

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

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 4:05-cv-33 (TSL/LRA)
	)	
IKE BROWN, et al.,	)	
	)	
Defendants.	)	
_____	)	

**UNITED STATES’ MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PERMANENT AND PRELIMINARY INJUNCTIVE RELIEF AGAINST DEFENDANTS IKE BROWN, THE NOXUBEE COUNTY DEMOCRATIC EXECUTIVE COMMITTEE, AND THE NOXUBEE COUNTY ELECTION COMMISSION<sup>1</sup>**

The United States brought this action against Ike Brown, the Noxubee County Democratic Executive Committee (“the NDEC”), and the Noxubee County Election Commission (“the Election Commission”) pursuant to Sections 2 and 11(b) of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§1973 and 1973i(b). This Court has subject matter jurisdiction over this action pursuant to 42 U.S.C. § 1973(j), 28 U.S.C. §§ 1331, 1343, and 1345.

In its June 29, 2007 Order, this Court found that Brown and the NDEC violated Section 2 of the Voting Rights Act because they “administered and manipulated the political process in ways specifically intended and designed to impair and impede participation of white voters and to dilute their votes.” United States v. Brown, 4:05-cv-00033, 2007 WL 1965433, \*35 (S.D. Miss. June 29,

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<sup>1</sup> The United States uses the term “preliminary relief” to describe the proposed rescheduling of the upcoming elections for local offices in the August 7, 2007 Democratic Primary and August 28, 2007 runoff. The use of the term “permanent relief” describes all other relief proposed by the United States.

2007). Further, the Court found that the Defendants' abuses of the political process in Noxubee County "have been racially motivated, and that . . . the result of this discriminatory administration of the voting process is the dilution of white voting strength." *Id.* The Court ordered both parties to submit recommendations for appropriate relief within thirty days. *Id.* at \*36.

Based on the Court's findings, the United States requests permanent and preliminary injunctive relief. In particular, the United States requests that this Court appoint a Voting Referee/Elections Administrator (hereinafter "referee-administrator")<sup>2</sup> to conduct the Democratic Primary elections, and that this Court order a brief four-month delay for certain local races to give the referee-administrator adequate time to prepare. In addition, the Defendant Election Commission has failed to purge the county's voter registration list of persons not entitled to vote in county elections, increasing the ability of Brown and the NDEC to engage in discriminatory practices in the administration of Noxubee County elections. Because of these failures by the Defendant Election Commission and the fact that the Commission is a necessary party for effective relief, the United States requests that injunctive relief be entered against the Commission as well.<sup>3</sup>

#### **A. Appointment of a Referee-Administrator**

Along with a variety of other curative measures recommended by the United States to protect Noxubee County voters from again being subjected to a racially unfair electoral system, the United

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<sup>2</sup> The term "voting referee" denotes a particular type of statutorily authorized special master under 42 U.S.C. § 1971. In addition to the term "voting referee," the United States uses the term "elections administrator" because the two titles best characterize the duties to be carried out by this appointee.

<sup>3</sup> Indeed, the Court acknowledged that the Election Commission's failure to purge the voter rolls opened the door for absentee voter fraud by "creat[ing] the potential for persons to vote under others' names." *Brown*, 2007 WL 1965433, at \*35 n.73.

States moves that Brown and the NDEC no longer be allowed to operate as superintendents of Noxubee County Democratic Primary elections. The United States requests that in their stead, a referee-administrator be commissioned to carry out almost all aspects of Democratic Primary elections, though the Defendants would otherwise be permitted to operate party functions as usual.

***1. Equitable Powers to Appoint a Referee-Administrator***

This Court is well within its powers in equity and under Fed. R. Civ. P. 53 to appoint a referee-administrator to, among other things, administer Democratic Primary and runoff elections in Brown and the NDEC's stead. Federal courts are endowed with the "inherent equitable power to appoint a person, whatever be his title, to assist it in administering a remedy." Ruiz v. Estelle, 679 F.2d 1115, 1161 (5th Cir. 1982), amended in part on rehearing, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042; accord United States v. Yonkers Bd. of Educ., 29 F.3d 40, 44 (2d Cir. 1994) (per curiam).

In Ruiz, the seminal case on the equitable power of a federal court to appoint an individual to assist it in administering a remedy, the Fifth Circuit held that the federal court's long-established power to appoint an agent to manage the implementation of its decree goes beyond the power to appoint an administrator pursuant to Fed. R. Civ. P. 53.<sup>4</sup> Ruiz, 679 F.2d at 1161; accord Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (citing Ruiz, 679 F.2d at 1160-63, Gary W. v. Louisiana, 601 F.2d 240, 244-45 (5th Cir. 1979)). Accordingly, Rule 53 "does not terminate or modify the district court's inherent equitable power to appoint a person . . . to assist it in administering a remedy." Id.; see Schwimmer v. United States, 232 F.2d 855, 865 (8th Cir. 1956) ("Beyond the provisions of Fed. R. Civ. P. 53 for appointing and making references to Masters, a

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<sup>4</sup> This Court's power to appoint an administrator pursuant to Rule 53 is discussed below.

Federal District Court has the inherent power to supply itself with this instrument for the administration of justice when deemed by it [to be] essential.”); see also Veneri v. Draper, 22 F.2d 33, 35 (4th Cir. 1927) (stating “the power is inherent in the federal courts independently of any statute”). Therefore, “[o]ver and above the authority contained in Rule 53 . . . there has always existed in the federal courts an inherent authority to appoint [administrators] as a natural concomitant of their judicial power.” Ruiz, 679 F.2d at 1161 n.240 (citations omitted); accord United States v. Connecticut, 931 F. Supp 974, 984 (D. Conn. 1996).

