

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION**

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

PLAINTIFFS

VS.

CIVIL ACTION NO. 3:11CV159-TSL-EGJ-LG

**PHIL BRYANT, in his official capacity as
Governor of the State of Mississippi, ET AL.**

DEFENDANTS

and

**THE APPORTIONMENT AND ELECTIONS COMMITTEE
OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES,
ET AL.**

INTERVENORS

**ATTORNEY GENERAL'S RESPONSE TO PLAINTIFFS'
MOTION TO SET ASIDE THE 2011 LEGISLATIVE ELECTION
RESULTS AND ORDER SPECIAL LEGISLATIVE
ELECTIONS FOR ALL LEGISLATIVE DISTRICTS IN 2013**

Defendant Jim Hood, in his official capacity as Attorney General of the State of Mississippi and as Member of the State Board of Election Commissioners (“Attorney General”), files this Response to Plaintiffs’ Motion to Set Aside the 2011 Legislative Election Results and Order Special Elections for all Legislative Districts in 2013 [Docket No. 140].¹

INTRODUCTION

In its May 2011 Memorandum Opinion and Order, the Court declined to impose a remedy in this “one person, one vote” lawsuit to allow the Mississippi Legislature to comply with its redistricting duties under Section 254 of the Mississippi Constitution. The United States

¹ The Attorney General requests that the Court dispense with the requirement of filing a separate Memorandum of Authorities pursuant to Local Rule 7(b)(4) as the reasons and authorities supporting his Response are fully set forth below.

Supreme Court affirmed.

In the 2012 session, the Legislature performed its duty. Legislative redistricting plans were passed and precleared by the Department of Justice. Plaintiffs now seek a post-election remedy while making essentially the same arguments they made for a pre-election remedy. None of their authorities, or any other factual arguments, warrant conducting a special legislative election.

A SPECIAL ELECTION WOULD BE INAPPROPRIATE

Plaintiffs' request for post-election relief should be denied. So holding would be consistent with the Court's prior reasons for denying pre-election relief. It would also be appropriate because Plaintiffs have failed to produce any authority supporting a different result.

Initially, Plaintiffs' argument ignores the Court's May 16, 2011 holding that the release of census data in an election year does not automatically trigger a requirement to redistrict or a right to a remedy. The Court reasoned that in light of on *Reynolds v. Sims*, 377 U.S. 533 (1964), and its progeny, and because the State's redistricting policy expressed in Section 254 of the Mississippi Constitution is constitutional as applied to the facts of this case, Plaintiffs were not entitled to a pre-election remedy.² In so holding, the Court considered, but rejected, Plaintiffs' contention

that *Reynolds* has been undermined by the Supreme Court's statement in *Georgia v. Ashcroft*, 539 U.S. 461, 488 n. 2 (2003), that "[w]hen the decennial census numbers are released, States must redistrict to account for any changes or shifts in population" and that "if the State has not redistricted in response to the new census figures, a federal court will ensure the districts comply with the one-person, one-vote mandate before the next election."³

² Memorandum Opinion and Order at p. 13, Docket No. 124.

³ *Id.* at p. 14.

Plaintiffs made the same argument again on a direct appeal. The Supreme Court was unpersuaded and affirmed the May 16 decision.⁴

Plaintiffs' post-election claim simply reiterates the same *Ashcroft* footnote argument rejected prior to the 2011 election. The Court should reach the same conclusion that it did last year. Release of the 2010 census data did not trigger a requirement to redistrict or a right to a remedy as to the 2011 election. That correct conclusion is supported by the Court's prior reasoning, and the similar reasoning of numerous other federal courts that have denied requests for special elections following *Reynolds* where census timing was at issue.⁵

Plaintiffs' own authorities also demonstrate that special elections are only an appropriate remedy in certain, very limited, circumstances. For example, special elections have been ordered when there are egregious violations of voting rights attendant to an election such as election day misconduct or unconstitutional voter registration policies.⁶ A post-election remedy

⁴ *Mississippi State Conference of N.A.A.C.P. v. Barbour*, 132 S.Ct. 542 (2011).

