

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

HANCOCK COUNTY BOARD OF
SUPERVISORS, *ET AL.*

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VERSUS

C. #1:10-CV-564LG-RHW

RUHR, *ET AL.*

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

ADAMS COUNTY, MISSISSIPPI BRANCH
OF THE NAACP, and JACQUELINE MARSAW,
on behalf of themselves and all others similarly
situated

VERSUS

C. #5:11-CV-30DPJ-FKB

ADAMS COUNTY, MISSISSIPPI BOARD OF
SUPERVISORS, *ET AL.*

ADAMS COUNTY DEFENDANTS' MEMORANDUM OF AUTHORITIES
IN SUPPORT OF THEIR MOTION TO DISMISS FOR
MOOTNESS OF PLAINTIFFS' CAUSE

COMES NOW the Defendants, ADAMS COUNTY, MISSISSIPPI BOARD OF SUPERVISORS; ADAMS COUNTY, MISSISSIPPI BOARD OF ELECTION COMMISSIONERS; AND EDWARD WALKER, in his capacity as Adams County Circuit Clerk, (hereinafter "Adams County") by and through counsel, and files this its Memorandum of Authorities in Support of their Motion to Dismiss for Mootness of Plaintiffs' Cause, and in submits the following:

INTRODUCTION

Because of the passage of time since the this Court's dismissal and the remand by the United States Court of Appeals for the Fifth Circuit, this Court no longer has jurisdiction of this cause. As discussed in more detail herein, the requested relief related to the 2011 election is now moot. The issue before this Court is whether this case still presents a justiciable issue or whether, given the occurrence of the event, it is now moot.

While the case may have been justiciable when filed, the fact that the 2011 elections have now been held causes it to be no longer justiciable. There is no dispute that there must be an actual controversy to satisfy the constitutional limitations on the Court's power as set out in Article III, Section 2 of the United States Constitution. "The question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between the parties having adverse legal interest, of sufficient immediacy as reality to warrant. . . a judgment." *Maryland Casualty Company v. Pacific Coal & Oil Company*, 312 U.S. 270, 273 (1941). Therefore, it is not enough that the controversy existed at the time a plaintiff files a complaint. Furthermore, the Court should only look to the plaintiff's complaint to determine whether a justiciable controversy actually exists. *See O'Shea v. Littleton*, 414 U.S. 488 (1974).

In the case at bar, approximately two years has passed since this case was filed against the Adams County Defendants. The elections at issue in the Plaintiffs' Complaint has occurred and the elected supervisors are currently serving their terms. The relief sought by the Plaintiffs would provide no actual relief in this case. The Plaintiffs may argue that their case falls within one of the exceptions to mootness. However, Plaintiffs' reliance on the recognized exceptions to mootness is misplaced. The Plaintiffs had plenty of time to fully litigate their claims prior to the

2011 elections. To claim that these Plaintiffs may face the same issues in twenty years is merely conjecture or hypothetical, and not a real and immediate injury creating jurisdiction in this Court. Furthermore, Plaintiffs attempt to assert post-election relief at this late hour in the case does not necessarily create a live controversy as the courts are reluctant to grant the post-election relief sought by the Plaintiffs. Because the pre-election relief complaint is moot, the Court is deprived of the jurisdiction to consider the Plaintiffs' amendments.

Therefore, the Plaintiffs had the opportunity to timely litigate their claims and seek their pre-election relief. The failure of the Plaintiffs to do this has rendered their case moot, and this Court should dismiss this Complaint as it is moot.

RELEVANT FACTS

Plaintiffs filed their Complaint against Adams County on February 28, 2011, alleging a violation of the one person, one vote mandate protected by the Equal Protection Clause of the 14th Amendment to the United States Constitution. Plaintiffs' claims are based on the 2010 census data which was released in February 2011. *See Complaint at Doc No. 1 in Case No. 5:11cv30*. By Court Order on March 7, 2011, the Attorney General for the State of Mississippi intervened in this action and filed an Answer and Motion to Dismiss. On March 17, 2011, Adams County filed its Answer to the Complaint as a responsive pleading.

