No. 19-60133

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOSEPH THOMAS; VERNON AYERS; MELVIN LAWSON,

Plaintiffs – Appellees

v.

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

Defendants – Appellants

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

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

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CERTIFICATE OF INTERESTED PARTIES

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

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

s/ Tommie S. Cardin
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JURISDICTIONAL STATEMENT

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

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

STATEMENT OF THE ISSUES[1]

1. Whether the district court lacked jurisdiction for failure to grant the request for a three-judge court required by 28 U.S.C. § 2284(a)?

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

3. Whether the district court erred as a matter of law by finding that the boundaries of District 22 violate § 2 of the Voting Rights Act?

[1] In the merits panel ruling in this appeal, the panel held that the district court's injunction is no longer in effect. While the entire panel decision has been vacated, defendants do not disagree with this determination. Accordingly, Issue IV in defendants' principal merits brief has been omitted from discussion in this *en banc* brief.

STATEMENT OF THE CASE

Facts

In 2002, following the 2000 Census, the Mississippi legislature established the boundaries of each of Mississippi's fifty-two senate districts. District 22 included all or part of five Mississippi counties with a Black Voting Age Population ("BVAP") of 49.8%. ROA.1526 (D-4). In 2012, following the 2010 Census, the Mississippi legislature adopted Joint Resolution No. 201 ("J.R. 201") redrawing the boundaries of District 22 to increase the BVAP to 50.77% and expanding it to all or part of six Mississippi counties. ROA.1572, 1579 (D-5); ROA.1599 (D-11). On September 14, 2012, the United States Department of Justice ("DOJ") precleared J.R. 201 over objections from one of the plaintiffs, Joseph Thomas. ROA.1595 (D-10); ROA.1690 (D-16).

In 2015, in the only election ever held utilizing the challenged boundaries of District 22, the white Republican incumbent, Eugene Clarke, Chairman of the Senate Appropriations Committee, defeated Thomas, a black Democrat who previously served in the Mississippi Senate.[2] ROA.372. Instead of bringing suit in 2012 when the plan was adopted and precleared by DOJ or after the 2015 election, Thomas, along with two other plaintiffs, Lawson and Ayers, who reside in District

[2] This was not Thomas' first defeat in a majority-minority district. In fact, Thomas was originally elected to the Mississippi Senate in 2003 for Senate District 21, a majority-minority district under the 2002 districting plan. However, Thomas lost this seat in the August 2007 Democratic primary election. ROA.795, RE 9.

22 and are long-time registered voters and electoral participants, waited almost three additional years to commence this action.

The next cycle of statewide elections, which includes District 22, occurs in 2019. Specifically, the candidate qualifying period started on January 2, and ended on March 1, 2019. Miss. Code Ann. § 23-15-299 (2019). Beginning January 2, candidates could qualify to run for state senate seats based on district boundaries which had been in effect since September 14, 2012 by paying the requisite filing fee. Miss. Code Ann. § 23-25-297 (2019). After the qualifying deadline ended, the work began for providing qualified candidates to be placed on the primary ballots. The primary was August 6, 2019, followed by the general election to be held on November 5.

The Mississippi Constitution requires legislative redistricting every ten (10) years. MISS. CONST. art. 13, § 254 (1890). The next cycle of legislative redistricting will occur following the 2020 Census, no later than 2022, before the next cycle of statewide elections. *See Miss. State Conf. NAACP v. Barbour*, 2011 WL 1870222 (S.D. Miss. May 16, 2011).

Course of Proceedings

On July 9, 2018, plaintiffs-appellees Thomas, Lawson and Ayers ("plaintiffs") filed suit alleging that the boundaries of District 22 violate § 2(b) of the Voting Rights Act, 52 U.S.C. § 10301(b). ROA.20. On July 25, 2018, plaintiffs

filed their First Amended Complaint. ROA.65, RE 8. Although plaintiffs sought expedited consideration on August 30, 2018, ROA.114, to which all defendants promptly objected, ROA.157, the district court did not grant the motion until November 16, 2018. ROA.201. The district court set a trial date of February 6, 2019 with a compressed period of time for discovery. This schedule was against the backdrop of a candidate qualifying period starting January 2, 2019 and running until March 1, 2019, and a legislative session beginning January 8, 2019 and concluding on March 29, 2019.

After a two-day trial ending on February 7, 2019, the district court issued an order on February 13, 2019, which held that District 22 violated § 2 of the Voting Rights Act for reasons that would be explained later and invited the Mississippi legislature to consider a political solution. ROA.355, RE 4. On February 16, 2019, the district court issued its memorandum opinion and order finding liability and rejecting defendants' affirmative defense of laches.[3] ROA.357, RE 5. On February 25, 2019, the district court notified the parties that that it wanted the Mississippi legislature, a nonparty to the action, to respond by noon on February 26, 2019 regarding the status of redrawing District 22. ROA.457. Prior to the deadline,

[3] In response, defendants filed a first notice of appeal to this Court, ROA.389, and a first motion to stay with the district court, ROA.391. The district court denied this first motion to stay prior to the final judgment being rendered, ROA.474, and this Court held that it lacked jurisdiction to consider the first appeal as the issues were rendered moot once final judgment issued, ROA.501.

defendants advised the district court that the Mississippi legislature desired the opportunity to enact a new redistricting plan for District 22 should the stay motions then pending before the district court and this Court be denied. ROA.469-70. Defendants also asserted their right to be heard on any remedy the district court may order. *Id.*

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

On February 27, 2019, Governor Bryant and Secretary Hosemann filed a notice of appeal from the final judgment and promptly moved again for a stay in the district court. ROA.484, RE 2; ROA.490. On March 6, 2019, the district court denied the stay request. ROA.550. Defendants then sought a stay once more in this Court. On March 15, 2019, a divided panel of this Court granted in part and denied in part the stay motion on the grounds that the district court did not afford the legislature an opportunity to fashion a remedy for the § 2 violation. *Thomas v. Bryant*, 919 F.3d 298 (5th Cir. 2019) (Clement, J., dissenting). The panel enforced

the stay for this purpose until April 3rd and extended the qualifying deadline for candidates in any affected districts until April 12th. *Id*. at 316.

In response, on March 27, 2019, the Mississippi legislature adopted Joint Resolution No. 201 redrawing District 22 and affecting only one other district, District 13. However, the legislation adopting the plan states that "in the event that the appellants prevail in the appeal of the case …, this resolution shall be repealed and the districts as originally configured in Chapter 2234, Laws of 2012, shall take effect." ROA.635-36.

On August 1, 2019, the merits panel in this appeal affirmed the decision of the district court, while announcing detailed opinions to follow. *Thomas v. Bryant*, 931 F.3d 455 (5th Cir. 2019). Accordingly, on September 3, 2019, the merits panel issued its divided opinions. *Thomas v. Bryant*, 938 F.3d 134 (5th Cir. 2019). On September 23, 2019, the Court, *sua sponte*, vacated the panel decision and set this appeal for rehearing *en banc*. *Thomas v. Bryant*, --- F.3d ---, 2019 WL 4616927 (5th Cir. Sept. 23, 2019) (mem.).

SUMMARY OF ARGUMENT

This is an action, pursuant to § 2 of the Voting Rights Act, challenging the boundaries of District 22—a majority-minority district.

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

Second, plaintiffs' § 2 claim is barred by laches due to their inexcusable delay in asserting their claim, coupled with the resulting prejudice. Plaintiffs commenced this action nearly six years after the DOJ precleared the challenged district over plaintiff Thomas' objection, and nearly three years after the only election in the challenged district was completed—an election in which plaintiff Thomas was defeated. As a result of this inexcusable delay, the trial in this matter was not held until the middle of the 2019 candidate qualifying period causing great

prejudice to local election officials, voters and candidates in the affected districts. Further, defendants suffered prejudice in their ability to effectively try this case due to the compressed time frame, and the Mississippi legislature is now forced to redraw the challenged district twice within a period of a few years. In erroneously rejecting the laches defense, the district court failed to apply the correct legal standard in measuring delay and failed to consider the substantial prejudice resulting from plaintiffs' inexcusable delay.

