No. 19-60133

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOSEPH THOMAS; VERNON AYERS; MELVIN LAWSON,

Plaintiffs – Appellees

v.

PHIL BRYANT, Governor of the State of Mississippi, all in the official capacities of their own offices and in their official capacities as members of the State Board of Election Commissioners; DELBERT HOSEMANN, Secretary of State of the State of Mississippi, all in the official capacities of their own offices and in their official capacities as members of the State Board of Election Commissioners,

Defendants – Appellants

On Appeal from the United States District Court for the Southern District of Mississippi; USDC No. 3:18-cv-00441-CWR-FKB

BRIEF FOR THE APPELLANTS GOVERNOR PHIL BRYANT AND SECRETARY OF STATE DELBERT HOSEMANN

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Appellants Governor Phil Bryant and Secretary of State Delbert Hosemann certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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I hereby certify that to the best of my knowledge and belief, these are the only persons having an interest in the outcome of this appeal.

s/ Tommie S. Cardin
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STATEMENT REGARDING ORAL ARGUMENT

This appeal presents important legal issues of first impression that will have a significant impact on both Mississippi's November 2019 state-wide legislative elections, as well as future litigation challenging reapportionment following the 2020 Census. Specifically, oral argument will assist the Court in its review of precedent from outside of this Circuit interpreting the jurisdictional requirement of convening a three-judge court pursuant to 28 U.S.C. § 2284(a) to resolve challenges to state legislative districts, and the limitations on the use of Section 2 of the Voting Rights Act to challenge a single, majority-minority legislative district. Further, oral argument will assist the Court in its review of the evidentiary record required to resolve the application of the laches defense to this case, as well as to evaluate the district court's factual finding of a Section 2 violation. Such record evidence covers a span of more than seven years—beginning in 2012 when the Mississippi legislature drew the challenged district, through the single election held in the challenged district in 2015, and culminating in the trial held in February 2019. Accordingly, appellants believe the adjudicative process will be aided by oral argument and respectfully request the same.

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JURISDICTIONAL STATEMENT

On February 26, 2019, the district court entered an order altering the boundaries of Mississippi Senate District 22 ("SD22") and District 23, and extending the candidate qualifying deadline for the affected districts. ROA.474, RE 6. Minutes later, the district court issued a final judgment, resolving all claims and defenses in the case. ROA.481, RE 7. On February 27, 2019, defendants-appellants filed their Notice of Appeal. ROA.484, RE 2.

Plaintiffs-Appellees, three registered voters residing in SD22, allege subject matter jurisdiction under 22 U.S.C. §§ 1331 and 1343(a), ROA.67, ¶9, RE 8. Although the district court erred by exercising jurisdiction over this legislative redistricting case without convening the three-judge court required by 28 U.S.C. § 2284(a), under 28 U.S.C. § 1292(a)(l), this Court may review even an erroneous exercise of jurisdiction. *League of United Latin American Citizens v. Texas*, 113 F.3d 53 (5th Cir. 1997).

STATEMENT OF THE ISSUES

1. Whether 28 U.S.C. § 2284(a) is jurisdictional and mandates that an action challenging the apportionment of a state legislative district under the Voting Rights Act must be heard by a three-judge court?

2. Whether the doctrine of laches should apply to require that any challenge to state legislative district under the Voting Rights Act be barred when (a) it is brought too late to allow an orderly process of judicial review and legislative response, and (b) there was reason to know of the cause of action in time to file a suit to which such a review and response would have been possible?

3. Whether a single majority-minority district is subject to challenge under § 2 of the Voting Rights Act?

4. Whether the district court erred as a matter of law by imposing a remedy without (a) affording to the legislature a reasonable opportunity to act, and (b) conducting a remedial hearing and making specific findings of fact?

STATEMENT OF THE CASE

Facts

In 2002, following the 2000 Census, the Mississippi legislature established the boundaries of each of Mississippi's fifty-two Senate Districts. SD22 included all or part of five Mississippi counties with a Black Voting Age Population ("BVAP") of 49.8%. ROA.1526 (D-4). In 2012, following the 2010 Census, the Mississippi legislature adopted Joint Resolution No. 201 ("J.R. 201") redrawing the boundaries of SD22 to increase the BVAP to 50.77% and expanding it to all or part of six Mississippi counties. ROA.1572, 1579 (D-5); ROA.1599 (D-11). On September 14, 2012, the United States Department of Justice ("DOJ") precleared J.R. 201 over objections from one of the plaintiffs-appellees, Joseph Thomas. ROA.1595 (D-10); ROA.1690 (D-16).

In 2015, in the only election ever held utilizing the challenged boundaries of SD22, the white Republican incumbent, Eugene Clarke, Chairman of the Senate Appropriations Committee, defeated Thomas, a black Democrat who previously served in the Mississippi Senate.[1] ROA.372. Instead of bringing suit in 2012 when the plan was adopted and precleared by DOJ or after the 2015 election, Thomas, along with two other plaintiffs, Lawson and Ayers, who reside in SD22 and are

[1] Thomas lost his Senate seat in the August 2007 Democratic primary election for SD22 under the 2002 districting plan. ROA.795, RE 9.

long-time registered voters, waited almost three additional years to commence this action.

The next cycle of statewide elections, which includes SD22, occurs in 2019. Specifically, the candidate qualifying period started on January 2, and ended on March 1, 2019. Miss. Code Ann. § 23-15-299 (2019). Beginning January 2, candidates could qualify to run for state senate seats based on district boundaries which had been in effect since September 14, 2012 by paying the requisite filing fee. Miss. Code Ann. § 23-25-297 (2019). After the qualifying deadline ended, the work began for providing qualified candidates to be placed on the primary ballots. On June 7, 2019, absentee ballot applications must be available in the Circuit Clerk's office of each county. Miss. Code Ann. § 23-15-625 (2019). The deadline for printing the sample primary ballot in the Statewide Election Management System is June 17, 2019. Miss. Code Ann. § 23-15-331 (2019). The first primary is August 6, 2019, followed by the general election on November 5.

The Mississippi Constitution requires legislative redistricting every ten (10) years. MISS. CONST. art. 13, § 254 (1890). The next cycle of legislative redistricting will occur following the 2020 Census, no later than 2022, before the next cycle of statewide elections. *See Miss. State Conf. NAACP v. Barbour*, 2011 WL 1870222 (S.D. Miss. 2011).

Course of Proceedings

On July 9, 2018, plaintiffs-appellees Thomas, Lawson and Ayers ("plaintiffs") filed suit alleging that the boundaries of SD22 violate § 2(b) of the Voting Rights Act, 52 U.S.C. § 10301(b). ROA.20. On July 25, 2018, plaintiffs filed their First Amended Complaint. ROA.65, RE 8. Although plaintiffs sought expedited consideration on August 30, 2018, ROA.114, to which all defendants promptly objected, ROA.157, the district court did not grant the motion until November 16, 2018. ROA.201. The district court set a trial date of February 6, 2019 with a compressed period of time for discovery. This schedule was against the backdrop of a candidate qualifying period starting January 2, 2019 and running until March 1, 2019, and a legislative session beginning January 8, 2019 and concluding on March 29, 2019.

After a two-day trial ending on February 7, 2019, the district court issued an order on February 13, 2019, which held that SD22 violated Section 2 of the Voting Rights Act for reasons that would be explained later and invited the Mississippi legislature to consider a political solution. ROA.355, RE 4. On February 16, 2019, the district court issued its memorandum opinion and order finding liability and rejecting defendants' affirmative defense of laches.[2] ROA.357, RE 5. On February

[2] In response, Governor Bryant and Secretary Hosemann filed a first notice of appeal to this Court (ROA.389) and a first motion to stay with the district court (ROA.391). The district court

25, 2019, the district court notified the parties that that it wanted the Mississippi legislature, a nonparty to the action, to respond by noon on February 26, 2019 regarding the status of redrawing SD22. ROA.457. Prior to the deadline, appellants advised the district court that the Mississippi legislature desired the opportunity to enact a new redistricting plan for SD22 should the stay motions then pending before the district court and this Court be denied. ROA.469-70. Appellants also asserted their right to be heard on any remedy the district court may order. *Id.*

However, less than three hours later on February 26, 2019, without either providing to the Mississippi legislature a reasonable opportunity to act or affording to appellants their requested right to be heard, the district court imposed a judicial remedy. ROA.473, RE 6. Specifically, the district court ordered into effect a plan that plaintiffs had introduced at trial, ROA.1281 (P-6), and extended to March 15, 2019, the qualifying deadline for the two districts affected. ROA.473, RE 6. Minutes later, the district court entered final judgment. ROA.481, RE 7.