In the case at bar, the Plaintiffs sought the following relief:

- a. A declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2203, 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 permanent injunction enjoining the defendants from conducting elections under the existing redistricting plans for supervisor in Adams County, Mississippi;
- c. A temporary restraining order and preliminary injunction, enjoining the candidate qualification deadline for March 1, 2011 for the office of supervisor in Adams County, Mississippi for a short period of time in order to give the Adams 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 for Adams 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 and 1973(c);
- e. Award plaintiffs court costs and a reasonable attorney's fee pursuant to 42 U.S.C. §§ 1973(e) and 1988; and
- f. Grant Plaintiffs general relief.

See Complaint at pp. 7-8, Docket No. 1 in Civil Action 5:11cv30. It should be noted that Plaintiffs did not seek any post-election relief.

On May 16, 2011, this Court dismissed each case on standing grounds and, alternatively, on the merits. [Docket No. 143]. On June 28, 2011, Plaintiffs appealed this Court's Order dismissing their cases to the United States Court of Appeals for the Fifth Circuit. [Docket No. 164]. On August 31, 2012, the Fifth Circuit vacated this Court's prior Order of Dismissal and remanded this case for further proceedings. Specifically on remand, the Fifth Circuit instructed this Court is to determine "whether this controversy is moot or is live." *Hancock County Bd. of Supervisors v. Ruhr, et al.*, 2012 U.S. App. LEXIS 18521, at 21 (5th Cir., August 31, 2012). If this action is moot it should be dismissed. *Id.*

Adams County Defendants submit that in between the filing of the notice of appeal and the Fifth Circuit's decision, the 2011 elections for county supervisors were held. In January 2012, the newly elected Board of Supervisors took office for their current term. Therefore, Adams County Defendants submit that the mootness issue is ready for consideration by this Court.

LAW AND ARGUMENT

I. PLAINTIFFS CLAIMS ARE MOOT FOR LACKING A JUSTICIABLE ISSUE.

While the case may have been justiciable when filed, but the fact that the 2011 elections have now been held causes it to be no longer justiciable. The threshold issue here is does the complaint allege an actual case or controversy as required by Article III of the Constitution. *See O'Shea*, 414 U.S. at 493. "Plaintiffs in the federal courts must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." *Id.* "The injury or threat of injury must be both real and immediate, not conjecture or hypothetical." *Id. at 494*. Therefore, this Court cannot review this case if it is moot due to the lack of case or controversy. *See DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974).

Plaintiffs seek declaratory judgment that the apportionment schemes violate the one person, one vote principle, injunctive relief to stop the Defendant from conducting the 2011 elections and to extend deadlines until new district lines are implemented, injunctive relief that any new districts comply with applicable law, and attorneys fee, court costs and general relief.

Adams County Defendants submit that the 2011 election did in fact proceed as originally scheduled. The elected Board of Supervisors for Adams County, Mississippi have assumed their office and have been performing their governmental functions since taking office. At the time the Supervisors took office, the Plaintiffs claims became moot as the relief sought could not be granted. Therefore, their complaint should be dismissed by this Court.

II. THE PLAINTIFFS CLAIMS DO NOT FALL UNDER THE “CAPABLE OF REPETITION, YET EVADING REVIEW” EXCEPTION.

Tipped off by the Fifth Circuit, the Plaintiffs will likely argue that their otherwise moot claims raise a judicable issue because it is “capable of repetition, yet evading review.” Adams County Defendants submit that Plaintiffs reliance on this exception is misplaced. *Sosna v. Iowa*, 419 U.S. 393 (1975) is the first case that recognized the “capable of repetition, yet evading review” exception to the law of mootness. To claim this exception to the mootness doctrine, the Plaintiffs must meet 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.” See *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). Plaintiffs bear the burden of proving the two elements of this exception.

Plaintiffs in the case at bar fail to carry their burden for this exception to the mootness doctrine. Plaintiffs had sufficient time to pursue their claims prior to the 2011 elections. At no time did the Plaintiffs seek a stay from the Fifth Circuit while this matter was on appeal. The Plaintiffs had sufficient time to litigate their case prior to this Court’s dismissal, and had options to protect their claims while on appeal. Their failure to do so cannot be saved by the first

element of the “capable of repetition, yet evading review” exception to the mootness doctrine.

