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 REBUTTAL BRIEF SUPPORTING MOTION TO DISMISS ON ACCOUNT OF MOOTNESS

I. Introduction.

In his opening brief, the Attorney General explained why plaintiffs' "one person, one vote" lawsuits were mooted by the 2011 elections. Plaintiffs' responsive arguments do not demonstrate that any live controversies subsist or otherwise provide any valid reason the mootness doctrine does not apply.

Plaintiffs' complaints only sought relief against the 2011 elections. Those elections have been held. Their lawsuits cannot be revived by implied alternative claims for "post-election relief" or other injunctive relief they have never properly sought.

Additionally, plaintiffs have not satisfied the test for "capable of repetition, yet evading review." They had an opportunity to litigate their claims in 2011. And, in any event, plaintiffs' hypothesis that a series of future events will create the same claims in twenty years does not carry their burden.

Plaintiffs' lawsuits are no longer live controversies subsequent to the

targeted counties' 2011 elections. There is now only one thing left for the Court to do: dismiss these consolidated cases as moot.

II. Rebuttal Argument.

A. New Claims for "Post-Election Relief" cannot Save Plaintiffs' Current Claims from Mootness.

Plaintiffs filed these consolidated lawsuits in February 2011 to enjoin the defendant counties' 2011 supervisor elections, and obtain other relief centered on those elections.[1] The 2011 elections have been held. Plaintiffs' claims now fall within the rule that "a request for injunctive relief generally becomes moot upon the happening of the event sought to be enjoined."[2]

Instead of identifying any live claims spelled out in their complaints, plaintiffs insist there are two reasons these cases are not moot. Both suggest they previously sought "post-election relief," but neither explanation is valid.

First, plaintiffs say their complaints have always impliedly sought "post-election relief."[3] However, Fifth Circuit case law is clear that implied claims do not save lawsuits from mootness.[4] Plaintiffs' complaints lack any express claims for

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[1] All of plaintiffs' claims specifically relate to the 2011 elections. *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.

[2] *Harris v. City of Houston*, 151 F.3d 186, 189 (5th Cir. 1998) (collecting authorities).

[3] *See* Plaintiffs' Revised Mem. at p. 9, Docket No. 210.

[4] *See Bayou Liberty Ass'n v. U.S. Army Corps of Eng'rs*, 217 F.3d 393, 398 (5th Cir. 2000) (no implied claim for relief on remand not previously requested); *Harris*, 151 F.3d at 190-91 (no implied claim for post-election relief after election mooted original claims).

"post-election relief" and therefore no longer present a live controversy.[5]

Second, plaintiffs argue that they impliedly sought "post-election relief" in motions for temporary restraining orders before the prior dismissal and appeal of their lawsuits.[6] But, those motions were never properly presented to the Court. Plaintiffs filed motions for temporary restraining orders and/or preliminary injunctions in February 2011 before these cases were consolidated.[7] On March 25, 2011, the Court terminated every motion filed prior to consolidation, and specifically directed the parties "to file (or re-file)" their motions.[8] Plaintiffs never re-filed any motions for temporary restraining orders and/or preliminary injunctions.

Even assuming that impliedly seeking "post-election relief" in motions for temporary or preliminary injunctive relief could have saved plaintiffs' claims from mootness, they never presented those motions. Plaintiffs' abandonment of their February 2011 motions cannot revive claims for "post-election relief."

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[5] Plaintiffs' lack of any claims for "post-election relief" is highlighted by their current efforts to amend their complaints. *See* Plaintiffs' Motion for Leave to Amend Complaints in the Consolidated Cases, Docket No. 168. If Plaintiffs' current complaints actually contain claims for "post-election relief," then they would have no reason to submit proposed amended complaints adding claims for "post-election relief" and a previously unarticulated Section 2 cause of action.

[6] Specifically, plaintiffs contend (1) they filed motions for temporary restraining orders in February 2011; (2) those motions sought "shortened terms of office" for supervisors elected under then-current districts; (3) "shortened terms of office" is a form of "post-election relief;" and therefore (4) they have previously requested "post-election relief" in their motions for temporary restraining orders and which saves their claims from mootness. *See* Plaintiffs' Revised Mem. at pp. 9-10, Docket No. 210.

[7] *See* Motions for Temporary Restraining Order, Docket No. 2 in Civil Action Nos. 3:11cv121, 3:11cv122, 3:11cv123, 3:11cv124, 4:11cv33, 5:11cv28, 5:11cv29, and 5:11cv30.

