

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF GEORGIA  
AUGUSTA DIVISION

HENRY D. HOWARD, EARNEST G. )  
SMITH, GLORIA FRAZIER, THOMAS )  
WALKER, KENNETH MARTIN, )  
MELVIN IVEY, and ALBERT )  
ROBINSON, JR., )

Plaintiffs, )

v. )

Case No. 1:14-cv-00097-JRH-BKE

AUGUSTA-RICHMOND COUNTY, )  
GEORGIA, COMMISSION; DEKE S. )  
COPENHAVER, in his official capacity as )  
Mayor of Augusta-Richmond County; )  
and LYNN BAILEY, in her official )  
capacity as Executive Director of the )  
Richmond County Board of Elections, )

Defendants. )  
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PLAINTIFFS’ MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY  
INJUNCTION

I. Introduction

Plaintiffs have moved the Court pursuant to Fed. R. Civ. P. 65(a) for a preliminary injunction enjoining Defendants from holding the 2014 elections for the Augusta-Richmond County Commission and Mayor at the time of the May 20, 2014 statewide primary elections, rather than at the time of the November 2014 general elections, pending a final decision on the merits of Plaintiffs’ Complaint. The grounds for this Motion are that: (1) there is a substantial likelihood that Plaintiffs will prevail on the merits of their claim that holding the elections for the Augusta-Richmond County Commission and Mayor at the time of the May primary elections would be in violation of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c; (2) Plaintiffs will suffer irreparable injury unless the injunction issues; (3) the threatened injury outweighs

whatever damage the proposed injunction may cause the Defendants; and (4) the injunction would not be adverse to the public interest.

II. Statement of Facts

Plaintiffs are African American registered voters and residents of Richmond County, Georgia, and are eligible to vote in elections for members of the Augusta-Richmond County Commission and Mayor. The County Commission consists of ten members, eight of whom are elected from eight single-member districts (Districts 1-8), and two of whom are elected from two super districts (Districts 9-10), each of which contains approximately one half of the county population. The Mayor of the Augusta-Richmond County Commission is elected by the voters of the county at-large. Elections for the County Commission and Mayor are nonpartisan, and terms of office are for four years. Terms of office for the County Commission are staggered. Elections in 2014 will be held for Districts 2, 4, 6, 8 and 10, and for Mayor. All Plaintiffs are eligible to vote for Mayor and two Plaintiffs are each eligible to vote in elections for Districts 2 and 4.

In 2011, the Georgia General Assembly amended Ga. Code Ann. § 21-2-139(a) to allow municipalities to follow their charter provisions for purposes of holding elections. Augusta-Richmond regarded itself as following municipal election rules and that its general nonpartisan consolidated elections would be held at the time of the November general election and not at the time of the primary.

In 2012, the General Assembly enacted Act No. 719, Section 9 of which amended Ga. Code Ann. § 21-2-139(a) to provide that, for purposes of determining when elections should be held, all consolidated governments in Georgia holding nonpartisan elections should be treated as counties, not as municipalities, and that the elections would be held in conjunction with the statewide primary in even numbered years. The only county affected by the amendment was

Augusta-Richmond; where elections for the Augusta-Richmond County Commission and Mayor would be moved from November (when the general election is held) to July (when the statewide primaries were held). The other six consolidated governments in Georgia either did not have nonpartisan elected offices or already elected their nonpartisan offices in July.

Georgia submitted the 2012 change to the Department of Justice (DOJ) for preclearance under Section 5 of the Voting Rights Act and DOJ entered an objection on December 21, 2012, on the grounds that moving the County Commission and Mayoral elections from the November general elections to the date of the statewide primary would result in reduced Black turnout. Letter from Thomas E. Perez, U.S. Assistant Attorney General, to Dennis R. Dunn, Georgia Deputy Attorney General (Dec. 21, 2012), attached hereto as Exhibit A. Black persons are 54.4% of the total population, and 50.9% of the voting age population, in Augusta-Richmond County. DOJ concluded that minority turnout would be lower in July than in November and the change would have a “retrogressive effect.” According to DOJ, in 2012 “in percentage terms, black persons were 55.4 percent less likely to vote in July than in November, while white persons were only 41.4 percent less likely to vote.” In the 2010 election, “black voters constituted 53.2 percent of the electorate in November, but only 43.4 percent in July.” DOJ also held that the evidence “precludes a determination that the state has met its burden of showing that the purported change was not adopted, at least in part, with a discriminatory purpose.” The State of Georgia did not seek judicial preclearance of the voting change, so the holding of elections for the Augusta-Richmond County Commission and Mayor at the time of the November general election remained in effect.

