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' MOTION FOR A PRELIMINARY INJUNCTION

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' Motion for Preliminary Injunction [Doc. 9] as follows:

INTRODUCTION

Plaintiffs are not entitled to an injunction halting the May 20, 2014 nonpartisan election already underway in Augusta-Richmond County. Their sole claim is that Augusta-Richmond County cannot enforce the 2012 state law which moved nonpartisan elections for consolidated governments from the general election to the time of the state primaries. Plaintiffs contend that this law cannot be implemented because the United States Attorney General refused to preclear the law under Section 5 of the Voting Rights Act, and implementation of the law is therefore a violation of Section 5.

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

Plaintiffs' claim fails as a matter of law. Implementation of the state statute changing the election date does not require preclearance, and the Department of Justice's prior objection to the statute is of no effect following the Supreme Court's decision in *Shelby County, Ala. v. Holder*, ___ U.S. ___, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013).

In *Shelby County*, the Supreme Court invalidated the coverage formula set forth in the 2006 renewal of the preclearance provisions of the Voting Rights Act, including Section 4(b). The coverage formula, found in Section 4(b), was used to determine which jurisdictions were subject to the requirement of preclearance for changes in election laws or practices. Because Section 5 only applies to "covered jurisdictions" and *Shelby County* invalidated Section 4(b) coverage formula, Section 5 cannot be applied to the State of Georgia, Augusta-Richmond County, or any other previously covered jurisdiction.

The fact that the Department of Justice, acting under the 2006 renewal, objected to the election date change, does not mean that preclearance is nonetheless required. Contrary to Plaintiffs' assertion, *Shelby County* has retroactive application to the election date change. The question of whether that change could be enforced in Georgia – and particularly in Augusta-Richmond County – was still an "open question" when *Shelby County* was decided. After the Department of Justice originally objected to the voting change in 2012, the State of Georgia remained free to file a declaratory judgment action at any time to obtain preclearance, and therefore, there was no final adjudication regarding preclearance. Once the Supreme Court decided *Shelby County*, there was no need or requirement for the State to seek preclearance. The statute changing the election date was duly passed by the legislature and signed by the Governor in 2012, and as Section 5 is ineffective, the statute must be applied. Additionally, Supreme Court

precedent provides that retroactivity is applicable as to all events, regardless of whether such events predate the Court's announcement of the rule.

For those reasons, Plaintiffs cannot meet the very first test of a motion for preliminary injunction: they not clearly established a substantial likelihood of success on the merits. In addition, Plaintiffs have not clearly established the remaining elements necessary to obtain an injunction because they have not shown that (1) they will suffer any irreparable injury, (2) the asserted injury to them does not outweigh the harm to County Defendants and (3) the issuance of an injunction is not adverse to the public interest.

For these reasons, Plaintiffs' Motion for Preliminary Injunction should be denied.

STATEMENT OF FACTS

Augusta, Georgia is a consolidated government with elected offices that are nonpartisan. Ga. L. 1996, p. 3607, § 3. State law requires such governments to conduct their nonpartisan elections at the same time that statewide nonpartisan elections and primaries are held. O.C.G.A. § 21-2-139(a). During its 2014 session, the Georgia General Assembly moved the date of the statewide primary and nonpartisan elections from July to May. Act No. 343 (2014) (HB 310). [Doc. 1, ¶23].

After the Governor signed that legislation on January 21, 2014, Augusta-Richmond County's election process for the nonpartisan elections got underway. On January 30, 2014, the Board of Elections ran a notice in the county legal organ that it would hold candidate qualifying for the May 20, 2014 election from March 3 until noon on March 7, 2014. Declaration of Lynn Bailey, attached as Ex. A ("Bailey Dec"), Advertisement, attached as Ex. 3 to Bailey Dec. The Board of Elections is the superintendent of elections for Augusta-Richmond County. Bailey Dec., at ¶ 2. During the qualifying period, 19 candidates qualified for the mayor's seat and the

five Augusta Commission seats to be filled in the May 20 election. Bailey Dec., at ¶ 6; Augusta Chronicle, *14 Candidates Qualify for Augusta Commission Election* (March 9, 2014), *available at* http://chronicle.augusta.com/news/government/2014-03-09/14-candidates-qualify-augusta-commission-election (last visited April 30, 2014).