On February 27, 2019, Governor Bryant and Secretary Hosemann filed a notice of appeal from the final judgment and promptly moved again for a stay in the district court. ROA.484, RE 2; ROA.490. On March 6, 2019, the district court denied the stay request. ROA.550. Appellants then sought a stay once more in this

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denied this first motion to stay prior to the final judgment being rendered (ROA.474) and this Court held that it lacked jurisdiction to consider the first appeal as the issues were rendered moot once final judgment issued (ROA.501).

Court. On March 15, 2019, a divided panel of this Court granted in part and denied in part the stay motion on the grounds that the district court did not afford the legislature an opportunity to fashion a remedy for the Section 2 violation. *Thomas v. Bryant*, 919 F.3d 298 (5th Cir. 2019). The panel enforced the stay for this purpose until April 3rd and extended the qualifying deadline for candidates in any affected districts until April 12th. *Id*. at 316.

In response, on March 27, 2019, the Mississippi legislature adopted a plan redrawing SD22 and affecting only one other district, District 13. The legislation adopting the plan states that it shall stand repealed and the plan adopted by the legislature in 2012 shall be effective if appellants are successful in their appeal.

SUMMARY OF ARGUMENT

This is an action, pursuant to § 2 of the Voting Rights Act, challenging the boundaries of SD22--a majority-minority district.

First, 28 U.S.C. § 2284(a) is jurisdictional and by its plain and unambiguous language mandates that a three-judge court shall be convened to hear all challenges to the apportionment of any statewide legislative body. The district court, disregarding the text of the statute and misapplying the series-qualifier and surplusage cannons of construction, misconstrued the statute and erroneously denied appellants' motion to convene a three-judge court. Moreover, even if any ambiguity exists in the statute, the legislative history demonstrates that Congress intended for three-judge courts to hear all challenges to the apportionment of state legislative bodies. Thus, the district court lacked jurisdiction to hear this case, and its final judgment must be vacated.

Second, plaintiffs' § 2 claim is barred by laches due to their inexcusable delay in asserting their claim, coupled with the resulting prejudice. There is no dispute that the doctrine of laches applies to proceedings under the Voting Rights Act. Plaintiffs commenced this action nearly six years after the DOJ precleared the challenged district over plaintiff Thomas' objection, and nearly three years after the only election in the challenged district was completed—an election in which plaintiff Thomas was defeated. As a result of this inexcusable delay, the trial in

this matter was not held until the middle of the 2019 candidate qualifying period causing great prejudice to local election officials, voters and candidates in the affected districts. Further, defendants suffered prejudice as a result of having to conduct discovery and try this case in an abbreviated time frame, and the Mississippi legislature is now forced to redraw the challenged district twice within a period of a few years. In erroneously rejecting the laches defense, the district court failed to apply the correct legal standard in measuring delay and failed to consider the substantial prejudice resulting from plaintiffs' inexcusable delay.

Third, the district court erred by finding that the boundaries of SD 22 violate § 2 of the Voting Rights Act. No court has ever held, as a matter of law, that a single majority-minority district violates § 2. Further, plaintiffs failed to offer any evidence of either discriminatory intent, or the manipulation of district lines to fragment minority voters. Finally, plaintiffs failed to offer sufficient evidence to meet their burden to establish that white bloc voting in SD22 enables it to defeat the minority's preferred candidate. In fact, the evidence offered at trial establishes that blacks in Mississippi participate in the political process at a greater percentage than whites. Thus, plaintiffs' § 2 challenge to this majority-minority district fails and should be dismissed.

Fourth, the district court erred by imposing a remedy without affording to the Mississippi legislature a reasonable opportunity to act and without conducting a

remedial hearing and making specific findings of fact. Despite acknowledging clear precedent establishing that the legislature is entitled to the first opportunity to redraw SD22, on February 26, 2019, the district court entered an order imposing its plan just hours after being advised by appellants that the Mississippi legislature desired an opportunity to act. Further, the district court imposed its remedy without providing appellants an opportunity to be heard and without making any findings that the plan it adopted complies with traditional redistricting principles applied by the Mississippi legislature. Finally, the court-imposed plan has the effect of diluting minority voting strength in a neighboring Senate District in order to pack minority voters in SD22, and eliminated plaintiff Thomas' opposition in SD22. Such unprecedented judicial interference in the legislative districting process mandates that district court's February 26, 2019 order and final judgment incorporating that order be vacated.

ARGUMENT

Standard of Review

"Issues of subject matter jurisdiction are questions of law reviewed *de novo.*" *Pershing, L.L.C. v. Kiebach*, 819 F.3d 179, 181 (5th Cir. 2016) (citing *Am. Rice, Inc. v. Producers Rice Mill, Inc.*, 518 F.3d 321, 327 (5th Cir. 2008)).

"This court reviews *de novo* the legal standards the district court applied to determine whether Section 2 has been violated." *Sensley v Albritton*, 385 F.3d 591, 595 (5th Cir. 2004) (citing *N.A.A.C.P. v. Fordice*, 252 F.3d 361, 364 (5th Cir. 2001)). "However, because Section 2 vote dilution disputes are determinations 'peculiarly dependent upon the facts of each case that require an intensely local appraisal of the design and impact of the contested electoral mechanisms,' we review the district court's findings on the *Gingles* threshold requirements and its ultimate findings on vote dilution for clear error." *Id.* (quoting *Thornburg v. Gingles*, 478 U.S. 30, 79, (1986)) (quotations removed). In applying such a standard of review, the Court "preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law." *Sensley*, 385 F.3d at 595 (quoting *Gingles*, 478 U.S. at 79).

I. The district court lacked jurisdiction as a result of its failure to convene a three-judge court pursuant to 28 U.S.C. § 2284(a).

A. The plain and unambiguous language of 28 U.S.C. § 2284(a) mandates that a three-judge court shall be convened to hear challenges to the apportionment of any statewide legislative body.

"The task of statutory interpretation begins and, if possible, ends with the language of the statute." *United States v. Lauderdale Cty., Mississippi*, 914 F.3d 960, 964 (5th Cir. 2019). Section 2284(a) states:

> A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

It cannot be reasonably disputed that Section 2284(a) is jurisdictional. *See Kalson v. Patterson*, 542 F.3d 281, 287 (2nd Cir. 2008) (stating "28 U.S.C. § 2284 is jurisdictional . . ."); *Armour v. Ohio*, 925 F.2d 987, 988-89 (6th Cir. 1991) (*en banc*) (reversing the judgment of the district court and remanding the case "with instructions to follow the procedures set out for convening a three-judge district court"); *LULAC of Texas v. Texas*, 318 F. App'x 261, 264 (5th Cir. 2009) (*per curiam*) ("We agree with our sister circuits that the term 'shall' in § 2284 is mandatory and jurisdictional.").

Further, this lawsuit indisputably is an action challenging the apportionment of a statewide legislative body. Specifically, it's a statutory (not constitutional) action, pursuant to § 2 of the Voting Rights Act, challenging the boundaries of

SD22. The plain text of Section 2284(a) requires a three-judge panel "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284(a) (emphasis added). Thus, "[t]he only question is whether the 'constitutional' modifier in § 2284(a) applies to the second phrase in the sentence," or the determiner "the" at the beginning of the second phrase cuts off the application of the modifier. *Thomas*, 919 F.3d at 322 (Clement, J., dissenting).

In resolving this question of statutory construction, the district court misapplied the "series-qualifier" canon explained by the late Justice Antonin Scalia and Bryan Garner in their book, "Reading Law." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 147-148 (2012). Scalia and Garner explain that "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." *Id.* at 147. Significantly, they go further and explain that such a modifier does not apply to the series when a "determiner (a, the, some, etc.) will be repeated before the second element . . ." *Id.* at 148 (emphasis added).

That is precisely the grammatical structure of § 2284(a): a determiner, "the," is repeated before the second phrase "apportionment of any statewide legislative body," cutting off the modifier "constitutionality." *See Thomas*, 919 F.3d at 322

(Clement, J., dissenting) ("The detainer 'the' (or the determining phrase 'the apportionment') cuts off the continued application of the word 'constitutionality' to the second phrase."). Employing the series-qualifier canon of construction properly results in an interpretation of the plain language of the statute requiring a three-judge court to hear challenges to the apportionment of any statewide legislative body.

