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

HANCOCK COUNTY BOARD OF SUPERVISORS	§	
V.	§	**NO. 1:10CV564 LG-RHW**
RUHR	§	
MADISON COUNTY BOARD OF SUPERVISORS, *et al.*	§	
V.	§	**NO. 3:11CV119 LG-RHW**
STATE OF MISSISSIPPI	§	
NAACP, *et al.*	§	
V.	§	**NO. 3:11CV121 LG-RHW**
COPIAH COUNTY BOARD OF SUPERVISORS	§	
NAACP, *et al.*	§	
V.	§	**NO. 3:11CV121 LG-RHW**
PIKE COUNTY BOARD OF SUPERVISORS	§	
NAACP, *et al.*	§	
V.	§	**NO. 3:11CV123 LG-RHW**
SIMPSON COUNTY BOARD OF SUPERVISORS	§	
NAACP, *et al.*	§	
V.	§	**NO. 3:11CV124 LG-RHW**
AMITE COUNTY BOARD OF SUPERVISORS	§	
NAACP, *et al.*	§	
V.	§	**NO. 4:11CV33 LG-RHW**
WAYNE COUNTY BOARD OF SUPERVISORS	§	

NAACP, *et al.*	§	
V.	§	**NO. 5:11CV28 LG-RHW**
WARREN COUNTY BOARD OF SUPERVISORS	§	
	§	
NAACP, *et al.*	§	
V.	§	**NO. 5:11CV29 LG-RHW**
CLAIBORNE COUNTY BOARD OF SUPERVISORS	§	
	§	
NAACP, *et al.*	§	
V.	§	**NO. 5:11CV30 LG-RHW**
ADAMS COUNTY BOARD OF SUPERVISORS	§	
	§	

PLAINTIFFS' REVISED MEMORANDUM OF AUTHORITIES IN OPPOSITION TO THE DEFENDANTS' MOTIONS TO DISMISS ON GROUNDS OF MOOTNESS

COME NOW the individually named plaintiffs and local branches of the National Association for the Advancement of Colored People ("NAACP") in the following civil action numbers involving the following counties: 5:11cv30-LG-RHW (Adams County); 3:11cv124-LG-RHW (Amite County); 3:11cv121-LG-RHW (Copaih County); 3:11cv122-LG-RHW (Pike County); 3:11cv123-LG-RHW (Simpson County); 5:11cv28-LG-RHW (Warren County); and 4:11cv33-LG-RHW (Wayne County); and file this their memorandum of authorities in opposition to the motions to dismiss on grounds of mootness filed by the defendants, (1) the Adams County defendants [the Adams County, Mississippi Board of Supervisors; Adams County, Mississippi Board of Election Commissioners; and Edward Walker], (2) the Amite County defendants [the Amite County, Mississippi Board of Supervisors], (3) the Copiah County defendants [the Copiah County, Mississippi Board of Supervisors; Copiah County, Mississippi Board of Election Commissioners; and Edna Stevens], (4) the Pike County defendants [the Pike County, Mississippi Board of

Supervisors], (5) the Simpson County defendants [the Simpson County, Mississippi Board of Supervisors; Simpson County, Mississippi Board of Election Commissioners; and Cindy Jensen], (6) the Warren County defendants [the Warren County, Mississippi Board of Supervisors; Warren County, Mississippi Board of Election Commissioners; and Shelly Ashley-Palmetree], and (7) the Wayne County defendants [the Wayne County, Mississippi Board of Supervisors; Wayne County, Mississippi Board of Election Commissioners; and Rose Bingham], and the intervenor, Mississippi Attorney General Jim Hood ("Hood"). This memorandum of authorities sets forth an introduction and the relevant facts, plaintiffs' claim and requested relief, the parties burdens, argument opposing the defendants' motions, and a conclusion.

INTRODUCTION AND THE RELEVANT FACTS

Mississippi law provides that each county shall be governed by a five member board of supervisors elected from single member districts every four years. The term of members of the board of supervisors is four years. The last election was held in 2011, with a candidate qualification deadline of March 1, 2011. Political party primaries were held on August 2, 2011, run-offs were held on August 23, 2011, and a general election was held on November 8, 2011. Supervisor candidates elected in 2011 took office on January 1, 2012 to serve four year terms of office.

