

**IN THE UNITED STATES DISTRICT Court
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION**

**HANCOCK COUNTY BOARD OF §
SUPERVISORS §
V. § NO. 1:10CV564 LG-RHW
RUHR §**

[CONSOLIDATED WITH]

**NAACP, *et al.* §
V. § NO. 3:11CV121 LG-RHW
COPIAH COUNTY BD. OF SUPERVISOR'S §**

**NAACP, *et al.* §
V. § NO. 3:11CV122 LG-RHW
PIKE COUNTY BD. OF SUPERVISOR'S §**

**NAACP, *et al.* §
V. § NO. 3:11CV123 LG-RHW
SIMPSON COUNTY BD. OF SUPERVISOR'S §**

**NAACP, *et al.* §
V. § NO. 3:11CV124 LG-RHW
AMITE COUNTY BD. OF SUPERVISOR'S §**

**NAACP, *et al.* §
V. § NO. 4:11CV33 LG-RHW
WAYNE COUNTY BD. OF SUPERVISOR'S §**

**NAACP, *et al.* §
V. § NO. 5:11CV28 LG-RHW
WARREN COUNTY BD. OF SUPERVISOR'S §**

**NAACP, *et al.* §
V. § NO. 5:11CV30 LG-RHW
ADAMS COUNTY BD. OF SUPERVISOR'S §**

PLAINTIFFS' SUPPLEMENTAL BRIEF

Plaintiffs in the NAACP cases¹ submit this supplemental brief in response to the Court's Order entered on June 25, 2013 requesting supplemental briefs. [Doc. 219]. The parties are allowed to supplement their briefs in light of the United States Supreme Court decision in *Shelby County, Alabama v. Holder*, No. 12-96, 2013 WL 3184629 (June 25, 2013), and address the recent decision of the three-judge district Court in *Mississippi State Conference of N.A.A.C.P. v. Barbour*, No. 3:11cv159TSL-EGJ-LG-MTP, 2011 WL 1870222 (S. D. Miss. May 16, 2011) *aff'd*, 132 S. Ct. 542 (2011), and *aff'd sub nom. Miss. State Conference of NAACP v. Bryant*, 133 S. Ct. 2389 (2013).² Plaintiffs will address the three-judge district Court decision in *NAACP v. Barbour* first and then address the Supreme Court decision in *Shelby County, Alabama v. Holder*.

NAACP v. BARBOUR

Plaintiffs filed suit on March 17, 2011 seeking to enjoin the 2011 legislative elections³ under a scheme enacted in 2002 because the scheme was unconstitutionally malapportioned. *NAACP v. Barbour*, 2011 WL 1870222, pp. 4-5. "Secretary of State Hosemann filed a motion to dismiss the complaint on the ground that it [was] premature, because ... the Mississippi Constitution [allowed] the State until the end of the 2012 legislative session to complete redistricting of the Legislature." *Id.*, p. 5. The Mississippi Constitution expressly provides that:

¹This supplemental brief is not submitted on behalf of plaintiff in *Claiborne County, Mississippi Branch of the NAACP v. Claiborne County, Mississippi Board of Supervisors, et al.*, Civil Action No. 5:11cv29 LG-RHW, because all counsel for the Claiborne County, Mississippi Branch of the NAACP have withdrawn from representing that party.

²Hereinafter referred to as *NAACP v. Barbour*.

³Plaintiffs challenged the apportionment scheme for districts of the Mississippi Senate and the Mississippi House of Representatives.

The Legislature shall at its regular session in the second year following the 1980 decennial census and every ten (10) years thereafter, and may, at any other time, by joint resolution, by majority vote of all members of each house, apportion the state in accordance with the Constitution of the state and of the United States...

MISS. CONST. art. 13 § 254. All parties agreed, “that, based on the 2010 census data, the [existing] apportionment scheme” violated the “one-person, one-vote principle” announced in *Reynolds v. Sims*, 377 U.S. 533 (1964). *NAACP v. Barbour*, supra, p. 6. Nevertheless, the Court concluded that the existing scheme did not contravene *Reynolds*’ one person, one vote principle because it had been in place only nine (9) years and the Mississippi Constitution did not require apportionment until the end of the 2012 legislative session. *NAACP v. Barbour*, supra. The United States Supreme Court affirmed this holding twice⁴ without comment. *NAACP v. Barbour*, supra, *aff’d*, 132 S. Ct. 542 (2011), and *aff’d sub nom. NAACP v. Bryant*, 133 S. Ct. 2389 (2013).

