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

HANCOCK COUNTY BOARD OF SUPERVISORS
V. No. 1:10-cv-564-LG-RHW
RUHR

This document pertains to the following civil action consolidated with the above lead case:

AMITE COUNTY, MISSISSIPPI BRANCH OF THE NAACP, *et al.* PLAINTIFFS

VS. No. 3:11cv124-LG-RHW

AMITE COUNTY, MISSISSIPPI BOARD OF SUPERVISORS; *et al.* DEFENDANTS

and

JIM HOOD, ATTORNEY GENERAL FOR THE STATE OF MISSISSIPPI, *EX REL*. THE STATE OF MISSISSIPPI INTERVENOR

AMITE COUNTY BOARD OF SUPERVISORS'
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT AS MOOT

Defendant Amite County, Mississippi Board of Supervisors, by and through counsel, moves the Court under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss Plaintiffs' Complaint as moot. In support, the Amite County Board of Supervisors shows as follows:

I. Introduction

Article III of the Constitution limits federal court jurisdiction to "cases" and "controversies." U.S. CONST. art. III, § 2, cl.1. "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson,* 415 U.S. 452, 485 n.10 (1974). A case becomes moot if it "no longer present[s] a case or controversy

under Article III, § 2 of the Constitution." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). Here, Plaintiffs' Complaint is anchored to the 2011 election cycle – it requests relief based *solely* on pre-election claims, and because the complained-of events have already occurred, there is no longer a case or controversy. Further, Plaintiffs' moot claims are not saved by the "capable of repetition yet evading review" exception to the mootness doctrine. Even Plaintiffs' request for declaratory relief is moot because there is no longer a live controversy on which the Court could issue an effective remedy. The same is true for the requests for attorneys' fees and for "general relief." Thus, the Court is without jurisdiction to hear this dispute. As such, and as further explained below, the Court should grant the Board of Supervisors' Motion to Dismiss.

II. There can be no injunction against the 2011 qualifying deadline or the 2011 elections.

It is "beyond dispute that a request for injunctive relief generally becomes moot upon the happening of the event sought to be enjoined." *Harris v. City of Houston*, 1998 U.S. App. LEXIS 18589, at *8 (5th Cir. Aug. 11, 1998) (and collecting cases). Here, because the March 1, 2011 qualifying deadline and the August and November primary and general elections have already occurred, the Court cannot grant effective relief as to those events. As such, Plaintiffs' claims for injunctive relief as to the past events present no justiciable case or controversy. This much is clear.

As to the future coercive relief that Plaintiffs request, *i.e.*, that any future redistricting plans comply with the Constitution and the laws of the United States, such a request presents no justiciable controversy. Plaintiffs have not alleged that Defendants *will* violate any law in formulating a new redistricting plan. As such, there is no controversy between the parties as to Defendants' future efforts to redistrict. Worse, to enjoin or coerce Defendants to follow the law in their efforts to redistrict would be redundant. Defendants are fully aware of and will abide by

their obligation to follow the law. Such an injunction is not permitted by Rule 65. *See, e.g.*, *Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 897 (5th Cir. 1978), cert. denied, 99 S. Ct. 118 (1978) (explaining that injunctive relief merely requiring defendants to "'obey the law' cannot be sustained"). Thus, there is no case or controversy as to the prospective injunctive relief claims.

III. No relief can be afforded on the declaratory and general relief requests.

"[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). Here, granting Plaintiffs' requests for declaratory and general relief does not affect the rights of the parties before the Court. This is because the pre-election injunctive relief claim is the *sine qua non* of the entire case. If the Court declares, as Plaintiffs wish, that the present apportionment scheme violates Plaintiffs' Fourteenth Amendment rights, there is no effect unless that declaration is manifested into a change in the election, *i.e.*, an *enforcement* of their Fourteenth Amendment rights.[1]

Certainly, such a declaration issued prior to the 2011 elections would have bolstered Plaintiffs' pre-election injunctive relief claims. But those elections having passed, that same declaration now would simply be an advisory opinion – one prohibited by long-standing justiciability jurisprudence. *See Flast v. Cohen*, 392 U.S. 83, 96 n.14 (1968) ("The rule against advisory opinions was established as early as 1793 . . . and the rule has been adhered to without deviation."). As such, there is no case or controversy on the declaratory relief claim.

Further, because there can be no change to the 2011 elections now, attorneys' fees under 42 U.S.C. § 1973*l*(e) cannot be granted because Plaintiffs cannot prevail in a suit to *enforce* the voting guarantees of the fourteenth amendment. The same is true for attorneys' fees under 42

[1] Note that Plaintiffs present no claim for nominal damages that would survive a mootness challenge. *See generally Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740 (5th cir. 2009). As stated below, their claims for attorneys' fees are dependent on them prevailing on their *enforcement* of voting guarantees. 42 U.S.C. § 1973*l*(e).

U.S.C. § 1988(b). *See Curtis v. Taylor*, 625 F.2d 645, 648-49 (5th Cir. 1980) (holding that request for attorneys' fees does not salvage an otherwise moot case).

In sum, the Declaratory Judgment Act only allows for the Court to declare the rights of the parties when there is an actual controversy. 28 U.S.C. § 2201(a) ("In a case of actual controversy within its jurisdiction . . . .") Here, there is no actual controversy because the 2011 elections have already occurred and the Court can no longer grant any remedy as to those events. And as the Supreme Court said in *Rice*, *supra*, the courts are without power to decide questions that do not affect the rights of the parties. Granting Plaintiffs' requests for declaratory relief would attempt to do just that. As such, the declaratory relief claims are non-justiciable.