The 2010 federal decennial census was published in early February, 2011. The census reflected that supervisor districts in the challenged counties[1] were unconstitutionally

[1]The Claiborne County, Mississippi Branch of the NAACP and the defendants in that case do not have counsel representing them. Counsel for all parties in the Claiborne County case withdrew while the case was on appeal. Therefore, only the plaintiffs in the Adams, Amite, Copiah, Pike, Simpson, Warren, and Wayne Counties cases are continuing to prosecute their cases.

malapportioned.[2]

Plaintiffs, the NAACP Branches and individual African-American voters in each of the challenged counties, filed a "one-person" one vote claim against the defendants on February 28, 2011. Plaintiffs also filed motions requesting temporary restraining orders and preliminary injunctions seeking to enjoin the 2011 elections in the challenged counties and an order shortening "the terms of office and set aside any elections under the malapportioned scheme."

Plaintiffs alleged that members of the NAACP Branches were voters in over populated and under represented districts in each of the challenged counties.[3] Plaintiffs also alleged that they were aggrieved by the unconstitutional malapportionment of supervisor districts. Plaintiffs further alleged that they " would be aggrieved if elections are held under the grossly malapportioned existing apportionment scheme **with the candidates elected being allowed to hold office for the next four years**."

Plaintiffs requested temporary restraining orders and preliminary injunctions **"enjoining the defendants from conducting elections under the existing redistricting plans,"**[4] and **"requiring that any new redistricting plan for supervisors for [each county] comply with the 14th and 15th amendments to the United States Constitution, 42 U. S. C. § 1983, and §§ 2 and 5 of the Voting**

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[2]Plaintiffs allege the total range of deviation in each of the counties is as follows: Adams County (39.46%), Amite County (49.05%), Copiah County (40.36%), Pike (18.86%), Simpson (26.70%), Warren (52.74%), and Wayne (30.20%).

[3]Plaintiffs also alleged that Rev. Frank Lee was a voter in an over populated and under represented supervisor district in Pike County, Mississippi.

[4]All of the challenged counties have not redistricted. The malapportioned plans are still in place in most of the counties. Any special election or the next regular election will be held under the existing malapportioned schemes in most of the counties.

Rights Act of 1965, as amended and extended, 42 U. S. C. §§ 1973 and 1973c." Finally, plaintiffs requested general relief.

The Amite County Board of Supervisors devised a plan and submitted it to the United States Attorney General for review under § 5 of the Voting Rights Act of 1965, 42 U. S. C. § 1973c. Plaintiffs understand that the Attorney General interposed a timely objection to Amite County's plan.

Plaintiffs and the defendants will be faced with this controversy every 20 years. Every 20 years the federal decennial census will be published before the candidate qualification deadline and election dates, and the counties will not redistrict and obtain preclearance[5] of the plans prior to the elections.

Plaintiffs object to the defendants' motion to dismiss on grounds of mootness because the defendants' motions to dismiss on grounds of mootness are not ripe since the defendants have failed to respond to mootness related discovery. The United States Court of Appeals for the Fifth Circuit in the appeal of this case in *Hancock County Board of Supervisors vs. Ruhr*, supra, held:

> 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....Indeed, the district court has had no opportunity to consider this case in its post-election posture....
>
> 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.

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[5]The constitutionality of the current version of § 5 is under review by the United States Supreme Court. See, *Shelby County, Ala. v. Holder*., *cert. granted* November 9, 2012, Sup. Ct. No. 12-96.

[Slip Opinion, pp. 18-21]. The Fifth Circuit expressly stated that "more factual development is needed" before a final determination is made on the issue of mootness. The plaintiffs, pursuant to that holding, submitted interrogatories and requests for production of documents to the defendants on November 14, 2012. The defendants have not responded to plaintiffs' discovery requests. Instead, the defendants filed a motion to dismiss on grounds of mootness. This Court should stay any ruling on the defendants' motion to dismiss on grounds of mootness until after the mootness related discovery has been completed.[6] See, *Association of American Physicians and Surgeons v. Clinton*, 879 F. Supp. 103 (D. D. C. 1994).

Furthermore, without waiving their objection, the plaintiffs submit that the same parties, the NAACP Branches and the boards of supervisors, will face the same dilemma every 20 years. Every 20 years if the counties are malapportioned and the boards of supervisors fail to redistrict and obtain preclearance of their redistricting plans before the election, and plaintiffs seek pre-election relief, the period of time involved will not be sufficient for plaintiffs to fully litigate the matter before the election.[7] In that regard, the case is capable of repetition but yet evading review.

