STATE OF MISSISSIPPI

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CIVIL LITIGATION DIVISION

May 18, 2012

United States Court of Appeals for the Fifth Circuit
Office of the Clerk
Attn: Ms. Sabrina M. Hains
600 S. Maestri Place
New Orleans, LA 70130

RE: No. 11-60446, Hancock County Board of Supr., et al. v. Karen Ruhr, et al., Consolidated with No. 11-60676, Tallahatchie Cty. MS Br. NAACP, et al. v. Tallahatchie Cty. MS Bd. of Supr., et al.

Dear Ms. Hains:

I represent Jim Hood, Attorney General for the State of Mississippi *ex rel.* the State of Mississippi (the "Attorney General") in the above-referenced consolidated appeals. The Attorney General was an intervenor-defendant at the District Court level in each of the consolidated cases and has submitted the primary briefs supporting the positions of the Appellees. The Attorney General submits this Consolidated Supplemental Letter Brief in response to the Court's request dated May 11, 2012 and in advance of the oral argument scheduled for June 4, 2012.

Consolidated Supplemental Letter Brief

Issue #1

Whether Plaintiffs' requested relief will redress their alleged injuries. Put differently, whether Plaintiffs have satisfied the "redressability" element of standing. Plaintiffs, for their part, must identify their requested relief and their alleged injuries with specificity and must specifically explain how that relief will redress those injuries.

Response

As the Southern District Court expressly held below, Plaintiffs have not satisfied the "redressability" element of standing. The record in these consolidated appeals compels that conclusion. Their Consolidated Supplemental Letter Brief does not support a contrary holding.

An accurate understanding of the Plaintiffs' pleadings, and the relevant course of

proceedings below, is important for addressing the "redressability" element of standing. On or about February 28, 2011, Plaintiffs filed the nine complaints in the cases now on appeal. Each complaint requested the following specific relief:

a. A declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202, that the present apportionment scheme and the actions and inactions of the defendants violate rights secured to plaintiffs by the 14th amendment to the United States Constitution;

b. A temporary restraining order, preliminary injunction, and/or a permanent injunction enjoining the defendants from conducting elections under the existing redistricting plans for supervisor in [each respective] county;

c. A temporary restraining order and a preliminary injunction, enjoining the candidate qualification deadline for March 1, 2011 for the office of supervisor in [each respective] County, Mississippi for a short period of time in order to give the [each respective] County, Mississippi Board of Supervisors an opportunity to redistrict the supervisor districts and obtain preclearance of the redistricting plan;

d. A temporary restraining order, preliminary injunction, and/or a permanent injunction requiring that any new redistricting plan for supervisors in [each respective] County, Mississippi comply with the 14th and 15th amendments to the United States Constitution, 42 U.S.C. § 1983, and §§ 2 and 5 of the Voting Rights Act of 1965, as amended and extended, 42 U.S.C. §§ 1973(e) and 1973c;

e. Award plaintiffs court costs and a reasonable attorneys fee pursuant to 42 U.S.C. § 1973(e) and 1988.[1]

The named Plaintiffs asserting those claims included Jacqueline Marsaw (Adams), Glenn Wilson (Amite), Nannette Thurmond-Smith (Copiah), Frank Lee (Pike), L.J. Camper (Simpson), Leah Parson (Wayne), Johnny Thomas (Tallahatchie), and the local branch of the NAACP in each respective county. Other than the named Plaintiffs, none of the complaints identified any specific voters who the NAACP local branches purportedly represented. Contrary to Plaintiffs' representations during this appeal (*see*, *e.g.*, Plaintiffs' Consolidated Supplemental Letter Brief at pp. 3-4), Plaintiffs filed Motions to Amend to add new Plaintiffs. But no amendment was ever

