

**FIN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
NORTHERN DIVISION**

**JOHN ROBERT SMITH, et al.**

*Plaintiffs,*

v.

**DELBERT HOSEMAN, et al.,**

*Defendants*

and

**BEATRICE BRANCH, et al.,**

*Intervenors*

**3:01-cv-855-HTW-DCB**

**KELVIN BUCK, et al.,**

*Plaintiffs,*

v.

**HALEY BARBOUR, et al.,**

*Defendants.*

**3:11-cv-717-HTW-LRA**

**REPLY TO OPPOSITION TO MOTION OF *AMICI CURIAE* FOR LEAVE TO FILE  
BRIEF OPPOSING VACATUR OF THE INJUNCTION**

The proposed *amici curiae* NAACP Legal Defense and Education Fund, Inc., Mississippi State Conference of the NAACP, One Voice, and Black Voters Matter Capacity Building Institute respectfully submit this reply to the opposition of the Governor and the Attorney General (the “State”) to *amici’s* motion for leave to participate as *amici curiae* (Dkt. No. 180). The State mischaracterizes *amici’s* proposed brief and participation in this case. The Court should reject the State’s arguments and grant *amici’s* motion for leave.

First, the State incorrectly contends that *amici* “raise new claims and issues not previously asserted by the existing parties.” Dkt. No. 180, at 2. *Amici’s* brief argues that the State’s enacted Congressional plan is a racial gerrymander—that it used race as the predominant factor in drawing Congressional District 2 (“CD 2”), subordinating race-neutral redistricting principles, and that its use of race was not narrowly tailored to achieve a compelling interest. Dkt. No. 169-3 (“*Amici Br.*”). *Amici’s* argument is premised on the same arguments and racial gerrymandering concerns raised by the *Buck* Plaintiffs in their opposition to the motion to vacate the Court’s injunction. Dkt. No. 163, at 11–15. And the *Buck* Plaintiffs rely on some of the same evidence that *amici* reference. *See, e.g., id.* at 12–13 (citing floor testimony indicating the Legislature used a racial target to draw CD 2). Similarly, during the February 2 status conference, the *Buck* Plaintiffs also raised concerns that the State’s plan constituted an unconstitutional racial gerrymander. Ex. A, Tr. 23:3–5 (“So we’re talking about they subordinated racially-neutral criteria to a consideration of race. That’s one of the issues we’re talking about in intent of discrimination.”); *id.* at 24:11–13 (“[T]he legislature did not use, but subordinated that neutral criteria to their criteria of race of drawing the district the way it did.”).

Despite the *Buck* Plaintiffs and *amici* identifying the same racial gerrymandering concern, the State nonetheless argues that the Court should reject *amici’s* motion because the *Buck* Plaintiffs and *amici* purportedly advance different theories of “narrow tailoring” to support a racial gerrymandering claim. Dkt. No. 180, at 3. This is incorrect. As an initial matter, the State mischaracterizes *amici’s* argument, suggesting that it is *amici’s* position that Section 2 of the Voting Rights Act requires a “target” BVAP in CD 2 of 54% based on illustrative plans prepared by *amici’s* expert. *Id.* at 2. *Amici* do not argue for a racial target. Rather, *amici* argue that *the State’s racial target* was not narrowly tailored to achieve Section 2 compliance because the State has

failed to introduce *any* evidence that the Legislature performed *any* analysis to support its target. *Amici* Br. at 18–22. The illustrative plans prepared by *amici*'s expert demonstrate that drawing CD 2 with a significantly lower BVAP still provides Black voters the opportunity to elect their candidates of choice in compliance with Section 2 and better satisfies the State's traditional redistricting principles. *Amici* Br. at 15–16. To adjudicate the constitutionality of the State's plan, this Court will need to determine whether the Legislature's predominate use of race and a racial target was narrowly tailored to achieve Section 2 compliance. On this question, *amici*'s brief, supporting evidence, and limited participation in future hearings will “assist the court in reaching a proper decision.” *Cox v. Morris*, No. 3:18-CV-30-DMB-JMV, 2019 WL 1601367, at \*5 (N.D. Miss. Apr. 15, 2019); *see also Cooper v. Harris*, 137 S. Ct. 1455, 1471-72, 1479-80 (2017) (explaining the reliance of racial polarization analysis to a racial gerrymandering claim and that an alternative map can be an “evidentiary tool” for identifying a racial gerrymander).

Second, the State argues that *amici* must meet the higher Rule 24 standard for intervention in order to be permitted to participate in this action. Dkt. No. 180, at 3. But, as referenced in *amici*'s motion for leave, “courts have exercised great liberality in permitting an amicus curiae to file a brief in a pending case, and, with further permission of the court, to argue the case and introduce evidence.” *United States v. Louisiana*, 751 F. Supp. 608, 620 (E.D. La. 1990). The sole question before the Court is whether *amici* have an “interest in the case.” *See Lefebure v. D'Aquilla*, 15 F.4th 670, 671 (5th Cir. 2021) (noting that the relevant interest need not be the same as a party or an interest sufficient for standing, and that an *amici* brief need not even be helpful to the court); *Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) (similar). “Courts should welcome amicus briefs” because they help courts “avoid error in their judgments.” *Lefebure*, 15 F.4th at 675. Motions for leave should be granted “unless it is obvious

that the proposed briefs do not meet [Federal] Rule [of Appellate Procedure] 29's criteria as broadly interpreted." *Neonatology Assocs.*, 293 F.3d at 133.

*Amici* have extensive experience litigating precedent-setting voting rights and redistricting cases, and several *amici* advocate on behalf and/or have members who are Black Mississippians who will be directly affected by the Court's decision. *Amici* Br. at 1–3. *Amici*'s perspectives will assist the Court in determining the crucial question of whether the State's plan passes Constitutional muster. Moreover, it is in the interest of efficiency and judicial economy for the Court to permit *amici*'s limited participation in briefing and any hearings, rather than requiring *amici* to file a separate lawsuit. Courts often permit parties to participate in a litigation as an *amicus* as an efficient alternative to intervention. *See, e.g., Cox*, 2019 WL 1601367, at \*5.

Third, the State's argument that *amici*'s motion is untimely is baseless. *Amici* moved swiftly in accordance with the Court's expedited briefing schedule to submit their brief on the same date that the Court ordered oppositions to the State's motion to vacate the injunction be filed. *See* Fed. R. App. P. 29(a)(6) ("An *amicus curiae* must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed."); *Cox*, 2019 WL 1601367, at \*5 ("[The] motion for leave to file an *amicus* brief, which was filed less than a week after [the party's] response was due, is timely"). That the Mississippi State Conference of the NAACP has monitored the redistricting process is no reason to prohibit all four *amici* from participating in the action. And the State has identified no prejudice whatsoever that it will suffer if the Court grants *amici*'s motion.

Accordingly, *amici* respectfully request that this Court grant their motion for leave to appear as *amici curiae*, accept their attached *amici curiae* brief and the supporting declarations, and permit *amici*'s limited participation in any hearings.

Respectfully submitted,

March 1, 2022

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**CERTIFICATE OF SERVICE**

I, Fred L. Banks, Jr., do hereby certify that I have this date filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to all counsel of record with ECF.

SO CERTIFIED, this the 1st day of March, 2022.

/s/ Fred L. Banks, Jr.  
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**EXHIBIT A**

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

JOHN ROBERT SMITH, ET AL.

PLAINTIFFS

VERSUS

CAUSE NO. 3:01-CV-00855-HTW-EGJ-DCB

ERIC CLARK, ET AL.

DEFENDANTS

STATUS HEARING

BEFORE

THE HONORABLE HENRY T. WINGATE  
UNITED STATES DISTRICT  
THE HONORABLE DAVID C. BRAMLETTE  
SENIOR UNITED STATES DISTRICT JUDGE  
AND THE HONORABLE E. GRADY JOLLY  
UNITED STATES CIRCUIT JUDGE  
FEBRUARY 2, 2022  
JACKSON, MISSISSIPPI

REPORTED BY: TAMIKA T. BARTEE, B.C.R., RPR, CCR #1782

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**APPEARANCES:**

FOR THE PLAINTIFFS:	ARTHUR JERNIGAN, ESQUIRE
FOR THE KELVIN BUCK PLAINTIFFS:	CARROLL RHODES, ESQUIRE JOHN WALKER, ESQUIRE CARLOS TANNER, ESQUIRE
FOR THE MS REPUBLICAN PARTY EXECUTIVE COMMITTEE:	MICHAEL WALLACE, ESQUIRE TATE LEWIS, EXECUTIVE DIRECTOR
FOR THE MS DEMOCRATIC PARTY EXECUTIVE COMMITTEE:	SAMUEL L. BEGLEY, ESQUIRE JUDGE TYREE IRVING ANITRA EUBANKS, ESQUIRE
FOR THE MS SECRETARY OF STATE:	TREY JONES, ESQUIRE MATT ALLEN, ESQUIRE LEIGH JANOS, ESQUIRE KYLE KIRKPATRICK, ELECTIONS DIV.
FOR MS EARLY VOTING INITIATIVE 78:	WILBUR O. COLOM, ESQUIRE APHRODITE MCCARTHY, ESQUIRE DITA MCCARTHY, ESQUIRE KELLY JACOBS, ESQUIRE
FOR THE MS GOVERNOR AND MS ATTORNEY GENERAL:	JUSTIN MATHENY, ESQUIRE DOUG MIRACLE, ESQUIRE
FOR THE MS NAACP:	MATTHEW CAMPBELL JAMIL JOHNSON
FOR CONGRESSMAN BENNIE THOMPSON:	FANNIE WARE

1           JUDGE JOLLY: The purpose of our meeting today is  
2 really quite -- is an informal meeting, and to try to find out the  
3 positions of the parties, where everybody is and what the issues  
4 are really before us.

