

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

DORIS POWELL,)	
)	
Plaintiff,)	
)	CIVIL ACTION NUMBER
v.)	
)	2:08-cv-01345-LSC
THE STATE OF ALABAMA, et al.,)	
)	
Defendants.)	

**THE STATE OF ALABAMA’S MOTION TO DISMISS
OR FOR JUDGMENT ON THE PLEADINGS**

The State of Alabama (“the State”), a Defendant in this action, pursuant to Rule 12 of the Federal Rules of Civil Procedure, respectfully moves this Court to dismiss Plaintiff’s claims on grounds that this Court lacks subject matter jurisdiction, the State is entitled to a judgment as a matter of law, and Plaintiff has failed to state a claim on which relief can be granted. In support of this Motion, the State sets forth as follows:

I. Introduction / Facts.

This is the second federal action filed with respect to a vacancy that occurred on the County Commission for Jefferson County, Alabama. In *Plump v. Riley*,

Case No. 2:07-cv-01014-MEF-CSC (M.D. Ala.), Supreme Court No. 07-1460 (pending), the plaintiff asked a three-judge court to declare that an appointment to the Commission made by Governor Bob Riley must be precleared pursuant to §5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c. The District Court declared that the appointment must be vacated if not precleared. *Plump v. Riley*, ___ F.Supp.2d ___, 2008 WL 192826 (M.D. Ala., Jan. 22, 2008). The State submitted the Governor’s appointment for preclearance by the United States Department of Justice (“DOJ”), and the Governor appealed the District Court’s judgment to the United States Supreme Court (both the appeal and the preclearance submission remain pending). The United States Supreme stayed the judgment of the District Court, and that stay remains in effect; accordingly, the Governor’s appointee remains in office.

The District Court in *Plump* properly avoided the question of whether the Governor’s appointment was valid as a matter of *Alabama* law. *Plump*, ___ F.Supp.2d ___, *3. Other litigants put that question before an Alabama state court. The Circuit Court ruled that Alabama law required that the vacancy be filled by special election, not gubernatorial appointment, and the Alabama Supreme Court reversed. *Working v. Jefferson County Election Comm’n*, ___ So. 2d ___, 2008 WL 2569255 (Ala., June 30, 2008).

During the course of an interlocutory appeal to the Alabama Supreme Court, the Court entered an order enjoining the Jefferson County Election Commission from canvassing the results of a special election that had been held to fill the vacancy in issue (the same vacancy that had already been filled by gubernatorial appointment). *See* Complaint, ¶ 14. The Alabama Supreme Court later ruled that, pursuant to Ala. Code §§11-3-1(b) and (f), the Governor's appointment was valid as a matter of Alabama law, the special election was *not* valid as a matter of Alabama law, and the appointee would serve until the November 2008 general election, not for the full unexpired term. *Working, supra*. On remand, the Circuit Court entered orders implementing the Alabama Supreme Court's opinion, making way for a November election. The next business day, the State submitted for preclearance the matters that are the subject of this case.

Plaintiff filed this action seeking an order enjoining the Defendants from enforcing the Alabama Supreme Court's injunction and Ala. Code §§11-3-1(b) and (f). As Plaintiff correctly alleges, though, those matters have already been submitted to DOJ for preclearance, and those submissions are pending. Complaint, ¶¶ 20-22. At this date, there is nothing more Defendants could possibly do to have the matters precleared. Consequently, there is no case or controversy, and therefore no jurisdiction.

II. Standard.

A judgment on the pleadings is appropriate when the plaintiff can prove no set of facts in support of her claim that would entitle her to relief. *Moore v. Liberty National Life Ins. Co.*, 267 F.3d 1209, 1213 (11th Cir. 2001). In considering a motion for judgment on the pleadings, a court accepts the allegations of the complaint as true. *Id.* Likewise, a motion to dismiss may be granted when the movant shows that the plaintiff can prove no set of facts that would entitle her to relief. *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.2d 1183, 1187 (11th Cir. 2004).

III. This Court Lacks Subject-Matter Jurisdiction.

“It is axiomatic that federal courts are courts of limited jurisdiction, and as such are under a continuing duty to satisfy themselves of their jurisdiction before proceeding to the merits of any case.” *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1275 n.22 (11th Cir. 2000), quoting *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1049 (3d Cir.1993). “Simply put, once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue.” *University of South Alabama v. American Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999). Thus, “[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” F.R.C.P. 12(h). “The court must, therefore, make an early independent

jurisdictional assessment and, if necessary, dismiss or remand – even *sua sponte* – any claims that fall outside of the court’s subject matter jurisdiction.” *Business Alliance for Responsible Development v. Storm*, 462 F.Supp.2d 1186, 1188 (N.D.Ala., 2006).