The decision of the three-judge district Court is distinguishable from the instant case. The decision was based on the fact that *Reynolds* did not require the Legislature to reapportion if a scheme had been in place less than 10 years even if the most recent census revealed the scheme was grossly malapportioned. *NAACP v. Barbour*, supra. The Court recognized that *Reynolds* only requires “some reasonable plan for periodic revision of [its districting scheme],” *Reynolds v. Sims*, supra, at 583, and a State constitutional provision that requires redistricting every 10 years is a reasonable plan for periodic redistricting.⁵ *Reynolds v. Sims*, supra, at 583-584.

⁴The three-judge district Court denied plaintiffs’ request for a preliminary injunction, and plaintiffs filed an interlocutory appeal which was denied by the Supreme Court in 2011. After remand, the three-judge district Court entered a final judgment dismissing the case with prejudice. Plaintiffs appealed the final judgment and the Supreme Court affirmed the dismissal in 2013.

⁵Mississippi’s reasonable plan for periodic redistricting is memorialized in the State’s Constitution. MISS. CONST. art. 13 § 254. That plan requires redistricting every 10 years by the end of

The decision of the three-judge district Court does not apply to the present case because there is no State constitutional provision pertaining to redistricting of the boards of supervisors. There is, however, a State statute that allows a board of supervisors to redistrict, but it does not require redistricting every 10 years or in the second year following a census. See MISS. CODE. ANN. § 19-3-1. The statute allows a board to redistrict at any time but it does not specify a time when redistricting must be completed.⁶ When, as here, there is no rational approach to redistricting established by a State constitutional provision or statute, then redistricting must occur whenever a new census reveals that the existing districting scheme is malapportioned. *Whitcomb v. Chavis*, 403 U.S. 124, 163 (1971); *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 195 (*per curiam*); *Connor v. Finch*, 431 U.S. 407, 415 (1977); *Georgia v. Ashcroft*, 439 U.S. 461, 488, n.2 (2003); *Perry v. Perez*, 565 U.S. ___, 132 S.Ct. 934, 940 (2012) (*per curiam*). The Supreme Court held in *Perry* that “if an intervening event - most commonly, as here, a census - renders the current plan unusable, a Court must undertake the ‘unwelcome obligation’ of creating an interim plan. *Perry v. Perez*, supra, 132 S.Ct. at 940.⁷ This holding is consistent with *Reynolds* wherein the Court held that malapportionment “is constitutionally impermissible under the Equal Protection Clause.” *Reynolds v. Sims*, supra, at 568. Since there is no State constitutional provision similar to the provision at issue

the legislative session in the second year after a census is released. MISS. CONST. art. 13 § 254.

⁶The statute requires redistricting “with due regard to equality of population ... for the election of members of the boards of supervisors...” MISS. CODE. ANN. § 19-3-1. In this regard, the statute requires districts to contain equal population before an election. The 2011 supervisor elections were not held in districts “with due regard to equality of population...” See MISS. CODE. ANN. § 19-3-1.

⁷A census that reveals existing districts exceed 10% variance presumptively establishes that a scheme is unconstitutionally malapportioned. *Brown v. Thomson*, 462 U.S. 835 (1983); *Fairley v. Hattiesburg, Mississippi*, 584 F.3d 660, at 675 (5th Cir. 2009).

in *NAACP v. Barbour*, the holding in *Barbour* does not apply to the instant case.

Furthermore, the facts in the instant case are distinguishable from the facts in *NAACP v. Barbour*. In the *Barbour* case, the redistricting plan had been in existence only nine (9) years when the census revealed the plan was malapportioned, and a State constitutional provision did not require redistricting until the plan had been in existence for 10 years. *NAACP v. Barbour*, supra. In the present case, each county redistricting plan is malapportioned according to latest census, and each plan has been in existence longer than 10 years.⁸ Importantly, there is no State constitutional provision establishing a reasonable time for periodic redistricting of supervisor districts. See *Reynolds v. Sims*, supra. Consequently, *NAACP v. Barbour*, does not apply to the present case.