[1] *See* Original Complaints, 3:11cv121 (Copiah) R. 6-16; 3:11cv122 (Pike) R. 6-15; 3:11cv123 (Simpson) R. 7-17; 3:11cv124 (Amite) R. 5-15; 4:11cv33 (Wayne) R. 7-17; 5:11cv28 (Warren) R. 7-16; 5:11cv29 (Claiborne) R. 5-14; 5:11cv30 (Adams) R. 6-16; and 2:11cv42 (Tallahatchie) R. 7-17. None of the complaints included a claim for "special election" or post-election relief. Furthermore, contrary to the misstatement contained in Plaintiffs' Supplemental Letter Brief at page 4, their complaints filed in the District Court did not contain a request for "general relief."

authorized and other Plaintiffs were ever actually included as parties to the litigation. *See Summit Office Park v. U.S. Steel Corp.*, 639 F.2d 1278, 1282 (5th Cir. 1981) (a plaintiff who lacks standing does not have standing to amend the complaint to add new plaintiffs).

Among the named Plaintiffs, only Frank Lee (Pike) *pled* that he resides and votes in a district that was "under-represented" based on comparing the existing district lines in each county to the Plaintiffs' purported 2012 Census data. *See Fairly v. Patterson*, 493 F.2d 598, 603 (5th Cir. 1974) (only voters in an "over-represented district may have standing to assert a "one person, one vote" injury). Any "standing" analysis should thus begin with the realization that – as the District Court correctly held in the Hancock case – Plaintiff Frank Lee (Pike) is the only Plaintiff who even could arguably satisfy even the first "injury in fact" standing requirement.

Assuming Plaintiff Frank Lee (Pike), or any of the other named Plaintiffs, could satisfy the "injury in fact" requirement for standing, their claims still fail the "redressability" analysis. Standing requires a plaintiff to prove (1) an injury in fact (2) that is fairly traceable to the defendant's conduct and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Specifically, to establish the third "redressability" element, "it must be 'likely', as opposed to merely 'speculative', that the injury will be 'redressed by a favorable decision." *Id.* at 561 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976). The redressability element requires the Court to assume it will grant the relief sought and then determine whether the relief "will likely alleviate the particularized injury alleged by the plaintiff." *Florida Audubon Society v. Bentsen*, 94 F.3d 658, 663-64 (D.C. Cir. 1996). If redressability, and the other required elements for standing, do not "adequately appear from all materials of record, the complaint must be dismissed." *Warth v. Sedlin*, 422 U.S. 490, 502 (1975).

There are two reasons why Plaintiff Frank Lee (Pike) fails the redressability element. First, the relief sought when the District Court dismissed his claim along with all the others was too speculative to remedy his alleged injury. The District Court issued its Memorandum Opinion and Order on May 16, 2011 and held Lee's claim was not redressable. [Memorandum Opinion and Order, (Hancock) R.E. 10]. Plaintiffs' claimed injury was the prospect of "under-representation" due to allegedly malapportioned supervisor district lines. Their complaint sought to declare the current lines invalid, enjoin the statutorily-established qualifying deadline, enjoin the statutorily-established elections, and generally enjoin defendants from enacting new lines that did not comply with the law. [*See* Original Complaints, referenced at n. 1].

It was merely speculative to reason that granting the *specific relief sought* as of May 16, 2011 would actually remedy any Plaintiffs' claimed "under-representation." If the District Court had enjoined the qualifying deadline, other election deadlines, or even the elections, then there still would have been no certainty that Lee's Pike County Board (or any other counties' Boards) could complete the redistricting process, and the election process, by the time current supervisors' terms of office would expire. New lines had to be drawn, submitted to the public for comment, voted upon, and put through the potentially lengthy and wholly uncertain process of submission and approval by Department of Justice.