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

Finally, Section 2 must be construed as precluding liability here to avoid the severe constitutional doubts raised by the district court's judgment in assigning

population to voting districts on the sole basis of race. Otherwise, defining a statutory violation in such a way as to require a presumptively unconstitutional remedy, then, necessarily casts doubt on the constitutionality of § 2 as applied to define that violation.

ARGUMENT

I. The district court lacked jurisdiction for failure to grant the request for a three-judge court required by 28 U.S.C. § 2284(a).

"Issues of subject matter jurisdiction are questions of law reviewed *de novo*." *Pershing, L.L.C. v. Kiebach*, 819 F.3d 179, 181 (5th Cir. 2016) (citing *Am. Rice, Inc. v. Producers Rice Mill, Inc.*, 518 F.3d 321, 327 (5th Cir. 2008)). Likewise, questions of statutory construction are also reviewed *de novo*. *MS Tabea Schiffahrtsgesellschaft MBH & Co. KG v. Board of Com'rs of Port of New Orleans*, 636 F.3d 161, 164 (5th Cir. 2011). Here, defendants properly requested a three-judge court under § 2284(b)(1), and the district court improperly failed to notify the Chief Judge of this Court, notwithstanding the requirement of § 2284(a) for the convention of such a court "when an action is filed challenging … the apportionment of any statewide legislative body."

The failure to grant defendants' request, where § 2284(a) applies, deprives the Court of jurisdiction. A panel of this Court concluded, "[w]e agree with our sister circuits that the term 'shall' in § 2284 is mandatory and jurisdictional." *LULAC of Texas v. Texas*, 318 F. App'x 261, 264 (5th Cir. 2009) (*per curiam*) (citing *Kalson v. Patterson*, 542 F.3d 281, 287 (2d Cir. 2008); (*Armour v. Ohio*, 925 F.2d 987, 988-89 (6th Cir. 1991) (*en banc*)). Plaintiffs cite no court which has reached a contrary conclusion, and there is no reason this Court should be the first.

The district court's jurisdiction, then, depends upon a proper understanding of § 2284(a), which reads in full:

> 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.

Regarding statutory construction, this Court has said, "[t]he judicial inquiry thus 'begins with the statutory text and ends there as well if the text is unambiguous.'" *Texas Education Agency v. United States Dept. of Education*, 908 F.3d 127, 132 (5th Cir. 2018) (quoting *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004)). Here, as the merits panel dissent demonstrated, the text is not unambiguous, because its grammatical structure can be read two different ways:

- two alternative objects of the preposition "of" ("challenging the constitutionality of [1] the apportionment of congressional districts or [2] the apportionment of any statewide legislative body"), or
- two alternative objects of the participle "challenging" ("challenging [1] the constitutionality of the apportionment of congressional districts or [2] the apportionment of any statewide legislative body").

Thomas, 938 F.3d 134, 187 n.91 (Willett, J. dissenting). The first reading would not require three judges in this case, while the second clearly would.

Even when "[o]ur inquiry begins and ends with the text," this Court will apply canons of construction to that text. *Reed v. Taylor*, 923 F.3d 411, 416 (5th Cir. 2019). Here, the district court properly resorted to canons of construction to

construe the statutory text.[4] The district court acknowledged that its limitation of the statute to constitutional challenges violated the surplusage canon. "If 'the constitutionality of' is indeed carried over to all following phrases, the second use of 'the apportionment of' is rendered unnecessary." ROA.334, RE 3. (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 171 (2012)). The district court nevertheless found this universally applied canon of construction to be outweighed by "the series-qualifier canon of construction." ROA.333, RE 3 (citing Scalia & Garner at 147).

It is telling that the district court's authority for the existence of this supposed canon is a dissent. ROA.333 n.5, RE 3 (citing *Lockhart v. United States*, 136 S. Ct. 958, 970 (2016) (Kagan, J., dissenting)). The only case in which this Court appears to have considered the possible application of the canon is *United States ex rel. Vaughn v. United Biologics, L.L.C.*, 907 F.3d 187 (5th Cir. 2018). There, this Court declined to treat the statutory series as a uniform unit because of the insertion of a "determiner." *Id*. at 195 (citing Scalia & Garner at 148). Thus, it appears that no decision of this Court or of the Supreme Court has applied the

[4] As part of this process, this Court will often "turn to the context" of particular statutory language as part of a larger statutory scheme. *United States v. Lauderdale County*, 914 F.3d 960, 965 (5th Cir. 2019). Because § 2284 is a single-section statute last amended by Congress in 1976, there is little context to consult.

supposed canon in such a way that the noun "constitutionality" would control both uses of "apportionment" found thereafter.

Because neither this Court nor the Supreme Court has relied on the series-qualifier canon, defendants have not done so. However, if the canon exists in this Circuit, the statute's use of a determiner would preclude its operation here. As the panel dissent noted, the use of the article "the" separates the final phrase, "apportionment of any statewide legislative body," from the prior reference to "constitutionality." *Thomas*, 938 F.3d at 186 (Willett, J., dissenting). In support, the dissent cited three examples of the use of the article "a" as a determiner which might require separate treatment of the items in a series. *Id*. (citing Scalia & Garner at 149).

Both the existence of the series-qualifier canon and its application in this case are highly questionable. By contrast, the application of the surplusage canon is clear and supported by unequivocal authority. *Obdusky v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1037 (2019) (quoting *Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 299 n.1 (2006) (courts "generally presum[e] that statutes do not contain surplusage")).[5] Indeed, this Court has described the

[5] Courts should apply the canons of construction to determine the meaning that legislators would have attached at the time to the language that they used. *See generally* Scalia & Garner at 33-41. The surplusage canon was well-established in 1976 when Congress adopted the current language of § 2284(a). "These words cannot be meaningless, else they would not have been used."

surplusage canon "[a]s a 'cardinal principle of statutory construction.'" *Texas Education Agency*, 908 F.3d at 133 (quoting *Bennett v. Speer*, 520 U.S. 154, 173 (1997)). Because the application of the canons of construction clearly resolves the grammatical ambiguity, there is no need to look further.

Should this Court find the canons of construction insufficient to resolve the grammatical ambiguity in the text, the history of the 1976 amendment to § 2284(a) plainly demonstrates that Congress understood the language as requiring three judges for all statewide redistricting challenges.[6] The Report of the Senate Judiciary Committee, issued two days before the Senate's consideration of the bill, makes it clear that its provisions apply to all apportionment challenges, at either the State or federal level. S. Rep. 94-204, 94th Cong., 2nd Sess. 1976, 1976 U.S.C.C.A.N. 1988, 1975 WL 12516.

On its very first page, in a section entitled "PURPOSE OF BILL," the Committee explained that "three-judge courts would be retained … in any case involving congressional reapportionment or the reapportionment of any statewide

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United States v. Butler, 297 U.S. 1, 65 (1936). By contrast, the series-qualifier canon was then unknown. The authors of the treatise cite only a single federal case before 1976 said to have applied some version of the canon. Scalia & Garner at 149 n.8 (citing *Long v. United States*, 199 F.2d 717, 719 (4th Cir. 1952)).

[6] Because courts enforce statutes, not committee reports, legislative history should not be consulted where "the text of the statute is clear." *United States v. Key*, 599 F.3d 469, 480 (5th Cir. 2010). Defendants submit that the canons clarify the text; the legislative history does not contradict, but reinforces that clarification.

legislative body." Report at 1, 1976 U.S.C.C.A.N. at 1988. In further explanation, the Committee declared:

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

Report at 9, 1976 U.S.C.C.A.N. at 1996.