In *Shelby County, Alabama v. Holder*, the Court subsequently invalidated the Section 5 coverage formula, Section 4(b) of the Voting Rights Act, adopted by Congress in 2006 as being

“based on decades-old data and eradicated practices.” 133 S. Ct. 2612, 2627 (2013). But it left Section 5 itself intact and noted that “Congress may draft another formula based on current conditions.” *Id.* at 2631. The Court did not hold or suggest that Section 5 objections made after the 2006 extension were unconstitutional or unenforceable but only that “[t]he formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.” *Id.* In addition, the objection to the change of the date of elections for the Augusta-Richmond County Commission and Mayor was not based “on decades-old data and eradicated practices” but on current conditions in Augusta and Richmond County.

On January 17, 2014, Deputy Legislative Counsel H. Jeff Lanier wrote to Representative Wayne Howard that while the coverage formula of Section 5 was held to be unconstitutional in *Shelby County*, the DOJ objection to the 2012 amendment “is still valid” and elections for the Augusta-Richmond County Commission and Mayor “can continue to be held in November.” A copy of the letter is attached hereto as Exhibit B.

In 2014, the General Assembly adopted HB 310, which changed the date of the statewide primary election from July to May to comply with the decision in *United States v. Georgia*, 892 F. Supp. 2d 1367 (N.D. Ga. 2012), which held that Georgia had to provide for at least 45 days of absentee voting to comply with the Uniformed and Overseas Citizen Absentee Voting Act of 1986 (UOCAVA). But according to Mr. Lanier in his letter to Rep. Howard, the bill did not affect municipal elections or alter elections being held for the Augusta-Richmond County Commission and Mayor in November. The 2012 DOJ objection, therefore, remains in effect, such that Augusta-Richmond may not move its County Commission and Mayoral elections from November to the lower-turnout date of the statewide primary election.

On March 21, 2014, below signed counsel wrote a letter to Defendant Bailey asking whether the Board of Elections planned to conduct elections for the Augusta-Richmond County Commission and Mayor in May of this year. In a letter dated March 28, 2014, Defendant Bailey replied that “the election for members of the Augusta Commission and Mayor of Augusta will be conducted in conjunction with the General Primary on May 20, 2014, as required by Georgia law.” A copy of the letter is attached hereto as Exhibit C.

### III. Injunctive Relief Is Necessary and Appropriate

A district court in determining whether to grant a preliminary injunction should consider four factors: (1) a substantial likelihood that plaintiffs will prevail on the merits; (2) they will suffer irreparable injury unless the injunction issues; (3) the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the injunction would not be adverse to the public interest. *Lucero v. Trosch*, 121 F.3d 591, 599 (11th Cir. 1997); *Haitian Refugee Ctr., Inc. v. Nelson*, 872 F.2d 1555, 1561-62 (11th Cir. 1989), *aff’d sub nom. McNary v. Haitian Refugee Ctr.*, 498 U.S. 479 (1991). Under all four factors, Plaintiffs are entitled to preliminary injunctive relief on their claim that Defendants are in violation of Section 5 of the Voting Rights Act.

#### A. Plaintiffs Are Likely to Prevail on the Merits

##### (1) Nothing in *Shelby County* Indicates it Should be Applied Retroactively

First, *Shelby County* left Section 5 itself intact and noted that Congress could draft another formula based on current conditions. Second, the Court held only that “[t]he formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.” 133 S. Ct. at 2631. It did not hold that past use was improper. Third, the Court did not hold or suggest that Section 5 objections made after the 2006 extension were unconstitutional or unenforceable. Fourth, the new rule in *Shelby County* was not applied retroactively to voting

changes that had been objected to in *Shelby County*. As the Court noted, “the Attorney General has recently objected to voting changes proposed from within the county.” 133 S. Ct. at 2621. These were objections to annexations and a 2008 redistricting plan submitted by the City of Calera. *See id.* at 2646 (Ginsburg, J., dissenting). But nothing in *Shelby County* holds or suggests these objected to changes can now be implemented. Fifth, it would violate Section 5 as well as the basic purpose of the Voting Rights Act to allow a voting change to be implemented which was objected to because, based upon current conditions, it had a discriminatory purpose and effect.

(2) Case Law Does Not Support Retroactive Application of *Shelby County*

*Harper v. Virginia Department of Taxation* held:

When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate announcement of the rule.

509 U.S. 86, 97 (1993). But *Harper* does not mean *Shelby County* now renders the DOJ objection to Section 9 of Act No. 719 unenforceable. By its terms, the retroactive application rule of *Harper* is not relevant to the DOJ objection because the objection is not involved in a case “still open on direct review.” In addition, and as noted above, the Court in *Shelby County* held only that “[t]he formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.” 133 S. Ct. at 2631. It upheld the constitutionality of Section 5 and did not hold or suggest that Section 5 objections made after the 2006 extension were unconstitutional or unenforceable.