Federal courts have routinely chosen to appoint administrators in the context of rectifying voting rights violations. See, e.g., United States v. Berks County, 250 F. Supp. 2d 525, 541 (E.D. Pa. 2003) (finding, in a Section 2 case to protect Hispanic voters, the appointment of a Rule 53 administrator to be appropriate because of the “sweeping relief” requested by the United States and the egregious violations of federal law by the defendants); Moore v. LeFlore County Bd. of Election Comm’rs, 361 F. Supp. 609 (N.D. Miss. 1973) (approving the recommendations of a court-appointed administrator who was commissioned to redraw district lines, change the boundaries of the voting precincts, and change polling place locations).

A variety of reasons may justify a court’s equitable decision to appoint an administrator, including: (1) the difficulty for a court to supervise the implementation of a remedial plan; (2) a record of intransigence by the defendant toward previous court orders; (3) strained working relations between defense and plaintiff’s lawyers; (4) a defendant’s failure to acknowledge completely evident violations of the law; and (5) a defendant’s history of failing to “conform its actual practices to its written policies and procedures.” Ruiz, 679 F.2d at 1160. Essentially, the “scope and complexity of the decree and the importance as well as the difficulty of ensuring compliance”

constitute sufficient justifications for a federal court to invoke its implied authority as a court of equity and appoint an administrator to assist in the implementation of its decree. Id. at 1162.

All five of the factors outlined in Ruiz are satisfied and justify the exercise of the Court's equitable powers to appoint a referee-administrator to administer primary and primary runoff elections. First, it would be extraordinarily difficult for the Court to supervise a remedial plan that seeks to redress discrimination which, in Noxubee County, normally occurs during the days leading up to the election and on election day itself, a relatively brief period. Without a plan which provides for an immediate response when discriminatory practices threaten citizens' voting rights, the practical time constraints which naturally attend court intervention will render this Order largely ineffective, should the Defendants choose to disobey it.<sup>5</sup>

Second, the Defendants also have a record of disregarding the law and court orders, including the orders of this Court. Brown and the NDEC ignored a prior decision by a state court judge to hold a new election in Noxubee County, and they did so to the detriment of a white voter-preferred candidate. (See United States Proposed Findings of Fact and Conclusions of Law, pp. 105-07.) Similarly, this Court ordered the Defendants to pay a \$500 penalty for failure to comply with discovery deadlines; eighteen months later, the Defendants still refuse to acknowledge their responsibility to comply with the outstanding order. Brown has also made it clear in recent publications that he has no intention of changing the way elections are conducted in Noxubee County, despite this Court's ruling. When asked about the effect of this Court's ruling on the

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<sup>5</sup> The United States has, in the past, and can, in the future, send federal observers to monitor elections in Noxubee County. However, though observers are statutorily authorized to report what they have seen, they cannot intervene should they witness violations of federal law. See 42 U.S.C. § 1973f (providing only that federal observers are allowed to enter polling places for the purpose of observation).

upcoming election, Brown told a reporter, “We will win on appeal . . . . Nothing is going to change in the meantime.” Scott Boyd, *Ruling Could Force Dem Leader Out*, The Beacon (Macon, MS), July 3, 2007, at 1; see also id. (“There’s no way this [ruling] will affect the upcoming primary.”); Jimmy E. Gates, *Judge: Voter Rights Denied*, The Clarion-Ledger (Jackson, MS), June 30, 2007 (“Asked what impact, if any, Friday’s ruling by Lee would have on the Aug. 7 primary elections in Noxubee County, Brown said he didn’t see any at this time.”); cf. Kristin Mamrack, *Whites Discriminated Against, Judge Rules*, The Commercial Dispatch (Columbus, MS), June 30, 2007 (“But [Brown] indicated his goals, which he reportedly earlier said were to keep Republicans from voting in Democratic elections, have been addressed by an earlier federal ruling. ‘Judge Pepper already said everything that needed to be said,’ Brown commented[.]”). (Exs. A, B, & C). Should the Court conduct a hearing on the issue of appropriate injunctive relief, the United States is prepared to present witnesses to testify to these out-of-court statements.

Third, the working relationship between counsel for the United States and the Defendants has been less than ideal at times. One example is that Brown and the NDEC failed to cooperate with opposing counsel in the preparation and completion of an accurate pretrial order for this case. Instead, the Defendants attempted to add additional witnesses to the pretrial order after the holding of the pretrial conference and the submission of the pretrial order. (Tr. at 97-98.) Next, defense counsel lodged accusations in open court that the United States sought to “harass and badger” black poll workers, an outburst this Court ruled to be out of order. (Tr. at 2482-83.) Finally, the Court granted a second deposition of Brown after the United States argued, among other things, that a second deposition was warranted because of the inappropriate conduct of defense counsel at the first deposition.

Fourth, in the face of these violations of federal law, at no point have the Defendants acknowledged any responsibility for their unlawful activity. Brown was particularly obstinate during his testimony, even when questioned on the stand regarding discriminatory actions he had admittedly taken to disadvantage white voters or white voter-preferred candidates.

