IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 13-60614

HANCOCK COUNTY BOARD OF SUPERVISORS

PLAINTIFF/APPELLANT

V.

KAREN LADNER RUHR, in her official capacity as Hancock County Circuit Clerk and Hancock County Registrar, et al.

DEFENDANTS

JIM HOOD, Attorney General for the State Of Mississippi, ex rel., the State of Mississippi

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BRIEF OF APPELLEES

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On Appeal from the United States District Court
for the Southern District of Mississippi, Southern Division

HAZLEHURST, MISSISSIPPI, BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on behalf of themselves and all others similarly situated, NANETTE THURMOND-SMITH

PLAINTIFFS/APPELLANTS

PAMELA JEFFERSON; ROBERT CATCHINGS

MOVANTS/APPELLEES

V.

COPIAH COUNTY, MISSISSIPPI, BOARD OF SUPERVISORS, et al; **DEFENDANTS/APPELLEES**

JIM HOOD **INTERVENOR DEFENDANT/APPELLEE**

PIKE COUNTY, MISSISSIPPI, BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on behalf of themselves and all others similarly situated, REVEREND FRANK LEE

PLAINTIFFS/APPELLANTS

GREGORY PARTMAN

MOVANT/APPELLEE

V.

PIKE COUNTY, MISSISSIPPI, BOARD OF SUPERVISORS et al; **DEFENDANTS/APPELLEES**

JIM HOOD **INTERVENOR DEFENDANT/APPELLEE**

SIMPSON COUNTY, MISSISSIPPI, BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on behalf of themselves and all others similarly situated, L. J. CAMPER

PLAINTIFFS/APPELLANTS

LASTER SMITH

MOVANT/APPELLEE

V.

SIMPSON COUNTY, MISSISSIPPI, BOARD OF SUPERVISORS, et al; **DEFENDANTS/APPELLEES**

JIM HOOD **INTERVENOR DEFENDANT/APPELLEE**

AMITE COUNTY, MISSISSIPPI, BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on behalf of themselves and all others similarly situated, GLENN WILSON

PLAINTIFFS/APPELLANTS

HUGH MCGEE

MOVANT/APPELLEE

V.

AMITE COUNTY, MISSISSIPPI, BOARD OF SUPERVISORS et al; **DEFENDANTS/APPELLEES**

JIM HOOD **INTERVENOR DEFENDANT/APPELLEE**

WAYNE COUNTY, MISSISSIPPI, BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on behalf of themselves and all others similarly situated, LEAH PARSON

PLAINTIFFS/APPELLANTS

JIMMIE GREEN; DAVID JONES

MOVANTS/APPELLEES

V.

WAYNE COUNTY, MISSISSIPPI, BOARD OF SUPERVISORS et al;

DEFENDANTS/APPELLEES

JIM HOOD

INTERVENOR DEFENDANT/APPELLEE

VICKSBURG, MISSISSIPPI, BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on behalf of themselves and all others similarly situated,

PLAINTIFFS/APPELLANTS

FANNIE TONTH

MOVANT/APPELLEE

V.

WARREN COUNTY, MISSISSIPPI, BOARD OF SUPERVISORS et al;

DEFENDANTS/APPELLEES

JIM HOOD

INTERVENOR DEFENDANT/APPELLEE

ADAMS COUNTY, MISSISSIPPI, BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on behalf of themselves and all others similarly situated, JACQUELINE MARSAW

PLAINTIFFS/APPELLANTS

BRENDA PROBY

MOVANT/APPELLEE

V.

ADAMS COUNTY, MISSISSIPPI, BOARD OF SUPERVISORS et al; **DEFENDANTS/APPELLEES**

JIM HOOD **INTERVENOR DEFENDANT/APPELLEE**

BENJAMIN E. GRIFFITH, MSB #8056
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Case No. 13-60614

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 13-60614

HANCOCK COUNTY BOARD OF SUPERVISORS

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V.

KAREN LADNER RUHR, in her official capacity as Hancock County Circuit Clerk and Hancock County Registrar, et al.

DEFENDANTS

JIM HOOD, Attorney General for the State Of Mississippi, ex rel., the State of Mississippi INTERVENOR/APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible recusal or disqualification.

1. Hazlehurst, Mississippi Branch of the NAACP and Nanette Thurmond-Smith, on behalf of themselves and all others similarly situated – Plaintiffs/Appellants.

2. Pike County, Mississippi Branch of the NAACP and Rev. Frank Lee, on behalf of themselves and all others similarly situated – Plaintiffs/ Appellants.

3. Simpson County, Mississippi Branch of the NAACP and L. J. Camper, on behalf of themselves and all others similarly situated – Plaintiffs/ Appellants.

4. Amite County, Mississippi Branch of the NAACP and Glenn Wilson, on behalf of themselves and all others similarly situated – Plaintiffs/ Appellants.

5. Wayne County, Mississippi Branch of the NAACP and Leah Parson, on behalf of themselves and all others similarly situated – Plaintiffs/ Appellants.

6. Vicksburg, Mississippi Branch of the NAACP, on behalf of itself and all others similarly situated – Plaintiff/Appellant.

7. Claiborne County, Mississippi Branch of the NAACP, on behalf of itself and all others similarly situated – Plaintiff/Appellant.

8. Adams County, Mississippi Branch of the NAACP and Jacqueline Marsaw, on behalf of themselves and all others similarly situated – Plaintiffs/Appellants.

9. Jim Hood, Attorney General for the State of Mississippi, ex rel. the State of Mississippi – Defendant/Intervenor.

10. Carroll Rhodes, Esq., Deborah McDonald, Esq., and Leonard McClellan, Esq.,* counsel for plaintiffs-appellants - Hazlehurst, Mississippi Branch of the NAACP and Nanette Thurmond-Smith, on behalf of themselves and all others similarly situated; Pike County, Mississippi Branch of the NAACP and Rev. Frank Lee, on behalf of themselves and all others similarly situated; Simpson County, Mississippi Branch of the NAACP and L. J. Camper, on behalf of

themselves and all others similarly situated; Amite County, Mississippi Branch of the NAACP and Glenn Wilson, on behalf of themselves and all others similarly situated; Wayne County, Mississippi Branch of the NAACP and Leah Parson, on behalf of themselves and all others similarly situated; Vicksburg, Mississippi Branch of the NAACP, on behalf of itself and all others similarly situated; Claiborne County, Mississippi Branch of the NAACP, on behalf of itself and all others similarly situated; and Adams County, Mississippi Branch of the NAACP and Jacqueline Marsaw, on behalf of themselves and all others similarly situated.

11. Copiah County, Mississippi Board of Supervisors, Copiah County, Mississippi Democratic Party Executive Committee, Copiah County, Mississippi Republican Party Executive Committee, Copiah County, Mississippi Board of Election Commissioners, and Edna Stevens, in her official capacity as Circuit Clerk – Defendants/Appellees.

12. Pike County, Mississippi Board of Supervisors, Pike County, Mississippi Democratic Party Executive Committee, Pike County, Mississippi Republican Party Executive Committee, Pike County, Mississippi Board of Election Commissioners, and Roger Graves, in his official capacity as Circuit Clerk – Defendants/Appellees.

13. Simpson County, Mississippi Board of Supervisors, Simpson County, Mississippi Democratic Party Executive Committee, Simpson County, Mississippi Republican Party Executive Committee, Simpson County, Mississippi Board of Election Commissioners, and Cindy Jensen, in her official capacity as Circuit Clerk – Defendants/Appellees.