SHELBY COUNTY, ALABAMA v. HOLDER

On June 25, 2013, the Supreme Court of the United States held that §4(b) of the Voting Rights Act of 1965⁹ (“VRA”) was unconstitutional. *Shelby County, Alabama v. Holder*, supra. That provision deals only with the coverage formula - the formula used to determine which jurisdictions are covered by § 5's¹⁰ preclearance requirement.¹¹ *Id.* Importantly, the Supreme Court did not issue a “holding on § 5 itself, only the coverage formula.” *Id.*, 2013 WL 3184629, p. 18. This holding can be interpreted in either of two ways. One interpretation is that “without that formula, § 5 is

⁸Even if a county redistricting plan had been in place less than 10 years when suit was filed, the plan was still unconstitutionally malapportioned in 2011 when elections were held, and this Court should have enjoined those elections. *Perry v. Perez*, supra, 132 S. Ct. at 940; *Connor v. Finch*, supra, at 415. Furthermore, the plans now have been in place longer than 10 years.

⁹42 U.S.C. § 1973b(b).

¹⁰42 U.S.C. § 1973c.

¹¹Mississippi falls in the coverage formula. *Branch v. Smith*, 538 U.S. 254, 262 (2003).

immobilized.” *Id.*, at 20, n. 1 (Ginsburg, J., dissenting). In other words, preclearance is no longer required because the Supreme Court struck down § 4(b)’s list of limited jurisdictions subject to the preclearance requirement. An alternative interpretation is that all 50 States are now subject to § 5’s preclearance requirement since the limited application has been struck down. As discussed in more detail below, plaintiffs submit that the more reasoned interpretation is the alternative one.

The Supreme Court has held for the past 48 years that § 5 of the VRA is constitutional. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Georgia v. United States*, 411 U.S. 526 (1973); *City of Rome v. United States*, 446 U.S. 156 (1980); *Lopez v. Monterey County*, 525 U.S. 266 (1999) (*Lopez II*). More importantly, the Supreme Court has not held that § 5 is unconstitutional even when recently presented with this issue. *Northwest Austin Municipal Utility Dist. No. One v. Holder*, 557 U.S. 193 (2009); *Shelby County, Alabama v. Holder*, *supra*. After all, “the purpose of § 5 has always been to insure that no voting procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.” *Beer v. United States*, 425 U.S. 130, 141 (1976); *City of Lockhart v. United States*, 460 U.S. 125, 134 (1983). Congress enacted the VRA “to rid the country of racial discrimination in voting.” *Beer v. United States*, *supra*, at 140, *quoting*, *South Carolina v. Katzenbach*, *supra*, at 315. Furthermore, the Supreme Court recently recognized that “voting discrimination still exists, no one doubts that.” *Shelby County, Alabama v. Holder*, *supra*, at p. 4. Since the country has not been ridded of racial discrimination in voting, *Beer v. United States*, *supra*, at 140, and since such discrimination still exists, *Shelby County, Alabama v. Holder*, *supra*, at p. 4, § 5 is still necessary and enforceable. See, *South Carolina v. Katzenbach*, *supra*; *Georgia v. United States*, *supra*; *City of Rome v. United States*, *supra*; *Lopez II*, *supra*; *Beer v. United States*, *supra*; *City of Lockhart v. United States*, *supra*. The

relevant inquiry is which jurisdictions are subject to the Act's preclearance requirement.

The Supreme Court answered that question when it struck down § 4(b). The Court held that § 4(b) was unconstitutional when Congress extended it in 2006. *Shelby County, Alabama v. Holder*, supra. The Court reasoned that § 4(b) violated the principle of equal sovereignty among the States because it was not based on current conditions or data. *Shelby County, Alabama v. Holder*, supra. The Supreme Court opined that Congress, in extending § 4(b) in 2006 based on outdated data, treated covered States differently from non-covered States. *Shelby County, Alabama v. Holder*, supra. The Court held that this disparate treatment contravenes the Constitution and violates the sovereignty rights of covered States to be treated equally. *Shelby County, Alabama v. Holder*, supra. If the doctrine of equal sovereignty requires States to be treated equally, then every State should be subject to § 5's preclearance requirement.¹² See *Shelby County, Alabama v. Holder*, supra.