5           So I'm not going to really resolve any legal issues today,  
6 but we hope to become better informed and narrow the issues. So  
7 with that understanding, let me have each of the parties identify  
8 themselves -- or each of the lawyers identify themselves and the  
9 party that they represent. Starting with you, Mr. Jernigan.

10           MR. JERNIGAN: May it please the Court. I am  
11 Arthur Jernigan, and I represent the original plaintiffs,  
12 John Robert Smith and Gene Walker. Unfortunately, Your Honor, we  
13 lost Shirley Hall in the last twenty years since this case was  
14 filed; she died last year. So they do remain the original  
15 plaintiffs.

16           JUDGE JOLLY: This is an old case, isn't it?

17           Okay. Next, please.

18           MR. RHODES: May it please the Court. Carroll Rhodes,  
19 along with John Walker and Carlos Tanner, and we represent the  
20 Kelvin Buck plaintiffs in the 2011 case.

21           JUDGE JOLLY: In opposition to the --

22           MR. RHODES: In opposition to the Republican Party's  
23 motion.

24           JUDGE JOLLY: All right, sir. Anybody else want to --  
25 Mr. Wallace?

1 MR. WALLACE: Your Honor, I'm Mike Wallace, I represent  
2 the Mississippi Republican Party. They are the defendants in both  
3 of these consolidated cases.

4 JUDGE JOLLY: Anybody -- yes, indeed.

5 MR. MATHENY: Your Honor, Justin Matheny with the Attorney  
6 General's Office. I'm here with Doug Miracle, and I represent  
7 Governor Reeves and Attorney General Fitch in both cases.

8 JUDGE JOLLY: All right.

9 MR. JONES: May it please the Court. I'm Trey Jones,  
10 Your Honor, and this is my partner, Matt Allen, and we represent  
11 the Secretary of State's Office. And here with me is  
12 Kyle Kirkpatrick from the Secretary of State's Office.

13 JUDGE JOLLY: All right.

14 MR. BEGLEY: May it please the Court, Sam Begley. I  
15 represent the Mississippi Democratic Party Executive Committee.  
16 We are the defendants in both cases.

17 JUDGE JOLLY: All right. Anybody else will share an  
18 appearance?

19 MS. McCARTHY: May it please the Court. Aphrodite  
20 McCarthy and Wilbur Colom. We here represent MEVI 78. We're  
21 proposed plaintiff intervenors in this case.

22 JUDGE JOLLY: Okay. You're not a party at this point, but  
23 you are the --

24 MS. McCARTHY: No, Your Honor.

25 JUDGE JOLLY: -- intervenor. You've moved to intervene in

1 the case.

2 JUDGE JOLLY: Does anybody else wish to enter an  
3 appearance at this time?

4 I'm going to read a little statement here from the  
5 Southern District of Mississippi, and to clarify the fact -- the  
6 reason we're having this hearing when so many hearings are  
7 precluded from trial or from in-person arguments.

8 This is the statement: As many of you are aware, the  
9 Southern District of Mississippi is presently operating under  
10 Special Order No. 17, promulgated by Chief Judge Dan Jordan for  
11 the Southern District of Mississippi, and agreed to by all other  
12 district court judges.

13 This order cancels in-court proceedings in various  
14 courtrooms in the Southern District of Mississippi because of the  
15 perils presented by COVID-19. This order, however, contains an  
16 exception for matters deemed to be extraordinary, and we deem this  
17 redistricting matter, as an exception to Special Order No. 17. We  
18 have thus chosen to proceed with all safety precautions in place.

19 Now, we have the two basic parties here, as I understand  
20 the proceeding at this point. We have the Mississippi Republican  
21 Party that has moved to vacate an injunction entered in 2011 or  
22 '12 -- I forget when it was. And then, we have the opposition to  
23 the vacating of that injunction.

24 Now, what I would like to know is, is there anybody here  
25 that does not align themselves with one or -- with either of those

1 parties? Who does not align themselves with those -- and I'm  
2 saying that in order to try to reduce the number of people that  
3 we're going to hear from today.

4 I want to hear from the primary parties, that is, the  
5 movant and the opposition to the motion, and then, if anybody  
6 wants to add to that, we would be happy to hear you. But if you  
7 are aligned with either the movant or the opposition to the  
8 movant, then there will be less inclination to hear from you.

9 So now -- so, Mr. Jernigan, who do you represent?

10 MR. JERNIGAN: Your Honor, I represent John Robert Smith  
11 and Gene Walker. They were the original plaintiffs in the  
12 original redistricting case filed in 2001 or '2, after the 2000  
13 census. Your Honor, we -- we initiated this, and asked for the  
14 original three-judge court to enter a constitutional redistricting  
15 plan or order elections at large.

16 This Court entered a constitutional redistricting plan,  
17 which was appealed to the United States Supreme Court and  
18 affirmed. Because I'm a counsel of record for the original  
19 plaintiffs, I'm here, Your Honor, but we ask for the same relief  
20 from the Court now that we asked for then, and that's for this  
21 Court to affirm a constitutional redistricting plan. We submit,  
22 Your Honor, that was done by the Mississippi Legislature a couple  
23 or three weeks ago and signed into law by the governor and meets  
24 all the constitutional requirements to be confirmed.

25 JUDGE JOLLY: So you are fully aligned with the Republican

1 Party in this case, or the interests of the Republican Party?

2 MR. JERNIGAN: We are essentially asking for the same  
3 relief, Your Honor, yes.

4 JUDGE JOLLY: All right. Good. So --

5 JUDGE BRAMLETTE: Well, let me see. What relief is that?  
6 I mean, do you agree with what the legislature has done or not?

7 MR. JERNIGAN: We do, Your Honor, and we submit that that  
8 plan is constitutional and should be confirmed.

9 MR. BEGLEY: Sam Begley representing the Mississippi  
10 Democratic Party Executive Committee. The party is aligned with  
11 the plaintiffs, and the proponents to the motion.

12 JUDGE JOLLY: All right. Does anyone else care to make a  
13 response to my question? All right. Then what we will do is hear  
14 first from the movant, who is Mr. Wallace.

15 And I emphasize again, although we may get into some of  
16 merits of your argument, the purpose here today, of course, is not  
17 to decide any of the issues that have been raised in this  
18 proceeding, but is to simply try to narrow the issues and narrow  
19 the parties so that it can be more expeditiously and effectively  
20 resolved.

21 So, Mr. Wallace, why don't we hear from you and --

22 MR. WALLACE: Thank you, Your Honor. May it please the  
23 Court. I'm Mike Wallace for the Republican Party defendants in  
24 this case. We thank the Court for assembling so speedily today.  
25 It is always difficult to assemble a three-judge panel. We know

1 that, especially in the emergency conditions that this Court is  
2 facing right now. That is why we filed our motion the instant the  
3 governor signed the bill and it became law and there was something  
4 for you to consider. The good news is that ours is largely a  
5 procedural motion about how we ought to proceed, and the good news  
6 is that Mr. Rhodes and his clients largely agree with that.

7 We have said in our motion that this Court is the place to  
8 determine whether Mississippi has adopted a constitutional  
9 congressional redistricting plan. That's the language you used in  
10 the order that is still in effect. We think this is the Court  
11 where that ought to be established, and the Buck plaintiffs agree  
12 with that.

13 The Buck plaintiffs say they want to file a motion to  
14 enjoin the new statute, and we agree that they have a right to do  
15 that, and that this is the place to do it. So we're -- we're all  
16 on the same page there.

17 He also says that they have the burden of proof, and once  
18 again, we agree with them a hundred percent. They do have the  
19 burden of filing a motion and proving House Bill 384 to be  
20 unconstitutional or illegal.

21 We think the issues you will need to address are the ones  
22 that we laid out in our motion. First, does H.B. 384 constitute a  
23 constitutional redistricting plan, and a legal redistricting plan?  
24 Does it satisfy all state and federal constitutional and statutory  
25 requirements? Mr. Rhodes says it doesn't, and he ought to have an

1 opportunity to say why.

