No. 11-82

In the
Supreme Court of the United States

MISSISSIPPI STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,
Appellants,

v.

HALEY BARBOUR, GOVERNOR OF MISSISSIPPI, ET AL.,
Appellees.

On Interlocutory Appeal From The United States District Court For The Southern District of Mississippi

MOTION TO DISMISS OF ATTORNEY GENERAL JIM HOOD

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QUESTIONS PRESENTED

1. Direct review of a three-judge district court's interlocutory decisions is only available in the narrowest circumstances. The three-judge panel below declined to enjoin Mississippi's 2011 legislative elections to allow the Legislature to redistrict on the timetable prescribed by state law, and retained jurisdiction to address the merits of a further remedy after the process is completed. The threshold jurisdictional issue here is whether that ruling qualifies for direct review by this Court within the limited confines of 28 U.S.C. § 1953.

2. Lower court decisions rendered moot by intervening events should not be disturbed on appeal. Any injunctive relief as to the 2011 Mississippi Legislative elections which appellants contend should have been granted is moot, or likely will become moot, because primary elections have already taken place and the general election will go forward on November 2, 2011. If this Court determines it has jurisdiction to hear this appeal under 28 U.S.C. § 1953, then the alternative dispositive issue is whether Mississippi's 2011 legislative elections have rendered appellants' claim for pre-election injunctive relief moot.

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***

Pursuant to Rule 18.6 of the Rules of this Court, appellee Jim Hood, in his official capacity as Attorney General of the State of Mississippi and as member of the State Board of Election Commissioners, respectfully moves that this interlocutory appeal be dismissed.

OPINIONS BELOW

The interlocutory Memorandum Opinion and Order of the three-judge district court regarding injunctive relief is unreported and set out in full in the Appendix to appellants' Jurisdictional Statement. J.S. App. 3-

27. The interlocutory Order of the three-judge district court denying an amended motion to amend the Memorandum Opinion and Order is unreported and set out in full in the Appendix to appellants' Jurisdictional Statement. J.S. App. 1-2.

JURISDICTION

A three-judge district court for the Southern District of Mississippi was convened pursuant to 28 U.S.C. § 2284. The three-judge district court's interlocutory Memorandum Opinion and Order regarding appellants' requested injunctive relief (J.S. App. 3-27) was entered on May 16, 2011. The three-judge district court's interlocutory Order denying appellants' amended motion to amend the May 16, 2011 Memorandum Opinion and Order (J.S. App. 1-2) was entered on May 27, 2011. Appellants seek to invoke this Court's jurisdiction under 28 U.S.C. § 1253. Jurisdiction is not appropriate under Section 1253; furthermore, their claim for injunctive relief has become moot during the course of this appeal.

STATEMENT OF THE CASE

1. This interlocutory appeal arises out of appellants' claims for declaratory and injunctive relief regarding use of the current Mississippi legislative districts in 2011 elections. State senators and representatives are elected to Mississippi's bicameral Legislature from single-member districts and serve four-year terms. The Senate consists of 52 members and the House of Representatives consists of 122 members. Current members were last elected in 2007 and their terms expire on December 31, 2011. J.S. App. 12. Those members were elected under district

lines adopted when the Legislature last redistricted in 2002.

The Mississippi Constitution specifically sets forth the procedure for the State Legislature to accomplish its redistricting. MISS. CONST. art. 13, § 254. The Legislature is next required to redistrict in 2012. More specifically, the Legislature "may" redistrict at any time, but "shall" redistrict "at its regular session in the second year following the...decennial census." *Ibid.* If the Legislature fails to successfully redistrict during the 2012 regular session, redistricting must be accomplished at a mandatory special session called by the Governor. *Ibid.* If the special session fails, then a five-member commission has 180 days to adopt a redistricting plan. *Ibid.* Additionally, Mississippi is a jurisdiction covered by the Voting Rights Act. The Department of Justice must pre-clear any new redistricting plan for the State, or the United States District Court for the District of Columbia must approve the plan in a declaratory judgment action, prior to its use in future elections. *See* 42 U.S.C. § 1973(c).

