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

HENRY D. HOWARD, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:14-cv-0097-JRH-BKE
	)	
AUGUSTA-RICHMOND COUNTY, GEORGIA, COMMISSION, et al.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs believe their Motion for a Preliminary Injunction would be rendered moot no matter how the Court resolves Plaintiffs' claim that the change in the date of elections for the Augusta-Richmond County Commission and Mayor may not be implemented under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. If a three-judge court rules the change may not be implemented absent preclearance, further injunctive relief will be unnecessary. If the court issues a contrary ruling, a preliminary injunction will not be required. Plaintiffs, however, reply to Defendants' Response in Opposition to Plaintiffs' Motion for a Preliminary Injunction (Doc. 19, "Defs.' Opp'n"), as set out below.

I. Plaintiffs Are Likely to Succeed on the Merits of Their Claim

Defendants contend that Plaintiffs are not entitled to injunctive relief because "the Department of Justice's prior objection to the statute [changing the date of elections for the Augusta-Richmond County Commission and Mayor] is of no effect following the Supreme Court's decision in *Shelby County, Ala. v. Holder*." Defs.' Opp'n at 2. The contention is 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. 2612, 2627 (2013). 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. *Id.* at 2646 (Ginsburg, J., dissenting); Letter from Grace Chung Becker, Acting Assistant Attorney General, to Dan Head of Wallace, Ellis, Fowler & Head (Aug. 25, 2008), attached hereto as Exhibit A. 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." 133 S. Ct. 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.

Defendants' claim of the "unavailability of Section 5 preclearance today," Defs.' Opp'n at 9, ignores the fact that jurisdictions today may in fact be bailed into Section 5 coverage. Under Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c), a court, in a lawsuit brought by the Attorney General or an aggrieved person, may bail-in a state or political subdivision to

Section 5 coverage "for such period as it may deem appropriate" if the court finds a violation of the Fourteenth or Fifteenth Amendment. The bail-in provision, like Section 5 itself, was not affected by the *Shelby County* decision and remains in force today. Two states, Arkansas and New Mexico, have been bailed-in as well as jurisdictions in California, Colorado, Florida, New Mexico, New York, South Dakota, and Tennessee. *See, e.g., Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990); *Sanchez v. Anaya*, No. 82-0067M (D.N.M. Dec. 17, 1984); *McMillan v. Escambia Cnty., Fla.*, 559 F. Supp. 720, 727 (N.D. Fla. 1983); *United States v. Sandoval Cnty., N.M.*, 797 F. Supp. 2d 1249 (D.N.M. 2011). For a discussion of the states and political subdivisions that have been bailed-in to Section 5 coverage, *see* Travis Crum, "The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance," 119 *Yale L.J.* 1992, 2010-2015 (2010).

Defendants rely on the September 23, 2013 letter from Deputy Attorney General Dennis R. Dunn to Senator Jesse Stone (Doc. 19-1, Ex. 1 to Bailey Decl.) to support their contention that the DOJ objection to the change in the date of elections is now unenforceable. But Defendants ignore Dunn's warning that "there is no settled case law in Georgia that definitively adopts these conclusions in relation to implementation now of a practice or procedure to which DOJ previously objected." *Id.* at 6. Defendants also ignore the contrary opinion of Deputy Legislative Counsel H. Jeff Lanier. On January 17, 2014, Lanier wrote 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." Letter from H. Jeff Lanier, Deputy Legislative Counsel, to Rep. Wayne Howard (Jan. 17, 2014) (Doc. 9-2), at 2.

A. Case Law Does Not Support Retroactive Application of *Shelby County* to the 2012 Section 5 Objection to the Change in the Date of Elections

Defendants claim that Plaintiffs argue that "any objections previously lodged by the Department of Justice remain in place." Defs.' Opp'n at 9. What Plaintiffs actually contend is that Section 5 objections made after the 2006 extension of Section 5 and before the decision in *Shelby County*, and which were not involved in cases still open on direct review at the time of the *Shelby County* decision, remain in effect. Since no case involving the objection to the change in the date of the elections for the Augusta-Richmond County Commission and Mayor was on direct review at the time of the *Shelby County* decision, the decision should not be applied retroactively to invalidate the objection.

Harper v. Virginia Department of Taxation, upon which Defendants rely, 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 "preclearance remained an open issue via judicial preclearance." Defs.' Opp'n at 10. However, the state did not in fact seek judicial preclearance and there was thus no case "open on direct review" at the time of the *Shelby County* decision. And as noted above, the Court in *Shelby County* did not hold that the rule would be retroactively applied but 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. And as also noted above, the new rule in *Shelby County* was not applied retroactively to voting changes that had been objected to in Shelby County.

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, 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, 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." 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.

