, 181-82, 105 S.Ct. 1128, 84 L.Ed.2d 124 (1985) (permitting a claim to proceed when plaintiffs sought election invalidation). Such invalidation is an extraordinary remedy that the courts will only employ in exceptional circumstances, as where there has been egregious defiance of the Voting Rights Act on the part of the covered entity. See *Watkins v. Mabus*, 502 U.S. 954, 112 S.Ct. 412, 116 L.Ed.2d 433 (1991) (mem.), aff’g in part, vacating as moot in part 771 F.Supp. 789 (S.D.Miss.1991); see also *Harris*, 151 F.3d at 189-91 (dismissing as moot a voting law case in which the complained-of election had passed); 25 AM.JUR.2D Elections § 133 (2010) (noting that invalidation of an election is a “drastic remedy”

that should only be employed where the government action “constitutes deliberate defiance” of the Act).

Plaintiffs’ “one person, one vote” claims in this case do not warrant such an extraordinary remedy. As in *Wilson v. Birnberg*, 667 F.3d 591 (5th Cir. 2012), Plaintiffs have failed to claim of the kind of egregious or invidious discrimination that would make invalidation of the 2011 election an appropriate remedy. Similarly, in *Lopez v. City of Houston*, 617 F.3d 336 (5th Cir. 2010), where minority voters sought to enjoin the November 2009 elections until the city council added two seats and redistricted, the Fifth Circuit in an opinion by Judge Edith Jones held that the plaintiffs had failed to allege the kind of egregious or invidious discrimination that would have made invalidation of the November 2009 election an appropriate remedy and would have saved their claim from mootness after the election passed.

Accordingly, these Defendants respectfully submit that the original claims asserted by the Plaintiffs with respect to the 2011 elections are moot, and Plaintiffs’ Complaint should be dismissed. Further, these Defendants submit that such a determination of mootness should precede any consideration of Plaintiffs’ pending Motion to Amend, since the threshold issue of mootness is one of subject matter jurisdiction *vel non*, and a determination that this Court lacks subject matter jurisdiction precludes consideration of any further claims for relief in this civil action and renders any amendment of those claims a futility.

Conclusion

Based upon the above argument and authorities, the Wayne County Defendants respectfully submit that their Motion to Dismiss based upon the fact that Plaintiffs’ “one

person, one vote” cause of action is now moot is well taken and should be granted pursuant to applicable Fifth Circuit precedent and in accordance with Rule 12(b)(6), Fed. R. Civ.Proc.

FILED, this the 4th day of December, 2012.

GRIFFITH & GRIFFITH

By: /s/ Benjamin E. Griffith
Benjamin E. Griffith, MSB #5025
**Attorney filing on behalf of Wayne
County, MS, Board of Supervisors and
Rose Bingham, in her official capacity as
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CERTIFICATE OF SERVICE

I, Benjamin E. Griffith, counsel for **DEFENDANTS, WAYNE COUNTY, MISSISSIPPI, BOARD OF SUPERVISORS and ROSE BINGHAM** in her official capacity as **CIRCUIT CLERK OF WAYNE COUNTY, MISSISSIPPI**, in the above case, do hereby certify that I have this day caused a true and correct copy of the above and foregoing *Wayne County Defendants' Memorandum of Authorities in Support of Motion to Dismiss Based on Mootness* to be delivered by the federal ECF filing system to all counsel of record who have appeared in this case.

FILED, this 4th day of December, 2012.

Benjamin E. Griffith
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