Meanwhile, many deadlines imposed under state and federal law had to be met in advance of both the August primary and November general elections. For example, deadlines for changes in supervisor district lines, preparation of absentee ballots, applications for absentee ballots, campaign finance statements, and providing ballots to military and overseas voters as required by federal law. There was never a guarantee that granting the Plaintiffs their requested relief would redress their alleged injury. Accordingly, as the District Court correctly found in the Hancock action, the only named Plaintiff who could meet the "injury in fact" requirement still failed to satisfy the "redressability" requirement.[2]

Second, the Court should not only be guided by the District Court's "redressability" analysis as of May 16, 2011, it must also assess the "redressability" prong and the other elements of standing as of the present day. The case or controversy requirement "subsists through all stages of federal judicial proceedings, trial and appellate . . . it is not enough that the dispute was very much alive when suit was filed." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). As of today, the elections in Mr. Lee's county and all the other counties have been held. The specific declaratory and injunctive relief sought in Plaintiffs' complaints would not redress their alleged injuries if this Court ordered it today. For either of these reasons, viewed when the District Courts dismissed the cases or now, Plaintiffs' claims do not meet the "redressibility" element.

Issue #2

Whether this controversy is moot, in light of the fact that the election itself has already been conducted.

Response

This controversy is moot, even assuming Plaintiffs' lawsuits ever presented a justiciable case or controversy or their complaints ever stated any legitimate claim to relief. A case or controversy "must exist at all stages of the litigation, not just at the time the suit was filed." *Bayou Liberty Ass'n v. U.S. Army Corps of Eng'rs*, 217 F.3d 393, 396 (5th Cir. 2000). A dispute may become moot while it is on appeal. *See Church of Scientology of California v. U.S.*, 506 U.S. 9, 12 (1992). Generally, a controversy is moot "once the action that the plaintiff sought to have enjoined has occurred . . . because 'no order of this court could affect the parties' rights with respect to the injunction we are called upon to review.'" *Seafarers Int'l Union of N. Am. v. National Marine Servs., Inc.*, 820 F.2d 148, 151-52 (5th Cir. 1987) (quoting *Honig v. Students of*

[2] Prior to the May 16, 2011 Hancock Order, Plaintiffs had filed Motions for Temporary Restraining Orders or Preliminary Injunctions in several of the consolidated cases. However, all such Motions had been terminated by Text Order dated March 25, 2011 [*see* (Hancock) R. 21] with directions to the parties to re-file any pending Motions. Plaintiffs did not re-file any Motions seeking injunctive relief prior to the May 16, 2011 and none were pending before the Court at that time. As a consequence, Plaintiffs never had any request for special elections or any other remedies that the District Court might have had authority to grant (assuming their claims had merit) and might arguably have alleviated their alleged injuries when the Southern District Court dismissed their claims.

the Cal. Sch. for the Blind, 471 U.S. 148, 149 (1985)).

Plaintiffs' complaints filed in the District Courts on or about February 28, 2011 specifically sought: (1) a declaratory judgment that the counties' apportionment schemes violate their Fourteenth Amendment rights, (2) an injunction barring the counties from conducting any elections on their current supervisor lines, (3) an injunction extending the statutory candidate qualification deadline indefinitely and until new district lines, (4) an injunction requiring any new district lines to conform with applicable law, and (5) an attorneys fees award.[3]

On May 16, 2012, the Southern District Court dismissed the consolidated Hancock County cases for lack of standing, and alternatively, for failure to state a claim. [Memorandum Opinion and Order, Hancock R.E. 10]. On September 14, 2011, the Northern District Court dismissed the Tallahatchie County case for the same reasons. [Final Judgment, Tallahatchie R.E. 2]. Meanwhile, the Board of Supervisors primary elections were held on August 2, 2012, and general elections were held on November 8, 2012 in each of the respective counties (and all other counties in Mississippi). The elections were held on time tables established by Mississippi law (all such deadlines were previously pre-cleared by Department of Justice) and using district lines devised prior to the 2010 Census and previously pre-cleared by the Department of Justice. When the qualifying deadline passed, and the elections were held, Plaintiffs' claims seeking to enjoin those events became moot.