It is hardly surprising that the Report made no exceptions for statutory challenges to the apportionment of legislatures, because the Committee understood that the very few available statutory challenges also required three-judge courts. The Committee said, "[t]hree-judge courts would continue to be required … in cases under the Voting Rights Act of 1965, 42 U.S.C. section 1971g, 1973(a), 1973c and 1973h(c)." *Id*. Of course, § 1973(a) is § 2(a) of the Voting Rights Act, the statutory basis for plaintiffs' claims in this case. ROA.65, ¶ 1, RE 8.[7] The Committee plainly declared its belief that all actions under § 2 required three-judge courts, and the Committee indicated the same understanding six years later when it amended § 2:

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

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

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

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

This concern for federalism explains why Congress might reasonably have treated legislative redistricting challenges differently from congressional redistricting challenges. Congress has full authority over elections of Members of the House of Representatives under U.S. Const. art. I, § 4. Congress always has full power to negate a redistricting judgment entered by a single judge by adopting a statute, while state legislatures cannot so protect themselves. Moreover, before

1976 the Supreme Court had made clear that federalism concerns mandated greater leeway in the design of state legislation to congressional districts. *Gaffney v. Cummings*, 412 U.S. 735, 742-44 (1973). The statutory precaution of three judges is entirely appropriate to recognize the role of state legislatures in our federal system.

Neither plaintiffs nor the district court suggests that any Court of Appeals has previously been squarely confronted with the need to resolve the jurisdictional question presented by this appeal. That is because no previous complaint has asserted a statutory challenge to a statewide legislative body while purporting to eschew a constitutional challenge. For instance, the Supreme Court described § 2284(a) as "providing for the convention of such a court whenever such an action is filed challenging the constitutionality of apportionment of legislative districts" in a case that did not present the question of a statutory challenge. *Harris v. Arizona Indep. Redistricting Comm'n*, 136 S.Ct. 1301, 1306 (2016). In construing the statutory text in light of the canons and the legislative history, this Court acts without authoritative guidance from any other court.

Although plaintiffs purport to rely only on § 2 for relief, their complaint exemplifies the need to prove unconstitutional conduct. "The lack of opportunity is the result of white bloc voting and lower African-American turnout that are vestiges of the historical discrimination and extreme socio-economic disparities

that have been inflicted on African-Americans over a long period of time." ROA.68, ¶ 15, RE 8. "There is a lengthy and documented history of voter discrimination against African-Americans in Mississippi." ROA.71, ¶ 31, RE 8. "The history of discrimination and these socioeconomic disparities have hindered their ability to participate in the political process…." ROA.72, ¶ 32, RE 8. Further, over the objection of defendants, ROA.718-721, RE 9, evidence was admitted at trial regarding past unconstitutional behavior of the State, including the testimony of plaintiffs' expert, the Honorable Fred L. Banks, Jr.:

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

ROA.1290, ¶ 2 (P-9). Thus, plaintiffs alleged and offered evidence at trial that the 2012 redistricting statute had an unconstitutional basis.[8]

Plaintiffs' attempt to divorce the Voting Rights Act from the Constitution contravenes the language used by Congress in both 1976 and 1982, as well as the

[8] Absent such proof, § 2 could not be constitutionally applied to these facts. This Court has recognized that the 1982 amendment to § 2 purported to reach legislation that is not unconstitutional in itself; such a reach is permissible only for the purpose of providing a remedy for past unconstitutional actions. *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984). "[W]e perceive § 2 as merely prescribing a portion to remove vestiges of past official discrimination and to ward off such discrimination in the future. Congress has not expanded the Constitution's substantive guarantees, but simply redefined and strengthened the statutory protections around core constitutional values, thus exercising its authority within the confines of the Constitution." *Id*. at 374 n.6 (quoting *Major v. Treen*, 574 F. Supp. 325, 347 (E.D. La. 1983)).

allegations of unconstitutional conduct pled in their amended complaint and supporting evidence offered at trial. Congress provided that a three-judge court should be invoked for all challenges to the apportionment of state legislatures. The statute can be so read, and it should be so enforced.

II. Plaintiffs' § 2 claim is barred by the doctrine of laches.

This suit should have ended shortly after it started as barred by the doctrine of laches. Laches applies "when plaintiffs (1) delay in asserting a right or claim; (2) the delay was not excusable; and (3) there was undue prejudice to the party against whom the claim was asserted." *Tucker v. Hosemann,* 2010 WL 4384223 at *4 (N.D. Miss. Oct. 28, 2010) (citing *Save Our Wetlands, Inc. v. U.S. Army Corps of Engineers,* 549 F.2d 1021, 1026 (5th Cir. 1977)). The standard of review of the district court's laches findings is abuse of discretion giving rise to clear error. *Retractable Techs., Inc. v. Becton Dickinson & Co*., 842 F.3d 883, 898 (5th Cir. 2016). Here, plaintiffs sat on their rights for years all while offering no excuse whatsoever for their delay, resulting in real and compounding prejudice to defendants, the legislature, voters and candidates. As a result, the district court committed clear error by denying the application of laches.

A. Inexcusable Delay

At the outset, the district court erred in applying the wrong legal standard to determine plaintiffs' delay. In measuring the delay, the legal standard for the cause

of action accruing is objective. It is when a plaintiff knew or reasonably should have known of the cause of action. *Armco, Inc. v. Armco Burglar Alarm Co.,* 693 F.2d 1155, 1161-62 (5th Cir. 1982)*; White v. Daniel,* 909 F.2d 99, 102 (4th Cir. 1990) (applying laches to dismiss a voting rights suit); *see Elvis Presley Enters. v. Capece*, 141 F.3d 188, 205 (5th Cir. 1998). As the merits panel dissent recognizes, in *Armco*, the Court "emphasized that delay should be counted from when the plaintiff should've known of the alleged violation." *Thomas*, 938 F.3d at 178 (Willett, J., dissenting). This objective standard makes even more sense in a voting rights case. Every voter in the district has standing to sue. *See Lopez v. Hale County, Texas,* 797 F. Supp. 547, 548 (N.D. Tex. 1992) (Smith, J. for three-judge court), *aff'd*, 506 U.S. 1042 (1993) (resident has standing). If ignorance were enough to justify delay, there would, as a practical matter, be no time constraints at all. The district court disregarded this standard and applied a subjective test concerning actual knowledge of individual plaintiffs, which was error. ROA.377, RE 5.[9]

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

Here, as well-captured in the dissents of the motions panel, *Thomas v. Bryant,* 919 F.3d 298, 320-21 (5th Cir. 2019) (Clement, J., dissenting), and the merits panel, *Thomas*, 938 F.3d at 178 (Willett, J., dissenting), plaintiffs could have brought suit as early as 2012 when the J.R. 201 was precleared by DOJ. ROA.1594-95 (D-10). In fact, lead plaintiff Thomas explicitly complained to DOJ in an August 2012 letter requesting that it look at District 22 because it "violated section 5 and 2 of the Voting Rights Bill." ROA.1690. The record before the district court also supports that the other remaining plaintiffs were longstanding and active participators in the electoral process in District 22 and the surrounding areas. ROA.716; ROA.821-35. The record and defendants' briefs in this matter demonstrate that plaintiffs knew or should have known in 2012 that their cause of action had accrued. And, if not in 2012, then certainly by 2015 after an election utilizing the plan at issue was held in the district. [10] Yet, at no point in 2012, 2013, 2014 nor even in 2015 after the election was held, did plaintiffs sue. Instead, they waited three more years until mid-2018 before filing this action triggering the spectacle now before us. Because the district court erred as a matter of law in

[10] The majority of the merits panel asserts that defendants abandoned 2012 as the operative date for the accrual of the cause of action. *Thomas*, 938 F.3d at 148-49. As the panel dissent demonstrates, *id*. at 178, this is simply inaccurate. If, for some reason plaintiffs did not know or should not have known in 2012, then they unquestionably knew or should have known by 2015—this is the consistent point made throughout the briefs on this issue before the district court, motions panel and merits panel.

failing to apply the objective standard for measuring delay, it abused its discretion, resulting in clear error.