Moreover, the district court properly acknowledged that its [mis]reading of § 2284(a) renders the second use of the phrase "apportionment of" in the statute superfluous. ROA.334, RE 3. The district court quoted Scalia's and Garner's warning that "a clever interpreter could create unforeseen meanings or legal effects from this stylistic mannerism." *Scalia & Garner* at 177. Here, however, it is the district court's disregard for a second canon of construction, the surplusage canon, that creates the unforeseen meaning. The district court should have heeded the authors' warning that disregard of the second use of "the apportionment of" "should be regarded as the exception rather than the rule." *Id*. at 178. The effect of the district court's [mis]reading of the statute is to render unnecessary and superfluous the second use of the phrase "the apportionment of" in contravention of the surplusage cannon. *See Obduskey v. McCarthy*, 139 S.Ct. 1029 (2019) (quoting *Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 299, n. 1 (2006)) (stating courts "generally presum[e] that statutes do not contain

surplusage"). Thus, applying the surplusage canon to give effect to the second use of the phrase "the apportionment of" also compels the reading that a three-judge court should be convened to adjudicate any action "challenging . . . the apportionment of any statewide legislative body."

Finally, if Congress had intended to limit the jurisdictional requirement of a three-judge court to only constitutional challenges to the apportionment of statewide legislative bodies, there would have been much clearer ways to do so. In her dissent to the panel denial of appellants' Motion to Stay, Judge Clement provided three such examples:

- A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or [~~the apportionment~~] of any statewide legislative body.
- A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of [either] the apportionment of congressional districts or the apportionment of any statewide legislative body.
- A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of

> congressional districts or [of] the apportionment of any statewide legislative body.

See Thomas, 919 F.3d at 322-32 (Clement, J., dissenting). No such limitation is supported by the plain text of the statute. Thus, because the plain text of § 2284(a) is unambiguous, the Court's "inquiry begins and ends with the text." *Asadi v. G.E. Energy*, 720 F.3d 620, 622 (5th Cir. 2013) (quoting *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004)). Accordingly, the district court lacked jurisdiction as a result of its failure to convene a three-judge court, and its final judgment should be vacated and the case remanded for a new trial before a three-judge court.

B. The legislative history demonstrates that Congress intended three-judge courts to hear all challenges to the apportionment of state legislative bodies.

Additionally, without conceding any ambiguity in the language of § 2284(a), the legislative history fully supports appellants' interpretation of the statute. On June 20, 1975, the United States Senate adopted a bill preserving the jurisdiction of three-judge courts to hear all challenges to the apportionment of state legislative bodies. On August 2, 1976, the House adopted the Senate bill. The report of the Senate Judiciary Committee, issued two days before the Senate's consideration of the bill, makes it clear that its provisions apply to all apportionment challenges, at either the State or federal level. S. Rep. 94-204, 94th Cong., 2nd Sess. 1976, 1976 U.S.C.C.A.N. 1988, 1975 WL 12516.

On its very first page, in a section entitled "PURPOSE OF BILL," the Committee explained that "three-judge courts would be retained . . . in any case involving congressional reapportionment or the reapportionment of any statewide legislative body." Report at 1, 1976 U.S.C.C.A.N. at 1988. In further explanation, the Committee declared:

> The bill preserves three-judge courts for cases involving congressional reapportionment or the reapportionment of a statewide legislative body because it is the judgment of the committee that these issues are of such importance that they ought to be heard by a three-judge court and, in any event, they have never constituted a large number of cases.

Report at 9, 1976 U.S.C.C.A.N. at 1996. Explaining the meaning of "any statewide legislative body", the Committee said, "Where such a body exercises its powers over the entire State, this section requires that three judges hear cases challenging apportionment of its membership." *Id.*

It is hardly surprising that the Report made no exceptions for statutory challenges to the apportionment of legislatures, because it understood that the very few available statutory challenges also required three-judge courts. The Committee said, "Three-judge courts would continue to be required ... in cases under the Voting Rights Act of 1965, 42 U.S.C. section 1971g, 1973(a), 1973c and 1973h(c)." *Id.* Of course, § 1973(a) is § 2(a) of the Voting Rights Act, the statutory

basis for plaintiffs' claims in this case. ROA.65, ¶ l, RE 8.[3] The Committee plainly declared its belief that all actions under § 2 required three-judge courts, and the Committee indicated the same understanding six years later when it amended § 2:

> Finally, the Committee reiterates the existence of the private right of action under Section 2, as has been clearly intended by Congress since 1965. See *Allen v. Board of Elections*, 393 U.S. 544 (1969).

S. Rep. No. 97-417, 97th Cong. 2nd Sess. 1982 at 30, 1982 U.S.C.C.A.N. 177, 1982 WL 25033. *Allen*, of course, required the convening of a three-judge court for proceedings under § 5, now codified as 52 U.S.C. § 10304, and the Committee indicated its expectation of the same result under § 2.

Whether or not Congress in 1976 and 1982 correctly anticipated the procedures to be employed in the enforcement of § 2, it gave no indication that any statute could be invoked against the apportionment of a statewide legislative body without convening a three-judge court. The 1976 Report acknowledged the importance of that protection to the Attorney General of Mississippi, who "suggested that three-judge courts should be retained because a court of three judges signifies the seriousness of the case and issues the strain between the States and the Federal Government." S. Rep. 94-204 at 10, 1976 U.S.C.C.A.N. at 1997. The Congress that adopted § 2284(a) in 1976 clearly had no intention that a suit

[3] The Voting Rights Act has recently been recodified. The language formerly codified as § 1973(a) now appears as 52 U.S.C. § 10301(a).

"challenging ... the apportionment of any statewide legislative body" could be considered by anything other than a three-judge court.

Because, until recently, complaints have always combined constitutional and statutory challenges to statewide legislative apportionments, there are no cases squarely addressing the issue which plaintiffs have concocted here. However, in *Page v. Bartels,* 248 F.3d 175 (3d Cir. 2001), the Third Circuit considered the related question of whether a § 2 claim could be resolved by a single judge, while reserving the constitutional claims for a three-judge court. Prior decisions had plainly recognized the power of a single judge to resolve statutory claims without convening a three-judge court to hear constitutional claims. *Id.* at 188-89 (citing *Hagans v. Lavine,* 415 U.S. 528 (1974)). The Third Circuit, however, held that such a distinction could not be drawn between a § 2 challenge and a constitutional challenge. Reading the same legislative history available to this Court, the Third Circuit concluded "that Congress was concerned less with the *source* of the law on which an apportionment challenge was based that on the unique importance of apportionment cases generally." 248 F.3d at 190 (emphasis in original). The Third Circuit "conclude[d] that because statutory Voting Rights Act challenges to statewide legislative apportionment are generally inextricably intertwined with

constitutional challenges to such apportionment, those claims should be considered an 'action' within the meaning of § 2284(a)." *Id.*[4]

Here, plaintiffs have sought to extricate a § 2 claim from its inextricable intertwining with the Constitution. While *Page* did not address such a complaint, its "reasoning" compels the same result. *Thomas*, 919 F.3d at 324, n. 4 (Clement, J., dissenting). Artful pleading should not be allowed to deprive a legislature of the respect for its apportionment statute which Congress plainly intended to afford it in 1976.

Indeed, plaintiffs' attempt to unmoor § 2 from the Constitution itself raises profound constitutional problems. The Fifth Circuit recognized that the 1982 amendment to § 2 purported to reach legislation that is not unconstitutional in itself; such a reach is permissible only for the purpose of providing a remedy for past unconstitutional actions. *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984). "[W]e perceive § 2 as merely prescribing a potion to remove vestiges of

[4] *Page* had not yet been decided when the Sixth Circuit decided *Rural West Tenn. African-American Affairs Council* v. *Sundquist*, 209 F.3d 835 (6th Cir. 2000), so its reasoning was not available for consideration. In the Tennessee litigation, separate suits challenging the apportionment of the House and Senate had been combined for consideration by a three-judge district court. *Id.* at 237. The Supreme Court had twice considered direct appeals, finally affirming denial of relief on the apportionment of the Senate. After that defeat, plaintiffs amended their remaining complaint "to challenge the House Plan on the sole ground that it violated § 2 of the Voting Rights Act. Because the amended complaint contained no constitutional claims the three-judge court disbanded itself." *Id.* at 838. The Sixth Circuit opinion did not address the propriety of that decision, nor did it explain its decision to accept jurisdiction of the appeal. Whether or not that unexplained jurisdictional result is binding in the Sixth Circuit, the careful explanation by the Third Circuit in *Page* should be considered more persuasive here.

past official discrimination and to ward off such discrimination in the future. Congress has not expanded the Constitution's substantive guarantees, but simply redefined and strengthened the statutory protections around core constitutional values, thus exercising its authority within the confines of the Constitution." *Id.* at 374, n.6 (quoting *Major v. Treen*, 574 F. Supp. 325, 347 (E.D. La. 1983)).