Finally, without waiving their objection, the plaintiffs submit that the defendants cannot carry their heavy burden of proving the plaintiffs' claims are moot. As discussed above, plaintiffs have requested relief which has not been mooted by the 2011 elections and the controversy is capable of

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[6]The discovery relates to the issues of when the census is published every 20 years, when the boards of supervisors adopt plans after the census is published every 20 years, when the boards of supervisors obtain preclearance of adopted plans every 20 years after the census is published; and when elections are held every 20 years after the census is published.

[7]The plaintiffs have submitted discovery on these issues to the defendants, but the defendants refused to answer the discovery before they filed their motions to dismiss on grounds of mootness.

repetition but yet evading review.

PLAINTIFFS' CLAIM AND REQUESTED RELIEF

Plaintiffs filed an equal protection "one-person, one-vote" dilution claim against each of the challenged counties. Plaintiffs requested injunctions enjoining elections under malapportioned plans. Plaintiffs also sought to enjoin the 2011 elections. Plaintiffs sought injunctive relief requiring the defendants to promptly redistrict in compliance with the 14th and 15th amendments to the United States Constitution and §§ 2 and 5 of the Voting Rights Act of 1965, as amended and extended.[8] Finally, plaintiffs requested an injunction shortening the terms of office holders elected under malapportioned plans.[9]

THE PARTIES BURDENS

The defendants have filed motions to dismiss asserting that the controversy is moot. Plaintiffs have countered that there is a live controversy. "The party asserting mootness bears the 'heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." defense has the burden of proving mootness. *Del-Ray Battery Co. v. Douglas Battery Co.,* 635 F. 3d 725, at 729 (5th Cir. 2011). See, also, *Pederson v. Louisiana State University*, 213 F. 3d 858, at 874 (5th Cir. 2000) (same). When a plaintiff has requested injunctive relief and interim events have not "completely and irrevocably eradicated the effects of the alleged violation," then the case is not moot. *Pederson v. Louisiana State University*, supra, at 874, *quoting, County of Los Angeles v. Davis*, 440 U. S. 625, 631, 99 S. Ct. 1379, 59 L. Ed. 2d 642 (1979). The

[8]42 U. S. C. §§ 1973 and 1973c.

[9]Plaintiffs requested general relief in their complaint and the specific relief of shortened terms of office in their motions for temporary restraining orders and preliminary injunctions.

defendants have asserted the mootness defense. Therefore, the defendants have the heavy burden of proving that plaintiffs' requested injunctive relief has been "completely and irrevocably eradicated the effects of the alleged violation." *Pederson v. Louisiana State University*, supra, at 874. As discussed below, the defendants cannot meet this burden because plaintiffs requested injunctive relief: (1) enjoining all elections under the malapportioned plans, including the 2011 elections; (2) shortening the terms of office of those elected under the malapportioned plans; (3) orders requiring the defendants to promptly redistrict and obtain preclearance of plans that satisfy **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 1973c**, and, except for the 2011 supervisor elections, there have been no events that completely eradicated plaintiffs' requested relief.

Plaintiffs have also asserted that the controversy is capable of repetition but yet evading review. "There are two prongs to the 'capable of repetition, yet evading review' exception,...and ... [the plaintiffs bear the burden of proving both prongs." *Libertarian Party v. Dardenne*, 585 F. 3d 215, 216-217 (5th Cir. 2010). Plaintiffs have propounded interrogatories and requests for production of documents to the defendants to obtain evidence supportive of both prongs of the capable of repetition but yet evading review exception to the mootness doctrine. The defendants have steadfastly refused to provide that information. The requested information is critical to plaintiffs' proof that the capable of repetition, but yet evading review exception to the mootness doctrine applies in this case. The Court should withhold ruling on the defendants' mootness motion until after the defendants have provided the information requested and plaintiffs given adequate time to address the exception. *Association of American Physicians and Surgeons v. Clinton*, supra.

ARGUMENT IN OPPOSITION TO THE DEFENDANTS' MOTIONS

Plaintiffs have asserted the instant case is not moot because (1) there is a live controversy and (2) the controversy is capable of repetition but yet evading review. A discussion of the defense and the exception to the mootness doctrine is set out below.

