UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 19-60109

JOSEPH THOMAS; VERNON AYERS; and MELVIN LAWSON

Plaintiffs-Appellees,

– v. –

PHIL BRYANT, Governor of Mississippi and DELBERT HOSEMANN, Secretary of State of Mississippi, in Their Official Capacities of Their Own Offices and in Their Official Capacities as Members of the STATE BOARD OF ELECTIONS COMMISSIONERS,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON

RESPONSE TO APPELLANTS' EMERGENCY MOTION FOR STAY OF ORDER

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Plaintiffs-Appellees,
v. No. 19-60109

PHIL BRYANT, *et al.*,
Defendants-Appellants.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons as described in the fourth sentence of 5th Cir. Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Honorable Court may evaluate possible disqualification or recusal.

1. Joseph Thomas, Appellee
2. Vernon Ayers, Appellee
3. Melvin Lawson, Appellee
4. Robert B. McDuff, Lead Counsel for Appellees
5. Beth L. Orlansky, Mississippi Center for Justice, Counsel for Appellees
6. Jon Greenbaum, Lawyers' Committee for Civil Rights Under Law, Counsel for Appellees
7. Ezra D. Rosenberg, Lawyers' Committee for Civil Rights Under Law, Counsel for Appellees
8. Arusha Gordon, Lawyers' Committee for Civil Rights Under Law, Counsel for Appellees
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14. Phil Bryant, Governor of Mississippi, Appellant
15. Delbert Hosemann, Secretary of State of Mississippi, Appellant
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20. B. Parker Berry, Butler Snow LLP, Counsel for Appellants
21. Jim Hood, Attorney General of Mississippi
22. Douglas T. Miracle, Counsel for the Office of the Mississippi Attorney General

Respectfully submitted,

s/Jon Greenbaum
JON GREENBAUM
DATE: February 27, 2019

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Appellants have not demonstrated in their Motion for Stay ("Appellants' Motion") that they can satisfy the high standard of review, abuse of discretion, needed to override the district court's denial of a stay.

This case involves a straightforward minority vote dilution claim involving one Mississippi legislative district, Senate District 22, configured in a manner that results in racial discrimination in violation of § 2 of the Voting Rights Act. Plaintiffs-Appellees' proof of the core components of a § 2 claim—the three preconditions in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and the Senate factors—were not rebutted and largely undisputed and accordingly, the district court found a violation.

As demonstrated by Appellees' proposed illustrative plans, the discrimination can easily be cured by redrawing only District 22 and one adjacent district, leaving the other 50 districts undisturbed. A remedial plan can easily be implemented for the August 6, 2019 primary election with a brief postponement of the March 1 qualifying deadline in those two senate districts. The Secretary of State's office has confirmed that the elections can proceed on schedule as long as the official ballot is available by June 17, 2019. Ex. 15 at 167, ¶ 5 (Turner Affidavit).[1]

[1] Exhibits filed by Appellants will be referred to by Appellants' exhibit number and this Court's page numbers in the format of "Ex. ___ at ___."

This case was filed on July 9, 2018 and tried February 6–7, 2019. The district court announced on February 13, 2019, that the evidence demonstrated a violation of § 2. The court stated that Plaintiffs-Appellees had already presented plans during the liability stage that would remedy the violation but added that "the Legislature is entitled to the first opportunity to redraw District 22." Appellees' Exhibit A at 1.[2] On February 16, the court issued its opinion explaining the reasons for its holding and once again stated that "the Legislature is entitled to the first opportunity to redraw District 22." Ex. 14 at 31.

As later noted by the court, A. Ex. B at 1, n.2, the initial reaction of legislative leadership to the court's decision was to wait for an appeal: "Mississippi lawmakers are in no hurry to redraw a state Senate district after a judge ruled that the district dilutes black voting power. The Senate Elections Committee Chairman, Republican Kevin Blackwell of Hernando, told The Associated Press on Thursday that he's waiting to see if the state will appeal the judge's order." Emily Wagster Pettus, *No Fast Action on Judge's Redistricting Order in Mississippi*, Assoc. Press (Feb. 14. 2019). The leadership took no steps until the judge set a deadline of February 26 for a response from the legislature. A. Ex. F. at 1. On that day, the leadership authorized Appellants' counsel to inform the Court that (in counsel's words) "*in the event that the stay motions . . . are denied*, the Senate desires the

[2] Appellees' exhibits will be cited as "A. Ex. __ at ___."

opportunity to perform its constitutional duty and enact a redistricting plan redrawing Senate District 22." A. Ex. C at 1 (emphasis added).

On February 25, Appellees moved to postpone the qualifying deadline for two weeks, from March 1 to March 15, for Districts 22 and adjacent District 23, with no change to the qualifying deadline for the other 50 state senate districts. A. Ex. G at 1. The purpose of the motion was to give potential candidates notice of the new district lines after a remedy is adopted. According to the evidence, District 23 can be redrawn along with 22 to cure the violation. Ex. 14 at 8–9, 24 & n.59.

On February 26, the district court issued several rulings. It denied Appellants' Motion for a Stay, explaining that "[w]e are months away from the primaries and months more away from the general election." A. Ex. B at 4. It further noted that a remedy can be achieved by moving only 28 precincts from one district to another and that "[t]here is no evidence in these [Appellants'] affidavits or elsewhere that such modest steps will harm the efficient conduct of the 2019 election cycle." *Id.* at 5. The court found that Appellants are not likely to succeed on appeal, and that issuing a stay would "substantially injure" Appellees because their right to vote would be impaired if a § 2 violation continued for another election cycle. *Id.* at 6. It concluded that "the traditional factors also weigh against issuance of a stay." *Id.* at 5.

Having been informed that the Legislature would not act unless the efforts to obtain a stay were futile, the court also moved forward on February 26 to put a plan in place. It issued an order modifying Districts 22 and 23 as provided in Plaintiffs-Appellees' Illustrative Plan 1 and extending the candidate qualifying deadline in Districts 22 and 23 from March 1 to March 15. A. Ex. B at 1–2. The court also entered judgment for Plaintiffs-Appellees. A. Ex. E at 1.

