

## Rushed Election to Fill a Vacancy

*Butler v. City of Columbia*

(*Cameron McGowan Currie, D.S.C. 3:10-cv-794*)

A member of the city council for Columbia, South Carolina, resigned on March 9, 2010.<sup>1</sup> The city decided to depart from its normal timetable and add an election for the vacancy to a city election scheduled for April 6.<sup>2</sup> The city was faced with a choice between (1) giving candidates and voters, respectively, enough time to file and register and (2) ensuring that residents of the unrepresented district were not unrepresented during budget deliberations.<sup>3</sup> South Carolina's supreme court approved inclusion of an election for the vacated office in the April 6 election.<sup>4</sup>

On March 30, a retired law professor filed a pro se federal complaint alleging that the rushing of the vacancy election had not been precleared pursuant to section 5 of the Voting Rights Act.<sup>5</sup> She and her co-plaintiffs sought a temporary restraining order<sup>6</sup> and a three-judge court to hear the complaint.<sup>7</sup>

The pro se plaintiff wished to proceed with three co-plaintiffs represented by counsel.<sup>8</sup> Because court rules require attorneys to file documents electronically and require pro se parties to file documents traditionally, the pro se plaintiff filed her complaint traditionally and sought to join the other plaintiffs with Notices of Joinder.<sup>9</sup>

The court assigned the case to Judge Cameron McGowan Currie,<sup>10</sup> who authorized the pro se plaintiff, an attorney licensed elsewhere, to appear pro hac vice without payment of fees and to receive service electronically but not to file electronically.<sup>11</sup>

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1. *Denman v. City of Columbia*, 387 S.C. 131, 691 S.E.2d 465, 466 (S.C. 2010); Opinion at 2, *Butler v. City of Columbia*, No. 3:10-cv-794 (D.S.C. Apr. 5, 2010), D.E. 38, available at 2010 WL 1372299; see Adam Beam, *Columbia Sets District 2 Vote for April 6*, Columbia State, Mar. 10, 2010.

2. *Denman*, 387 S.C. 131, 691 S.E.2d at 466; Opinion, *supra* note 1; see Beam, *supra* note 1.

3. See Adam Beam, *Judge Rules on Columbia Election*, Columbia State, Mar. 19, 2010.

4. *Denman*, 387 S.C. 131, 691 S.E.2d 465; see Adam Beam, *Supreme Court Sets April 6 Election Day*, Columbia State, Mar. 24, 2010.

5. Complaint, *Butler*, No. 3:10-cv-794 (D.S.C. Mar. 30, 2010), D.E. 1; see Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, as amended, 42 U.S.C. § 1973c (2012) (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge court); see Adam Beam, *District 2 Election Back in Court*, Columbia State, Mar. 31, 2010; Adam Beam, *Law Prof Asks Judge to Halt Columbia Election*, Columbia State, Mar. 30, 2010.

6. Temporary Restraining Order Motion, *Butler*, No. 3:10-cv-794 (D.S.C. Mar. 30, 2010), D.E. 15.

7. Motion, *Butler*, No. 3:10-cv-794 (D.S.C. Mar. 30, 2010), D.E. 5.

8. Notices of Joinder, *id.* (Mar. 30, 2010), D.E. 4 & 13.

9. *Id.*; see D.S.C. ECF Policies and Procedures ¶¶ 2.1, 3.3 (May 12, 2006).

10. Tim Reagan interviewed Judge Currie for this report by telephone on September 6, 2012.

11. Docket Sheet, *Butler*, No. 3:10-cv-794 (D.S.C. Mar. 30, 2010) (specifying these decisions were not intended as precedents for future cases).

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On the following day, a voter moved to intervene in support of the defendant; he had prevailed in the state court lawsuit.<sup>12</sup> The circuit's chief judge named a three-judge panel,<sup>13</sup> but amended the panel's composition on the next day because of a schedule conflict.<sup>14</sup>

In matters before a three-judge court, the original judge may issue interim orders.<sup>15</sup> At a proceeding on Wednesday, March 31, Judge Currie granted joinder and intervention, deferred ruling on the temporary restraining order until Monday, and ordered the city to advise the Justice Department of the action.<sup>16</sup>

On Friday, after consultation with the other judges on the panel and with the consent of the parties, Judge Currie converted the motion for a temporary restraining order to a motion for a preliminary injunction, which the full panel would hear on Monday.<sup>17</sup>

The job of a section 5 three-judge court was clarified by the Supreme Court in *Lopez v. Monterey County*: determine (1) whether section 5 covers a contested change, (2) whether section 5's approval requirements were satisfied, and (3) if the requirements were not satisfied, what temporary remedy, if any, is appropriate.<sup>18</sup> After Monday's evidentiary hearing, the court enjoined the inclusion of the election for the unexpired city council seat in the scheduled city election, pending preclearance.<sup>19</sup>

A special election was held on July 13 following previously precleared procedures.<sup>20</sup> A runoff election was held on July 27.<sup>21</sup>

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance.<sup>22</sup>

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12. Intervention Motion, *id.* (Mar. 31, 2010), D.E. 19.

13. Order, *id.* (Mar. 31, 2010), D.E. 25.

14. Order, *id.* (Apr. 1, 2010), D.E. 29.

When there is time, it is Judge Currie's practice to have her law clerks prepare a bench memorandum for the other two judges on the panel. Interview with Hon. Cameron McGowan Currie, Sept. 6, 2012.

15. 28 U.S.C. § 2284(b)(3) (2012).

16. Docket Sheet, *supra* note 11; see Adam Beam, *Judge to Rule Monday if Election Can Proceed Tuesday*, Columbia State, Apr. 1, 2010.

17. Order, *Butler*, No. 3:10-cv-794 (D.S.C. Apr. 2, 2010), D.E. 33.

Judge Currie advises other judges to seek a complete and accurate record of previous relevant preclearances. Interview with Hon. Cameron McGowan Currie, Sept. 6, 2012.

18. 519 U.S. 9, 23 (1996).

19. Opinion, *supra* note 1; see Adam Beam, *Court: No District 2 Election Without Federal OK*, Columbia State, Apr. 5, 2010.

20. See Adam Beam, *District 2 Election Will Be July 13*, Columbia State, Apr. 7, 2010.

21. See Adam Beam, *Newman Tops Howard in District 2 Race*, Columbia State, July 28, 2010.

22. *Shelby Cnty. v. Holder*, 570 U.S. \_\_\_, 133 S. Ct. 2612 (2013); see Robert Barnes, *Court Blocks Key Part of Voting Rights Act*, Wash. Post, June 26, 2013, at A1; Adam Liptak, *Justices Void Oversight of States, Issue at Heart of Voting Rights Act*, N.Y. Times, June 26, 2013, at A1.