

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

HENRY D. HOWARD, et al.,)	
)	
Plaintiffs,)	
)	
v.)	CV 114-097
)	
AUGUSTA-RICHMOND COUNTY,)	
GEORGIA, COMMISSION, et al.,)	
)	
Defendants.)	
_____)	

PLAINTIFFS’ REPLY BRIEF IN SUPPORT OF REQUEST
FOR APPOINTMENT OF A THREE-JUDGE COURT

Plaintiffs file this Reply Brief in response to the Court’s April 22, 2014 Order (Doc. 7).

I. A Three-Judge Court is Required to Hear Plaintiffs’ Section 5 Claim

Defendants claim that a three-judge court is not required to hear this case because “there is absolutely no basis for Plaintiffs’ assertion that Section 5 applies to the election date change.” Cnty. Defs.’ Resp. (Doc. 18), at 1. Defendants’ claim is totally without merit. First, the claim is contradicted by the fact that the state submitted the change for preclearance under Section 5, 42 U.S.C. § 1973c. It would not have done so if Section 5 did not apply to the change. Second, the Department of Justice objected to the change. It would not have done so if the change was not covered by Section 5. Third, established case law conclusively provides that a change in the date of an election is a voting change subject to Section 5. *See NAACP v. Hampton Cnty. Election Comm’n*, 470 U.S. 166, 178 (1985) (“a change in the date of an election, if enacted by statute, requires approval by the Attorney General under § 5”); *Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (same); *Perkins v. Matthews*, 400 U.S. 379, 393 n. 11 (1971) (same).

The cases relied upon by Defendants, *DeJulio v. Georgia*, 127 F. Supp. 2d 1274, 1301 (N.D. Ga. 2001), and *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), further contradict Defendants' claim because they involved "internal operations of an elected body." Cnty. Defs.' Resp. at 3 (quoting *Presley*, 502 U.S. at 503). Those two cases make clear that changes such as the one involved here which have a "direct relation to, or impact on, voting" are subject to preclearance under Section 5. *Presley*, 502 U.S. at 506; *see also DeJulio*, 127 F. Supp. 2d at 1301.

Section 5 of the Voting Rights Act provides in relevant part that: "Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court." 42 U.S.C. § 1973c(a). Section 2284(a) provides in relevant part that: "A district court of three judges shall be convened when otherwise required by Act of Congress." Here, Plaintiffs seek an injunction prohibiting Defendants from implementing a voting change that was objected to by the Department of Justice under Section 5 of the Voting Rights Act as having a discriminatory purpose and effect. Since this is an action under Section 5, it should be heard and determined by a court of three judges. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 563 (1969) ("Congress intended that disputes involving the coverage of § 5 be determined by a district court of three judges"); *Perkins*, 400 U.S. at 382 n. 3 (suits to enforce § 5 must be heard by a three-judge court); *Watson v. Comm'rs Ct. of Harrison Cnty.*, 616 F.2d 105, 107 (5th Cir. 1980) ("Disputes involving that provision [§ 5] are to be resolved by a district court of three judges"); *Sumter Cnty. Democratic Exec. Comm. v. Dearman*, 514 F.2d 1168, 1170 (5th Cir. 1975) (§ 5 coverage issues "must be heard by a three-Judge court of the District in which the suit is brought").

A. The Jurisdiction of a Three-Judge Court is Limited

The jurisdiction of a three-judge court in a Section 5 enforcement case is limited to deciding: “(i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5’s approval requirements were satisfied, and (iii), if the requirements were not satisfied, what remedy was appropriate.” *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983). *Accord, Lopez v. Monterey Cnty., Cal.*, 519 U.S. 9, 23 (1996); *McCain v. Lybrand*, 465 U.S. 236, 250 n.17 (1984); *Brooks v. State Bd. of Elections*, 775 F. Supp. 1470, 1474 (S.D. Ga. 1989) (three-judge court). A local district court lacks jurisdiction to pass on the discriminatory purpose or effect of a change. *City of Lockhart*, 460 U.S. at 129 n.3. *Accord, Perkins*, 400 U.S. at 385 (“What is foreclosed to such district court is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General—the determination whether a covered change does or does not have the purpose or effect ‘of denying or abridging the right to vote on account of race or color.’”). Here, the change in the date of elections for the Augusta-Richmond County Commission and Mayor was covered by Section 5 and was objected to by the Department of Justice. Under the circumstances, the remaining issue is the appropriate remedy for Defendants’ failure to comply with Section 5.