Fifth, the Defendants have not only demonstrated a repeated failure to conform to written policies and practices, they almost uniformly opt not to conform to written policies and practices when doing so will work to the disadvantage of white voters or white voter-preferred candidates. Therefore, all five of the factors in Ruiz weigh in favor of the appointment of a referee-administrator. Finally, because the United States is the Plaintiff in this case, broader equitable remedies are more appropriate.

Where a sovereign state or nation is party plaintiff, it is sometimes more certainly entitled to specific relief than a private party might be. Georgia v. Tennessee Copper Co., 206 U.S. 230, 237, 27 S. Ct. 618, 51 L. Ed. 1038 (1907). Courts of equity frequently go much further both in giving and in withholding relief in furtherance of the public interest than they are accustomed to go where only private interests are involved. Virginian Ry. Co. v. System Fed'n No. 40, 300 U.S. 515, 552, 57 S. Ct. 592, 81 L. Ed. 789 (1937).

Alabama v. United States, 304 F.2d 583 (5th Cir. 1962). In light of the severity of the violations in this case and the fact that the United States is the Plaintiff, the broader remedy of the appointment of a referee-administrator is an appropriate exercise of this Court's equitable powers.

## ***2. Authority in the Federal Rules to Appoint a Referee-Administrator***

In addition to this Court's equitable power to appoint a referee-administrator to administer Democratic Primary and runoff elections in Noxubee County, this Court has the statutory authority to do so under Fed. R. Civ. P. 53. Rule 53 states:

Unless a statute provides otherwise, a court may appoint a master only to: . . . (C) address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

Fed. R. Civ. P. 53(a)(1)(C). The Fifth Circuit has held that even in cases where the federal court invokes Rule 53 as authority to appoint an administrator, rather than its equitable power, the “choice to refer the case to a Special Master is not extraordinary.” Gary W., 601 F.2d at 244-45 (citing a litany of cases in which federal courts have appointed a Rule 53 administrator).

The appointment of a referee-administrator to administer elections consistent with the orders of this Court satisfies the requirement under Rule 53 that enforcement of a traditional, limited injunction against discrimination cannot be “addressed effectively and timely by an available district judge.” Fed. R. Civ. P. 53(a)(1)(C). Unlike traditional Section 2 cases where a remedial district plan would be ordered into effect prior to an election, the actions of Defendants in this case usually occur on election day and the days leading up to an election. Even if a traditional remedy prohibiting racial discrimination is in place and the Defendants violate it, another round of racially unfair elections will have already taken place in Noxubee County, potentially putting the United States in the position of asking this Court to grant the even more extraordinary relief of invalidating the results of an election and ordering a new election. The more prudent course of action is to appoint a referee-administrator pursuant to this Court’s equitable powers and Rule 53, thereby putting in place an individual who will represent the Court’s interests in enforcing the law and effectively providing an election official to whom voters and candidates can convey their grievances and have them resolved.

Even though such a remedial plan may intrude into the province of local affairs, such plans may be necessary to preserve the rights of voters. For example, in Local 28 of Sheet Metal Workers

International Association v. EEOC, 478 U.S. 421 (1986), a district court held that a workers' union engaged in a pattern and practice of discrimination against minorities in its membership practices, in violation of Title VII of the Civil Rights Act of 1964. Citing to Rule 53 and Fifth Circuit case law, the Supreme Court upheld the federal district court's appointment of an administrator with broad powers to supervise the union's membership practices. Id. at 481-82. The Court found that the intrusion into the union's affairs by a court-appointed administrator was justified by the "difficulties inherent in monitoring compliance with the court's orders" and, in particular, "petitioners' established record of resistance to prior state and federal court orders . . . ." Id. (citing Fed. R. Civ. P. 53; Ruiz, 679 F.2d at 1160-63; Gary W., 601 F.2d at 244-45)). The Supreme Court held that "[w]hile the administrator may substantially interfere with petitioners' membership operations, such 'interference' is necessary to put an end to petitioners' discriminatory ways." Local 28, 421 U.S. at 482.

As in Local 28, here the difficulties inherent in monitoring compliance with this Order, combined with the Defendants' reputation for resisting state and federal court orders, necessitates a more rigorous remedy. Defendants' history of intentional discrimination and their willingness to ignore state and federal court orders demonstrate that a referee-administrator is necessary not only to monitor, but also to be responsible (at least in part) for the implementation of this Order. As the Second Circuit has held,

Obviously, a special master vested with authority to implement a court's order poses a greater threat of intrusion than one whose authority is limited to monitoring compliance with that order. See, e.g., United States v. Parma, 661 F.2d 562 (6th Cir. 1981), cert. denied, 456 U.S. 926, 102 S. Ct. 1972, 72 L. Ed. 2d 441 (1982). Nevertheless, as with any other remedial tool, the grant of administrative authority to a master does not amount to an abuse of the court's broad discretion if the authority conferred is tailored to

cure the constitutional violation. See, e.g., Glover v. Johnson, 934 F.2d 703, 713 (6th Cir. 1991) (upholding appointment of administrator).

United States v. Yonkers Bd. of Educ., 29 F.3d 40, 44 (2d Cir. 1994) (per curiam); accord EEOC v. Local 638, 81 F.3d 1162, 1181 (2d Cir. 1996).