2 And the other issue is whether it is unconstitutional for  
3 being -- the existing plan is unconstitutional for being  
4 malapportioned. We think we all agree on that.

5 JUDGE JOLLY: I'm going to ask you a question you probably  
6 may or may not have thought of, and certainly not hold you to any  
7 spontaneous answers that you may make.

8 But there is a motion before us to dissolve the  
9 injunction. And the grounds for the assertion of jurisdiction of  
10 this panel is because we said that -- that until -- that we  
11 maintain jurisdiction until the state of Mississippi came up with  
12 a legitimate plan, in effect, creating our own jurisdiction over  
13 the redistricting for 2020, for this next decade.

14 Now, you filed a motion to dissolve, and we are the ones  
15 that created the jurisdiction of this panel. Now, if we said we  
16 grant the motion to dissolve without comment on the  
17 constitutionality of the present redistricting plan drawn by the  
18 legislature, would we be in error or can we do that, or should we  
19 do that?

20 MR. WALLACE: I have thought about that, Your Honor, and  
21 to some extent, I think we've addressed that in our brief. As I  
22 recall the language of our motion, we've asked you to vacate the  
23 injunction and to determine what injunction, if any, should  
24 replace it.

25 So it's a -- it's a vacate or modify, is what we've



1 technically asked for. You probably have the authority to say, we  
2 think grounds for vacation are here and we want to vacate it and  
3 not go any further. That may be within your power. I don't  
4 believe it is best practices for a court of equity, and we've  
5 cited some authority on that, including the *Jackson* case from the  
6 Fifth Circuit that says a redistricting court generally ought to  
7 consider all possible challenges to the redistricting and wrap it  
8 up in one case.

9 I've cited the usual equitable principles which apply in  
10 federal court, as well as in any other court of equity, which is  
11 that equity does justice by a whole and not by halves. You want  
12 to tie up all the loose ends so there will be no further  
13 litigation later on.

14 If you disregard those principles of equity, and we know  
15 they are all very elastic, but if you were to dismiss this case,  
16 you would not foreclose further litigation.

17 Mr. Rhodes has already told you that he has a client that  
18 wants to file more litigation. You could end this case, but you  
19 could not end this dispute. It would keep on going, and it would  
20 go to some other judge who doesn't know as much about it as this  
21 panel does.

22 Last night, I had the wonderful experience of sitting down  
23 and rereading the trial from 20 years ago. We -- Mr. Johnston got  
24 it back from the archives yesterday. A lot of what you learned  
25 20 years ago is about old arguments that are dead. But you also

1 learned about how the secretary of state runs an election, how the  
2 local election commissioners run an election. How much time they  
3 need; how complicated it is. You three judges are the experts on  
4 all of the practical facets of running an election.

5 And if a new Court has to start over, learn all of that  
6 and finish all of that by March 1st, they're going to have a very  
7 difficult time.

8 So, Your Honor, I have anticipated your question. I can't  
9 sit here and tell you that you can't just bring the hammer down  
10 today and tell us we're done, go home. But, I think, under the  
11 usual proceedings in equity, it would be prudent to finish what  
12 you've started, and let's find out whether this statute is really  
13 constitutional or whether it isn't.

14 JUDGE JOLLY: Okay. Let me ask Mr. Rhodes his position  
15 with respect to that question. If you'd just step down a minute.  
16 Is this --

17 MR. WALLACE: And the only thing we disagree on, he  
18 wants -- he wants -- he wants -- he wants the -- he wants you to  
19 extend the filing deadline to March 1. That's where we'll have a  
20 fight, but I will get out of his way for right now.

21 JUDGE JOLLY: Okay. Glad to see you, Mr. Rhodes. Haven't  
22 seen you in a long time.

23 MR. RHODES: Thank you, Judge. Glad to see you. And it's  
24 good to be here, too. And I'd like to thank the three-judge court  
25 for convening so quickly.

1           And, Judge Jolly, to answer your question: The Republican  
2 Party has asked this Court to vacate its prior injunction. The  
3 prior injunction that this Court entered in 2011 enjoined the use  
4 of the plan that was in existence that had been drawn by the Court  
5 before and put in place. The Court drew or adopted a plan that  
6 the parties agreed to, put that plan in place in 2011, for the  
7 2012 congressional elections and all succeeding congressional  
8 elections.

9           But now, because of the 2020 census, it shows that the  
10 plan that the Court put in place in 2011, is now malapportioned.  
11 And when the Court put that plan in place in 2011, the Court said  
12 the injunction would stay in place until the state of Mississippi  
13 produces a constitutional plan that has been precleared.  
14 Preclearance no longer is required after the *Shelby County* case.  
15 But this Court has to determine whether the state has met its  
16 burden of producing a constitutional plan. So the Court cannot  
17 just vacate or dissolve the injunction without making that  
18 determination. And for making that determination --

19           JUDGE JOLLY: Well, I mean, we could, we could just say,  
20 you know, we're not going to reach that question now. We created  
21 the jurisdiction ourselves, and because we created it, we  
22 dis-create it. And --

23           MR. RHODES: Yes, Judge, but you said, "until -- "

24           JUDGE JOLLY: Sir?

25           MR. RHODES: You said it will remain in place until they

1 produce a constitutional plan. So if you vacate or dissolve, the  
2 assumption here is that their plan is already constitutional, and  
3 we would like to litigate that issue.

4 JUDGE JOLLY: No, no, that -- I'm saying, we would  
5 pretermite that question. We would not even address -- we would  
6 specifically not decide that question, but we would dissolve  
7 the -- which in case would put you in the position of asking for  
8 another three-judge court.

9 MR. RHODES: Yes, Your Honor. And we would have to try to  
10 ask for another three-judge court in short order, and ask that the  
11 plan that the State has adopted be enjoined because it is  
12 unconstitutional. So it's better if this Court -- and we ask the  
13 Court not to vacate its injunction but to amend it. And to amend  
14 it by putting in place just an interim plan that -- the Court  
15 fashioned a plan in 2002. All the Court did make minor changes to  
16 equalize population. The Court did the same thing 2011. And  
17 we're asking the Court to do the same thing again, while this  
18 issue of whether or not what the State did is constitutional is  
19 litigated, and let the elections go forward on the schedule.

20 The only reason we said that the Court want to move the  
21 qualification deadline back, is because the qualification deadline  
22 is already opened, and voters and candidates do not know what the  
23 districts really look like yet. But you can keep the  
24 qualification deadline just like it is, and just put in place an  
25 interim plan to use while the parties sort out whether or not the

1 state plan is constitutional.

2 JUDGE BRAMLETTE: Mr. Rhodes, in 2002, we did enter a  
3 final judgment as you said. At that time, the Mississippi  
4 legislature had not acted. We came along in 2011, and we amended  
5 the prior judgment. As you know, again, the Mississippi  
6 legislature was silent.

7 But in 2022, the legislature has created a new four  
8 district plan, which has been signed into law. Now, we stated in  
9 our 2011 opinion, this: Primary responsibility for  
10 reapportionment lies with the State of Mississippi. If the State  
11 of Mississippi can timely reapportion the districts in a  
12 constitutionally and acceptable manner, the federal courts have no  
13 duties to draw up the district lines.

14 So I'm concerned about our jurisdiction. I mean, we're a  
15 court. We're not consultants or advisors. Do we have  
16 jurisdiction? I guess my question is: How long does this  
17 injunction of 2002 last?

18 MR. RHODES: Judge --

19 JUDGE BRAMLETTE: How will its purpose be achieved? Is it  
20 equitable to apply it prospectively *ad infinitum*. I mean,  
21 clearly, Judge Jolly and I are running out of time.

22 MR. RHODES: Judge, some of the plaintiffs' lawyers are  
23 running out of time, too. But Judge, what y'all said was that  
24 that injunction stays in place until the State of Mississippi  
25 produces a constitutionally-accepted plan.

1           Now, all we're asking for the Court to do, is to amend its  
2 injunction and put a temporary plan in place that the  
3 Court fashions, or one the NAACP offered.

4           In the plan that the NAACP offered, the NAACP followed the  
5 Court's guidance from its 2002 opinion and 2011 opinion, to make  
6 only minor changes to equalize population, maintain a black  
7 majority district, keep districts compact, not have districts  
8 unusually large, keeping universities and military bases, et  
9 cetera. We followed the Court's neutral criteria and the other  
10 criteria that this Court did to make minor changes.

11           So the NAACP is asking to use their plan, and all the Buck  
12 plaintiffs are saying, the Court could draw or fashion its own  
13 plan, just make minor changes to the existing plan until that  
14 issue of whether or not what the State did is constitutional.

15           And that's where the Buck plaintiffs are challenging what  
16 the state did as unconstitutional. And we're saying the Court  
17 needs to resolve that issue prior to dissolving itself.