II. Irreparable Injury

As Plaintiffs have noted in their Reply Brief in Support of Request for Appointment of a Three-Judge Court (Doc. 20, at 3), the jurisdiction of a three-judge court is limited and it lacks jurisdiction to pass judgment on the discriminatory purpose or effect of a voting change. *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983); *Perkins v. Matthews*, 400 U.S. 379, 385 (1971). It therefore lacks jurisdiction to review the merits of the objection letter to determine if the objection was well taken. However, and despite Defendants' claim to the contrary, DOJ's objection to the change in the date of the election demonstrates that Plaintiffs will suffer irreparable injury absent an injunction.

First, a new voting practice in a covered jurisdiction is unenforceable and "will not be effective as la[w] until and unless cleared [under Section 5]." *Clark v. Roemer*, 500 U.S. 646, 652 (1991) (quoting *Connor v. Waller*, 421 U.S. 656 (1975) (per curiam)). *Accord, Lopez v. Monterey County, Cal.*, 519 U.S. 9, 20 (1996). Enforcing the change in the date of the election would violate Plaintiffs' rights protected by Section 5 and would constitute irreparable injury. Second, the DOJ letter is not, as Defendants contend, "hearsay." Defs.' Opp'n at 16. As the letter makes clear: "We have carefully considered the information you have provided, as well as census data, comments and information from other interested parties, and other information, including previous submissions." Letter from Thomas E. Perez, Assistant Attorney General, to Dennis R. Dunn, Deputy Attorney General (Dec. 21, 2012) (Doc. 9-1), at 1. DOJ also reviewed "voter registration and turnout data" for elections in 2010 and 2012. *Id.* at 2. After conducting a careful review of the data and evidence, DOJ concluded that moving the elections from November to the date of the primary "would have a retrogressive effect on the ability of minority voters to elect candidates of choice to office." *Id.* The DOJ letter was not hearsay but was based

on reliable and objective data. Third, there is no merit to Defendants' contention that the data relied upon by DOJ have "no relevance on the issue of whether the right to vote will be adversely affected by a May election date." Defs.' Opp'n at 15. DOJ relied upon the evidence that was available, *i.e.*, registration and turnout in general and primary elections in 2010 and 2012. There was no data showing turnout in a May primary election, since none had been held, and Defendants produced no evidence that turnout in such an election would be different from turnout in a July primary election.

Defendants also ignore the fact that the DOJ objection was not based only upon voter turnout data but evidence that the change was adopted with a discriminatory purpose. DOJ found that: voting is racially polarized in Augusta-Richmond; the change was not requested by local citizens or officials; the legislation's sponsors did not inform or seek the views of the local delegation, minority legislators, or local officials about the change; the Board of Commissioners adopted a resolution opposing the change; the rationales provided in support of the change did not withstand scrutiny; Augusta-Richmond would be the only municipal government in the state that would not have local elections in November; and previous changes in the date for Augusta-Richmond elections had been objected to under Section 5. DOJ letter at 3. Evidence other than projected turnout in a May primary supports DOJ's objection to the voting change. As is apparent, Plaintiffs will suffer irreparable injury if a voting change objected to because of its discriminatory purpose and effect is implemented.

III. The Alleged Harm to Defendants

Plaintiffs repeat that an objected to voting change may not be implemented or reviewed by a three-judge court. However, and despite Defendants' claim to the contrary, DOJ's objection to the change in the date of the election will not impose substantial harm or burdens on

Defendants. The only relief Plaintiffs seek is holding the election for the Augusta-Richmond County Commission and Mayor at the time of the general election in November. That could be accomplished by providing notice of the change in the date of the election and not making any changes in ballots but simply not counting any votes cast in the May primary for the Augusta-Richmond County Commission and Mayor. There would also be no need to change the dates for candidate qualifying.

There is also no merit to Defendants' claim that Plaintiffs "offered no relevant, admissible proof that their voting rights are diminished and that their harm is greater than the substantial harm shown by County Defendants." Defs.' Opp'n at 17. For the reasons stated above, and based upon the findings of the DOJ, the change in the date of elections "would have a retrogressive effect on the ability of minority voters to elect candidates of choice to office." DOJ letter at 2. Plaintiffs will suffer irreparable injury absent an injunction.

IV. The Public Interest Favors an Injunction

Defendants contend that "the law required the election at issue to be scheduled for May 20." Defs.' Opp'n at 17. But as noted above, a voting practice objected to under Section 5 is unenforceable and cannot be implemented until and unless it is precleared.