Instead of proposing a remedial plan, Appellants and the Legislature have focused on staying the case. But Appellants cannot satisfy the requirements of a stay, and now that the court has denied their stay, cannot demonstrate the abuse of discretion and the clear error of judgment required before a lower court's stay denial is overridden on appeal. *Wildmon v. Berwick Universal Pictures,* 983 F.2d 21, 23 (5th Cir. 1992). Appellants have made no showing of likelihood of success on the merits. They have raised two legal claims—that a three-judge district court was required and that § 2 claims can never be brought in a bare majority-minority district— in which the weight of authority supports the court's contrary rulings. They have challenged the court's factual finding that African-American turnout in District 22 is lower than white turnout but that finding is supported by the evidence, is not clearly erroneous, and is not essential to the court's ultimate conclusion. They raise the equitable claim of laches but fail even to argue the essential element of undue prejudice, which the court found not to exist. In

addition, the other three factors—balancing of the equities regarding the parties and the public interest—do not favor a stay.

For these reasons, their Motion should be denied. Alternatively, if this Court believes the Legislature should have another opportunity to draw a remedial plan, this Court should grant a stay on remedy only to allow the Legislature a brief period of time to adopt a new remedial plan for District 22.

STATEMENT OF THE CASE

The district court concluded that Plaintiffs-Appellees had met all of the three *Gingles* preconditions, Ex. 14 at 23–27, and also found that this showing was bolstered by the Senate factors, *id.* at 27–30, such that "the plaintiffs have established District 22's lines result in African-Americans having less opportunity than other members of the electorate to elect the State Senator of their choice." *Id.* at 30. The court also stated that "Mississippi's Senate is much whiter than Mississippi." *Id.* Based on these determinations, the court found that the configuration of District 22 violated § 2 of the Voting Rights Act. *Id.*

Regarding the three *Gingles* preconditions, the court found that Defendants-Appellants, through the testimony of their expert, did not contest Plaintiffs' showing that they satisfied the first two *Gingles* preconditions or that there was racially polarized voting. Ex. 14 at 23–24. The court found that a pattern of racially polarized voting through four election cycles demonstrated the third

Gingles precondition in "that white bloc voting in District 22 defeats the African-American community's candidate of choice." *Id.* at 26–27.

As presently drawn, District 22 is 50.77 percent black in voting age population ("BVAP"). In rejecting Defendants-Appellants' claim that no § 2 case can be brought with respect to a majority-minority district, the district court quoted this Court's statement that "[u]nimpeachable authority from our circuit has rejected any *per se* rule that a racial minority that is a majority in a political subdivision cannot experience vote dilution." Ex. 14 at 30–31, quoting *Monroe v. City of Woodville,* 881 F.2d 1327, 1333 (5th Cir. 1989).

The court concluded that "although African-American voters in District 22 are already sufficiently numerous and geographically compact as to constitute a majority, the District could be redrawn to increase the BVAP by at least 10 additional percentage points" with plans that "satisfy traditional redistricting criteria" and "show that the BVAP can be increased without impairing the District's compactness." Ex. 14 at 8, 11, 24. As the court noted in its February 13 order: "The plaintiffs have put forward three alternate Plans that would remedy the § 2 violation, comply with Supreme Court precedent, and satisfy traditional redistricting criteria. Plans 1 and 2 would affect only Districts 22 and 23. Plan 3 would affect Districts 22, 23, and 13." A. Ex. A at 1; Ex. 14 at 8–11.

The court also agreed with Plaintiffs' expert's conclusion, based on

ecological inference analysis, that "[o]n average, white turnout is 10.2 percentage points higher than black turnout" in the last four state senate elections in District 22. Ex. 14 at 7. The court rejected Defendants' expert reliance on self-reporting statewide census surveys showing African-American participation equals white participation in even-numbered election years because they "look at the wrong jurisdiction [statewide rather than District 22], the wrong election years, and rely upon known issues with self-reported voting surveys—issues that EI [ecological inference], in contrast, seeks to overcome." Ex. 14 at 28.

Days before trial, the Governor and Secretary of State filed a motion, claiming that pursuant to 28 U.S.C. § 2284(a), the case should have been assigned to a three-judge district court. The court denied that motion noting, among other things, that their position was contrary to the language of the statute and existing case law. Ex. 13.

Defendants-Appellants also contended the case should be dismissed on the equitable ground of laches. But as the court correctly noted, Plaintiffs-Appellees filed this case "16 months before the 2019 general election, 13 months before the primaries, and eight months before the qualification deadline." Ex. 14 at 23. While the case could have been filed sooner, the court concluded that the failure to file sooner was excusable. But the court's more important finding was that "[t]he evidence in our case weighs against a finding of undue prejudice," *id.*, an essential

element of a laches claim.

ARGUMENT

I. Appellants Have Not Demonstrated a Likelihood of Success on the Merits

A. The District Court Correctly Denied Appellants' Last-Minute Motion to Convene a Three-Judge Court

Appellants' lead argument as to why there is a strong likelihood they will succeed on appeal is a weak one – that the court erred as a matter of law in denying the motion they filed days before trial to appoint a three-judge court. *See* Ex. 13. The court's decision is consistent with the governing statute and the case law.

28 U.S.C. § 2284(a) provides for the two circumstances where a three-judge court shall be convened: "A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." Neither circumstance applies here; § 2 does not include a provision for a three-judge court, 52 U.S.C. § 10301, and this case involves a statutory (not constitutional) challenge to the apportionment of a statewide legislative body.

Appellants contend that the language of 28 U.S.C. § 2284(a) is grammatically ambiguous and could be read so that any challenge to the apportionment of a statewide legislative body would be heard by three-judges

whereas only constitutional challenges to a congressional reapportionment would be heard by a three-judge panel. Appellants' Mot. at 6–8. Appellants' reading is inconsistent with the plain reading of the statute, where the term "the constitutionality of" serves as a series-modifier of everything that follows, as discussed by Justice Scalia and Bryan Garner. *See* Ex. 13 at 3. Appellants argue that, because the examples provided in Justice Scalia and Garner's text regarding the series qualifier canon of construction all "involve a modifier, not a noun," this "canon simply does not apply to §2284(a)." Appellants' Mot. at 7. Appellants' argument relies solely on the fact that the examples Justice Scalia and Garner happened to include in their text do not include any examples of nouns as modifiers. But they ignore the basic fact that a noun—or a phrase *e.g.,* "the constitutionality of"—can also act as a modifier. *Merriam-Webster Dictionary* 746 (10th ed. 1993) (defining a modifier as a "word or phrase that makes specific the meaning of another word or phrase").