In February 2011, data from the decennial census first became available to the Legislature during its 2011 regular session. J.S. App. 10. In March and early April, the Mississippi House and Senate successfully proposed and adopted separate resolutions for new districts applicable to each of the respective houses. J.S. App. 10-11. However, a final agreement as to both houses could not be reached. J.S. App. 11. The process ultimately failed after the Senate declined to adopt resolutions governing both houses of the Legislature. *Ibid.* The Legislature adjourned on April

7, 2011 without adopting a complete plan for revising its respective districts. J.S. App. 12.

Meanwhile, the 2011 election cycle for legislators' next four-year term of office was ongoing. Beginning January 1, 2011, candidates could file to be nominated through party primaries or qualify as independents. The qualification deadline for candidates passed on June 1, 2011. *Ibid.* Subsequently, party executive committees, county clerks, and other officials in Mississippi's 82 counties expended the time, money, and efforts necessary to prepare ballots and proceed with the 2011 scheduled elections. Primary elections were held on August 2, 2011. *Ibid.* Run-offs for party primaries were conducted on August 23, 2011. *Ibid.* Voting in the general election by way of absentee ballot will commence on September 24, 2011. The general election will take place on November 8, 2011. *Ibid.* Successful candidates in the general election will take office in January 2012. *Ibid.*

2. During the Legislature's 2011 regular session, on March 17, 2011, appellants filed this suit seeking a declaration that the current legislative districts, last revised and pre-cleared by Department of Justice in 2002, are unconstitutionally malapportioned in light of the newly released decennial census data, and based upon the "one person, one vote" principle gleaned from the Fourteenth Amendment's Equal Protection Clause. J.S. App. 14-15. Appellants' complaint further sought an injunction barring use of the current legislative districts in the 2011 elections. The named defendants filed responses to the complaint. Additionally, groups made up of members of the Legislature, and certain individual members of the Legislature, intervened and likewise responded to the complaint.

A three-judge court was convened pursuant to 28 U.S.C. § 2284(a). J.S. App. 13. On April 22, 2011, the three-judge court conducted a hearing and allowed all parties and intervenors to present their views regarding the case. J.S. App. 14. On April 29, 2011, the three-judge court entered an order stating that it was inclined to adopt the individual reapportionment plans passed by the House and Senate during the regular 2011 session as an interim remedy only. *Ibid.* The order also set a hearing for May 10, 2011, at which counsel for the parties were instructed to present their views, comments and objections to the proposed remedy. *Ibid.* At the May 10, 2011 hearing, the three-judge court received documentary evidence, testimony, comments, objections, and arguments of counsel. *Ibid.*

On May 16, 2011, the three-judge panel issued a Memorandum Opinion and Order. J.S. App. 3-27. The panel declined to impose new lines as an interim remedy, and instead prescribed that the 2011 elections proceed on the current lines adopted and pre-cleared in 2002. J.S. App. 7. However, the three-judge court retained jurisdiction to allow the Legislature to first satisfy its duties under Section 254 of the Mississippi Constitution in 2012, and then consider whether other relief may be appropriate at that time. J.S. App. 7-8. The court did not rule on the issue of special elections following the 2011 regular elections. But, it set out a specific process by which any party could petition for special elections after the legislative and preclearance process played out in 2012. J.S. App. 24-26. Appellants sought reconsideration in an amended motion to amend the May 16 Memorandum Opinion and Order. J.S. App. 46-61. The three-judge panel denied the motion to amend on May 27, 2011. J.S. App. 1-2.

Appellants filed their Notice of Appeal to this Court on June 7, 2011. J.S. App. 32-38. Their Jurisdictional Statement was served on July 15, 2011. Appellants have not petitioned the district court to enjoin the 2011 elections pending appeal. Likewise, they have not sought an injunction pending appeal, or expedited review, in this Court.

ARGUMENT

I. The three-judge district court's decisions are outside the scope of 28 U.S.C. § 1253.

Controversies that have been fully considered and finally decided on the merits by trial courts are best suited for appellate review. 28 U.S.C. § 1253 is an exception to that general principle and permits review of interlocutory decisions by three-judge district courts in limited circumstances. The instant appeal does not satisfy Section 1253 and, therefore, should be dismissed for lack of appellate jurisdiction.