Furthermore, though plaintiffs have offered nothing at any level to excuse their delay, both the district court and the merits panel pointed to the analogous statute of limitations period to approve of plaintiffs' late filing. However, using the analogous statute of limitation period as a shield to prevent laches in the election context defeats the entire purpose of the doctrine as suits could be deemed excusable even if filed on the day of an election deadline so long as within the prescriptive period. "[L]aches is an equitable doctrine that, if proved, is a complete defense to an action irrespective of whether the analogous state statute of limitation has run." *Mecom v. Levingston Shipbuilding Co*., 622 F.2d 1209, 1215 (5th Cir. 1980). Laches "is not, like limitation, a mere matter of time; but principally a question of the equity or inequity of permitting the claim to be enforced." *Barrios v. Nelda Faye, Inc.*, 597 F.2d 881, 885 (5th Cir. 1979).[11] When coupled with the legion of cases admonishing federal courts to avoid intervening or meddling at the eleventh hour with the states' established election deadlines and machinery, "it is

[11] *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("[U]nder 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.")

often wiser for courts to push pause instead of fast forward."[12] *Thomas*, 938 F.3d at 175 (Willett, J., dissenting). Accordingly, the district court abused its discretion and committed clear error in finding plaintiffs' lingering delay excusable.

B. Prejudice Upon Prejudice

Absent some serious impediment, late-decade judicial redistricting upon the doorstep of the approaching census and eleventh-hour changes near impending election deadlines should be heavily disfavored. District courts and other circuit courts alike have done so under very similar circumstances. *White v. Daniel,* 909 F.2d 99, 104 (4th Cir. 1990) (applying laches to preclude untimely Section 2 challenge because "[w]e believe that two reapportionments within a short period of two years would greatly prejudice the County and its citizens by creating instability and dislocation in the electoral system and by imposing great financial and logistical burdens"); *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 F.2d 606, 611 (4th Cir. 1970) (finding injunctive relief unavailable to plaintiffs who filed a redistricting lawsuit thirteen weeks prior to a filing deadline for candidates for the state legislature); *Chestnut v. Merrill*, 377 F. Supp. 3d 1308, 1317 (N.D. Ala. 2019) (applying laches as "forc[ing] the state … to redistrict twice in two years—once based on nine-year old census data—would

[12] *See id.*; *accord Miller v. Johnson*, 515 U.S. 900, 915 (1995); *Chapman v. Meier*, 420 U.S. 1, 27 (1975).

result in prejudice")[13]; *Fouts v. Harris,* 88 F.Supp.2d 1351, 1354 (S.D. Fla. 1999), *aff'd*, 529 U.S. 1084 (2000) (same); *Arizona Minority Coalition for Fair Redistricting,* 366 F. Supp. 2d 887887 (D. Ariz. 2005); *Maxwell v. Foster,* 1999 WL 33507675 (W.D. La. Nov. 24, 1999) (barring suit for laches as impending census was approaching); *Lopez*, 797 F. Supp. 547.

As noted by both the motions panel dissent and the merits panel dissent, this suit has injected pointless confusion into the state's electoral process. In the blink of an eye, candidates were upended and voters were thrown out of their accustomed districts—all in the midst of the qualifying period. To demonstrate this gross interference by plaintiffs at taxpayer expense, consider the following series of events:

* The district court was not able to rule on a motion for expedited consideration for ten weeks. ROA.114; ROA.201.
* The trial did not take place until February 6, over a month after the qualifying period began on January 2.
* The district court announced its intent to invalidate the district only 16 days before the end of the qualifying deadline. ROA.355.

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

* The district court failed to hold a hearing to determine the remedy for the violation it found.

* The district court gave the legislature one day, and then imposed its own remedy, cutting both Republicans out of the race and extending the qualifying deadline– a result that could have been avoided had it had time to conduct a hearing on the remedy. ROA.457; ROA.473.

* This Court then had to rule on two emergency appeals, and, like the district court, took the unusual step of announcing its decision before it gave any explanation and extended the qualifying deadline again. ROA.557.

* The motions panel of this court then produced 46 pages of opinions within seven days, a compressed time table which left no time for measured consideration of expression. ROA.562.

* Only then was the legislature, close to the end of its 90-day session, given an opportunity to construct a remedy that put the excluded candidates back in the race.[14]

[14] As the merits panel dissent recognized, the duty to draw electoral maps "is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Thomas*, 938 F.3d at 175 (Willett, J., dissenting). The legislature suffered extreme prejudice as a result of the district court strong-arming it into a slap-dash redistricting plan under a Damoclean sword of its forging. Specifically, the legislature "had to quickly enact a new district map, without the substantial deliberation that redistricting requires." *Id*. at 179. Moreover, the legislature will be required to once again redraw District 22 following the 2020

* The legislature was forced to do this based on nine-year old census data only one year before a new census.[15]

* This Court had to entertain an emergency appeal with expedited oral argument prior to the absentee ballot deadline in mid-June.

* The merits panel of this Court took the unusual approach of announcing its decision mere days before the primary, presumably to prevent voter confusion over the district lines, but did not release its actual opinion until much later.

* The Court will now entertain rehearing *en banc* in January of 2020—in the middle of the new legislative session.

Add to this the prejudice suffered by defendants in their ability to effectively try this case because of plaintiffs' delay, [16] and we end up here, a case that laches

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Census. As the panel dissent correctly noted, legislatures are not "designed to legislate with lickety-split haste—even in response to district court diktats." *Id.* at 177. Such action "defies the High Court's federalism-based warnings in short-fuse election cases [and] endorses an inflated view of judicial power. . . ." *Id.* at 176.

[15] The need to rely on nine-year-old census data is a recognized source of prejudice in cases like this one. *See White*, 909 F.2d at 103-04 (using old census data which might be inaccurate caused prejudice: "a challenge to a reapportionment plan close to the time of a new census, which may require reapportionment, is not favored.").

[16] As the merits panel dissent correctly recognizes: "The plaintiffs hamstrung the State by creating a nigh-impossible timetable for effectively litigating." *Thomas*, 938 F.3d at 179. Though plaintiffs filed a motion to expedite the case on August 30, 2018, ROA.114, the district court did not set a trial calendar until November of 2018 and, when it did so, it ordered expedited discovery for the trial starting in February of 2019—in the middle of the qualifying period. Even more, it was only several days before trial that defendants were given plaintiffs' expert analysis – done almost a year before – which showed that 2,000 voters in 2015 mistakenly voted outside the district. ROA.1085-1089. This analysis revealed for the first time that there had been a

should have barred well over a year ago. Instead, plaintiffs, the district court and the merits panel essentially say "no big deal" because the suit was filed 16 months before the general election in November of 2019. If that was the operative date, then most of the events above never happen. No, the operative date was the first critical election deadline—the commencement of the qualifying period on January 2, 2019—which was barely five months after plaintiffs filed their amended complaint. *See NAACP v. Hampton Cty. Election Comm'n*, 470 U.S. 166, 177 (1985) (qualifying deadlines and other preliminary deadlines "cannot be considered in isolation from the election of which [they] form[] a part.")

Because plaintiffs waited six years to file suit right before the qualifying period, defendants, the legislature, voters and candidates have endured lasting prejudice. Indeed, as Judge Clement noted in the motions panel dissent, "I have not found a case in which a court altered district boundaries during or after a candidate qualification period."[17] *Thomas,* 919 F.3d at 318 (motions panel). Yet, here we are.