Second, Appellants turn to a cherry-picked version of the legislative history in 1976 of § 2284(a) to argue that "every statutory method of challenging any apportionment" must be heard by a three-judge panel. Appellants' Mot. at 8–9. However, a more thorough review establishes that the Senate Judiciary Committee provided for three-judge courts in only certain reapportionment cases (*i.e.,* cases with constitutional claims) because they wanted to avoid overwhelming the courts.

Chestnut v. Merrill, 2019 WL 338909, at *3 (N.D. Ala. Jan. 28, 2019) ("in 1976, when Congress amended § 2284, Congress made the amendments to *limit* the number of cases requiring a three-judge panel.").[3] In *Morales v. Turman*, the Supreme Court held that "the three-judge court procedure is not a measure of broad social policy to be construed with great liberality, but . . . an enactment technical in the strict sense of the term and to be applied as such." 430 U.S. 322, 324 (1977).

Appellants cannot identify one apportionment case involving a Voting Rights Act claim but not a constitutional challenge where a three-judge court has been convened. To the contrary, these cases were heard by a single judge. *See Rural W. Tenn. African-Am. Affairs Council v. Sundquist*, 209 F.3d 835, 838 (6th Cir. 2000) ("RWTAAC then amended its complaint to challenge the House Plan on the sole ground that it violated § 2 of the Voting Rights Act. Because the amended complaint contained no constitutional claims, the three-judge court disbanded itself."); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004) (VRA challenge to South Dakota state house districts); *Old Person v. Brown*, 182 F. Supp. 2d 1002 (D. Mont. 2002) (VRA challenge to Montana state house districts); *Chestnut*, 2019 WL 338909, at *5 (N.D. Ala. Jan. 28, 2019) (VRA challenge to

[3] In 1976, due to a "mounting volume of three-judge court cases and the increased dissatisfaction with that procedure" Congress decided to "virtually [ ] end the use of those courts" and repealed the "statutes that had required three-judge courts for constitutional challenges to state laws and administrative orders and to Acts of Congress." Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4235 (3d ed.).

Alabama Congressional districts). Consistent with these authorities, the court properly denied Appellants' motion to convene a three-judge court. Ex. 13 at 5.

B. Contrary to Appellants' Contention, There Is No *Per Se* Rule Against § 2 Claims in Bare Majority-Minority Districts, and the District Court's Finding on Turnout Differentials Is Supported by the Evidence and Is Not Clearly Erroneous

Although Appellants label Section I-B of their Motion to this Court with a broad heading—"[t]he Court erred as a matter of law by finding that the border of District 22 violates the results test of § 2"—they only make two arguments. First, they claim that § 2 claims are not legally cognizable in districts with a majority-minority population. Appellants' Mot. at 9–13. Second, they claim the district court erred when it found African-American turnout is lower than white turnout in state senate elections in District 22. *Id.* at 13–16.

The Supreme Court has recognized that "it may be possible for a citizen voting-age majority to lack real electoral opportunity." *LULAC v. Perry,* 548 U.S. 399, 428 (2006). Moreover, as previously noted, this Court stated that "[u]nimpeachable authority from our circuit has rejected any *per se* rule that a racial minority that is a majority in a political subdivision cannot experience vote dilution." *Monroe v. City of Woodville,* 881 F.2d 1327, 1333 (5th Cir. 1989). According to Appellants, "Plaintiffs rely . . . upon [this] single Fifth Circuit decision." Appellants' Mot. at 1. But Plaintiffs-Appellees also rely on the Supreme Court's statement in *LULAC* and decisions from four other circuits that have

reached the same conclusion. *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 934 (8th Cir. 2018); *Pope v. Cty. of Albany*, 687 F.3d 565, 575 n.8 (2d Cir. 2012); *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1041 (D.C. Cir. 2003); *Meek v. Metro. Dade Cnty.*, 908 F.2d 1540, 1546 (11th Cir. 1990). Appellants argue that this principle should not be "extended" from the at-large context in *Monroe* to the single-member district context in the present case, but *LULAC*, *Kingman*, and *Pope* cases all involved challenges to districts. Appellants' Mot. at 11–12.

The primary case Appellants cite, *Bartlett v. Strickland*, 556 U.S. 1 (2009), involves a fundamentally different issue. In *Bartlett*, the plaintiffs attempted to meet the first *Gingles* precondition by creating an illustrative state house district where African-American voters made up less than 50 percent but could, along with white crossover voters, elect representatives of their choice. *Id*. at 6. The Supreme Court rejected this argument, concluding that the minority population must compose a "numerical, working majority" to have recourse under § 2 and satisfy the first *Gingles* requirement of size and geographic compactness. *Id.* at 12–13. The Supreme Court's holding in *Bartlett* precluding a § 2 violation when the minority population is too small does not suggest, let alone mandate, a *per se* rule barring a claim on the ground that the minority population is too large. Such a *per se* rule would nullify the Court's statement four years earlier in *LULAC*.

Particularly given that Justice Kennedy wrote both the opinion in *LULAC* and the plurality opinion in *Bartlett* upon which Appellants rely, Appellants' reading of *Bartlett* as somehow overriding *LULAC* is nonsensical.

Appellants claim that "Plaintiffs cite no case holding that a majority-minority district violates § 2," Appellants' Mot. at 13, but the Eighth Circuit, in *Ferguson-Florissant*, affirmed the lower court's holding that even if the population of the challenged district was majority-minority, the district's election system still violated § 2. 894 F.3d at 933–34, 941. Even if majority-minority districts rarely violate § 2, the case law makes it clear that it is possible. And the violations will most likely occur in cases like this one, where the majority is extremely slim, white bloc voting consistently defeats the minority candidates of choice, white voter participation exceeds minority voter participation, and reasonably compact alternative districts can be drawn under which minority voters can elect candidates of choice.