*Leonard McClellan, Esq. died on September 20, 2011.

14. Amite County, Mississippi Board of Supervisors, Amite County, Mississippi Democratic Party Executive Committee, Amite County, Mississippi Republican Party Executive Committee, Amite County, Mississippi Board of Election Commissioners, and Sharon Walsh, in her official capacity as Circuit Clerk – Defendants/Appellees.

15. Wayne County, Mississippi Board of Supervisors, Wayne County, Mississippi Democratic Party Executive Committee, Wayne County, Mississippi Republican Party Executive Committee, Wayne County, Mississippi Board of Election Commissioners, and Rose Bingham, in her official capacity as Circuit Clerk – Defendants/Appellees.

16. Warren County, Mississippi Board of Supervisors, Warren County, Mississippi Democratic Party Executive Committee, Warren County, Mississippi Republican Party Executive Committee, Warren County, Mississippi Board of Election Commissioners, and Shelly Ashley-Palmertree, in his official capacity as Circuit Clerk – Defendants/ Appellees.

17. Claiborne County, Mississippi Board of Supervisors, Claiborne County, Mississippi Democratic Party Executive Committee, Claiborne County, Mississippi Republican Party Executive Committee, Claiborne County, Mississippi Board of Election Commissioners, and Sammie Good, in her official capacity as Circuit Clerk – Defendants/Appellees.

18. Adams County, Mississippi Board of Supervisors, Adams County, Mississippi Democratic Party Executive Committee, Adams County, Mississippi Republican Party Executive Committee, Adams County, Mississippi Board of Election Commissioners, and Edward Walker, in his official capacity as Circuit Clerk – Defendants/Appellees.

19. Elise Berry Munn, Esq., Michael G. Berry, Esq., and Berry & Munn, P.A. - counsel for defendants-appellees - Copiah County, Mississippi Board of Supervisors, Copiah County, Mississippi Democratic Party Executive Committee, Copiah County, Mississippi Republican Party Executive Committee, Copiah County, Mississippi Board of Election Commissioners, and Edna Stevens, in her official capacity as Circuit Clerk.

20. Wayne Dowdy, Esq., and Dowdy & Cockerham - counsel for Defendant/ Appellee - Pike County, Mississippi Board of Supervisors.

21. Alfred Lee Felder, Esq. - counsel for Defendant/Appellee - Pike County, Mississippi Democratic Party Executive Committee.

22. Benjamin E. Griffith, Esq., Daniel J. Griffith, Esq., Michael S. Carr, Esq., Griffith & Griffith, and Robert Daniel Welch, Esq. - counsel for Defendant/Appellee - Simpson County, Mississippi Board of Supervisors, Simpson County, Mississippi Board of Election Commissioners, and Cindy Jensen, in her official capacity as Circuit Clerk.

23. Benjamin E. Griffith, Esq., Griffith & Griffith, Charles Martin Leggett, Esq., Cooper Martin Leggett, Esq., and Leggett Law Office, PLLC - counsel for Defendant/Appellee - Wayne County, Mississippi Board of Supervisors and Rose Bingham, in her official capacity as Circuit Clerk.

24. Benjamin E. Griffith, Esq., Daniel J. Griffith, Esq., Michael S. Carr, Esq., Griffith & Griffith, and James R. Sherard, Esq. - counsel for Defendant/Appellee - Warren County, Mississippi Board of Supervisors, Warren County, Mississippi Board of Election Commissioners, and Shelly Ashley-Palmertree.

25. Tommie S. Cardin, Esq., Leslie Scott, Esq., John H. Dollarhide, Esq., and Butler, Snow, O'Mara, Stevens & Cannada - counsel for Defendants/Appellees - Amite County, Mississippi Board of Supervisors and Claiborne County, Mississippi Board of Supervisors.

26. Bryan H. Callaway, Esq., - counsel for Defendants/Appellees - Adams County, Mississippi Board of Supervisors, Adams County, Mississippi Board of Election Commissioners, and Edward Walker, in his official capacity as Circuit Clerk.

27. Bobby L. Cox, Esq., and Truly, Smith & Latham - counsel for Defendant/Appellee - Adams County, Mississippi Democratic Party Executive Committee.

28. Harold E. Pizzetta, III and Justin L. Matheny, Office of the Mississippi Attorney General, Counsel for Appellee-Intervenor Defendant Jim

Hood, Attorney General for the State of Mississippi *ex rel*. State of Mississippi.

I hereby certify that to the best of my knowledge and belief, these are the only persons having an interest in the outcome of this appeal.

THIS, the 5th day of December, 2013.

/s/ *Benjamin E. Griffith*
Benjamin E. Griffith, MSB #5026
Attorney of Record for Defendants/Appellees, Warren County Board of Supervisors, et al.; Wayne County Board of Supervisors, et al; Simpson County Board of Supervisors, et al

STATEMENT REGARDING ORAL ARGUMENT

These Appellees/Defendants submit that the issues raised in this second appeal have been fully addressed by briefs submitted by the parties and that oral argument is not essential to assist this Court in addressing those issues and rendering its opinion in these consolidated cases.

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Case No. 13-60614

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF APPELLEES

I. STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1291 to review the District Court's Final Judgment and Order Granting Motions to Dismiss the claims asserted below based on mootness and inapplicability of the exception to mootness for claims capable of repetition, yet evading review. The lower court exercised federal question jurisdiction pursuant to 28 U.S.C. §§1331 and 1343.

II. STATEMENT OF THE ISSUES

The issues on appeal are:

A. Whether the lower court erred in dismissing Appellants' one person, one vote claims as moot, where the 2011 primary and general elections have already been held, and the relief sought by Appellants – enjoining enforcement of state law relating to qualification deadlines and extending

the date for elections – is no longer available.

B. Whether the lower court erred in dismissing Appellants' claims as not within the mootness exception for claims capable of repetition, yet evading review, in light of ***Shelby County v. Holder*'s** immobilization of the Section 5 preclearance requirement and the absence of a reasonable expectation that Appellants or others similarly situated will be subjected to the same unique conditions in 2031 that existed in 2011.

III. STATEMENT OF THE CASE AND RELEVANT FACTS

A. Nature of the Case

This is the second appeal from the lower court's dismissal of consolidated cases brought against certain Mississippi counties by Appellants asserting one person, one vote claims. In the first appeal, this Court vacated the lower court's dismissal based on lack of standing and remanded with instructions for the lower court to proceed to evaluate the mootness issues presented in this second appeal. ***Hancock County Bd. of Sup. v. Ruhr***, 487 Fed. App'x. 189 (5th Cir. Aug. 31, 2012).

