

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

HENRY D. HOWARD, et al.,)	
)	
Plaintiffs,)	
)	
v.)	No. 1:14-cv-0097-JRH-BKE
)	
AUGUSTA-RICHMOND COUNTY,)	
GEORGIA, COMMISSION, et al.,)	
)	
Defendants.)	
_____)	

PLAINTIFFS’ RESPONSE TO DEFENDANTS’ MOTION TO DISMISS

Plaintiffs file this Response to Defendants’ Motion to Dismiss (Doc. 17).

I. Plaintiffs State a Claim Upon Which Relief Can Be Granted

Defendants contend that Plaintiffs’ claim to enforce Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, “is barred by *Shelby County, Ala. v. Holder*.” Defs.’ Br. in Supp. of Mot. to Dismiss (Doc. 17-1), at 2. The contention is without merit. *Shelby County* invalidated the coverage formula of Section 5, *i.e.*, Section 4(b), 42 U.S.C. § 1973b(b), because it was “based on decades-old data and eradicated practices.” 133 S. Ct. 2612, 2627 (2013). But the Court issued “no holding on § 5 itself, only on the coverage formula,” and provided that “Congress may draft another formula based on current conditions.” *Id.* at 2631. Notably, the Court held only that “[t]he formula in that section can *no longer* be used as a basis for subjecting jurisdictions to preclearance.” *Id.* (emphasis added). It did not hold that past use was improper. The Court also did not hold or suggest that Section 5 objections made after the 2006 extension were unconstitutional or unenforceable. The new rule in *Shelby County* was also not applied retroactively to voting changes that had been objected to in Shelby County. As the Court noted,

“the Attorney General has recently objected to voting changes proposed from within the county.” *Id.* at 2621. These were objections to annexations and a 2008 redistricting plan submitted by the City of Calera. *See id.* at 2646 (Ginsburg, J., dissenting). But nothing in *Shelby County* holds or suggests these objections to changes can now be enforced. The Court also provided that: “Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2.” *Id.* at 2631. It would thus violate Section 5, as well as the basic purpose of the Voting Rights Act, to allow a voting change to be implemented which was objected to because, based upon current conditions, it had a discriminatory purpose and effect.

A. Case Law Does Not Support Retroactive Application of *Shelby County*

Harper v. Virginia Department of Taxation, upon which Defendants rely, held:

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 retroactive effect in all cases *still open on direct review* and as to all events, regardless of whether such events predate or postdate announcement of the rule.

509 U.S. 86, 97 (1993) (emphasis added). But *Harper* does not mean *Shelby County* now renders the DOJ objection to the change in the date of elections for the Augusta-Richmond County Commission and Mayor unenforceable. By its terms, the retroactive application rule of *Harper* is not relevant to the DOJ objection because the objection was not involved in a case “still open on direct review.” Defendants argue that “preclearance remained an open issue via judicial preclearance.” Defs.’ Br. at 7. However, the state did not in fact seek judicial preclearance and there was thus no case open on direct review at the time of the *Shelby County* decision. And as noted above, the Court in *Shelby County* upheld the constitutionality of Section 5 and did not hold or suggest that Section 5 objections made after the 2006 extension were unconstitutional or unenforceable.

The decisions in *Bird v. Sumter County Board of Education*, No. 1:12–CV–76, 2013 WL 5797653 (M.D. Ga. Oct. 28, 2013), and *Hall v. Louisiana*, ___ F. Supp. 2d ___, No. 12–00657, 2013 WL 5405656 (M.D. La. Sept. 27, 2013), relied upon by Defendants, are not to the contrary. In *Bird*, a new districting plan for the Sumter County Board of Education was enacted by the Georgia legislature in 2011 and submitted for Section 5 preclearance. However, before DOJ acted upon the submission, it was withdrawn, leaving in place the pre-existing malapportioned plan. A suit was then filed to set aside the malapportioned plan as violating “one person, one vote.” But following the decision in *Shelby County*, the court held that the “one person, one vote” claim was moot and the 2011 plan, as to which there had been no Section 5 objection, would go into effect. The present case is thus distinguishable from *Bird* because it involves a Section 5 objection and no litigation was pending involving the objection to which *Shelby County* would apply. In *Hall*, the plaintiff sought an injunction requiring the state to submit various unsubmitted voting changes for preclearance under Section 5. While the litigation was pending *Shelby County* was decided, and the court held the decision “must be given retroactive effect in cases that are still under direct review,” and that Section 5 no longer offered a remedy for “failure to obtain preclearance.” *Hall*, 2013 WL 5405656, at *5-6. But again, the present case is distinguishable from *Hall* because it involves a Section 5 objection and no litigation was pending involving the objection to which *Shelby County* would apply.

Defendants also rely upon *Texas v. Holder*, 133 S. Ct. 2886 (2013), but it was a case “still under review” to which *Shelby County* applied. The Section 5 objection in this case was not under review at the time of the *Shelby County* decision. Similarly, *King v. Lumpkin*, 545 F. App’x 799 (11th Cir. 2013), and *Hancock County Board of Supervisors v. Ruhr*, No. 1:10CV564 LG-RHW, 2013 WL 4483376 (S.D. Miss. Aug. 20, 2013), upon which Defendants also rely, are

inapposite because they did not involve Section 5 objections and litigation involving their Section 5 claims was pending at the time of the *Shelby County* decision.

