

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

HANCOCK COUNTY BOARD OF
SUPERVISORS
Plaintiff

VS.

CIVIL ACTION NO. 1:10cv564-LG-RHW

KAREN LADNER RUHR, in her official
capacity, ET AL.
Defendants

consolidated with:
3:11cv121-LG-RHW
3:11cv122-LG-RHW
3:11cv123-LG-RHW
3:11cv124-LG-RHW
4:11cv33-LG-RHW
5:11cv28-LG-RHW
5:11cv29-LG-RHW
5:11cv30-LG-RHW

and

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

ATTORNEY GENERAL'S RESPONSE IN OPPOSITION TO
PLAINTIFFS' "MOTION TO SET ASIDE THE 2011 ELECTIONS
FOR MEMBERS OF THE BOARDS OF SUPERVISORS
AND ORDER SPECIAL ELECTIONS"

Intervenor Jim Hood, Attorney General for the State of Mississippi *ex rel.* the State of Mississippi files this Response in Opposition to Plaintiffs' "Motion to Set Aside the 2011 Elections for Members of the Boards of Supervisors and Order Special Elections" [Docket No. 221] and states:

1. On May 16, 2011, this Court dismissed these eight consolidated lawsuits for lack of standing, and alternatively, on the merits.¹ On August 31, 2012,

¹ Memorandum Opinion and Order of Dismissal, Docket No. 143.

the Fifth Circuit vacated that ruling and remanded these cases with a specific instruction for this Court to determine whether plaintiffs' claims are moot before addressing any other issues.²

2. Following remand, the Attorney General and the county defendants filed motions to dismiss on account of mootness. The parties briefed the mootness issue in December 2012, and filed supplemental briefs in July 2013, as requested by the Court.

3. On July 25, 2013, plaintiffs filed a "Motion to Set Aside the 2011 Elections for Members of the Boards of Supervisors and Order Special Elections" asserting new claims for injunctive and declaratory relief against the county defendants.³ Plaintiffs' motion should be denied for several reasons in addition to those which may be asserted in opposition by the county defendants.

4. First, plaintiffs' lawsuits are moot and should be dismissed. They should not be allowed to belatedly add new claims. New, previously unpled, claims do not save their cases from mootness for all the reasons set forth in the Attorney General's and the county defendants' previous mootness briefing.

5. Second, the Fifth Circuit specified that mootness must be decided before any other issues in these consolidated cases. If the Court determines

² Fifth Circuit Opinion at p. 21, Docket No. 166. Importantly, the Fifth Circuit did not hold that plaintiffs' complaints state valid legal claims. Rather, the Appeals Court merely instructed this Court to assess mootness on remand before evaluating any other aspect of plaintiffs' claims.

³ Motion to Set Aside the 2011 Elections for Members of the Boards of Supervisors and Order Special Elections, Docket No. 221.

plaintiffs' cases are not moot, then a scheduling order or other appropriate case management order(s) should be entered so the parties may address any remaining issues. At a minimum, the county defendants should be afforded an adequate opportunity to conduct discovery, designate experts, file dispositive motions on the merits, and/or take any other steps necessary to address the merits of any claims plaintiffs seek to assert against them.⁴

6. Third, plaintiffs' motion is an improper attempt to amend their complaints. It asserts entirely new, and previously unpled, claims for relief against the county defendants. Plaintiffs did not obtain leave of court pursuant to Fed. R. Civ. P. 15, or follow any other rule, before seeking to assert their new claims by way of motion practice. If plaintiffs want to add new claims to their lawsuits, they should be required to follow the proper procedures.

7. Fourth, plaintiffs' motion is legally and factually deficient for many reasons. For example, plaintiffs' new claims for post-election relief require them to prove each of the county defendants committed "egregious defiance" of law in connection with their 2011 supervisor elections.⁵ Plaintiffs have not identified any

⁴ Such a procedure would be particularly appropriate given the Court's prior dismissal of plaintiffs' complaints on the merits in the alternative, and the fact that the Fifth Circuit did not reverse that holding. It simply required this Court to address mootness first, and then the issue of whether plaintiffs have stated a legal claim if the cases are not moot.

⁵ See, e.g., *Wilson v. Birnberg*, 667 F.3d 591, 595-97 (5th Cir. 2012); *Lopez v. City of Houston*, 617 F.3d 336, 340 (5th Cir. 2010). Contrary to the asserted basis for their motion, plaintiffs are not automatically entitled to injunctive or declaratory "post-election" relief simply because the county defendants' 2011 supervisor elections were allegedly held on malapportioned district lines. *Reynolds v. Sims*, 377 U.S. 533, 586 (1964); *Mississippi State*

facts that would even arguably justify a finding of “egregious defiance” against all of the county defendants in these consolidated cases, much less any single one of them. Moreover, even assuming plaintiffs could *identify* any facts to support their new claims, they have not *proven* those facts with evidence. There is no proof in the record supporting plaintiffs’ new claims to “post-election” relief.

8. The Attorney General respectfully requests that this Court dispense with the requirement of filing a separate memorandum of authorities pursuant to Local Rule 7(b)(4) because the reasons and authorities supporting his opposition to plaintiffs’ motion are fully set forth above.

FOR THESE REASONS, the Attorney General respectfully requests that the Court enter an order denying Plaintiffs’ “Motion to Set Aside the 2011 Elections for Members of the Boards of Supervisors and Order Special Elections” with prejudice. Alternatively, and at a minimum, the Court should deny plaintiffs’ motion without prejudice, enter a scheduling order or other case management order(s) to afford the county defendants an opportunity to file dispositive motions, designate experts, conduct discovery, and/or take any other steps necessary before allowing plaintiffs to assert any new claims, and require plaintiffs to follow the appropriate procedures

Conference of N.A.A.C.P. v. Barbour, No. 3:11cv159-TSL-EGJ-LG-MTP, 2011 WL 1870222 (S.D. Miss. May 16, 2011), *aff’d*, 132 S.Ct. 542 (2011), and *aff’d sub nom.*, *Mississippi State Conference of N.A.A.C.P. v. Bryant*, 133 S.Ct. 2389 (2013). See also *French v. Boner*, 963 F.2d 890, 891 (6th Cir. 1992), *cert. denied*, 506 U.S. 954; *Ramos v. Illinois*, 976 F.2d 335, 340-41 (7th Cir. 1992); *Republican Party of Oregon v. Keisling*, 959 F.2d 144, 145-46 (9th Cir. 1992), *cert. denied*, 504 U.S. 914; *Fairley v. Forrest County, Mississippi*, 814 F.Supp. 1327, 1343-46 (S.D. Miss. 1993); *Bryant v. Lawrence County*, 814 F.Supp. 1346, 1354 (S.D. Miss. 1993).

for seeking to add new claims to their lawsuits.

THIS the 7th day of August, 2013.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been filed electronically with the Clerk of Court using the Court's ECF system, and thereby served on all counsel of record who have appeared to date.

THIS the 7th day of August, 2013.

S/Justin L. Matheny
Justin L. Matheny