

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:
3:11cv121-LG-RHW
3:11cv122-LG-RHW
3:11cv123-LG-RHW
3:11cv124-LG-RHW
4:11cv33-LG-RHW
5:11cv28-LG-RHW
5:11cv29-LG-RHW
5:11cv30-LG-RHW

and

JIM HOOD, ATTORNEY GENERAL
FOR THE STATE OF MISSISSIPPI,
EX REL. THE STATE OF MISSISSIPPI
Intervenor

ATTORNEY GENERAL'S SUPPLEMENTAL BRIEF
SUPPORTING MOTION TO DISMISS ON ACCOUNT OF MOOTNESS

I. Introduction.

Two recent decisions by the United States Supreme Court further demonstrate why these consolidated cases on remand from the Fifth Court are moot and not within any exception, and thus due for dismissal. On August 31, 2012, following previous dismissal for lack of standing and alternatively, on the merits, the Fifth Circuit remanded these consolidated cases for this Court to initially consider whether they are moot in light of Fall 2011 Board of Supervisors' elections in the subject Mississippi counties.¹ In December 2012, the parties fully briefed

¹ August 31, 2012 Fifth Circuit Opinion, Docket No. 166.

motions to dismiss on account of mootness.²

On June 25, 2013, the Court requested supplemental briefs addressing the Supreme Court's recent decisions holding Section 4 of the Voting Rights Act is unconstitutional and affirming a three-judge panel's decision dismissing certain "one person, one vote" claims involving Mississippi's Legislative redistricting.³ The Attorney General submits this brief pursuant to the Court's June 25, 2013 Order. The recent Supreme Court decisions are additional authority supporting dismissal of these consolidated cases because they are moot.

**II. *Shelby County* Further Demonstrates Plaintiffs' Reliance on the
"Capable of Repetition, Yet Evading Review" Exception to Mootness is
Unfounded.**

A case or controversy "must exist at all stages of the litigation, not just at the time the suit was filed."⁴ Generally, in cases involving injunctive relief, a controversy is moot "once the action that the plaintiff sought to have enjoined has occurred . . ."⁵ Plaintiffs' complaints seek "one person, one vote" based injunctive relief against elections that have been held and declaratory relief against former

² See Attorney General's Motion to Dismiss and Supporting Briefs, Docket Nos. 197, 198 & 214; County Defendants' Motions to Dismiss, Supporting Briefs and Joinders, Docket Nos. 193, 194, 195, 196, 199, 200, 201, 202, 205, 206, 212, 213, 215, 216, 217, & 218; Plaintiffs' Responses and Supporting Briefs, Docket Nos. 208, 209 & 210.

³ *Shelby County, Alabama v. Holder*, ___ U.S. ___, 133 S.Ct 2612 (Jun. 25, 2013); *Mississippi State Conference of N.A.A.C.P. v. Barbour*, No. 3:11cv159-TSL-EGJ-LG-MTP, 2011 WL 1870222 (S.D. Miss. May 16, 2011), *aff'd*, 132 S.Ct. 542 (2011), and *aff'd sub nom.*, *Mississippi State Conference of N.A.A.C.P. v. Bryant*, 133 S.Ct. 2389 (2013).

⁴ *Bayou Liberty Ass'n v. U.S. Army Corps of Eng'rs*, 217 F.3d 393, 396 (5th Cir. 2000).

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

district lines. As previously explained in the Attorney General’s principal briefs, their claims are moot.

In response, plaintiffs have consistently argued dismissal on mootness grounds would be inappropriate due to 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.”⁶

Specifically regarding the second element, 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.⁷ Plaintiffs 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.⁸

⁶ *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

⁷ *Libertarian Party v. Dardenne*, 595 F.3d 215, 217 (5th Cir. 2010). As previously explained, federal courts universally recognize that speculation does not satisfy the second required prong of the “capable of repetition, yet evading review” test. See Attorney General’s Mem. Supporting Motion to Dismiss on Account of Mootness at p. 11 & n. 26, Docket No. 198. Moreover, and specifically on appeal of these consolidated cases, the Fifth Circuit cautioned against accepting plaintiffs’ speculative theory that circumstances in 2031 will be similar to those they alleged gave rise to their 2011 claims. See 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.”).

⁸ See Plaintiffs’ Revised Mem. Supporting Opposition to Motion to Dismiss at p. 6, Docket No. 210.

In addition to all the other reasons previously explained that plaintiffs' speculative "twenty year recurrence" theory is flawed,⁹ *Shelby County versus Holder* vividly demonstrates why plaintiffs' factual predictions for 2031 are speculation, at best, and completely off-base, at worst. Either way, their 2031 forecast cannot satisfy the reasonable expectation of recurrence element required for the "capable of repetition, yet evading review" exception. There is no way to know what impact pre-clearance requirements, if any, will have on elections and redistricting in 2031.