Moreover, and also as in Local 28, the appointment of a referee-administrator is a limited remedy. The Local 28 Court noted that although the district court's order gave the administrator broad powers to oversee the union's membership practices, the union retained complete control over its other affairs. Id. at 482. The Court's appointment of a referee-administrator to act as the administrator of local elections would be, like the remedial plan in Local 28, limited in its scope and tailored to cure the Defendants' statutory violations. The grant of power to the referee-administrator would extend specifically to voting processes where Defendants engaged in discrimination or where the process contributed to a discriminatory scheme. Although the proposed remedy gives the referee-administrator broad powers to administer elections, Brown and the NDEC will otherwise retain control over all other party affairs.

### ***3. Remedies in Equity under 42 U.S.C. § 1971(e)***

Courts have also appointed voting referees, a type of administrator provided for by § 1971 of the Civil Rights Act, who are broadly empowered to represent the interests of the federal district court when an aggrieved party proves that any person has been deprived of his or her right to vote on the basis of race or color and that "such deprivation was or is pursuant to a pattern or practice." 42 U.S.C. § 1971(e). Voting referees function as administrators with "all the powers conferred upon a master by Rule 53(c)" who may take any "action appropriate or necessary to carry out the

provisions of this subsection and to enforce its decrees.” Id. “All action necessary to make a vote effective” may be taken by the § 1971 voting referee to ensure fair voting. Id.

Though the United States brought its voting rights claims under the broader provisions of Sections 2 and 11(b) of the Voting Rights Act, § 1971 cases show that courts have recognized the need for administrators and voter referees, especially in the context of the vindication of voters’ rights. For example, the Fifth Circuit held that administrators and voting referees serve the federal interest of conserving judicial resources:

The necessity for exploring all means of solving what appear to be insoluble problems grows out of our developing awareness that ‘if the real ideal of justice under law is to be achieved, precious Judge and judicial time must be carefully husbanded and conserved.’ Benson v. United States, 332 F.2d 288 (5th Cir. 1964). . . . Courts may rightly adapt procedures to lessen or avoid this costly loss of irreplaceable judge-time . . . .

United States v. Mayton, 335 F.2d 153, 163 (5th Cir. 1964). The court went on to explain that the particular intricacies associated with ensuring racially fair electoral practices further justified the need for voting referees. Id. at 163.

In another challenge to the employment of voting referees, United States v. Manning, 215 F. Supp. 272, 292 (W.D. La. 1963), the court specifically rejected the argument that the use of voting referees resulted in the federal court improperly displacing state officials. The court held,

There is nothing new about the idea of court-appointed judicial officers. Judicial reliance on masters, referees, and other agents of the court has a long history. The court’s use of such representatives is in line with the traditional authority courts of equity exercise. The appointment of federal election supervisors by a district judge has been before the courts and held constitutional.

Id. at 292. The court then thoroughly discussed the history of court-appointed judicial officers, ultimately finding that court appointment of a voting referee under § 1971(e) was, like the

appointment of administrators or special masters, an entirely appropriate remedy for a federal court to implement in a voting rights case. Id. The court also explained why a federal court's appointment of a third party to administer local election functions is preferable over pursuing orders of contempt when a traditional, limited injunction is violated:

Experience caused Congress to conclude that this single-bite approach was ineffective and was only a slight deterrent to purposeful discrimination. Registrars would know, of course, that they would someday be brought to book. But when? What book? Overburdened courts and congested dockets were thus an unwitting tool in postponement of the hope of ultimate equality of treatment. That is where § 1971(e) [the voting referee provision] comes into play.

Id. at 160.

Finally, the Fifth Circuit has found that referee-administrators can navigate issues of local elections:

Energetic, resourceful, conscientious Judges who man the United States District Courts in these areas can, and will, find a way to make certain that this law is administered in a way that is faithful to the legislative purpose of eradicating for all time racial discrimination in voter rights. And, in so doing, this will give practical meaning to the general congressional aim that in civil rights cases 'Congress has directed the federal courts to use that combination of federal law, common law, and state law as well as will be best 'adapted to the object' of the civil rights laws.'

Mayton, 335 F.2d at 165 (quoting Lefton v. City of Hattiesburg, 333 F.2d 280 (5th Cir. 1964)) (citations omitted).

Thus, courts have acknowledged the propriety of voting referees under § 1971, a more narrow statute than the Voting Rights Act of 1965. In doing so, they have noted that courts have equitable powers beyond any statute to appoint special masters. Therefore, precedent under this

section serves to support the use of a referee-administrator to assist the Court in protecting the voting rights of the citizens of Noxubee County.

This Court therefore has the authority under its equitable powers, Rule 53, and federal precedent to appoint a referee-administrator to implement the Court's remedial Order and supervise Noxubee County Democratic Primary and runoff elections. Brown and the NDEC have acted in a racially unfair manner in the administration of elections and have indicated, through Brown, that they intend to continue doing so. As this Court has acknowledged, Brown's chairmanship of the NDEC has greatly enhanced his "ability to affect the electoral process in a . . . direct fashion." United States v. Brown, 4:05-cv-00033, 2007 WL 1965433, \*9 (S.D. Miss. June 29, 2007). Without the appointment of a referee-administrator, the efforts of the United States to rectify the voting rights violations in Noxubee County will very likely be rendered futile. Therefore, the United States respectfully requests that in addition to the other curative relief requested in its Proposed Order Granting Permanent and Preliminary Injunctive Relief, the Court also appoint a referee-administrator.<sup>6</sup>