B. Procedural History

On February 28, 2011, Appellants commenced the original district court proceedings by filing separate civil actions for declaratory and injunctive relief against county Boards of Supervisors, County Registrars, County Republican Executive Committees, County Democratic Executive Committees, and County Boards of Election Commissioners in Adams, Amite, Claiborne, Copiah, Pike, Simpson, Warren, and Wayne Counties. [ROA 13-60614 2647-2657; ROA 13-60614 2842-2851; ROA 13-60614 3017-3027; ROA 13-60614 3235-3245; ROA 13-60614 3379-4489; ROA 13-60614 3583-3592; ROA 13-60614 3783-3793]. Appellants' claims were based upon the February 4, 2011, release of 2010 census data shortly before the March 1, 2011, qualifying deadline for board of supervisors candidates. Specifically, Appellants sought a judicial declaration that the existing, precleared district lines established by each of the respective Boards of Supervisors following the 2000 decennial census were unconstitutional under the one person, one vote principle of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, for use in the quadrennial 2011 election cycle. Appellants' claims were based upon the population changes they alleged were

revealed in the United States Census Bureau's release of 2010 census data on February 4, 2011, less than one month before the qualifying deadline for candidates for the office of Board of Supervisors. Appellants also sought to enjoin the statutorily mandated qualification deadline of March 1, 2011, and to require each of the Boards of Supervisors to revise their respective voting districts on an expedited timetable prior to the August 2, 2011, primary elections. [ROA 13-60614 2663-2681; ROA 13-60614 2857-2867; ROA 13-60614 3033-3046; ROA 13-60614 3395-3404].

Each complaint sought the following identical relief:

a. A declaratory judgment that the present apportionment scheme and the actions and inactions of the defendants violate rights secured to plaintiffs by the 14th Amendment to the United States Constitution;

b. Enjoining the defendants from conducting elections under the existing redistricting plans for supervisors in [each respective] county;

c. Enjoining the candidate qualification deadline for March 1, 2011, for the office of supervisor in [each respective] County, Mississippi, for a short period of time in order to give the [each respective] County, Mississippi

Board of Supervisors an opportunity to redistrict the supervisor districts and obtain preclearance of the redistricting plan;

d. Requiring that any new redistricting plan for supervisors in [each respective] County, Mississippi, comply with the 14th and 15th Amendments to the United States Constitution, 42 U.S.C. §1983, and §§2 and 5 of the Voting Rights Act of 1965, as amended and extended, 42 U.S.C. §§1973(e) and 1973(c);

e. Court costs and a reasonable attorneys fee. [ROA 13-60614 2647-2657, 2842-2851, 3017-3027, 3235-3245, 3379-4489, 3583-3592, 3783-3793].

Appellants sought identical relief in separately filed motions [ROA 13-60614 2663-2681, 2857-2867, 3033-3046, 3395-3404].

First Appeal and Intervening 2011 Elections

Following intervention by the Attorney General of the State of Mississippi in early March 2011, based on Appellants' challenge of the constitutionality of the March 1 qualification deadline mandated by Miss. Code Ann. §23-15-299(2)(2007), as applied to the respective county supervisors races and as applied to the use of the current, precleared supervisor district lines in the 2011 election

cycle, the lower court on motion by the Attorney General, consolidated these civil actions and one other similar action pending in the Southern District of Mississippi, based on common questions of law. [ROA 13-60614 3076-3077; ROA 13-60614 3834-3836; ROA 13-60614 3867-3868]. On March 25, 2011, the lower court terminated every motion filed prior to consolidation and directed the parties to file or refile their motions. March 25, 2011, Text Order ("[t]he Motions and/or Notices filed after this Order must be refiled in the lead case. The Motions filed in the member cases will be terminated.") [R.E. 57a, Tab 2; 62a, Tab 3; 68a, Tab 4; 73a, Tab 5; 79a, Tab 6; 86a, Tab 7; 93a, Tab 8]. Appellants never refiled any motions for temporary restraining orders or preliminary injunctions, and they abandoned their February 2011 motions.

In March 2011, the Attorney General moved to dismiss all of these complaints pursuant to Rules 12(b)(1) and 12(b)(6), Fed. R. Civ. Proc., based on lack of standing and failure to state a claim upon which relief could be granted, and Appellees joined in that motion. [ROA 13-60614 434-459; ROA 13-60614 3086-3109; ROA 13-60614 3844-3866].

On May 16, 2011, the lower court issued its Opinion and Order dismissing

Appellants' claims for lack of standing and failure to state a claim on the merits. [ROA 13-60614 1724-1742].

Appellants filed their Notice of Appeal on June 28, 2011, amended on June 29, 2011, but did not petition this Court of Appeals for a stay pending appeal as authorized by Federal Rules of Appellate Procedure 8(a)(2).[1] [ROA 13-60614 1855-1873].

This Court issued its Opinion and Judgment on August 31, 2012, vacating the lower court's orders dismissing the Complaints and remanding the consolidated cases to the lower court "for consideration of mootness in accordance with this Opinion." ***Hancock County Bd. of Sup. v. Ruhr***, 487 Fed. Appx. 189, 2012 WL 3792129 (5th Cir. Aug. 31, 2012)["***Hancock I***"]. [ROA 13-60614 1880; ROA 13-

[1]Appellants chose not to seek a stay pending appeal from the Fifth Circuit nor did they seek to expedite their appeal as authorized by F.R.A.P. 8 and Fifth Circuit Local Rule 27.5. ***Bayou Liberty Ass'n. v. U.S. Army Corp of Engineers***, 217 F.3d 393, 398 (5th Cir.); ***Newdow v. Roberts***, 603 F.3d 1002, 1008-09 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 2441 (2011)(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)("When a party has these legal avenues [for injunctive relief] available, but does not utilize them, the action is not one that evades review."); ***Matter of Kulp Foundry, Inc***., 601 F.2d 1125, 1130 (3rd Cir. 1982)(Mootness exception inapplicable where lack of prompt and diligent action in seeking a stay defeated review.)

60614 1874-1901]. Specifically, while this Court disagreed with those portions of the lower court's Order dismissing the Complaints for lack of standing, it did not address those portions of the lower court's Order dismissing the Complaints based on their failure to state a claim upon which relief could be granted, nor could it review whether the lower court abused its discretion in denying the amendments sought by Appellants.

The rationale for this Court's decision in ***Hancock I*** and its detailed instructions on remand to the lower court were as follows:

> [1] Appellees, on one hand, argue that appellants' claims are moot. To be sure, the completion of the elections has arguably mooted the claims for injunctive relief to enjoin election deadlines and elections. "Generally, a request for an injunction is moot upon the happening of the event sought to be enjoined." Appellants, on the other hand, urge that this controversy is live.
>
> [2] First, appellants argue that this case falls within the "capable of repetition, yet evading review" exception to the mootness doctrine. Under this exception, a party may save an otherwise moot claim by showing 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 subjected to the same action again." Appellants declare: "[E]very twenty years the parties and courts will be faced with the same election cycle when census data and elections happen in the same year."
>
> [3] Second, appellants argue that meaningful relief is still available and that, accordingly, the controversy remains live. According to appellants, the completion of the elections has not mooted their claims for declaratory relief or for general relief. Moreover, they are still suffering a "one person, one vote" injury, which would be remedied by invalidating the elections

conducted pursuant to malapportioned districts and ordering remedial elections after redistricting is finished. . . .

[4] But as appellees counter, "a court will only invalidate an election in exceptional circumstances, usually when there has been an egregious defiance of the Voting Rights Act."

[5] Although the VRA is not at issue in this case, the point remains that appellants have not alleged that appellees have acted egregiously or in bad faith. This controversy, according to appellees, was simply a product of bad timing. Given the mobility of modern populations, every decennial census will inevitably shatter the fiction that districts have remained perfectly proportional since the last decennial census. When census data is released just before an election, latent malapportionment will rear its ugly head, notwithstanding the absence of foul play. Or so one could argue. . . .