18           JUDGE WINGATE: Mr. Rhodes, if we just tinker with the  
19 plan, make some amendments to it, won't a potential, aspiring  
20 office holder still be confused as to where they are running from?  
21 What district would actually be the district which would envelop  
22 their efforts?

23           MR. RHODES: Judge, not as much as if this -- if the Court  
24 just dissolved the injunction and let the state plan go into  
25 place. Because the state plan does more than tinker with the

1 existing districts. So election officials will have less to do if  
2 the Court just tinkers with the existing plan a little bit.

3 Voters would not be as confused if the Court just tinkers  
4 a little bit. And candidates would not be confused. So what the  
5 Court has done in the past, if the Court does again, will be  
6 better for voters and election officials and candidates than what  
7 the State does.

8 Because if the State -- if you just dissolve your  
9 injunction, and the State put its plan in place, elected officials  
10 in four counties in Southwest Mississippi will have to notify  
11 people, and there are more split counties, split precincts in the  
12 state plan than in the NAACP plan, which the NAACP plan is asking  
13 the Court not to just tinker with this a little bit, and not do  
14 any major changes, you know, so the elections can proceed as  
15 they're already scheduled.

16 JUDGE WINGATE: Mr. Rhodes, one additional question:  
17 Somewhere in your papers, you said that the legislative plan has  
18 some racial problems. Did you say that?

19 MR. RHODES: Yes.

20 JUDGE WINGATE: What are you talking about?

21 MR. RHODES: Judge, the NAACP has engaged or engaging  
22 political scientists to do analysis. Although that plan put black  
23 voters into the Second Congressional District, the question is:  
24 How performing are those black voters?

25 JUDGE BRAMLETTE: How what?

1 MR. RHODES: Performing. You know, as far as being able  
2 to keep the ability of black voters in the Second District able to  
3 elect a candidate of their choice. And this is one of the  
4 concerns that the Buck plaintiffs have.

5 JUDGE WINGATE: Okay. I don't quite understand that.  
6 Could you put some more meat on that skeleton?

7 MR. RHODES: Okay. Yes, Your Honor.

8 JUDGE WINGATE: Because you are talking about the Second  
9 District, right?

10 MR. RHODES: Second District. But I'm talking about the  
11 additional area from the state plan, Franklin County.

12 JUDGE WINGATE: The additional area which is far south?

13 MR. RHODES: Farther south.

14 JUDGE WINGATE: All right.

15 MR. RHODES: Bringing them in would further dilute or  
16 limit the ability of black voters to elect, not just a current  
17 congressman. It's about being able to elect a candidate of  
18 choice.

19 If President Biden, for instance, is re-elected and  
20 decides to appoint Congressman Thompson as the Secretary of  
21 Homeland Security or any other position, then that becomes --  
22 Second District becomes an open seat.

23 The question becomes whether or not any other black  
24 candidate would be able to raise funds and campaign that full  
25 length of the state, and be able to get black voters to turn out



1 like they would if you had the voters from central Mississippi,  
2 Hinds County area, or some other area in that district.

3 New candidate would be able to campaign better, you know,  
4 just in a compact district. The Second District that the State  
5 drew is not as compact, and there is some investigation going on  
6 as to whether or not legislators had an intent to harm the ability  
7 of black voters to elect. That's why we're asking for an  
8 evidentiary hearing on that issue of intent.

9 JUDGE WINGATE: I want to follow up on that. You know,  
10 when you first started, you provided the factors that were  
11 necessary for us to consider on redistricting: compactness,  
12 et cetera, et cetera. Right?

13 MR. RHODES: Yes.

14 JUDGE WINGATE: All right. Now, among those factors,  
15 where is the factor that will speak to your concern about someone  
16 new coming in, some minority, some new person aspiring for that  
17 position to run with a district that the person is not familiar  
18 with as to constitute a racial bias? I mean, how does racial bias  
19 generate from that when that district is 60-plus percent  
20 African-American? And right now, I think, it's something like  
21 62 percent. And -- but under the state plan, it's still plus  
22 60 percent African-American.

23 MR. RHODES: Yes, Your Honor, and it depends on where that  
24 African-American addition to the Second Congressional District is  
25 coming from. And although --

1 JUDGE WINGATE: I didn't quite understand.

2 MR. RHODES: -- although the criteria -- this Court, in  
3 2011, recognized that Second Congressional Dist- -- Mississippi  
4 needs one black congressional district. The Court realized that  
5 the State should comply with Section 2 of the Voting Rights Act,  
6 that criteria. Section 2 of the Voting Rights Act says that black  
7 voters need to be afforded the opportunity to elect a candidate of  
8 their choice.

9 Now, it doesn't say whether that candidate of choice was  
10 an incumbent or somebody new. And with all the litigation that  
11 has gone on within the Fifth Circuit and the United States Supreme  
12 Court over that issue of what constitutes vote dilution since the  
13 1980s, have been -- the Courts have been more concerned with black  
14 voters generally, whether it's a newcomer, incumbent, or whoever,  
15 to be able to be elected, whether black voters can elect someone  
16 that they choose.

17 And what we're saying is that it matters where those black  
18 voters come from when you add them. You can add folks who are not  
19 as politically active, you can add people who are as politically  
20 active, and it makes a difference as to whether or not the black  
21 voters are able to elect a candidate of their choice.

22 JUDGE WINGATE: Thank you.

23 JUDGE JOLLY: Okay. Mr. Rhodes, do you have anything  
24 further to say?

25 MR. RHODES: Your Honor, we are just asking the Court to

1 amend its injunction, tinker with it, and let elections proceed  
2 while we litigate this issue with the same three-judge court.

3 JUDGE JOLLY: So we understand, your position is that the  
4 discrimination really comes from the size -- from the geographical  
5 size of the district? Is that --

6 MR. RHODES: Not just geographical size, but where the  
7 black voters are added to, to the Second Congressional -- where  
8 they're coming from.

9 JUDGE BRAMLETTE: How does that factor in though? In  
10 other words, Wilkinson County, when you add Wilkinson and Adams  
11 and Jefferson -- you mentioned Franklin County a moment ago, that  
12 offsets Franklin; Franklin's majority Caucasian. But these other  
13 counties are black. Are you saying that black voters -- nobody  
14 wants to come to Wilkinson County, I understand that. That's  
15 where I'm from. Are you saying the black voters down there are  
16 not as prepared to make the right decision, vis-a-vis, a black  
17 candidate? Is that what you're saying?

18 MR. RHODES: Your Honor, in the 1980s, I, along with  
19 Deborah McDonald and Willie Rose litigated that issue in front of  
20 Judge Barbour in *Monroe v. City of Woodville*. And Judge Barbour  
21 said in that case -- and it was affirmed by the Fifth Circuit --  
22 that black voters are not losing elections because of  
23 statistically significant white/black voting. Black voters are  
24 losing elections because too many black voters are crossing over  
25 and voting for the white candidates.

1           Although Wilkinson County is majority black, they have  
2 majority white elected. Now, that might be the candidates of  
3 their choice, but, you know.

4           JUDGE BRAMLETTE: It's not now, I can tell you that. You  
5 can walk through the courthouse down there; most of the officials  
6 elected are African-American.

7           MR. RHODES: And, Your Honor, there have been quite a few  
8 losses where African-American officials in Wilkinson County over  
9 the last 20, 30 years, have lost to white candidates. And because  
10 the black turnout is not as high, and that's another reason, you  
11 know, in the Second Congressional District.

12           Franklin County is not going to have a -- and Amite County  
13 is not going to have that high of a black voter turnout, and  
14 that's why the concern is, where are the black voters you're  
15 adding to the Second District, where are they coming from?

16           JUDGE JOLLY: So, I mean, you're alleging racial  
17 discrimination that would support the change in the district on  
18 the basis of the enthusiasm -- the voter enthusiasm of the black  
19 population?

20           MR. RHODES: Judge, what we're saying is that the  
21 districts were drawn with certain information in mind. Where we  
22 get the black voters from in drawing this district that the  
23 legislature came up with, and which configuration would give a  
24 white candidate a better chance to be elected in the Second  
25 Congressional District. That's one of the intentional

1 discrimination issues we need -- we want to have an evidentiary  
2 hearing on it.

3 JUDGE JOLLY: Is that the nub of your claim of  
4 discrimination, is that it does not include more black  
5 enthusiastic voters? Is that --

6 MR. RHODES: Well, Judge, and the additional claim is that  
7 neutral redistricting criteria that was adopted by this Court,  
8 when the legislature considered what criteria they're going to use  
9 to draw a district this time around, the Joint Legislative  
10 Congressional Redistricting and Legislative Reapportionment  
11 Committee came up with criteria. And No. 4 in their criteria was  
12 to use the neutral criteria that this Court adopted in its 2011  
13 order.

14 That neutral criteria included the size of the district,  
15 not running the district all the way down the Mississippi River.  
16 Compactness; compactness was the first neutral criteria that this  
17 Court stated. And the Court stated why compactness was important.