Moreover, plaintiffs' amended complaint is replete with allegations of prior unconstitutional behavior. "The lack of opportunity is the result of white bloc voting and lower African-American turnout that are vestiges of the historical discrimination and extreme socio-economic disparities that have been inflicted on African-Americans over a long period of time." ROA.65, ¶ 15, RE 8. "There is a lengthy and documented history of voter discrimination against African-Americans in Mississippi." ROA.65, ¶ 31, RE 8. "The history of discrimination and these socioeconomic disparities have hindered their ability to participate in the political process ROA.65, ¶ 32, RE 8. Further, over the objection of defendants, ROA.718-721, RE 9, evidence was admitted at trial regarding past unconstitutional behavior of the State, including the testimony of plaintiffs' expert the Honorable Fred L. Banks, Jr.:

> There is a lengthy and documented history of voter discrimination against African-Americans in Mississippi, the state which has always had the highest percentage of black citizens in our nation, since the civil war. This was then recognized by a number of federal court decisions, including those cited in the complaint in this case.

ROA.1290, ¶ 2 (P-9). Thus, plaintiffs alleged and offered evidence at trial that the 2012 redistricting statute had an unconstitutional basis.

In short, the legislative history fully supports appellants' construction of the unambiguous text of § 2284(a). Plaintiffs' attempt to divorce the Voting Rights Act from the Constitution contravenes the language and the intent of Congress in both 1976 and 1982, as well as the allegations of unconstitutional conduct pled in their amended complaint and supporting evidence offered at trial. Congress clearly expressed its intent that a three-judge court should be invoked in all challenges to the apportionment of state legislatures. The statute can be so read, and it should be so enforced.

II. Relief is barred by laches due to plaintiffs' inexcusable delay in asserting their § 2 claim and resulting prejudice.

The doctrine of laches applies "when plaintiffs (1) delay in asserting a right or claim; (2) the delay was not excusable; and (3) there was undue prejudice to the party against whom the claim was asserted." *Tucker v. Hosemann,* 2010 WL 4384223 at *4 (N.D. Miss. Oct. 28, 2010) (citing *Save Our Wetlands, Inc. v. U.S. Army Corps of Engineers,* 549 F. 2d 1021, 1026 (5th Cir. 1977)). There does not appear to be any dispute in the appellate courts that the doctrine of laches may apply to a proceeding under the Voting Rights Act. The Fourth Circuit squarely so held in *White v. Daniel,* 909 F.2d 99 (4th Cir. 1990), when it found the district court had abused its discretion by denying a motion to dismiss based on laches.

And, long ago the Supreme Court recognized the propriety of equitable considerations in a voting rights case. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964); *see also Arizona Minority Coalition for Fair Redistricting v. Arizona Indys. Redistricting Comm'n*, 366 F. Supp. 2d 887, 908 (D. Ariz. 2005) ("The defense [of laches] applies to redistricting cases as it does to any other"). And, any notion that laches is unavailable as a defense in the reapportionment context due to the ongoing violation theory "is contrary to well settled reapportionment and laches case law." *Fouts v. Harris,* 88 F.Supp.2d 1352, 1354 **(**S.D. Fla. 1999), *aff'd*, 529 U.S. 1084 (2000); s*ee also Arizona Minority Coalition for Fair Redistricting*, 366 F. Supp. 2d 887; *Maxwell v. Foster,* 1999 WL 33507675 (W.D. La. Nov. 24, 1999); *Lopez v. Hale County, Texas*, 797 F. Supp. 547 (N.D. Texas 1992) (Smith, J. for three-judge court), *aff'd*, 506 U.S. 1042 (1993).

The standard of review is abuse of discretion, but there is ample evidence of abuse here. In this case the district court both abused its discretion and made a clear error of judgment, *Wildman v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5th Cir. 1992), quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), by giving no consideration to factors which necessarily should play a role in ruling on the issue of laches. Those factors are (1) the legal standard for the accrual of a cause of action, (2) the undisputed knowledge of the factual basis for a cause of action in 2015, (3) the need for this Court to have the time to

exercise its powers of review in an orderly manner, (4) the need for the Mississippi legislature to have the time to take up redistricting in an orderly manner, and (5) the impending 2020 Census.

Here, plaintiffs filed suit on July 9, 2018, ROA.20, followed by an amended complaint on July 25, 2018, ROA.65, RE 8. Defendants promptly answered on August 8, 2018, ROA.76, and filed their motion for summary judgment, ROA.124, 134, asserting, *inter alia*, their laches defense on September 4, 2018. Though plaintiffs filed a motion requesting an expedited schedule on August 30, 2018, ROA.114, to which defendants promptly objected, ROA.157, the district court did not rule on this motion until November 16, 2018, ROA.201.[5] In this order, the district court set an expedited schedule for designation of plaintiffs' experts on December 10, 2018; designation of defendants' experts on January 7, 2019; a discovery deadline of January 18, 2019; and, a trial date of February 6, 2019. *Id*. It did so even though the Mississippi legislature's 90-day session began on January 8, 2019, the qualifying period for the election began on January 2, 2019 and that period ended on March 1, 2019.

[5] On August 30, 2018, which was the same day that plaintiffs filed their motion to expedite, the district court issued a text order that plaintiffs' motion to expedite would follow an abbreviated briefing schedule. ROA.9, RE 1. In that text order, the district court indicated that it might call for a hearing on the motion prior to September 15. *Id.* Inexplicably, the district court took no further action on the motion until November 16, 2018. ROA.201.

There is no question that if this suit had been brought in 2015, when all the facts necessary to plaintiffs' case were known, orderly review and orderly deliberation could have taken place. That would even have been the case if the suit had been brought in 2016 or in 2017. But it was not. Instead it was brought in mid-2018 and produced the unseemly spectacle before us now. *See*, *Reynolds* 377 U.S. at 585 (courts should avoid "requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.")

There was and is no excuse for this delay. For the sake of future disputes of this nature, this Court should rule that laches bars this suit and allow the election to go forward under the 2012 plan. Further, the guidance provided by this suit will be applied when the Mississippi legislature, in due course, redistricts the state in response to the 2020 Census.

Judge Clement's dissenting opinion accurately explains why plaintiffs' delay, their lack of an excuse, and the prejudice to all other parties justifies the application of laches in this case:

> (1) The plaintiffs are entirely to blame for the haste with which we must resolve this case. The challenged redistricting occurred seven years ago. Disliking what he saw from the start, Thomas contacted the Department of Justice in 2012 and asked them to "look hard" at newly drawn Senate Districts 21, 22, and 34. He questioned whether the new redistricting plan as a whole reduced black voting strength in Mississippi. Rejecting

Thomas's concerns, the DOJ precleared the plan in September 2012.

(2) Thomas waited. He did not file a Voting Rights Act challenge in 2012, 2013, or 2014. He chose instead to run in the 2015 election, losing 54% to 46% to the incumbent chairman of the State Senate Appropriations Committee. Thomas was "real disappointed" that despite his efforts to appeal to white voters in the 2015 election, he garnered little of the white vote. *See Thomas v. Bryant*, 2019 WL 654314, at *1 (S.D. Miss. Feb. 16, 2019).

(3) Still, Thomas did nothing. He did not file a Voting Rights Act challenge in 2015, 2016, or 2017. Thomas has explained that he was unaware that an individual could file a Voting Rights Act challenge until his lawyer told him in 2018. But "laches does not depend on subjective awareness of the legal basis on which a claim can be made." *Envtl. Def. Fund, Inc. v. Alexander*, 614 F.2d 474, 479 (5th Cir. 1980). The letter to the DOJ shows that Thomas had concerns about District 22 as early as 2012, yet he waited until halfway through 2018 to act.