Following the close of qualifying, the Board of Elections certified the candidates and built the ballots for the election. Bailey Dec., at ¶ 6. Two weeks after qualifying closed, despite the facts that public notice of the May election had been available for more than a month and more than a dozen candidates had qualified for election to the offices, Plaintiffs' counsel mailed a letter to the Executive Director of the Board of Elections, inquiring whether the county's nonpartisan elections would be held in May. [Doc. 9-3]. The Executive Director replied promptly, confirming that the elections would be held on May 20, 2014 as required by Georgia law. [Doc. 9-3].

Plaintiffs took no action for yet another month, during which time the Board of Elections continued to prepare for the election. The Board of Elections submitted all ballot combination information to the Secretary of State's office by March 12, 2014 so that the ballots could be built with the names of qualified candidates. Bailey Dec., at ¶ 6. The Board of Elections reviewed the ballot proofs and sent the proofs for printing absentee ballots on March 21, 2014. Bailey Dec., at ¶ 7. The election began on April 4, 2014 when the Board of Elections made absentee ballots available to voters in accordance with state and federal law. Bailey Dec., at ¶ 8; O.C.G.A. § 21-2-384(a)(2); 42 U.S.C. § 1973ff-1(a)(8). Advance in-person voting began on Monday of this week and 343 voters have voted in-person through today. Bailey Dec., at ¶ 10; O.C.G.A. § 21-2-385(d)(1). Election Day is May 20, only 20 days from today. Bailey Dec., at ¶¶ 10-11.

Plaintiffs filed their complaint to enjoin the elections on April 18, 2014, two weeks after the elections began with absentee voting, just ten days before in-person advance voting began and just 32 days before Election Day. Bailey Dec., at ¶ 9; O.C.G.A. § 21-2-385(d)(1) (advance voting period). In their complaint, Plaintiffs contend that because the Department of Justice, in their Section 5 preclearance response, objected to the part of the state law changing the date for consolidated governments' nonpartisan elections, those elections could not be held in May but could only be held in November. [Doc. 1, pp. 5-6].

As discussed at length in the argument section below, shortly after the State received the objection letter in December 2012, the Supreme Court heard arguments in *Shelby County* regarding the 2006 renewal of the preclearance provisions of the Voting Rights Act. *Shelby County, Ala. v. Holder*, ___ U.S. ___, 133 S.Ct. 2612 (2013). In June 2013, the Supreme Court issued its opinion in *Shelby County*, concluding that the formula for identifying jurisdictions subject to preclearance was unconstitutional. *Id.*

Following the *Shelby County* decision, a member of the Richmond County legislative delegation, State Senator Jesse Stone, sought a legal opinion from Georgia Attorney General Sam Olens regarding *Shelby County's* effect on Augusta-Richmond County's nonpartisan elections; specifically, Senator Stone inquired about the continued viability of the Department of Justice's 2012 objection to the change in the nonpartisan election date from November to May. Bailey Dec., Ex. 1, Letter from Deputy Attorney General Dennis R. Dunn to Sen. Jesse Stone, September 23, 2013.[2] After thoroughly reviewing the issues and precedents involved, the Attorney General's Office concluded that the date for Augusta-Richmond's nonpartisan elections

[2] Deputy Attorney General Dunn also sent a letter with the same opinion to Sen. Hardie Davis on October 18, 2013 in response to his request. Bailey Dec., Ex. 2, Letter from Deputy Attorney General Dennis R. Dunn to Sen. Hardie Davis, October 18, 2013.

would be in accordance with state law, *i.e.* at the time of the statewide primaries rather than the general election:

> Based upon this holding [*Shelby County*], it appears there is not now, nor has there been since the extension of Section 5 in 2006, any valid and constitutional statutory authority for applying the preclearance requirement of Section 5 to the State of Georgia. This being the case, then, it also follows that the DOJ objection to the amendment to O.C.G.A. § 21-2-139(a) is itself unenforceable because it was interposed pursuant to an unconstitutional provision within the VRA. It also follows then that the amendment to O.C.G.A. § 21-2-139(a) may now be implemented and enforced as it relates to Augusta/Richmond County, the only jurisdiction affected by the DOJ objection.

