

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

HENRY D. HOWARD, *et al.*,

Plaintiffs,

v.

AUGUSTA-RICHMOND COUNTY,
GEORGIA, COMMISSION; *et al.*,

Defendants.

CASE NO. 1:14-CV-0097-JRH-BKE

COUNTY DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

COME NOW Defendants Augusta-Richmond County Commission¹; Deke S. Copenhaver, in his official capacity; and Lynn Bailey, in her official capacity (collectively "County Defendants"), and, in accordance with this Court's April 22, 2014 Order [Doc. 7], respond to Plaintiffs' Complaint [Doc. 1] and offer this Brief in Support of County Defendants' Motion to Dismiss.

INTRODUCTION

After the Augusta-Richmond County 2014 nonpartisan elections had already begun with the issuance of absentee ballots and with just over a month until the May 20, 2014 Election Day, Plaintiffs filed this action to enjoin those elections. According to Plaintiffs, the elections should instead be held in November because the May election date was not precleared by the Department of Justice under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c.

For the reasons discussed below, Plaintiffs' complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6) and 12(b)(7) because they have failed to state a claim upon

¹ 1997 Ga. Laws p. 4024 designates the name of the consolidated government as "Augusta, Georgia." In this Brief, the term "Augusta-Richmond County" shall mean "Augusta, Georgia."

which relief can be granted and failed to join an indispensable party, respectively. Plaintiffs' Section 5 enforcement action fails to state a claim because their claim is barred by *Shelby County, Ala. v. Holder*, ___ U.S. ___, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013). Additionally, Plaintiffs have not named any party responsible for elections to whom the Court can direct an injunction. The defendants named do not administer the elections in Augusta-Richmond County and therefore cannot be enjoined from doing so.

STATEMENT OF FACTS

Augusta, Georgia is a consolidated government with elected offices that are nonpartisan. Ga. L. 1996, p. 3607, § 3. State law requires such governments to conduct their nonpartisan elections at the same time that statewide nonpartisan elections and primaries are held. O.C.G.A. § 21-2-139(a). During its 2014 session, the Georgia General Assembly moved the date of the statewide primary and nonpartisan elections from July to May. Act No. 343 (2014) (HB 310). [Doc. 1, ¶23].

After the Governor signed that legislation on January 21, 2014, Augusta-Richmond County's election process for the nonpartisan elections got underway. Qualifying for the May 20, 2014 election was held on March 3-7, 2014, O.C.G.A. 21-2-132(c), and 19 candidates qualified for the mayor's seat and the five Augusta Commission seats to be filled in the May 20 election. *See* Augusta Chronicle, *14 Candidates Qualify for Augusta Commission Election* (March 9, 2014), available at <http://chronicle.augusta.com/news/government/2014-03-09/14-candidates-qualify-augusta-commission-election> (last visited April 30, 2014).

Two weeks after qualifying closed, despite the facts that public notice of the May election had been available for more than a month and more than a dozen candidates had qualified for election to the offices, Plaintiffs' counsel mailed a letter to the Executive Director

of the Board of Elections, inquiring whether the county's nonpartisan elections would be held in May. [Doc. 9-3]. The Executive Director replied promptly, confirming that the elections would be held on May 20, 2014 as required by Georgia law. [Doc. 9-3].

Plaintiffs took no action for yet another month, during which time the Board of Elections continued to prepare for the election. The election began on April 4, 2014 when the Board of Elections made absentee ballots available to voters in accordance with state and federal law. O.C.G.A. § 21-2-384(a)(2); 42 U.S.C. § 1973ff-1(a)(8).

Plaintiffs filed their complaint to enjoin the elections on April 18, 2014, two weeks after the elections began with absentee voting, just ten days before in-person advance voting began and just 32 days before Election Day. [Doc. 1]; O.C.G.A. § 21-2-385(d)(1) (advance voting period). In their complaint, Plaintiffs contend that because the Department of Justice, in their Section 5 preclearance response, objected to the part of the state law changing the date for consolidated governments' nonpartisan elections when the State submitted the change for Section 5 preclearance in 2012, those elections could not be held in May but could only be held in November. [Doc. 1, pp. 5-6].