(4) That delay prejudiced the defendants and the public. Laches is an inexcusable delay on the part of the plaintiff that results in prejudice to the defendant. *Conan Props., Inc. v. Conans Pizza, Inc.*, 752 F.2d 145, 153 (5th Cir. 1985). It has been applied by the Supreme Court to bar untimely Voting Rights Act challenges. *Lopez v. Hale Cty., Tex.*, 506 U.S. 1042 (1993) (affirming *Lopez v. Hale Cty., Tex.*, 797 F. Supp. 547, 550 (N.D. Tex. 1992)); *Cf. White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990). By waiting until now to challenge the district, Thomas has injected needless uncertainty into the November 2019 election. Mere months before Election Day, Mississippi voters went to bed in one district and woke up in another. Candidates suddenly find themselves running for office in a district they do not know, appealing to a public that does not know them. And the Republican Party finds itself without a horse in the race, moments before the starting gun is fired.

(5) The delay has inured to the benefit only of Thomas, whose prospects have brightened noticeably since the district

> court redrew the political landscape. His postponement of legal action has—unless the stay is granted—all but ensured that there will be no time for reconsideration of the district court's opinion before the election. Judge Reeves's decision, made on an accelerated timeline following expedited discovery, is likely to be the end of the matter. The balance of the equities, in my view, is not on Thomas's side.

Thomas, 919 F.3d at 320-21(Clement, J., dissenting).

To this recitation, only a few things need to be added. First, in measuring delay, the legal standard is that the cause of action accrues, and the delay begins, when the plaintiff either knows or reasonably should have known of the cause of action. *White*, 909 F.2d at 99; *Arizona Minority*, 366 F. Supp. 2d at 908; *Fouts*, 88 F. Supp. 2d at 1354 (ignorance no excuse); *see Elvis Presly Enters. v. Capece*, 141 F.3d 180, 205 (5th Cir. 1998).

The district court, and the panel, erred as a matter of law in failing to apply this standard and, instead, looked to whether there was evidence that each plaintiff subjectively knew of the cause of action. The facts as to the individual plaintiffs are irrelevant. Under the 'should have known' test, they all "should have known" in 2015. There is no doubt that, if not in 2012, then by the time of the 2015 election, any reasonable person would have known of the present cause of action. The facts on which the district court relied to find a violation all existed as of 2015.

This objective standard makes even more sense in a voting rights case. Every voter in the district has standing to sue. *See Lopez*, 797 F. Supp. at 548

(resident has standing). If ignorance were enough to justify delay, there would, as a practical matter, be no time constraints at all. For this reason, the length of delay in this case is at least three years, and the district court clearly erred in believing there was no proof of delay at all. *See Arizona Minority*, 366 F. Supp. 2d at 908 (two-year delay in raising claim inexcusable).[6]

Second, there is no excuse for the three-year delay. None of the plaintiffs have offered any evidence to the contrary. At the latest, all of the necessary facts were in place as of November 2015, but no suit was filed until July 2018, six months before the 90-day legislative session was to begin, eight months before the filing deadline for the Senate elections, and less than two years before the 2020 Census which will require yet another legislative reapportionment effort.

Third, there is manifest prejudice in addition to the electoral embarrassment noted by Judge Clement.[7] That embarrassment – a suit filed eight months before a filing deadline that could not be heard by the district court until less than a month

[6] Further evidence of the district court's misapplication of the correct legal standard is demonstrated by its inconsistent treatment of the supposed lack of awareness of each plaintiff. On the one hand, the court cites Thomas' "unawareness of the law in 2012," ROA.378, RE 5, as not enough to excuse his delay in pursuing a remedy, yet apparently found Ayers' and Lawson's presumed unawareness of any problem in 2012 as sufficient for them to delay. ROA.377, RE 5. Just as Thomas' unawareness of the law in 2012 is insufficient to excuse his delay in pursuing a remedy, neither is that of Ayers or Lawson. Subjective awareness is not the correct legal standard.

[7] In her panel dissent, Judge Clement noted that "[b]y waiting until now to challenge the district, Thomas has injected needless uncertainty into the November 2019 election. Mere months before Election Day, Mississippi voters went to bed in one district and woke up in another. Candidates suddenly find themselves running for office in a district they do not know, appealing to a public that does not know them." *Thomas*, 919 F.3d at 321.

before that deadline – is echoed in the facts of other decisions in which applied the laches doctrine to suits filed a short time before filing deadlines. *See White*, 909 F.2d at 103 (collecting cases); *Arizona Minority*, 366 F. Supp. 2d at 909 (citing cases applying laches when suit filed 13 weeks before filing deadline, or two days before filing began, or "just weeks" before critical deadlines).

The defendants suffered prejudice in their ability to try the case. For example, it was only several days before trial that they were given plaintiffs' expert analysis – done almost a year before – which showed that 2,000 voters in 2015 mistakenly voted outside the district. ROA.1085-1089. And the need to rely on eight-year-old census data is a recognized source of prejudice in cases like this one. *See White*, 909 F.2d at 103-04 (using old census data which might be inaccurate caused prejudice: "a challenge to a reapportionment plan close to the time of a new census, which may require reapportionment, is not favored.").

The delay prejudiced the local election officials, voters and candidates in the affected districts, which were seemingly redrawn overnight as the original qualifying deadline neared only to have the districts redrawn once more when the panel denied defendants' stay motion.

The delay also prejudiced the Mississippi legislature, which, if the district court's order stands, is now required to redraw the district twice within the period of a few years. *Maxwell*, 1999 WL at *4 (reapportionment "on the cusp of a

constitutionally required legislative reapportionment" is prejudicial). Moreover, plaintiffs' delay in filing suit resulted in a trial that did not even start until the legislature was half way through its 90-day annual session.

Recognizing the problem the delay created, the district court took the unusual step of announcing that the existing district was illegal without stating why. ROA.355, RE 4. A few days later it explained its ruling. ROA.357, RE 5. The next week, without warning, it gave the Mississippi legislature – not even a defendant – one day to comply, and at the end of that day put its own plan in place. ROA.457. These unusual procedures were themselves a marker of the fact that this suit was filed too late. And the legislature will have to do this all over again after the 2020 Census.

This Court was then forced to hear not one, but two, emergency appeals, in which a panel was forced to write a 46-page opinion within seven days. It did so without the benefit of oral argument on important statutory and public policy issues that no doubt would have merited argument had time been available. And then the Mississippi legislature interrupted the waning days of its session to remedy the most glaring injustice of the plan unilaterally imposed by the district court—eliminating candidates who previously had qualified to run against plaintiff Thomas in SD22.

Defendants do not question the good faith of the district judge who grew up in the affected SD22. No doubt, even though the Department of Justice had precleared the 2012 plan, the district court undoubtedly believed that the legal issues in the case were relatively simple, and the result obvious, so that the hasty procedure caused no prejudice. But, the doctrine of laches exists for a purpose. If there were some excuse, any objective excuse, for the delay in bringing this suit, emergency measures like these could be justified. But there is none.

In *Chestnut v. Merrill*, __ F. Supp. 3d __ , 2019 WL 1376480 (N.D. Ala. March 27, 2019), the district court applied the doctrine of laches in a suit like this one and refused to grant injunctive relief. There the challenge was to Congressional districts drawn in 2011 after the 2010 census. Elections took place in 2012, 2014, 2016 and 2018 under the plan. Even though the suit was filed in 2018, it was estimated that a "final decision (after appeal) would not be reached until 2019 or 2020." *Id*. at *4. The opinion noted that at least one court had found undue delay when only one election under a challenged plan remained. *Id.* at *5, citing *Fouts, supra*. Citing the "knew or should have known" standard, it gave no weight to the sophistication level of the individual plaintiffs. *Id*. at *6. Finally, relying on *Fouts* and other decisions, it said that forcing a state to redistrict "twice in two years – one based on nine-year-old census data – would result in prejudice." *Id.* at *7.

Relying on laches, the *Chestnut* court refused to grant injunctive relief as to the 2020 Congressional election, but indicated that it would be willing to consider declaratory relief to prevent the legislature "from reusing their plan as a basis for the 2021 redistricting plan." *Id.* at *7; *see Reynolds,* 377 U.S. at 585 (where "a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief….") [8]

In this case, the district court applied the wrong legal standard in measuring delay and failed to take into consideration the need for an orderly process in both the Mississippi legislature and this Court. Accordingly, the district court's February 26, 2019 order redrawing SD22 and its final judgment incorporating the order should be vacated and judgment rendered for defendants.

