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

HANCOCK COUNTY BOARD OF SUPERVISORS — **PLAINTIFF**

VS. — **CIVIL ACTION NO. 1:10cv564-LG-RHW**

KAREN LADNER RUHR, in her official capacity, ET AL. — **DEFENDANTS**

consolidated with

NAACP, ET AL.
VS. — **CIVIL ACTION NO. 3:11cv121-LG-RHW**
COPIAH COUNTY BOARD OF SUPERVISORS, ET AL.

NAACP, ET AL.
VS. — **CIVIL ACTION NO. 3:11cv122-LG-RHW**
PIKE COUNTY BOARD OF SUPERVISORS, ET AL.

NAACP, ET AL.
VS. — **CIVIL ACTION NO. 3:11cv123-LG-RHW**
SIMPSON COUNTY BOARD OF SUPERVISORS, ET AL.

NAACP, ET AL.
VS. — **CIVIL ACTION NO. 3:11cv124-LG-RHW**
AMITE COUNTY BOARD OF SUPERVISORS, ET AL.

NAACP, ET AL.
VS. — **CIVIL ACTION NO. 4:11cv33-LG-RHW**
WAYNE COUNTY BOARD OF SUPERVISORS, ET AL.

NAACP
VS. — **CIVIL ACTION NO. 5:11cv28-LG-RHW**
WARREN COUNTY BOARD OF SUPERVISORS, ET AL.

NAACP

VS. **CIVIL ACTION NO. 5:11cv29-LG-RHW**
CLAIBORNE COUNTY BOARD OF SUPERVISORS, ET AL.

NAACP, ET AL.
VS. **CIVIL ACTION NO. 5:11cv30-LG-RHW**
ADAMS COUNTY BOARD OF SUPERVISORS, ET AL.

ATTORNEY GENERAL'S MEMORANDUM OF AUTHORITIES SUPPORTING MOTION TO DISMISS ON ACCOUNT OF MOOTNESS

I. Introduction.

Shortly after 2010 census data was released during the legislatively established 2011 county election cycles, plaintiffs filed these consolidated "one person, one vote" lawsuits against several Mississippi counties to halt the 2011 elections in favor of immediate supervisor district reapportionment. Last year, the Court held plaintiffs lacked standing and otherwise failed to state a claim. Plaintiffs appealed, and the Fifth Circuit held some of them have standing. But the Court of Appeals did not decide whether the claims had any merit. Instead, the cases were remanded for this Court to determine whether they are moot, before deciding any other issues regarding the lawsuits.

Now, almost two years after these consolidated cases were initiated, all the claims for injunctive and declaratory relief sought by plaintiffs are indeed moot. The elections have been held and the elected supervisors are serving their current terms. The relief sought by plaintiffs would not be effective.

Plaintiffs will certainly argue their claims are not moot. They will likely assert the "capable of repetition, yet evading review" exception applies. But they had plenty of time to litigate their claims before the 2011 elections, and can only speculate they will face the same factual scenario again, far in the future. They will probably claim their complaints expressly seek "pre-election relief," so the Court should find they impliedly seek "post-election relief." But it is too late for a do over. They will also likely contend that amending their complaints by adding an entirely new claim, under a new theory, should save their cases from mootness. But since their claims are moot – as the Fifth Circuit has instructed, and consistent with federal law – these consolidated cases must be dismissed instead of allowing an amendment.

In short, plaintiffs had the opportunity to litigate their claims. The opportunity to grant their requested relief has passed. Now the Court must take this opportunity to dismiss plaintiffs' complaints because they are moot.