Ex. 1, p. 3.

In accordance with that opinion and the state law in effect, Augusta-Richmond County gave notice of candidate qualifying and preparations for the election began. Bailey Dec, Ex. 3, and at ¶ 5. As discussed above, mail-in absentee voting began a month ago, early in-person voting began this week and Election Day is 20 days from today.

ARGUMENT AND CITATION OF AUTHORITY

As an initial matter, Plaintiffs' Section 5 enforcement action should be dismissed for the reasons set forth in the motion to dismiss concurrently filed by County Defendants today. If the Court does not dismiss the case and takes up Plaintiffs' motion for preliminary injunction, that motion should be denied.

First, the focus of Plaintiffs' complaint and motion for preliminary injunction is their contention that discrimination will occur if existing Georgia law is enforced. However, issues related to the purpose or effect of a voting change cannot be reviewed by this Court in an enforcement action. As the Supreme Court instructs, the "district court may determine only whether § 5 covers a contested change, whether § 5's approval requirements were satisfied, and if the requirements were not satisfied, what temporary remedy, if any, is appropriate." *Lopez v. Monterey Cnty., Cal.*, 519 U.S. 9, 23, 117 S. Ct. 340, 349, 136 L. Ed. 2d 273 (1996); *see also*

City of Lockhart v. United States, 460 U.S. 125, 129 n.3, 103 S. Ct. 998, 1001, 74 L. Ed. 2d 863 (1983) (same).

Second, even if the Court can take up the motion for preliminary injunction, Plaintiffs do not meet the stringent requirements for the granting of such a motion in this Circuit, where a preliminary injunction is an "extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion' as to the four requisites." *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). Plaintiffs here are not entitled to a preliminary injunction because they have not clearly established that (1) they are likely to succeed on the merits, (2) they will suffer any irreparable injury absent injunctive relief, (3) the injury to them outweighs the harm of an injunction to County Defendants, and (4) the issuance of an injunction is not adverse to the public interest. *All Care Nursing Serv., Inc. v. Bethesda Mem'l Hosp., Inc.*, 887 F.2d 1535, 1537 (11th Cir. 1989).

I. Plaintiffs Are Not Likely to Succeed on the Merits Because *Shelby County* Applies Retroactively.

A. Standard for Retroactive Application

Plaintiffs contend that this Court must use the test of *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971) to assess whether a rule of federal law must be applied retroactively. However, in *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97, 113 S. Ct. 2510, 2517, 125 L. Ed. 2d 74 (1993), the Supreme Court called the *Chevron* analysis into question, *see Harper*, 509 U.S. at 91, and explained how a court determines whether a rule of federal law should be applied retroactively:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Thus, contrary to Plaintiffs' claims, the *Harper* standard for determining retroactivity controls this case,[3] and for the reasons set forth below, *Shelby County* invalidates Plaintiffs' claim that the May election date violates Section 5.

B. The Decision in *Shelby County*

Section 5 of the Voting Rights Act prohibits "covered jurisdictions" from enforcing any change in a voting practice or procedure until the jurisdiction has obtained "preclearance" from the federal government by submitting the change to the District Court for the District of Columbia or the Attorney General and receiving no objection. 42 U.S.C. § 1973c. Until *Shelby County*, jurisdictions were "covered" by virtue of a formula outlined in Section 4(b) of the Voting Rights Act and tied to voter registration or turnout in presidential elections from the 1960s and 1970s. 42 U.S.C. § 1973b.