As discussed at length in the argument section below, shortly after the State received the objection letter in December 2012, the Supreme Court heard arguments in *Shelby County* regarding the 2006 renewal of the preclearance provisions of the Voting Rights Act. *Shelby County, Ala. v. Holder*, ___ U.S. ___, 133 S.Ct. 2612 (2013). In June 2013, the Supreme Court issued its opinion in *Shelby County*, concluding that the formula for identifying jurisdictions subject to preclearance was unconstitutional. *Id.*

ARGUMENT AND CITATION OF AUTHORITY

This Court should dismiss a case under to Fed. R. Civ. P. 12(b)(6) when a dispositive issue of law prevents the plaintiff from succeeding on any set of facts. *Marshall Cnty. Bd. of Educ. v. Marshall Cnty. Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993); *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1057 (11th Cir. 2007). In addition, if a plaintiff fails to join a party that is necessary to accord complete relief, a complaint may be dismissed. Fed. R. Civ. P. 19(a)(1)(A); *Mann v. City of Albany, Ga.*, 883 F.2d 999, 1002 (11th Cir. 1989). The Court should dismiss this case on both grounds.

I. Plaintiffs' Complaint Should be Dismissed under FRCP 12(b)(6) Because They Failed to State a Claim Upon Which Relief Can Be Granted.

In their complaint, Plaintiffs urge that, contrary to the Attorney General's opinion, *Shelby County* does not apply retroactively and for this reason, the enforcement of the election date change is "in violation of Section 5 of the Voting Rights Act." [Doc. 1, ¶¶ 20-25. 32]. For the reasons discussed below, *Shelby County* bars Plaintiffs' claim.

A. Standard for Retroactive Application

Plaintiffs contend that this Court must use the test of *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971) to assess whether a rule of federal law must be applied retroactively. However, in *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97, 113 S. Ct. 2510, 2517, 125 L. Ed. 2d 74 (1993), the Supreme Court called the *Chevron* analysis into question, *see Harper*, 509 U.S. at 91, and explained how a court determines whether a rule of federal law should be applied retroactively:

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 our announcement of the rule.

Thus, contrary to Plaintiffs' claims, the *Harper* standard for determining retroactivity controls this case,² and for the reasons set forth below, *Shelby County* invalidates Plaintiffs' claim that the May election date violates Section 5.

B. The Decision in *Shelby County*

Section 5 of the Voting Rights Act prohibits "covered jurisdictions" from enforcing any change in a voting practice or procedure until the jurisdiction has obtained "preclearance" from the federal government by submitting the change to the District Court for the District of Columbia or the Attorney General and receiving no objection. 42 U.S.C. § 1973c. Until *Shelby County*, jurisdictions were "covered" by virtue of a formula outlined in Section 4(b) of the Voting Rights Act and tied to voter registration or turnout in presidential elections from the 1960s and 1970s. 42 U.S.C. § 1973b.

In *Shelby County*, Plaintiffs brought a facial challenge to the coverage formula of Section 4(b), which determined which the jurisdictions were required to seek preclearance. 133 S. Ct. at 2629-2630. The majority held that formula was unconstitutional because the coverage formula in 2006, Congress failed to use current conditions to impose coverage. *Shelby County*, 133 S. Ct. at 2629. The majority therefore found the formula "irrational" and that it was left "with no choice but to declare § 4(b) unconstitutional." *Shelby County*, 133 S. Ct. at 2631. As a result, unless and until Congress comes up with a new formula, no jurisdiction is barred from enforcing a change to a voting practice or procedure without prior approval from the Attorney General or the District Court for the District of Columbia. 42 U.S.C. § 1973c. There appeared to be no doubt on the part

² As discussed below, the courts in *Hall v. Louisiana*, ___ F. Supp. 2d. ___, Case No. 12-00657, 2013 WL 5405656 at *5 (M.D. La. Sept. 27, 2013) and *Bird v. Sumter County Board of Education*, No. 1:12-CV-76, 2013 WL 5797653 (M.D. Ga. Oct. 28, 2013) both applied *Harper* in finding that *Shelby County* should be applied retroactively.

of the Supreme Court that such was the effect of *Shelby County*. As the dissent stated, “without that formula, § 5 is immobilized.” *Shelby County*, 133 S.Ct. at 2633 n.1 (Ginsburg, J. dissenting).