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<sup>6</sup> For the reasons mentioned in the brief, the United States believes that the most effective remedy would be the appointment of a referee-administrator. If the Court concludes that such an appointment is not warranted, other remedial options include the following: (1) notaries: (a) prohibiting Brown, and any notary whose fees have been paid by him, from acting as a notary in the administration of absentee applications and ballots; (b) prohibiting notaries, and those who accompany notaries in the collection of absentee applications or ballots prior to a primary or runoff election, from serving as poll officials in the same election; and (c) prohibiting the Circuit Clerk from expending funds to aid notaries in procuring the return of completed absentee ballots; (2) poll officials: (a) appointing poll officials without regard to race; (b) training poll officials, including by distributing the Court's liability and remedial Order, distributing the most recent version of the Mississippi Secretary of State's County Election Handbook, and providing training as to the contents of the Order and Handbook; (c) permitting only statutorily authorized poll managers and workers to decide or review challenges to the qualifications of a voter or an absentee ballot; and (d) requiring poll officials to strictly comply with and enforce Mississippi voter assistance laws; (3) Non-involvement of Brown and the NDEC: (a) prohibiting Brown and

**B. Requested Delay of Certain Local Races in the August 7, 2007 Democratic Primary**

Should the Court appoint a referee-administrator to supervise Noxubee County Democratic Primary elections, this Court should also grant the United States' motion to delay the election in order to allow the referee-administrator to have adequate time to administer the election and, in particular, the absentee ballot process.

With so little time left before the August 7, 2007 election, there are a number of things that must be done before the referee-administrator can be adequately prepared to implement the Court's Order. First, the Court would need a sufficient amount of time to review potential appointees for the referee-administrator position and make an appointment.<sup>7</sup> The referee-administrator would then need a sufficient amount of time to become acquainted with the Court's opinion and remedial Order, review applicable Mississippi election laws, and review necessary election records at the Noxubee

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members of the NDEC from being present in the Circuit Clerk's office in the two weeks prior to any primary election or primary runoff except for matters pertaining to themselves or their immediate family; and (b) prohibiting Brown and members of the NDEC from being present in the polling places unless they are in the polling place for personal voting reasons; (4) Discriminatory activities: (a) prohibiting Defendants from intimidating voters who support white candidates; (b) requiring Defendants to enforce state law campaign limitations in a racially fair manner; (c) prohibiting Defendants from recruiting ineligible candidates to run for local office; and (d) prohibiting Defendants from enforcing any party loyalty requirements in a racially discriminatory manner; (5) Election Commission: (a) prohibiting the Noxubee County Election Commission from allowing Brown or members of the NDEC from managing general elections or giving instructions to poll officials conducting the general elections; and (b) requiring the Election Commission to add or delete names from the voting rolls in a timely manner; (6) Other provisions: (a) requiring Brown, the NDEC, the Election Commission, and Circuit Clerk to maintain certain detailed records pertaining to compliance with the Court's remedial Order; (b) requiring the Defendants to forward election-related complaints to the United States; and (c) prohibiting Defendants from encouraging voters to vote under false names.

<sup>7</sup> The United States intends to submit one or more nominees for appointment to the position of referee-administrator. It has already spoken with former Mississippi Supreme Court Justice Reuben Anderson, and Justice Anderson has expressed a willingness to serve in this capacity in the event he is appointed by the Court.

County courthouse, among other things. Furthermore, without a delay in the election, the referee-administrator will have no practical effect on the administration of the absentee ballot process, since that process is already well under way and all indications are that it is functioning just as it has in years past. The United States has received complaints that an inordinately high number of absentee ballots have already been voted at the Noxubee County Courthouse and that, contrary to state law, white candidates are being denied access to records showing the number of absentee ballots sent to voters.<sup>8</sup>

Therefore, the United States has moved to briefly delay the holding of the August 7, 2007 Democratic Primary elections for local offices as well as any Democratic Primary runoff election on August 28, 2007. The United States requests that the Court delay the Democratic Primary elections for local office until the time of the November 6, 2007 election, set a special Democratic Primary runoff election for November 27, 2007, and set a special general election for December 11, 2007. The injunction would only apply to local elections and not to elections for statewide offices, state legislative offices, or multi-county offices; regarding statewide offices, state legislative offices, and multi-county offices, the elections would proceed as usual.

Currently, there are seventeen local offices up for election, nine of which are contested, including: sheriff, chancery clerk, school superintendent, all supervisor districts except District 4, southern constable, and coroner.<sup>9</sup> Six of the contested offices have more than two candidates who have qualified for the office and may therefore require a runoff. And three of the offices have

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<sup>8</sup> The United States is prepared to call witnesses to attest to these facts in a hearing before the Court, if necessary.

<sup>9</sup> Five out of the nine contested races involve both black and white candidates.

independent candidates who have qualified for the office, necessitating a general election for these three positions.<sup>10</sup> Those Noxubee County officials scheduled to be elected in 2007 elections will be taking office on January 1, 2008. The adjusted election schedule proposed by the United States will result in the completion of the election cycle for all local Noxubee County officials scheduled to be elected this year.

Although the United States recognizes the extraordinary nature of the requested injunction, the United States argues that the extreme circumstances of this case call for such a remedy for the reasons stated below.

**C. Preliminary Injunctions and the Court's Power to Briefly Delay the August 7, 2007 Democratic Primary and August 28, 2007 Runoff Elections**

In deciding whether to issue a preliminary injunction, a trial court is bound to exercise its right to do so in light of the four prerequisites recognized by the Fifth Circuit:

- (1) a substantial likelihood that plaintiff will prevail on the merits,
- (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted,
- (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and
- (4) that granting the preliminary injunction will not disserve the public interest.

