

**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.

**PLAINTIFFS' REPLY IN SUPPORT
OF MOTION FOR EXPEDITED SCHEDULE**

The Court's text order of August 30 stated: "If the state disagrees with plaintiffs' proposed schedule, the state should propose an alternative schedule in the response." The State's response [doc. 21] indicated no disagreement with the Plaintiffs' proposed schedule except to reiterate the contention in its motion for summary judgment [docs. 19-20] that the case should be dismissed. Obviously, if summary judgment is granted, any schedule set by the Court will become moot at that point. But a schedule should nevertheless be set since summary judgment might well be denied. Given the absence of any objection to the Plaintiffs' proposed schedule beyond the summary judgment arguments, the Court should grant the Plaintiffs' motion to expedite.

The Plaintiffs will respond to the summary judgment motion no later than September 18. For present purposes, it is worth noting that the Defendants' claim --- in responding to the motion to expedite --- that this case was filed "on the eve of another" election cycle, [doc. 21 at 1-2], is inaccurate. The case was filed well over a year prior to the primary election.

As will be explained in the Plaintiffs' upcoming summary judgment response, important distinctions exist between the present case and the laches cases cited by the Defendants in their motion for summary judgment. For example, the primary redistricting case they cite is *Maxwell v. Foster*, 1999 WL 33507675 (W.D. La. Nov. 24, 1999). [Doc. 20 at 9-10, 12]. There, the district court's dismissal occurred on November 24, 1999 --- *after* the 1999 statewide legislative elections had been held in Louisiana. As the court in *Maxwell* noted, "three elections" had been held under the plan. *Id.* at *4. (Those would be the 1991, 1995, and 1999 elections since Louisiana's legislative election cycle is the same as Mississippi's). Further, the Plaintiffs there had asked the court "to declare the entire [legislative] plan invalid." *Id.* By contrast, the present case seeks a declaration of invalidity regarding only one of Mississippi's fifty-two state senate districts, and the remedy would require the redrawing only of that district and one adjacent district. (The violation could also be remedied by redrawing that district and two adjacent districts). Only one election has been held under this plan. The Plaintiffs have proposed a schedule by which this Court can render a liability decision and, if necessary, implement a remedy many months in advance of the 2019 election.

In their response to the motion to expedite, the Defendants cite *Common Cause v. Rucho*, 2018 WL 4214334¹ (M.D.N.C. Sept. 4, 2018). But that case involved a partisan gerrymandering challenge to the congressional districts in North Carolina. After the three-judge federal district court found a violation, the United States Supreme Court vacated the decision on June 25, 2018 and remanded for further consideration. 138 S.Ct. 2679. On remand, the district court issued an opinion on August 27, 2018 and again found a violation. 2018 WL 4087220. Eight days later, on September 4, the district court issued the order cited by the Defendants and said there was

¹ The Defendants mistakenly cited the page number of this case as 4214331 but the last digit is a 4, not a 1.

insufficient time to implement a new districting plan before the November 6, 2018 congressional elections approximately two months away. But in the present case, the primary election is nearly eleven months away and the general election is approximately fourteen months away. The schedule proposed in the Plaintiffs' motion to expedite allows sufficient time for the Court to adjudicate a violation and impose a remedy for the one district that is being challenged here.

The Defendants also cite *Martin v. Mabus*, 700 F. Supp. 327, 343- 344 (S. D. Miss. 1988). There the court, in an opinion issued on September 12, 1988, concluded that the lines used to elect judges in certain judicial districts in Mississippi diluted African-American voting strength in violation of Section 2 of the Voting Rights. The court declined to order special elections for judges to coincide with the congressional and presidential elections less than two months away. But it did order that special elections occur approximately five months later, in February of 1989, in order to cure the Section 2 violation. *Id.* at 344. Here, by contrast, the Plaintiffs are not seeking special elections, but instead the less intrusive remedy of imposing a remedial plan many months in advance of the regular election cycle.

The Defendants quote *Smith v. Clark*, 189 F.Supp.2d 529, 535 (S.D. Miss. 2002) (three-judge court) regarding the concerns that militate against postponing qualifying deadlines. This actually *supports* the Plaintiffs' proposed schedule, which would allow for implementation of a remedial plan without postponing the March 1, 2019 qualifying deadline. But in the event postponement becomes necessary, *Smith* does not hold that it never can happen. Indeed, as stated in our motion [doc. 17 at 3 n. 2], the district court's decision in *Seamon v. Upham*, 536 F. Supp. 931, 936-938 (E.D. Tex. 1982) (three-judge court) and the Supreme Court's subsequent remand of that case, *Upham v. Seamon*, 456 U.S. 37, 44 (1982), make it clear that a district court has discretion to postpone a qualifying deadline where necessary. Moreover, *Smith* was

concerned with the lines for an entire statewide congressional redistricting plan. Here, any remedial plan can be limited to two or three of the fifty-two state senate districts, and the Court would have the option of postponing the qualifying deadline only for those two or three districts.

The discussion in this reply brief demonstrates how the relevant equitable factors in this case differ from those in the cases cited by the Defendants, and how this Court has the authority to adopt a schedule that will allow for any Voting Rights Act violation to be adjudicated and remedied within a reasonable time frame. This will be discussed further in the upcoming summary judgment response. In the meantime, the Defendants have presented no reasons beyond their summary judgment arguments as to why this Court should not set a schedule that would allow for a remedy to be imposed for the 2019 election in the event the Court concludes that the present lines for District 22 violate Section 2 of the Voting Rights Act.

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2018 I electronically filed a copy of the Motion for Expedited Schedule using the ECF system which sent notification of such filing to all counsel of record.

s/Robert B. McDuff