Regarding turnout, the court described as follows, Plaintiffs-Appellees' expert Dr. Palmer's conclusion based on an ecological inference analysis of the last four District 22 elections: "[T]here is a sizable turnout gap between African-American and white voters in District 22. On average, white turnout is 10.2 percentage points higher than black turnout." Ex. 14 at 7. In their Motion, Appellants claim that the court should have disregarded Dr. Palmer's analysis and

relied on self-reporting statewide census surveys showing that African-American voter registration and turnout exceeds that of whites in even-numbered years during presidential and congressional elections. Appellants' Mot. at 13. But after hearing the expert testimony, the court rejected that contention, pointing out that the census surveys "look at the wrong jurisdiction [statewide rather than District 22], the wrong election years, and rely upon known issues with self-reported voting surveys—issues that EI [ecological inference], in contrast, seeks to overcome." Ex. 14 at 28. This is a perfectly sensible and supportable finding by the court based on actual turnout at the polls and there is no clear error.[4]

Appellants also claim the court erred by considering the 2015 District 22 election because Dr. Palmer excluded from his analysis of two majority white precincts in Cleveland within District 22 where most voters were mistakenly given ballots for another senate district. Dr. Palmer based his conclusion on his analysis of the other approximately 50 precincts in District 22 where voters received the proper ballots and valid votes were counted. *See* A. Ex. H at 3–4. That analysis

[4] Appellants cite the statement in *NAACP v. Fordice* that the plaintiffs' expert in that case "acknowledged that in recent years Mississippi's African-American and white citizens have maintained virtual parity in voter turnout." 252 F.3d 361, 368 (5th Cir. 2001). Appellants notably omit the footnote from this cite. The footnote states that white turnout was slightly higher in 1994 and 1996 while African-American turnout was slightly higher in 1995." *Id.* at 368 n.1. These statewide numbers do not undermine Dr. Palmer's expert analysis that white turnout exceeded African-American turnout by an average of 10 points in District 22 senate elections over four separate election cycles. As noted by the Supreme Court, § 2 requires an "intensely local appraisal" of the relevant facts. *Gingles,* 478 U.S. at 79.

demonstrates the turnout differentials Dr. Palmer documented. Moreover, the analysis of the elections from prior District 22 elections corroborates these turnout differentials.[5]

Appellants did not present any witness who claimed that election administration errors invalidated Dr. Palmer's turnout analysis. Though Appellants claim they did not learn of this until January 31, 2019, one week before trial, and therefore they "could not examine that data," Appellants' Mot. at 15, in actuality, Appellant Secretary of State knew about these errors in 2015 because he issued a public statement about them. Ex. 2 at 4. Counsel for Defendants-Appellants inquired about this subject at Plaintiffs' expert's deposition and it was that inquiry that led Plaintiffs, out of an abundance of caution, to provide them with the list that is in Exhibit 2 of their Motion to this Court. But even if Appellants had only a week, that was sufficient time for their expert to "examine that data" and analyze any alleged impact of excluding the two precincts where voters received the wrong

[5] The current plan, adopted in 2012, was used for the 2015 election. The 2011, 2007, and 2003 elections were conducted under the prior plan adopted in 2002. Having claimed in their laches arguments in district court that this case should have been filed once the plan was precleared in 2012, Appellants now imply that the one election held in 2015 under the existing plan was an insufficient basis for the decision in this case. According to Appellants, "[t]his Court has reversed a decision finding legally significant white bloc voting based on a single contest." Appellants' Mot. at 16, *citing Rangel v. Attorney General,* 8 F.3d 242, 246 (5th Cir. 1993). But Appellants fail to point out that in *Rangel,* this Court based its ruling on five statewide judicial elections where minority candidates won in the territory covered by the judicial district under challenge. *Id.* at 247. The present case is different. As previously noted, the candidates supported by African-American voters lost due to white bloc voting in both endogenous and the exogenous elections in District 22 across all state election cycles from 2003 to the present.

ballot. At trial, Appellants did not claim or establish a record that they were prejudiced by this January 31 disclosure. Instead, they sat quietly by and complained about the timing of the disclosure only after the trial. As the district court stated regarding this issue: "The defendants presented no evidence indicating that Dr. Palmer's approach was in error or would cast any shadow on his conclusions." Ex. 14 at 24.

Their contention rests solely on one of their attorneys asserting that the court could "take judicial notice that Cleveland is the location of predominantly [white] Delta State University" and "[h]ad those non-voting white students been taken into consideration in plaintiffs' turnout estimates, the level of estimated white participation throughout District 22 would have fallen." Appellants' Mot. at 15. But this attorney is neither a witness nor an expert; he has not conducted a statistical analysis or provided any specific data and he was not subject to cross-examination. Moreover, the fact that a pocket of white college students in one precinct might not vote because they are registered elsewhere—and ineligible to vote in District 22—does not demonstrate that African-American turnout somehow equals white turnout among eligible voters in District 22.

Even if the district court had committed clear error in its finding regarding turnout, that subsidiary finding is not essential to the court's ultimate finding of a violation. Appellants claim that in order to win, Appellees "bore the burden to

demonstrate that the African-American citizens of Mississippi 'do not in fact participate to the same extent as other citizens.'" Appellants' Mot. at 13 (quoting *Fordice,* 252 F.3d at 368). But they left out part of the quote. The Fifth Circuit was referring to the impact the Senate Report factors on the history of discrimination and socioeconomic disparities had on present-day participation. The Fifth Circuit simply said that "*to support a favorable finding on these factors*, [the plaintiff-appellee] bore the burden to demonstrate that the African-American citizens of Mississippi 'do not in fact participate to the same extent as other citizens.'" 252 F.3d at 368 (emphasis added) (internal citation omitted). But the absence of proof on certain Senate factors does not usually automatically override proof of the *Gingles* factors. *Gingles*, 478 U.S. at 45. As stated by district court: "[t]he Fifth Circuit has noted that it will be only the very unusual case in which Plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of the circumstances." Ex. 14 at 18 (quoting *Benavidez v. Cty. of Irving, Tex.*, 638 F. Supp. 2d 709, 713 (N.D. Tex. 2009) (citations omitted)).