[6] Based on the record before us, however, we are unable to determine whether this controversy is live. To illustrate, because the district court has not evaluated mootness in the first instance, we lack access to factual findings with which to determine whether the "capable of repetition, yet evading review" exception to mootness is applicable to this case. Although 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. . . .

[7] In an abundance of caution, and because more factual development is needed, we remand this consolidated case to the district court so that it can determine whether this controversy is moot or is live. If the district court determines that this controversy is moot, the court must dismiss the case. If the district court determines that this controversy is live, the court must proceed to determine whether appellants' complaints – after allowing for proper amendments – adequately state a claim upon which *post-election* relief can be granted. Of course, new pleadings will be necessary; we do not forbid new counts. But if the district court determines that the appellants' complaints have failed to state a claim for post-election relief, the court must dismiss the case.

[8] At this time, then, we do not address those portions of the district court orders dismissing the complaints based on their failure to state a claim. We cannot leapfrog the justiciability inquiry to reach the merits of this case. . . And, as we explained, we disagree with the district court that the additional plaintiffs would not have satisfied redressabililty. However, because we cannot yet determine whether appellants' complaints have stated a claim

> upon which relief could be granted, we cannot yet review whether the court abused its discretion in denying the amendments.
> [9] For the foregoing reasons, we VACATE the district court orders dismissing the complaints, and we REMAND the consolidated case to the United States District Court for the Southern District of Mississippi for consideration of mootness in accordance with this opinion. (Paragraph enumeration added and internal case citations and footnotes omitted.) 487 Fed. Appx. at 199 – 201, 212 WL 3792129 at *6-8.

Proceedings on Remand

On remand, Appellants filed but never pursued and ultimately abandoned a motion seeking discovery from Appellees related to the issue of mootness. [ROA 13-60614 1982-2007]. Appellants failed to state with any specificity what such discovery would entail, failed to outline their reasons for needing further discovery, failed to demonstrate that further discovery would produce anything meaningful, failed to show anything beyond conclusory statements that any crucial information relating to the mootness inquiry was exclusively in the sole possession of the counties, failed to show what facts were involved, and why those facts were known exclusively by any of the counties, failed to specify what steps had been taken by Appellants to obtain access to those facts, and failed to show how any further or additional discovery would relate to the issue of the mootness exception for "capable of repetition, yet evading review."

On December 4, 7, and 21, 2012, Appellees and the Attorney General filed

motions to dismiss the consolidated cases as moot. [ROA 13-60614 2140-2235; ROA 13-60614 2244-2257; ROA 13-60614 2330-2333].

On June 25, 2013, the lower court requested the parties to submit supplemental briefs in light of the United Stated Supreme Court's decision in ***Shelby County v. Holder***, __ U.S. __, 133 S. Ct. 2612 (2013), and ***Miss. State Conf. of N.A.A.C.P. v. Barbour***, 132 S. Ct. 542 (2011), aff'd. sub nom. ***Miss. State Conf. of N.A.A.C.P. v. Bryant***, __ U.S. __, 133 S. Ct. 2389 (2013)("courts have generally accepted some lag time between the release of census data and the reapportionment of a state's legislative districts is both necessary and constitutionally acceptable, even when it results in elections based on malapportioned districts in the years that census data are released."). [ROA 13-60614 2367-2368].

On July 25, 2013, in addition to filing a supplemental brief as directed by the lower court, Appellants also filed a Motion to Set Aside the 2011 Elections for Supervisors in the counties at issue and to order special elections. [ROA 13-60614 2369-2387; R. E. 147a-151a; Tab 22].

On July 25 and 26, 2013, Appellees/Defendants and the Attorney General

filed their supplemental briefs as directed by the lower court. [ROA 13-60614 2388-2466].

On August 20, 2013, the lower court entered its Order and Final Judgment granting Appellees' and the Attorney General's Motion to Dismiss on grounds of mootness, finding inapplicable the exception for claims "capable of repetition, yet evading review." [ROA 13-60614 2526-2537; R.E. 107a-116a; Tab 11].

Appellants filed their Notice of Appeal on August 27, 2013. [ROA 13-60614 2538-2547].

C. Statement of Relevant Facts

The 2010 decennial census data was released on February 4, 2011, in the middle of the 2011 election cycle and less than thirty (30) days before the March 1, qualification deadline mandated by state law. The 2011 primary and general elections for supervisors in the counties at issue were held under district lines that had been precleared under Section 5 of the Voting Rights Act using 2000 census data.

None of the counties at issue engaged in an egregious defiance of the Voting Rights Act by holding the 2011 elections under existing district lines when the

2010 census data was released shortly before those elections. On the contrary, consistent with well-established precedent, each of the counties at issue had to be afforded adequate time and a sufficient opportunity to complete the redistricting process and produce a constitutionally sufficient plan, a task rendered impracticable when the census data became available only months before scheduled elections, at a time when Section 5 of the Voting Rights Act was still operative.

Appellees' Completion of Redistricting Process

Even for those counties with districts having maximum relative deviations apparently in excess of 10% in light of the 2010 census data, the counties proceeded in good faith to commence the redistricting process. They were unable to complete that process in a timely manner after having received the new census data in the midst of the current 2011 election cycle, and were under no obligation to halt the election process unilaterally, nor to extend the qualification deadline and hastily redistrict their respective district lines prior to the August 2, 2011, primary elections.

Warren County, Wayne County, and Simpson County, as well as the other

counties at issue, have now undertaken and completed the redistricting process, including obtaining Section 5 preclearance of their redistricting plans under Section 5 of the Voting Rights Act, in a good faith effort to hold elections in districts based on the 2010 census data. [ROA 13-60614 2411, 2422, 2433].

None of these counties has acted in an intentionally discriminatory manner. Contrary to Appellants' claims, none of the counties at issue have engaged in intentionally, gross, spectacular, or wholly indefensible conduct, ***Bell v. Southwell***, 376 F.2d 659 (5th Cir. 1967), nor did any of these counties commit a blatant, deplorable or reprehensible violation of federally protected rights, ***Perkins v. Matthews***, 336 F. Supp. 6, 9 (S.D. Miss.); ***Smith v. Paris***, 257 F. Supp. 901, 905 (M.D. Ala. 1966); ***Hamer v. Ely***, 410 F.2d 152, 156 (5th Cir.), or any other form of substantial malfeasance or abhorrent failure to redistrict, ***Tucker v. Burford***, 603 F. Supp. 276, 277 (N.D. Miss. 1985).

The counties at issue acted in a reasonable manner to undertake the redistricting process consistent with the circumstances. Those circumstances were the product of bad timing. They did not entail bad faith. They did not entail foul play, or egregious misconduct on the part of any of the counties at issue.

Consequently, the county supervisor elections were held in each of the counties as scheduled pursuant to the state election laws and applicable deadlines, and the members of the boards of supervisors in the counties at issue were elected to four-year terms of office, with elected supervisors taking office in January 2012.

Following this Court's vacature and remand, Appellants argued in support of their motion requesting that the 2011 elections be set aside and that the lower court order special elections, that the remedy they were seeking was that they "want the current districts enjoined, elections not to be held under the existing benchmark districts because they are grossly malapportioned." [ROA 13-60614 2529-2530].

Appellants requested pre-election relief only, and no implied claim, request or demand for post-election relief could have been or should have been ferretted out by the lower court.

Following the 2011 elections, no active controversy still existed for which relief could be granted. Dismissal based on mootness was proper, and Appellants could make no plausible showing that their claims were capable of repetition, yet evading review.