In *Shelby County*, Plaintiffs brought a facial challenge to the coverage formula of Section 4(b), which determined which the jurisdictions were required to seek preclearance. 133 S. Ct. at 2629-2630. The majority held that formula was unconstitutional because the coverage formula in 2006, Congress failed to use current conditions to impose coverage. *Shelby County*, 133 S. Ct. at 2629. The majority therefore found the formula "irrational" and that it was left "with no choice but to declare § 4(b) unconstitutional." *Shelby County*, 133 S. Ct. at 2631. As a result, unless and until Congress comes up with a new formula, no jurisdiction is barred from enforcing a change to a voting practice or procedure without prior approval from the Attorney General or the District Court for the District of Columbia. 42 U.S.C. § 1973c. There appeared to be no doubt on the part

[3] As discussed below, the courts in *Hall v. Louisiana*, ___ F. Supp. 2d. ___, Case No. 12-00657, 2013 WL 5405656 at *5 (M.D. La. Sept. 27, 2013) and *Bird v. Sumter County Board of Education*, No. 1:12-CV-76, 2013 WL 5797653 (M.D. Ga. Oct. 28, 2013) both applied *Harper* in finding that *Shelby County* should be applied retroactively.

of the Supreme Court that such was the effect of *Shelby County*. As the dissent stated, "without that formula, § 5 is immobilized." *Shelby County*, 133 S.Ct. at 2633 n.1 (Ginsburg, J. dissenting).

In their complaint, however, Plaintiffs nonetheless seek to "enforce" Section 5 against Augusta-Richmond County as a covered jurisdiction. Plaintiffs claim "the basic purpose of the Voting Rights Act" is violated if the Court allows implementation of a change to which the Department of Justice objected. [Doc, 9, p. 6].

The basic purpose of the Voting Rights Act, however, is to prevent the government from taking any action related to the electoral process that has a discriminatory purpose and effect. Section 5 preclearance was a temporary, emergency measure directed at some state and local governments identified by Section 4(b), the section invalidated by *Shelby County*. The unavailability of Section 5 preclearance today does not eliminate the basic purpose of the Voting Rights Act. Plaintiffs who claim that an electoral change has a discriminatory purpose or effect can bring litigation on a number of fronts; Section 5 is not required to invalidate that law. *Shelby County*, 133 S. Ct. at 2631.

C. The Retroactive Application of the *Shelby County* Decision to Open Cases

In their brief on their preliminary injunction motion, Plaintiffs urge that *Shelby County* operates only prospectively, and any objections previously lodged by the Department of Justice remain in place to prevent a jurisdiction from implementing an otherwise-valid law. [Doc. 9, pp. 6-9]. The proper application of *Harper* to this situation, however, demands just the opposite conclusion.

Under *Harper*, a holding must be given "full retroactive effect in all cases still open on direct review and as to all events." 509 U.S. at 97. Even after the Department of Justice issued its

2012 objection to administrative preclearance regarding the election date change in Section 9 of Act No. 719, preclearance remained an open issue via judicial preclearance.

Section 5 prohibits a covered jurisdiction from enforcing a voting change until one of two federal approvals is obtained: (1) the jurisdiction obtains a judgment from the District Court for the District of Columbia that the change does not have the purpose or effect of denying or abridging the right to vote on account of race or color, or (2) that the jurisdiction obtains an affirmative indication by the Attorney General that he or she will not object to the change in practice or procedure. 42 U.S.C. § 1973c(a); 28 C.F.R. § 51.10. Any determination by the Attorney General to object to a particular change has no effect on a jurisdiction's right to bring a declaratory judgment action seeking preclearance of the same change. 28 C.F.R. § 51.11. In short, even after receiving an objection to the change from the Department of Justice, a jurisdiction may seek approval of the change by filing a declaratory judgment action in the DC District Court. *See, e.g., Texas v. Holder*, 888 F. Supp. 2d 113, 118 (D.D.C. 2012). Although a jurisdiction cannot enforce the change until it obtains preclearance, there is no deadline for that jurisdiction to seek either administrative or judicial preclearance under Section 5. 42 U.S.C. § 1973c(a).

For that reason, after the Attorney General made his initial objection to election date change in Section 9 of Act No. 719, the matter of Augusta-Richmond County's ability to implement the change remained open. The State of Georgia was free to file an action seeking judicial preclearance in the DC District Court at any time. Thus, contrary to Plaintiffs' claim that the matter was not "open on direct review," unless and until there was a final adjudication from the DC District Court denying preclearance (and the Supreme Court if appealed), the matter remained open because Georgia still had a path open to obtain preclearance judicially.