II. Facts.

On February 28, 2011, plaintiffs filed eight individual lawsuits against the defendant Boards of Supervisors, and other county elected and party officials, of Adams, Amite, Claiborne, Copiah, Pike, Simpson, Warren and Wayne counties. The cases were initially filed in various divisions of this Court. Shortly thereafter, the Attorney General intervened and moved to consolidate the cases with two

previously filed lawsuits involving similar legal issues.[1] On March 23, 2011, the ten cases were consolidated.[2]

Plaintiffs' complaints targeting each separate set of county defendants sought relief based entirely on an alleged Fourteenth Amendment "one person, one vote" theory. Specifically, plaintiffs complained that 2010 United States census data – released in February 2011 – demonstrated an impermissible population deviation among then-current supervisor districts in the defendant counties.[3] Plaintiffs sought ***only*** the following relief:

> a. A declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202, that the present apportionment scheme and the actions and inactions of the defendants violate rights secured to plaintiffs by the 14th amendment to the United States Constitution;
>
> b. A temporary restraining order, preliminary injunction, and/or a permanent injunction enjoining the defendants from conducting elections under the existing redistricting plans for supervisor in [each respective] county;
>
> c. A temporary restraining order and a preliminary injunction, enjoining the candidate qualification deadline for March 1, 2011

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[1] The first two lawsuits were filed by the Hancock and Madison County Boards of Supervisors. Those lawsuits were dismissed in May 2011 along with the current plaintiffs' lawsuits, and the Hancock and Madison County Boards did not appeal from dismissal of their cases.

[2] Order Granting Consolidation, Docket No. 33. References to Docket Numbers included herein refer to documents filed under the primary cause number (1:10cv564) unless otherwise noted.

[3] *See* Complaints at ¶¶ 21-23, Docket Nos. 1 in Nos. 3:11cv121, 3:11cv122, 3:11cv123, 3:11cv124, 4:11cv33, 5:11cv28, 5:11cv29, and 5:11cv30. According to the complaints, by plaintiffs' calculations, the 2010 census figures revealed a population deviation among the most populated and least populated supervisor districts in each county as follows: Adams (39.46%), Amite (49.05%), Claiborne (56.17%), Copiah (40.36%), Pike (18.86%), Simpson (26.70%), Warren (52.74%), and Wayne (30.20%). Some or all of the counties will likely be able to prove plaintiffs' analyses are inaccurate. However, that proof is not material to the issues presently before the Court.

for the office of supervisor in [each respective] County, Mississippi for a short period of time in order to give the [each respective] County, Mississippi Board of Supervisors an opportunity to redistrict the supervisor districts and obtain preclearance of the redistricting plan;

d. A temporary restraining order, preliminary injunction, and/or a permanent injunction requiring that any new redistricting plan for supervisors in [each respective] County, Mississippi comply with the 14th and 15th amendments to the United States Constitution, 42 U.S.C. § 1983, and §§ 2 and 5 of the Voting Rights Act of 1965, as amended and extended, 42 U.S.C. §§ 1973(e) and 1973c; and

e. Award plaintiffs court costs and a reasonable attorneys fee pursuant to 42 U.S.C. § 1973(e) and 1988; and

f. Grant plaintiff general relief.[4]

None of the complaints specifically sought "post-election" forms of relief in connection with the 2011 supervisor elections.

On March 25, 2011, the Attorney General moved to dismiss plaintiffs' complaints for lack of standing and failure to state a claim.[5] On May 16, 2011, following briefing and a hearing, the Court dismissed each case on standing grounds, and, alternatively, on the merits.[6] On May 19, 2011, plaintiffs filed

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[4] *See* Complaints at pp. 7-8, Docket No. 1 in Civil Action Nos. 3:11cv121, 3:11cv122, 3:11cv123, 3:11cv124, 4:11cv33, 5:11cv28, 5:11cv29, and 5:11cv30.

[5] Motion to Dismiss, Docket No. 43. While briefing on the Motion to Dismiss was ongoing, several plaintiffs sought to amend their complaints. Each proposed amendment sought to include additional plaintiffs, purportedly to cure apparent standing problems encountered by the original plaintiffs. *See* Proposed Amended Complaints, Docket Nos. 51-1, 53-1, 54-1, 55-1, 62-1, 63-1, 64-1, and 65-1 . Significantly, however, none of the 2011 proposed amendments sought to add any new claims or any new requests for relief.