Section 1253 only permits direct Supreme Court review when a three-judge district court has issued an order granting or denying injunctive relief:

> [e]xcept as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1253. The statute must be narrowly construed. "[A]ny loose construction of the

requirements of [the statute] would defeat the purposes of Congress...to keep within narrow confines our appellate docket." *Phillips v. United States*, 312 U.S. 246, 250 (1941). Further, the statute is not "a measure of broad social policy to be construed with great liberality," rather, it is "an enactment technical in the strict sense of the term and to be applied as such." *Id.* at 251.

The three-judge panel's decision below does not fall within the scope of Section 1253. The court merely stayed its hand given imminent 2011 state legislative elections. It refrained from deciding whether appellants' "one person, one vote" challenge entitled them to a coercive remedy in advance of the Legislature's completion of the redistricting process prescribed by Mississippi law. In doing so, the court retained jurisdiction to address further remedy issues after the redistricting process could be completed.

A direct interlocutory appeal under Section 1253 is only appropriate when a three-judge panel affirmatively grants or denies injunctive relief. *Gunn v. University Comm. to End the War in Vietnam*, 399 U.S. 383, 387-90 (1970). In *Gunn*, a three-judge district court merely stayed its hand and, thus, direct appeal was not proper. The district court entered an order explaining that the plaintiffs were entitled to a declaratory judgment and injunctive relief against enforcement of a Texas statute the court deemed unconstitutional. *Id.* at 386. The district court stayed its mandate, and retained jurisdiction, to allow the Texas legislature to modify the statute at issue in the next legislative session. *Id.* The district court found the plaintiffs may be entitled to relief, but it did not

implement a remedy. That decision was not reviewable under Section 1253.

In 2011, this case is in the same posture that *Gunn* was in 1970. In its comprehensive opinion below, the three-judge court extensively analyzed the issues, reasoned that entering a specific injunctive remedy would be premature, and retained jurisdiction over the case. *Gunn*'s reasoning counsels against review of this appeal. So does this Court's analysis in other similar instances where it has properly declined to accept direct appeals under Section 1253. *See Carey v. Wynn*, 439 U.S. 8 (1978) (per curiam) (dismissing appeal from order granting declaratory judgment but denying injunctive relief); *MTM, Inc. v. Baxley*, 420 U.S. 799, 803-04 (1975) (per curiam) (declining to address appeal where district court's order did not answer the underlying constitutional issue); *Goldstein v. Cox*, 396 U.S. 471, 478-79 (1970) (dismissing appeal from order denying summary judgment seeking injunctive relief contained in complaint); *Mitchell v. Donovan*, 398 U.S. 427, 431 (1970) (per curiam) (declining to accept appeal from order only addressing claims for declaratory relief); *Rockefeller v. Catholic Med. Ctr. of Brooklyn & Queens, Inc.*, 397 U.S. 820 (1970) (per curiam) (declining to accept appeal absent order granting or denying injunctive relief).

Additionally, Section 1253 jurisdiction is particularly inappropriate in ongoing state legislative reapportionment cases where a final remedy has not been decided. A few years prior to *Gunn*, in *Moss v. Burkhart*, a three-judge district court from the Western District of Oklahoma addressed redistricting of the Oklahoma Legislature. 207 F.Supp. 885 (W.D. Okla. 1962). The three-judge court found a need for

the Oklahoma Legislature to revise election districts. *Id.* at 892-94. However, the district court stayed its hand as to appropriate relief due to elections scheduled for that year. *Id.* at 895. Then, following primary elections run on the current lines, the court set out guidelines and a timetable on which the Oklahoma legislature must revise districts. *Id.* at 898-99. But, the court again stayed its hand as to the upcoming general election and declined to award any affirmative injunctive relief. *Id.* at 899. On a direct appeal from the district court's decisions, this Court wisely determined that it had no jurisdiction under Section 1253 to consider the appeal. *Price v. Moss*, 374 U.S. 103 (1963).

This case is on all fours with *Moss*. Here, the district court refrained from enjoining imminent elections, but retained jurisdiction to address appellants' claim for affirmative relief at a more appropriate time. This Court should dismiss this appeal as it did in *Moss*.

In sum, whether analyzed generally by looking to cases where this Court has declined jurisdiction because a three-judge panel has not granted or denied injunctive relief, or by specifically viewing this appeal in the same way as the Court did in *Moss*, this appeal is beyond the scope of Section 1253. Accordingly, it should be dismissed for lack of jurisdiction.