IV. STANDARD OF REVIEW

The jurisdictional issue of mootness is a question of law subject to *de novo* review. ***Harris v. City of Houston***, 151 F.3d 186, 189 (5th Cir. 1998). In evaluating *de novo* the District Court's grant of Appellees' Rule 12(b)(1) motions for dismissal, this Court applies the same standard as the District Court. ***Herbert v. United States***, 53 F.3d 720, 722 (5th Cir. 1995).

Appellants erroneously assert in their Brief that the District Court dismissed their lawsuits by applying Rule 12(b)(6). [Brief of Appellants at pp. 12, 14-17]. Although Rule 12(b)(6) also warrants de novo review, those standards do not apply to this appeal from the District Court's dismissal based on Rule 12(b)(1).

Motions filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure challenge the subject matter jurisdiction of the District Court to hear the case. Fed. R. Civ. P. 12(b)(1). The party asserting jurisdiction has the burden of proof on a Rule 12(b)(1) motion. ***Ramming v. United States***, 281 F.3d 158, 161 (5th Cir. 2001). Under this standard, Appellants "constantly bear[] the burden of proof that jurisdiction does in fact exist." *Id*., citing ***Menchaca v. Chrysler Credit Corp***., 613 F.2d 507, 511 (5th Cir. 1980)).

"Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed

facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the district court's resolution of disputed facts." *Id*., citing ***Barrera-Montenegro v. United States***, 74 F.3d 657, 659 (5th Cir. 1996).

When the District Court does not resolve any disputed facts, this Court "'consider[s] the allegations in the complaint as true.'" ***Spotts v. United States***, 613 F.3d 559, 566 (5th Cir. 2010), quoting ***St. Tammany Parish, ex rel. Davis v. Fed. Emergency Mgmt. Agency***, 556 F.3d 307, 315 (5th Cir. 2007)).

Appellate review is "limited to determining whether the district court's application of the law is correct . . .," and if its decision was based on undisputed facts. In the instant case, for example, the fact that the 2011 elections have taken place in each of the counties at issue formed part of the basis for the district court's decision, hence review in this Court would be directed to determining whether that fact is indeed disputed. *Id*., quoting ***St. Tammany Parish***, 556 F.3d at 315. This Court then determines the appropriateness of the District Court's dismissal. *Id*.

V. SUMMARY OF THE ARGUMENT

The lower court properly granted Appellees' Motion to Dismiss on Grounds of Mootness. [ROA 13-60614; 2526-2537; R. E. 95a-106a; Tabs 9 & 10].

Once the 2011 elections were held, no active controversy remained for which relief could be granted.

Having requested only pre-election relief in their Complaints, Appellants could not stretch their federal pleadings to encompass an implied request for post-election relief, nor could they establish by competent, admissible evidence that the mootness exception for claims capable of repetition, yet evading review, was applicable.

Contrary to Appellants' unsupported assertion that "the N.A.A.C.P. branches and Boards of Supervisors will face this dilemma every twenty years," [Brief of Appellant at 14], such conclusional allegations are the product of speculation, improbable inferences, unsubstantiated assertions and legalistic argumentation without a basis in fact. Instead, the specific, concrete facts reveal the following:

(1) While Appellants' attempts to argue that Appellees' conduct was too short in duration to be fully litigated, the March 1, 2011, qualifying deadline came very soon, less than one month after the issuance of the 2010 census data, and hence, it was not Appellees' conduct and action that was too short to be litigated, but that of the United States Census Bureau in issuing 2010 census data in early February 2011 shortly before the March 1, 2011, qualification deadline.

(2) Appellants' attempt to show that the county governments at issue will

"have an opportunity to act in the same allegedly unlawful manner in the future," ***Lopez v. City of Houston***, 617 F.3d 336, 340-41 (5th Cir. 2010), is not sufficient to satisfy the second prong of the mootness exception without a reasonable expectation that the county governments in the counties at issue "will act in that manner." ***Lopez***, supra at 341.

(3) Appellants have failed to establish a reasonable expectation that they will be subjected to the same conditions found here in 2011. The variables that preclude such a finding are manifold:

a. The U.S. Census Bureau can become more efficient and timely in releasing the census data by 2031;

b. County boards of supervisors can more likely have sufficient time to draw, adopt and implement redistricting plans, especially now that Section 5 preclearance has been effectively immobilized by the U.S. Supreme Court's June 25, 2013, decision in ***Shelby County v. Holder***, __ U.S. __, 133 S. Ct. 2612 (2013);

c. No one can reasonably expect that the populations within Warren County, Simpson, County, and Wayne County, or any of

the counties at issue, will shift to such a degree as to require district lines to be redrawn in 2031. In other words, supervisor district populations with the counties at issue may not shift to a sufficient degree so as to lead to a one person, one vote challenge to the then-existing district lines as they may exist in 2031, lines that have yet to be drawn for much of a population that will not reach voting age population for years to come;

d. In addition to eliminating potentially many months of time required for a county board of supervisors to conduct and complete the redistricting process under federal supervision, as a result of ***Shelby County v. Holder***, which has effectively nullified the Section 5 preclearance requirement, advances in computer technology and improvements in the accuracy and speed with which redistricting data and plans can be drawn, will likely shorten the timeline for the redistricting process in 2031 to a fraction of the time required for that process in 2011;

e. Finally, rather than engage in rank speculation about the precise

> conditions and circumstances that can be "reasonably expected" in 2031, as Appellants strive to do, it is manifest that Appellants or those similarly situated cannot show that they will be in the same position at any point in the future, whether in 2031, 2061, or 2081, as they found themselves during the 2011 election cycle. With Mississippi counties and other political subdivisions no longer subject to having voting changes submitted to and precleared by the U.S. Department of Justice in light of ***Shelby County v. Holder***, county redistricting plans, election regulations and procedural changes can and will be effectuated immediately, with counties having the ability – as the law now stands – to implement new district lines upon receipt of the 2030 census data and to complete the redistricting process well before the supervisor candidate qualification deadline currently set by state law as March 1, 2031, for the next quadrennial elections in which Appellants fear this perfect storm will again occur.

These and other variables preclude Appellants from invoking the mootness

exception for claims that are "capable of repetition, yet evading review," applicable only in exceptional circumstances. ***City of Los Angeles v. Lyons***, 461 U.S. 95, 109 (1983).

Given the uncertainty of the 2031 election cycle, almost twenty years from now, the uncertainty of any congressional action to reinstate the Section 5 preclearance requirement, and the uncertainty of when, how and how quickly the U.S. Census Bureau will be able to transmit 2030 decennial census data to counties, this is a classic case for rejecting the mootness exception, since any other conclusion would necessarily be grounded on the speculation and conjecture rejected in ***Weinstein v. Bradford***,423 U.S. 147, 149 (1975) and ***Lopez v. City of Houston***, 617 F.3d 336 (5th Cir. 2010)(claim properly adjudicated moot after election was held, where plaintiffs failed to allege the kind of egregious or invidious discrimination that would have made invalidation of an election proper).

With the 2011 elections having taken place and county supervisors in the challenged counties who were elected in 2011 now approaching the mid-term of their four-year terms of office, the relief initially demanded by Appellants – enjoining the 2011 qualification deadline and extending the dates for the 2011

primary and general elections – is no longer available. The claims asserted by Appellants are moot. The relief demanded by Appellants is no longer available. There is no active controversy with respect to Appellants' claims.