The Court specifically held that its decision in *Shelby County, Alabama v. Holder* "in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2."¹³ *Id.*, at p. 18. As previously noted, the purpose of the VRA is "to rid the country of racial discrimination in voting."

¹²Under the equal sovereignty doctrine, it is not fair to require federal review of Mississippi's voter identification law, MISS. CODE. ANN. § 13-15-563, before implementation, but not require federal review of Pennsylvania's voter identification law, 25 P. S. §§ 2626 and 3050, abrogated by *Applewhite v. Commonwealth*, 2012 WL 4497211 (Pa. Cmwlth.), before implementation. See *Shelby County, Alabama v. Holder*, supra. Pennsylvania is a non-covered State. A retrogressive voter ID law would have just as great an adverse effect on minority voters in Pennsylvania as in Mississippi. After all, Pennsylvania, like Mississippi, has discriminated against minority voters. *United States v. Berks County, Pa.*, 277 F. Supp. 2d 570 (E. D. Pa. 2003) (Pennsylvania's English only ballot discriminated against language minorities); *Mississippi State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245 (N. D. Miss. 1987) (Mississippi's dual registration requirement discriminated against minority voters). The equal sovereignty doctrine requires that Mississippi and Pennsylvania be treated equally by the federal government. *Id.*

¹³42 U.S.C. § 1973.

Beer v. United States, supra, at 140. And, as noted above, the country is not yet rid of that discrimination. *Shelby County, Alabama v. Holder*, supra, at p. 4. Since §§ 2 and 5 have similar congressional purposes,¹⁴ and since § 2 applies nationwide, *Georgia v. Ashcroft*, supra, at 478; *Shelby County, Alabama v. Holder*, supra, p. 18, it is reasonable to conclude that § 5 should apply nationwide as well.¹⁵

Another reason § 5 should apply to all 50 States is because courts are required to apply the law.¹⁶ *Lopez v. Monterey County*, 519 U. S. 9 (1996) (*Lopez I*); *Hathorn v. Lovorn*, 457 U. S. 255 (1982); *Georgia v. Ashcroft*, supra; *Thornburg v. Gingles*, supra. The VRA is the law of the land. *South Carolina v. Katzenbach*, supra; *Beer v. United States*, supra; *Georgia v. Ashcroft*, supra; *Lopez I*, supra; *Hathorn v. Lovorn*, supra; *Shelby County, Alabama v. Holder*, supra. The Supreme Court

¹⁴The VRA's purpose is "to rid the country of racial discrimination in voting." *Beer v. United States*, supra, at 140. However, different avenues are used by §§ 2 and 5 to achieve that purpose. Section 5 requires federal administrative or judicial review of potentially discriminatory voting laws and practices before implementation. *South Carolina v. Katzenbach*, supra; *Lopez I*; *Lopez II*; *Georgia v. Ashcroft*, 539 U. S. 461, 477-479 (2003). Section 2, on the other hand, allows judicial review only of discriminatory voting laws and practices after implementation. *Thornburg v. Gingles*, 478 U. S. 30 (1986); *Georgia v. Ashcroft*, supra, at 477-479. Section 2 places a more onerous financial, temporal, and proof burden on minorities to prove discrimination than Section 5 places on covered jurisdictions to prove an absence of discrimination. *Georgia v. Ashcroft*, supra, 477-479; *Shelby County, Alabama v. Holder*, supra, at 27-31 (Ginsburg, J., dissenting).

¹⁵Plaintiffs caution that § 5 should apply to all 50 States until Congress amends the coverage formula of § 4(b). "Congress may draft another formula based on current conditions." *Shelby County, Alabama v. Holder*, supra, at p. 18. Until Congress drafts another formula, every State should be treated equally with respect to § 5. *Shelby County, Alabama v. Holder*, supra.

