

**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’ SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF THEIR MOTION TO DISMISS FOR
MOOTNESS THE 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 Supplemental Memorandum in Support of their Motion to Dismiss for Mootness the Plaintiffs’ Cause pursuant to this Court’s Order On June 25, 2013, and in submits the following:

INTRODUCTION

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.*

On June 25, 2013, the Court requested additional briefing from the parties to address the application, to the case at bar, of the decisions in *Shelby County, Alabama v. Holder*, ___ U.S. ___. 133 S.Ct. 2612 (Jun. 25, 2013) and *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).

As previously set forth in Defendants' Motion, 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. It is well settled 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, 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 continue to argue that their case falls within an exceptions to mootness being "capable of repetition, yet evading review" because the same events will repeat every twenty years. However, Plaintiffs' reliance on this recognized exceptions to mootness is misplaced. 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.

LAW AND ARGUMENT

I. *SHELBY COUNTY* FURTHER SUPPORTS DISMISSAL OF PLAINTIFFS' CLAIMS AS MOOT FOR LACKING A JUSTICIABLE ISSUE.

These Plaintiffs must allege "some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." *See O'Shea*, 414 U.S. at 493. "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 argue that their otherwise moot claims raise a judicable issue because it is “capable of repetition, yet evading review.” 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.

The Supreme Court’s holding in *Shelby County* further supports the dismissal of Plaintiffs’ claims for mootness, in addition to the arguments set forth in Defendants’ prior Motions. In *Shelby County*, the Supreme Court was asked to consider the constitutionality of the pre-clearance requirement and the coverage formula of the Voting Rights Act of 1965, as amended and re-authorized by Congress in 2006. Specifically the Supreme Court reviewed “Section 5 of the Act [that] required States to obtain federal permission before enacting any law relating to voting...[a]nd Section 4 of the Act [that] applied that requirement only to some States.” *Shelby County*, 133 S.Ct. at 2618.

To support their position, Plaintiffs place significant emphasis on the Supreme Court’s decision to “issue no holding on Section 5 itself, only on the coverage formula.” *Id.* at 2631. Plaintiffs conclude that since the Supreme Court did not rule on Section 5, that every State is now subject to the Section 5 pre-clearance requirement. However, the Plaintiffs’ position fails to recognize the Supreme Court’s significant and detailed analysis of the relationship between these two sections.

The *Shelby County* Court continues to recognize the “extraordinary measures” of the Voting Rights Act of 1965. *Shelby County*, 133 S.Ct. at 2618. After delineating the history and amendments of the Act, the Court focused on the current application of Section 4(b) and Section 5 in today’s conditions as it relates to the protection of rights of minority voters. The Court found that the “coverage formula—the means of linking the exercise of the unprecedented authority with the problem that warranted it—made sense” until the re-authorization in 2006. *Id.* at 2625. Throughout the opinion, the Supreme Court always analyzes Section 4(b) and Section 5 together. In fact the Court explains “[t]he provisions of Section 5 apply only to those jurisdictions singled out by Section 4.” *Id.* at 2627. Therefore, it is only logical to conclude that without Section 4(b) *to single out* the jurisdiction, Section 5 will not apply to any jurisdictions. The Court further held that Congresses “failure to act leaves us today with no choice but to declare Section 4(b) unconstitutional...[t]he formula in that section can no longer be used as a basis for subjecting jurisdiction to preclearance.” *Id.* at 2631. As for Section 5, the Court issued no holding as to its constitutionality. *Id.* Plaintiffs conclude that because the Court withheld review of Section 5, that it applies to all the states. *See Plaintiffs’ Supplemental Brief pg. 6, Doc. 220.* However, a more reasoned interpretation is that the Court withheld review because it did not need to address the constitutionality of Section 5 until Congress implements a new coverage formula since Section 5 does not automatically subject every jurisdiction to preclearance but only those identified by the coverage formula of Section 4(b).

In this case, *Shelby County* has the immediate impact of undermining the Plaintiffs’ claim that the subject event will occur every twenty years. The Plaintiffs cannot know whether Section 5’s preclearance requirement applies or will ever again apply to Mississippi in 2031. The

Plaintiffs cannot know what coverage formula Congress may enact, if any, that would impact this jurisdiction. Therefore, the Plaintiffs in the case at bar cannot carry their burden for the asserted exception to the mootness doctrine under the Supreme Court's holding in *Shelby County*.

II. THE MISSISSIPPI 2011 LEGISLATIVE REDISTRICTING CASE DOES NOT SAVE PLAINTIFFS' COMPLAINT FROM DISMISSAL AS MOOT.

In the *Barbour* case the issue was whether the Mississippi Constitution, Section 254, was unconstitutional as to the reapportionment guideline. *See Barbour*, 2011 WL at *1. Plaintiffs focus solely on Section 254 of the State Constitution, and the lack of an equivalent statutory provision for board of supervisors, to distinguish *Barbour* from the case at bar. However, more relevant to the case at bar is the distinction of the relief sought by the *Barbour* plaintiffs as opposed to these Plaintiffs. The *Barbour* plaintiffs sought both pre- and post- election relief at the beginning of their case. *Id.* at *5. These Plaintiffs only sought post-election relief when it appeared that their initial complaints would be dismissed. The Plaintiffs allege that post-election relief is available in this case, and therefore saving it from dismissal under the mootness doctrine. However, this argument ignores the "case or controversy" requirement being met at all stages of the litigation. *See Lopez v. City of Houston*, 617 F.3d 336, 340 (5th Cir. 2010). It has been recognized that an election can be invalidated "[b]ut 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*.

Further in *Barbour*, the Court recognized that “hardly a year passes after reapportionment that citizens are not denied their one-person, one-vote constitutional right. *Barbour*, 2011 WL at *1; citing *Reynolds v. Sims*, 377 U.S. 533 (1964). The *Barbour* Court further found that “[t]he question is whether the federal courts should impose a remedy at this time [and]...simply because an election law has become unconstitutional does not necessarily mean a federal court should step in to rewrite it.” *Id.* at *6. The *Barbour* Court found that the relevant Supreme Court authority determined that it should not interfere or impede the state apportionment. *Id.*

The *Barbour* Court's decision not to interfere is not solely based on the existence of the State's reapportionment provision, as argued by these Plaintiffs in an attempt to distinguish the cases, but on the grounds that the reapportionment provision was not unconstitutional. Likewise the reapportionment provision was not unconstitutional because the Supreme Court has long recognized the “legal fiction” that such statutes operate under. *Id.* at 8. Similarly, the same legal fiction should act as a bar to the relief sought by the Plaintiffs in the case at bar in light of their failure to timely seek post-election relief and their failure to overcome the mootness doctrine.

CONCLUSION

Adams County moves this Court to dismiss the Plaintiffs' Complaint against it as moot. The recent decision in *Shelby County* and *Barbour* provide further support that the Plaintiffs' claims are moot as set forth herein. These reasons are in addition to the grounds set forth in Defendants previous briefs before the Court. Therefore, this Court should dismiss the Plaintiffs' Complaint against Adams County as being moot for lacking any justiciable claims.

Respectfully submitted, this the 26th day of July, 2013.

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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 *Supplemental Memorandum in Support of their Motion to Dismiss for Mootness the 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 26th day of July, 2013.

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