Appellants' demand for post-election relief fares no better. Appellants never requested post-election relief, and they have presented the lower court and this Court in their second appellate venture with no evidence of deliberate misconduct, egregious violation of the Voting Rights Act, or intentional, abhorrent or reprehensible delay in the redistricting process by Appellees. Any belated demand by Appellants for new elections or any other form of post-election relief is unwarranted.

VI. ARGUMENT

I. The lower court followed this Court's instructions on remand in *Hancock I* for determination of mootness.

In this Court's ***Hancock I*** decision, it noted the possibility that that the claims in the case might be moot and remanded for a determination in this regard. This Court specified in its remand Order that mootness must be decided before any other issues in these consolidated cases. [ROA 13-60614; 1880, 1874-1901]. If the lower court determined that Appellees'/Plaintiffs' claims were not moot, then a

scheduling order or other appropriate case management order would be entered so that the parties may address any remaining issues. The lower court on remand found that all of the consolidated cases before that court were in fact moot, since they sought relief in relation to deadlines for the 2011 county board of supervisor elections which had since come and gone. Specifically, the lower court found on remand:

> In this case, when the qualifying deadline passed, and the elections were held, Plaintiffs' claims seeking to enjoin those events became moot. The Court finds that the Plaintiffs have not demonstrated a reasonable expectation that the same circumstances would arise again. Thus, the capable of repetition, yet evading review exception to mootness is not applicable to the claims in this case. The claims alleged in Plaintiffs' Complaints are moot and must be dismissed. ***Hancock County Bd. of Sup. v. Ruhr***, 487 Fed. Appx 189, 2012 WL 3792129 (5th Cir. Aug. 31, 2012). [ROA 13-60614; 2526-2537; R. E. 95a-106a; Tabs 9 & 10].

II. Appellants have shown no basis for invoking the mootness exception for claims "capable of repetition, yet evading review".

The lower court rejected Appellants'/Plaintiffs' attempt to invoke the "capable of repetition, yet evading review" exception to the mootness doctrine, holding that the exception was not applicable to the claims before it. [ROA 13-60614; 2526-2537; R. E. 95a-106a; Tabs 9 & 10]. This exception applies where "(1) the challenged action is in its duration too short to be fully litigated prior to

cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." ***Davis v. Fed. Election Comm'n,***. 554 U.S. 724, 735 (2008). In Appellants'/Plaintiffs' second flight up the appellate ladder, we ask the Court to accept the lower court's analysis of the mootness issue, particularly in light of the lower court's observation that:

> It is also apparent from the evidence and arguments at hearing that Department of Justice preclearance was the primary impediment to the counties' ability to redistrict in time for the 2011 elections. This step in the redistricting process has been removed. After the United States Supreme Court's decision in ***Shelby County, Alabama v. Holder***, 133 S. Ct. 2612 (2013), no county in Mississippi is required to obtain preclearance from the Department of Justice for changes to voting procedures, including new supervisor district lines. The court held that the formulas in Section 4(b) of the Voting Rights Act may no longer be used as a basis for subjecting jurisdictions to preclearance. ***Shelby Cnty***., 133 S. Ct. at 2631.

III. *Shelby County v. Holder* has a clear impact upon the ability of formerly covered counties to complete the redistricting process in a timely manner.

As the lower court noted, the U.S. Supreme Court's decision in ***Shelby County v. Holder*** provides a further barrier to Appellants' attempt to invoke the mootness exception. One consequence of ***Shelby County*** is clear: the next time a Mississippi county is forced to redistrict in response to 2020 or 2030 census data, the absence of any Department of Justice preclearance requirements should greatly

speed up the process, increasing the likelihood that the county redistricting process will be conducted in time for the next scheduled county elections. As the lower court noted,

> There has been no evidence or even a suggestion that the Mississippi county election officials deliberately defied or in the future indented to defy the requirements of the Voting Rights Act. Instead, the evidence is to the contrary. Despite the time constraints imposed by Mississippi statute, the Defendants made every effort to comply with their redistricting responsibilities. Plaintiffs have merely shown that the Defendants may be presented with an opportunity to act in the same allegedly unlawful manner in the future. This is not enough. ***Hancock County Board of Supervisors v. Karen Ladner Ruhr, et al***, 2013 WL4483376 at *4.

The practical effect of the U.S. Supreme Court's ***Shelby County*** decision was to remove the Section 5 preclearance requirement, and in this case it rendered the "capable of repetition, yet evading review" exception to the mootness doctrine inapplicable. This conclusion is inescapable in light of other relevant facts addressed by the lower court.

IV. Appellants are barred from asserting an implied claim for post-election relief.

Appellants now seek to do an end-run around the mootness doctrine by asserting – late in the course of these proceedings and shortly before the lower court's ruling on remand – that they have implicitly or indirectly asserted claims for

post-election relief, and that the lower court failed to consider those claims.

There are several flaws in this argument, which leapfrogs this Court's remand instructions in an effort to obtain staggering relief reserved for cases involving egregious conduct that strikes at the very heart of fair elections. Such conduct is not evidenced in this entire record.

First, Appellants moved for leave to amend their Complaint following this Court's remand decision, arguing that "if there was insufficient time for the court to enjoin the election and fashion a remedy prior to the primaries, the Court should set the election aside and order special elections for supervisors." [ROA 13-60614; 1902-2007].

Second, Appellants made the belated argument that this Court's ruling in ***Hancock I*** instructed the lower court to allow them leave to assert claims for post-election relief if the lower court concluded that such claims had potential merit. This was a distortion of this Court of Appeals' instructions on remand to the lower court and an improper attempt to place the merits of claims not yet a part of this lawsuit at issue before mootness was decided and before the lower court had decided if the Complaints stated claims for relief. This Court's remand instructions

were clear: "We remand this consolidated case to the district court so that it can determine whether this controversy is moot or is live. If the district court determines that this controversy is moot, the court must dismiss the case." ***Hancock I***, 487 F.Ed. App'x. 189 at 200-01.

Appellants' argument finds no support in the record, nor does it reflect Fifth Circuit precedent or the facts of this case. As the lower court noted in its August 20, 2013, Order dismissing the Complaints as moot, this Court of Appeals' ruling in the initial appeal included language which appeared to indicate that the lower court was only to consider the merits of Appellants'/Plaintiffs' claims for post-election relief in the event it decided their claims were not moot. As this Court stated in its remand instructions:

> If the district court determines that this controversy is live, the court must proceed to determine whether Appellants' Complaints – after allowing for proper amendments – adequately state a claim upon which post-election relief can be granted. Of course, new pleadings will be necessary; we do not forbid new counts. But if the district court determines that the Appellants' Complaints have failed to state a claim for post-election relief, the court must dismiss the case. ***Hancock I***, 487 F.Ed. App'x. 189 at 200 (5th Cir. 2012).

These instructions from this Court of Appeals provided the lower court with discretion to choose, as it did, not to specifically rule upon Appellants' claim for post-election relief, since the lower court was not instructed by this Court of

Appeals to do so, but only "[i]f the district court determines that this controversy is live." ***Hancock I***, 487 F.Ed. App'x. 189 at 200 (5th Cir. 2012).

Appellants cannot come forward with a factually grounded and legally plausible scenario in which a claim for pre-election relief might be moot, yet claims for post-election relief might still be valid under the circumstances of this case.