18 And we're saying that this Second Congressional District  
19 has been compact, going all the way back to *Jordan v. Winter*.  
20 After the *Jordan v. Winter* case was over in 1984, the legislature  
21 in the 1990s, drew congressional districts; they kept the Second  
22 Congressional District compact.

23 This time around, they did not. The Court did after 2001  
24 and 2011; the Court kept it compact. And the additional criteria  
25 was the size. The Court talked about how geographically large

1 these districts do not need to be.

2 JUDGE JOLLY: You're right about that.

3 MR. RHODES: So we're talking about they subordinated  
4 racially-neutral criteria to a consideration of race. That's one  
5 of the issues we're talking about in intent of discrimination.

6 JUDGE JOLLY: The district runs from Memphis, Tennessee,  
7 all the way down to the Louisiana line. It's a long, long  
8 district. That much is certainly obvious.

9 MR. RHODES: Yes. But the Court in the past has cut it  
10 off at Jefferson County.

11 JUDGE JOLLY: But is that racially discrim- -- are you  
12 saying it is racially discriminatory because of its size?

13 MR. RHODES: No, Judge. We said that this Court  
14 adopted --

15 JUDGE JOLLY: Does that even figure into your argument,  
16 that the Second Congressional District is physically larger,  
17 making it much more difficult for whomever was the congressman or  
18 the candidate from that area to campaign than it would in any  
19 other district; is that your argument?

20 MR. RHODES: For making it unnecessarily larger. This  
21 Court in 2001 and 2011 said compactness was an issue and refused,  
22 refused to run the district all the way down to Wilkinson County,  
23 that area. Instead, the Court picked up population within  
24 Hinds County.

25 The Court, in its opinion, also said, you need to put

1 growth areas in different congressional districts. One of the  
2 growth areas in this area of Hinds County, is the Jackson  
3 Metropolitan area. Northeast Jackson growing, Madison County  
4 growing. You can pick up population and put in the Second  
5 Congressional District from there, and not subordinate this  
6 neutral criteria that this Court adopted in 2011. Compactness,  
7 not having unusually large districts; those are criteria that this  
8 Court adopted in 2011, and the legislature, this year -- well, in  
9 2021, stated that they wanted to use the Court's neutral criteria  
10 in drawing the congressional district. And all we're saying is  
11 that the Court -- is that the legislature did not use, but  
12 subordinated that neutral criteria to their criteria of race of  
13 drawing the district the way it did. And that's why we want an  
14 evidentiary hearing on that issue, from the same Court.

15 JUDGE JOLLY: Thank you, Mr. Rhodes. Oh, hold on just a  
16 minute.

17 JUDGE WINGATE: And if you had a hearing on this point,  
18 how would you make your proof?

19 MR. RHODES: Part of it would come from the floor debate  
20 in the senate.

21 JUDGE WINGATE: From where?

22 MR. RHODES: The floor debate. We have captured some  
23 testimony from the floor debate as to race being intentional, and  
24 we want to be able to engage in discovery, Your Honor. We would  
25 like to take depositions of committee members, staffers, as to

1 what instructions were given on the drawing of the lines, who had  
2 input on the drawing of the lines. Before we have that  
3 evidentiary hearing, we would like to have some discovery of those  
4 issues.

5 JUDGE BRAMLETTE: What would happen to the qualifying date  
6 of March 1st if we did that, obviously -- that date, March 1st, so  
7 what is your response to my question? What would we do about the  
8 qualifying date?

9 MR. RHODES: Judge, what we're -- leave the qualifying  
10 date the same. What we're asking the Court to do is to draw its  
11 own interim plan or to adopt the NAACP plan as an interim plan.  
12 Let people run. The Court schedule an evidentiary hearing some  
13 time later on this year, give us time to conduct some discovery.  
14 If the state can prove, or if the -- let me say it another way.  
15 If the plaintiffs, the Buck plaintiffs, fail to prove that the  
16 State plan was drawn unconstitutionally for an intentional racial  
17 purpose, then the Court could vacate its injunction, and put in  
18 place a state plan.

19 On the other hand, if the Buck plaintiffs prove that the  
20 State did use race as a predominant factor in drawing its plan,  
21 then the Court could, again, keep its interim plan in place until  
22 the State comes back with a constitutional plan that complies with  
23 Section 2.

24 JUDGE WINGATE: Mr. Rhodes, on the NAACP plan, there are  
25 some sections that are in red of areas that have been added or



1 moved.

2 MR. RHODES: Yes.

3 JUDGE WINGATE: All right. Where were they moved to?

4 MR. RHODES: In the Second Congressional District.

5 Primarily, the shifts were between the Third Congressional  
6 District and the Second Congressional District. And between the  
7 Third District and the Fourth District, there was a move.

8 And the reason this movement took place, Judge, the Second  
9 Congressional District lost 65,000 people. First, Third, and  
10 Fourth gained. So all of them have to, you know, move some  
11 population around.

12 But in the NAACP plan, they only split, I think, four  
13 counties -- three counties, excuse me, three counties, in order to  
14 achieve zero percent population deviation.

15 You can move people from the Third District to the Second.  
16 You can move them from the First District to the Second. But the  
17 way the Court has been drawing the plans in the past, the Court  
18 has come into the Jackson metro area to pick up population to put  
19 in the Second District when the Second District loses population.  
20 And we ask the Court to put an interim plan in place doing that,  
21 or use the NAACP plan.

22 JUDGE WINGATE: And none of these plans violate the  
23 protocols that are set up for a minority elected from a  
24 majority/minority district?

25 MR. RHODES: Well, the NAACP is maintaining that the state

1 plan does by where the black voters, or the black population was  
2 moved into the Second District.

3 JUDGE WINGATE: But the Second District would still have  
4 greater than 60 percent?

5 MR. RHODES: Yes. Yeah.

6 JUDGE WINGATE: And that was a big concern the last time  
7 we did this?

8 MR. RHODES: Yes, Judge, but since that time, the math and  
9 science has become more sophisticated, and the Supreme Court has  
10 also indicated, you don't need no target number. You need enough  
11 black voter in each population within a district to give black  
12 voters an equal chance to elect a candidate of their choice.

13 In the past, we were covered by Section 5 of the Voting  
14 Rights Act. And Section 5 prohibited retrogression. People  
15 misunderstood retrogression to mean we can't reduce that number  
16 below what it is.

17 But the Court -- the Supreme Court has said, no,  
18 retrogression -- you can reduce the number, but you have to give  
19 black voters the ability to elect.

20 Now, we maintain that given the racial black voting within  
21 Mississippi, and within the Second Congressional District, it  
22 would still need to be around that 60 percent. But we just don't  
23 want to say that -- that you got to have 60 percent. You need  
24 enough blacks in the Second Congressional District to give them a  
25 chance to elect a candidate of their choice.

1 JUDGE WINGATE: But your percentage in the Second District  
2 that you submitted is still more than 60 percent?

3 MR. RHODES: It's still more than 60 percent.

4 JUDGE WINGATE: In fact, right now, it's what, 62 percent?

5 MR. RHODES: It's 62 percent in the plan we submitted.

6 And that's because of Northeast Jackson. We put all of  
7 Hinds County into the Second Congressional District. White  
8 vote -- white population leaving Jackson, blacks moving  
9 into Northeast Jackson.

10 Southern Madison County, white populations are leaving,  
11 the black folks are moving in. So what we did was added where  
12 there was growth, and it just so happens that that growth happened  
13 to be in black areas.

14 JUDGE WINGATE: Last question: Since Congressman  
15 Bennie Thompson is the incumbent, is he in lockstep with your  
16 argument?

17 MR. RHODES: Yes, Your Honor, I believe some -- I believe  
18 Ms. Fannie Ware from his office is here today, too.

19 JUDGE WINGATE: So he's in lockstep with your argument  
20 here about the Second District as constituted by the  
21 Mississippi Legislature?

22 MR. RHODES: In opposition.

23 JUDGE WINGATE: That it's too sparse, too large --

24 MR. RHODES: Yes.

25 JUDGE WINGATE: -- even though the number of

1 African-Americans in that district would still comprise more than  
2 60 percent?

3 MR. RHODES: Yes. And Judge, in Wilkinson County,  
4 Mississippi, in *Monroe v. City of Woodville*, African-Americans  
5 were over 50 percent of the town of Woodville, unable to elect  
6 alderman.

7 JUDGE WINGATE: Okay. Now, why were they unable to elect  
8 somebody?

9 MR. RHODES: As Judge Barbour said, they didn't lose  
10 because of white statistical black voting, but because too many  
11 black folks were crossing over and voting for white candidates.

