

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

KENNETH HALL
Plaintiff

Civil Action No. 3:12-cv-657
BAJ/RLB

and

BYRON SHARPER
Intervenor-Plaintiff

v.

STATE OF LOUISIANA, et al.
Defendants

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS’
MOTION TO VACATE JUDGMENT

The subject matter of this litigation—the system of electing Baton Rouge City Court Judges established by Act 609 (1993)—no longer exists. In particular, the allocation of three City Court Divisions to majority-white Section 2 as prescribed by Act 609 (1993) was fundamentally altered by Act 374 (2015). Accordingly, because this Court’s June 9 judgment and order exclusively concerned an election system that is no longer in force or effect, *vacatur* on the grounds of mootness is required.¹

Nothing said in the three opposing briefs can change this result.² Indeed, they either are largely supportive of the proposition as it applies to Plaintiffs’ claim under Section 2 of the Voting Rights Act or misfire on glancing blows not aimed directly at the issue of mootness. Specifically, the Secretary of State does not oppose *vacatur* of the June 9 judgment with respect to Plaintiffs’ claim under Section 2 of the Voting Rights Act: “[T]he Court should deny

¹ See Pls. Memo. in Supp. of Mot. for Relief, Doc. 563-1.

² See City-Parish Defs.’ Memo. in Opp’n, Doc. 564; Secretary of State Def.’s Memo. in Opp’n, Doc. 565; Attorney General Def.’s Opp’n to Pls. Mot., Doc. 566.

Plaintiffs' Motion to Vacate Judgment to the extent that such *vacatur* would extend to Plaintiffs' claims that do not arise out of Section 2 of the Voting Rights Act []." (Doc. 565 at 1).

For their part, the Attorney General and City-Parish Defendants argue that the June 9 judgment regarding the Plaintiffs' Section 2 claim against Act 609 (1993) was not mooted by Act 374 (2015). However, they do not appear to argue that a Section 2 case or controversy actually remains alive with respect to the 1993 system itself. Instead, they posit that an inchoate Section 2 challenge to the new system under Act 374 can be discerned within a few snippets of lay witness testimony about citywide elections, which they believe to somehow insulate the June 9 judgment from mootness.³ Of course, no challenge to Act 374 has been pled before this Court, and as discussed below, there is no basis in law or fact to infer such a challenge, particularly in the face of the instant Motion. In any event, even if the Plaintiffs were to challenge Act 374, the June 9 judgment would still need to be vacated as moot.

The Attorney General and City-Parish Defendants' arguments against Rule 60 relief are similarly off-target. The Attorney General incongruously claims that the Defendants were not responsible for changing the law, notwithstanding that the Defendant Governor affirmatively signed Act 374 into law.⁴ But more important, the question of whether *vacatur* is appropriate does not hinge upon the Defendants' responsibility for Act 374. *Vacatur* would still be required even if Act 374 had resulted solely from "happenstance." In short, no Defendant has provided a substantial reason why this Court should not vacate the Section 2 judgment.

³ See Doc. 564 at 6-7; Doc. 566 at 10-11.

⁴ See Doc. 566 at 5-6; Doc. 566-3 at 2 (history of the bill, as submitted by Defendants, showing Governor signed HB 76 on July, 1, 2015, to become Act. No. 374).

Each of the Defendants' three briefs devotes some effort to itemizing non-statutory claims raised in the Plaintiffs' Complaint,⁵ but they all studiously gloss over the fact that the same transaction or occurrence which gave rise to the Plaintiffs' Section 2 claim—the use of the 1993 system established by Act 609—also gave rise to the non-statutory claims. The non-statutory claims are therefore also moot; any attempt by Plaintiffs to appeal the Court's June 9 decision with respect to those claims would be dismissed as moot for precisely the same reasons as the Section 2 judgment. Thus, the Court's June 9 judgment with respect to all claims should be vacated.

ARGUMENT

A. There is No Serious Dispute That Act 374 Mooted the Plaintiffs' Section 2 Claim

The City-Parish Defendants argue that Act 374 did not moot Plaintiffs' claims because certain witnesses testified at trial “that the creation of a 2-2-1 Election Plan for Baton Rouge City Court, such as the one contained in House Bill 76, would not satisfy their claims of vote dilution under Section 2.” (Doc. 564 at 6). The Attorney General similarly claims that the “Plaintiffs presented evidence at trial that the creation of a 2-2-1 Election Plan for City Court, such as the one contained in House Bill 76, would not satisfy their claims of vote dilution under Section 2.” (Doc. 566 at 10). Nothing in the cited testimony (or any other part of the record) remotely suffices to establish a live case or controversy involving Act 374 *vis à vis* the Plaintiffs.⁶

⁵ See Doc. 564 at 3-6; Doc. 565 at 3-6; Doc. 566 at 2-4, 8-11.