Plaintiffs assert two reasons why their case is not moot: "[w]hen a district court wrongly withholds a request for pre-election relief, the election results should be set aside and a new election ordered;" and "every twenty years the parties and courts will be faced with the same election cycle when census data and elections happen in the same year. Therefore, the case is capable of repetition but yet evading review." [Appellants' Supp. Brief at pp. 9-10]. This Court has previously addressed similar arguments in local elections contexts and held that the claims at issue were moot.

The misplaced argument that the District Courts "wrongly withheld a request for pre-election relief" and, thus, should have set elections results aside and order new elections does not save Plaintiffs' claims from mootness. There are at least two reasons why.

First, as an initial matter, and as explained in the Attorney General's previous briefing, the District Courts did not "wrongfully withhold" pre-election relief. The District Courts correctly determined Plaintiffs lacked standing and otherwise failed to state a claim for their requested declaratory and injunctive relief.

Second, and perhaps more importantly, in *Lopez v. City of Houston*, this Court faced a similar local election dispute and rejected the precise argument Plaintiffs are making in this case. 617 F.3d 336 (5th Cir. 2010). In *Lopez*, minority voters in Houston brought a challenge to the

[3] *See* n. 1, above. Plaintiffs' Complaints did not include a request for special elections, other post-election relief, or even "general relief."

city's assessment of its population and alleged improper failure to redistrict and add new city council seats on Fourteenth Amendment and other grounds. *Id.* at 339. The voters sought an order enjoining the November 2009 elections until the city redistricted and two new seats were added. *Id.* The District Court denied their relief, the elections were held, and then the voters appealed. *Id.*

On appeal, the voters argued their claims were not moot because the Court could invalidate the election and require a new election after adding two new council seats. *Id.* at 340. This Court recognized that "[i]nvalidation of a past election can, in some instances, be a viable remedy that will save a claim from mootness even if the election has passed." *Id.* (citing *NAACP v. Hampton Cnty. Election Comm'n*, 470 U.S. 166, 181-82 (1985). However, "invalidation is a extraordinary remedy that can only be employed in exceptional circumstances, usually when there has been an egregious defiance of the Voting Rights Act on the part of the covered entity." *Id.* (collecting authorities). Since the voters had not demonstrated any such "egregious defiance" of the Voting Rights Act, their claims were not saved from mootness by the notion that special elections might have been an available remedy. *Id. See also Harris v. City of Houston*, 151 F.3d 186, 189 (5th Cir. 1998) (explaining injunctive relief becomes moot upon happening of event sought to be enjoined and applying mootness to injunctive and declaratory relief claims while refusing to read additional requests for relief into plaintiffs' claims in local elections dispute that might save them from having become moot); *Wilson v. Birnberg*, 667 F.3d 591, 595-97 (5th Cir. 2012) (holding requested injunctive relief affecting local election was mooted by election taking place and that new election was not appropriate as claims did not warrant such an "extraordinary remedy").

In this consolidated appeal, like the voters in *Lopez*, Plaintiffs' complaints did not plead, or otherwise make any probative showing, that special elections should have been ordered to remedy the injuries they alleged. Furthermore, as discussed extensively in the Attorney General's Response Brief and the Southern District Court's Memorandum Opinion and Order in the Hancock appeal, Plaintiffs' claims here are not aimed at any "egregious defiance" of the law. The 2010 Census data was released in the middle of the 2011 election cycle. The information was not available to the respective counties in time to redistrict, obtain pre-clearance, and comply with all of the impending election deadlines in advance of the election. This is no case of "egregious defiance."