12 JUDGE BRAMLETTE: Judge Barbour didn't know too much about  
13 Wilkinson County.

14 JUDGE WINGATE: You get in trouble on Wilkinson County.

15 JUDGE JOLLY: Anything further? Thank you, Mr. Rhodes.

16 MR. RHODES: Thank you, Your Honor.

17 MR. WALLACE: Your Honor, may I?

18 JUDGE JOLLY: Yes, indeed.

19 MR. WALLACE: May it please the Court. I want to say  
20 something about Judge Bramlette's question about jurisdiction, and  
21 then I'll talk as much or as little as you like about Mr. Rhodes'  
22 allegations, which I've just heard for the first time here this  
23 afternoon, just as you have.

24 The Court has jurisdiction. The retentive power of equity  
25 is pretty strong, and so you have jurisdiction. The question is

1 the extent to which you want to exercise it. I'm reminded of what  
2 this Court did in the legislative redistricting hearing ten years  
3 ago.

4 The Court issued an order in 2011 that says you're going  
5 to go ahead and use the old plan for the time being because we  
6 don't have time to set up a new one, but this Court's going to  
7 retain jurisdiction. And when the Court adopts a plan next year,  
8 come see us, and we won't have to repeat anything that's already  
9 been done, and we're going to look at it. And that's what the  
10 Court did, and the Court denied further relief to the plaintiffs.  
11 So you can keep jurisdiction until you are satisfied that  
12 the problem has been completely addressed.

13 Judge Bramlette, it doesn't mean you have to keep it for  
14 ever and ever world without end. I'm -- I'm like any defendant;  
15 my ultimate goal is to have this complaint dismissed. But I think  
16 to get there, you have to make the determination you've said you  
17 need to make: Has the legislature adopted a constitutional plan?  
18 We think it has.

19 Once this Court makes that determination, it says so, it  
20 allows the statutory plan to go into effect, and at that point,  
21 this Court dismisses the case with a job well done and all the  
22 loose ends tied up.

23 So we think you have jurisdiction to do that. We think  
24 you ought to do that. And the fact that we've already been told  
25 what the claims are going to be is all the more reason for us to

1 do it here.

2           If the Court does dismiss this case, then it takes weeks,  
3 and I don't know how long to assemble a three-judge Court, get all  
4 the parties, all these same parties -- we're all indispensable  
5 parties; nobody's going to be missing. We'll all be back in some  
6 courtroom, and then I will have my opportunity to respond to what  
7 Mr. Rhodes just said. And we're getting pretty close to March 1st  
8 by the time that happens.

9           You were also right, Judge Bramlette; it is not this  
10 Court's business to grant any relief until it determines that the  
11 legislature has done something wrong. And there -- to this point,  
12 there has been no cognizable allegation that there's anything  
13 wrong with House Bill 384. And without some such well-supported  
14 allegation, then you can't go moving deadlines, you can't enjoin  
15 House Bill 384; you need to let -- you need to let it go into  
16 place.

17           Now, the only -- as I said, I'll say as much or as little  
18 as you want about his allegations. But his principal allegation  
19 is that he has an expert who will tell you that the 60 percent  
20 black majority in District 2 under House Bill 384 is not  
21 performing. And what "performing" means is that it doesn't  
22 perform, or it may not perform the way Mr. Rhodes wants it to.  
23 What does the statute say? The statute says that black voters  
24 have to have an equal opportunity to elect candidates of their  
25 choice.

1           If he has an expert that is going to tell this Court that  
2 a 60 percent black voting-age population majority anywhere in the  
3 State of Mississippi lacks an equal opportunity to elect  
4 candidates of the choice, I want to see that expert report.

5           As a matter of fact, I want to see it tomorrow. I think  
6 what this Court ought to do, is tell Mr. Rhodes to go home,  
7 compose his motion, attach his expert report, and send it in here,  
8 and then I will say as much as I would like to say about the  
9 allegations we've heard today.

10           Judge, I don't know Wilkinson County; I'm from Biloxi.  
11 And I don't know the Delta all that well, either. But I do not  
12 believe there is a distinction between the way black voters  
13 perform in Wilkinson County and the way they perform in --

14           JUDGE JOLLY: Let me ask you: Has the inability to  
15 perform or the performance question ever been recognized as a  
16 basis for discrimination in redistricting cases?

17           MR. WALLACE: I think what he's talking about is a term of  
18 art that says, are they cohesive enough to elect candidates of  
19 their choice? We had that discussion last year with Judge Reeves  
20 about a state senate district, which was black majority, and he  
21 thought it wasn't a performing black majority. And it was mooted  
22 in the middle of en banc oral argument at the Fifth Circuit a few  
23 months later. So we don't know what the law really is on that.

24           But I don't know of any authority. That's why I -- that's  
25 why common sense tells me a 60 percent majority will get you

1 there. I'm -- I'm old enough to remember Frank Parker. I wish  
2 Mr. McDuff were here to tell me if I'm getting him wrong. Mr.  
3 Parker's theory was, you needed a 65 percent black voting -- black  
4 majority because there were all kinds of impediments to blacks  
5 registering and getting to the polls and getting organized and all  
6 of those things. And you needed a 60 percent voting age  
7 population majority for all of those reasons.

8 We are here 40 years later, and now for the first time,  
9 I'm hearing a lawyer tell me that a 60 percent voting age  
10 population isn't good enough. And I really want to see that  
11 expert report, because I don't believe that's the law.

12 So I know this -- this Court has every reason to want this  
13 cup to pass from you. I understand that. But you are further  
14 down the road than anybody. Mr. Rhodes is obviously ready to file  
15 his motion and his expert report, and we've got a deadline on  
16 March 1st. And I came here to ask you to set a schedule, and  
17 that's what I'm going to do, and I'm going to sit down.

18 Please -- please tell Mr. Rhodes to get busy, and we'll  
19 see what he has to say. And if you think his argument is legally  
20 sufficient, then we'll see if it's factually sufficient. But  
21 right now, we're just talking. Let's get it scheduled and do some  
22 law.

23 JUDGE BRAMLETTE: What about the qualifying deadline?  
24 Does this Court have authority to delay that?

25 MR. WALLACE: There's a -- there's a -- there's a lot of



1 law on that, Your Honor, and it all says that qualifying deadlines  
2 are an important part of the statutory scheme, and they ought to  
3 be respected by the Court.

4 As you've said, what the legislature has done can be  
5 disrupted if there's good reason to believe the legislature has  
6 messed something up. We went through that in great detail in the  
7 2011 legislative litigation ten years ago about when you can and  
8 when you should change dates. And the Court, ten years ago,  
9 decided not to do it.

10 Until I see any reason to believe that the legislature has  
11 done something wrong, I would tell you it would be error to extend  
12 dates. Let's -- let's see their case, and if you think it's  
13 serious, then we can see what kind of authority this Court ought  
14 to exercise. Thank you, Your Honor.

15 JUDGE JOLLY: Thank you, Mr. Wallace. We have a motion to  
16 intervene, and after we have heard the motion to intervene, if the  
17 parties have something to say about it, I think we will then set a  
18 briefing date, but I'll have to talk to my colleagues here about  
19 that. So let's hear on the motion to intervene.

20 Mr. Colom?

21 MR. COLOM: Yes, Your Honor, thank you for the  
22 opportunity. I think our issue is probably not ripe for being  
23 addressed now. We are concerned about the previous order and  
24 language in it that we believe affected the right to initiative in  
25 Mississippi and that we did not believe that this Court intended

1 for that injunction creating the four districts going back to  
2 2001, I believe, to have any impact.

3           However, the Court's decision on Mr. Rhodes' motion on  
4 behalf of the NAACP will determine whether or not we want to make  
5 suggestions to the Court to what should be put in such an  
6 injunction.

7           JUDGE JOLLY: But why should you have any right to make  
8 those suggestions in this proceeding. This is a reapportionment  
9 proceeding, and I'm not fully understanding why you think your  
10 claim is relevant, to put it in legal terms. What kind of  
11 standing do you have to raise that issue in this proceeding?

12           MR. COLOM: Our clients are individuals, citizens of  
13 Mississippi, seeking to advance an initiative for early voting.  
14 The Supreme Court has made -- or Mississippi, has made the -- the  
15 initiative process in Mississippi inoperable because it says that  
16 there are only four districts in Mississippi, and the Constitution  
17 of Mississippi contemplates getting initiative voters to sign  
18 petitions from five districts.

19           It's our belief, they rely upon this Court's opinion,  
20 given the injunction, for the -- for the conclusion that the five  
21 districts, for initiative purposes, no longer exist, when we  
22 believe that this Court's jurisdiction did not extend to the  
23 Mississippi Constitution's provision on initiatives and that this  
24 Court did not intend to have its injunction of effect in any way  
25 the initiative process in Mississippi.

1           So I will request to this Court, and I will -- we actually  
2 made our motion to amend the order that this Court had entered --  
3 that's before the new redistricting plan -- to state that it in no  
4 way extended to in anyway to affect the Mississippi constitutional  
5 provision on initiatives.