Likewise, Plaintiffs claims fail to satisfy the second element of the “capable of repetition, yet evading review” as the Plaintiffs cannot prove that these same individual plaintiffs will be subject to the same government action. *Libertarian Party v. Dardenne*, 595 F.3d 215, 217 (5th Cir. 2010). The Court in *Libertarian Party* held that the plaintiffs “must show either a demonstrated probability or reasonable expectation that they will be subject to the same government action again.” *Libertarian Party*, 595 F.3d at 217. (Internal quotes omitted). “A mere physical or theoretical possibility is not sufficient to satisfy this prong of the exception. *Id.*

Plaintiffs may argue that this same “injury” may occur every twenty years when the census data will be released in the same year as supervisor elections. However, this twenty year occurrence is too remote and speculative to save their claim from the mootness doctrine. Furthermore, Plaintiffs cannot assure that the same individual plaintiffs will be in the same districts, or that that district will be under-represented. Finally, Plaintiffs cannot show that all of the deadlines and requirements for the 2031 election will be the same as the 2011 election.

The Fifth Circuit recognized this issue. It declined to speculate as to whether these same plaintiffs would be subject to the same controversy every twenty years. *Hancock County Bd. of Supervisors*, 2012 U.S. App. LEXIS 18521, at 20. This Court should likewise decline to engage in the type of speculation required to overcome the application of the mootness doctrine to this case.

III. PLAINTIFFS' NEW POST-ELECTION RELIEF DOES NOT SAVE THEIR COMPLAINT FROM DISMISSAL AS MOOT.

The Plaintiffs may allege that post-election relief is available in this case, and therefore saving it from dismissal under the mootness doctrine. As set forth herein, a case before a federal court must meet the “case or controversy” requirement at all stages of the litigation. *See Lopez v. City of Houston*, 617 F.3d 336, 340 (5th Cir. 2010). Therefore, if the Court cannot grant any relief for a plaintiff’s claim, the case will be dismissed as moot. “Invalidation of past election can, in some instances, be a viable remedy that will save a claim from mootness even if the election has passed.” *Id.* “But such invalidation **is an extraordinary remedy that can only be employed in exceptional circumstances**, usually when there has been egregious defiance of the Voting Rights Act on the part of the covered entity. *Id.* (Emphasis added).

In the case at bar, the Plaintiffs failed to seek any post-election relief in their Complaints. Further, Plaintiffs never allege that the Adams County Defendants acted in any egregious manner in its compliance with the Voting Rights Act, nor can the Plaintiffs point to any action by the Adams County Defendants to meet that threshold. Therefore, the Plaintiffs’ claims as alleged in their Complaints are moot. Plaintiffs have failed to establish that they are entitled to the extraordinary relief discussed in *Lopez*.

CONCLUSION

Adams County moves this Court to dismiss the Plaintiffs' Complaint against it as moot. The Plaintiffs fail to establish that this case falls within any exception to the mootness doctrine. There is no dispute that the relief sought cannot be given as the 2011 elections have been held and the Supervisors are currently serving their term. The Plaintiffs did not specifically seek any post-election relief nor can they establish any right to the same. To invalidate the elections is an extraordinary action for this Court to undertake. The Plaintiffs have not established that they are entitled to the same given that they failed to stay the elections at the appellate level or to expedite the appeal itself. Therefore, this Court should dismiss the Plaintiffs' Complaint against Adams County as being moot for lacking any justiciable claims.

Respectfully submitted, this the 10th day of December, 2012.

DIAMOND & BLALOCK, P.L.L.C.

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CERTIFICATE OF SERVICE

I, Jeremy P. Diamond, counsel for DEFENDANTS, ADAMS COUNTY, MISSISSIPPI BOARD OF SUPERVISORS; ADAMS COUNTY, MISSISSIPPI BOARD OF ELECTION COMMISSIONERS; AND EDWARD WALKER, in his capacity as Adams County Circuit Clerk, in the above case, do hereby certify that I have this day caused a true and correct copy of the above and foregoing *Memorandum of Authorities in Support of their Motion to Dismiss for Mootness of Plaintiffs' Cause* to be delivered by the federal ECF filing system to all counsel of record who have appeared in this case.

SO CERTIFIED, this the 10th day of December, 2012.

By: s/Jeremy P. Diamond
JEREMY P. DIAMOND