[8] March 25, 2011 Text Order.

B. *Lopez v. City of Houston* is Indistinguishable.

In addition to the other problems with plaintiffs' implied "post-election relief" arguments, the Fifth Circuit's holding in *Lopez v. City of Houston* directly applies here and conclusively establishes their claims are moot. After a city election, the *Lopez* plaintiffs argued their claims targeting the election were still live because "post-election relief" was possible. The Fifth Circuit held that, absent viable claims of egregious or invidious discrimination, invalidation of elections and/or ordering special elections were not appropriate remedies that would save the election claims from mootness.[9] Since the case did not involve egregious or invidious discrimination, the *Lopez* plaintiffs' claims were moot.[10]

The moot claims here are just like the moot claims in *Lopez*. Plaintiffs do not have any claims – or proof – of egregious or invidious discrimination. As the Court has previously recognized, plaintiffs' alleged "one person, one vote" injuries occurred because the county defendants did not have enough time to evaluate 2010 census data, reapportion their supervisor districts, obtain Department of Justice preclearance, and meanwhile comply with the established 2011 election schedule and deadlines.[11] Apparent population shifts, and the lack of time for county governments to respond, caused plaintiffs' alleged injuries, not unreasonable, ill-motivated, actions or inactions of the county defendants.

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[9] *Lopez v. City of Houston*, 617 F.3d 336, 340 (5th Cir. 2010).

[10] *Id.*

[11] Memorandum Opinion and Order at pp. 16-17, Docket No. 143.

To avoid *Lopez*, plaintiffs contend its holding was "dicta," and was based on a "misunderstanding" of the "United [States] Supreme Court's ruling on invidious vote dilution."[12] Those arguments are off-base. To the contrary, *Lopez*'s holding appropriately accounts for the stark distinction between cases where special elections have been considered or ordered,[13] and the facts in *Lopez* similar to these consolidated cases where egregious or invidious discrimination is not involved. *Lopez* is directly on point, and demonstrates why plaintiffs' claims should be dismissed as moot.

C. "Capable of Repetition, Yet Evading Review" does not Apply.

Plaintiffs' claims also cannot be saved by the "capable of repetition, yet evading review" exception to mootness. That exception applies only in "exceptional circumstances"[14] and requires proof that "(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

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[12] Plaintiffs' Revised Mem. at p. 12, Docket No. 210.

[13] For example, plaintiffs' Revised Memoradum cites numerous authorities where special elections were an issue due to very particular facts that are completely different from these consolidated cases. *See*, *e.g.*, *Keller v. Gilliam*, 454 F.2d 55, 57-58 (5th Cir. 1972) (special elections after trial court had ordered 1971 election to proceed on at-large basis with each of the five supervisors to be representative of the prior districts); *Taylor v. Monroe County Bd. of Supervisors*, 394 F.2d 333, 334 (5th Cir. 1972) (remanding for consideration of special elections after Supreme Court had made clear that "one person, one vote" principles applied in local election context while case was on appeal); *Tucker v. Burford*, 603 F.Supp. 276, 279 (N.D. Miss. 1985) (special elections for officers elected on allegedly malapportioned lines nearly three years after release of census data); *Moore v. Leflore County Board of Election Commissioners*, 351 F.Supp. 848, 852 (N.D. Miss. 1971) (special elections following elections held pursuant to law that had never been precleared).

[14] *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983).

subjected to the same action again."[15] According to plaintiffs, in this case

> 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.[16]

That theory does not prove the "capable of repetition, yet evading review" exception applies here.

1. Plaintiffs had enough time to litigate.

Plaintiffs' claims do not satisfy the "too short to be fully litigated" element. There was sufficient time to litigate their claims in 2011. The first prong of the "capable of repetition, yet evading review" exception has not been met.[17]

The record proves plaintiffs had a full opportunity to litigate their claims before the 2011 elections. The cases were filed in February 2011. Between February and June, there was time to consolidate the cases, conduct a status conference, file numerous procedural and dispositive motions, and hear all the motions. Plaintiffs then had time to appeal, and could have moved for a stay

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

[16] Plaintiffs' Revised Mem. at p. 6 (emphasis added), Docket No. 210.