⁶ The trial transcript, of course, shows that none of the three witnesses discussed by the Parish Defendants testified about what would “satisfy [the Plaintiffs'] claims of vote dilution under Section 2.” In the first place, lay testimony offered for that purpose would have been inadmissible. Nothing in the Plaintiffs' Proposed Findings of Fact and Conclusion of Law asked the Court to make findings with respect to the legality of a 2-2-1 plan, or the legality of citywide elections generally. (Doc. 546). With respect to Rep. Williams specifically, his testimony concerned previous bills that attempted to create at-large seats, and not Act 374, which had not been introduced at that time. (Tr. II at 285:10-286:5). The testimony by Judge White and Tiffany Foxworth cited by the Defendants was even more attenuated, because it concerned only the ability to raise money in citywide elections. (Tr. I at 257:2-257:22; Tr. II at 56:6-56:21). It is equally fanciful for the Attorney General and City-Parish Defendants to suggest that this

Fundamentally, Plaintiffs have not sought leave to amend the pleadings to raise a challenge to Act 374, nor have they moved the Court to conform the pleadings to the evidence.⁷ The Defendants have not done so, and it is far-fetched to think that they would seek such an amendment; after all, to do so they would have to aver to the Court that there is a plausible claim that Act 374 is racially discriminatory. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Act 374 simply is not before the Court.

But even if the Plaintiffs did challenge Act 374, mootness would still require the June 9 judgment to be vacated. In *Diffenderfer v. Central Baptist Church of Miami Florida*, 404 U.S. 412 (1972) (per curiam), the Supreme Court recognized that *pre hoc* contemplations about the legal soundness of a revised law will not save a case from mootness, when the new law differs in substance or structure from the prior challenged practice. In *Diffenderfer*, the Supreme Court mooted and vacated the judgment based upon plaintiffs' initial claims because the legislature had revised the challenged practice, although not necessarily in the manner plaintiffs would have sought as a remedy. *Id.* at 413-14. The Supreme Court acknowledged that the *Diffenderfer* plaintiffs may wish "to attack the newly enacted legislation", but the Court still proceeded to moot and vacate the judgment.⁸ *Id.* at 415.

The Attorney General also argues that "one could easily infer that the Plaintiffs could view the changes to the 1993 Election Plan as trivial and that the offending action persists." (Doc. 566 at 11). No inference is required or would be appropriate on this point. The Plaintiffs'

testimony amounted to a preemptive challenge of Act 374, (Doc. 554 at 6-7; Doc. 556 at 10-11), months before it was ever adopted, as it is for them to suggest that such testimony can somehow sustain an Article III case or controversy today.

⁷ See Fed. R. Civ. P. Rule 15(a), 15(b).

⁸ The possibility of attacking the newly enacted statute did persuade the Supreme Court that "rather than remanding the case to the District Court for dismissal as is our usual practice when a case has become moot pending a decision by this Court...we vacate the judgment of the District Court and remand the case to the District Court with leave to the appellants to amend their pleadings." *Diffenderfer*, 404 U.S. at 415.

Memorandum discussed in detail why Act 374 fundamentally altered the City's judicial election system.⁹ The conversion of a subdistrict seat into a position elected citywide is a fundamental change and not simply a matter of degree. *Cf. Ne. Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 661-62 (1993).¹⁰ It is possible that Act 374 embodies an "offending action" as the Attorney General puts it, but the point is that it would be a new and fundamentally different "offense" than what was pled and tried before this Court, and it is not a question properly before this Court at this time.

Even if this Court reconsidered its June 9 judgment under Rule 59, or the Fifth Circuit reversed on the merits, no effectual relief could now result from a ruling concerning the 1993 Plan, and a federal court lacks power to issue an advisory opinion. *See, e.g., Prieser v. Newkirk*, 422 U.S. 395, 401 (1975) ("[A] federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.'" (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971))).

Finally, while the Attorney General suggests that the case cannot be moot because it has the right to seek attorneys' fees,¹¹ no Defendant sought either costs or attorney's fees within the

⁹ See Doc. 563-1 at 6-8.

¹⁰ In *Northeastern Florida*, the Supreme Court distinguished between statutory revisions that "changed substantially" the offending practice, as here, and those where the statutory provisions did not fundamentally alter the challenged practice. The Supreme Court found the *Northeastern Florida* claim was not moot by observing: "[t]he gravamen of petitioner's complaint is that its members are disadvantaged in their efforts to obtain city contracts. The new ordinance may disadvantage them to a lesser degree than the old one, but insofar as it accords preferential treatment to black- and female-owned contractors . . . it disadvantages them in the same fundamental way." *Id.* at 662. The Court further explained in a footnote that its prior decisions where revisions mooted plaintiffs' claims could be distinguished because those statutes were "changed substantially and . . . there was therefore no basis for concluding that the challenged conduct was being repeated." *Id.* at 662 n.3 (distinguishing current case from *Diffenderfer* and other similar cases where claims mooted by legislative revision) (citations omitted).