Plaintiffs contend that the Supreme Court's silence in *Shelby County* regarding recent objections in Shelby County somehow supports a finding that the decision was not retroactive. *Harper*, however, demands just the opposite conclusion. [Doc. 9, p., 6]. Because the majority in *Shelby County* did not specify whether the rule was retroactive or not and did not reserve the question, *Harper* directs that the rule should be applied retroactively. *Harper*, 509 U.S. at 97-98.

D. Other Cases Addressing *Shelby County's* Retroactivity

To County Defendants' knowledge, all other courts to date that have faced the question of whether *Shelby County* removed any requirement for preclearance have reached the same conclusion: *Shelby County* applies retroactively, and preclearance is no longer required for any voting changes.

First, after District Court for the District of Columbia denied preclearance of Texas' statute requiring photo identification for voting, the state appealed to the U.S. Supreme Court. While that appeal was pending, the Supreme Court decided *Shelby County* and then vacated the denial of preclearance to Texas, remanding it to the district court for consideration in light of *Shelby County*. *See Texas v. Holder*, 133 S. Ct. 2886, 186 L. Ed. 2d 930 (2013). Although Texas' photo identification statute had been objected to by both the Attorney General and the District Court for the District of Columbia, *Texas v. Holder*, 888 F. Supp. 2d 113, 118 (D.D.C. 2012) the Supreme Court still found the matter of preclearance mooted by *Shelby County*.

Similarly, the Supreme Court remanded the Texas' appeal of the District Court for the District of Columbia's denial of preclearance to the state's redistricting plan, suggesting it was moot. *Texas v. United States*, 133 S. Ct. 2885, 186 L. Ed. 2d 930 (2013). The Supreme Court clearly stated that by virtue of *Shelby County*, the denial of preclearance by the district court was mooted—and Texas was no longer required to seek preclearance of its validly-implemented

statutes. Notably, the Department of Justice did not oppose Texas' motion to dismiss the case as moot.[4]

The Middle District of Georgia also found *Shelby County* was retroactive in *Bird v. Sumter County Board of Education*, No. 1:12-CV-76, 2013 WL 5797653 (M.D. Ga. Oct. 28, 2013). In *Bird*, the Sumter County Board of Education originally submitted its 2011 redistricting plan for administrative preclearance but later withdrew the submission before the Department of Justice granted preclearance. *Id*. at *1. The court originally granted a preliminary injunction because the Board of Education did not have an equally-populated plan that had been precleared, but later dismissed the case as moot in light of *Shelby County*. *Id*. at *3.

The legislation at issue in *Bird*, *i.e.*, the Sumter County Board of Education map, was in the same procedural posture as the election date change at issue here—it was an otherwise-valid state law but could not be enforced until it was precleared. Both laws were validly-enacted and remained on the books. The *Bird* court determined that the 2011 plan was immediately enforceable without preclearance after *Shelby County*, and the same rule applies to the legislation at issue in this case. *Id*. at *3.

Next, in a case involving whether Louisiana properly submitted changes to its judicial election systems for preclearance, a district court determined that *Shelby County* applied retroactively to all claims involved, including claims for failure to preclear actions prior to the renewal of the Voting Rights Act in 2006. *Hall v. Louisiana*, ___ F. Supp. 2d. ___, Case No. 12-00657, 2013 WL 5405656 at *5 (M.D. La. Sept. 27, 2013). Although Plaintiffs attempt to distinguish *Hall* on the grounds that "no litigation [involving an objection] was pending," they miss the important distinction that, as discussed above, Georgia was free to seek judicial

[4] *Perez v. Texas*, ___ F. Supp. 2d ___, Case No. 11-CA-360, 2013 WL 4784195 at *3 n.3 (Sept. 6, 2013)

preclearance of Section 9 of Act No. 719 at any time, meaning the matter remained open when *Shelby County* was decided, just as any unsubmitted matters remained open in *Hall*.