"significant election administration error" in Bolivar County in the only endogenous election that plaintiffs were relying on to support their claim. ROA.780:11-12, RE 9. To this day, no one knows what the effect of his omission of 10% of the voters in the district had on his analysis. Thus, plaintiffs' unreasonable delay in filing suit "stymied the State's ability to fully litigate its own preferred, democratically enacted plan, which inherently prejudiced the State." *Id.*

[17] The merits panel majority posits that reversing the district court would create a circuit outlier regarding laches. *Id.* at 150. Incorrect. In actuality, when applying the proper laches period of the qualifying deadline, failing to reverse the district court would create the circuit outlier as demonstrated by the evidence of prejudice suffered by defendants and related parties.

The district court committed clear error as a matter of law by applying the wrong legal standard in measuring delay and failed to take into consideration the prejudice incurred by defendants, the legislature, voters and candidates. Accordingly, this Court should find that laches bars plaintiffs' claim and vacate the decision of the district court.

III. The district court erred as a matter of law by finding that the boundaries of District 22 violate § 2 of the Voting Rights Act.

Under § 2(b) of the Voting Rights Act, some groups in some circumstances, generally including African-Americans in Mississippi, may be entitled to relief if they carry the burden of proving that they have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." The plain meaning of "less" necessarily implies that an unprotected group has more. Plaintiffs, on the other hand, pled that "equal opportunity" in District 22 requires "a black voting age population of approximately 60% rather than the existing 50.8%." ROA.71, ¶ 30, RE 8.[18] Without announcing precisely how big a supermajority would be necessary to grant equal opportunity, the district court gave plaintiffs the relief they wanted,

[18] A three-judge court found amended § 2 to be satisfied by the "creat[ion of] a rural Delta-River area district with a black voting age population majority" of 52.83%. *Jordan v. Winter*, 604 F. Supp. 807, 814 (N.D. Miss. 1984), *aff'd mem.*, 469 U.S. 1002 (1984). After 35 years of progress, it is hard to imagine why a BVAP-majority district in the Delta is no longer sufficient to satisfy § 2.

moving thousands of people in and out of District 22 on the sole basis of race, in order to create a 60% BVAP majority.

The district court's supposed factual finding that a 50.8% majority has "less opportunity" than a 49.2% minority is "based on a misreading of the governing law," and is therefore clearly erroneous. *Johnson v. De Grandy*, 512 U.S. 997, 1022 (1994). As the merits panel dissent correctly stated, "[t]he project of judicial oversight in § 2 cases is one of ensuring equal opportunity, not dictating winners." *Thomas*, 938 F.3d at 184 (Willett, J., dissenting). As a matter of law, no appellate court has previously approved the invalidation of a single-member district where the protected group has a majority of the voting age population. As a matter of fact, where only one election has ever been held within the supposedly illegal boundaries of District 22, the record does not show that "a bloc voting majority [is] *usually* … able to defeat candidates supported by" black citizens. *Thornburg v. Gingles*, 478 U.S. 30, 49 (1986) (emphasis in original). For both of these reasons, the judgment must be reversed.

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

Plaintiffs purport to allege that the legislature unintentionally deprived them of equal opportunity even though it created a district with 50.8% BVAP majority. No court has previously redrawn a single-member district with a BVAP majority simply because of unintentional discrimination. This Court over 30 years ago said

that an at-large local government might be broken up despite a black majority, but no lack of equal opportunity was actually proven. *Monroe v. City of Woodville*, 881 F.2d 1327 (5th Cir. 1989). Another at-large government survived a similar challenge in *Salas v. Sw. Tex. Jr. Coll. Dist.*, 964 F.2d 1542 (5th Cir. 1992).

Where, as here, the borders of single-member districts are involved, the Supreme Court has set a simple standard for the application of § 2:

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

Bartlett v. Strickland, 556 U.S. 1, 18-19 (2009) (opinion of Kennedy, J.) (citation omitted). Equal opportunity consists of having "no better or worse opportunity to elect a candidate than does any other large group of voters with the same relative voting strength." *Id*. at 14 (opinion of Kennedy, J.). Where a minority "make[s] up more than 50 percent of the voting age population," a group having "the same relative voting strength" cannot exist. *Id*. at 18, 14 (opinion of Kennedy, J.).[19] The

[19] The dissent read the controlling opinion as providing that "a district with a minority population making up 50% or more of the citizen voting age population (CVAP) can provide a remedy to minority voters lacking an opportunity 'to elect representatives of their choice.'" *Id*. at 27 (Souter, J., dissenting) (quoting § 2(b)). Because such a district already exists here, no remedy is required.

group having a majority cannot have "less opportunity" than smaller groups, as § 2(b) requires.[20]

Where "such a district is not drawn," *id*. at 18 (opinion of Kennedy, J.), plaintiffs can show that more such districts should be created:

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

LULAC v. Perry, 548 U.S. 399, 430 (2006). The Supreme Court found that an additional Latino-majority district should be created in that case. "Latinos, to be sure, are a bare majority of the voting-age population in new District 23, but only in a hollow sense, for the parties agree that the relevant numbers must include citizenship." *Id*. at 429. Here, plaintiffs neither alleged nor proved that any portion of the 50.8% BVAP majority is hollow or illusory due to ineligibility to vote because of lack of citizenship or for any other reason.[21]

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[20] Relying on *Bartlett*, one court squarely held that § 2 could not require the addition of more black residents to a 52.88% BVAP district because it was "*already* a majority- minority district under *Bartlett*'s definition." *Jeffers v. Beebe*, 895 F. Supp. 2d 920, 932 (E.D. Ark. 2012) (emphasis in original). This holding was not criticized by the Eighth Circuit when it struck down an at-large form of government, notwithstanding a majority BVAP population, in *Missouri St. Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924 (8th Cir. 2018).

[21] The record shows that blacks in Mississippi register to vote as a greater rate than whites. ROA.1642 (D-14, Table 1). Plaintiffs offered no evidence that District 22 differs in this regard from the other 51 districts.

The Supreme Court has explained the showing that must be made to justify the revision of single-member district lines under § 2: "[a] plaintiff may allege a section 2 violation in a single-member district if the manipulation of district lines fragments politically cohesive minority voters among several districts or packs them into one district or a small number of districts, and thereby dilutes the voting strength of members of the minority population." *Shaw v. Hunt*, 517 U.S. 899, 914 (1996). This obligates a plaintiff to offer evidence of packing or cracking minority voters. Although the complaint alleged that, as a matter of arithmetic and geometry, additional blacks could be added to District 22 from "one or two adjacent districts," ROA.71, ¶ 30, RE 8, plaintiffs neither alleged nor proved that those persons were "politically cohesive," *Shaw*, 517 U.S. at 914, with those already in District 22. To the contrary, the district court acknowledged that, "'[t]o the extent possible, consistent with the constitutional and statutory requirements, federal redistricting courts attempt to preserve local political boundaries – city and county lines,' since those lines often reflect 'communities of interest.'" ROA.367, RE 5 (quoting *Smith v. Clark*, 189 F. Supp. 2d 529, 542 (S.D. Miss. 2002), *aff'd sub nom. Branch v. Smith*, 538 U.S. 254 (2003)). However, Plan 1, which the district court ordered into effect, split Warren County and the City of Vicksburg for the first time. ROA.365, RE 5.[22]

[22] That is why the only evidence of cracking and packing was actually offered by defendants to

Certainly, the intentional "manipulation of district lines" on the basis of race would constitute a § 2 violation, but plaintiffs admit that the legislature behaved with complete innocence in 2012 when it adopted the lines of District 22. As the merits panel dissent cogently asked, "[h]ow can a court conclude that a specific district violates Section 2 without scrutinizing whether and how the minority votes have been manipulated across various districts?" *Thomas*, 938 F.3d at 181 (Willett, J., dissenting). Further, "[n]o court has ever ruled that a majority-minority district violates § 2 in isolation." *Id.* Indeed, nothing in Supreme Court jurisprudence or this Court's cases suggests what unintentional manipulation might look like. Plaintiffs simply allege that the legislature could have created a larger BVAP majority, but failed to do so, ROA.71, RE 8, a theory that has never been authoritatively accepted. Indeed, the Supreme Court in *Miller v. Johnson* rejected the contention that the Voting Rights Act requires the creation of black-majority districts wherever possible, 515 U.S. at 924-27, a holding that is completely inconsistent with plaintiffs' argument that even a BVAP majority district is not good enough to satisfy the Act.