6           JUDGE JOLLY: We can't issue a decision and then decide  
7 anticipatory issues that might come up with respect to it.

8           MR. COLOM: Well, the Court maintained jurisdiction to  
9 modify or amend its own order. And we -- we wanted to modify  
10 language within the injunction to make it clear that it only  
11 affected the election of people to Congress and had no application  
12 to anything else operative within the state of Mississippi laws  
13 and Constitution.

14          JUDGE JOLLY: It's like it's self-evident.

15          MR. COLOM: Well, the Mississippi Supreme Court did not  
16 see it that way. I just wanted this Court to make that clear,  
17 because they took the districts the Court had created for  
18 elections to Congress, right, as -- as applicable to the  
19 Mississippi Constitution for purposes of the initiative process.

20          JUDGE BRAMLETTE: Counselor, aren't you asking this Court,  
21 though, to perform a legislative function by amending Section 273  
22 of the State Constitution of 1890, in order to provide for a voter  
23 initiative process. Isn't that what you're doing?

24          MR. COLOM: No, sir. I'm asking this Court to make it  
25 clear that it is not taking on the legislative purposes -- for

1 legislative purposes, doing that. That the jurisdiction of this  
2 Court, when it entered its orders, were only to enforce the  
3 federal Constitution and the Voting Rights Act, and that this --  
4 the order entered by this Court did not reach anything else. It's  
5 solely within the Mississippi Constitutional and statutes that has  
6 no application to those federal Constitution and statutory  
7 provisions. It is to clarify the limits of the order by this  
8 Court. It is to clarify and modify it to make it clear.

9 JUDGE JOLLY: Who said we did do that?

10 MR. COLOM: The Mississippi Supreme Court said you did.

11 JUDGE JOLLY: How did they say that?

12 MR. COLOM: In an opinion striking down the initiative  
13 proc- -- well, not strike it down. They said it was inoperative  
14 because of the order entered by this Court creating four  
15 districts, when the Constitution says the initiative petitions had  
16 to be collected from the five congressional districts, the old one  
17 that existed in 1990.

18 JUDGE WINGATE: But even if we were to put in the order  
19 that you asked, to say that we didn't intend for our ruling to  
20 have that far reaching effect, you'd still be left, realistically,  
21 with four districts.

22 MR. COLOM: Yeah, for purposes of electing the people to  
23 Congress, that's -- that's understandable, because that's a  
24 federal constitutional requirement.

25 JUDGE WINGATE: But the statute that concerns you says

1 that you have to have petitions from five districts.

2 MR. COLOM: Not the statute, the constitutional provision  
3 says that.

4 JUDGE WINGATE: Right.

5 MR. COLOM: And the Mississippi Supreme Court says this --  
6 but it also says, Your Honors, that Mississippi Legislature cannot  
7 adopt any legislation that undermines the constitutional right to  
8 initiative.

9 So what the Court -- the way the opinion of this Court has  
10 been applied, it has done something that the legislature, in fact,  
11 could not do. That the legislature could not adopt a  
12 redistricting plan, in our view, that undermined the  
13 constitutional right to initiative.

14 And so, we're saying, we wanted this Court to simply  
15 clarify in any order or opinion, that it is not extending its  
16 jurisdiction to any other provision within the Mississippi  
17 Constitution or statutes.

18 JUDGE WINGATE: Would that be binding on the Mississippi  
19 Supreme Court?

20 MR. COLOM: No, sir. It would be binding on this Court,  
21 and -- to clarify its order. Again, we would approach the  
22 Mississippi Supreme Court to address that issue once this Court  
23 makes it clear that its order, its writ, does not go to the  
24 initiative process in the Mississippi Constitution.

25 JUDGE JOLLY: I mean, don't you -- I mean, does it occur

1 to you, though, that if everybody has a question about what our  
2 redistricting order does, they file to us for an interpretation of  
3 our redistricting order. I mean, it seems to me that that clearly  
4 is not the avenue for the relief you are seeking. I mean, you can  
5 do it by an independent action, but to try to intervene in this  
6 particular case, it's just not germane to what we are doing.

7 MR. COLOM: Well -- well, our argument, Your Honor, is  
8 since you maintained jurisdiction and only this Court can  
9 interpret its orders, and we've asked to modify it. The other  
10 side said --

11 JUDGE JOLLY: Any Court can interpret our order. Any  
12 competent court can interpret our order.

13 MR. COLOM: Well, in some questions -- in this case,  
14 Your Honor, we believe the Court was silent.

15 JUDGE JOLLY: You need an independent action to ask some  
16 legitimate court to say that the redistricting order doesn't mean  
17 this; let somebody else interpret our order. I mean, we can't  
18 answer every question that every citizen would ask about our  
19 order. I mean, it doesn't make sense, does it?

20 MR. COLOM: Well, I was -- I think it's appropriate  
21 because it goes beyond -- I was arguing that this Court's order  
22 had limited scope, and had limited jurisdiction, and to simply  
23 clarify that within the order.

24 Now, it says clearly in the order that you can amend or  
25 modify or clarify -- I think the word is used "clarify," if I

1 remember correctly -- and we wanted you to clarify that order.

2 JUDGE JOLLY: Thank you very much.

3 MR. COLOM: Thank you.

4 JUDGE JOLLY: Thank you, sir. And now --

5 JUDGE WINGATE: We just heard from those who wish to be  
6 intervenors. What about the ones who are already intervenors?

7 MR. WALLACE: May it please the Court. Those are  
8 Mr. McDuff's clients, the Branch intervenors, and he sent an  
9 e-mail to your chambers this morning that says they -- they do not  
10 care to participate.

11 JUDGE WINGATE: And he's speaking for all of his clients?

12 MR. WALLACE: That's the way I interpreted the e-mail, but  
13 I'd encourage the Court to go back and look at it.

14 JUDGE JOLLY: I understand what you're saying now. All  
15 right. If anybody else has anything they would like to say, any  
16 other represented party here would have any kind of remarks,  
17 Mr. Begley from the Democratic point of view, or any of the other  
18 parties that would like to make further comment? Okay. I believe  
19 not.

20 So we will -- now, Mr. Wallace, you have filed the motion  
21 to dissolve the injunction. And ordinarily, I mean, that puts the  
22 burden on you to initially file the motion -- I mean, file the  
23 first brief.

24 But on the other hand, if, to the extent that it is at  
25 issue in this case, Mr. Rhodes has the burden to show that the

1 legislature acted in a discriminatory way --

2           So, I believe the way to handle this, and I'll be glad to  
3 hear from either of you on this, but is for you to file the first  
4 brief supporting your motion to dissolve the injunction. And then  
5 Mr. Rhodes' response to that, and, of course, you would have any  
6 kind of opportunity you wanted to to respond to his initial  
7 response to your motion. Have I got that sufficiently confused  
8 for you?

9           JUDGE BRAMLETTE: And also, Mr. Wallace, when you do that,  
10 of course, you have to argue in your brief why it is and how it is  
11 that this three-judge panel should move forward and make a  
12 decision on the constitutionality of the legislative plan.

13           MR. WALLACE: Thank you. And may it please the Court.  
14 Yes, we did file the motion. We filed it in the name of vacating  
15 the injunction and for other relief. Our ultimate objective is to  
16 vacate the injunction. The other relief we asked for was a  
17 schedule to permit the Court to decide to -- to -- to make the  
18 decision on whether it's constitutional or not. So we have filed  
19 that brief, and they've filed an answer to it.

20           So I understand the Court's concern about jurisdiction. I  
21 think we've addressed that to some extent in our prior briefing,  
22 but we will be happy to say more about it. But ultimately --  
23 ultimately, the Buck plaintiffs have agreed they have the burden  
24 of proof. I don't care whether we go first or they go first, but  
25 it's hard for us to say any more than we've said now until we see



1 what their actual claim is.

2 JUDGE JOLLY: That's exactly right. And that's fine. We  
3 can't cut anybody off and say, You file a motion, you file a  
4 response and that's it.

5 So, Mr. Rhodes, do you have anything that you would like  
6 to contribute to this conversation? And the conversation being  
7 about whose burden it is to proceed first on the motion to  
8 dissolve the injunction.

9 MR. RHODES: Your Honor, since Mr. Wallace's client filed  
10 a motion to vacate, then they should carry the burden on those two  
11 issues they raised, to vacate, and whether or not the legislative  
12 plan is constitutional. Because they're saying, "vacate your  
13 injunction altogether," and your injunction says, "You are  
14 enjoined until the legislature propose a constitutional  
15 redistricting plan." So his motion to vacate, and say vacate all  
16 of that order. And so they -- I think they would have the burden  
17 of showing that the legislature plan is constitutional and we  
18 could respond. And we could have the burden of proving it's not.

19 JUDGE JOLLY: We'll just start it this way. Mr. Wallace,  
20 you filed the first brief on the motion to dissolve, and we'll  
21 just take it from there. Then, I think, at that point, when you  
22 file a motion to dissolve, you are asserting that the present  
23 motion -- that the present plan is satisfactory, which, of course,  
24 is his burden to show that it is unconstitutional.