[6] Memorandum Opinion and Order of Dismissal, Docket No. 143. The Court's order also denied plaintiffs' outstanding motions to amend. As noted above, none of the amendments sought to add any new claims or any new requests for relief. They only sought to add new plaintiffs to some of

Motions to Reconsider, and, on June 1, 2011, Motions for Stay Pending Appeal.[7] On June 13, 2011, all of plaintiffs' post-judgment and stay motions were denied.[8]

On June 28, 2011, plaintiffs appealed the Memorandum Opinion and Order of Dismissal and post-judgment rulings to the Fifth Circuit Court of Appeals.[9] Plaintiffs did not subsequently seek a stay pending appeal, and did not ask the Fifth Circuit to expedite their appeal.[10]

Meanwhile, during the proceedings in this Court and on appeal, the 2011 supervisor elections in each defendant county were held. Numerous deadlines and requirements were met, including significantly: the candidate qualifying period (January 1, 2011 – March 1, 2011); party primary elections (August 2, 2011); and general elections (November 8, 2011). In January 2012, the newly elected Boards of Supervisors of each respective county took office for their current terms.

Eight months later, on August 31, 2012, the Fifth Circuit vacated and remanded this Court's May 16, 2011 Memorandum Opinion and Order of Dismissal.[11] The Court of Appeals determined that some of the plaintiffs –

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the individual cases.

[7] *See* Motions to Reconsider, Docket Nos. 144-146; Motions for Stay Pending Appeal, Docket Nos. 147 and 148.

[8] Order, Docket No. 163; Text Order dated June 13, 2011.

[9] Notice of Appeal, Docket No. 164. An Amended Notice of Appeal was filed on the following day. Amended Notice of Appeal, Docket No. 165.

[10] *See* Fed. R. App. P. 8 (procedure for obtaining stay from Court of Appeals following motion in the district court); Fifth Circuit Local Rule 27.5 (procedure for motion to expedite appeals).

[11] The Fifth Circuit's opinion was not officially reported but is now included in this Court's docket at Docket No. 166.

particularly each local branch of the NAACP and some (unidentified) individual plaintiffs – had satisfied the pleading requirements for standing.[12] But the Fifth Circuit did not address this Court's alternative determination that none of the plaintiffs stated a claim on the merits. Instead, the Court of Appeals suggested the case may be moot given that the 2011 elections were completed while the consolidated cases were on appeal.[13] Accordingly, this Court's prior opinion was not reversed in its entirety. The order was vacated, and the cases were remanded with specific instruction to address the mootness question before any other issues.[14]

On November 7, 2012, Magistrate Judge Walker held a status conference with the parties. Judge Walker required plaintiffs to file any motion seeking mootness discovery by November 16, 2012, and defendants to file any motions addressing the mootness issue by December 7, 2012.[15] Plaintiffs have since filed motions to amend their complaints and to conduct mootness discovery.[16] As of this writing, the Court has not decided those motions. However, the mootness question is ready for determination.

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[12] Fifth Circuit Opinion at p. 18, Docket No. 166.

[13] *Id*. at pp. 18-21, Docket No. 166.

[14] *Id*. at p. 21, Docket No. 166.

[15] *See* Minute Entry and Deadlines entered by the Court on November 7, 2012.

[16] Motion to Amend Complaints in Consolidated Cases, Docket No. 168; Motion for Discovery, Docket No. 169. Plaintiffs' motions to amend were also filed individually under each of the case numbers consolidated in this action.