As plaintiffs' counsel explained to the district court, "[n]ormally in these sorts of cases if there is going to be an allegation of cracking, we're going to show specifically where the cracking took place." ROA.997. Plaintiffs made no such

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demonstrate the illegality of Plan 1. ROA.937-40.

allegation or showing here. In the absence of evidence establishing the "packing" or "cracking" of minority voters, plaintiffs cannot establish that the district lines resulted in minority vote dilution in violation of § 2. Plaintiffs failed to offer any evidence to establish that minority voting strength in District 22 was manipulated through the district lines. Plaintiffs failed to offer any evidence to establish that, in derogation of traditional redistricting criteria, minorities were "packed" or "cracked" into neighboring districts, nor did they even raise such an allegation in their Complaint or Amended Complaint.[23] Rather, the district court acquiesced in plaintiffs' argument that, due to historical discrimination in Mississippi, a BVAP in excess of 60% is necessary in District 22 in order for the minority to elect the candidate of their choosing.[24]

The district court, in a footnote, asserted its reason for concluding that "more than 50 percent of the voting-age population in the relevant geographical area," *Bartlett*, 556 U.S. at 18, might nevertheless lack equal opportunity under § 2(b). "Practically speaking, this prohibits entrenched political powers from drawing a series of extremely marginal majority-minority districts with the expectation that

[23] As the merits panel dissent recognized, "the complaint (neither original nor amended) never mentions 'packing' or 'cracking.' But it did mention that District 22 needed 'a significantly increased black voting age population,' specifically '60% rather than the exiting 50.8%.' And the evidence, such as it was, focused solely on District 22, not on any adjoining districts." *Thomas*, 938 F.3d at 181 (Willett, J., dissenting).

[24] It is worth noting that the district court gave the legislature no guidance on what percentage was necessary to achieve equal opportunity, ROA.387, RE 5, even though defendants explicitly asked for it. ROA.1028-29.

the majority-minority group will be unable to turn out in numbers sufficient to ever elect a candidate of their choice." ROA.387 n.80, RE 5. *Bartlett*, however, makes clear that its "holding does not apply to cases in which there is intentional discrimination against a racial minority." 556 U.S. at 20. Plaintiffs could have alleged that the legislature designed District 22 "with the expectation that the majority-minority group would be unable to turn out in numbers sufficient ever to elect a candidate of their choice," but they explicitly declined to do so. Absent manipulation of lines to achieve an expected result, there can be no lack of equal opportunity in this BVAP-majority district.

Plainly, § 2 does not protect the right of minorities to elect the candidate of their choosing. "The district court and the majority seem to think that simply because a district *can be* drawn in a way that will guarantee a minority an election win, the Voting Rights Act *compels* that such a district be drawn. Not so." *Thomas*, 919 F.3d at 320 (Clement, J., dissenting in motions panel) (emphasis in original). "[N]othing in [§ 2] establishes a right have members of a protected class elected in numbers equal to their proportion to the population." 52 U.S.C. § 10301(b). In fact, as the merits panel dissent correctly recognized, "[t]he VRA explicitly disavows the maximization of minority electoral success and explicitly emphasizes electoral participation and opportunity." *Thomas*, 938 F.3d at 180 (Willett, J., dissenting). "[T]he ultimate right of § 2 is equality of opportunity, not

a guarantee of electoral success for minority-preferred candidates of whatever race." *De Grandy*, 512 U.S. at 1014 n.11.

A majority in a single-member district, as matter of law, cannot have "less opportunity" than a minority, unless, as in *LULAC v. Perry*, it proves that it is not really a majority. Plaintiffs offered no such allegation or proof, and their claim must fail.

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

Assuming *arguendo* that plaintiffs stated a § 2 claim, the Supreme Court has mandated that plaintiffs must establish three preconditions before a court may examine the "totality of circumstances," as § 2(b) requires:

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

LULAC v. Clements, 999 F.2d 831, 849 (5th Cir. 1993) (citing *Gingles*, 478 U.S. at 50-51; *Growe v. Emison*, 507 U.S. 25, 40 (1993)).

Plaintiffs submitted three different maps, each including parts of District 22 and adjoining districts and encompassing a larger BVAP majority. ROA.1282 (P-6); ROA.1284 (P-7). They claim this evidence meets the first requirement of *Gingles*, even though a BVAP majority district already exists. For the reasons stated above, because District 22 already contains a majority-minority voting age

population, plaintiffs cannot meet the first *Gingles* precondition and their claim must be dismissed. *Jeffers*, 895 F. Supp. 2d at 932 (holding that if a district already contains a majority-minority voting age population, the first *Gingles* precondition fails as a matter of law).

Plaintiffs attempted to satisfy the second and third *Gingles* preconditions without a single election for senator that has ever been properly conducted in District 22. Instead, they offered analyses of the outcome of certain statewide elections in this century,[25] as well as Senate elections in other districts in other years.[26] ROA.1065 (P-1). Accordingly, plaintiffs must carry the burden of demonstrating that "the white majority votes sufficiently as a bloc to enable it usually to defeat the majority's preferred candidate," *LULAC v. Clements*, 999 F.2d at 849, without being able to prove that white voters have ever actually defeated "the minority's preferred candidate" for senator in District 22.

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

[25] Significantly, they exclude the Attorney General race, won by a Democrat each year. ROA.1069-70 (P-1).

[26] The elections in 2003, 2007, and 2011 involved a different district with different boundaries, although denominated as District 22.

In order to prevail, plaintiffs "bore the burden to demonstrate that the African-American citizens of Mississippi 'do not in fact participate to the same extent as other citizens.'" *N.A.A.C.P. v. Fordice*, 252 F.3d 361, 368 (5th Cir. 2001) (quoting *LULAC v. Clements*, 999 F.2d at 866).

Plaintiffs, however, claimed that black voters in District 22 have a lower rate of turnout than whites. Census Bureau figures established that black turnout rates exceed white rates in Mississippi in even-numbered years, ROA.1642 (D-14, Table 1), and this Court has previously acknowledged evidence that black turnout was relatively higher in odd-numbered years. *N.A.A.C.P. v. Fordice*, 252 F.3d at 368 n.1. That supposed lower rate of turnout in a single district is the indispensable foundation of their contention "that minority voters *in this case* failed to participate equally in the political process." *LULAC v. Clements*, 999 F.2d at 867 (emphasis in original). There are two problems with that argument, one legal and one factual.

Every decade, the Mississippi legislature must engage in multiple redistrictings on a statewide basis. In *N.A.A.C.P. v. Fordice*, which involved districts for the election of Supreme Court justices, it was no accident that this Court required proof of the participation levels of "the African-American citizens of *Mississippi*." 252 F.3d at 368 (emphasis added). In that case, which involved only three districts, it might arguably have been possible to obtain reliable evidence of participation levels in the separate districts. That kind of knowledge is

simply impossible to obtain at a district level when the legislature is redrawing 52 senate districts and 122 house districts. To deny the legislature the right to rely on Census Bureau statistics means that any one of the 174 districts can be challenged at any time on the basis of district-specific statistical estimates of which the legislature could not have been aware at the time of enacting the statute.[27] The law should bar the imposition of any such burden.