Lindsay v. City of San Antonio, 821 F.2d 1103, 1107 (5th Cir. 1987) (citations omitted). These four requirements are a mixed question of both fact and law. Id. The district court's decision to grant or deny a preliminary injunction is left to its sound discretion. Mississippi Power & Light Co. v.

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<sup>10</sup> No Republicans have qualified to run in the upcoming local elections in Noxubee County.

United Gas Pipe Line Co., 760 F.2d 618, 621 (5th Cir. 1985). The extraordinary remedy of a preliminary injunction should only be granted if the movants have clearly carried their burden of persuasion on all four factors. Id.<sup>11</sup>

“It cannot be gainsaid that federal courts have the power to enjoin state elections.” Chisom v. Roemer, 853 F.2d 1186, 1189 (5th Cir. 1988) (citing Watson v. Comm’rs Court of Harrison County, 616 F.2d 105 (5th Cir. 1980); Hamer v. Campbell, 358 F.2d 215 (5th Cir. 1966)), rev’d on other grounds, 501 U.S. 380 (1991). “There can be no doubt that under the Supremacy Clause, federal courts do and indeed must have this authority in our unique form of government.” Chisom, 853 F.2d at 1189 (footnotes omitted). Furthermore, federal courts have the authority to order special elections when it is necessary. Campos v. City of Houston, 968 F.2d 446, 451 (5th Cir. 1992). “‘But, intervention by the federal courts in state elections has always been a serious business,’ not to be lightly engaged in.” Id. (quoting Oden v. Brittain, 396 U.S. 1210, 1211 (1969) (Black, Circuit Justice 1969)). Courts granting injunctive relief must “tailor the remedy to fit the evil presented” so as to “eradicate the effect of past discrimination as well as to insure against discrimination in the future.” United States v. McLeod, 385 F.2d 734, 748 (5th Cir. 1967) (citing a litany of various appropriate forms of injunctive relief).

### ***1. Substantial Likelihood that the Plaintiff will Prevail on the Merits***

“The first of the four prerequisites to temporary injunctive relief is generally the most important.” Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1232 (11th Cir. 2005). In this case,

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<sup>11</sup>Because this Court has already ruled in favor the United States on liability, it is unclear whether this Court needs to adopt the analytic framework of a preliminary injunction, rather than a permanent injunction, in determining the appropriate remedy. In any case, the United States believes that it satisfies the elements for both.

the United States has already prevailed on the merits of its claim that Brown and the NDEC have acted with an intent to discriminate against the white electorate of Noxubee County. This Court has explicitly held that “Brown and the NDEC have administered and manipulated the political process in ways specifically intended and designed to impair and impede participation of white voters and to dilute their votes.” Brown, 2007 WL 1965433, at \*35. Therefore, the United States has met its burden regarding this prong of the analysis.

## ***2. Irreparable Injury***

“The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.” Reynolds v. Sims, 377 U.S. 533, 555 (1964). Instead of a per se rule that “if an electoral standard, practice, or procedure abridges Section 2 of the Voting Rights Act it automatically does irreparable injury to all or a portion of the body politic,” the Fifth Circuit has adopted a standard that requires the district court to consider whether “other corrective relief will be available at a later date, in the ordinary course of litigation” and to intervene with injunctive relief “only when the threatened harm would impair the court’s ability to grant an effective remedy.” Chisom, 853 F.2d at 1186, 1189.

This Court has already found that in his role as Chairman of the NDEC, Brown has led the NDEC in intentionally operating an electoral system which has resulted in the dilution of white Noxubee County voters’ ballots. This system of discrimination has pervaded every facet of Noxubee County elections, including candidate recruitment and qualification, racial appeals in campaigns, racially motivated absentee voter fraud, racially motivated “assistance” of voters at the

polls,<sup>12</sup> racially motivated selection of poll workers, and racially motivated implementation of state law campaign limitations. Moreover, as noted previously in this memorandum, Brown has recently indicated in three different publications that he plans to continue conducting elections as he has in prior elections.

In light of Brown and the NDEC's previous conduct and because Brown has publicly announced his intent to continue the same course of action, the only effective way to ensure that federal statutory protections are extended to Noxubee County voters is, among other things, to remove Brown and replace him with a disinterested party who will fairly administer county elections in a non-discriminatory manner. However, with only days remaining until the primary, it would be extremely difficult for the Court to appoint a qualified individual to fill such a role in time for the Democratic Primary election. And even if the Court were able to make an eleventh hour appointment of a referee-administrator, Brown has openly committed to acting as he has in previous elections and undoubtedly has taken such actions already. Much of the damage to a fair electoral process has probably already been done, particularly with regard to the unlawful distribution of absentee ballots or racially disparate treatment of candidates, as mentioned above. Therefore, if the election is allowed to go forward, the voters of Noxubee County will essentially have to wait another four years for the next primary elections for these local races until a remedial order of this Court

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<sup>12</sup> The evidence at trial showed "a concerted effort to illegally 'assist' black voters, which could not have occurred without complicity on the part of Brown and the NDEC and the poll workers they selected and placed in these polling locations." Brown, 2007 WL 1965433, at \*23 (footnote omitted).

actually provides an effective guarantee that they will experience an election that is conducted in a racially fair manner.<sup>13</sup>

The Court is presented with precisely the appropriate scenario for electoral injunctive relief described by the Chisom court. Not only will other corrective relief not be available at a later date, but based on Brown's assurances that he will not change his behavior in response to this Court's liability finding, it is almost guaranteed that with Brown and the NDEC supervising the election, Noxubee County will again experience the irreparable harm of a racially unfair election.