In *Shelby County*, the Supreme Court considered a constitutional challenge to the pre-clearance requirements of the Voting Rights Act last re-authorized by Congress in 2006.¹⁰ Petitioners chiefly contended that the Act's Section 4(b) (the coverage formula for determining some of the jurisdictions subject to pre-clearance requirements) and Section 5 (the pre-clearance requirements for covered jurisdictions to submit certain voting changes to the Department of Justice or otherwise seek federal declaratory relief before changes take effect) are inconsistent with the Tenth Amendment and beyond the scope of Congress's Fifteenth Amendment authority.¹¹ After examining the Court's previous reviews of the Act's validity, and rejecting the government's justification for Congress's coverage formula, the majority concluded that Section 4(b) – unchanged since 1965 and based

⁹ See Attorney General's Mem. Supporting Motion to Dismiss at pp. 9-12, Docket No. 198; Attorney General's Rebuttal Supporting Motion to Dismiss at pp. 6-10, Docket No. 214.

¹⁰ *Shelby County, Alabama v. Holder*, ___ U.S. ___, 133 S.Ct. 2612 (Jun. 25, 2013). The 2006 re-authorization for twenty-five years would have kept the Act in place until 2031.

¹¹ *Id.* at 2622-23.

on forty year old data – is unconstitutional.¹² The majority further declined to address the issue of whether Section 5 pre-clearance requirements are similarly constitutionally infirm.¹³

As of this writing, the Attorney General is unaware of any lower courts' application of the Court's *Shelby County* holding. However, since the majority opinion has stricken Section 4(b)'s coverage formula, logically, there are no Section 4(b) jurisdictions subject to Section 5 pre-clearance requirements at present.¹⁴

In this case, *Shelby County*'s immediate impact on plaintiffs' "twenty year recurrence" theory is simple and obvious. A substantial question exists going forward, in both the short and long term, whether Mississippi jurisdictions, or any other Section 4(b) jurisdiction, must seek pre-clearance of any voting changes enacted following the Court's decision. There is no way to know whether pre-clearance requirements will exist in 2031, what those requirements may be, how long pre-clearance may take, or what jurisdictions may be subject to it. It would therefore be speculative, at best, to conclude the facts that might face the plaintiffs and subject counties in these consolidated cases in 2031 would be similar to those in

¹² *Id.* at 2361.

¹³ *Id.*

¹⁴ In addition to the majority's reasoning and holding, Justice Ginsburg's dissenting opinion recognizes that in declaring Section 4(b) unconstitutional, the decision renders Section 5's pre-clearance requirements "immobilized." *Id.* at 2632 & n. 1 (Ginsburg, J., dissenting). *See also* United States Department of Justice – Voting Section website, available on-line at <<http://www.justice.gov/crt/about/vot/>> (last accessed July 26, 2013) (explaining the Department of Justice's current policy of declining to make pre-clearance determinations on pending and future Section 5 submissions by Section 4(b) covered jurisdictions in light of the *Shelby County* decision).

2011. Plaintiffs' "twenty year recurrence" theory does not satisfy their burden of proving a reasonable expectation of being subjected to the same factual scenario two redistricting cycles from now.

III. The Three-Judge Panel and Supreme Court Decisions in Mississippi's 2011 Legislative Redistricting Case Further Highlight the Flaws in Plaintiffs' Redistricting Timing and Anti-Mootness Theories.

In October 2011, and again in May 2013, the Supreme Court affirmed a three-judge panel's decisions rejecting "one person, one vote" challenges leveled at Mississippi's 2011 Legislative elections.¹⁵ While none of the Legislative redistricting decisions directly evaluated the plaintiffs' claims in terms of mootness, comparing those decisions to these consolidated cases illustrates at least two reasons that plaintiffs' claims here are moot.

First, the Legislative redistricting decisions show why plaintiffs' census timing theory in this case is generally flawed. Throughout the proceedings before the three-judge panel, and again on both trips to the Supreme Court, the Legislative redistricting plaintiffs argued that the release of census data *automatically* required the Mississippi Legislature to redistrict based on 2010 census data before any future elections could be held.¹⁶ Plaintiffs are pressing the

¹⁵ *Mississippi State Conference of N.A.A.C.P. v. Barbour*, No. 3:11cv159-TSL-EGJ-LG-MTP, 2011 WL 1870222 (S.D. Miss. May 16, 2011), *aff'd*, 132 S.Ct. 542, and *aff'd sub nom.*, *Mississippi State Conference of N.A.A.C.P. v. Bryant*, 133 S.Ct. 2389 (2013).

¹⁶ *See Barbour*, 2011 WL 1870222, at *5. Plaintiffs' recent supplemental brief (Docket No. 220) attempts to factually distinguish *Barbour's* merits holding from these consolidated cases by pointing out the Legislature's duty to redistrict itself every ten years under Section 254 of the Mississippi Constitution is different from laws governing counties. As explained below, the merits of plaintiffs' claims are not squarely at before the Court on its current mootness inquiry. But even if plaintiffs' purported distinction is somehow relevant to mootness, their argument is misleading. For

same general theory here. The Legislative redistricting panel's, and the Supreme Court's, ultimate rejection of that theory demonstrates its lack of merit.

