

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

HANCOCK COUNTY BOARD OF SUPERVISORS §
v. § **1:10CV564 LG-RHW**
RUHR §

This document pertains to the following civil action consolidated with the above lead case:

NAACP, et al §
v. § **5:11CV28 DCB-JMR**
WARREN COUNTY BOARD OF SUPERVISORS §

WARREN COUNTY, MISSISSIPPI’S SUPPLEMENTAL BRIEF

Defendants, Warren County, Mississippi, Board of Supervisors, Shelly Ashley-Palmtree, in her official capacity as Circuit Clerk of Warren County, Mississippi, and Warren County, Mississippi, Board of Election Commissioners, by counsel, respectfully submit this Supplemental Brief to address the impact and significance of *Shelby County, Alabama v. Holder*, 2013 WL 3184629 (U.S. June 25, 2013) and the three-judge panel decision in *Mississippi State Conference of N.A.A.C.P. v. Barbour*, 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 N.A.A.C.P. v. Bryant*, 133 S. Ct. 2389, 2013 U.S. LEXIS 3843 (U.S. May 20, 2013), upon these consolidated actions.

Shelby County is a watershed 5-4 decision in which the United States Supreme Court declared unconstitutional the coverage formula provided in Section 4(b) of the Voting Rights Act. Section 4(b) in turn determines jurisdictions to which the Section 5 preclearance requirement applies, hence the decision effectively immobilized Section 5.

In the majority opinion by Chief Justice John Roberts, the Court reinvigorated the core principles of federalism undergirding the fundamental principle of equal sovereignty of states. It clearly defined the broad powers of states “to determine the conditions under which the right of suffrage may be exercised.” *Shelby County v. Holder*, slip op. at 10, citing *Carrington v. Rash*, 380 U.S. 89, 91 (1965).

Reaffirming the primary duty of states in drawing congressional district lines, *Shelby County v. Holder*, slip op. at 10, the Court scrutinized the manner in which the Voting Rights Act “authorize[d] federal intrusion into sensitive areas of state *and local policymaking*,” *Shelby County v. Holder*, supra, slip op. at 12 (emphasis added).

The Court emphasized the constitutional equality of states by placing principled limits on the substantial federalism costs that had been exacted from covered jurisdictions, costs that up until then had been exacerbated by increasingly broadened coverage under Section 5 of the Voting Rights Act. *Shelby County v. Holder*, slip op. at 16, citing *Reno v. Bossier Parish School Board*, 528 U.S. 320, 324, 335-336 (2000).

“Never make predictions, especially about the future”

Casey Stengel was right on this one. *Shelby County* demonstrates how problematic it can be for one party to complex litigation, let alone one branch of the federal government, to predict the future, especially when the constitutionality of that prediction must be determined by another branch. In 2006, when Congress enacted the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, 120 Stat. 577 [“2006 VRAARA” or “the Act”], it predicted that the 40-year old coverage formula of Section 4(b) – a formula based on “decades-old data relevant to decades-old problems,” eradicated practices and a comparison between the States in 1965 - would suffice in 2006 and for another 25 years.

Its prediction proved incorrect. Seven years later Congress was called to task over its re-enactment of a coverage formula “based on 40-year old facts having no logical relation to the present day,” *Shelby County v. Holder*, slip op. at 21. Congress failed to use the thousands of pages of hearings, reports, submissions and data generated in 2005 and 2006 to shape a valid coverage formula grounded in current conditions. *Id.*

Congress’ Prediction About the Future

As a consequence of this erroneous prediction and of Congress’ failure to ensure that the 2006 VRAARA passed to remedy the problem of voting discrimination spoke to current conditions, the Act’s Section 4(b) coverage formula was declared unconstitutional, and Section 5 has been immobilized. Section 5 no longer applies to any state or local jurisdiction, nor will it unless and until Congress enacts a new coverage formula based on current political conditions, something that is far beyond our predictive skills and must await the hands of time.

“From Selma to Shelby County”

To get a reasonably accurate assessment of the level of uncertainty over possible Congressional efforts to “fix” the *Shelby County* decision, one need go no further than the Senate Judiciary Committee, which convened hearings on July 17, 2013.

The full Senate Judiciary Committee, followed by its Constitution Subcommittee, convened hearings in the Dirksen Senate Office Building entitled “*From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act.*” <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=6ae289b2466e2489f90d6b42c9d8d78f>. The Senate hearings featured Congressman John Lewis, (D-Ga.) and Jim Sensenbrenner (R-Wi.), both anxious to jump-start the process of amending and updating the key coverage provision of the Voting Rights Act. Much of the discussion focused on past discrimination and “third

generation” vote dilution litigation as well as recent voter ID legislation now being implemented in several formerly covered jurisdictions. House Judiciary Committee hearings will be chaired by a Republican, and House Majority Leader Eric Cantor has already said that he wants to ensure voting rights are protected, but what form that desire takes is unclear. *Id.*

With respect to predictions of how fast Congress would act, most participants and observers at these recent hearings felt it was very unlikely that Congress, particularly Representatives from formerly covered jurisdictions, would willingly impose mandates on their own states by revising and extending the preclearance provision. Congress is not likely to revive Section 4 in the foreseeable future. <http://video.msnbc.msn.com/newsnation/52501129#52501129>