[17] *See, e.g., Bayou Liberty Ass'n*, 217 F.3d at 398-99 (plaintiffs had sufficient time to litigate claims since they could apply for preliminary injunction and seek stay on appeal to prevent alleged harm); *Smith v. Winter*, 782 F.2d 508, 510 (5th Cir. 1986) (no mootness exception where plaintiffs failed to prove it was impossible to litigate their claims prior to an election).

pending appeal or expedited review at the Fifth Circuit.[18]

Plaintiffs did not successfully obtain injunctive relief, and elected not to pursue other avenues for available injunctive relief. But that does not mean they lacked sufficient time to litigate their claims.[19] Stated differently, just because plaintiffs did not obtain the relief they sought in 2011, that does not likewise mean the relief was not available on account of time constraints.[20] The "too short to be fully litigated" element necessary for "capable of repetition, yet evading review" is not satisfied.

2. No reasonable expectation of recurrence.

Even assuming plaintiffs lacked sufficient time to litigate, they also have not proven a "reasonable expectation" of being subjected to the "same challenged action again."[21] "A 'mere physical or theoretical possibility' that an alleged action will

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[18] Plaintiffs' Motion for Stay Pending Appeal was denied by this Court. *See* June 13, 2011 Text Order. They chose not to seek a stay pending appeal from the Fifth Circuit or to expedite their appeal. *See* Fed. R. App. P. 8; Fifth Circuit Local Rule 27.5.

[19] *See Bayou Liberty Ass'n*, 217 F.3d at 398-99. *See also Newdow v. Roberts*, 603 F.3d 1002, 1008-09 (D.C. Cir. 2010), *cert. denied*, 131 S.Ct. 2441 (2011) (a plaintiff "must make a full attempt to prevent his case from becoming moot, an obligation that includes filing for a preliminary injunction and appealing denials of preliminary injunctions."); *Minnesota Humane Society v. Clark*, 184 F.3d 795, 797 (8th Cir. 1999) ("[w]hen a party has these legal avenues [for injunctive relief] available, but does not utilize them, the action is not one that evades review."); *Headwaters, Inc. v. Bureau of Land Management, Medford Dist.*, 893 F.2d 1012, 1016 (9th Cir. 1989) (fact that plaintiff was unable to secure a stay pending appeal did not control whether it had sufficient time to litigate claims); *Matter of Kulp Foundry, Inc.*, 691 F.2d 1125, 1130 (3rd Cir. 1982) (mootness exception not applicable where lack of prompt and diligent action in seeking a stay defeated review).

[20] *See DiMaio v. Democratic National Committee*, 555 F.3d 1343, 1345 (11th Cir. 2009) (finding case not "capable of repetition, yet evading review" where inability to fully litigate it prior to the event sought to be enjoined was due in part to delay on account of how plaintiffs pursued their claims).

[21] *Weinstein*, 423 U.S. at 149.

recur is not enough to meet the second prong of the exception."[22]

Plaintiffs rely on numerous "ifs" and "ands" to construct a "reasonable expectation" of recurrence that fails the "capable of repetition, yet evading review" standard. Their theory first supposes numerous factors combining in twenty years – including population shifts, the census data release, the election schedule and deadlines, and others – that could create an environment for supervisor district malapportionment. Then, assuming that environment would exist, plaintiffs forecast they would suffer a "one person, one vote injury," and furthermore, that they would be unable to obtain legal relief before elections. Plaintiffs' speculation, upon speculation, on top of speculation, regarding future events does not make out a "reasonable expectation" for purposes of "capable of repetition, yet evading review."[23]

Meanwhile, there are numerous reasons to reasonably expect plaintiffs' theory would not play out in 2031. Any number of possible events would upset their predictions, including that:

- census data may be available at an earlier time;
- technology may enable county governments to redistrict more quickly;
- the election schedule may be different;
- the time frames for the Department of Justice's consideration of redistricting

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[22] *Hunter v. Owens*, 460 Fed. Appx. 421, 423 (5th Cir. 2012) (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)).

[23] *See* Attorney General's Mem. Supporting Motion to Dismiss at pp. 10-12 and authorities cited therein, Docket No. 198.

plans could be different, or, the requirement for Department of Justice review of such plans may be different if Section 5 of the Voting Rights Act is altered or inapplicable;

- the particular plaintiffs here may not have any connection to an allegedly malapportioned district; and/or

- the particular plaintiffs here might not claim a "one person, one vote injury" in 2031 if they are satisfied with elections conducted using allegedly malapportioned districts.[24]

Instead of guessing that plaintiffs' hypothetical chain of events *will occur*, and none of the potential events that would de-rail their predictions *will not occur*, the Court should hold that the "capable of repetition, yet evading review" exception does not apply here.