III. Plaintiffs' Lawsuits are Moot.

A. The Elections Plaintiffs Sought to Enjoin have Taken Place.

The claims alleged in plaintiffs' complaints are moot. A case or controversy "must exist at all stages of the litigation, not just at the time the suit was filed."[17] Generally, in cases involving injunctive relief, a controversy is moot "once the action that the plaintiff sought to have enjoined has occurred . . .."[18]

Plaintiffs' complaints in these consolidated case seek: (1) a declaratory judgment that the counties' supervisor apportionment schemes (as existing when the complaints were filed) violate the "one person, one vote" principle, (2) an injunction barring the counties from conducting their 2011 elections on the then-existing supervisor lines, (3) an injunction extending the 2011 statutory candidate qualification deadline indefinitely and until new district lines are implemented, (4) an injunction requiring that any "new" district lines conform with applicable law, (5) an attorneys fees award, and (6) general (but unspecified) relief.[19]

In each county in Mississippi, the 2011 supervisor election qualifying deadline passed long ago. Board of Supervisors primary elections were held on August 2, 2011, and general elections were held on November 8, 2011. The elections were held on statewide time tables established by Mississippi statutes

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[17] *Bayou Liberty Ass'n v. U.S. Army Corps of Eng'rs*, 217 F.3d 393, 396 (5th Cir. 2000).

[18] *Seafarers Int'l Union of N. Am. v. National Marine Servs., Inc.*, 820 F.2d 148, 151-52 (5th Cir. 1987).

[19] *See* n. 4, above. Plaintiffs' complaints do not specifically include a request for special elections, other post-election relief.

(previously pre-cleared by Department of Justice) and using district lines devised prior to the 2010 Census (also previously pre-cleared by the Department of Justice). Elected supervisors took office in January 2012. When the qualifying deadline passed, and the elections were held, plaintiffs' claims seeking to enjoin those events became moot.[20]

B. The "Capable of Repetition, Yet Evading Review" Doctrine does not Apply.

Plaintiffs will likely resist dismissal on mootness grounds by invoking the "capable of repetition, yet evading review" exception. The "capable of repetition, yet evading review" doctrine requires proof of two elements: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."[21]

Plaintiffs' cases do not satisfy the first element. They had ample time to present their claims to this Court in Spring 2011. Their cases were dismissed on May 16, 2011. Plaintiffs appealed on June 29, 2011. They sought a stay or

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[20] Plaintiffs' other claims for relief not specifically related to election deadlines are also moot, or at most, incapable of effective relief, now. Plaintiffs are not entitled to their requested declaratory relief because there is no live case or controversy to be resolved here. In such circumstances, a declaratory judgment would amount to an impermissible advisory opinion. *See Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977). Similarly, plaintiffs cannot obtain injunctive relief compelling defendants to draw "new" lines that comply with the law. Injunctive "obey the law" commands are improper. *See*, *e.g.*, *Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 897 (5th Cir. 1978), *cert. denied*, 99 S.Ct. 118 (1978) (explaining injunctive relief merely requiring defendants to "'obey the law' cannot be sustained"). Furthermore, it should go without saying that plaintiffs' request for an attorneys' fees award is no longer a live issue, given none of their other claims is viable.

[21] *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

injunction pending appeal, but the motion was denied.[22] After that initial unsuccessful stay motion, with five months remaining prior to the general election, they never petitioned the Fifth Circuit for a stay or even sought expedited consideration of their appeal.[23]

There was plenty of time to litigate the case in 2011 before the elections. In hindsight, plaintiffs cannot complain that their claims could not be fully litigated in time to achieve the relief they requested.

Plaintiffs' lawsuits also fail to meet the second element. To satisfy the second part of the "capable of repetition, yet evading review" test, a party must show a "demonstrated probability" or "reasonable expectation," not merely a "theoretical possibility" that it will be subject to the same government action again.[24] Plaintiffs may speculatively argue that census data will be released in the same year as supervisor elections every twenty years, therefore, the same type of controversy will repeat itself twenty years from now and that purportedly makes their claims non-moot.

A "twenty year recurrence" argument does not satisfy plaintiffs' burden of proof for numerous reasons. First, it is entirely uncertain when census data will be published in 2031. Since it is impossible to know when census data will be

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[22] *See* June 13, 2011 Text Order.