A. There is no “Case” or “Controversy” Before the Court.

This Court has jurisdiction only over “cases” or “controversies.” U.S. Const., Art. III §2. Furthermore, the Declaratory Judgment Act applies only when there is an “actual controversy” between the parties. 28 U.S.C. § 2201; *see also*, *Provident Life & Accident Insurance Co. v. Transamerica-Occidental Life Insurance Co.*, 850 F.2d 1489, 1491 (11th Cir. 1988) (dismissing for lack of jurisdiction where there was no “case or controversy” between the parties). The standard for determining whether an “actual controversy” exists under the Declaratory Judgment Act is the same as the standard for determining whether there is an actual case or controversy within the meaning of Article III. *Hendrix v. Poonai*, 662 F.2d 719, 721 (11th Cir. 1981).

A “case or controversy” is defined as follows:

The controversy must be definite and concrete, touching the legal relations of parties having *adverse legal interests*. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Provident Life, 850 F.2d at 1491, quoting *Aetna v. Haworth*, 300 U.S. 227, 240-41 (1937) (emphasis added). There is *not* a case or controversy in the following circumstances:

Courts have found the case or controversy requirement lacking when the plaintiff has no interest in the case, when the defendant has no interest in the case, ***when no conflict exists in the case, when there is no adverse claimant***, when there is no conflict in the case because of a defect in the parties and when there is no legal relationship between the parties.

Provident Life, 850 F.2d at 1491 (emphasis added), citing *Bochard, Declaratory Judgments* 30 n. 18. In short, there is no case or controversy “when the parties desire ‘precisely the same result.’” *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 383 (1980) (citation omitted).¹

The Plaintiff wants certain matters precleared, and the State has asked that they be precleared, as the Plaintiff admits in the Complaint.² DOJ may grant preclearance. If DOJ denies preclearance, and if State officials sought to enforce

¹ See also, *League of Women Voters of California v. F.C.C.*, 489 F.Supp. 517, 520 (C.D. Cal. 1980) (“Where it is clear that both sides desire the same result, the requisite adversariness is lacking and the action is not a case or controversy.”); *Board of Education v. Califano*, 479 F.Supp. 561 (S.D.N.Y. 1979) (dismissed for lack of jurisdiction where parties did not take opposing positions, noting that “there can be no conflict between the positions of [the parties] when [the defendant] has not taken a position”); *Stephenson v. Stephenson*, 249 F.2d 203, 205 (7th Cir. 1957) (in action to quiet title to a remainder interest in a trust, where none of the other parties had taken a position adverse to the plaintiff, the case could not meet the “case or controversy” requirement and was properly dismissed).

² Defendants do not necessarily agree that all the matters included in the various preclearance submissions in fact require preclearance under §5. That does not, however, give rise to a case or controversy, where the State, in spite of its views on the scope of §5, has requested preclearance and has not taken the position that State officials will enforce the applicable laws if preclearance is denied.

the laws after DOJ refused to preclear them, there might be a case or controversy *at that point*, but not now. *See Rabiee v. King*, Case No. 2-06-cv-1395-RDP (N.D. Ala.), Memorandum Opinion and Order (Doc. 44, Feb. 06, 2007) (dismissing for lack of subject matter jurisdiction when both plaintiff and defendant contended that the subject law did not require preclearance).³

Plaintiff says that he wants a three-judge court convened *just in case* DOJ does not grant preclearance by the date that the ballots of the November election are to be printed.⁴ Article III does not permit a court to take jurisdiction over a matter “just in case” a case or controversy will arise. There must be a real case or controversy at the time suit is filed, or the court never acquires jurisdiction.

³ Plaintiff implies that the State is already defying §5 by enforcing the Alabama Supreme Court’s injunction against canvassing the results of a special election. However, a matter cannot be submitted for preclearance before it becomes final. 28 C.F.R. §§ 51.21, 51.22(a). That order did not become final until after the June 30, 2008 opinion, when the Court issued its mandate. At that point, it made sense to see how the Circuit Court would implement the decision before seeking preclearance. The Circuit Court entered its order on Friday, July 25, 2008. The State submitted it for preclearance on the very next business day, Monday, July 28.

Moreover, as stated above, the special election was invalid as a matter of Alabama law, and the only order requiring the Governor’s appointee to vacate office has been stayed by the U.S. Supreme Court. If the results of the invalid election were canvassed while the State awaits preclearance, there would be two persons claiming the office of Commissioner.