¹¹ Doc. 556 at 8, 11.

applicable deadlines.¹² Any arguable interest the Defendants might have had in those issues accordingly has been waived.

B. *Vacatur* is Required With Respect to the June 9 Judgment Concerning Plaintiffs’ Section 2 Claim

The Attorney General denies that the change to the 1993 system accomplished by Act 374 “occurred due to any action of the Defendants.” (Doc. 566 at 5). This has no merit. Act 374 is a Louisiana law enacted and put into effect by State officials. The Legislature is an arm of the Defendant State of Louisiana. Moreover, Act 374 was signed into law by the Defendant Governor. (*See* Doc. 566-3 at 2).

The Attorney General has lodged legislative records showing that three of Plaintiffs’ witnesses (Rep. Michael Jackson, the late Rep. Alfred Williams, and Judge Trudy White) and Plaintiffs’ former counsel (Ronald Johnson) supported HB 76 in April and May, 2015.¹³ Contradicting their suggestion elsewhere that Plaintiffs are *challenging* Act 374,¹⁴ the Attorney General attempts an about-face by claiming that these legislative records show that the Plaintiffs are *responsible for* Act 374. (Doc. 556 at 5-6).

However, the Defendants have provided no statement from either of the Plaintiffs in support of Act 374 (or HB 76 for that matter). Instead, they attempt to attribute support for Act 374 to the Plaintiffs via third persons. Assuming for purposes of argument that this might be

¹² *See* Local Rule 54(c) (thirty-day deadline for costs), Fed. R. Civ. P. 54(d)(2)(B) (fourteen-day deadline for attorney’s fees).

¹³ *See generally* Docs. 566-2, 566-3, 566-4 and 566-5. Plaintiffs note that Pages 44 and 45 of Doc. 566-3 appear to have been redacted for filing but in any event are largely illegible; Plaintiffs reserve the right to respond should Defendants lodge legible and/or unredacted copies with the Court. Mr. Johnson filed his withdrawal as counsel in this action on August 21, 2014 (Doc. 506), which was granted on August 25, 2014 (Doc. 508).

¹⁴ *See supra* at 3-4.

justified in some other case,¹⁵ the problem in this case is that the minutes of legislative testimony and lists of witnesses submitting cards in support of HB 76 that the Attorney General and City-Parish Defendants rely upon¹⁶ are directed at the wrong piece of legislation. Those minutes and lists concern only HB 76 as introduced.¹⁷ HB 76 as introduced would have changed Act 609 to provide for three judicial Divisions in a majority-black Section 1 and two judicial Divisions in a majority-white Section 2, and provided for no at-large seat.¹⁸ As the result of Senate action, HB 76 was amended in the Senate to fundamentally alter the allocation of judicial Divisions, *i.e.*, converting one of the existing Divisions to an at-large seat, and making the system into a 2-2-1 plan.¹⁹

In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), the Supreme Court explained that the “principal condition” that guides granting *vacatur* is “whether the party seeking *vacatur* caused the mootness by voluntary action.” *Id.* at 24-25 (citations omitted). There simply is no evidence that the Plaintiffs caused the passage of Act 374.

Furthermore, in *U.S. Bancorp* the Supreme Court also affirmed its prior reasoning that “mootness by happenstance provides sufficient reason to vacate.” *Id.* at 29 n.3. The Fifth Circuit has likewise affirmed that happenstance will warrant *vacatur* in fairness to a losing party who can no longer seek review of an adverse decision for that reason. *See Staley v. Harris Cnty., Tex.*, 485 F.3d 305, 310 (5th Cir. 2007) (“[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstances, ought not in fairness be forced to

¹⁵ The Attorney General and City-Parish Defendants have cited no authority for binding plaintiffs though the actions of third parties in these circumstances.

¹⁶ *See* Doc. 566-2 at 2-8; Doc. 566-3 at 46-49; Doc. 566-4 at 6-7.

¹⁷ *See id.*

¹⁸ *Compare* Doc. 566-3 at 21-26 (HB 76 as introduced), *with* Doc. 566-3 at 38-43 (HB 76 as amended); *see also* Doc. 566-3 at 2 (legislative history stating that amendment to HB 76 adopted by Senate on June 3, 2015).

¹⁹ *Id.*

acquiesce in the judgment.”) (citation omitted). To the extent that the Defendants in this action do not bear full responsibility for Act 374, the remaining responsibility is therefore attributable to “happenstance.”