C. Appellants Have Not Argued the Timing of This Case Created Undue Prejudice, an Essential Element of Laches

In response to Defendants-Appellants' invocation of laches, the district court correctly noted that Plaintiffs-Appellees filed this case "16 months before the 2019 general election, 13 months before the primaries, and eight months before the

qualification deadline." Ex. 14 at 23. The court added: "[t]his timeframe is more than enough to litigate their single-district single-count claim." *Id.* Though the case could have been filed sooner, the court held that any failure to file sooner by two of the Plaintiffs-Appellees was excusable. *Id.* at 21. But the court's more important finding was that "[t]he evidence in our case weighs against a finding of undue prejudice." *Id.* at 23. As the court pointed out, "[t]o succeed with a laches defense, the defendants must show '(1) a delay in asserting a right or claim, (2) that the delay was not excusable, *and* (3) that there was undue prejudice to the party against whom the claim is asserted.'" *Id.* at 20 (emphasis added), quoting *Envtl. Def. Fund v. Alexander,* 614 F.2d 474, 478 (5th Cir. 1980). Here, Appellants have not even argued undue prejudice in their Motion. This is because there is no undue prejudice. As mentioned above, the Secretary of State's office confirmed that the elections can proceed on schedule as long as the official ballot is available by June 17, 2019. Ex. 15 at 167, ¶ 5 (Turner Affidavit).

Thus, the same analysis applies here as in *Retractable Technologies, Inc. v. Becton Dickinson & Co.*, 842 F.3d 883, 900 (5th Cir. 2016):

> We need not decide . . . whether BD proved an inexcusable delay . . . because in any event, the district court neither erred nor abused its discretion in concluding that BD suffered no undue prejudice. . . . The district court's factual findings are not clearly erroneous; as a result, the district court did not abuse its discretion in rejecting the affirmative defense of laches.

Appellants have made no showing that the court abused its discretion, the standard

of review on laches. *Id.* at 898.

II. The Balance of Harms Weighs Against a Stay

As the district court noted when denying the stay, any stay will "substantially injure" African-American voters who have lived with this § 2 violation through four election cycles: "Given the importance of voting and the years that have elapsed without the electoral opportunity intended by § 2, the better course of action seems to be to not injure the plaintiffs for another election cycle." A. Ex. B at 6. The district court also stated that, "there is no evidence . . . that [the] modest steps [involved in this limited remedy] will harm the efficient conduct of the 2019 election cycle." *Id.* at 5.

Appellants raise the spectre of an unopposed election, but as counsel knows, candidates have already qualified in both parties and a brief extension of the qualifying deadline in two districts will cause no harm. They quote *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006), about the risk of confusion as "an election draws closer," but the stay there was granted because of a statewide change on October 4 for a November 7 election. By contrast, the primary election here is over five months away.

III. The Public Interest Weighs Against a Stay

According to Appellants, "[t]he public is best served by allowing it to enforce its laws, rather than requiring compliance with an electoral scheme it did

not choose while the appeal in this matter remains pending." Appellants' Mot. at 19–20. But the same could have been said about numerous discriminatory electoral mechanisms that have been struck down by the courts over the last 50 years. The public includes African-American voters and given that Appellants have not demonstrated a likelihood of prevailing on the merits, the public interest favors enforcement of the Voting Rights Act in this election cycle.

Appellants state that party committees must reconvene to approve candidate qualifications but present no reason why that cannot be done in short order. *Id.* Appellants cite *Watkins v. Mabus*, 771 F. Supp. 789 (S.D. Miss. 1991). In that case, the three-judge court allowed elections to go forward under an unconstitutional plan given the unusual sequence of events that had occurred, but it did so with the understanding that special elections from a lawful plan would be conducted the next year, which is what happened. *Id.* at 797 (setting deadlines for nominations for a special master and a status conference the following year); 791 F. Supp. 646 (S.D. Miss. 1992). Here it is far better to conduct this election under a plan that complies with § 2.

CONCLUSION

For the foregoing reasons, Appellants' Motion should be denied. Alternatively, if this Court believes the Legislature should be given another opportunity to adopt a remedial plan, the Stay should be entered with respect only

to the remedy so the Legislature can have a period of time to adopt a remedial plan.

February 27, 2019 Respectfully submitted

/s/ Jon Greenbaum

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CERTIFICATE OF SERVICE

I, Jon Greenbaum, hereby certify that I electronically filed the foregoing with the Clerk of Court using the CM/ECF system and that I have served the District Court by email as follows:

District Judge Carlton Reeves
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s/Jon Greenbaum
JON GREENBAUM
DATE: February 27, 2019

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding parts of the document exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32.2, this document contains 5,173 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word, Version 2013, in 14-point Times New Roman font and 12-point Times New Roman font for footnotes.

This, the 27th day of February, 2019.

s/Jon Greenbaum
JON GREENBAUM

EXHIBIT A

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

JOSEPH THOMAS, et al. **PLAINTIFFS**

V. **CAUSE NO. 3:18-CV-441-CWR-FKB**

PHIL BRYANT, et al. **DEFENDANTS**

ORDER

The plaintiffs in this case allege that the boundaries of Mississippi Senate District 22 violate § 2 of the Voting Rights Act. A trial on this claim was held on February 6 and 7, 2019. The Court anticipates issuing a full memorandum opinion next week.

The purpose of this Order is to advise the Mississippi Legislature that the evidence supports the plaintiffs' allegations. As presently drawn, District 22 does not afford the plaintiffs "an equal opportunity to participate in the political processes and to elect candidates of their choice." *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (quotation marks and citation omitted).

The plaintiffs have put forward three alternate Plans that would remedy the § 2 violation, comply with Supreme Court precedent, and satisfy traditional redistricting criteria. Plans 1 and 2 would affect only Districts 22 and 23. Plan 3 would affect Districts 22, 23, and 13.

The Legislature is entitled to the first opportunity to redraw District 22, and, if it chooses, extend the March 1 qualification deadline for candidates in the affected Districts. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 416 (2006). As Judge Jolly wrote in a congressional redistricting case, "[a]lthough it may be difficult for the Legislature to adopt a plan," a "legislative plan is unequivocally to be preferred over a court-ordered plan . . . . Without commenting on the ultimate role of the federal courts should the Legislature act, we encourage

the Legislature to act." *Smith v. Clark*, 189 F. Supp. 2d 503, 511–12 (S.D. Miss. 2002) (three-judge court).