In their complaint, however, Plaintiffs nonetheless seek to “enforce” Section 5 against Augusta-Richmond County as a covered jurisdiction. Plaintiffs claim “the basic purpose of the Voting Rights Act” is violated if the Court allows implementation of a change to which the Department of Justice objected. [Doc, 9, p. 6].

The basic purpose of the Voting Rights Act, however, is to prevent the government from taking any action related to the electoral process that has a discriminatory purpose and effect. Section 5 preclearance was a temporary, emergency measure directed at some state and local governments identified by Section 4(b), the section invalidated by *Shelby County*. The unavailability of Section 5 preclearance today does not eliminate the basic purpose of the Voting Rights Act. Plaintiffs who claim that an electoral change has a discriminatory purpose or effect can bring litigation on a number of fronts; Section 5 is not required to invalidate that law. *Shelby County*, 133 S. Ct. at 2631.

C. The Retroactive Application of the Decision to Open Cases

In their brief on their preliminary injunction motion, Plaintiffs urge that *Shelby County* operates only prospectively, and any objections previously lodged by the Department of Justice remain in place to prevent a jurisdiction from implementing an otherwise-valid law. [Doc. 9, pp. 6-9]. The proper application of *Harper* to this situation, however, demands just the opposite conclusion.

Under *Harper*, a holding must be given “full retroactive effect in all cases still open on direct review and as to all events.” 509 U.S. at 97. Even after the Department of Justice issued its

2012 objection to administrative preclearance regarding the election date change in Section 9 of Act No. 719, preclearance remained an open issue via judicial preclearance.

Section 5 prohibits a covered jurisdiction from enforcing a voting change until one of two federal approvals is obtained: (1) the jurisdiction obtains a judgment from the District Court for the District of Columbia that the change does not have the purpose or effect of denying or abridging the right to vote on account of race or color, or (2) that the jurisdiction obtains an affirmative indication by the Attorney General that he or she will not object to the change in practice or procedure. 42 U.S.C. § 1973c(a); 28 C.F.R. § 51.10. Any determination by the Attorney General to object to a particular change has no effect on a jurisdiction's right to bring a declaratory judgment action seeking preclearance of the same change. 28 C.F.R. § 51.11. In short, even after receiving an objection to the change from the Department of Justice, a jurisdiction may seek approval of the change by filing a declaratory judgment action in the DC District Court. *See, e.g., Texas v. Holder*, 888 F. Supp. 2d 113, 118 (D.D.C. 2012). Although a jurisdiction cannot enforce the change until it obtains preclearance, there is no deadline for that jurisdiction to seek either administrative or judicial preclearance under Section 5. 42 U.S.C. § 1973c(a).

For that reason, after the Attorney General made his initial objection to election date change in Section 9 of Act No. 719, the matter of Augusta-Richmond County's ability to implement the change remained open. The State of Georgia was free to file an action seeking judicial preclearance in the DC District Court at any time. Thus, contrary to Plaintiffs' claim that the matter was not "open on direct review," unless and until there was a final adjudication from the DC District Court denying preclearance (and the Supreme Court if appealed), the matter remained open because Georgia still had a path open to obtain preclearance judicially.

Plaintiffs contend that the Supreme Court's silence in *Shelby County* regarding recent objections in Shelby County somehow supports a finding that the decision was not retroactive. *Harper*, however, demands just the opposite conclusion. [Doc. 9, p. 6]. Because the majority in *Shelby County* did not specify whether the rule was retroactive or not and did not reserve the question, *Harper* directs that the rule should be applied retroactively. *Harper*, 509 U.S. at 97-98.

D. Other Cases Addressing *Shelby County's* Retroactivity.

To County Defendants' knowledge, all other courts to date that have faced the question of whether *Shelby County* removed any requirement for preclearance have reached the same conclusion: *Shelby County* applies retroactively, and preclearance is no longer required for any voting changes.