Additionally, and more relevant to mootness, recent and consistent judicial rejection of that premise, in turn, shows why plaintiffs "twenty year recurrence" theory (central to their "capable of repetition, yet evading review" argument in these cases) lacks merit. There is no "reasonable expectation" that facts will unfold in 2031 in the same manner as they did in 2011. Since there is no absolute, inflexible, rule mandating that redistricting must occur as soon as census data comes out, and before any election can be held, there is no way to accurately predict the amount of time that might be available for local governments to redistrict in 2031 before elections held that year.

In short, guessing at an acceptable time frame to apply to local redistricting in 2031 is just guesswork. The circumstances in 2031 should be evaluated in 2031. In the meantime, this Court should reject plaintiffs' mootness exception arguments which pretend to know precisely what those acceptable time frames will be nearly two decades from now.

example, plaintiffs have not pled (much less proven) any of the county defendants' district lines existing in 2011 had been in effect for more than ten years. As another example, plaintiffs' efforts to factually distinguish *Barbour* do not distance these cases from all the other numerous authorities recognizing local governments are not required to automatically redistrict before the next schedule election following release of new census data.

In any event, if this Court determines plaintiffs' claims are not moot, then the county defendants will have the opportunity, at the appropriate time, to demonstrate (1) why this Court correctly dismissed plaintiffs' claims on the merits in 2011 (before the Fifth Circuit remanded the cases and instructed it to consider mootness), and (2) why this Court should dismiss plaintiffs' claims on the merits again, if it must reach that question at some point in the future.

Second, unlike these consolidated cases, the Legislative redistricting plaintiffs raised the issue of potential post-election relief prior to the three-judge panel's original denial of injunctive relief prior to the Fall 2011 state-wide elections.¹⁷ In May 2011, the panel declined to enjoin the 2011 elections but withheld its final judgment so special elections could be evaluated in 2012.¹⁸ In October 2011, the Supreme Court affirmed denial of pre-election injunctive relief.¹⁹ After the Legislature redistricted itself in 2012 and the lines were pre-cleared, the three judge panel denied plaintiffs' post-election relief and the Supreme Court summarily affirmed that decision.²⁰

These consolidated cases' procedural contrast to the Legislative redistricting case is telling. In these cases, plaintiffs did not specifically seek special elections relief prior to a final judgment. As a consequence, and as previously explained in the Attorney General's prior mootness briefing, there are no legitimate claims or issues remaining to be decided that would keep these cases alive. Now that the elections have long since passed, and the county defendants required to devise new

¹⁷ *Id.* (recognizing "[t]he Plaintiffs acknowledge that, as a last resort, this Court may utilize the current districts as an interim remedy. However, they argue that if that happens, new elections must be ordered within a year.").

¹⁸ *Barbour*, 2011 WL 1870222, at *9. Specifically, the panel permitted the parties to petition for a special election following the enactment of redistricting plans in 2012, and DOJ pre-clearance.

¹⁹ *Barbour*, 132 S.Ct. 542 (2011).

²⁰ *Bryant*, 133 S.Ct. 2389 (2013).

lines based on 2010 census data have done so, plaintiffs' claims are moot.²¹

IV. Conclusion.

The Supreme Court's recent decisions in *Shelby County* and *Bryant* may not independently and conclusively establish these consolidated cases are moot.

However, at a very minimum, they do demonstrate further reasons why plaintiffs' "capable of repetition, yet evading review" arguments lack merit, and their failure to timely seek post-election relief is fatal. For the reasons explained above, and in the Attorney General's previous briefing, plaintiffs' claims in each of these consolidated cases should be dismissed as moot.

THIS the 26th day of July, 2013.

Respectfully submitted,

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²¹ See Attorney General's Mem. Supporting Motion to Dismiss at pp. 12-15, Docket No. 198; Attorney General's Rebuttal Supporting Motion to Dismiss at pp. 3-4, Docket No. 214. Recently, in an apparent effort to circumvent mootness by injecting new claims into these consolidated cases without amending their complaints upon leave of court, plaintiffs filed a "Motion to Set Aside the 2011 Elections for Members of the Boards of Supervisors." See Docket No. 221. If the merit of plaintiffs' new filing is ever evaluated by the Court, the motion should be summarily denied for numerous reasons that the county defendants will no doubt raise in response. In the meantime, plaintiffs' motion further demonstrates why their claims are moot. They obviously now recognize their prior failures to plead any claims for "post-election relief" at any time before now, at a point when it is obviously too late to save their claims from mootness.

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CERTIFICATE OF SERVICE

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

THIS the 26th day of July, 2013.

S/Justin L. Matheny
Justin L. Matheny