#### ***4. Balancing of Threatened Injuries and Service of the Public Interest***

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<sup>13</sup> It is important to distinguish this case from Chisom in two important respects: first, the injunctive relief requested by the United States here will not leave Noxubee County without any of its local elected officials, unlike the relief in Chisom, which would have potentially left the state of Louisiana without three of its supreme court justices. As mentioned previously, those Noxubee County officials scheduled to be elected in 2007 elections will be taking office on January 1, 2008. The adjusted election schedule proposed by the United States will result in the completion of the election cycle for all local Noxubee County officials scheduled to be elected this year.

Second, Chisom was decided in the context of an allegation that a redistricting plan could cause a discriminatory result in violation of the Voting Rights Act. Were the motion brought by the United States to enjoin the upcoming election due to the use of an election procedure not previously determined to be unlawful, the injunctive relief in question might justifiably be viewed more circumspectly. Courts are wary of issuing injunctions when the basis for the allegation of voter discrimination is unconstitutionally drawn districts. See McDaniel v. Sanchez, 452 U.S. 130, 150 n.30 (1981) (“[R]edistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt”); Chisom, 853 F.2d at 1192 (cautioning that local authorities should be given the first opportunity to cure statutory defects in their districts); accord Boddie v. City of Cleveland, No. 4:01-cv-88-D-B, 2001 WL 1523854, at \*2 (N.D. Miss. Apr. 24, 2001); Garza v. Dallas Indep. Sch. Dist., No. 3:01-cv-0602-H, 2001 WL 492384, at \*2 (N.D. Tex. May 04, 2001). However, in this exceptional case, this Court has already found that Brown and the NDEC have engaged in a pattern of behavior that resulted in and was intended to dilute the votes of white Noxubee County voters. This case is therefore distinguishable from Chisom as well as the other cases which wisely caution against granting eleventh-hour electoral injunctive relief when other remedies are available.

In order to balance the threatened injuries and consider whether the public interest would be served by preliminarily enjoining an election, a court must consider a number of factors, including: general equitable principles, the proximity of the forthcoming election, the complexity of state election law, and the reasonableness of requiring a jurisdiction to make changes in adjusting to the court's decree. Chisom, 853 F.2d at 1189 (citing Reynolds v. Sims, 377 U.S. at 585). The Chisom court also considered the defendant's willingness to take corrective measures. Id. at 1190-92; cf. United States v. Oregon State Med. Soc'y, 343 U.S. 326, 333 (1952) ("It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption.").

While the United States "has no interest in who wins or loses the elections," it does have a steadfast interest in ensuring that the county's "election procedures conform with the Constitution and the Voting Rights Act." United States v. City of Cambridge, 799 F.2d 137, 140 (4th Cir. 1986). That interest is directly at stake here. The court's consideration of general equitable principles weigh in the United States' favor since the consequences of issuing an injunction are far outweighed by the threatened harm to interests of Noxubee County voters. Brown and the NDEC have shown they have little regard for election law when it works to the advantage of their favored black candidates. Without recounting the variety of activities which led to a 2003 election cycle polluted with discriminatory actions by Brown and the NDEC, it is sufficient to say that their actions were calculated to "stack the deck" in favor of their preferred candidates and executed in a racially unfair manner, particularly with regard to the handling of absentee ballots. Brown, 2007 WL 1965433, at \*22. Because the absentee balloting process is already underway and Brown has committed to running the election as he has in times past, the price of reprinting ballots and delaying the primary

election until November of 2007 is small compared to subjecting the voters of Noxubee County to another election in violation of federal law. Leaving the election in the hands of Brown and the NDEC will again cause voters to participate in elections run by racially discriminatory election officials, thereby possibly disenfranchising more voters on the basis of their race and, at the very least, undermining their confidence in the result of the election. See Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (finding “[n]o right is more precious” than the right to vote and that “other rights, even the most basic, are illusory if the right to vote is undermined”); United States v. Charleston County, 318 F. Supp. 2d 302, 327 (D.C.S.C. 2002) (“[T]he public interest aligns with the Congressional enactment of the Voting Rights Act prohibiting the use of an election system that unlawfully dilutes [minority] voting strength.”).

Furthermore, with regard to the proximity of the elections, Defendants are in no position to complain about the short period of time that is left before the scheduled August 7, 2007 election. Although “[f]ederal courts have been particularly wary of enjoining elections when the plaintiffs have delayed filing lawsuits and injunctive motions until the eleventh hour,” Boddie v. City of Cleveland, No. 4:01-cv-88-D-B, 2001 WL 1523854, at \*2 (N.D. Miss Apr. 24, 2001), the United States filed this lawsuit two years ago and the trial was originally scheduled for October 16, 2006. However, the Defendants requested a delay because of their unpreparedness for trial. As a matter of equity, it is the fault of the Defendants that the United States has been placed in the position of requesting such a remedy at this late hour. Indeed, the United States argued against a trial delay because it would interfere with the imposition of an effective remedy for the August 2007 election. In responding to the Defendants’ motion to continue the trial, the United States argued, “[T]he pervasive problems in Noxubee County may justify a remedy regarding voter registration rolls and

election administration that necessitates a resolution as soon as possible so that remedial measures may be in place and effective for the 2007 primary elections.” (Memo in Resp. to Mot. for Trial Delay; Document 167 at 10.) The Defendants should therefore not be allowed to take advantage of their own dilatory actions and argue that the delay of the August 2007 election places an unfair or undue burden on them. Had the Defendants been prepared for trial when it was first scheduled, the Court would have had plenty of time to implement the relief necessary to address the federal violations, without having to briefly delay the August 7, 2007 election.<sup>14</sup>