⁵ See *French v. Boner*, 963 F.2d 890, 891 (6th Cir. 1992), *cert. denied*, 506 U.S. 954 (no valid "one person, one vote" claim in year Census data became available); *Ramos v. Illinois*, 976 F.2d 335, 340-41 (7th Cir. 1992) (no constitutional violation in four year delay of implementing new Census data); *Republican Party of Oregon v. Keisling*, 959 F.2d 144, 145-46 (9th Cir. 1992), *cert. denied*, 504 U.S. 914 (redistricting causing temporary dilution of voting power did not merit constitutional violation or require special elections). See also *Kahn v. Griffin*, 2004 WL 1635846, at *6 (D. Minn. July 20, 2004), *certified question answered by* 71 N.W. 2d 815 (Minn. 2005) (alleged "one person, one vote" deviation did not require special elections); *Cardona v. Oakland Unified Sch. Dist., California*, 785 F.Supp. 837, 843 (N.D. Cal. 1992) (dismissing "one person, one vote" claims for post-election relief premised upon failure to redistrict for 1992 elections based on 1990 Census data where accuracy of population data had not been resolved); *Fairley v. Forrest County, Mississippi*, 814 F.Supp. 1327, 1343-46 (S.D. Miss. 1993) (no "one person, one vote" violation requiring special elections after elections in same year as new Census data became available); *Bryant v. Lawrence County, Mississippi*, 814 F.Supp. 1346, 1354 (S.D. Miss. 1993) (similarly holding no "one person, one vote" violation requiring special elections after elections held in same year as new Census data became available).

⁶ See *Hamer v. Campbell*, 358 F.2d 215, 221-22 (5th Cir. 1966) (holding election should be set aside and new election ordered on account of town's deprivation of plaintiffs' voting rights through voter registration and poll tax measures); *Bell v. Southwell*, 376 F.2d 659, 661-62 (5th Cir. 1967) (holding election should be set aside and new election ordered due to voter intimidation, including segregated voting system and violence at polls).

might be appropriate where plaintiffs clearly establish a right to relief but the timing of their challenge precludes feasibility of a pre-election remedy.⁷ Special elections can be appropriate when a state law affecting an election is unconstitutional or inapplicable, or the election actually contravened state law.⁸ Occasionally, special elections have also been required when an insufficient remedy was previously devised by the district court.⁹

None of those circumstances are present here. Plaintiffs have not alleged that any election day misconduct or improper voting practices influenced the 2011 legislative election. There was plenty of time for the Court to award pre-election relief, had it been warranted. The Court has specifically held that Mississippi's legislative redistricting policy is not

⁷ See *Tucker v. Burford*, 603 F.Supp. 276, 278-79 (N.D. Miss. 1985) (requiring special election following supervisors' failure to redistrict more than two years following release of 1980 Census data).

⁸ See *Watkins v. Mabus*, 771 F.Supp. 789, 806-07 (S.D. Miss. 1991), *aff'd in part and vacated in part*, 502 U.S. 954 (1991) (ordering special elections without considering question of whether Section 254 required the court to stay its hand rather than granting relief); *Chargois v. Vermillion Parish School Board*, 348 F.Supp. 498, 500-501 (W.D. La. 1972) (explaining court would order special election following preclearance of proposed plans based on failure of defendants to comply with Louisiana law regarding timing of reapportionment); *Moore v. Leflore County Bd. of Election Commissioners*, 351 F.Supp. 848, 850-51 (N.D. Miss. 1971) (finding county board of supervisors elected at-large based on 1966 order of the board, and pursuant to state statute that was not precleared; special election remedy warranted because supervisors were not elected under any precleared plan); *Taylor v. Monroe County Bd. of Supervisors*, 421 F.2d 1038, 1041-43 (5th Cir. 1970) (reversing district court order denying special election based on reading of state statute that prohibited any change in district lines from affecting any current supervisor's term of office); *Fain v. Caddo Parish Police Jury*, 312 F.Supp. 54, 56-58 (W.D. La. 1970) (discussing potential remedies for apportionment of multi-member districts, leaving it to governing body to determine what plan to implement and whether should be revisited after results of 1970 Census published); *Chavis v. Whitcomb*, 307 F.Supp. 1362, 1366-67 (D.C. Ind. 1969) (holding state statute providing for multi-member district was unconstitutional, therefore allowing senators elected under unconstitutional statute beyond time imposed by court ordered remedy not permissible).

