THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

DYAMONE WHITE; DERRICK SIMMONS; TY PINKINS; CONSTANCE OLIVIA SLAUGHTER HARVEY-BURWELL — **PLAINTIFFS**

VS. — **CIVIL ACTION NO. 4:22-cv-00062-SA-JMV**

STATE BOARD OF ELECTION COMMISSIONERS; TATE REEVES ***in his official capacity as Governor of Mississippi*****; LYNN FITCH** ***in her official capacity as Attorney General of Mississippi*****; MICHAEL WATSON** ***in his official capacity as Secretary of State of Mississippi*** — **DEFENDANTS**

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR THE COURT TO TAKE JUDICIAL NOTICE

Defendants State Board of Election Commissioners, Tate Reeves, in his official capacity as Governor of Mississippi, Lynn Fitch, in her official capacity as Attorney General of Mississippi, and Michael Watson, in his official capacity as Secretary of State (collectively "Defendants") submit their Memorandum in Support of their Motion for the Court to take Judicial Notice of the facts and information identified in and attached to the Motion under Rule 201(b) and 201(c)(2) of the Federal Rules of Evidence. Pursuant to Local Rules 7(b)(1), Plaintiffs advise they intend to oppose this motion.

"The doctrine of judicial notice permits a judge to consider a generally accepted or readily verified fact as proved without requiring evidence to establish it." *United States v. Berrojo*, 628 F.2d 368, 369 (5th Cir. 1980). Taking judicial notice of Census data is appropriate, relevant for

this case, and will streamline the presentation of evidence at trial. *See Shelby County, Ala. v. Holder*, 570 U.S. 529, 535 (2013) (using Census Bureau data to determine that "African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5[.]"); *Hollinger v. Home State Mut. Ins.,* 654 F.3d 564, 571-72 (5th Cir. 2011). The facts below are appropriate topics for judicial notice under Fed. R. Evid. 201.

FACTS TO BE NOTICED

Defendants seek judicial notice of the following facts, as discussed below:

1. Census data from the U.S. Census Current Population Survey's Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States in 1986, 1988, 1990, 1992, 1994, 1996, 1998, 2000, 2002, 2004, 2006, 2008, 2010, 2012, 2014, 2016, 2018, 2020, and 2022,[1] which includes:

a. According to the 1986 Census Current Population Survey, 45.8% of white non-hispanic persons in Mississippi reported voting in the 1986 general election, and 40.2% of black persons in Mississippi reported voting in the 1986 general election. *See Exhibit A*.

b. According to the 1986 Census Current Population Survey, 77.3% of white non-hispanic persons in Mississippi reported as registered to vote in the 1986 general election, and 75.9% of black persons in Mississippi reported as registered to vote in the 1986 general election. *See Exhibit A*.

c. According to the 1988 Census Current Population Survey, 64.2% of white non-hispanic persons in Mississippi reported voting in the 1988 general election, and 60.3% of black persons in Mississippi reported voting in the 1988 general election. *See Exhibit B*.

[1] Exhibits A through S are the Tables from the Census Current Population Survey ("CPS") in 1986 through 2022.

d. According to the 1988 Census Current Population Survey, 80.5% of white non-hispanic persons in Mississippi reported as registered to vote in the 1988 general election, and 74.2% of black persons in Mississippi reported as registered to vote in the 1988 general election. *See Exhibit B.*

e. According to the 1990 Census Current Population Survey, 35.8% of white non-hispanic persons in Mississippi reported voting in the 1990 general election, and 32.5% of black persons in Mississippi reported voting in the 1990 general election. *See Exhibit C.*

f. According to the 1990 Census Current Population Survey, 70.8% of white non-hispanic persons in Mississippi reported as registered to vote in the 1990 general election, and 71.4% of black persons in Mississippi reported as registered to vote in the 1990 general election. *See Exhibit C.*

g. According to the 1992 Census Current Population Survey, 69.4% of white non-hispanic persons in Mississippi reported voting in the 1992 general election, and 61.9% of black persons in Mississippi reported voting in the 1992 general election. *See Exhibit D.*

h. According to the 1992 Census Current Population Survey, 80.2% of white non-hispanic persons in Mississippi reported as registered to vote in the 1992 general election, and 78.5% of black persons in Mississippi reported as registered to vote in the 1992 general election. *See Exhibit D.*

i. According to the 1994 Census Current Population Survey, 46.2% of white non-hispanic persons in Mississippi reported voting in the 1994 general election, and 41.7% of black persons in Mississippi reported voting in the 1994 general election. *See Exhibit E.*

j. According to the 1994 Census Current Population Survey, 74.6% of white non-hispanic persons in Mississippi reported as registered to vote in the 1994 general election, and 41.7% of

black persons in Mississippi reported as registered to vote in the 1994 general election. *See Exhibit E*.

