IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION

HENRY D. HOWARD, *et al.*, Plaintiffs, v. AUGUSTA-RICHMOND COUNTY, GEORGIA, COMMISSION; *et al.*, Defendants.	CASE NO. 1:14-CV-0097-JRH-BKE

COUNTY DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' REQUEST FOR APPOINTMENT OF A THREE-JUDGE COURT

COME NOW Defendants Augusta-Richmond County Commission[1]; Deke S. Copenhaver, in his official capacity; and Lynn Bailey, in her official capacity (collectively "County Defendants"), and, in accordance with this Court's April 22, 2014 Order [Doc. 7], respond to Plaintiffs' Request for Appointment of a Three-Judge Court [Doc. 4] as follows:

INTRODUCTION

Although three-judge courts are generally required for Section 5 enforcement actions under 42 U.S.C. § 1973c, *Allen v. State Bd. of Elections*, 393 U.S. 544, 563, 89 S. Ct. 817, 830, 22 L. Ed. 2d 1 (1969), they are not required when a case is insubstantial and completely without merit. This case is insubstantial and without merit because there is absolutely no basis for Plaintiffs' assertion that Section 5 applies to the election date change in Section 9 of Act No. 719, as demonstrated by County Defendants' Response to Plaintiffs' Motion for Preliminary

[1] 1997 Ga. Laws p. 4024 designates the name of the consolidated government as "Augusta, Georgia." In this Response, the term "Augusta-Richmond County" shall mean "Augusta, Georgia."

Injunction and County Defendants' Motion to Dismiss, filed contemporaneously with this response. Thus, this Court should deny Plaintiffs' Motion for a Three-Judge Court.

ARGUMENT AND CITATION OF AUTHORITY

When a plaintiff brings an action alleging that a jurisdiction is enforcing voting changes that it failed to preclear, a three-judge court is generally required. 42 U.S.C. § 1973c, *Allen*, 393 U.S. at 563. However, a three-judge court is not required in every case.

As the former Fifth Circuit explained, a single-judge court has the authority to determine whether a three-judge court is required in a Section 5 enforcement action. *United States v. Saint Landry Parish Sch. Bd.*, 601 F.2d 859, 863 (5th Cir. 1979)[2]; *Broussard v. Perez*, 572 F.2d 1113, 1118 (5th Cir. 1978); *see also Miller v. Daniels*, 509 F. Supp. 400, 405 (S.D.N.Y. 1981) (collecting cases). In *DeJulio v. Georgia*, 127 F. Supp. 2d 1274, 1300 (N.D. Ga. 2001) *aff'd* 290 F.3d 1291 (11th Cir. 2002), the Northern District of Georgia similarly concluded that merely intoning the "catchwords of § 5" does not entitle plaintiff to a three-judge court because the complaint must be examined to determine whether it presents a substantial claim. If a claim is insubstantial or completely without merit, a single-judge court "may properly dismiss the claim," *Saint Landry Parish Sch. Bd.*, 601 F.2d at 863, because convening a three-judge panel will result in "the unnecessary waste of judicial resources." *DeJulio*, 127 F. Supp. 2d at 1300.

A Section 5 enforcement action is clearly without merit "if Supreme Court precedent provides that preclearance requirements do not apply to the situation before the court." *DeJulio*, 127 F. Supp. 2d at 1300; *see also Miller*, 509 F. Supp. at 406-407 (dismissing Section 5 claims because no preclearance issue was presented). In *DeJulio*, plaintiffs claimed Georgia failed to

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[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir.1981) (en banc), the Eleventh Circuit adopted all decisions of the former Fifth Circuit prior to September 30, 1981 as binding precedent.

obtain preclearance of certain internal rules of the Georgia General Assembly, which the plaintiffs claimed affected their right to vote and requested the appointment of a three-judge court. 127 F. Supp. 2d . at 1280-1282. Because Supreme Court precedent demonstrated that no preclearance was required for "internal operations of an elected body," which was the only Section 5 claim plaintiffs brought, the Northern District of Georgia denied the three-judge court request, concluding the claim was insubstantial. *DeJulio*, 127 F. Supp. 2d at 1301, citing *Presley v. Etowah County Commission*, 502 U.S. 491, 503, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992).

This case presents a very similar scenario. As explained in more detail in the Motion to Dismiss and Response in Opposition to Motion for Preliminary Injunction, Plaintiffs argue that Augusta-Richmond County cannot enforce a state law because it has not been precleared pursuant to Section 5 of the Voting Rights Act. But the statute in question does not require preclearance because the Supreme Court's decision in *Shelby County, Ala. v. Holder*, ___ U.S. ___, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013), invalidated the coverage formula that made the preclearance provisions of Section 5 operational after the 2006 renewal of those provisions of the Voting Rights Act.

Although the Department of Justice originally objected to the voting change at issue in this case in 2012, there was no final adjudication of whether preclearance should be granted, and the State of Georgia was free to file a declaratory judgment action at any time to seek preclearance. Thus, *Shelby County* has retroactive application to the voting change in question because whether it could be enforced was still open when *Shelby County* was decided.

Because Augusta-Richmond County is no longer covered by Section 4 of the Voting Rights Act, it is not required to obtain preclearance prior to enforcing a state law related to voting that was passed after the 2006 renewal of the Voting Rights Act. As with the plaintiffs in

DeJulio, Plaintiffs here have asserted a cause of action where "Supreme Court precedent provides that preclearance requirements do not apply to the situation before the court." 127 F. Supp. 2d at 1300. This Court is not required to convene a three-judge panel and can rule on the issues presented as a single-judge court.

CONCLUSION

Because Plaintiffs have presented a case that is insubstantial and without merit, this Court should deny their request for the appointment of a three-judge court.

This 30th day of April, 2014.

s/ Anne W. Lewis
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day electronically filed the within and foregoing COUNTY DEFENDANTS RESPONSE IN OPPOSITION TO PLAINTIFFS' REQUEST FOR APPOINTMENT OF A THREE-JUDGE COURT with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

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This 30th day of April, 2014.

s/ Anne W. Lewis
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