Defendants also argue that *Clark v. Roemer* "is directly on point here" and supports their argument that the objected to election should go forward. Defs' Opp'n at 18. *Clark* in fact directly refutes Defendants' argument. The Court held that the state should have been enjoined from conducting elections to which the Attorney General had interposed a Section 5 objection. According to the Court, "§ 5's prohibition against implementation of unprecleared changes required the District Court to enjoin the election. This is especially true because . . . the Attorney General interposed objections before the election." *Clark*, 500 U.S. at 654. In addition, the

Court rejected a number of reasons for not enjoining the elections which are similar to those advanced by the Defendants here, *i.e.*, "the short time between election day and the most recent request for injunction, the fact that qualifying and absentee voting had begun, and the time and expense of the candidates." *Id.* at 653.

Canady v. Lumberton City Board of Education, 454 U.S. 957 (1981), also directly refutes Defendants' argument. In *Canady*, the Attorney General objected to three annexations by the Lumberton City Board of Education as being discriminatory, but despite the objections the Board continued to implement the changes. On October 15, 1981, a three-judge court ruled the Board was in violation of Section 5, but allowed elections scheduled for November 3, 1981, to go forward with the proviso that if the objection was not removed by December 31, a special election must be held to fill all Board of Education seats. *Canady v. Lumberton City Board of Education*, No. 80-215-CIV3 (E.D.N.C.).[1] The plaintiffs filed an application in the Supreme Court for an injunction pending appeal prohibiting implementation of the objected to changes which was granted. The Court issued an injunction preventing residents of the annexed areas from voting in school board elections until the Board "demonstrate[s] compliance with Section 5 of the Voting Rights Act." *Canady*, 454 U.S. at 957. The same rule should apply here preventing Defendants from implementing the objected to change in the date of elections.

The other cases relied upon by Defendants did not involve Section 5 objections and lend no support to their argument that "the public interest does not favor an injunction." Defs.' Opp'n at 18. *Reynolds v. Sims*, 377 U.S. 533 (1964), involved a "one person, one vote" claim. *Miller v.*

[1] For discussions of the unreported decision of the three-judge court, *see* Laughlin McDonald, "Voting Rights in the South: Ten Years of Litigation Challenging Continuing Discrimination Against Minorities," 53-54 (Jan. 1982), available at https://www.aclu.org/files/FilesPDFs/votingrightssouth.pdf; Daniel McCool, Susan M. Olson and Jennifer L. Robinson, *Native Vote: American Indians, the Voting Rights Act, and the Right to Vote* 52 (Cambridge U. Press, 2007); Celia Pistolis, Bill Rowe and Ted Fillette, "Legal Services History and Achievements in North Carolina," 5 (Apr. 1, 2008), available at http://www.legalaidnc.org/public/Participate/legal-services-community/History-LS/CHRONICLE_LegalServicesHistoryAndAchievementsInNC.pdf.

Board of Commissioners of Miller County, 45 F. Supp. 2d 1369 (M.D. Ga. 1998), involved constitutional claims, not a Section 5 claim. *Fulani v. Hogsett*, 917 F.2d 1028 (7th Cir. 1990), also involved a constitutional claim and not a Section 5 claim. *Johnson v. Smith*, No. TCA 94–40025–WS, 1994 WL 907596 (N.D. Fla. July 18, 1994), also involved a constitutional claim and not a Section 5 claim. *Johnson v. Mortham*, 926 F. Supp. 1540 (N.D. Fla. 1996), also involved a constitutional challenge and not a Section 5 claim. Again, none of the cases relied upon by Defendants support its contention that an injunction would be adverse to the public interest.

Defendants also accuse Plaintiffs of "delay" in bringing suit and "the prejudice" it will cause Defendants. Defs.' Opp'n at 19. However, Defendants have been on notice of the Section 5 violation since December 21, 2012, more than two years before the election would be held. By refusing to comply with the Section 5 objection, Defendants, and not Plaintiffs, have caused any confusion, costs, and prejudice that might result from having to comply with the preclearance requirement. Indeed, Deputy Attorney General Dunn in his letter to Senator Stone warned that the implementation of the change in the date of elections "could lead to litigation in relation to the Augusta-Richmond County consolidated government." Ex. 1 to Bailey Decl. at 3. It was to avoid such litigation and the expense and time it would entail that counsel for Plaintiffs wrote a letter to Defendant Bailey on March 21, 2014, explaining that implementation of the change in the date of elections was prohibited by Section 5. A copy of the letter is attached as Exhibit B. But despite the letter, Defendants proceeded to implement the objected to voting change. Again, it is the Defendants, and not the Plaintiffs, who are responsible for any burdens that would be imposed if an injunction were granted.

Conclusion

Plaintiffs' Motion for a Preliminary Injunction should be granted.

Dated this 12th day of May, 2014.

Respectfully submitted,

s/M. Laughlin McDonald

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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 12th day of May, 2014.

s/M. Laughlin McDonald

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