k. According to the 1996 Census Current Population Survey, 59.3% of white non-hispanic persons in Mississippi reported voting in the 1996 general election, and 48.8% of black persons in Mississippi reported voting in the 1996 general election. *See Exhibit F*.

l. According to the 1996 Census Current Population Survey, 75% of white non-hispanic persons in Mississippi reported as registered to vote in the 1996 general election, and 67.4% of black persons in Mississippi reported as registered to vote in the 1996 general election. *See Exhibit F*.

m. According to the 1998 Census Current Population Survey, 41.1% of white non-hispanic citizens in Mississippi reported voting in the 1998 general election, and 40.4% of black citizens in Mississippi reported voting in the 1998 general election.[2] *See Exhibit G*.

n. According to the 1998 Census Current Population Survey, 75.8% of white non-hispanic citizens in Mississippi reported as registered to vote in the 1998 general election, and 71.3% of black citizens in Mississippi reported as registered to vote in the 1998 general election. *See Exhibit G*.

o. According to the 2000 Census Current Population Survey, 61.9% of white non-hispanic citizens in Mississippi reported voting in the 2000 general election, and 58.5% of black citizens in Mississippi reported voting in the 2000 general election. *See Exhibit H*.

p. According to the 2000 Census Current Population Survey, 72.6% of white non-hispanic citizens in Mississippi reported as registered to vote in the 2000 general election, and 73.7% of

[2] From 1986 through 1996, the referenced population was "persons 18+" rather than "citizens 18+." From 1998 until present, the referenced population is "citizens 18+." This revision has no bearing on the appearance or magnitude of a racial difference between black and white voters in Mississippi.

black citizens in Mississippi reported as registered to vote in the 2000 general election. *See Exhibit H*.

q. According to the 2002 Census Current Population Survey, 44.6% of white non-hispanic citizens in Mississippi reported voting in the 2002 general election, and 40.2% of black citizens in Mississippi reported voting in the 2002 general election. *See Exhibit I*.

r. According to the 2002 Census Current Population Survey, 72.1% of white non-hispanic citizens in Mississippi reported as registered to vote in the 2002 general election, and 67.9% of black citizens in Mississippi reported as registered to vote in the 2002 general election. *See Exhibit I*.

s. According to the 2004 Census Current Population Survey, 60% of white non-hispanic citizens in Mississippi reported voting in the 2004 general election, and 66.6% of black citizens in Mississippi reported voting in the 2004 general election. *See Exhibit J*.

t. According to the 2004 Census Current Population Survey, 73.6% of white non-hispanic citizens in Mississippi reported as registered to vote in the 2004 general election, and 76.2% of black citizens reported as registered to vote in the 2004 general election. *See Exhibit J*.

u. According to the 2006 Census Current Population Survey, 39.9% of white non-hispanic citizens in Mississippi reported voting in the 2006 general election, and 50.5% of black citizens in Mississippi reported voting in the 2006 general election. *See Exhibit K*.

v. According to the 2006 Census Current Population Survey, 71% of white non-hispanic citizens in Mississippi reported as registered to vote in the 2006 general election, and 72.2% of black citizens in Mississippi reported as registered to vote in the 2006 general election. *See Exhibit K*.

w. According to the 2008 Census Current Population Survey, 68.4% of white non-hispanic citizens in Mississippi reported voting in the 2008 general election, and 73.1% of black citizens in Mississippi reported voting in the 2008 general election. *See Exhibit L*.

x. According to the 2008 Census Current Population Survey, 75% of white non-hispanic citizens in Mississippi reported as registered to vote in the 2008 general election, and 81.9% of black citizens in Mississippi reported as registered to vote in the 2008 general election. *See Exhibit L*.

y. According to the 2010 Census Current Population Survey, 47.7% of white non-hispanic citizens in Mississippi reported voting in the 2010 general election, and 48.1% of black citizens in Mississippi reported voting in the 2010 general election. *See Exhibit M*.

z. According to the 2010 Census Current Population Survey, 74.2% of white non-hispanic citizens in Mississippi reported as registered to vote in the 2010 general election, and 73.6% of black citizens in Mississippi reported as registered to vote in the 2010 general election. *See Exhibit M*.