If a future "one person, one vote" controversy arises in the subject counties in 2031, plaintiffs can file, and diligently prosecute, lawsuits that account for the actual circumstances that will exist in 2031.[25] In the meantime, the "capable of repetition, yet evading review" exception does not revive their now moot 2011 lawsuits.

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[24] For example, in the *Tunica County NAACP v. Tunica County Board of Supervisors* (ND Civil Action No. 2:11cv41-P-A) case brought by plaintiffs' same attorneys and consolidated with these cases while on appeal to the Fifth Circuit, the plaintiffs withdrew their appeal after informing the court that they were satisfied with the 2011 election results conducted on then-current district lines. *See* Motion to Dismiss Tunica County, Mississippi Branch of the National Association for the Advancement of Colored People and Marilyn Young in Case No. 11-60446 and attached correspondence, copy affixed hereto as Ex. "1."

[25] *See, e.g., County of Morris v. Nationalist Movement*, 273 F.3d 527, 534 (3rd Cir. 2001) (exception did not apply, and mootness precluded review on appeal, because if new dispute over future events arose, then parties "would have ample opportunity to bring a new lawsuit and to develop a record reflective of the particular circumstances attendant to that dispute.").

D. Dismissal Should not be Postponed for Plaintiffs to take "Mootness" Discovery.

Plaintiffs also claim that "mootness" discovery will improve their "capable of repetition, yet evading review" theory.[26] The proposed 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.[27]

Discovery regarding those facts (most of which, if not all, are a matter of public record in any event) would not help plaintiffs, or the Court, make a better prediction about what will happen in 2031.

The Court does not ever have to allow discovery unlikely to produce facts bearing on the issues at hand.[28] In this instance, even if plaintiffs' proposed

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[26] Plaintiffs' Response papers claim that they served discovery on the county defendants on November 14, 2012 and those defendants have "steadfastly refused to provide that information." Plaintiffs' Revised Mem. at pp. 6 & 8, Docket No. 210. That is inaccurate. On November 7, 2012, the Court set a deadline for plaintiffs to file a motion for leave to conduct "mootness" discovery. The plaintiffs filed their motion on November 14, 2012. *See* Docket No. 169. As of this writing, there has been no ruling on whether plaintiffs are permitted to serve their proposed discovery. The discovery has never been authorized. The county defendants have not "steadfastly refused" to provide plaintiffs with responses.

[27] Plaintiffs' Revised Mem. at p. 6, Docket No. 210. *See also* Plaintiffs' Proposed Interrogatories and Requests for Production, Docket Nos. 169-1 and 169-2.

[28] *Cf. Mauldin v. Fiesta Mart*, 114 F.3d 1184, 1997 WL 255640, at *2 (5th Cir. 1997) (affirming district court's denial of former Rule 56(f) request because additional discovery was speculative and unlikely to uncover relevant evidence); *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir. 1990) (explaining entitlement to discovery is not unlimited and may be cut off when requested discovery is not likely to produce facts needed to withstand dispositive motion); *Fullerton v. Merlin C. Reiser and Merco, L.L.C.*, 2008 WL 5246128, at *2 (S.D. Miss. Dec. 12, 2008) (denying former Rule 56(f) request for deposition that could only produce irrelevant facts and would not assist in responding to summary judgment motion); *Blount v. National Lending Co.*, 108 F.Supp.2d 666, 671 (S.D. Miss. 2000) (denying former Rule 56(f) request seeking irrelevant discovery).

discovery would produce facts regarding census timing, election timing, redistricting timing, and preclearance timing in the early 1970s and 1990s, those facts will not provide greater certainty regarding what will happen in 2031.

As explained in Section II., C., 2., above, any number of uncertain events – which could not be made certain by any discovery – would make a case in 2031 very different from these cases, or the facts existing twenty and forty years ago. The Court should deny plaintiffs' requested discovery because the information sought would be unhelpful in determining whether plaintiffs' claims are "capable of repetition, yet evading review."

III. Conclusion.

For the reasons set forth above, and in the Attorney General's initial Motion to Dismiss on Account of Mootness and supporting Memorandum, the Attorney General submits plaintiffs' claims are now moot. Therefore, he respectfully requests that the Court enter an order dismissing plaintiffs' complaints in each of these consolidated cases.

THIS the 27th 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 27th day of December, 2012.

S/Justin L. Matheny
Justin L. Matheny