The linchpin for Appellants' novel argument is ***Tucker v. Burford***, 603 F. Supp. 276 (N.D. Miss. 1985), in which then Chief Judge Neal Biggers, Jr. set aside county elections which had been held in 1984 based upon districts which were malapportioned under the 1980 census data. ***Tucker*** does not support Appellants' argument that post-election relief was available in this case, which was not an appropriate case for its invocation. Specifically, in ***Tucker***, the district court granted election relief in the form of special elections for county supervisors elected on allegedly malapportioned district lines nearly three years after the release of census data.

While Appellants in the instant consolidated cases waited until the election was in progress before seeking judicial relief, when they were denied that relief by the lower court, they took no further action to seek a stay or injunction pending

appeal to the U.S. Court of Appeals for the Fifth Circuit, nor did they exercise diligence in seeking to have the alleged failure by the lower court rectified by the Court of Appeals prior to the election which was not held until August 2011.

Appellants have not provided any justification for their failure to initially assert claims for post-election relief, such as the claims the plaintiffs in ***Tucker*** did assert. In ***Tucker***, moreover, Judge Biggers emphasized that setting aside an election was an extraordinary remedy, but he found in that case that the fact that Panola County officials had dragged their feet in redistricting for a period of over three (3) years following the 1980 census justified this extraordinary step. Such facts are not present in the instant consolidated cases. Indeed, Judge Biggers wrote in ***Tucker*** in very strong language that he "abhor[ed] the failure of the Panola County officials to redistrict prior to the November 1983 election so as to conform to the one-man/one-vote principle, despite knowledge of a maximum population deviation exceeding 30% in the districts." ***Tucker***, 603 F. Supp. at 278. Still, Judge Biggers chose not to invalidate the 1983 elections, based largely on the fact that plaintiffs had not sought relief prior to those elections. It was only the November 1984 elections, a full four (4) years after the 1980 census, which Judge

Biggers chose to invalidate. Such extreme and abhorrent failure to redistrict is not present with respect to the counties at issue in this consolidated appeal.

Appellants/Plaintiffs emphasize that they did seek pre-election relief in this case, and while this is true, it does not make the actions of the counties at issue in this case comparable to that of Panola County in ***Tucker***. Unlike that county in ***Tucker***, moreover, there was nothing "abhorrent" about the conduct of the counties in these consolidated cases, and no facts appear in the record that could support a finding that these Defendants/Appellees exhibited "egregious defiance" of the type present in ***Tucker***, where 1980 census data was disclosed to the county in 1982, and the election was held two years after receipt of that census data. ***Tucker***, 603 F. Supp. at 278. Indeed, there does not appear to be a basis for concluding that the conduct of the counties at issue was reprehensible or abhorrent in any respect whatsoever. See, e.g., ***Fairley v. Forrest County, Miss***., 814 F. Supp. 1327 (S.D. Miss. 1993)("One election every twenty years. . .will be held so close to the taking of the decennial census that decision makers acting in good faith may be unable to devise a constitutionally-acceptable reapportionment in time for the regularly scheduled elections. Does that mean that the Constitution requires the holding of

special elections in every state in which this occurs once every twenty years? This court thinks not." *Id*. at 1343); ***Bryant v. Lawrence County, Miss***., 814 F. Supp. 1346 (S.D. Miss. 1993)(recognizing that a political body operating a constitutional redistricting plan "must have a reasonable time after each decennial census in order to develop another plan and have it precleared by the Justice Department. Elections held under such a previously precleared plan, in the year that new census data becomes available, but before redistricting can take place, should not be set aside and new elections ordered." *Id*. at 1354); ***French v. Boner***, 963 F.2d 890 (6th Cir. 1992)(noting important considerations that outweigh the interests of mathematical equality in the context of elections for four-year terms that occur on the cusp of the decennial census).

Further distinguishing the consolidated cases at issue from Panola County in ***Tucker***, the instant cases deal with the 2011 board of supervisors elections, where the census was held in 2010, and the actual census data was only released a few weeks before Appellants filed their one person, one vote claims. A county's failure to redistrict immediately following a census is far less reprehensible than its failure to do so a full four years after a census as in ***Tucker v. Burford***. Further,

Appellants' request for the extraordinary relief of setting aside an election is further hampered by the fact that Appellants chose to seek relief against such a large number of counties. For Appellants to argue that these counties independently committed egregious failures to redistrict, based on mathematical inequality in district population determined less than thirty days before the qualification deadline for an election already in progress, defies logic and flies in the face of political reality and the facts of this case. Appellants argue that they are now entitled to the extraordinary remedy of invalidation of a large number of elections. Such a claim of entitlement is unsupportable. It is insupportable particularly when one weighs in the balance the settled expectations of voters and elected officials, the substantial costs of elections, the need for stability and continuity of office under four-year terms. This extraordinary remedy that Appellants now seek from this Court of Appeals is staggering relief to which they have no colorable claim to entitlement.

V. Appellees have shown good faith in an effort to redistrict in a timely manner.

In light of the foregoing, even if the lower court had specifically declined to allow Appellants' leave to amend and had specifically ruled upon their request to assert claims for post-election relief, the unassailable fact remains that the counties

at issue had been making good faith efforts to redistrict, a fact which the lower court recognized when it stated:

> There has been no evidence or even a suggestion that the Mississippi county election officials deliberately defied or in the future intend to defy the requirements of the Voting Rights Act. Instead, the evidence is to the contrary. Despite the time constraints imposed by Mississippi statute, the Defendants made every effort to comply with their redistricting responsibilities. Plaintiffs have merely shown that Defendants may be presented with an opportunity to act in the same allegedly unlawful manner in the future. This is not enough. ***Hancock County Board of Supervisors v. Karen Ladner Ruhr, et al***, 2013 WL4483376 at *4.

Thus, the lower court did not find "abhorrent" or reprehensible conduct by the counties before him, and even appeared to praise their efforts to redistrict in a timely manner. This was justified under the facts of this case, a far cry from the aggravated and extreme facts presented in ***Tucker***.

In light of these findings, Appellants' reliance upon ***Tucker*** is misplaced. The lower court's interpretation of ***Tucker*** was sound and reflected factual distinctions between Panola County, the county at issue in ***Tucker***, and the counties in these consolidated cases. We urge this Court now to affirm the lower court's ruling on remand.

This Court's order and remand instructions in the first appeal did not direct the lower court to address any claims for post-election relief. Nonetheless, such

claims were barred since the actions of the subject counties were neither reprehensible, abhorrent or in deliberate disregard of the voting rights or constitutional rights or federally protected rights of Appellants. On the contrary, each of the counties in these consolidated cases acted reasonably when confronted with 2010 census data that was released to the counties in February 2011, just a matter of weeks before the qualification deadline for county quadrennial elections. Their inability to redistrict in a timely manner following the receipt of the census results less than one month earlier was not an egregious failure to redistrict as in ***Tucker v. Burford***, nor should it be the basis for post-election relief under the circumstances of this case.

VII. CONCLUSION

This controversy originated as a one person, one vote challenge in 2011 and is making its second appearance in this Court. There is no longer a live controversy on which the Court can issue an effective remedy, and Appellants' claims were properly dismissed as moot.