First, after the District Court for the District of Columbia denied preclearance of Texas' statute requiring photo identification for voting, the state appealed to the U.S. Supreme Court. While that appeal was pending, the Supreme Court decided *Shelby County* and then vacated the denial of preclearance to Texas, remanding it to the district court for consideration in light of *Shelby County*. See *Texas v. Holder*, 133 S. Ct. 2886, 186 L. Ed. 2d 930 (2013). Although Texas' photo identification statute had been objected to by both the Attorney General and the District Court for the District of Columbia, *Texas v. Holder*, 888 F. Supp. 2d 113, 118 (D.D.C. 2012) the Supreme Court still found the matter of preclearance mooted by *Shelby County*.

Similarly, the Supreme Court remanded the Texas' appeal of the District Court for the District of Columbia's denial of preclearance to the state's redistricting plan, suggesting it was moot. *Texas v. United States*, 133 S. Ct. 2885, 186 L. Ed. 2d 930 (2013). The Supreme Court clearly stated that by virtue of *Shelby County*, the denial of preclearance by the district court was mooted—and Texas was no longer required to seek preclearance of its validly-implemented

statutes. Notably, the Department of Justice did not oppose Texas' motion to dismiss the case as moot.³

The Middle District of Georgia also found *Shelby County* was retroactive in *Bird v. Sumter County Board of Education*, No. 1:12-CV-76, 2013 WL 5797653 (M.D. Ga. Oct. 28, 2013). In *Bird*, the Sumter County Board of Education originally submitted its 2011 redistricting plan for administrative preclearance but later withdrew the submission before the Department of Justice granted preclearance. *Id.* at *1. The court originally granted a preliminary injunction because the Board of Education did not have an equally-populated plan that had been precleared, but later dismissed the case as moot in light of *Shelby County*. *Id.* at *3.

The legislation at issue in *Bird*, *i.e.*, the Sumter County Board of Education map, was in the same procedural posture as the election date change at issue here—it was an otherwise-valid state law but could not be enforced until it was precleared. Both laws were validly-enacted and remained on the books. The *Bird* court determined that the 2011 plan was immediately enforceable without preclearance after *Shelby County*, and the same rule applies to the legislation at issue in this case. *Id.* at *3.

Next, in a case involving whether Louisiana properly submitted changes to its judicial election systems for preclearance, a district court determined that *Shelby County* applied retroactively to all claims involved, including claims for failure to preclear actions prior to the renewal of the Voting Rights Act in 2006. *Hall v. Louisiana*, ___ F. Supp. 2d ___, Case No. 12-00657, 2013 WL 5405656 at *5 (M.D. La. Sept. 27, 2013). Although Plaintiffs attempt to distinguish *Hall* on the grounds that “no litigation [involving an objection] was pending,” they miss the important distinction that, as discussed above, Georgia was free to seek judicial

³ *Perez v. Texas*, ___ F. Supp. 2d ___, Case No. 11-CA-360, 2013 WL 4784195 at *3 n.3 (Sept. 6, 2013)

preclearance of Section 9 of Act No. 719 at any time, meaning the matter remained open when *Shelby County* was decided, just as any unsubmitted matters remained open in *Hall*.

Although not deciding cases primarily about the Voting Rights Act, other courts have also concluded that *Shelby County* removed the requirement for preclearance. In *King v. Lumpkin*, 545 F. App'x 799 (11th Cir. 2013), the Eleventh Circuit affirmed the dismissal of a request for a three-judge court and declaratory judgment in a case in which an elected official claimed Section 5 violations related to an ethics action against him, noting that “the preclearance requirements of Section 5 of the VRA cannot be enforced until Congress amends the coverage formula in Section 4 of the VRA.” *King*, 545 F. App'x at 803 n.2 (11th Cir. 2013).

In a decision involving primarily standing, a district court in Mississippi also found that, as a result of *Shelby County*, preclearance of new district lines was no longer required. *Hancock Cnty. Bd. of Sup'rs v. Ruhr*, 1:10CV564 LG-RHW, 2013 WL 4483376 at *4 (S.D. Miss. Aug. 20, 2013) (“The court held that the formula in section 4(b) of the Voting Rights Act may no longer be used as a basis for subjecting jurisdictions to preclearance”).