The controversy is live because plaintiffs alleged they are aggrieved by the malapporitoned and districts and by supervisors being elected and continue to serve a full four-year term in the malapporitoned districts. In essence, plaintiffs alleged valid equal protection claims. See, *Moore v. Ogilvie*, 394 U. S. 814, at 816, 89 S. Ct. 1493, at 1494, 23 L. Ed. 2d 1 (1969) ("The need for its resolution thus reflects a continuing controversy in the federal-state area where our 'one man, one vote' decisions have thrust"); *Pope v. County of Albany*, 687 F. 3d 565 (2nd Cir. 2012).

The plaintiffs also have a valid "equal representation" claim. The one-person, one-vote principle "ensures that every voter, no matter what district he or she lives in, will have an equal say in electing a representative." *Daly v. Hunt*, 93 F. 3d 1212, 1216 (4th Cir. 1996). See, also, *Garza v. County of Los Angeles*, 918 F. 2d 763 (9th Cir. 1990), *cert. denied*, 498 U. S. 1028, 111 S. Ct. 681, 112 L. Ed. 2d 673 (1981). The principle "also ensures that every person receives equal representation by his or her elected officials." *Daly v. Hunt*, supra, at 1216. After all, "representational equality is at least as important as electoral equality in a representative democracy." *Id*., at 1226-27; *NAACP-Greensboro Branch v. Guilford County Board of Elections*, 858 F. Supp. 2d 516, at 523 (M. D. N. C. 2012).

In the present case, plaintiffs requested pre-election relief. Plaintiffs also requested post-

election relief.[10] Plaintiffs requested the Court to enjoin the 2011 elections for supervisor, order the counties to adopt, preclear, and implement constitutional precleared plans that did not result in discrimination against African-American voters, and to shorten the terms of office of supervisors elected under unconstitutional malapportioned plans. The requested relief reflects a live controversy until the relief is granted. See, *Tucker v. Buford*, 603 F. Supp. 276 (N. D. Miss. 1985);. *Taylor v. Monroe County Bd. of Supervisors*, 394 F. 2d. 333 (5th Cir. 1972); *Keller v. Gilliam*, 454 F. 2d 55 (5th Cir. 1972); *Moore v. Leflore County Board of Election Commissioners*, 351 F. Supp. 848 (N. D. Miss. 1971) (three-judge court); *Chargois v. Vermillion Parish School Board*, 348 F. Supp. 498 (W. D. La. 1972); *Fain v. Caddo Parish Police Jury*, 312 F. Supp. 54 (W. D. La. 1970); *Chavis v. Whitcomb*, 307 F. Supp. 1362, 1367 (Ind. 1969) (three-judge court) (per curiam). In each of these cases, the plaintiffs requested pre-election relief seeking to enjoin upcoming elections under malapportioned plans. The district courts in *Taylor v. Monroe County Bd. of Supervisors*, supra, and *Keller v. Gilliam*, supra, refused to grant the relief. The plaintiffs appealed, and the elections were conducted under malapportioned plans. The Fifth Circuit reversed and sent the cases back to the district courts indicating the elections should be set aside and special elections ordered. In *Tucker v. Buford*, supra, *Moore v. Leflore County Board of Election Commissioners*, supra, *Chargois v. Vermillion Parish School Board*, supra, *Fain v. Caddo Parish Police Jury*, supra, and *Chavis v. Whitcomb*, supra, the district courts either enjoined the elections or set election results aside that were conducted under malapportioned plans and ordered new or special elections. Where, as here,

[10]In their motions for temporary restraining orders and preliminary injunctions, plaintiffs requested the shortening of terms of office. In order to shorten the term of office of a supervisor, the Court must set aside the election and order a special election. See, *Tucker v. Buford*, infra.

a live controversy continues, the mootness doctrine does not apply. *Moore v. Ogilvie*, supra, *Pope v. County of Albany*, supra; *Tucker v. Buford*, supra; *Moore v. Leflore County Board of Election Commissioners*, supra.

The controversy is not moot because it is capable of repetition but yet evading review. See, *Norman v. Reed*, 502 U. S. 279, 112 S. Ct. 698, 116 L. Ed. 2d 711 (1992). In *Norman*, the Supreme Court held:

> We start with Reed's contention that we should treat the controversy as moot because the election is over. We should not. Even if the issue before us were limited to petitioners' eligibility to use the Party name on the 1990 ballot, that issue would be worthy of resolution as 'capable of repetition, yet evading review... There would be every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints if we should fail to resolve the constitutional issues that arose in 1990.