B. A Covered Voting Change Cannot be Implemented Unless it is Precleared

Under Section 5, “[n]o new voting practice is enforceable unless the covered jurisdiction has succeeded in obtaining preclearance.” *Lopez*, 519 U.S. at 20. *Accord, Clark v. Roemer*, 500 U.S. 646, 652 (1991) (“A voting change in a covered jurisdiction will not be effective as la[w] until and unless cleared” under § 5 (internal quotation marks omitted)); *McDaniel v. Sanchez*,

452 U.S. 130, 137 (1981) (a covered voting change must be precleared “before it may become effective”). And “[i]f a voting change subject to § 5 has not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting implementation of the change.” *Lopez*, 519 U.S. at 20. *Accord, Clark*, 500 U.S. at 654 (“§ 5’s prohibition against implementation of unprecleared changes required the District Court to enjoin the election”). As *Clark v. Roemer* stressed, injunctive relief is especially required where “the Attorney General interposed objections before the election.” *Id. Accord, Morris v. Gressette*, 432 U.S. 491, 495-96 (1977) (a § 5 objection, “standing alone,” is a sufficient basis for enjoining implementation of a voting change). Plaintiffs are entitled to an injunction prohibiting the implementation of the objected to change in the date of elections for the Augusta-Richmond County Commission and Mayor.

II. *Shelby County v. Holder* Should Not be Applied Retroactively

Defendants’ final argument is that *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013), “has retroactive application to the voting change in question” and that “it is not required to obtain preclearance” of the election date change. Cnty. Defs.’ Resp. at 3. That argument is also without merit. *Shelby County* invalidated the coverage formula of Section 5, *i.e.*, Section 4(b), 42 U.S.C. § 1973b(b), because it was “based on decades-old data and eradicated practices.” 133 S. Ct. at 2627. But the Court issued “no holding on § 5 itself, only the coverage formula,” and provided that “Congress may draft another formula based on current conditions.” *Id.* at 2631. Notably, the Court held only that “[t]he formula in that section can *no longer* be used as a basis for subjecting jurisdictions to preclearance.” *Id.* (emphasis added). It did not hold that past use was improper. The Court also did not hold or suggest that Section 5 objections made after the 2006 extension were unconstitutional or unenforceable. The new rule in *Shelby County* was

also 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.” *Id.* 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 enforced. The Court also provided that: “Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2.” *Id.* at 2631. It would thus 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.

A. 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 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 the change in the date of elections for the Augusta-Richmond County Commission and Mayor unenforceable. By its terms, the retroactive application rule of *Harper* is not relevant to the DOJ objection because the objection was not involved in a case “still open on direct review.” Defendants argue that “Georgia was free to file a declaratory judgment action at any time to seek preclearance,” Cnty. Defs.’ Resp. at 3, but it did not do so and there was no case open on direct review at the time of the *Shelby County* decision. 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 (M.D. Ga. Oct. 28, 2013), and *Hall v. Louisiana*, ___ F. Supp. 2d ___, No. 12-00657, 2013 WL 5405656 (M.D. La. Sept. 27, 2013), relied upon by Defendants, in their Brief in Support of Motion to Dismiss (Doc. 17-1), at 9, 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.

Defendants also rely upon *Texas v. Holder*, 133 S. Ct. 2886 (2013), but it was a case “still

under review” to which *Shelby County* applied. The Section 5 objection in this case was not under review at the time of the *Shelby County* decision. Similarly, *King v. Lumpkin*, 545 F. App’x 799 (11th Cir. 2013), and *Hancock County Board of Supervisors v. Ruhr*, No. 1:10CV564 LG-RHW, 2013 WL 4483376 (S.D. Miss. Aug. 20, 2013), upon which Defendants also rely in their Motion to Dismiss, are inapposite because they did not involve Section 5 objections and litigation involving their Section 5 claims was pending at the time of the *Shelby County* decision.

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 extension 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.” *Shelby County*, 133 S. Ct. at 2624 (quoting *Katzenbach*, 383 U.S. at 308). The Court further acknowledged that “voting discrimination still exists; no one doubts that.” 133 S. Ct. at 2619. 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 ‘injury 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 injury and hardship to minority voters which was 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,” and acknowledged that “voting discrimination still exists.” 133 S. Ct. at 2619, 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.

Conclusion

This case is required to be heard by a three-judge district court, and *Shelby County* should not be applied retroactively to invalidate the Section 5 objection to the change in the date of the elections for the Augusta-Richmond County Commission and Mayor. This case presents a very important issue: whether objections after the 2006 extension of Section 5, which were not subject to litigation when *Shelby County* was decided, are now unenforceable. To hold that they are would undermine the purpose of Section 5, the constitutionality of which was affirmed by the Court in *Shelby County*.

Dated this 2nd day of May, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have on this day served the foregoing document on all the parties in this case in accordance with the directives from the Court Notice of Electronic Filing (“NEF”), which was generated as a result of electronic filing.

Submitted this 2nd day of May, 2014.

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