⁴ Should this Court determine that it has jurisdiction, the State does not agree that an injunction should issue to stop the November election. The prudent course would be to let the election machinery go forward in the event preclearance is granted, not to stop it in case preclearance is *not* granted. What if this Court enjoined State officials from including the Commission election on the ballots, and then DOJ precleared the relevant laws after it was too late to print new ballots? The State would be precluded from holding an election required by Alabama law and allowed by federal law. Better to let the election go forward, and then if preclearance is denied, State officials can refuse to canvass the results of the election for that one office (or can be enjoined from doing so).

Plaintiff's claims are therefore due to be dismissed for lack of subject-matter jurisdiction.

B. Plaintiff's Claims Are Not Yet Ripe.

Another way to analyze the defect in Plaintiff's claims is through the doctrine of ripeness, which is also a matter of jurisdiction:

Article III of the Constitution limits the jurisdiction of the federal courts to actual cases or controversies and requires us to consider whether a plaintiff's claims are ripe. U.S. Const. Art. III, § 2, cl. 1; *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808, 123 S.Ct. 2026, 2030, 155 L.Ed.2d 1017 (2003) ("The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction"); *see also Konikov v. Orange County, Fla.*, 410 F.3d 1317, 1322 (11th Cir. 2005). The ripeness doctrine keeps federal courts from deciding cases prematurely. [*Digital Props., Inc. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir. 1997)]. It "protects federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes." *Id.*; *see also Konikov*, 410 F.3d at 1322 ("The purpose of this doctrine is to avoid entangling ourselves in abstract disagreements, and also to shield agencies from judicial interaction until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.") (alteration and internal quotation marks omitted). "Courts must resolve . . . whether the claim is sufficiently mature, and the issues sufficiently defined and concrete, to permit effective decision-making by the court." *Digital Props.*, 121 F.3d at 589 (internal quotation marks omitted).

To determine whether a claim is ripe we must evaluate: (1) "the fitness of the issues for judicial decision"; and (2) "the hardship to the parties of withholding court consideration." *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1315 (11th Cir. 2000) (internal quotation marks omitted). In applying the fitness and hardship prongs we must consider the following factors: "(1)

whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.” *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 733, 118 S.Ct. 1665, 1670, 140 L.Ed.2d 921 (1998); *see also Ala. Power Co. v. Fed. Energy Regulatory Comm’n*, 685 F.2d 1311, 1315 (11th Cir. 1982) (listing four similar factors).

Beulieu v. City of Alabaster, 454 F.3d 1219, 1227 (11th Cir. 2006), *cert. denied*, 127 S.Ct. 2040 (2007).

Plaintiff’s claims have not ripened because DOJ has not denied preclearance, and no one is trying to seat the winner of the November 2008 election for Commissioner *without* preclearance (obviously, the election has not yet been held.) Applying the “fitness” and “hardship” prongs discussed in the test above, there is no hardship to Plaintiff by “delayed review.” The worst that could happen is that an election is held that is not enforced. Judicial intervention would inappropriately interfere with further administrative action, because if this Court stays the election, but DOJ thereafter grants preclearance, local election officials will be unable to hold an election required by Alabama law and permitted by the Voting Rights Act. Furthermore, the Court would surely benefit from further factual development, to give DOJ time to rule on the preclearance submission.

Finally, the lack of ripeness is obvious on the face of the Complaint which requests an injunction that is stayed until some point in the future. See Complaint at Prayer for Relief, ¶ D. The Plaintiff picks September 14, 2008 as the date on

which she needs an injunction, thereby practically admitting that the litigation does not ripen until at least then, if it ever does. Of course, if preclearance is granted, Plaintiffs claims never become ripe, and in any event, even if the Plaintiff is entitled to relief, there is no need to stop the printing of ballots. But the very fact that Plaintiff does even want an injunction to take effect at this time shows that Plaintiff's claims are not ripe, and this Court therefore lacks jurisdiction.

IV. Conclusion.

For the reasons stated above, the State respectfully requests that this Court grant a judgment as a matter of law in favor of the State or dismiss Plaintiff's claims.⁵

Respectfully submitted,

TROY KING (KIN047)
ATTORNEY GENERAL

BY:

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⁵ It also appears that, even if the Plaintiff is entitled to relief, the relief would come not from the State, but from local elections officials (who have the authority to manage elections for county offices and to canvass and declare the results thereof). The State reserves the right to argue that the State is not a proper party to this action, even if this Court has jurisdiction.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of August, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following (or by U.S. Mail to the non CM/ECF participants):

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