Comments from the most stalwart of supporters of the Voting Rights Act tried to keep an optimistic tone about the prospects for a future legislative fix. Senator Patrick Leahy (D-Vt.), Chairman of the Senate Judiciary Committee, observed that “[w]e must work together as a body – not as Democrats or Republicans, but as Americans – to ensure that we protect against racial discrimination in voting.” <http://www.judiciary.senate.gov/pdf/7-17-13LeahyStatement.pdf> Query whether there have been any signs within the past 12 months, or within the past four years, of the Senate or the House “working together as a body” to enact legislation approaching the significance of this Section 4 renewal issue.

The ACLU’s Washington Legislative Office asked for bipartisanship: “The Voting Rights Act’s long bipartisan history of protecting the right to vote and rooting out racially discriminatory changes through Section 5 must continue. ...[I]t is crucial that congressional action be taken to restore and redesign its protections”

http://www.aclu.org/files/assets/aclu_statement_for_sjc_hearing_selma_to_shelby_july_2013.pdf

Similarly, the NAACP Legal Defense and Educational Fund called for a bipartisan effort to address the *Shelby County* decision: “We fully hope and expect that Congress can cast partisanship aside, and take action to ensure that the cornerstone of our democracy is as strong as ever.” How likely is such bipartisanship to surface now in the House or Senate?
http://www.naacpldf.org/files/case_issue/NAACPLDFSenate.pdf

The Brennan Center for Justice urged Congress to “work together again to restore this critical law to ensure our elections remain free, fair, and accessible for all Americans.”
http://www.brennancenter.org/sites/default/files/analysis/VRA_Testimony_071713.pdf

The uncertain nature of efforts to jump-start Congressional action to undo *Shelby County v. Holder* was reflected in NPR’s July 21, 2013 edition of “All Things Considered.” The story was entitled simply “*The Voting Rights Act: Hard-Won Gains, An Uncertain Future.*”
<http://www.npr.org/2013/07/21/204284355/whats-next-for-the-voting-rights-act>

Alternatives To Section 4

One of the threshold questions in these hearings was posed by NPR: “Do we even need Section 4, or can we rely on some other provision of the law? One of those other provisions might be Section 2.” *Id.* Section 2 applies nationwide and is already a highly effective weapon in the federal arsenal to fight voting discrimination. Section 2 has proven to be most effective when applied against local governments. Indeed, local governments, cities, counties, school districts and special districts comprise the vast majority of the targeted jurisdictions, whether in actions brought by the DOJ or through private plaintiffs, or in tandem. Further, Congress will be challenged to “figure out what newer data would point to places where there is so much voter discrimination, those places need continual scrutiny,” *id.*, in what would likely be “a very slow process, since Congress acts slowly in general and because this legislation could potentially

affect elections.” Id. As Illinois Democrat Sen. Dick Durbin put it, "I understand the challenge from the Supreme Court, but in this political climate on Capitol Hill, what was once a very popular bipartisan issue is now, I'm afraid, divided on party lines." Id.

Availability of Section 3 (b)'s Pocket Trigger for Preclearance

Preclearance is unlikely to return quickly in any other form. Some proponents of the efforts to resurrect preclearance may point to Section 3 as a potential mechanism for reinstating preclearance even in the absence of Section 5. One can question whether preclearance will likely re-emerge on a broad scale under Section 3, a little-noticed and seldom used provision known as a “pocket trigger.” Section 3 does provide a bail-in mechanism that requires a showing of a constitutional violation under the 14th and 15th Amendments, and only upon such a showing would a federal district court be empowered in its discretion to subject a state or local jurisdiction to the preclearance requirement - if and only if the jurisdiction has enacted intentionally discriminatory voting measures, in violation of the 14th or 15th Amendments.

Section 3's use has been largely confined to consent decrees and cases in which the state or local government defendant simply abandoned its appeal efforts and agreed to a Section 3 remedy. See generally Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L. J. 1992, 2016 (2010) ("Section 3 preclearance regimes imposed by district courts (largely via consent decrees) have targeted preclearance for only certain voting changes and set a sunset date for coverage.")

Plaintiffs' Prediction About the Future

Plaintiffs' attempt to invoke the exception to the mootness doctrine for cases “capable of repetition, yet evading review” falters for lack of evidence of a reasonable expectation or demonstrated probability that the release of 2030 decennial census data in the same year as the

2031 quadrennial elections on the county level will be repeated in the same way, at the same time and with the same consequences as in 2011. Mootness cannot be avoided by speculation.

Likelihood of a *Shelby County* legislative fix?

It is speculative to predict that *Shelby County* will be legislatively reversed. There is no more than a remote prospect of a bipartisan House and Senate joining hands within the next one to three years to revise the Voting Rights Act and extend its reach. There is no more than a remote possibility that Congressional action can be jump-started within the foreseeable future to resurrect Section 5 preclearance so that it will be a viable feature of the legislative and political landscape in 2030. The latest groundswell of uncertainty emanating from the Senate chambers provides a starting point for answering these fundamental questions that we believe go to the heart of the applicability of the mootness exception for “capable of repetition, but evading review.”