The Mississippi legislature in 2021 will have the benefit of the district court's opinion and can take it into account in drawing new districts based on the 2020 Census. And this Court can send a message to those who bring cases of this type that, absent some serious impediment, these cases should be brought at a time that will allow the ordinary processes of court and legislature to work.

[8] While the *Chestnut* court declined to apply the defense of laches to bar declaratory relief, the factual circumstances in *Chestnut* differ from the case herein where defendants were placed under a compressed litigation schedule to try the merits of the case.

III. The district court erred as a matter of law by finding that the boundaries of SD22 violate § 2 of the Voting Rights Act.

A. The results test of § 2 is not violated by a single legislative district with a majority BVAP.

Plaintiffs' claim that the boundaries of SD22 grants blacks "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" in violation of § 2(b) is a little peculiar since blacks already make up a majority of the voting age population in the challenged district. As a matter of simple mathematics, it would seem that blacks have a greater opportunity than other residents of SD22 to elect a senator of their choice. Plaintiffs nevertheless asserted that a handful of other factors somehow reduce their opportunity below the level of equality, notwithstanding their unquestioned numerical majority. They therefore seek to impose different boundaries for SD22 which they speculate will give blacks a better opportunity.

The Supreme Court in *Bartlett* rejected an invitation to permit courts to engage in speculation in the enforcement of § 2. *Bartlett v. Strickland,* 556 U.S. 556 U.S. 1 (2009). Plaintiffs in this case argued that a numerical majority may not be enough to guarantee equal opportunity; plaintiffs in *Bartlett* argued that less than a majority might be enough to guarantee equal opportunity.

In *Bartlett*, plaintiffs contended that § 2 should be construed to allow them to prove the existence of a district in which "the minority population, at least

potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Id.* at 13 (opinion of Kennedy, J.). The Supreme Court rejected this contention, holding that § 2 does not require the creation of a district in which a minority group is still a minority:

> Nothing in § 2 grants special protection to a minority group's right to form political coalitions. "[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground." [*Johnson v.*] *DeGrandy*, 512 U.S. [997], 1010 [(1994)].

Id. at 15 (opinion of Kennedy, J.). The Supreme Court declined to require courts and legislatures "to scrutinize every factor that enters into districting to gauge its effect on crossover voting." *Id*. at 22.

Instead, applying and explaining the holding of *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court set a simple numerical standard for the evaluation of districts in a legislative apportionment to which § 2 might apply:

> Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area? That rule provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2 . . . Where an election district could be drawn in which minority voters form a majority but such a district is not drawn, . . . then -- assuming the other *Gingles* factors are also satisfied -- denial of the opportunity to elect the candidate of choice is a present and discernable wrong that is not subject to the high degree of speculation and prediction attendant upon the analysis of crossover claims.

Id. at 18-19 (opinion of Kennedy, J.) (citation omitted).

Here, the premise of *Gingles* is not satisfied, and the danger of speculation is as apparent as it was in *Bartlett*. This is not a case in which "such a district is not drawn." *Id*. at 18. The 2012 Legislature actually drew "an election district ... in which minority voters form a majority." *Id*. *See* ROA.1598 (D-11). Plaintiffs claim that the nature of the boundaries deprive the black majority of an equal opportunity to compete with the white minority, but their effort to blame the boundaries instead of other factors relies on just the sort of speculation that *Bartlett* rejected in favor of "an objective, numerical test." 556 U.S. at 18.

Following the logic of *Bartlett*, a district court in Arkansas rejected an identical claim levied against a single majority-minority state senate district in the neighboring Arkansas Delta. *Jeffers v. Beebe*, 895 F. Supp. 2d 920 (E.D. Ark. 2012). In *Jeffers*, plaintiffs alleged that a single senate district with a BVAP of 52.88% was insufficient to satisfy § 2. *Id.* at 927-28. The district court recognized well-established Supreme Court precedent that § 2 does not guarantee minority voters an electoral advantage nor does it require drafters to maximize minority voting strength. *See Jeffers* at 931 (citing and quoting *Bartlett*). Relying on *Bartlett*, the court held:

> In the present case, we conclude that the plaintiffs have not established a claim for vote dilution under §2 because the 2011 Senate District 24 -- the challenged district – is *already* a majority-minority district under *Bartlett's* definition. It has a

> BVAP of 52.8 percent, which is "greater than 50%." . . . Thus, the plaintiffs have not shown that " an election district could be drawn in which minority voters form a majority but such a district [was] not drawn." . . . In other words, the plaintiffs failed to "prove that the alleged vote-dilution practice *prevented the creation* of an election district that would have contained a majority of minority voters . . . Because plainitffs "are unable to make that showing, they cannot satisfy the first *Gingles* precondition and therefore cannot state a §2 claim." *Id.*

Id. at 932 (emphasis original). That is precisely the case here. SD22 is *already* a majority-minority district and therefore plaintiffs cannot satisfy the first precondition of *Gingles*, rendering a fatal blow to their § 2 claim.

Of course, the Supreme Court has recognized the right of minorities to contest the number of majority-minority districts drawn in the apportionment of any legislative body. As the Court has explained:

> [I]n the context of a challenge to the drawing of district lines, "the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *DeGrandy*, supra, at 1008.

LULAC v. Perry, 548 U.S. 399, 430 (2006). Because plaintiffs neither argued, nor offered any evidence to establish that the Mississippi legislature failed to draw as many majority-minority districts as could properly be drawn, no relief is available under § 2. Plaintiffs cannot complain that a majority-minority district should have encompassed a different set of members of a minority group. "If the inclusion of the plaintiffs would necessitate the exclusion of others, then the State cannot be

faulted for its choice." *Id*. at 429-30. Here, plaintiffs simply argue that different boundaries should have been utilized which would give a different majority of minority voters a better chance to win. If § 2 does not immunize a minority of black voters "from the obligation to pull, haul, and trade to find common political ground," *DeGrandy*, 512 U.S. at 1020, it certainly should not immunize a black majority from the need to do such hard, political work within its own ranks.

Judge Clement captured the novelty of plaintiffs' claim in her dissent to the panel denial of Appellants' stay motion: "No court has ever found that a majority-minority single-member district violates Section 2 by itself." *Thomas*, 919 F.3d at 319 (Clement, J., dissenting). This is so because the Supreme Court has instructed in *Shaw v. Hunt* that "a plaintiff may allege a Section 2 violation in a single-member district if the manipulation of districting lines fragments politically cohesive minority voters among several districts or packs them into one district or a small number of districts, and thereby dilutes the voting strength of members of the minority population." *Shaw*, 517 U.S. 899, 914 (1996). Stated differently, a state can violate Section 2 by "cracking" minority voters into separate districts, or "packing" minority voters into supermajority districts. Plaintiffs have failed to even allege, much less offer any proof, to establish fragmentation through either "cracking" or "packing." Simply stated, § 2 does not guarantee minority voters in

any single district a minimum voting majority to enable them to prevail on election day.

Plaintiffs principally rely on this Court's decision in *Monroe v. City of Woodville*, 819 F.2d 507 (5th Cir. 1987) to support their suggestion that a black majority may be entitled to relief under these facts and circumstances. *Monroe*, however, involved an at-large form of government, not a single-member district. Further, in that case the City confessed liability, and this Court ruled that the district court should have attempted to fashion a remedy. When the district court tried the case, it again denied relief, and this time the Fifth Circuit affirmed. *Monroe v. City of Woodville*, 881 F.2d 1327 (5th Cir. 1989). The Court acknowledged that Fifth Circuit cases from the time before the 1982 amendment to § 2 had held that at-large forms of government could be attacked even where blacks held a voting age majority. The Court, however, expressed skepticism about the permanent vitality of such a rule:

> The caveat should be added that in *Zimmer* [*v. McKeithen*, 485 F.2d 1297, 5th Cir. 1973 (en banc), *aff'd* sub nom. *East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976)], at least, the black majority had recently been freed from literacy tests and impediments to voting registration. As *de jure* restrictions on the right to vote mercifully recede further into the historical past, we should expect it to be increasingly difficult to assemble a *Zimmer-type* voting rights case against an at-large electoral district where a minority-majority population exists.