Every federal court addressing the same Census-timing issue has held the local government unit was not required to complete the process prior to impending elections and explicitly refused to order special elections. *See*, *e.g.*, *Political Action Conference v. Daley*, 976 F.2d 335, 340-41 (7th Cir. 1992); *French v. Boner*, 963 F.2d 890, 891-92 (6th Cir. 1992), *cert. denied*, 506 U.S. 954 (1992); *Republican Party of Oregon v. Keisling*, 959 F.2d 144, 145-46 (9th Cir. 1992), *cert. denied*, 504 U.S. 914 (1992); *Kahn v. Griffin*, 2004 WL 1635846, at *6 (D. Minn. July 20, 2004), *certified question answered*, 71 N.W. 2d 815 (Minn. 2005); *Bryant v. Lawrence County*, 814 F.Supp. 1346, 1354 (S.D. Miss. 1993); *Fairley v. Forrest County, Mississippi*, 814 F.Supp. 1327, 1346 (S.D. Miss. 1993). Even federal courts addressing the same issue regarding the 2010 Census have likewise held the release of data in the current election year

did not require granting plaintiffs any relief. *See*, *e.g.*, *Graves v. City of Montgomery*, 807 F.Supp.2d 1096, 1110-12 (M.D. Ala. 2011); *Herdt v. Civil City of Jeffersonville, Indiana*, 2011 WL 3273209, at *3-4 (S.D. Ind., July 29, 2011).

There simply is no "egregious defiance" of the law attendant to the counties' actions or inactions at issue here. Special elections would be entirely inappropriate as a remedy, whether Plaintiffs pled it or not. Therefore, Plaintiffs' belated contention that the District Court could have granted their unpled special elections claim does not save their lawsuits from mootness.

Plaintiffs' alternative argument based on the "capable of repetition, yet evading review" doctrine is equally deficient. Their speculation that "every twenty years the parties and courts will be faced with the same election cycle when census data and elections happen in the same year" does not satisfy the mootness exception.

The "capable of repetition" doctrine requires proof of two elements: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). The first element is not satisfied here. Plaintiffs had ample time to present their claims to the District Courts in Spring 2011. They took their appeal in the consolidated Hancock County action on June 29, 2011. [Amended Notice of Appeal, (Hancock) R.E. 20]. They initially sought a stay or injunction pending appeal from the District Court in the Hancock County action. [Motion for Stay, (Hancock) R. 1783-89].[4] The motion was denied. [June 13, 2011 Text Order, (Hancock) R. 38]. However, with months remaining prior to the general election, Plaintiffs never petitioned this Court for a stay or even sought expedited consideration. *See Bayou Liberty Ass'n*, 217 F.3d at 398-99 (recognizing availability procedures for seeking expedited review diminishes argument that certain actions are inherently capable of avoiding review). Plaintiffs failed to seek expedited review. Now, they should not be heard to argue they could not have fully litigated their claims before the elections.

The second element is not satisfied here either. To meet the element, a party must show a "demonstrated probability" or "reasonable expectation," not merely a "theoretical possibility" that it will be subject to the same government action. *Libertarian Party v. Dardenne*, 595 F.3d 215, 217 (5th Cir. 2010). There is no reason to believe that all of the subject counties will not redistrict based on 2010 Census data prior to the next Board of Supervisors elections in 2015. Moreover, Plaintiffs' "repetition in twenty years" argument overlooks the requirement that the "same complaining party would be subjected to the same action again." They have not offered any credible basis for the Court to conclude that the particular voters here will reside in under-represented supervisor districts in 2030. The Court should decline Plaintiffs' invitation to look at least two Censuses and possibly two redistricting cycles ahead in order to hold their claims are

[4] In their Tallahatchie County appeal, the District Court's final judgment was not issued until September 14, 2011. [Final Judgment, (Tallahatchie) R.E. 2]. Plaintiffs never sought a stay or injunction pending appeal, or expedited consideration.

not moot.

Conclusion

None of the named Plaintiffs' claims meet the "redressability" requirement for standing. Their claims are also moot. For those reasons, as well as all the other reasons presented to the Court in the Appellees' briefs, the Court should either hold that Plaintiffs' claims were properly dismissed by the District Courts, or otherwise, if their cases are indeed moot, vacate the District Courts' orders and remand with instructions to enter a new order of dismissal.

Sincerely,

S/Justin L. Matheny

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