Norman v. Reed, 502 U. S. At 287-288, 112 S. Ct. at 704-705. Likewise, in the instant case, the 2011 elections do not moot plaintiffs' claims for relief. Furthermore, there is every reason to expect the same parties (NAACP and counties) to generate a similar future controversy subject to identical time constraints if this Court fails to resolve the constitutional issues that arose in 2011.[11] See, *Norman v. Reed*, supra.

Although the capable of repetition but yet evading review doctrine is an exception to the mootness doctrine in this case, plaintiffs request the Court to withhold a decision on the exception until after the defendants have responded to discovery and the plaintiffs have been afforded a

[11]The requested discovery will show that a similar controversy has existed every 20 years after a census has been published. This evidence can lead the Court to conclude that a similar future controversy will occur every 20 years. The defendants have refused to answer the discovery. Plaintiffs request the Court to withhold a ruling on the capable of repetition yet evading review exception to the mootness doctrine until after the defendants have answered the discovery.

reasonable time after which to respond to the defendants' motion. The plaintiffs object to having to respond to the motion at this time when the defendants have refused to provide information essential for that response.

Nevertheless, there is sufficient proof and allegations in the record for the Court to conclude that there is every reason to expect the same parties (NAACP and counties) to generate a similar future controversy subject to identical time constraints if this Court fails to resolve the constitutional issues that arose in 2011. See, *Norman v. Reed*, supra.

Some of the defendants cite *Lopez v. City of Houston*, 617 F. 3d 336 (5th Cir. 2010), as authority for their mootness motion. However, *Lopez* is inapposite. In *Lopez*, there was no proof that the same circumstance would likely recur in the future in *Lopez*. However, past election and census cycles is evidence that the same controversy involving the same parties are likely to recur in the future in the present case.[12]

The Fifth Circuit, in dicta, held that the plaintiffs, in *Lopez*, failed to claim egregious or invidious racial discrimination "that would make invalidation of the 2009 election an appropriate remedy." *Lopez v. City of Houston*, supra, at 340. The Fifth Circuit misunderstood the United Supreme Court's ruling on invidious vote dilution. All of the Supreme Court's findings of invidious racial discrimination is grounded in the Supreme Court's holding of invidious vote dilution in *Reynolds v. Sims,* 377 U. S. 568, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). See, *Brown v. Thomson*, 462 U. S. 835, 103 S. Ct. 2690, 77 L. Ed. 2d 214 (1983), *Connor v. Finch*, 431 U. S. 407, 97 S. Ct. 1828, at 1835, 52 L. Ed. 2d 465 (1977); *White v. Regester*, 412 U. S. 755, at 764, 93 S. Ct. 2332,

[12]The Fifth Circuit determined in this case that the NAACP alleged standing sufficient to challenge the malapportioned plans.

37 L. Ed. 2d 314 (1975); *Abate v. Mundt*, 403 U. S. 182, 91 S. Ct. 1904, 29 L. Ed. 2d 399 (1971); *Hadley v. Junior College Dist.*, 397 U. S. 50, 90 S. Ct. 791, 25 L. Ed. 2d (1970); *Avery v. Midland County*, 390 U. S. 474, 88 S. Ct. 1114, 20 L. Ed. 2d 45 (1968). A person's vote is invidiously diluted in a malapportioned scheme that has a total population deviation substantially more than 10%. See, *Reynolds v. Sims,* supra; *Brown v. Thomson*, supra; *Connor v. Finch*, supra *White v. Regester*, supra; *Abate v. Mundt*, supra; *Hadley v. Junior College Dist.*, supra; *Avery v. Midland County*, supra. The apportionment schemes in the challenged counties are grossly malapportioned. In that regard, the dicta in *Lopez v. City of Houston*, supra, does not apply in this case.

CONCLUSION

On the basis of the foregoing facts and authorities, the Court should deny the defendants' motions to dismiss on grounds of mootness, or, in the alternative, withhold ruling on the defendants motion to dismiss on grounds of mootness until the defendants answer plaintiffs discovery, and the plaintiffs have been afforded an adequate opportunity to address the capable of repetition, but yet evading review exception to the mootness doctrine.

This the 19th day of December, 2012.

Respectfully submitted,
NAACP, et. al., on behalf of themselves
and all others similarly situated

/s/ Carroll Rhodes

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CERTIFICATE OF SERVICE

I, CARROLL RHODES, hereby certify that I have this day electronically filed using the Court's ECF filing system a true and correct copy of the above and foregoing Revised Memorandum in Opposition to the Motions to Dismiss on Grounds of Mootness, and the Court has electronically served a copy of the motion upon the following:

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