To the extent the defendants' attorneys have not already done so, now would be an appropriate time to see if a political solution can be put into place.

SO ORDERED, this the 13th day of February, 2019.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

EXHIBIT B

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

JOSEPH THOMAS, et al. **PLAINTIFFS**

V. **CAUSE NO. 3:18-CV-441-CWR-FKB**

PHIL BRYANT, et al. **DEFENDANTS**

ORDER

Before the Court is a motion to stay filed by two of the three defendants. After considering the record evidence, arguments, and applicable law, the motion will be denied.

I. Background

In July 2018, the plaintiffs filed this § 2 case challenging the boundaries of Mississippi Senate District 22. Over the following months, all of the lawyers and parties worked diligently to gather evidence and marshal arguments—not just to resolve the case before the November 2019 election, but to have it resolved before the March 1, 2019 candidate qualification deadline.

Those efforts were successful. A trial was held in early February 2019. One week later, the Court notified the parties and the Legislature that the testimony and other evidence largely supported the plaintiffs' allegations.[1] A full memorandum opinion issued on February 16, 2019.

The Mississippi Legislature was provided the first opportunity to redraw the District and extend the March 1 qualification deadline.[2] It has so far declined to act and there is no progress on the horizon. Accordingly, alongside this ruling, the Court has issued an Order extending the

[1] For the record, the plaintiffs did not allege intentional racial discrimination. The question was whether the boundaries of District 22, the statistical evidence of two decades of voting patterns in that District, and the social and historical conditions of that area interacted "to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

[2] *But see* Emily Wagster Pettus, *No fast action on judge's redistricting order in Mississippi*, Assoc. Press, Feb. 14, 2019 ("Mississippi lawmakers are in no hurry to redraw a state Senate district after a judge ruled that the district dilutes black voting power. The Senate Elections Committee Chairman, Republican Kevin Blackwell of Hernando, told The Associated Press on Thursday that he's waiting to see if the state will appeal the judge's order.").

qualification deadline for Districts 22 and 23 to March 15, 2019, and requiring the defendants to redraw Districts 22 and 23 in accordance with the plaintiffs' illustrative Plan 1. A separate Final Judgment will follow.

One dispute remains. Two out of the three defendants—the Governor and the Secretary of State—have appealed and argue that the Court's ruling should be stayed pending that appeal. The Attorney General has not appealed or joined in their motion.

II. Legal Standard

The law governing motions to stay pending appeal is well-established:

> We consider four factors in deciding a motion to stay pending appeal: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. The first two factors . . . are the most critical.

Veasey v. Perry, 769 F.3d 890, 892 (5th Cir. 2014) (quotation marks and citation omitted).

"A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotation marks and citation omitted). "It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case. The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–34 (quotation marks, citations, and brackets omitted).

"[T]he movant need not always show a 'probability' of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) (citations omitted).

III. Discussion

At the outset, it must be noted that the movants' brief presents an idiosyncratic view of the record. They say the plaintiffs' statistical expert arrived at inaccurate estimates, but they introduced no evidence to dispute his actual methodology, which is generally accepted in this Circuit. They complain that "the Court declared that black voters 'are less likely to have transportation options that facilitate voter turnout in odd-year elections.'" The Court wrote that because it was unrebutted trial testimony. Elsewhere, the movants speculate about whether the Census Bureau has ever "suggested that blacks are more likely to over-report their participation than whites." The time for speculation has passed.

The movants' strongest argument relies upon a series of voting cases instructing lower courts to be wary of changing the status quo "on the eve of an election." *Veasey*, 769 F.3d at 892, 894 (collecting cases).

In *Veasey*, the Fifth Circuit stayed a Texas district court ruling that would have affected statewide voter identification rules "just nine days before early voting." *Id.* at 892. "[I]t will be extremely difficult, if not impossible, for the State to adequately train its 25,000 polling workers at 8,000 polling places about the injunction's new requirements in time for the start of early voting on October 20 or even election day on November 4," the court reasoned. *Id.* at 893.

The principle of electoral caution is not limited to voter identification cases, but extends to redistricting controversies like ours:

> Further, in the apportionment context, the Supreme Court has instructed that, in awarding or withholding immediate relief, a court is entitled to and *should* consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. Accordingly, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately

> effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid.

Id. (quotation marks, citations, and brackets omitted). The bottom line is that district courts must recognize "the Supreme Court's hesitancy to allow . . . eleventh-hour judicial changes to election laws." *Id.* at 895.

Given these authorities, a stay pending appeal would likely be appropriate if voting in District 22 had started or was imminent. A stay would probably also be warranted if the Court was ruling on this case in September or October, on the cusp of the November general election. That is not the situation. We are months away from the primaries and months more away from the general election.

There are, in fact, quite a few differences between the *Veasey* line of cases and this matter. The plaintiffs have not brought a constitutional case of statewide reach, but instead filed a one-count suit identifying one problem in one of Mississippi's 52 Senate Districts. That problem can be remedied by moving 1.4% of Mississippi's 1,962 electoral precincts into an adjacent Senate District. The affected voters have the entire campaign season to get acquainted with the candidates, to the extent the candidates are not already known to them—this *is* Mississippi, after all. And moving these precincts will not affect the incumbents. The District 22 incumbent is not running for re-election for other reasons, while the District 23 incumbent is favored to win under any redrawn map and may even run unopposed.

The available evidence regarding "the mechanics and complexities of state election law[]" also does not justify a stay. The State's elections consultant provided an affidavit explaining that any affected counties would need time to move the affected precincts. She stated that "the timeline for election creation is generally about 55 days before an election day." The Assistant Secretary of State for the Elections Division provided an affidavit stating that the

official ballot for the primary elections must be finalized by June 17, 2019. Before that can happen, the candidates must be determined to be qualified and approved by their political party. That takes some time. How much time, the record does not reveal.

This evidence likely would have carried more weight if the plaintiffs had asked for broader relief. What the affiants did not know (and could not have known at the time) was that so few precincts would move, and that the qualification deadline would be extended by only 14 days. There is no evidence in these affidavits or elsewhere that such modest steps will harm the efficient conduct of the 2019 election cycle. The Court simply cannot agree with movants' counsel's assertion that this will result in "chaos."