Uniqueness of Present Circumstances

The timing issue in 2011 was unique, as are the present circumstances now that the 2011 elections have taken place.

1. Section 5 of the Voting Rights Act was in full force and effect in 2011.
2. Warren County and other counties in these consolidated cases were mandated by federal law to comply with the preclearance requirements of Section 5 in 2011.
3. The 2010 decennial census data was released just a matter of days before Plaintiffs filed their various civil actions against over a dozen jurisdictions in the Southern and Northern Districts of Mississippi.

4. Plaintiffs at the time they initiated this litigation sought to enjoin the enforcement of Mississippi statutes relating to deadlines for county officials to qualify for office and sought to extend the date for the 2011 primary and general elections.
5. The very relief that Plaintiffs initially sought when they filed their civil actions – enjoining the state law qualification deadlines and extending the dates for elections – is no longer available.
6. The likelihood of Warren County and these other counties being subjected to a new, constitutional version of Section 5 at some time in the future is at best problematic.

No Likelihood Plaintiffs Will Be Subjected To Same Action Again

Without repeating the legal arguments that are now before this Court, Plaintiffs have provided no facts upon which to base a reasonable expectation that they will be subjected to the same action again. Any other conclusion would necessarily be bottomed on the speculation and conjecture rejected in *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

The 2011 elections have taken place, and county supervisors and other county officials elected in 2011 are nearing the mid-term of their four-year term of office. Warren County and all other counties in these consolidated actions have completed the redistricting process, redistricting plans based on the 2010 census data have been submitted to and precleared by the U.S. Department of Justice pursuant to Section 5, then in effect.

As we near the end of July 2013, Plaintiffs' demand for new elections or other post-election relief fares no better than it did in 2011 or 2012.

No Deliberate Misconduct or Egregious Violation of the VRA

Plaintiffs have failed to demonstrate to this Court any form of deliberate misconduct or any egregious violation of the Voting Rights Act by Warren County or any of the other counties in these consolidated actions, and there is no basis for such relief to be granted. Coupled with the fact that Plaintiffs in their present Complaint never asked for such post-election relief, we respectfully submit that relief in the form of new elections or any other form of post-election relief is not justified or appropriate.

Appropriate Federal-State Balance

Finally, we respectfully submit that the holding and course of proceedings in *Mississippi State Conference of N.A.A.C.P. v. Barbour*, *supra*, recently affirmed by the United States Supreme Court, exemplify the federal-state balance underscored in *Shelby County v. Holder*, a balance that is equally important when addressing the rights and responsibilities of political subdivisions of the state.

The three-judge panel struck a sensible balance between the federal government and the State of Mississippi and underscored the power of states “to determine the conditions under which the right of suffrage may be exercised.” *Shelby County v. Holder*, slip op. at 10, citing *Carrington v. Rash*, 380 U.S. 89, 91 (1965).

Pragmatic Federalism: A Properly Balanced Exercise of Power

The three-judge panel’s decision exhibited appropriate judicial restraint, was affirmed by the Supreme Court and now provides a template for the properly balanced exercise of powers by the federal government and the union of states of which Mississippi is one.

As did the three-judge panel, this Court can and should require Plaintiffs to demonstrate that an active, actual and concrete case or controversy exists at this stage of the litigation, not just at the time Plaintiffs filed their civil action.

The mootness doctrine counsels the Court to proceed carefully at this late stage in the litigation and to ask whether it is possible to grant any effectual relief to the Plaintiffs. With Section 5 preclearance removed from the calculus, a decision now will have no more than a speculative chance of affecting Plaintiffs' rights in the future or granting them any effectual relief. This is a case for applying the mootness doctrine.

Conclusion

It is the prerogative of this Court in the exercise of its Article III powers to declare that the issues presented are no longer "live," that the Plaintiffs lack a legally cognizable interest in the outcome, and that this action should be dismissed based on mootness. Since the Plaintiffs have failed to state a claim for post-election relief, the mootness doctrine applies, and this action should now be dismissed with prejudice.

FILED, this the 26th day of July, 2013.

GRIFFITH & GRIFFITH

By: /s/ Benjamin E. Griffith

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Attorney filing on behalf of Warren County,
MS, Board of Supervisors, Shelly Ashley-
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CERTIFICATE OF SERVICE

I, Benjamin E. Griffith, counsel for DEFENDANTS, WARREN COUNTY, MISSISSIPPI, BOARD OF SUPERVISORS, SHELLY ASHLEY-PALMERTREE, in her official capacity as CIRCUIT CLERK OF WARREN COUNTY, AND WARREN COUNTY, MISSISSIPPI, BOARD OF ELECTION COMMISSIONERS, in the above case, do hereby certify that I have this day caused a true and correct copy of the above and foregoing Warren County, Mississippi's Supplemental Brief to be delivered by the federal ECF filing system to all counsel of record who have appeared in this case.

FILED, this 26th day of July, 2013.

/s/Benjamin E. Griffith
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