Monroe, 881 F.2d at 1333. Now, three decades later, this Court should expect to see evidence of discrimination and its still continuing effects, which plaintiffs have not offered, before extending those principles for the first time to single-member districts.[9]

The practical implications of plaintiffs' contention are immense. Every decade, the Mississippi legislature must redistrict 52 senators and 122 representatives. Plaintiffs can always offer to prove, as these plaintiffs do not, that any aspect of any district was created in violation of the intent test of § 2 and the Fourteenth and Fifteenth Amendments. However, plaintiffs claim that, even where there is no evidence of discriminatory intent and no possibility of creating an additional district, the details of every single majority-minority district can require a trial. Plaintiffs claim that each of the 15 majority-minority Senate districts could be subject to suit, and, of course, the same would be true of every majority-minority House district, supervisor district, or city council district.

[9] The district court's opinion read the first *Monroe* decision as having been designed to "prohibit[] entrenched political powers from drawing a series of extremely marginal majority-minority districts with the expectation that the majority-minority group will be unable to turn out in numbers sufficient to ever elect a candidate of their choice." ROA.387, n.80, RE 5. To the contrary, the problem in *Monroe* was that there was no districting at all in an at-large form of government. These plaintiffs have not alleged any discriminatory intent, nor have they introduced evidence of any such "series" of deceptive redistrictings at any point in Mississippi's past. The days when "entrenched political powers "in Mississippi could be lawfully presumed to be malicious under the Voting Rights Act ended with *Shelby County v. Holder*, 570 U.S. 529 (2013).

Plaintiffs have not cited any case from any court where it has been held that a majority-minority district violated § 2 because other boundaries might have been more favorable to the electoral success of black voters and candidates. Nothing in the language of § 2 or any precedent suggests that such a rule should now be established. Thus, plaintiffs' § 2 claim fails as a matter of law.

B. The results test of § 2 is not violated unless participation in the political process is depressed among black citizens.

Assuming *arguendo* that plaintiffs stated a § 2 claim in spite of SD22 already being a majority-minority district, the Supreme Court has mandated that plaintiffs must establish three preconditions which must be met before a court may examining the "totality of circumstances," as § 2(b) requires:

> (1) the group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) it is politically cohesive; and (3) the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate."

League of United Latin American Citizens v. Clements, 999 F.2d 831, 849 (5th Cir. 1993), citing *Gingles*, 478 U.S. at 50-51, and *Growe v. Emison*, 507 U.S. 25, 40 (1993).

Plaintiffs submitted into evidence three different maps, each including parts of SD22 and adjoining districts, in which the BVAP majority is larger. ROA.1282 (P-6); ROA.1284 (P-7); ROA.1287 (P-8). They claim this evidence meets the first requirement of *Gingles*, even though a BVAP majority district already exists. For

the reasons stated above, because SD22 already contains a majority-minority voting age population, plaintiffs cannot meet the first *Gingles* precondition and their claim must be dismissed.

Regardless, plaintiffs attempted to satisfy the second and third *Gingles* preconditions without a single election for senator that has ever been properly conducted in SD22. Instead, they offer analyses of the outcome of certain statewide elections in 2015 in SD22, as well as other elections in other districts in other years. ROA.1065 (P-1). Accordingly, plaintiffs must carry the burden of demonstrating that "the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate," *LULAC v. Clements*, 999 F.2d at 849 (emphasis added), without being able to prove that white voters have ever actually defeated "the minority's preferred candidate" for senator for SD22.

Only if these three factual prerequisites are established does the Court turn to the totality of the circumstances, examining factors specified in *Gingles*, 478 U.S. at 44-45. Plaintiffs introduced evidence on some, but not all of these factors.

The history of voting-related discrimination in the State or political subdivision. Through the statements of Senator John Horhn and Fred Banks, plaintiffs made reference to unconstitutional practices in Mississippi's past. ROA.1295 (P-10); ROA.1290 (P-9). However, because plaintiffs' complaint declined to assert a claim under the Constitution, they did not ask the district court

to adjudicate that any constitutional violations had taken place or that any such violations had any effect on plaintiffs' ability to elect representatives of their choice under § 2(b).

The extent to which voting in the elections in the State or political subdivision is racially polarized. Plaintiffs sought to establish this factor by statistical evidence drawn from elections for other offices or other areas. *See* ROA.1065 (P-1).

The extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process. Although plaintiffs introduced proof that blacks in SD22 trail whites in socioeconomic categories, ROA.1092 (P-4), they offered no proof to connect that fact to past discrimination. Nor did they prove that those socioeconomic circumstances hinder their ability to participate effectively in the political process. Plaintiffs' expert presented a statistical estimate that black turnout in the 2015 Senate election was 29.6% of the voting age population, while the white turnout was 36.9%. ROA.1071, ¶ 20. However, the expert admitted that he had excluded from his analysis the precincts in Bolivar County in which voters had been assigned to the wrong districts, thereby affecting the accuracy of his estimates. ROA.776-77, RE 9. Although Census Bureau statistics show that black turnout has exceeded white

turnout in even-numbered election years since at least 2004, ROA.1642 (Table 1) (D-14), the district court declared that black voters "are less likely to have transportation options that facilitate voter turnout in odd-year elections." ROA.384, RE 5.[10]

The district court credited plaintiffs' contention that "the Delta is 'totally different' from Madison County." ROA.361, RE 5. However, when the district court created a congressional district in the Delta, it included most of Madison County, including those parts now encompassed within SD22. *Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss.), *aff'd*, 469 U.S. 1002 (1984). Although the district court found Madison County to be "suburban" ROA.361, RE 5, all three plans credited by the court would unite those suburban precincts with parts of Vicksburg, which the court expressly found to be part of the Delta. ROA.361, RE 5 (quoting *Jordan v. Winter*, 541 F. Supp. 1135, 1139 n.l (N.D. Miss. 1982), *vacated*, 461 U.S. 921 (1983).

While *Gingles* erects three prerequisites to the consideration of a claim under the results test the question for determination by the Court, under § 2(b), is whether black citizens "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

[10] This Court has previously acknowledged evidence that black turnout was relatively higher in odd-numbered years compared to even-numbered years. *N.A.A.C.P. v. Fordice*, 252 F.3d 361, 368 n.1 (5th Cir. 2001).

In order to prevail, plaintiffs "bore the burden to demonstrate that the African-American citizens of Mississippi 'do not in fact participate to the same extent as other citizens.'" *N.A.A.C.P v. Fordice*, 252 F.3d at 368 (quoting *LULAC v. Clements*, 999 F.2d at 866).

To the contrary, the uncontradicted evidence in this record shows that "African-Americans in Mississippi" participate in the political process to a greater extent than white Mississippians. Official figures maintained by the United States Census Bureau show that blacks have turned out to vote at a higher rate than whites in every even-numbered year between 2004 and 2016. ROA.1642 (Table 1) (D-14).[11] On the basis of this and other evidence, defendants' expert opined that "the data show that existing socioeconomic differences no longer diminish [African-Americans'] participation in the political process as they did in the past." *Id.* at ¶ 10.[12]

Plaintiffs, however, claimed that black voters in SD22 have a lower rate of turnout than whites. That supposed lower rate of turnout is the indispensable foundation of their contention "that minority voters *in this case* failed to participate

[11] There is nothing aberrational about these statistics. This Court acknowledged two decades ago that "in recent years Mississippi's African-American and white citizens have maintained virtual parity in voter turnout." *NAACP v. Fordice*, 252 F.3d at 368 (footnote omitted).

[12] Without citing evidence, the district court disparaged "known issues with self-reported voting surveys." ROA.384, RE 5. Because the Bureau has never suggested that blacks are more likely to over-report their participation than whites, the conclusion that black participation is greater than white participation remains sound.

equally in the political process." *LULAC v. Clements*, 999 F.2d at 867 (emphasis in original). There are two problems with that argument, one legal and one factual.

Every decade, the Mississippi legislature must engage in multiple redistrictings on a statewide basis. In *N.A.A.C.P. v. Fordice*, which involved districts for the election of Supreme Court Justices, it was no accident that this Court required proof of the participation levels of "the African-American citizens of *Mississippi*." 252 F.3d at 368 (emphasis added). In that case, which involved only three districts, it might arguably have been possible to obtain reliable evidence of participation levels in the separate districts. That kind of knowledge is simply impossible to obtain at a district level when the legislature is redrawing 52 senate districts and 122 house districts. To deny the legislature the right to rely on Census Bureau statistics means that any one of 174 districts can be challenged at any time on the basis of statistical estimates of which the legislature could not have been aware at the time of enacting the statute.[13] The law should bar the imposition of any such burden.