The traditional factors also weigh against issuance of a stay.

First, the movants have not made a strong showing that they are likely to succeed on appeal. Two of the three *Gingles* factors were uncontested at trial and the third heavily favored the plaintiffs once the defendants' expert was subjected to cross-examination. The movants' statute of limitations defense lacks support in the case law, while the laches argument can (at best) knock out one of the three plaintiffs. The movants' textual reinterpretation of 28 U.S.C. § 2284(a) has never been adopted by a single court and runs contrary to the leading treatise on textualism. The Court's memorandum opinion explained at length how the movants' remaining legal arguments are inconsistent with the binding case law of this Circuit.

The final three factors are collectively in equipoise. Here, as is so often the case, "both sides cloak themselves in the mantle of irreparable harm," "claim the public interest supports them," and argue "that their prospective harm is greater than the harm to the other." *Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 894 (5th Cir. 2012).

The second factor supports the issuance of a stay. It was only last year that the Supreme Court found that "the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018).[3] Without a stay, Mississippi will not be able to implement the District 22 map it previously enacted into law.

The third factor cuts the other way, since a stay would substantially injure the other parties to this litigation. In *Veasey*, the Fifth Circuit's discussion of this prong reaffirmed that "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." 769 F.3d at 896 (quotation marks, citation, and brackets omitted). Here, the evidence showed that the plaintiffs and other African-Americans in District 22 were unable to vote their candidate of choice into office in the 2003, 2007, 2011, and 2015 election cycles because of the structure of the District. Given the importance of voting and the years that have elapsed without the electoral opportunity intended by § 2, the better course of action seems to be to not injure the plaintiffs for another election cycle.

Finally, the public interest factor is inconclusive. In *Nken*, an asylum case in which the petitioner sought a stay of removal, the Supreme Court observed that "[o]f course there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm," just as "[t]here is always a public interest in prompt execution of removal orders." 556 U.S. at 436. And in *Perez*, last year's redistricting case, the Court wrote that the district court "should have respected the legislative judgments embodied in" the State's duly enacted maps, before adding, critically, "to the extent allowed by

[3] The Fifth Circuit has articulated this point somewhat differently, writing that "[w]hen a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Veasey*, 769 F.3d at 895 (quotation marks and citation omitted).

The *Veasey* court also found that "the State has a significant interest in ensuring the proper and consistent running of its election machinery." *Veasey*, 769 F.3d at 896. As discussed above, the evidence in this case does not show that amending District 22's boundaries will impair this legitimate interest.

the Constitution and the VRA." 138 S. Ct. at 2316 (citation omitted). These authorities confirm that it is difficult to draw hard and fast rules about where the public interest lies in these cases, since we should generally presume the government's lawful conduct and nevertheless order appropriate remedies where the government has run afoul of federal law. The more salient issue on this factor may again be "the timing" of the court's order in relation to the election, given the public interest in avoiding disruption on the eve of an election. *Veasey*, 769 F.3d at 895–96.

Having considered these factors, which to some extent favor a stay and in other, greater respects, counsel against a stay, the undersigned is not persuaded that a stay should issue.

IV. Conclusion

The thread running through the defendants' theory of the case, from their laches defense to the movants' stay application, has been prejudice. *We are too close to the next election*, they say. This is a basic § 2 case, though, and the judiciary is generally capable of resolving a "a run-of-the-mill case" filed 16 months before a general election. *Id.* at 892.

This Court has considered the record evidence, the limited scope of the remedy, and the practical impact this ruling will have on county and state election officials trying to do their jobs with fidelity to the law and the people they serve. It sees a small-bore remedy and months of time in which to implement it. The motion for stay pending appeal is, therefore, denied.

SO ORDERED, this the 26th day of February, 2019.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

EXHIBIT C

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February 26, 2019

VIA EMAIL & U.S. MAIL
Honorable Carlton W. Reeves
United States District Court
Southern District of Mississippi
501 East Court Street, Suite 5.500
Jackson, MS 39201
reeves_chambers@mssd.uscourts.gov

Re: *Joseph Thomas, et al. v. Phil Bryant, et al.*; In the United States District Court for the Southern District of Mississippi, Northern Division; Civil Action No. 3:18cv441-CWR-FKB

Dear Judge Reeves:

Pursuant to the order issued last night, counsel for defendants this morning contacted the legislative leadership.

Although we do not represent the Legislature, we are authorized to report that, in the event that the stay motions, now pending before this Court and the Fifth Circuit are denied, the Senate desires the opportunity to perform its constitutional duty and enact a redistricting plan redrawing Senate District 22.

We thank the Court for its attention to this matter.

Sincerely,

WISE CARTER CHILD & CARAWAY, P.A.

Michael B. Wallace

MBW/kp

cc: All Counsel of Record (via email)

EXHIBIT D

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

JOSEPH THOMAS, et al. **PLAINTIFFS**

V. **CAUSE NO. 3:18-CV-441-CWR-FKB**

PHIL BRYANT, et al. **DEFENDANTS**

ORDER

The Mississippi Legislature has not redrawn the boundaries of Senate District 22, and the candidate qualification deadline is approaching. The Court therefore orders as follows:

1. The candidate qualification deadline is extended to March 15, 2019, for all persons seeking to qualify for Mississippi Senate Districts 22 and 23. No other deadlines, jurisdictions, or offices are affected.

2. The boundaries of Districts 22 and 23 are amended to conform to plaintiffs' illustrative Plan 1. The defendants shall publish and transmit the Plan to the affected Circuit Clerks and other relevant officials.

A separate Final Judgment shall issue this day.

SO ORDERED, this the 26th day of February, 2019.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

EXHIBIT E

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

JOSEPH THOMAS, et al. **PLAINTIFFS**

V. **CAUSE NO. 3:18-CV-441-CWR-FKB**

PHIL BRYANT, et al. **DEFENDANTS**

FINAL JUDGMENT

Having resolved all of the claims and defenses in this case, this matter is due to be closed. Accordingly,

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of plaintiffs Joseph Thomas, Vernon Ayers, and Melvin Lawson and against defendants Governor Phil Bryant, Attorney General Jim Hood, and Secretary of State Delbert Hosemann, all in their official capacities.