Moreover, the district-specific estimates offered by plaintiffs in this case are unreliable because no properly conducted election has ever been held in District 22. The district court described the 2003, 2007 and 2015 Senate elections as "the 'endogenous' elections most relevant to this case," ROA.363, RE 5, but the 2003 and 2007 elections were held under different District 22 boundaries, and it is undisputed that the 2015 election featured a "significant election administration error" in Bolivar County. ROA.780:11-12, RE 9. Endogenous election "refers to elections for the particular office and district that is at issue." *Cano v. Davis*, 211 F. Supp. 2d 1208, 1235 (C.D. Cal. 2002), *aff'd*, 537 U.S. 1100 (2003). Instead of analyzing earlier elections under reconstituted election analysis, as described in

[27] Plaintiffs cite no case in which legislators have been unable to rely on Census Bureau figures on any subject. *See Shelby Cnty. v Holder*, 570 U.S. 529, 535 (2013) (finding under the Census Bureau's Voting and Registration data that "African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5").

Rodriguez v. Bexar County, 385 F.3d 853, 861 (5th Cir. 2004), plaintiffs chose to stake their entire case on a single "endogenous" election missing 10% of the vote.

Most importantly for the legal issues presented in this case, the mistakes in Bolivar County fatally undermine the statistical estimates of white and black turnout in that sole election. Plaintiffs' expert estimated that 29.6% of the black voting age population participated in that general election, as compared to 36.9% of whites. ROA.1071 (P-1). The expert's admitted exclusion of the Cleveland precincts, where voters were given the wrong ballots, distorted both of those estimates, particularly with regard to white participation. The population of the excluded Cleveland portion of District 22 is predominantly white, but this Court can take judicial notice that Cleveland is the location of Delta State University, a predominantly white institution. ROA.785-86, RE 9. College students are counted as part of the voting age population in the census, but college students are notoriously unlikely to register and to vote.[28] Had those non-voting white students been taken into consideration in plaintiffs' turnout estimates, the level of estimated white participation throughout District 22 would necessarily have fallen.

Here, the vote totals from the only endogenous election involving the challenged districting boundaries excluded votes from two District 22 precincts

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

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

Of course, plaintiffs themselves discussed possible impediments to black participation, but their own testimony showed those impediments not to be insurmountable. Plaintiff Melvin Lawson observed that blacks are less likely than whites to have their own means of transportation, but he confirmed that he and other politically active individuals drive voters to the polls on election day. ROA.825; ROA.834, RE 5. Whatever impediments may still exist, plaintiffs have failed to prove that they resulted in a depressed level of black participation, either in District 22 or in Mississippi as a whole.

Plaintiffs relied on a single flawed endogenous election to support their claim that white bloc voting operated to defeat the minority-preferred candidate. They offered no proof of how the state had manipulated adjacent district

boundaries to crack and pack voters for a dilutive effect.[29] As a result, the district court's judgment "effectively requires electoral success. But the statutes and caselaw focus on genuine opportunity. Not guaranteed victory." *Thomas*, 938 F.3d at 184 (Willett, J., dissenting). In this BVAP majority district, the evidence fails to show that black participation is in any way depressed. Absent such proof, *LULAC v. Clements* and *N.A.A.C.P. v. Fordice* declare that the results test of § 2 cannot be satisfied.

C. Section 2 must be construed as precluding liability here to avoid the severe constitutional doubts raised by the district court's judgment.

Although the district court's opinion reviewed evidence and case law in some detail, it was far from clear in identifying how the borders of District 22 cause "members of a racial group … [to] have less opportunity … to participate in the political process and to elect representatives of their choice," as § 2(b) requires. However vague the violation may have been, the remedy the district court found it to compel was mathematically precise. The district court added thousands of individuals from Yazoo and Warren Counties, about whom this record reflects nothing but their race, in sufficient numbers to raise the black voting age population of District 22 to 61.98%. ROA.365, RE 5; ROA.473. Similarly, the

[29] "The allegation that the minority's majority is not large enough to overcome white bloc voting would only become actionable if the minority's majority is being artificially lowered to dilute the minority vote." *Thomas*, 919 F.3d at 319 (Clement, J., dissenting in motions panel).

legislature, in order to satisfy the district court and plaintiffs, found a different group of people in Bolivar and Sunflower Counties sufficient to raise the black voting age population to 58.13%. ROA.638. The assignment of Americans to particular voting districts on the sole basis of their race ordinarily violates the Fourteenth and Fifteenth Amendments. *Miller*, 515 U.S. at 916; *Shaw v. Reno*, 509 U.S. 630 (1993).[30] Defining a statutory violation in such a way as to require a presumptively unconstitutional remedy, then, necessarily casts doubt on the constitutionality of § 2 as applied to define that violation.

Federal courts must construe the federal statutes in such a way as to avoid constitutional doubt. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932); s*ee generally* Scalia & Garner at 247-51.[31]

In *Northwest Austin Municipal Utility Dist. No. One v. Holder*, 557 U.S. 193 (2009), the Supreme Court applied that principle to construe § 4(a) of the Voting Rights Act, 52 U.S.C. § 10303(a), in such a way as to avoid serious constitutional

[30] *Accord Cooper v. Harris*, 137 S. Ct. 1455, 1487 (2017).

[31] Even where there may not be "a serious doubt of constitutionality," courts presume that Congress does not intend to encroach on state authority. "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971); *see generally San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247-48 (1959).

questions. The application of the statutory definition of "political subdivision" in § 14(c)(2), 52 U.S.C. § 10310(c)(2), would have precluded the district from employing the bailout provisions of § 4(a), notwithstanding the lack of any "evidence that it has ever discriminated on the basis of race." *Id*. at 200. After discussing the difficult constitutional questions presented, the Court held that "specific precedent, the structure of the Voting Rights Act, and *underlying constitutional concerns* compel a broader reading of the bailout provision." *Id*. at 207 (emphasis added). The same principle of constitutional avoidance that drove the Supreme Court's construction of § 4(a) should now drive this Court's construction of § 2(b).[32]

Here, the district court altered the border between two senate districts out of 52 districts contained in a statute adopted by the legislature and approved by the Attorney General under § 5 of the Voting Rights Act, 52 U.S.C. § 10304. Neither these plaintiffs nor anyone else has ever assailed any portion of the 2012 redistricting statute as violating any provision of the Constitution. Here, the district court read § 2 as requiring the reassignment of thousands of individuals, solely on the basis of their race, within a plan conceded to be constitutional. No binding authority declares that such a result is constitutionally permissible.

[32] Indeed, the principle of avoiding constitutional doubts had earlier led to restrictive constructions of § 2 in *Bartlett*, 556 U.S. at 21, and *LULAC v. Perry*, 548 U.S. at 446.

The Supreme Court, of course, has never ruled on the constitutionality of any application of § 2, as amended in 1982. In *Jones v. City of Lubbock*, this Court approved its constitutionality as used to invalidate an at-large city government, requiring instead elections from single-member districts.[33] 727 F.2d 364 (5th Cir. 1984). This Court there expressed its belief that Congress in 1982 had modeled § 2 largely on the Supreme Court's decision in *White v. Regester*, 412 U.S. 755 (1973), and this Court's opinion in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd on other grounds sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976). *Id.* at 379. *Zimmer* involved an at-large parish government, and *White* involved the use of multi-member state legislative districts as part of a plan primarily composed of single-member districts.[34] Neither *White* nor *Zimmer* nor *Jones* involved a challenge to a plan comprised of single-member districts.[35]

[33] When this Court upheld the constitutionality of § 2 as applied to a voter identification statute, it explicitly distinguished redistricting cases, which "require judges to make complicated, race-based predictions." *Veasey v. Abbott*, 830 F.3d 216, 252 (5th Cir. 2016) (*en banc*).