The decisions in *Bird v. Sumter County Board of Education*, No. 1:12–CV–76, 2013 WL 5797653, at \*3 (M.D. Ga. Oct. 28, 2013), and *Hall v. Louisiana*, No. 12–00657, 2013 WL 5405656, at \*5 (M.D. La. Sept. 27, 2013), are not to the contrary. In *Bird*, a new districting plan

for the Sumter County Board of Education was enacted by the Georgia legislature in 2011 and submitted for Section 5 preclearance. However, before DOJ acted upon the submission, it was withdrawn, leaving in place the pre-existing malapportioned plan. A suit was then filed to set aside the malapportioned plan as violating “one person, one vote.” But following the decision in *Shelby County*, the Court held that the “one person, one vote” claim was moot and the 2011 plan, as to which there had been no Section 5 objection, would go into effect. The present case is thus distinguishable from *Bird* because it involves a Section 5 objection and no litigation was pending involving the objection to which *Shelby County* would apply. In *Hall*, the plaintiff sought an injunction requiring the state to submit various unsubmitted voting changes for preclearance under Section 5. While the litigation was pending, *Shelby County* was decided, and the Court held the decision “must be given retroactive effect in cases that are still under direct review,” and that Section 5 no longer offered a remedy for “failure to obtain preclearance.” *Hall*, 2013 WL 5405656, at \*5-6. But again, the present case is distinguishable from *Hall* because it involves a Section 5 objection and no litigation was pending involving the objection to which *Shelby County* would apply.

Equally important, in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), the Court established a three-part analysis to determine whether to reject retroactive application of a new decision. First, a court must ask whether the decision “establish[es] a new principle of law.” *Id.* at 106. Second, a court must look “to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.” *Id.* at 107. Third, a court must consider “the inequity imposed by retroactive application.” *Id.* The rejection of retroactive application of the *Shelby County* decision in cases such as this meets the *Chevron Oil Co.* standard.

First, *Shelby County* established a new principle of law, that the 2006 coverage formula was unconstitutional. Second, given the history of Congressional enactment of Section 5 in 1965, its extensions in 1970, 1975, and 1982, and the fact that the Supreme Court upheld these acts of Congress in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), *Georgia v. United States*, 411 U.S. 526 (1973), *City of Rome v. United States*, 446 U.S. 156 (1980), and *Lopez v. Monterey County*, 525 U.S. 266 (1999), it is clear that retrospective operation of *Shelby County* would not further but would retard the operation of Section 5. As the Court noted in *Shelby County*, Section 5 was enacted to banish the “blight of racial discrimination in voting” that has “infected the electoral process in parts of our country for nearly a century.” 133 S. Ct. at 2624 (quoting *Katzenbach*, 383 U.S. at 308). Allowing the implementation of a voting practice that would have a discriminatory purpose and effect would be contrary to and undermine the basic purpose of Section 5. Finally, in light of the DOJ Section 5 objection, retroactive application of *Shelby County* would impose substantial inequities upon racial minorities in Richmond County. Based upon *Chevron Oil Co.*, retroactive application of *Shelby County* should be rejected.

*Harper* also recognized that denial of the retroactive application of “a new principle of law” would be appropriate “if such a limitation would avoid ‘injustice or hardship’ without unduly undermining the ‘purpose and effect’ of the new rule.” 509 U.S. at 94-95 (quoting *Chevron Oil Co.*, 404 U.S. at 106-07). Even assuming *Shelby County* could be applied here, denial of retroactive application would be appropriate because it would avoid the injury and hardship to minority voters which were detailed by DOJ in its objection letter. In addition, denial of retroactivity would not only not undermine, but would uphold, the purpose and effect of *Shelby County*, which confirmed the constitutionality of Section 5 as well as “the permanent, nationwide ban on racial discrimination in voting found in § 2.” 133 S. Ct. at 2631. Allowing a

voting practice that was found to have a discriminatory purpose and effect to be implemented would be contrary to the basic purposes of the Voting Rights Act.

The court in *Glazner v. Glazner*, 347 F.3d 1212 (11th Cir. 2003), also recognized and applied the *Chevron Oil Co.* test of prospective application of a new rule. Citing *Harper*, it noted “the Court has clearly retained the possibility of pure prospectivity and, we believe, has also retained the *Chevron Oil* test, albeit in a modified form, as the governing analysis for such determinations in civil cases.” 347 F.3d at 1216-17. The law of this Circuit thus confirms the propriety of the prospective application of *Shelby County* to voting changes.

