Elections: Challenge to Past Election Results is Moot in the Absence of "Demonstrated Probability" that Improper Districting Will Be Repeated

Hancock County Board of Supervisors v. Ruhr, No.13-60614 (5th Cir. May 16, 2014).

The mere potential for repetition of a flawed vote due to districting inequities--as opposed to "demonstrated probability" of repetition--is insufficient to surmount a mootness challenge and overturn past election results, according to the Fifth Circuit.

This case, a subset of a much larger voting rights battle, is the second appeal challenging the dismissal of complaints asserting Fourteenth Amendment voting rights claims against various Mississippi officials. In February 2011, the U.S. Census Bureau released the results of the 2010 census, which suggested malapportionment in various Mississippi voting districts. Nine Mississippi counties were already in the middle of the qualification period for candidates for local office at that time. Although they began the process of redrawing the voting districts to rectify inequities, it became clear that they were not going to complete redistricting and obtain Justice Department Preclearance approval under the Voting Rights Act before the August and November 2011 elections.

The NAACP and others challenged the results of the elections, asserting a "one person, one vote" violation of the Fourteenth Amendment. The District Court dismissed for lack of standing or alternatively failure to state a claim. On appeal, the Fifth Circuit held that plaintiffs did have standing but remanded the case for a determination on mootness since the elections had long passed by then. The District Court again dismissed the case for mootness, which led to a second appeal to the Fifth Circuit.

HELD: The Fifth Circuit affirmed, holding the case was moot because the "capable of repetition, yet evading review" exception to the mootness doctrine did not apply.

DISCUSSION: Mootness is a threshold inquiry, utilized to ensure that litigants have standing throughout an action. Since the Mississippi elections in question had already taken place, and votes had already been cast according to the old voting districts, the only viable mootness argument for the plaintiffs was that the issue fell within the "capable of repetition, yet evading review" exception to the mootness doctrine. Under this doctrine, plaintiffs carried the burden of showing either a "'demonstrated probability' or a 'reasonable expectation,' that they will be subject to the same unlawful governmental action again." The NAACP argued that if the relief they sought was not granted, which would have invalidated elections under the then-current gerrymandering scheme, the same situation would be revealed in future census results and there would again be insufficient time to litigate the issue.

As the Circuit Court stated, invalidating an election is an exceedingly rare grant by a court--one that requires exceptional circumstances. Those circumstances did not exist here. There was no evidence that officials deliberately defied the Voting Rights Act; in fact, the Department of Justice preclearance approval process was the primary impediment to accomplishing the redistricting in time, not intransigence of the local officials being sued. Furthermore, the grounds for plaintiffs' action had been narrowed by the Supreme Court under *Shelby County v. Holder*,

570 U.S. ____, 133 S. Ct. 2612 (2013). As a result, plaintiffs could only demonstrate the potential for repetition, which did not suffice.

http://www.ca5.uscourts.gov/opinions/unpub/13/13-60614.0.pdf (last accessed May 28, 2014).

Evidence: Expert Testimony Cannot Be Excluded Merely Because the Methodology Utilized is Still Being Refined

City of Pomona v. SQM North America Corp., No. 12-55147 (9th Cir. May 2, 2014).

Where a lower court refused to admit an environmental expert's testimony on the grounds that the methodology used is still being refined among the scientific community, the Ninth Circuit has reversed, holding that so long as the methodology is at least supported by a minority of scientists the testimony should be heard by a jury.

The California Department of Public Health (CDPH) regulates contaminant levels, including perchlorate, in drinking water throughout the state. In 2007, Pomona found perchlorate levels in its public water supply above CDPH's limits. It took remedial steps, including shutting off some of its wells, purchasing water, and mixing well and non-well water. It also investigated the source of the pollutant. An outside expert determined that the perchlorate came from SQM North America's (SQM) importation of sodium nitrate fertilizer from Chile, which had started in 1927 and continued through the 1950s. The city sued SQM to recover the cost of remediation; SQM moved to exclude the expert testimony. The District Court granted the motion, deeming the opinion unreliable on the grounds that: "(1) the opinions were subject to future methodological revisions and not yet certified; (2) the procedures he used had not yet been tested and were not subject to retesting; and (3) the reference database used by [the expert] was too small."

HELD: The Ninth Circuit reversed the District Court's decision to exclude the expert, holding the Court abused its discretion by not allowing the jury to determine issues of fact that were contested, but admissible.

DISCUSSION: Rule 702 of the FRE states that expert opinion evidence is admissible if "(1) the witness is sufficiently qualified as an expert by knowledge, skill, experience, training, or education; (2) the scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (3) the testimony is based on sufficient facts or data; (4) the testimony is the product of reliable principles and methods; and (5) the expert has reliably applied the relevant principles and methods to the facts of the case." Under this scheme the trial court's role is to ensure the testimony is based on a reliable foundation and is relevant to the issue at hand. Ultimately, trial courts do not determine whether an expert is right or wrong, but whether the substance of the testimony would be helpful to the jury.

The District Court had found that the expert did not use a reliable procedure since it was not yet accepted in the scientific community and was still being refined and because the EPA has not yet certified the method of analysis used for the kind of compound at issue. The Circuit Court rejected this holding because a scientific method can be reliable and generally accepted while