[34] In the at-large government case on which plaintiffs principally rely in this single-member-district case, this Court expressed its expectation of *Zimmer's* forthcoming obsolescence: "[a]s *de jure* restrictions on the right to vote mercifully recede into the historical past, we should expect it to be increasingly difficult to assemble a *Zimmer*-type voting rights case against an at-large electoral district where a majority-minority population exists." *Monroe*, 881 F.2d at 1333.

[35] The Supreme Court has explicitly distinguished claims involving single-member-district legislative plans, saying, "[a]t-large and multimember schemes, however, do not classify voters on the basis of race." *Shaw v. Reno*, 509 U.S. at 649.

South Carolina v. Katzenbach, 383 U.S. 301 (1966), establishes that, under certain circumstances, Congress may prohibit the enforcement of state or local legislation, which, like the 2012 redistricting plan here, is conceded to be perfectly constitutional. The Court found this "an uncommon exercise of congressional power," but concluded that "exceptional conditions can justify legislative measures not otherwise appropriate." *Id*. at 334. The Court emphasized that the application of the § 5 remedy was intended to be temporary, "provid[ing] for termination of special statutory coverage at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years." *Id*. at 331.

In *Shelby County v. Holder*, the Supreme Court decided that the extraordinary circumstances which had authorized Congress to interfere with valid state and local law no longer existed. This was true even though Congress in 2006 had reviewed the existing circumstances and decided to extend coverage for 25 more years. 570 U.S. 529, 538-39 (2013). Whatever the facts may have been in 1965, extraordinary remedies could not be based on 40-year-old data. *Id.* at 549. "[A] statute's 'current burdens' must be justified by 'current needs.'" *Id.* at 551 (quoting *Northwest Austin*, 557 U.S. at 203).

In 1982, when Congress adopted the current language of § 2 as permanent law, it provided no mechanism of escape for a State or jurisdiction "in which the

danger of substantial voting discrimination has not materialized." *South Carolina*, 383 U.S. at 331. Two years later, this Court upheld the constitutionality of § 2 as applied to an at-large city government because Congress had considered evidence "that the full exercise of the franchise by American minorities still suffered from the effects of electoral systems that hinder minority input into the nation's decision-making." *Jones*, 727 F.2d at 374. In the ensuing 37 years, Congress has never reconsidered § 2, although it revised § 5 on several occasions. Reviewing the sufficiency of the factual record to support the continued extraordinary remedy of § 5, the Supreme Court noted that, as of 2004, black voter registration of 76.1% in Mississippi exceeded white voter registration of 72.3%. *Shelby County*, 570 U.S. at 548. Census Bureau statistics in this record show that black registration rates have continued to exceed white registration in Mississippi through 2016. ROA.1642 (D-14, Table 1).[36] Because current conditions in Mississippi no longer justify the imposition of the extraordinary remedy of § 5, it is hard to imagine how the continued imposition of the extraordinary remedy of § 2 can be constitutionally justified.

Jones held that extraordinary remedies may be justified "[w]here Congress, on the basis of a factual investigation, perceives that a facially neutral measure" –

[36] That will come as no surprise to this Court, which long ago noted that "in recent years Mississippi's African-American and white citizens have maintained virtual parity in voter turnout." *NAACP v. Fordice*, 252 F.3d at 368 (footnote omitted).

here, the statute defining District 22 – "carries forward the effects of past discrimination." *Jones*, 727 F.2d at 375. Assuming that the district court's investigation may take the place of a congressional investigation, this record does not show that District 22 "carries forward the effects of past discrimination." Here, the district court found "evidence of substantial socio-economic disparities between District 22's African-American and white populations … that ultimately reflect the effects of slavery and segregation." ROA.384, RE 5. However, the district court found that plaintiffs were "not required to prove a causal connection between these factors and a depressed level of political participation." *Id. Jones* found that it is precisely that connection which rendered § 2 constitutional. Absent that connection, the extraordinary remedy cannot be justified.

The district court, in disclaiming the need for proof of causation, apparently relied on this Court's earlier dictum that "*where the level of black participation in politics is depressed*, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation." *LULAC v. Clements*, 999 F.2d at 867 (quoting S. Rep. No. 417 at 29 n.114) (emphasis added by Court); 1982 U.S.C.C.A.N. at 207 n.114. This Court declined to apply that language there for lack of "proof that participation in

the political process is in fact depressed among minority citizens." *LULAC v. Clements*, 999 F.2d at 867.[37]

More recently, this Court authoritatively applied the language discussed in *LULAC* in a voter identification case, finding sufficient proof of "a disparity in voter ID possession." *Veasey*, 830 F.3d at 259. In neither case did this Court identify anything in the statutory language which excuses a plaintiff from producing evidence that an alleged injury has been caused "on account of race or color," as § 2(a) requires.[38] Because *Jones* rests the constitutionality of § 2 on "the effects of past discrimination," 727 F.2d at 375, § 2 cannot constitutionally be applied to grant relief in the absence of proof of such effects.[39] Any suggestions to the contrary in this Court's prior cases should be overruled.

Jones also acknowledges that an extraordinary remedy such as § 2 cannot be applied so as to "violate the substantive guarantees of the [Fourteenth and

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[37] As explained in Part III.B above, the supposed proof of depressed participation in this record is insufficient to support the judgment.

[38] Indeed, this Court has elsewhere held such proof to be necessary. "[L]ow turnout, among a group registered in high percentages, could result from a Voting Rights Act violation. Obviously, plaintiffs must prove it." *Salas*, 964 F.2d at 1551. This Court denied relief because plaintiffs "offered no evidence directly linking this low turnout with past official discrimination." *Id*. at 1556.

[39] Where proof of discriminatory intent is not required, "[a] robust causality requirement ensures that '[r]acial imbalance … does not, without more, establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create." *Texas Dep't of Housing & Cmty Affairs v. Inclusive Cmtys. Project Inc.*, 135 S.Ct. 2507, 2523 (2015) (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)). Imposition of a lesser standard "raises serious constitutional concerns." 135 S.Ct. at 2523.

Fifteenth] Amendments." 727 F.2d at 374 n.5. Voters have a constitutional guarantee not to be "separated[d] … into different voting districts on the basis of race." *Miller*, 515 U.S. at 911. That is what the district court did in its remedy, and that is what the legislature did in its new statute to escape from that remedy. *Gingles* may arguably be read to suggest that such an otherwise unconstitutional remedy might be permissible if "a bloc voting majority [is] *usually* … able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Gingles*, 478 U.S. at 49 (emphasis in original). By applying § 2 to a district that had held only one election, which was improperly conducted, the district court implied a right to succeed wherever mathematically and geographically possible.

This is exactly the theory which the Supreme Court rejected in *Miller*. There, the Georgia legislature had violated *Shaw* by designing districts on the sole basis of race, simply because "the Justice Department had adopted a 'black-maximization' policy." *Miller*, 515 U.S. at 921. The Supreme Court held that a "policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan 'so discriminates on the basis of race or color as to violate the Constitution." *Id*. at

924 (citing *Beer v. United States*, 425 U.S. 130, 141 (1976)).[40] Here, all the record shows is that it was geographically and mathematically possible to add more black voters to District 22. What *Miller* forbids on a wholesale basis may not constitutionally be compelled by § 2 on a retail basis.

There can be no doubt, then, that the district court's application of § 2 on these facts creates severe constitutional problems. This Court should avoid those problems by rejecting the construction of § 2 adopted by the district court.

CONCLUSION

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

This the 23rd day of October, 2019.

Respectfully submitted,

s/ Tommie S. Cardin

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[40] Plaintiffs have never even claimed that the 2012 redistricting plan did not "create[] as many majority-minority districts as possible." The Supreme Court has explained that § 2 does not allow relief against a single-member-district plan absent "the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large population to elect candidates of its choice." *De Grandy*, 512 U.S. at 1008.

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CERTIFICATE OF SERVICE

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

This the 23rd day of October, 2019.

s/ Tommie S. Cardin
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains **12,998** words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

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

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