Although not deciding cases primarily about the Voting Rights Act, other courts have also concluded that *Shelby County* removed the requirement for preclearance. In *King v. Lumpkin*, 545 F. App'x 799 (11th Cir. 2013), the Eleventh Circuit affirmed the dismissal of a request for a three-judge court and declaratory judgment in a case in which an elected official claimed Section 5 violations related to an ethics action against him, noting that "the preclearance requirements of Section 5 of the VRA cannot be enforced until Congress amends the coverage formula in Section 4 of the VRA." *King,* 545 F. App'x at 803 n.2 (11th Cir. 2013).

In a decision involving primarily standing, a district court in Mississippi also found that, as a result of *Shelby County*, preclearance of new district lines was no longer required. *Hancock Cnty. Bd. of Sup'rs v. Ruhr*, 1:10CV564 LG-RHW, 2013 WL 4483376 at *4 (S.D. Miss. Aug. 20, 2013) ("The court held that the formula in section 4(b) of the Voting Rights Act may no longer be used as a basis for subjecting jurisdictions to preclearance").

E. Purpose and Prospective Application

Plaintiffs also claim that retroactive application of *Shelby County* should be denied to "uphold the purpose and effect of *Shelby County*," which apparently includes the prohibitions of Section 2. [Doc. 9, p. 8]. How Plaintiffs propose that the purpose and effect of the case should be upheld is unclear. Although *Shelby County* affirmed the existence of the continued ban on racial discrimination of Section 2, 133 S. Ct. at 2631, Plaintiffs here do not bring a Section 2 claim. In addition, the Supreme Court has consistently recognized that different standards govern Sections 2 and 5 and that an objection or preclearance decision under Section 5 is not related to whether a

particular statute violates Section 2. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 485, 117 S. Ct. 1491, 1501, 137 L. Ed. 2d 730 (1997).

Finally, Plaintiffs argue that the Eleventh Circuit has reserved the possibility of limiting new rules of law to prospective application only, citing *Glazner v. Glazner*, 347 F.3d 1212 (11th Cir. 2003). Although Plaintiffs correctly quote *Glazner* for the proposition that it is possible a new rule of law may only apply prospectively, the court in *Glazner* actually applied the law at issue retroactively, even though doing so created the possibility of significant, new potential liability. 347 F.3d at 1221. In *Glazner*, the court was overruling a 30-year old case and determining whether to apply that decision retroactively. 347 F.3d at 1221. *Glazer* has no relevance to the issues in this case, because the Supreme Court in *Shelby County* was not overruling a specific case—it was invalidating a Congressional decision to renew a statute based on outdated data. 133 S. Ct. at 2631. The decision did not create new liability, and Plaintiffs have not shown any reason why *Shelby County* should only be applied prospectively.

F. Conclusion

Plaintiffs brought this case as an enforcement action under Section 5, a path that no longer remains open after the *Shelby County* decision. With the demise of the coverage formula that determined the jurisdictions subject to the preclearance requirements of Section 5, there is no basis on which to enforce Section 5 against Augusta-Richmond County or any other former covered jurisdiction. Therefore, Plaintiffs have failed to state a claim upon which relief can be granted and their case must be dismissed.

For those same reasons, they have failed to establish clearly that they have a substantial likelihood of prevailing on the merits. Because they cannot therefore meet the first of the four

requirements for a preliminary injunction, their motion for a preliminary injunction should be denied.

II. Plaintiffs Will Not Suffer Irreparable Injury Absent an Injunction.

Plaintiffs correctly note the exalted and fundamental position of voting rights within our system of government. [Doc. 9, pp. 9-10]. Plaintiffs fail to establish clearly how their voting rights will be irreparably harmed if the May nonpartisan election continues to proceed. Therefore, they fail to meet the second requirement for a preliminary injunction.

To show irreparable injury by continued enforcement of existing Georgia law, Plaintiffs rely solely on the 2012 objection letter from the Department of Justice. That letter is not sufficient to demonstrate any irreparable harm to Plaintiffs.