II. Alternatively, appellants' claims are moot, or likely to become moot prior to any decision by this Court.

Even assuming appellate review would be appropriate now, this Court should decline to take up

the merits of appellants' case due to mootness. A claim for injunctive relief becomes moot when intervening events render imposition of the remedy sought impossible. That principle is particularly applicable where, as here, elections targeted for injunctive relief are held while the complaining party pursues an appeal.

"[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). The live case-or-controversy requirement must subsist throughout the trial and appellate stages of litigation in federal courts. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990). Mootness occurs on appeal when interim relief or events have eliminated the effects of the defendants' act or omission, and there is no reasonable expectation that the alleged violation will recur. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Specifically in the context of election cases, when injunctive relief is denied and the subject election takes place, pre-election claims become moot where an injunction cannot restore the pre-election status quo. *See Hall v. Beals*, 396 U.S. 45, 48 (1969).

In this case, on May 16, 2011, the three-judge district court declined to order an injunctive remedy, allowed 2011 elections to proceed on current district lines, and permitted Mississippi's prescribed legislative redistricting procedure to be completed. J.S. App. 3-27. Reconsideration was denied on May 27, 2011. J.S. App. 1-2. Appellants filed a Notice of Appeal to this Court on June 7, 2011. J.S. 10. Their Jurisdictional Statement was filed on July 15, 2011.

Appellees' responses are currently due September 19, 2011.[1]

Meanwhile, the candidate qualifying deadline for the 2011 elections passed on June 1, 2011. Party primaries were held on August 2, 2011 using the current lines. Runoffs in party primaries took place on August 23, 2011. As it now stands, candidates have qualified. Primary elections have already been held. It is impossible to enjoin those events which have already occurred.

Furthermore, the November 2, 2011 general election is imminent. Absentee voting will begin on September 24, 2011. Given the timetable of this appeal, even if the Court accepts jurisdiction, it is highly unlikely that the case can be briefed, argued, and decided on the merits before the general election. Appellants' claim for an injunction barring the 2011 elections has thus either been mooted by the elections that have already taken place, or will be mooted before a decision likely can be rendered with respect to this appeal.[2] A direct appeal, following a final

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[1] Notably, appellants have not made any efforts to save their pre-election claims as to the 2011 elections from becoming moot. Appellants did not seek an injunction pending appeal from the three-judge panel's orders. They also have failed to seek a stay or any sort of expedited review in this Court.

[2] Appellants' claim is not "capable of repetition, yet evading review," and thus saved from mootness. As made clear by the three-judge panel, the current legislative district lines will not be used in any election after 2011. J.S. App. 25-27. After the current election, the Legislature will devise new lines in accordance with the reapportionment scheme mandated by Mississippi law or the three-judge district court will step in. *Ibid.* Either way, the

determination by the three-judge court below, *might* present a proper case for review by this Court. In the meantime, it would be inappropriate to consider whether the district court erred by not enjoining elections that have taken place.[3] For this alternative reason, this appeal should now be dismissed.

CONCLUSION

Section 1253 does not authorize direct appeal from the three-judge panel's decision allowing Mississippi's 2011 legislative elections to proceed, and otherwise holding this case in abeyance. Alternatively, even if statutory jurisdiction for this appeal exists, the district court's decision regarding appellants' requested injunction has become moot on appeal, or will likely be mooted before any appellate decision can be reached. For these reasons, this Court should dismiss the

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current legislative districts will not be used again in future elections.

[3] Additionally, to the extent appellants contend the issue of special elections should be adjudicated for the first time on this appeal, they are wrong. The three-judge panel did not address the propriety of special elections and left it to the parties to raise that claim after Mississippi's reapportionment process plays out next year. J.S. App. 25-27. It would be premature for this Court to rule on special elections since none of the parties have presented that issue to the three-judge court below, the panel has not made any rulings on the subject, and the district court is better situated to make a determination regarding special elections in the first instance. *See, e.g., Perkins v. Matthews*, 400 U.S. 379, 395-97 (1971) (declining to rule on issue of special elections and deferring to district court); *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 737-39 (1964) (expressing no view on remedy that should be utilized by district court in election case).

appeal for lack of jurisdiction and decline to reach the merits of the issues presented by appellants.

THIS the 19th day of September, 2011.

Respectfully submitted,

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