[23] *See Bayou Liberty Ass'n*, 217 F.3d at 398-99 (recognizing availability procedures for seeking expedited review diminishes argument that certain actions are inherently capable of avoiding review).

[24] *Libertarian Party v. Dardenne*, 595 F.3d 215, 217 (5th Cir. 2010).

published in 2031, it is impossible to know what impact it might have on any election schedule in 2031. Second, there is no basis to conclude the "same complaining party would be subjected to the same action again" in 2031. The 2030 census may not reveal population shifts requiring reapportionment to comply with the "one person, one vote" principle in the counties involved here. Third, there is no reasonable basis to conclude the particular voters here will reside in "under-represented" supervisor districts in 2031. Fourth, there is no way to determine what will be the election schedule in 2031. The candidate qualifying deadline, or other statutory mandated deadlines and requirements, may be different.[25] In turn, a different schedule might have an impact on when county reapportionment could reasonably be accomplished in advance of the 2031 elections. Speculation about future facts in 2031 does not satisfy the "reasonable expectation" requirement for "capable of repetition, yet evading review."[26]

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[25] For example, the qualifying deadline and filing requirements for the 2011 supervisor elections were established by Miss. Code Ann. § 23-15-299(2). That statute has been amended by the Legislature numerous times, and most recently in 2000, 2003, 2006, and 2007.

[26] *See Hall v. Beals*, 396 U.S. 45, 49-50 (1969) (declining to assume speculative contingencies to satisfy "capable of repetition, yet evading review" exception); *McCarthy v. Ozark School Dist.*, 359 F.3d 1029, 1036 (8th Cir. 2004) (explaining "[a] speculative possibility is not a basis for retaining jurisdiction over a moot case."); *Vivian Tankships Corp. v. State of Louisiana*, 254 F.3d 1080, 2001 WL 563773, at *3 (5th Cir. 2001) (finding speculative chain of events necessary for claims for injunctive and declaratory relief to recur insufficient to satisfy mootness exception); *Tobin for Governor v. Illinois State Bd. of Elections*, 268 F.3d 517, 528-29 (7th Cir. 2001) (finding case moot where only pure speculation could be used to conclude political organization would find itself in same situation in future); *New Jersey Turnpike Authority v. Jersey Cent. Power and Light*, 772 F.2d 25, 33 (3rd Cir. 1985) (recognizing "'[c]apable of repetition' is not a synonym for 'mere speculation;' it is a substantive term on which the moving party must provide a reasonable quantity of proof - perhaps even by preponderance of the evidence."); *Whitfield v. City of Ridgeland*, 2012 WL 1668887, at *4-6 (S.D. Miss. May 11, 2012) (holding factual scenario necessary to satisfy "capable of repetition" exception to mootness was far too speculative and unlikely to recur).

Furthermore, the Fifth Circuit has already underscored the point. It explained courts should not speculate that a controversy, similar to plaintiffs' here, will occur every twenty years.[27] This Court should likewise decline to credit plaintiffs' prediction of the facts at least two Censuses, and possibly two redistricting cycles, from now to satisfy the "reasonable expectation" element.[28] Plaintiffs cannot satisfy either requirement for "capable of repetition, yet evading review," and that mootness exception cannot save their claims from dismissal.

C. The Court's Authority to Grant Special Election Relief does not Save Plaintiffs' Claims from Mootness.

Plaintiffs may also argue their lawsuits are not moot because federal courts generally have authority to award "post-election" relief in an elections case when "pre-election" relief has been requested.[29] However, the fact that the Court has

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[27] Fifth Circuit Opinion at p. 20, Docket No. 166 ("[a]lthough 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.").

[28] Additionally, the foregoing demonstrates why plaintiffs' proposed mootness "discovery" is of no moment. The Court has not ruled on their Motion for Discovery. However, the proposed discovery seeks to establish facts about past election cycles and county reapportionment. *See* Plaintiffs' Proposed Interrogatories and Requests for Production, Docket Nos. 169-1 and 169-2. Responses to the discovery will not establish when census data will be available, the election deadlines, or anything else regarding the 2031 elections. For at least those reasons, responses to plaintiffs' proposed discovery would still require the Court to speculate about 2031 and thus does not support application of the "capable of repetition, yet evading review" exception.