Most importantly, the factors the Department of Justice relied on to object to preclearance related specifically to holding the nonpartisan elections in July, [Doc. 9-1, p. 3], not in May, as is now occurring. That move was made by the General Assembly in its 2014 session after the *Shelby County* decision, so that the date for state primaries (and the nonpartisan elections required to be held on the same date) would be the same as the date for federal primaries, which had been changed from July to May pursuant to a district court order. *United States v. Georgia*, Case No. 1:12-CV-02230-SCJ, Doc. 44 (N.D. Ga. August 21, 2013). The data relied on by the Department of Justice in that letter have no relevance on the issue of whether the right to vote will be adversely affected by a May election date, and Plaintiffs have not submitted any such evidence. As discussed above, even if Plaintiffs had submitted such data, this Court cannot review the effect of the election change in this Section 5 enforcement action. *Lopez*, 519 U.S. at 23.

Even if the Court were to deem the issue to be whether any change in the election date has a discriminatory impact sufficient to establish the requisite harm, the letter from the Department of Justice does not provide admissible evidence of that contention. The letter is hearsay, the conclusions in it are uncross-examined, and therefore, it cannot be used to meet Plaintiffs' burden here.

Because Plaintiffs have not demonstrated that enforcing the existing law in Georgia regarding election dates will cause them an irreparable injury, their motion for preliminary injunction should be denied.

III. The Asserted Injury to Plaintiffs Does Not Outweigh the Harm to Defendants.

Plaintiffs attempt to minimize an injunction's proposed harm to Defendants by casting those as simply administrative in nature. [Doc. 9, p. 11]. Plaintiffs completely miss the scope of the burdens imposed by a change.

As the Declaration of the Augusta-Richmond County Elections Director Lynn Bailey, Ex. A, shows, the burden on the government if the election is stopped now and must be held again in November is substantial.

Because the election has already begun, an injunction now would require Ms. Bailey's office immediately to undertake numerous tasks to ensure that the election is stopped. As for electronic voting that has, is or will be taking place, the Court would have to direct whether (1) to suppress votes cast from appearing on reports generated by the tabulation system but allow the races and candidate's names to remain on the ballot or (2) remove the races from the ballot altogether. Bailey Dec., at ¶¶ 12-24. As Ms. Bailey's declaration shows, either option would require extensive work by the Elections Office employees while they are in the middle of an election – one that must go on even if certain elections are enjoined. Bailey Dec., at ¶ 33. In

addition, reprogramming the voting units would take time and the removal option could not be put into effect into very close to Election Day.

As for dealing with paper ballots (absentee or provisional), the burden is just as heavy. Bailey Dec., at ¶¶ 25-32. The Court will have to give the same direction, but actual removal from the ballot will require printing new ballots, which is impossible now if they are to be continuously available, as the law requires. Bailey Dec., at ¶ 31.

The Election Board's certification duties must be completed in a very tight time frame, and an injunction at this point would put the ability to complete those duties at grave risk. That fact is important because absentee ballots for runoffs must be prepared and ready no later than June 7. Bailey Dec., at ¶ 32.

Finally, a change in the election process now will undoubtedly put Augusta-Richmond County at risk for election contests. The candidates in the nonpartisan election are not the only concerned here. There are many other candidates on the ballot affected by the chaos that will ensue from an injunction at this point. In a close race, that chaos may be the basis for an election challenge, in which the Board of Elections is a necessary defendant. Bailey Dec., at ¶ 34.

On the other hand, Plaintiffs have offered no evidence that the election underway injures them. They have asserted that voting rights are involved, but they have offered no relevant, admissible proof that their voting rights are diminished and that their harm is greater than the substantial harm shown by County Defendants. As Plaintiffs have not carried their burden on this element, their motion for preliminary injunction should be denied.

IV. The Public Interest Does Not Favor an Injunction.

The public interest in elections is that they be conducted fairly and in accordance with the law. Here, the law required the election at issue to be scheduled for May 20 and to be held as it is

being held. For the reasons discussed in the motion to dismiss and in the section above discussing the likelihood of success on the merits, the law does not require a lawfully-conducted election to be enjoined on the ground cited by Plaintiffs.