Thus, even if the Defendants had no direct role in the passage of Act 374, *vacatur* would still be required. Indeed, the Fifth Circuit has held that *vacatur* is appropriate when the party seeking review of an adverse decision did not render the case moot, regardless of whether mootness resulted from a third-party’s action rather than their party opponent’s action. *AT&T Commc’ns of the Sw., Inc. v. City of Dallas, Tex.*, 243 F.3d 928, 930–31 (5th Cir. 2001). Consistent with prior case law,²⁰ equitable principles compel vacating the unfavorable ruling against Plaintiffs’ Section 2 claim.

The Defendants’ remaining arguments that the districting changes were foreseeable and that decisional law has remained unchanged do not affect the established legal standards governing mootness or *vacatur* in these circumstances.²¹

C. The June 9 Judgment With Respect to Plaintiffs’ Non-Statutory Claims Was Mooted by Act 374 and Should be Vacated

All three Defendants argue that the Plaintiffs’ non-statutory claims were not mooted by Act 374.²² However, Plaintiffs’ non-statutory claims are moot for the same reason as Plaintiffs’ Section 2 claims are moot: all of Plaintiffs claims were raised against the 1993 Plan (Act 609 (1993)), which was fundamentally altered after the Court’s June 9 judgment by Act 374. *See*

²⁰ See numerous cases cited in Plaintiffs’ opening brief. (Doc. 563 at 8 n.12).

²¹ The two cases that Defendants cite to articulate the purpose of Rule 60(b)(6) recite general observations about Rule 60 which are wholly consistent with the Fifth Circuit’s established practice to vacate cases when, as here, circumstances beyond the control of the plaintiffs have left no live case or controversy and thereby mooted the action. *See* Doc. 566 at 6 (citing *Re Smith*, 3 B.R. 224 (Va. 1980); *Klapprott v. United States*, 335 U.S. 601 (1949)).

²² *See* Docs. 564 at 3-6; Doc. 565 at 3-6; Doc. 566 at 1-4, 10-11.

Docs. 1, 13, 74, 128, 133, 180-81.²³

For the same reasons that this Court cannot issue an advisory opinion with regard to Plaintiffs' Section 2 claim, no federal court can grant declaratory or injunctive relief with respect to the 1993 Plan under the First, Fourteenth, or Fifteenth Amendments, or other constitutional provision.

Although the Plaintiffs had sought an order from the Court to "bail-in" the State of Louisiana under Section 3(c) of the Voting Rights Act of 1965, 52 U.S.C. § 10302(c), formerly 42 U.S.C. § 1973a(c),²⁴ that claim was ancillary to the Plaintiffs' constitutional claims against the 1993 Plan (since a constitutional violation is prerequisite to a Section 3(c) order), and those claims were mooted by Act 374.²⁵

The circumstances here all indicate that none of the Plaintiffs' claims presents the type of "live" controversy required to sustain federal court jurisdiction. The dispositive question is whether the revised legislation amends the practices that were "the target of the litigation",²⁶ and the targeted 1993 Plan no longer exists. For the foregoing reasons, and those articulated in Plaintiffs' initial memorandum in support of its Motion, Plaintiffs respectfully request that this Court vacate its June 9 Final Judgment based on mootness and dismiss the case.

Respectfully submitted,

²³ All of Plaintiffs' claims directly sought relief from the 1993 Plan, with the limited exception of their prayer for relief under Section 3(c) of the Voting Rights Act, 52 U.S.C. § 10302(c) which sought indirect relief from the 1993 Plan since liability under Section 3(c) requires finding a constitutional violation.

²⁴ Doc. 180; Doc. 181.

²⁵ Moreover, Plaintiffs informed the Court in their post-trial briefing that they no longer sought an order under Section 3(c): "Plaintiffs no longer seek a remedy that would require the state to seek preclearance of future voting changes under Section 3(c) of the Voting Rights Act, 52 U.S.C. § 10302(c),. . .". (Doc. 546 at 31 n.18).

²⁶ See *Defunis v. Odegaard*, 416 U.S. 312, 318 (1974).

Stephen M. Irving
COUNSEL FOR PLAINTIFFS
/s/ Stephen M. Irving
Steve Irving LLC
111 Founders Drive, Suite 700
Baton Rouge, LA 70810-8959
Telephone: 225-752-2688
Facsimile: 225-752-2663
Email: steve@steveirvingllc.com

Jon M. Greenbaum*
Robert A. Kengle*
Genevieve T. Bonadies*
COUNSEL FOR PLAINTIFFS
/s/ Genevieve T. Bonadies
Lawyers' Committee for Civil Rights Under Law
1401 New York Avenue, NW, Suite 400
Washington, DC 20005
Telephone: 202-662-8600
Facsimile: 202-783-0857
Email: jgreenbaum@lawyerscommittee.org
bkengle@lawyerscommittee.org
gbonadies@lawyerscommittee.org
**pro hac vice*