[29] Plaintiffs have previously asserted that requesting "pre-election relief" automatically entitles them to "post-election relief." *See*, *e.g.*, Motion to Amend at pp. 5-7, Docket No. 168. For purposes of analyzing mootness in these particular cases, the Court does not need to opine on the merits of plaintiffs' mistaken proposition. Notably, however, merely requesting "pre-election relief" does not automatically entitle plaintiffs to "post-election relief." Plaintiffs must *actually prove* a *valid* claim for "pre-election relief" to obtain "post-election relief." All of the cases cited by plaintiffs to support their proposition involved instances where federal courts determined plaintiffs had proved an entitlement to "pre-election relief" but that relief could not be ordered due to imminent elections, or other circumstances. To the contrary, in these consolidated cases, plaintiffs have never proven they have valid claims. Their requested injunctive relief was not denied because they were entitled to it,

authority to order a special election, or any other particular remedy, does not mean exercising that authority would be appropriate in these particular consolidated cases. Potential special election relief that plaintiffs could have previously specified in their complaints, or they are now attempting to read into their complaints given the benefit of hindsight, do not save their claims from mootness.

Whether pled or not, a potentially available special election remedy alone does not save otherwise moot election claims. In *Lopez v. City of Houston*,[30] the Fifth Circuit faced a local election dispute similar to plaintiffs' claims here and rejected their precise argument. In *Lopez*, minority voters in Houston brought a challenge to the city's assessment of its population and alleged improper failure to redistrict and add new city council seats on Fourteenth Amendment and other grounds.[31] The voters sought an order enjoining the November 2009 elections until the city redistricted and two new seats were added.[32] The district court denied their relief, the elections were held, and then the voters appealed.[33]

On appeal, the voters argued their claims were not moot because the Court could invalidate the election and require a new election after adding two new

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and it could not be implemented prior to the 2011 elections.

[30] 617 F.3d 336 (5th Cir. 2010).

[31] *Id.* at 339.

[32] *Id.*

[33] *Id.*

council seats.[34] The Fifth Circuit recognized that "[i]nvalidation of a past election can, in some instances, be a viable remedy that will save a claim from mootness even if the election has passed."[35] However, "invalidation is a extraordinary remedy that can only be employed in exceptional circumstances, usually when there has been an egregious defiance of the Voting Rights Act on the part of the covered entity."[36] Since the voters had not demonstrated any "egregious defiance" of the Voting Rights Act, their claims were not saved from mootness because special elections might have been an available remedy.[37]

In these consolidated cases – like the voters in *Lopez* – Plaintiffs have not pled or proven any factual allegations supporting a conclusion that special elections should be ordered to remedy their alleged injuries. The original complaints themselves demonstrate these are not cases of "egregious defiance" of law. At best, these cases show that the 2010 census data was released at a time when the defendant counties could not complete their reapportionment processes, obtain federally mandated Department of Justice preclearance, and meanwhile comply

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[34] *Id.* at 340.

[35] *Id.* (citing *NAACP v. Hampton Cnty. Election Comm'n*, 470 U.S. 166, 181-82 (1985)).

[36] *Id.* (collecting authorities).

[37] *Id. See also Wilson v. Birnberg*, 667 F.3d 591, 595-97 (5th Cir. 2012) (holding requested injunctive relief affecting local election was mooted by election taking place and that new election was not appropriate as claims did not warrant such an "extraordinary remedy"); *Harris v. City of Houston*, 151 F.3d 186, 189 (5th Cir. 1998) (explaining injunctive relief becomes moot upon happening of event sought to be enjoined and finding injunctive and declaratory relief claims moot while refusing to read additional requests for relief into plaintiffs' claims in local elections dispute that might prevent application of mootness doctrine).

with the legislatively established 2011 supervisor election requirements and deadlines.