aa. According to the 2012 Census Current Population Survey, 71.8% of white non-hispanic citizens in Mississippi reported voting in the 2012 general election, and 82.7% of black citizens in Mississippi reported voting in the 2012 general election. *See Exhibit N*.

bb. According to the 2012 Census Current Population Survey, 82.4% of white non-hispanic citizens in Mississippi reported as registered to vote in the 2012 general election, and 90.8% of black citizens in Mississippi reported as registered to vote in the 2012 general election. *See Exhibit N*.

cc. According to the 2014 Census Current Population Survey, 40.3% of white non-hispanic citizens in Mississippi reported voting in the 2014 general election, and 46.6% of black citizens in Mississippi reported voting in the 2014 general election. *See Exhibit O*.

dd. According to the 2014 Census Current Population Survey, 72.8% of white non-hispanic citizens in Mississippi reported as registered to vote in the 2014 general election, and 83.2% of black citizens in Mississippi reported as registered to vote in the 2014 general election. *See Exhibit O*.

ee. According to the 2016 Census Current Population Survey, 67.7% of white non-hispanic citizens in Mississippi reported voting in the 2016 general election, and 69.2% of black citizens in Mississippi reported voting in the 2016 general election. *See Exhibit P*.

ff. According to the 2016 Census Current Population Survey, 78.8% of white non-hispanic citizens in Mississippi reported as registered to vote in the 2016 general election, and 81.3% of black citizens in Mississippi reported as registered to vote in the 2016 general election. *See Exhibit P*.

gg. According to the 2018 Census Current Population Survey, 51.7% of white non-hispanic citizens in Mississippi reported voting in the 2018 general election, and 59.8% of black citizens in Mississippi reported voting in the 2018 general election. *See Exhibit Q*.

hh. According to the 2018 Census Current Population Survey, 71.8% of white non-hispanic citizens in Mississippi reported as registered to vote in the 2018 general election, and 77.9% of black citizens in Mississippi reported as registered to vote in the 2018 general election. *See Exhibit Q*.

ii. According to the 2020 Census Current Population Survey, 69.8% of white non-hispanic citizens in Mississippi reported voting in the 2020 general election, and 72.9% of black citizens in Mississippi reported voting in the 2020 general election. *See Exhibit R*.

jj. According to the 2020 Census Current Population Survey, 79.2 % of white non-hispanic citizens in Mississippi reported as registered to vote in the 2020 general election, and 83.4% of black citizens in Mississippi reported as registered to vote in the 2020 general election. *See Exhibit R*.

kk. According to the 2022 Census Current Population Survey, 47.6% of white non-hispanic citizens in Mississippi reported voting in the 2022 general election, and 47% of black citizens in Mississippi reported voting in the 2022 general election. *See Exhibit S*.

ll. According to the 2022 Census Current Population Survey, 74.3% of white non-hispanic citizens in Mississippi reported as registered to vote in the 2022 general election, and 72.2% of black citizens in Mississippi reported as registered to vote in the 2022 general election. *See Exhibit S*.

mm. Pursuant to Federal Rule of Evidence 1006, Defendants include, as Exhibit T, a table summarizing the data above.

ARGUMENT

This Court may take judicial notice of adjudicative facts not subject to reasonable dispute. *See* FED. R. EVID. 201.

> Federal Rule of Evidence 201 provides that a court may take judicial notice of an 'adjudicative fact' if the fact is 'not subject to reasonable dispute' in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned.

Amos v. Cain, 2020 WL 6688864, *1 (N.D. Miss. Nov. 12, 2020) (quoting *Doe v. Mckesson*, 945

F.3d 818, 833 (5th Cir. 2019) (quoting FED. R. EVID. 201(b)), *vacated on other grounds*, *Mckesson v. Doe*, 592 U.S. 1 (2020)). An "adjudicative fact" is defined as "'[a] controlling or operative fact, rather than a background fact.'" *Allied Home Mortg. Cap. Corp. v. Blues Alley Estates Ltd. P'ship*, 2008 WL 11342878, at *1 (N.D. Miss. Sept. 9, 2008) (quoting BLACK'S LAW DICTIONARY 629 (8th ed. 2004)). These facts should be adjudicative, meaning they are "facts which are relevant to the disposition of the case." *Amos*, 2020 WL 6688864, at *1 (citing *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 244 n.52 (5th Cir. 1976) (Brown, C.J., concurring) ("Adjudicative facts are the peculiar facts relevant to the particular case in controversy")).