Plaintiffs are likely to prevail on the merits of their Section 5 voting rights claim, which strongly favors the granting of injunctive relief. *See Johnson v. Halifax Cnty.*, 594 F. Supp. 161, 171 (E.D.N.C. 1984) (enjoining elections where plaintiffs showed a substantial likelihood of prevailing on the merits); *Taylor v. Haywood Cnty., Tenn.*, 544 F. Supp. 1122, 1135 (W.D. Tenn. 1982) (granting a preliminary injunction against pending elections after finding that plaintiffs established a likelihood of prevailing on a voting rights claim); *Foster v. Kusper*, 587 F. Supp. 1191, 1193 (N.D. Ill. 1984) (plaintiff entitled to preliminary injunction in election contest who established “a substantial likelihood of success on the merits”).

**B. Plaintiffs Will Be Irreparably Injured Absent an Injunction**

The right to vote is one of the most fundamental rights in our system of government. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *Harman v. Forssenius*, 380 U.S. 528, 537 (1965); *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The right to vote is entitled to special constitutional protection because:

The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. . . . [T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights.

*Reynolds*, 377 U.S. at 555, 562. *Accord*, *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“[o]ther rights, even the most basic, are illusory if the right to vote is undermined”). Because of the preferred place it occupies in our constitutional scheme, “any illegal impediment to the right to vote, as guaranteed by the U.S. Constitution or statute, would by its nature be an irreparable injury.” *Harris v. Graddick*, 593 F. Supp. 128, 135 (M.D. Ala. 1984). *Accord*, *Dillard v. Crenshaw Cnty.*, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986) (“denial of the right to vote” constitutes irreparable injury); *Cook v. Lockett*, 575 F. Supp. 479, 484 (S.D. Miss. 1983) (“perpetuating voter dilution” through use of a malapportioned districting plan constitutes “irreparable injury”); *Foster*, 587 F. Supp. at 1194 (denial of the right to vote for candidate of choice constitutes “irreparable harm”); *Puerto Rican Legal Def. & Educ. Fund, Inc. v. City of New York*, 769 F. Supp. 74, 79 (E.D.N.Y. 1991) (“it is well-settled that the claimed deprivation of a constitutional right such as the right to a meaningful vote or to the full and effective participation in the political process is in and of itself irreparable harm”). *See also* *Elrod*, 427 U.S. at 373 (the loss of constitutionally protected freedoms “for even minimal periods of time, unquestionably constitutes irreparable injury”).

Plaintiffs, as DOJ concluded in its objection letter, will suffer irreparable injury if elections for the Augusta-Richmond County Commission and Mayor are held in May rather than at the time of the November general election.

### C. The Threatened Injury to Plaintiffs Outweighs any Damage to Defendants

The threatened injury to Plaintiffs outweighs any damage that an injunction might cause Defendants. Defendants would not be harmed if elections were conducted in November rather than in May. First, the only elections that would be affected would be those for the Augusta-Richmond County Commission and Mayor. All the other elections would go forward as presently scheduled. Second, an injunction would not reopen the candidate qualifying time and

those candidates currently qualified would simply run for election in November. Third, since elections for other offices will be held in November, holding elections at that time for the Augusta-Richmond County Commission and Mayor would impose no hardships upon the Defendants. But even if Defendants were inconvenienced in some way by holding elections for the Augusta-Richmond County Commission and Mayor in November, that would not outweigh the loss suffered by Plaintiffs of voting in an election the DOJ found would have a discriminatory purpose and effect. “[A]dministrative convenience” cannot justify a state practice that impinges upon a fundamental right. *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975); *see Taylor v. Haywood Cnty., Tenn.*, 544 F. Supp. at 1135 (“[a]fter a balancing of the hardships which an injunction [against further use of challenged elections] would produce, the Court finds the scale tips in favor of the plaintiffs”); *Dillard*, 640 F. Supp. at 1363 (“the administrative burden” on county defendants “cannot begin to compare with the further subjection of the counties’ black citizens to denial of their right to full and equal participation”).

D. An Injunction Would Be in the Public Interest

The public has a broad interest in the integrity of elected government which is compromised by a system that discriminates against minority voters. *See Cook*, 575 F. Supp. at 485 (“[t]he public interest must be concerned with the integrity of our representative form of government”). Ignoring a Section 5 objection and subjecting the voters and residents of Richmond County to elections for the County Commission and Mayor under a racially discriminatory system would be adverse to the public interest. *Cf. Watson v. Comm’rs Ct. of Harrison Cnty.*, 616 F.2d 105, 107 (5th Cir. 1980). Plaintiffs here, in seeking to enforce the basic non-discrimination principles of the Voting Rights Act, are aligned with the public interest and an injunction against behavior that would violate the Act would promote that interest.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that their motion for a preliminary injunction be granted enjoining Defendants from holding the 2014 elections for the Augusta-Richmond County Commission and Mayor in May rather than November.

Dated this 22nd day of April, 2014.

Respectfully submitted,

s/M. Laughlin McDonald

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ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

This is to certify that I have on this day served all the parties in this case via UPS at the following addresses:

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Submitted this 22nd day of April, 2014.

s/M. Laughlin McDonald

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