There simply was no "egregious defiance" of the law attendant to the counties' actions or inactions here. Plaintiffs do not even specify any such claim. Special elections would be an entirely inappropriate remedy. The fact that the Court has the authority to award special elections, generally, does not save plaintiffs' claims from mootness here, specifically.

D. Plaintiffs' Recent Proposed Amendments Should not be Considered in the Court's Mootness Analysis.

Apparently believing that all of their claims as originally pled are now moot, plaintiffs recently filed a consolidated Motion to Amend their original complaints.[38] The proposed amended complaints seek to add specific allegations that plaintiffs are seeking "post-election" relief, and include a new cause of action for violation of Section 2 of the Voting Rights Act.[39] The county defendants have opposed the Motions to Amend.[40] As of this writing, the Court has not ruled on the motions.

The proposed amendments are not a valid method to sidestep mootness. Allowing an amendment to avoid mootness would be contrary to the Fifth Circuit

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[38] Consolidated Motion to Amend, Docket No. 168.

[39] Proposed Amended Complaints at pp. 7-8, Docket Nos. 168-1, 168-2, 168-3, 168-4, 168-5, 168-6 and 168-7. As pointed out in several of the county defendants' responses to plaintiffs' Motion to Amend, plaintiffs' proposed statutory "Section 2" claim involves an entirely different theory, standards of proof, and other considerations from the constitutional "one person, one vote" claims the complaints assert.

[40] Responses to Motions to Amend, Docket Nos. 180, 183 and 185. Some of the county defendants' Responses were docketed under the individual assigned case numbers. *See* Docket Nos. 22 (No. 4:11cv33), 23 (No. 5:11cv28), 24 (No. 3:11cv123), 22 (No. 3:11cv121) and 13 (No. 3:11cv124).

panel's prior instructions. This Court is specifically obligated to determine whether these cases must be dismissed as moot *before* considering any proposed amendments:

> [i]n 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.[41]

Moreover, even without the Fifth Circuit's explicit instruction, it would be improper for plaintiffs to revive their moot claims through an amendment. In federal cases, "when the court has no jurisdiction over the *claims* in the original complaint, it must dismiss the case, and it has no jurisdiction to permit an amendment."[42]

In summary, plaintiffs' claims are now moot. The Court should accordingly dismiss all the original complaints in these consolidated cases. Otherwise, if the

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[41] Fifth Circuit Opinion at p. 21 (emphasis added), Docket No. 166.

[42] *Alabama v. U.S. Army Corps of Engineers*, 382 F.Supp.2d 1301, 1316 (N.D. Ala. 2005) (collecting authorities) (emphasis in original). *See also Fox v. Board of Trustees of the State Univ. of New York*, 148 F.R.D. 474, 482-83 (N.D. N.Y. 1993) (refusing to allow plaintiffs to amend after case became moot, because the court lacked a live controversy to address, and therefore lacked subject matter jurisdiction over the action), *aff'd*, 42 F.3d 135 (2nd Cir. 1994), *cert. denied*, 515 U.S. 1169 (1995); Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall dismiss* the action.") (emphasis added).

Court somehow determines the original claims are not moot, then, and only then, should the Court consider plaintiffs' Motions to Amend, the defendants' arguments against the proposed amendments, and/or arguments favoring dismissal of any amended complaints, if, and when, they are filed. In any event, plaintiffs' proposed amended complaints are irrelevant to consideration of whether their cases are now moot.

IV. Conclusion.

For the reasons set forth above, all of plaintiffs' claims are now moot. No exception to mootness, or any other valid reason to hold otherwise exists. The Attorney General therefore respectfully requests that the Court dismiss plaintiffs' complaints in each of these consolidated cases.

THIS the 7th day of December, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been filed electronically with the Clerk of Court and thereby served on all counsel who have appeared of record to date.

THIS the 7th day of December, 2012.

S/Justin L. Matheny
Justin L. Matheny