Regarding the Defendants’ willingness to take corrective measures, as noted above in this memorandum, Brown has made it explicitly clear that regardless of this Court’s order, he will

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<sup>14</sup> Indeed, the United States is following Fifth Circuit precedent in requesting pre-election injunctive relief under these circumstances. In Toney v. White, 488 F.2d 310, 312 (5th Cir. 1973), the Fifth Circuit addressed “the question of what diligence in seeking pre-election judicial relief” is required. Id. at 314. The court held that “the law imposes the duty on parties having grievances based on discriminatory practices to bring the grievances forward for pre-election adjudication” and to do so in as timely a manner as possible. Id.; see also James v. Humphreys County Board of Election Commissioners, 384 F. Supp. 114, 126 (N.D. Miss. 1974) (finding that the plaintiffs’ failure to request pre-election relief was fatal to their claim since the plaintiffs “were surely aware of, or they could have easily have discovered” objectionable practices in question but had failed to do so until after the election due to a lack of diligence); McGill v. Ryals, 253 F. Supp. 374 (M.D. Ala. 1966) (denying a new election where relief had not been sought prior to the election); cf. Hadnott v. Amos, 394 U.S. 358 (1969) (ordering a new election and finding the district court was in error in failing to order pre-election relief); Hamer v. Campbell, 358 F.2d 215 (5th Cir. 1966), cert. denied, 385 U.S. 851 (1966) (finding the trial court erred in failing to grant pre-election relief where plaintiffs showed that the actions of the defendants would result in disenfranchising minority voters). In this case, the delay of the trial placed the United States in the unenviable position of waiting for this Court to make its liability finding and then receiving subsequent accounts of Brown openly declaring that he would continue conducting the elections as he had in previous elections, despite the Court’s ruling. Though the Court gave the parties thirty days to propose relief, the United States promptly filed its motion for injunctive relief in advance of the deadline. The United States has therefore responded with as much due diligence as was possible under these circumstances.

conduct the elections as he has in times past. Therefore, his express commitment to harm the public interest also weighs in favor of granting the temporary delay of the election.

#### ***5. Defendants' Actions Rendering the Judicial Process Futile***

The Fifth Circuit has held that the “most compelling reason in favor of granting a preliminary injunction is the need to prevent the judicial process from being rendered futile by defendant’s action or refusal to act.” Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974) (alterations omitted). Based upon the past behavior of the Defendants and Brown’s current assurances that he will continue to administer elections as he has done in the past, the United States asserts that without the implementation of the extraordinary remedies it has requested, the judicial process and this Court’s finding of liability will almost certainly be rendered ineffectual in the 2007 election cycle.

As noted above, this Court must consider whether “other corrective relief will be available at a later date, in the ordinary course of litigation” since “[o]nly when the threatened harm would impair the court’s ability to grant an effective remedy is there really a need for preliminary relief.” Boddie, 2001 WL 1523854, at \*2 (citing Chisom, 853 F.2d at 1189). The only corrective relief that will be available if Brown and the NDEC are allowed to conduct election activities in the same unlawful manner they did in 2003, as they are very likely already doing, is that this Court could void the August 7, 2007 Democratic Primary election results. The United States would argue, however, that the use of the post-election remedy of setting aside election results should be avoided if possible, and therefore requests that the Court briefly delay the upcoming primary election so that it will have sufficient time to appoint a referee-administrator to impartially supervise the election and implement the needed change in Noxubee County elections.

### **C. Conclusion**

The United States has more than adequately proven its case already, and the same Defendants who were found by this Court to have egregiously violated the law are still in place, openly committing to conducting the elections in the same way as they have in the past. The need for federal court intervention is evident, and the United States therefore requests that the Court appoint a referee-administrator to carry out almost all aspects of the Noxubee County Democratic Primary. Additionally, the United States requests that the Court enjoin Defendants Ike Brown and the Noxubee County Democratic Executive Committee, their agents, and all persons acting in concert with them, from seeking to hold or administer the August 7, 2007 Democratic Primary and August 28, 2007 runoff elections for county office. The United States also requests that the Court reschedule the primary election for the time of the general election, November 6, 2007, reschedule any necessary primary runoff election for November 27, 2007, and reschedule any necessary general election for December 11, 2007.

The evidence presented by the United States at trial indicated that most, if not all, of the activity in violation of the Voting Rights Act was committed in the context of an attempt to influence local elections. Therefore, rather than seeking to include statewide or multi-county elections in its proposed remedy, the United States' proposed remedies are tailored to address problems arising in Noxubee County elections, where the need for injunctive relief is most necessary to achieve racially fair elections.

The United States requests that the permanent relief requested in its motion, with the exception of the prohibitions against racial discrimination, extend through the period of the 2011 elections cycle so that the holding of two major local and statewide elections (2007 and 2011) will

be covered by this Order. This length of time is consistent with the practices of the Department of Justice and the Civil Rights Division which customarily seek relief, the duration of which is sufficiently lengthy to counter the effects of past acts of discrimination.

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