On the eve of the 2011 quadrennial elections for county supervisors in several Mississippi Counties, shortly before the March 1, 2011, qualification

deadline and just weeks after official release of the 2010 decennial census data, Appellants sought to enjoin the counties from holding elections under single-member redistricting plans they claimed to be malapportioned. Anchoring their Complaints to the 2011 election cycle, Appellants sought broad relief, including a declaration that the present county supervisor district lines were invalid, an injunction to halt the 2011 elections and an injunction to stop the establishment of invalid district lines. They sought this relief based solely on pre-election claims. Now that the complained-of events have occurred, there is no longer a live case or controversy.

At the time Appellants commenced their various lawsuits, each of the counties had just begun the process of redrawing district lines to address any malapportionment. The primary impediment to each of the counties being able to complete the redistricting process in time for the 2011 elections was the requirement that redistricting plans in covered jurisdictions be precleared by the U.S. Department of Justice under Section 5 of the Voting Rights Act. Appellants' claims were consolidated and dismissed by the trial court on grounds of lack of standing and failure to state a claim upon which relief could be granted. The

county elections were held under district lines as they existed prior to the 2010 census.

Contrary to Appellants' assertions that they are automatically entitled to injunctive "post-election" relief simply because Appellees' 2011 supervisor elections were allegedly held on malapportioned lines, precedent points the other way. ***Reynolds v. Sims***, 377 U.S. 533, 586 (1964); ***Miss. State Conf. 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 Conf. of NAACP v. Bryant***, 133 S. Ct. 2389 (2013). See also ***French v. Boner***, 963 F.2d 890, 891 (6th Cir. 1992), cert. denied, 506 U.S. 954; ***Ramos v. Illinois***, 976 F.2d 335, 340-41 (7th Cir. 1992); ***Republican Party of Oregon v. Keisling***, 959 F.2d 144, 145-46 (9th Cir. 1992), cert. denied, 504 U.S. 914; ***Fairley v. Forrest County, Miss***., 814 F. Supp. 1327, 1343-46 (S.D. Miss. 1993); ***Bryant v. Lawrence County, Miss***., 814 F. Supp. 1346, 1454 (S.D. Miss. 1993).

Appellants appealed to this Court in 2011, and by the time this Court heard oral argument in 2012, newly elected county officials had taken office. This Court concluded that Appellants had standing, vacated the order dismissing the

Complaints, and, since the 2011 county elections had been concluded, this Court remanded with instructions for the district court to make a factual determination whether the subject claims were still active controversies or moot. The district court on remand allowed the parties sufficient time to submit briefs on the issue of mootness, determined that the claims were moot and dismissed the Complaints. In doing so, it carefully followed this Court's remand instructions. Appellants' claims were properly dismissed based on mootness. The elections they sought to enjoin in 2011 have already taken place, and county supervisors have been serving in office for two of their four year terms.

Appellants have shown no more than a theoretical possibility under the "capable of repetition" prong, and they have failed to demonstrate a reasonable expectation that Appellees will act in the same allegedly unlawful manner in the future under the "evading review" prong of this exception to the mootness doctrine, which is properly invoked and available only in exceptional circumstances.[1]

[1]As Appellants assert, "the same parties, the NAACP branches and the boards of supervisors, will face the same dilemma every twenty years. Every twenty years ***if*** the counties are malapportioned ***and*** the boards of supervisors failed 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." [Appellants'/Plaintiffs' Revised Mem., ROA 13-60614 2318; R. E. 472, Doc. 210 at p. 6].

The applicable test set forth in ***Weinstein v. Bradford***, 423 U.S. 147, 149, 96 S. Ct. 347, 349, 46 L. Ed. 2d 350, 353 (1975), requires, "a reasonable expectation that the same complaining party would be subjected to the same action again." No evidence creating such a reasonable expectation has been shown by Appellants, nor has there been any evidence of a demonstrated probability of such a repetition, and the record reveals no basis for it.

In this regard, the district court correctly reasoned that while U.S. Justice Department Section 5 preclearance of redistricting plans for the counties was the primary impediment to the counties being able to complete the redistricting process in time for the 2011 elections, the U.S. Supreme Court's decision in ***Shelby County v. Holder***, 133 S. Ct. 2612 (U.S. June 25, 2013) effectively immobilized Section 5, the Court in that case holding that the coverage formula in Section 4(b) of the Voting Rights Act may no longer be used as a basis for subjecting jurisdictions to preclearance. ***Shelby County***, 133 S. Ct. at 2631. Absent viable claims of egregious or invidious discrimination, in validation of elections or ordering of special elections are not appropriate remedies that will save Appellants' election claims from mootness, and those claims are moot under ***Lopez v. City of Houston***,

617 F.3d 336 (5th Cir. 2010).

The claims alleged in Appellants' Complaints are moot and must be dismissed. When the March 1, 2011, qualification deadline passed and the 2011 elections were held, Appellants' claims in which they sought to enjoin those elections became moot. Appellants have failed to demonstrate a reasonable expectation that the same circumstances will arise again. Their hypothesis that a series of future events will create the same claims in twenty years falls short of and cannot carry their burden. Appellants failed to request post-election relief, and their omission cannot be remedied by implication.[1]

Appellants cannot bring this case within the mootness exception for "capable of repetition, yet evading review" in light the unique facts of this case that are not likely to occur again in this sequence. Those facts include the elimination of Section 5 preclearance following the June 25, 2013, decision by the Supreme Court in ***Shelby County v. Holder***. By taking the Section 5 preclearance factor out of the equation, Appellants cannot plausibly argue that these counties will likely have to delay completion of the redistricting process or the holding of regularly scheduled

[1]Implied claims do not save this lawsuit from mootness. ***Bayou Liberty Ass'n. v. U.S. Army Corp of Engineers***, 217 F.3d 393, 398 (5th Cir.).

quadrennial elections following the 2030 census due to delay in processing their Section 5 submissions of county redistricting plans with the Justice Department.

The mootness doctrine counsels the Court to proceed carefully at such a late stage in the litigation and appellate process and to ask whether it is practicable, fair and just to grant any effectual relief to Appellants. We respectfully submit that it is not. We ask this Court to affirm the judgment of the lower court dismissing these consolidated cases as moot.

RESPECTFULLY SUBMITTED on this the 5th day of December, 2013.

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THIS, the 5th day of December, 2013.

/s/ *Benjamin E. Griffith*
Benjamin E. Griffith

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7), the undersigned submits that this **Brief of Appellees** is in compliance with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), as follows:

1. Exclusive of those portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 11,311 words, which is in compliance with Fed. R. App. P. 32(a)(7)(B);

2. This brief has been prepared in a proportionally spaced typeface in Times New Roman 14 pt. font, using WordPerfect 10 word processing program, which complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6).

3. The undersigned understands that a material misrepresentation in completing this certificate or circumvention of the type-volume limits may result in this Court striking the brief and imposing sanctions.

THIS, the 5th day of December, 2013.

/s/ *Benjamin E. Griffith*
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United States Court of Appeals

FIFTH CIRCUIT
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December 06, 2013

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No. 13-60614 Hancock County Board of Supr, et al v. Karen Ruhr, et al
USDC No. 1:10-CV-564
USDC No. 3:11-CV-121
USDC No. 3:11-CV-122
USDC No. 3:11-CV-123
USDC No. 3:11-CV-124
USDC No. 4:11-CV-33
USDC No. 5:11-CV-28
USDC No. 5:11-CV-30

The following pertains to your brief electronically filed on December 5, 2013.

You must submit the seven paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

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