¹⁶In the instant consolidated cases, plaintiffs requested preliminary and permanent injunctions requiring new redistricting plans to comply with the 14th and 15th Amendments to the United States Constitution and §§ 2 and 5 of the VRA. Since § 5 is still the law of the land, the Court should ensure that any new redistricting plans comply with the law. *South Carolina v. Katzenbach*, supra; *Beer v. United States*, supra; *Lopez I*, supra; *Hathorn v. Lovorn*, supra; *Shelby County, Alabama v. Holder*, supra.

has not held that § 5 is unconstitutional. See, *South Carolina v. Katzenbach*, supra; *Georgia v. United States*, supra; *City of Rome v. United States*, supra; *Lopez II*, supra; *Beer v. United States*, supra; *City of Lockhart v. United States*, supra; *Northwest Austin Municipal Utility Dist. No. One v. Holder*, supra; *Shelby County, Alabama v. Holder*, supra. “[A] Court sitting in equity cannot ‘ignore the judgment of Congress, deliberately expressed in legislation.’” *United States v. Oakland Cannabis Buyers’ Cooperative*, 532 U. S. 483, 497 (2001), quoting, *Virginia R. Co. v. Railway Employees*, 300 U. S. 515, 551 (1937). Furthermore, the equal sovereignty doctrine requires each State to be treated equally. *Shelby County, Alabama v. Holder*, supra. Since § 5 is the law of the land, it should be enforced equally among the States. *South Carolina v. Katzenbach*, supra; *Beer v. United States*, supra; *Georgia v. Ashcroft*, supra; *United States v. Oakland Cannabis Buyers’ Cooperative*, supra; *Shelby County, Alabama v. Holder*, supra.

Finally, the VRA contains a severability clause. See 42 U.S.C. § 1973p. That clause provides that if a portion of the VRA is struck down, the remainder of the Act shall remain in full force and effect. 42 U.S.C. § 1973p. The only portion of the VRA struck down by the Supreme Court was § 4(b) - the coverage formula. *Shelby County, Alabama v. Holder*, supra. The Court did not strike down § 5. *Shelby County, Alabama v. Holder*, supra. The Court, in essence, struck down the limited application of § 5 to only a few States and parts of a few others. Since the Supreme Court reasoned that § 5's limited geographical application is unconstitutional, the Act should apply and be enforced throughout the entire country. See *Beer v. United States*, supra, at 140; *Shelby County, Alabama v. Holder*, supra.

Once the Court determines that § 5 is applicable, the Court must still resolve the manner in which § 5's preclearance requirements can now be satisfied. The boards of supervisors may, pursuant

to § 5, obtain either administrative or judicial preclearance. *Lopez I; Lopez II*. Even if preclearance cannot be obtained, this Court is prohibited from ordering into effect, either as an interim or permanent remedy to malapportioned plans, redistricting plans that do not comply with § 5. See *Upham v. Seamon*, 456 U. S. 37 (1982) (*per curiam*); *Hathorn v. Lovorn*, *supra*; *Lopez I; Lopez II*. However, the Court may devise its own redistricting plans to remedy the constitutional violation without subjecting those plans to preclearance. See *Connor v. Johnson*, 402 U. S. 690, 691 (1971) (*per curiam*) (“A decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act”). In essence, the Court may order the boards to draft plans that comply with the one person, one vote principle and obtain preclearance of those plans. *Upham v. Seamon*, *supra*; *Hathorn v. Lovorn*, *supra*; *Lopez I; Lopez II*. If the boards fail to obtain preclearance in time for elections this year, the Court may draft its own plans without being subjected to the preclearance requirement. *Connor v. Johnson*, *supra*.

CONCLUSION

On the basis of the foregoing facts and authorities and the facts and authorities contained in plaintiffs’ previous memorandums, this Court should deny the defendants’ motions to dismiss, set the 2011 elections for supervisor aside and order special elections this year.

This the 25th day of July, 2013.

Respectfully submitted,
NAACP, et al.

/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 Supplemental Memorandum, and the Court has electronically served a copy of the motion upon the following:

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This the 25th day of July, 2013.

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