This Court's inquiry here requires a review of "the totality of circumstances" to determine whether the lines of the Mississippi Supreme Court Central District deprive "black voters of the equal opportunity to participate in the political process and to elect representatives of their choice." *Fairley v. Hattiesburg, Miss.*, 584 F.3d 660, 667 (5th Cir. 2009); *see also Allen v. Milligan*, 599 U.S. 1, 18 (2023). United States census data in relation to voter turnout is relevant to these issues. *See Shelby County*, 570 U.S. at 535. For instance, in *Shelby County*, the Supreme Court used data from the United States Census Bureau's "Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States"—specifically Table 4b –to determine that black voter turnout exceeded white voter turnout in five of the six states, including Mississippi, originally covered by Section 5. *Id*. Likewise, the District Court in *Ala. State Conf. of NAACP v. Ala.* utilized the "Reported Voting and Registration, by Sex, Race, and Hispanic Origin, for States" table in its determination that "registration and turnout rates among African-Americans and whites have reached parity." *Ala. State Conf. of NAACP v. Ala.*, 612 F. Supp. 3d 1232, 1290 (M.D. Ala. 2020) (citing *Shelby County*, 570 U.S. at 548). This is the same data Defendants propose this Court judicially notice. Accordingly, the Court "***must*** take judicial notice if a party requests it and the

court is supplied with the necessary information." FED. R. EVID. 201(c)(2) (emphasis added).

The facts discussed above are properly the subject of judicial notice. First, "United States census data is an appropriate and frequent subject of judicial notice." *Stringer v. Whitely*, 942 F.3d 715, 722 n.23 (5th Cir. 2019) (taking judicial notice of United States Census Bureau ACS Data) (internal quotation marks and citation omitted). *See League of United Latin American Citizens* ("*LULAC*") *v. Abbott*, 617 F. Supp. 3d 622, 631 n.2 (W.D. Tex. 2022) (taking judicial notice of United States Census Bureau ACS Data); *Mississippi ex rel. Hood v. AU Optronics Corp.*, 876 F. Supp. 2d 758, 773-74 (S.D. Miss. 2012) (taking judicial notice of United States Census survey data).

The Census records are official government public records frequently used in Section 2 cases and are generally the subject of judicial notice under Rule 201. *See LULAC*, 617 F. Supp. 3d at 631 n.2 (citation omitted). These records are collected by the United States Census Bureau and the United States Bureau of Labor Statistics, which are both government agencies. These facts are not subject to reasonable dispute. FED. R. EVID. 201. *See Cannon v. Nash*, 2019 WL 2110594, at *1 (S.D. Miss. Apr. 29, 2019) (permitting judicial notice of governmental records readily available in the public domain, such as the internet, because the fact of record keeping is not subject to reasonable dispute and the accuracy could not reasonably be questioned).

If the Court takes judicial notice of the Census data above, the table summarizing the Census data is admissible pursuant to Federal Rule of Evidence 1006. *See United States v. Spalding*, 894 F.3d 173, 185-86 (5th Cir. 2018). "A party 'may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." *Spalding*, 894 F.3d at 185 (quoting FED. R. EVID. 1006). The voluminous records the table summarizes are attached as Exhibits A – S of the Motion for Judicial Notice. Should the Court take judicial notice of the voluminous Census Bureau data, it will be appropriately before the Court.

Since this is a bench trial, the Court sits as the trier of fact and there is no concern of improper use by a jury.

CONCLUSION

For these reasons, Defendants State Board of Election Commissioners, Tate Reeves, in his official capacity as Governor of Mississippi, Lynn Fitch, in her official capacity as Attorney General of Mississippi, and Michael Watson, in his official capacity as Secretary of State request that the Court grant Defendants' Motion for Judicial Notice.

This the 26th day of July, 2024.

Respectfully submitted,

DEFENDANTS STATE BOARD OF ELECTION COMMISSIONERS, TATE REEVES, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF MISSISSIPPI, LYNN FITCH, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF MISSISSIPPI, AND MICHAEL WATSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF MISSISSIPPI

/s/ *Charles E. Cowan*

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CERTIFICATE OF SERVICE

I, Charles E. Cowan, one of the attorneys for the above-named State Defendants, do hereby certify that I have this date caused to be filed with the Clerk of the Court a true and correct copy of the above and foregoing via the Court's ECF filing system, which sent notification of such filing to all counsel of record.

THIS the 26th day of July, 2024.

s/ *Charles E. Cowan*
CHARLES E. COWAN