SO ORDERED AND ADJUDGED, this the 26th day of February, 2019.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

EXHIBIT F

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

JOSEPH THOMAS, et al. **PLAINTIFFS**

V. **CAUSE NO. 3:18-CV-441-CWR-FKB**

PHIL BRYANT, et al. **DEFENDANTS**

ORDER

By noon tomorrow, the defendants shall update the Court on the Legislature's progress, if any, in redrawing Senate District 22.

By 2:00 PM tomorrow, the defendants shall respond to the plaintiffs' motion to extend the qualifying deadline.

The Court expects to rule on all of the pending motions before February 28, 2019.

SO ORDERED, this the 25th day of February, 2019.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

EXHIBIT G

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

JOSEPH THOMAS, et al,

Plaintiffs

vs. **Civil Action No. 3:18cv441-CWR-FKB**

PHIL BRYANT, Governor of Mississippi, et al.,

Defendants.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO EXTEND QUALIFYING DEADLINE IN TWO SENATE DISTRICTS

In the course of research to respond to the motion for stay filed in the Fifth Circuit yesterday by the Governor and Secretary of State, the Plaintiffs found authority from the Supreme Court that further supports their motion to postpone the qualifying deadline. Accordingly, they are submitting this short supplement to their supporting memorandum.

In the Mississippi legislative redistricting case of *Connor v. Johnson*, 402 U.S. 690, 692-93 (1971), the Supreme Court instructed the district court to postpone the qualifying deadline in order to implement a remedial plan: "The District Court is instructed, absent insurmountable difficulties, to devise and put into effect a single-member district plan for Hinds County by [June 14, 1971]. In light of this disposition, the District Court is directed to extend the June 4 filing date for legislative candidates from Hinds County to an appropriate date so that those candidates and the State of Mississippi may act in light of the new districts into which Hinds County will be divided." Although the district court later concluded there were "insurmountable difficulties" and declined to put the single-member district plan into effect, *Connor v. Johnson*, 330 F.Supp.

521 (S.D. Miss. 1971 (three-judge court), the Supreme Court's directive makes it clear that district courts have the authority to postpone qualifying deadlines in appropriate cases.

February 26, 2019,

Respectfully submitted,

s/ Robert B. McDuff
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2019, I electronically filed a copy of the foregoing using the ECF system which sent notification of such filing to all counsel of record.

s/Robert B. McDuff

EXHIBIT H

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

JOSEPH THOMAS, ET AL — PLAINTIFFS

VS. — CIVIL NO. 3:18CV441-CWR-FKB

PHIL BRYANT, ET AL — DEFENDANTS

TRANSCRIPT OF TRIAL
VOLUME 1

BEFORE THE HONORABLE CARLTON W. REEVES
UNITED STATES DISTRICT JUDGE
FEBRUARY 6, 2019
JACKSON, MISSISSIPPI

APPEARANCES:

FOR THE PLAINTIFFS: ROBERT B. MCDUFF
JON GREENBAUM
ARUSHA GORDON
POOJA CHAUDHURI
BETH L. ORLANSKI

FOR THE DEFENDANTS: TOMMIE S. CARDIN
B. PARKER BERRY
MICHAEL B. WALLACE
DOUGLAS T. MIRACLE

REPORTED BY: BRENDA D. WOLVERTON, RPR, FCRR, CRR
Mississippi CSR #1139

---

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TABLE OF CONTENTS

Q So once you had determined the precinct boundaries, what did you do next?
A Once we knew the geographic boundaries of each precinct, each year we could match those boundaries to census data to determine the demographics of the populations within each precinct. For the 2003 elections, we used the census data from 2000. And for the 2007, 2011 and 2015 elections, we used census data from 2010.
Q Why did you use the 2010 census data for the 2007 election?
A It was closer to 2007 than the 2000 census was.
Q Okay. Now that you compiled the data, what did you do next?
A Once the data set was complete, I was able to run the ecological inference analysis.
Q Can you explain to the court what ecological inference is?
A Ecological inference is a statistical technique designed to make estimates about the behaviors of different groups from aggregate data. And so in this case, I used ecological inference to estimate three different things for black voters and white voters. And the first thing -- and they are estimated together in one process -- is the percentage of the voting age population that did not vote in each contest and then the percentage of the voting age population within each group that voted for each of the two major candidates.
Q What are some of the advantages of using the ecological

inference approach?
A Ecological inference has several advantages for estimating group-level behaviors from aggregate data. First, it uses all of the available data. And so I ran ecological inference separately for each election I looked at. And so the data set that was used in each run of ecological inference included about 50 precincts which would be all the precincts where we had valid votes in the district.
Another advantage of it is it produces both an estimate, an average estimate that we can use to say approximately this percentage of African-American voters supported a particular candidate, for example, and also a confidence interval which is a measure of uncertainty in our estimate. Because it is a statistical process, we know there will be some uncertainty, and we get confidence intervals out of EI.
Q What?
A Confidence intervals. It's a measure of uncertainty. Instead of just a single point, it is a range in which we are confident that the true value will fall.
Q Did you run a certain number of simulations for each election contest?
A Yes. For this type of ecological inference, it is solved by running a computer algorithm that simulates results and tries to find the best possible estimates. And for each separate election, I ran 100,000 simulations.

Q Are you familiar with homogenous precinct analysis?
A I am.
Q What is it?
A Homogenous precinct analysis is a different approach to trying to estimate group behaviors from aggregate data. But unlike EI, it relies on just precincts that are considered homogenous, that is, are overwhelmingly -- consist overwhelmingly of one racial group or another. And so generally we would only look at precincts that were either 90 percent or higher black voting age population or less than 10 percent black voting age population.
Q Did you use homogenous precinct analysis in this case?
A No.
Q Why not?
A Ecological inference provides several advantages over homogenous precinct analysis. First, it's using all of the available data, and so when I run an EI, I would have around 50 precincts for each election. But with homogenous precinct analysis, there would be far fewer precincts that would be sufficiently homogenous to include, usually less than 10.
Additionally, EI, unlike homogenous precinct analysis, includes a measure of uncertainty which is important when making statistical estimates. And then third, ecological inference uses -- by using all of the data, it is including not just the homogenous precincts but also all the racially mixed