⁹ See *Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1157-63 (5th Cir. 1981) (reviewing validity of court drafted redistricting plan and ordering local authorities to produce a new plan within six months of future release of 1980 Census data); *Keller v. Gilliam*, 454 F.2d 55, 56-57 (5th Cir. 1972) (finding special elections required following reapportionment of supervisor districts and in light of court ordered remedy for at-large election of supervisors representing malapportioned districts).

unconstitutional as applied in this case, and the Supreme Court has affirmed that holding.¹⁰ Furthermore, last year, the Court did not impose an insufficient remedy. The Court's determination to allow the 2011 election to go forward using the lines previously precleared in 2002 was consistent with *Reynolds*, and similar federal court decisions where timing of census data was the key issue.¹¹

There is no good reason for the Court to depart from its prior holding. There are no factual circumstances warranting a special election. The Court should deny Plaintiffs' motion and dismiss this case.

THE VALIDITY OF THE 2012 PLANS SHOULD NOT BE LITIGATED HERE

The Court should deny the request for a special election for the reasons explained above. Denying Plaintiffs' motion would obviate any need to address any proposed new claim against the Legislature's 2012 district plans under Section 2 of the Voting Rights Act.

Following denial of their special election motion, if Plaintiffs still contend that the 2012 district plans violate Section 2, the Constitution, or any other federal law, then they should be required to raise that issue by way of a new lawsuit before those plans are used for the 2015 legislative elections. The Court's May 16, 2011 Memorandum Opinion and Order only retained jurisdiction to adjudicate the issue of special elections.¹² The Court did not retain jurisdiction to

¹⁰ See Memorandum Opinion and Order at p. 12, Docket No. 124, *aff'd*, *Mississippi State Conference of N.A.A.C.P. v. Barbour*, 132 S.Ct. 542 (2011).

¹¹ See note 3, above.

¹² See May 16, 2011 Memorandum Opinion and Order at p. 16, Docket No. 124 ("If a legislative reapportionment plan is adopted by the end of the 2012 session, in accordance with Section 254 of the Mississippi Constitution, and that plan is precleared by the Department of Justice or the United States District Court for the District of Columbia, this Court, upon motion of any party, will consider whether special elections are required using such a plan").

entertain a new Section 2, or other challenge, to the validity of the 2012 legislative district lines precleared by Department of Justice outside of the special election context.

Otherwise, if Plaintiffs' motion for a special election is granted, and the validity of the 2012 district lines must be addressed in this lawsuit, then the Court should enter a scheduling order allowing all the parties appropriate time to address Plaintiffs' motion to amend the complaint, file responsive pleadings, conduct discovery, file dispositive motions, and try the Plaintiffs' new claims targeting the 2012 district lines adopted by the Legislature.

CONCLUSION

For the reasons set forth above, Defendant 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 requests that the Court enter an order denying Plaintiffs' Motion to Set Aside the 2011 Legislative Election Results and Order Special Elections for all Legislative Districts in 2013 [Docket No. 140].

THIS the 30th day of October, 2012.

Respectfully submitted,

JIM HOOD, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL FOR
THE STATE OF MISSISSIPPI AND AS
MEMBER OF THE STATE BOARD
OF ELECTION COMMISSIONERS

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been filed electronically with the Clerk of Court and thereby served on the following persons who have appeared as counsel of record:

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THIS the 30th day of October, 2012.

S/Justin L. Matheny
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