25 So, I mean, we do have it a bit confused here about who

1 has what burden, but I don't know if that ultimately has any  
2 substantial effect on who -- who goes first and who goes second.

3 MR. WALLACE: We will be happy to go first. We'll tell  
4 you why we think it's constitutional and legal. And, I guess,  
5 we'll be anticipating the argument that he has briefly stated  
6 today, and we'll have more to say in rebuttal once we hear him and  
7 see him flesh out his arguments in his brief.

8 JUDGE JOLLY: Okay. What --

9 MR. RHODES: Your Honor, for us to meet our burden, that's  
10 why, in our response, we asked for an evidentiary hearing. We  
11 want to take depositions, because the burden is on us to prove  
12 intent of discrimination. We want to gather evidence to produce  
13 in the record. We wanted to -- that's why we didn't want to short  
14 circuit it. We wanted to --

15 JUDGE JOLLY: We'll have briefing first, and if the  
16 substantial issues of dispute are raised in the briefing, then you  
17 will have your opportunity to engage in such discovery procedures  
18 that may be appropriate and available.

19 So we will go with the schedule that I indicated.  
20 Mr. Wallace goes first; you respond to that. Then if anybody  
21 feels like they've been shortchanged, or that the procedure has  
22 precluded them from making the arguments that they wanted to make,  
23 we'll take it up at that time.

24 All right. Now, let me ask you about the timing of these  
25 briefs. Any kind of suggestions about that? I mean, we,

1 obviously, need to act fast if we're going to keep the March date.  
2 So...

3 MR. WALLACE: Your Honor, this group of defendants are  
4 cooperating. I think we have a pretty good idea of what our  
5 arguments are. There are elected officials who need to be  
6 consulted, and I don't know how easy they will be to consult when  
7 the legislature is in town.

8 I would say I can have a brief to you by this time next  
9 week, but I don't know whether that's going to provide sufficient  
10 opportunity for the other defendants to look at that and have  
11 input. Attorney general --

12 JUDGE JOLLY: Why don't we make it a week from Monday.  
13 What date would that be? The week from this coming Monday. Is  
14 that what you said?

15 MR. WALLACE: I think that's February 14th, isn't it?

16 JUDGE JOLLY: Well, not to interfere with anybody's  
17 romantic plans.

18 MR. WALLACE: I'm looking around at the other folks, and  
19 they seem to think we can do it by the 14th. I think we can do it  
20 by the 14th.

21 JUDGE JOLLY: Close of business on the 14th.

22 MR. WALLACE: Yes, Your Honor.

23 JUDGE JOLLY: All right. And then, Mr. Rhodes, you would  
24 respond in -- can you respond in seven days thereafter?

25 MR. RHODES: Judge, we would like to be given about the

1 same length of time. So theirs was -- they have a little bit  
2 longer, I think about ten days for theirs.

3 JUDGE JOLLY: Ten days?

4 MR. RHODES: Yes.

5 JUDGE JOLLY: All right. Then, ten days from the 14th --  
6 well, ten days, I guess, from the 15th. It would be the close of  
7 business on the 14th, theirs would be filed. You would have from  
8 that point forward, ten days to file your brief.

9 MR. BEGLEY: Your Honor, Sam Begley for the Democratic  
10 Party.

11 JUDGE JOLLY: Sure. Sure.

12 MR. BEGLEY: The parties would like the opportunity to  
13 respond to the Republican Party at the same time that the Buck  
14 plaintiffs do, by filing a brief.

15 JUDGE JOLLY: You're a party to this case. As of now,  
16 you're not an intervenor or anything; you're a party.

17 MR. BEGLEY: I just wanted to make sure you weren't  
18 limiting to these parties right here.

19 JUDGE JOLLY: No, I certainly am not.

20 MR. BEGLEY: Okay.

21 JUDGE JOLLY: Does anybody else want to file a brief who  
22 is entitled to file a brief?

23 JUDGE WINGATE: Does anybody contemplate moving the  
24 qualifying date?

25 MR. WALLACE: I expect we will oppose that. I can't speak

1 for the elected officials, but I think they will oppose it. I  
2 think we will -- since -- since we still haven't seen what their  
3 claim really is, we will have to have a rebuttal after the 24th --  
4 after the 24th. We can do it quickly, but we do have to have a  
5 chance to rebut these arguments that we have not yet seen.

6 JUDGE JOLLY: Mr. Rhodes, I would say that I am a bit  
7 confused about the basis for -- of your position of the  
8 discriminatory intent of the plan itself, and how this is  
9 discriminatory in terms of black voting rights.

10 So you need to spell that out in this brief. This is your  
11 opportunity to do it, and to attach all affidavits, maps, or other  
12 documents that are necessary to establish your position.

13 MR. RHODES: Yes, Your Honor.

14 JUDGE JOLLY: Thank you, Mr. Rhodes.

15 Yes, sir?

16 MR. MATHENY: I have a question, Your Honor. Justin  
17 Matheny for the Attorney General and the Governor.

18 JUDGE JOLLY: Right.

19 MR. MATHENY: We would like the opportunity to either join  
20 Mr. Wallace's brief or file our own on the same time schedule,  
21 and, of course, we will not be duplicating anything that he does  
22 or --

23 JUDGE JOLLY: Well, you're certainly entitled to do so if  
24 there is no duplication.

25 MR. MATHENY: Yes, Your Honor.

1 JUDGE JOLLY: But, we do not want duplication.

2 MR. MATHENY: Crystal clear.

3 JUDGE JOLLY: Don't need it. Does anybody? Does anybody  
4 else have any matter they'd like to raise at this point?

5 MR. JERNIGAN: No, Judge Bramlette, just we want  
6 constitutional reenforcement. I think we're going to file with  
7 Mr. Wallace and ride that horse as long as we can, Your Honor.

8 JUDGE JOLLY: Okay.

9 MR. JONES: Your Honor?

10 JUDGE JOLLY: Yes, Mr. Jones.

11 MR. JONES: May it please the Court. Do we have a small  
12 window of time to file a reply, a rebuttal, following the 24th?

13 JUDGE JOLLY: Well, I mean, at that time, I mean, there  
14 would be reply brief -- you would be entitled to file a reply  
15 brief. We're not asking for simultaneous briefs. So there would  
16 be a reply; there would be a time for a reply that we have not  
17 thought about or talked about today. And I would say a reply  
18 brief should be five days thereafter. Would that be --

19 MR. WALLACE: We will have a busy weekend, Your Honor, but  
20 we'll do that. The --

21 JUDGE JOLLY: We'll make it convenient to you.

22 MR. WALLACE: My brother rides in the Irish parade on the  
23 26th, but if he files a brief on Thursday the 24th, we'll have a  
24 rebuttal for you on the 28th.

25 JUDGE JOLLY: Well, I wouldn't dare interfere with the

1 parade. So you can extend that if you wish.

2 JUDGE WINGATE: So Mr. Wallace, do you see the last brief  
3 being filed on the 24th?

4 MR. WALLACE: Their brief is to be filed on the 24th. We  
5 will get you our rebuttal by Monday the 28th.

6 JUDGE WINGATE: It's the 28th.

7 MR. WALLACE: Monday -- their brief is Thursday the 24th,  
8 and we will get you the rebuttal by Monday, the 28th.

9 JUDGE WINGATE: And the qualifying deadline is when?

10 MR. WALLACE: It's the next day, Judge.

11 JUDGE WINGATE: I know. That's why I asked the question a  
12 few moments ago: Did anyone contemplate moving the qualifying  
13 deadline? If so, then I need -- I think we would like to see  
14 whatever authority you have for moving it or not moving it, so  
15 that we don't have to say, go out and research this matter on that  
16 late date to see if we have that authority to do it. So that we  
17 can look at all of that at one time.

18 MR. WALLACE: Your Honor, I can commit that in this brief  
19 I'm going to file a week from Monday, I will cover the cases that  
20 control and sort of rebutting an argument that hasn't been made  
21 yet, but I will tell you what we think the law is on your  
22 authority to move the deadline, and why we think you can't. And  
23 then I suppose you'll hear from him on that on the 24th.

24 JUDGE WINGATE: All right. As long as you place it in  
25 issue. Thank you.

1           JUDGE JOLLY: Does anybody have anything else they wish to  
2 raise before we adjourn this meeting, this proceeding? Okay. The  
3 proceeding is adjourned.

4           (Adjourned.)

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COURT REPORTER'S CERTIFICATE

I, Tamika T. Bartee, Certified Court Reporter, in and for the State of Mississippi, Official Court Reporter for the United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing pages contain a full, true, and correct transcript of the proceedings had in the aforementioned case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I further certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

THIS the 7th day of February, 2022.

s/ Tamika T. Bartee

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