E. Purpose and Prospective Application

Plaintiffs also claim that retroactive application of *Shelby County* should be denied to “uphold the purpose and effect of *Shelby County*,” which apparently includes the prohibitions of Section 2. [Doc. 9, p. 8]. How Plaintiffs propose that the purpose and effect of the case should be upheld is unclear. Although *Shelby County* affirmed the existence of the continued ban on racial discrimination of Section 2, 133 S. Ct. at 2631, Plaintiffs here do not bring a Section 2 claim. In addition, the Supreme Court has consistently recognized that different standards govern Sections 2 and 5 and that an objection or preclearance decision under Section 5 is not related to whether a

particular statute violates Section 2. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 485, 117 S. Ct. 1491, 1501, 137 L. Ed. 2d 730 (1997).

Finally, Plaintiffs argue that the Eleventh Circuit has reserved the possibility of limiting new rules of law to prospective application only, citing *Glazner v. Glazner*, 347 F.3d 1212 (11th Cir. 2003). Although Plaintiffs correctly quote *Glazner* for the proposition that it is possible a new rule of law may only apply prospectively, the court in *Glazner* actually applied the law at issue retroactively, even though doing so created the possibility of significant, new potential liability. 347 F.3d at 1221. In *Glazner*, the court was overruling a 30-year old case and determining whether to apply that decision retroactively. 347 F.3d at 1221. *Glazner* has no relevance to the issues in this case, because the Supreme Court in *Shelby County* was not overruling a specific case—it was invalidating a Congressional decision to renew a statute based on outdated data. 133 S. Ct. at 2631. The decision did not create new liability, and Plaintiffs have not shown any reason why *Shelby County* should only be applied prospectively.

F. Conclusion

Plaintiffs brought this case as an enforcement action under Section 5, a path that no longer remains open after the *Shelby County* decision. With the demise of the coverage formula that determined the jurisdictions subject to the preclearance requirements of Section 5, there is no basis on which to enforce Section 5 against Augusta-Richmond County or any other former covered jurisdiction. Therefore, Plaintiffs have failed to state a claim upon which relief can be granted, and their case must be dismissed.

II. Plaintiffs' Complaint Should Be Dismissed Because They Failed to Join a Necessary Party Under Fed. R. Civ. P. 12(b)(7) and 19.

In addition to failing to state a claim for relief, Plaintiffs have sued the wrong parties. In naming the Augusta-Richmond Commission, the Mayor, and an employee of the Board of

Elections, Plaintiffs did not sue the entity responsible for elections in Augusta-Richmond County: the election superintendent. *National Broad. Co., Inc. v. Cleland*, 697 F. Supp. 1204, 1216 (N.D. Ga. 1988) (“It is the Superintendents who supervise the election and primary process on a local level and ensure compliance with Georgia’s election laws.”).

Under Georgia law, the election superintendent is “[e]ither the judge of the probate court of a county or the county board of elections, the county board of elections and registration, the joint city-county board of elections, or the joint city-county board of elections and registration, if a county has such.” O.C.G.A. § 21-2-2(35)(A). In Augusta-Richmond County, the Board of Elections is the superintendent of elections, not the Commission, the Mayor, or Ms. Bailey.

Although Ms. Bailey is the Executive Director of the Board of Elections, her employer, the Board, oversees the election process, including the implementation of Section 9 of Act 719. O.C.G.A. § 21-2-2; *National Broad. Co.*, 697 F. Supp. at 1216. Because only the Board is enforcing Section 9 of Act 719 and holding the elections, the Board is the only correct defendant and the party in whose absence complete relief cannot be accorded to Plaintiffs. Fed. R. Civ. P. 19; *Mann*, 883 F.2d at 1002. Plaintiffs’ complaint should therefore be dismissed for failure to join a necessary party. *Id.*

CONCLUSION

Because Plaintiffs cannot prevail under any set of facts and failed to join a party necessary to provide complete relief, this Court should dismiss Plaintiffs’ complaint with prejudice.

This 30th day of April, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day electronically filed the within and foregoing COUNTY DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

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This 30th day of April, 2014.

s/ Anne W. Lewis
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