Even if Plaintiffs persuaded the Court that their claim should go forward, the public interest does not favor an injunction when "an impending election is imminent and a State's election machinery is already in progress," because "equitable considerations might justify a court in withholding the granting of immediately effective relief . . ." *Reynolds v. Sims*, 377 U.S. 533, 585, 84 S. Ct. 1362, 1393-94, 12 L. Ed. 2d 506 (1964) (discussing allowing elections to go forward even though the existing apportionment scheme was invalidated). Notably, the Supreme Court recognized there may be cases in which an unprecleared statute might be used in certain situations: "An extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the State until the eve of the election and there are equitable principles that justify allowing the election to proceed." *Clark v. Roemer*, 500 U.S. 646, 654-655, 111 S. Ct. 2096, 2102, 114 L. Ed. 2d 691 (1991). Even if Plaintiffs prevailed in their contention that preclearance was required to hold the election in May, *Clark* is directly on point here when the election at issue has begun. Plaintiffs here waited until after the Attorney General's opinion in September 2013, after the Board of Elections placed its February 2014 ad for qualifying, after candidate qualifying, after printing absentee ballots, and—most importantly—after voting began. In short, Plaintiffs waited until the entire election machinery got underway with voters voting and candidates campaigning.

Enjoining the election now is completely adverse to the public interest in fair elections, conducted in accordance with state law. An injunction will serve only to confuse voters, cost candidates time and money and cost County Defendants (and thus, ultimately voters) money .

As Plaintiffs have failed to meet any of the requirements for a preliminary injunction, it should be denied. Additionally, given Plaintiffs' delay and the prejudice to the County Defendants that will follow if the ongoing election process is stopped, this Court should deny relief on the ground of laches. The Middle District of Georgia has held that while laches does not apply to efforts to obtain permanent injunctive relief in voting cases, it can apply when plaintiffs seek preliminary relief. *See Miller v. Bd. of Comm'rs of Miller Cnty*., 45 F. Supp. 2d 1369, 1373 (M.D. Ga. 1998); *compare Fulani v. Hogsett*, 917 F. 2d 1028 (7th Cir.1990) (laches bars claim relating to ballot form where, among other things, ballots had been printed and absentee voting was underway). For this reason as well, the Plaintiffs' request for declaratory and injunctive relief directed at the May elections should be denied. If the Plaintiffs' claims are otherwise cognizable, this Court can take those up in due course.

Courts often deny preliminary injunctions when plaintiffs wait too long to file their cases. *See, e.g., Miller*, 45 F. Supp. 2d at 1372 ("By contrast, the Court finds that suspending the County's local electoral processes at this late date presents an extraordinary burden to each of the Defendants."); *Johnson v. Smith*, TCA 94-40025-WS, 1994 WL 907596 (N.D. Fla. July 18, 1994) ("The qualifying period for candidates in the 1994 election has ended, and the candidates have begun to organize their campaigns, to raise funds, and to spend those funds in reliance on the present districting scheme. For the court to interfere with that election process now would produce considerable confusion, inconvenience, and uncertainty among voters, candidates, and election officials."); *Johnson v. Mortham*, 926 F. Supp. 1540, 1543 (N.D. Fla. 1996) ("In July of 1994, this Court did not hesitate to deny Plaintiffs' request for a preliminary injunction because the 1994 congressional elections were impending and the qualifying period for federal candidates had closed.").

In the same way, the burden imposed on voters and candidates would be severe if Plaintiffs were granted a preliminary injunction. Voters are already voting on ballots containing the names of candidates who qualified for the May election. Candidates have been campaigning and spending funds toward turning out the vote in May. Plaintiffs have not provided any reason for their delay and can provide none. For that reason as well, an injunction is adverse to the public interest.

CONCLUSION

Plaintiffs have not shown that any of the four factors required for a preliminary injunction weigh in their favor. In addition, their delay weighs heavily in favor of such relief. This Court should therefore refuse the "extraordinary and drastic remedy" sought, *Robertson*, 147 F.3d at 1306, and deny Plaintiffs' motion.

This 30th day of April, 2014.

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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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day electronically filed the within and foregoing COUNTY DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION 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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