Moreover, the statistical estimates offered by plaintiffs in this case are unreliable because no properly conducted election has ever been held in SD22.

[13] Plaintiffs cited no case in which legislators have been held unable to rely on Census Bureau figures on any subject. *See Shelby Cnty*, 570 U.S. at 535 (finding under the Census Bureau's Voting and Registration data that "African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5").

Most importantly for the legal issues presented in this case, the mistakes in Bolivar County fatally undermine the statistical estimates of white and black turnout in that sole election. Plaintiffs' expert estimated that 29.6 % of the black voting age population participated in that general election, as compared to 36.9% of whites. ROA.1071 (P-1). The exclusion of the Cleveland precincts, however, distorted both of those estimates, particularly with regard to white participation. The population of the Cleveland portion of SD22 is predominantly white, but this Court can take judicial notice that Cleveland is the location of Delta State University, a predominantly white institution. ROA.785-86, RE 9. College students are counted as part of the voting age population in the census, but college students are notoriously unlikely to register and to vote.[14] Had those non-voting white students been taken into consideration in plaintiffs' turnout estimates, the level of estimated white participation throughout SD22 would necessarily have fallen.

The district court described the 2003, 2007, and 2015 Senate elections as "the 'endogenous' elections most relevant to this case," ROA.363, RE 5, but the 2003 and 2007 elections were held under different SD22 boundaries, and it is undisputed that the 2015 election featured a "significant election administration error" in Bolivar County. ROA.780:11-12, RE 9. Endogenous elections "refers to

[14] Previous redistricting litigation in Mississippi has recognized that university students "are unlikely to vote." *Fairley v. City of Hattiesburg*, 122 F. Supp. 3d 553, 570 n.6 (S.D. Miss. 2015), *aff'd*, 662 Fed. Appx. 291 (5th Cir. 2016).

elections for the particular office and district that is at issue." *Cano v. Davis*, 211 F. Supp. 2d 1208, 1235 (C.D. Cal. 2002), *aff'd*, 537 U.S. 1100 (2003). Instead of analyzing earlier elections under reconstituted election analysis, as described in *Rodriguez v. Bexar County, Texas*, 385 F.3d 853, 861 (5th Cir. 2004), plaintiffs chose to stake their entire case on a single "endogenous" election missing 10% of the vote.

Here, the vote totals from the only endogenous election involving the challenged districting boundaries excluded votes from two SD22 precincts and *included* votes from two non-SD22 precincts. ROA.775:22-778:11, RE 9. This four-precinct error, which simultaneously resulted in an overvote and undervote in Bolivar County, caused Dr. Palmer to exclude 10% of the actual vote totals for his analysis. ROA.779:9-14, RE 9. This Court has reversed earlier cases granting relief on a stronger record. *Rangel v. Morales*, 8 F.3d 242, 246 (5th Cir. 1993) ("evidence of one or two elections may not give a complete picture as to voting patterns within the district generally.") In *Rangel*, the Court reversed the district court's decision finding legally significant white bloc voting based on a single contest.

Of course, plaintiffs themselves discussed possible impediments to black participation, but their own testimony showed those impediments not to be insurmountable. Plaintiff Melvin Lawson observed that blacks are less likely than

whites to have their own means of transportation, but he confirmed that he and other politically active individuals drive voters to the polls on election day. ROA.825; ROA.834, RE 5. Whatever impediments may still exist, plaintiffs have failed to prove that they resulted in a depressed level of black participation, either in SD22 or in Mississippi as a whole.

In this black majority district, the evidence fails to show that black participation is in any way depressed. Absent such proof, *LULAC v. Clements* and *N.A.A.C.P v. Fordice* declare that the results test of § 2 cannot be satisfied.

IV. The district court erred by imposing a remedy without affording the legislature a reasonable opportunity to act and without conducting a remedial hearing and making specific findings of fact.

The Supreme Court "has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539-40 (1978) (citations omitted). Further, the Supreme Court has made clear that when a Federal court "declares an existing apportionment scheme unconstitutional it is . . . appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *Id.* at 540. This is so because "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller v. Johnson*, 515 U.S.

900, 915 (1995). In *Veasey*, this Court recently recognized the mandate that a federal court afford to the state legislature a reasonable opportunity to act before devising a remedy for a § 2 violation. *Veasey v. Abbott*, 830 F.3d 216, 270 (5th Cir. 2016). "Both the Supreme Court and this court have admonished district courts to afford local governments a reasonable opportunity to propose a constitutionally permissible plan and not haphazardly to order injunctive relief." *Rodriguez*, 385 F.3d at 870. [15]

In its February 16, 2019 Memorandum Opinion and Order, the district court acknowledged this precedent establishing that "the Legislature is entitled to the first opportunity to redraw District 22. . . [and] a 'legislative plan is unequivocally to be preferred over a court-ordered plan.'" ROA.387, RE 5. In spite of this recognition of clearly established law, less than two weeks later, the district court entered an order imposing a remedial plan without affording to the Mississippi legislature a reasonable opportunity to adopt a plan. ROA.473, RE 6. Moreover, the district court imposed its remedy without affording to appellants an opportunity to be heard on the issue of a remedy, and without making any findings to support

[15] In *Rodriguez*, after the Court held that plaintiffs had failed to meet their burden of proof to establish a § 2 violation, the Court went on to review the relief ordered by the district court and held it was an abuse of discretion. *Id.* at 869-70. This Court's review of the injunctive remedy is even more important in this case, where the final judgment has been stayed, but not vacated. Should a special election become necessary before 2023 in any of the affected districts – 13, 22, or 23 – candidates and election officials will need to know whether to apply the borders designed by the district court or by the legislature.

the remedy imposed. *Id.* The district court failed to cite any authority to support the imposition of a judicial remedy under these facts and circumstances, and its actions constitute an unprecedented act of judicial interference into the legislative redistricting process. As this Court held in *Rodriguez*, the imposition of a judicial remedy in such circumstances "does not comport with the Supreme Court's and this court's clear requirements." *Rodriguez*, 385 F.3d at 870 n.26.

Additionally, a court may not "broadly brush[] aside state apportionment policy" when designing a remedy. *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971); *see Upham v. Seamon*, 456 U.S. 37, 40-42 (1982). Here, state policies include traditional redistricting principles, such as compactness, preservation of communities of interest, contiguity, and preservation of political subdivisions. ROA.982-83, RE 9. The district court made no findings that the plan it adopted complies with traditional redistricting principles. *See* ROA.473, RE 6. In fact, the plan adopted by the district court plainly is inconsistent with traditional redistricting principles, including the splitting of the City of Vicksburg, which was entirely in District 23 under the existing plan. Moreover, in adopting one of plaintiffs' proposed plans as its own, the district court offered no explanation for its choice of that particular plan as opposed to the two alternative plans submitted by plaintiffs. With all respect, altering district boundaries during a qualifying period with no remedial hearing afforded to the parties and with no finding that the

court-imposed plan comports with state redistricting principles is an unprecedented act with no case law to support it.

Besides this unprecedented approach, the district court also imposed a redistricting plan which inexplicably and dramatically increased the BVAP of one district while sharply reducing the BVAP in an adjacent district. The effect of selecting one of plaintiffs' three proposed plans is the court-sanctioned "cracking" of minority votes in neighboring Senate District 23 and the "packing" of minority voters in SD22. Offering no legitimate reason for taking this approach, the result was to eliminate all opposition for plaintiff Thomas who had qualified to run in SD22.

In short, the actions of the district court violate clear precedent establishing the right of the Mississippi legislature to have the first say in redistricting, and the plan imposed is inconsistent with traditional redistricting principles and itself violates § 2 by sanctioning the "cracking" and "packing" of voters based solely on race. While this Court's entry of a stay gave the Mississippi legislature an opportunity to adopt a plan, such action by the Mississippi legislature does not absolve the district court of its errors. Accordingly, the district court's February 26, 2019 order imposing its remedial plan and the final judgment incorporating the order should be vacated.

CONCLUSION

For the reasons stated above, this Court should vacate the final judgment of the district court and render judgment dismissing plaintiffs' first amended complaint with prejudice.

This the 18th day of April, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Tommie S. Cardin, hereby certify that I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will automatically send email notification to all counsel of record.

This the 18th day of April, 2019.

s/ Tommie S. Cardin
TOMMIE S. CARDIN

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains **11,553** words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times Roman font.

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