IV. The "capable of repetition, yet evading review" exception does not apply.

Plaintiffs' moot pre-election relief claims are not salvaged by the "capable of repetition, yet evading review" exception.

> [T]he "capable of repetition, yet evading review" exception can be invoked if two elements are met: "(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.

Ctr. for Individual Freedom v. Carmouche, 449 F.3d 655, 661 (5th Cir. 2006) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). As to the first prong, Plaintiffs' attempt to fit their claims within the mootness exception is misleading. Plaintiffs' ostensibly argue that Defendants' conduct was too short in its duration to be fully litigated. But the real *challenged action* here is the fact that the qualifying deadline came so soon after the issuance of the 2010 Census data. As such, it is not Defendants' conduct that is too short to be litigated, but the U. S. Census Bureau's. *Cf. Courmouche*, 449 F.3d at 658, 662 (nonprofit sought right to engage in

election-related speech prior to approaching election). Thus, Plaintiffs' claims do not fit within the first prong of the mootness exception.

As to the second prong, "a reasonable expectation that the same complaining party would be subjected to the same action again," the Fifth Circuit held in a similar case involving decennial census data that the exception did not apply. *Lopez v. City of Houston*, 617 F.3d 336 (5th Cir. 2010). In *Lopez*, a group of minority voters in Houston, Texas, brought suit against the city for voting rights violations in how the city calculated its population for purposes of redistricting. *Id.* at 338. The district court dismissed the case as frivolous. *Id.* The Fifth Circuit affirmed on the grounds that the case was not justiciable. *Id.* The Fifth Circuit held that the plaintiffs did not meet the second prong of the "capable of repetition" exception. *Id.* at 340-41. The court held that "merely showing that the government will 'have an opportunity to act in the same allegedly unlawful manner in the future' is not enough to satisfy the second prong of the exception without a reasonable expectation that the government *will* act in that manner." *Id.* at 341.

Here, there is no reasonable expectation that Plaintiffs or, under a relaxed standard, voters like Plaintiffs, will be subjected in the future to the same conditions found here. Although the qualifying deadline and election dates cannot be "reasonably expected" to change, several variables exist that preclude a finding that the second prong applies here. First, the U.S. Census Bureau could become more efficient in releasing Census data, giving county boards of supervisors more time to draw and adopt plans and obtain preclearance. The supervisor district populations within Amite County may not shift to a sufficient degree so as to trigger a "one person, one vote" challenge to the redistricting lines that are then in place – lines that *have yet to be drawn*. The Board of Supervisors may not even be required to obtain preclearance under

Section 5 of the Voting Rights Act because the VRA may not even be in effect at that time. *See* Wayne County's Memo. Supp. Mot. Dismiss [196] at p. 10 (citing to the VRA's self-expiration and the U.S. Supreme Court's pending resolution of *Shelby County v. Holder*). If preclearance is not required, months and months are cut from the time it requires a county board of supervisors to conduct redistricting.

To be clear, no amount of discovery on mootness can predict whether the precise conditions of this case are "reasonably expected" to repeat themselves in 2031 or any other quadrennial election following a decennial census. As such, Plaintiffs cannot meet their burden under the second prong. Thus, the "capable of repetition yet evading review" exception to the mootness doctrine does not apply here.

V. There is no implied request for post-election relief that would save this case from dismissal on mootness grounds.

Plaintiffs have previously argued that "[a]lthough plaintiffs' original complaint clearly stated a claim for *preelection* relief, any claim for *post-election* relief was implied. See, *Tucker v. Bu[r]ford*, 603 F. Supp. 276 (N. D. Miss. 1985)." (Pls.' Mot. Discovery [169] at p. 5.) This is wrong. *Tucker* says nothing about implied post-election relief. The plaintiffs there, with respect to the 1984 elections, sought pre-election relief and *alternatively sought post-election relief*. *Tucker*, 603 F. Supp. at 277. With respect to the 1983 elections, plaintiffs failed to seek pre-election relief, barring their claims. *Id.* at 279. As such, *Tucker* provides no support for this Court considering a post-election relief claim when adjudicating the mootness of the case in its current posture.

Rather, the opposite of Plaintiffs' argument is true: there is no implied post-election relief. *See Harris*, 1998 U.S. App. LEXIS 18589, at *12 ("The plaintiffs in this case sought only prospective relief. On appeal, they suggest that we 'read into' their complaint additional requests

for relief and then proceed to an adjudication on the merits. We may not proceed in such a fashion.") The Fifth Circuit does not allow Plaintiffs to make such an argument, and this Court should not consider it.

VI. Conclusion

Plaintiffs' Complaint is founded on pre-election relief from the 2011 elections. All other relief requested therein stems from or is symbiotic to the 2011 elections. Because the complained-of events have already occurred and the Court can no have effect on past events, Plaintiffs' Complaint is now moot. As such, the Amite County Board of Supervisors moves the Court to dismiss Plaintiffs' Complaint and requests any other relief the Court deems proper.

DATED this the 7th day of December, 2012.

Respectfully submitted,

AMITE COUNTY, MISSISSIPPI
BOARD OF SUPERVISORS

By: s/ John Dollarhide
TOMMIE S. CARDIN, MB # 5863
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CERTIFICATE OF SERVICE

I, John H. Dollarhide, one of the attorneys Defendant Amite County, Mississippi Board of Supervisors, certify that I have this day electronically filed the foregoing document with the

Clerk of the Court using the ECF system which sent notification to all registered attorneys of record.

This the 7th day of December, 2012.

s/ John H. Dollarhide
JOHN H. DOLLARHIDE

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