Equally important, in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), the Court established a three part analysis to determine whether to reject retroactive application of a new decision. First, a court must ask whether the decision “establish[es] a new principle of law.” *Id.* at 106. Second, a court must look “to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.” *Id.* at 107. Third, a court must consider “the inequity imposed by retroactive application.” *Id.* The rejection of retroactive application of the *Shelby County* decision in cases such as this meets the *Chevron Oil Co.* standard.

First, *Shelby County* established a new principle of law: that the 2006 coverage formula was unconstitutional. Second, given the history of Congressional enactment of Section 5 in 1965, its extension in 1970, 1975, and 1982, and the fact that the Supreme Court upheld these acts of Congress in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), *Georgia v. United States*, 411 U.S. 526 (1973), *City of Rome v. United States*, 446 U.S. 156 (1980), and *Lopez v. Monterey County*, 525 U.S. 266 (1999), it is clear that retrospective operation of *Shelby County* would not further but would retard the operation of Section 5. As the Court noted in *Shelby County*, Section 5 was enacted to banish the “blight of racial discrimination in voting” that has “infected the electoral process in parts of our country for nearly a century.” *Shelby County*, 133 S. Ct. at 2624 (quoting *Katzenbach*, 383 U.S. at 308). The Court further acknowledged that “voting discrimination still exists; no one doubts that.” 133 S. Ct. at 2619. Allowing the implementation of a voting practice that would have a discriminatory purpose and effect would be contrary to and undermine the basic purpose of Section 5. Finally, in light of the DOJ Section

5 objection, retroactive application of *Shelby County* would impose substantial inequities upon racial minorities in Richmond County. Based upon *Chevron Oil Co.*, retroactive application of *Shelby County* should be rejected.

Harper also recognized that denial of the retroactive application of “a new principle of law” would be appropriate “if such a limitation would avoid ‘injury or hardship’ without unduly undermining the ‘purpose and effect’ of the new rule.” 509 U.S. at 94-95 (quoting *Chevron Oil Co.*, 404 U.S. at 106-07). Even assuming *Shelby County* could be applied here, denial of retroactive application would be appropriate because it would avoid injury and hardship to minority voters which was detailed by DOJ in its objection letter. In addition, denial of retroactivity would not only not undermine but would uphold the purpose and effect of *Shelby County*, which confirmed the constitutionality of Section 5, as well as “the permanent, nationwide ban on racial discrimination in voting found in § 2,” and acknowledged that “voting discrimination still exists.” 133 S. Ct. at 2619, 2631. Allowing a voting practice that was found to have a discriminatory purpose and effect to be implemented would be contrary to the basic purposes of the Voting Rights Act.

The court in *Glazner v. Glazner*, 347 F.3d 1212 (11th Cir. 2003), also recognized and applied the *Chevron Oil Co.* test of prospective application of a new rule. Citing *Harper*, it noted that “the Court has clearly retained the possibility of pure prospectivity and, we believe, has also retained the *Chevron Oil* test, albeit in a modified form, as the governing analysis for such determinations in civil cases.” 347 F.3d at 1216-17. The law of this circuit thus confirms the propriety of the prospective application of *Shelby County* to voting changes.

II. The Complaint Should Not Be Dismissed for Failure to Join a Necessary Party

Defendants finally contend the Board of Elections “is the only correct defendant and the

party in whose absence complete relief cannot be accorded to Plaintiffs.” Defs.’ Br. at 12. The argument ignores the fact that in her declaration in support of Defendants’ opposition to Plaintiffs’ motion for a preliminary injunction, Defendant Bailey acknowledged that: “In my position, I am charged with supervising the function of voter registration and conducting all elections for Augusta-Richmond County.” Decl. of Lynn Bailey (Doc. 19-1), at ¶ 3. She further stated that her “office administers elections for all elected offices in the county, including the Augusta-Richmond County Commission and Mayor.” *Id.* Defendant Bailey, who by her own declaration is “charged with . . . conducting all elections for Augusta-Richmond County,” is clearly a correct defendant in whose presence complete relief can be accorded to Plaintiffs.

Defendants further ignore the fact that in *Martin v. Augusta-Richmond County, Georgia, Commission*, No. CV 112–058, 2012 WL 2339499 (S.D. Ga. June 19, 2012), the court enjoined further elections under a malapportioned districting plan where the defendants did not include the Board of Elections but instead, as here, Lynn Bailey in her official capacity as Executive Director of the Richmond County Board of Elections. The court would not have ordered injunctive relief if Defendant Bailey were not a proper party as to whom relief could be granted.

Conclusion

The Defendants’ Motion to Dismiss is without merit and should be denied.

Dated this 7th day of May, 2014.

Respectfully submitted,

s/M. Laughlin McDonald

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CERTIFICATE OF SERVICE

This is to certify that I have on this day served the foregoing document on all the parties in this case in accordance with the directives from the Court Notice of Electronic Filing (“NEF”), which was generated as a result of electronic filing.

Submitted this 7th day of May, 2014.

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