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

**JOSEPH THOMAS; VERNON AYERS; and MELVIN LAWSON** — **PLAINTIFFS**

**v.** — **NO. 3:18-cv-00441-CWR-FKB**

**PHIL BRYANT, Governor of the State of Mississippi; DELBERT HOSEMANN, Secretary of State of the State of Mississippi; and JIM HOOD, Attorney General 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**

**DEFENDANTS' MOTION TO STAY ORDER PENDING APPEAL**

For the reasons set forth in the memorandum brief submitted concurrently herewith, defendants Phil Bryant and Delbert Hosemann move that this Court stay its order [Dkt. # 61] in this matter pending resolution of those defendants' appeal to the Fifth Circuit Court of Appeals pursuant to Fed. R. Civ. P. 62(c)(1).

Attached hereto in support hereof as Exhibit 1 is the affidavit of Kimberly P. Turner, Assistant Secretary of State for the Election Division.

This the 19th day of February, 2019.

Respectfully submitted,

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**DEFENDANTS' MEMORANDUM IN SUPPORT OF ITS MOTION TO STAY ORDER PENDING APPEAL**

Pursuant to Fed. R. Civ. P. 62(c)(1), Governor Phil Bryant and Secretary of State Delbert Hosemann, in their official capacities of their own offices and as members of the State Board of Election Commissioners ("Defendants"), move for a stay of this Court's order of February 16, 2019, pending their appeal. [Dkt. # 61]. For the reasons discussed below and consistent with the law of the Fifth Circuit and the United States Supreme Court, this Court should stay the judgment until the Fifth Circuit rules on the merits of Defendants' appeal.

## Introduction

This Court's order effectively enjoins State officials from using the statutory boundaries of Senate District 22 in the election of 2019, the qualifying period for which ends next Friday, March 1, 2019. *Abbott v. Perez*, 138 S. Ct. 2305, 2321-24 (2018). Injunctive relief is not automatically stayed. *See* Fed. R. Civ. P. 62(c)(1). However, this Court can and should exercise its discretion to order a stay in this instance.

Although parties are not "entitled to a stay as a matter of right," federal courts have "the authority to 'hold an order in abeyance pending review[, which] allows an appellate court to act responsibly' when faced with serious legal questions that merit careful scrutiny and judicious review." *Campaign for Southern Equality v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014), quoting *Nken v. Holder*, 555 U.S. 418, 427 (2009). Stays of district court orders pending appeal "simply suspend[] judicial alteration of the status quo." *Nken*, 555 U.S. at 429. The Fifth Circuit has "recognized that a 'movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Campaign for Southern Equality*, 773 F.3d at 57, quoting *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983).

Courts examine four factors in deciding whether a stay of a judgment pending appeal is appropriate. *Nken*, 555 U.S. at 426. They are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id*. The first two of the four factors "are the most critical." *Id*. at 434.

"The Supreme Court has repeatedly instructed courts to carefully consider the importance of preserving the status quo on the eve of an election." *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014). This is true in the apportionment context as well. *Id*. at 893. "[T]he Supreme Court has instructed that, '[i]n awarding or withholding immediate relief, a court is entitled to and *should* consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles.'" *Id*., quoting *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). "Accordingly, 'under certain circumstances, such as

where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the grant of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid.'" *Id*. Timing, not the merits of the underlying judgment, "seems to be the key" in deciding the propriety of a stay in an election case. *Veasey*, 769 F.3d at 895 (citing cases).

**STATEMENT OF FACTS**

Joint Resolution No. 201, adopted into law by the Mississippi Legislature in 2012, established the boundaries of Senate District 22 which, according to the 2010 census, included a black voting age population ("BVAP") of 50.77%. Defs.' Exh. D-5 (J.R. No. 201 (2012 Senate Plan)); Defs.' Exh. D-11 at 2-3 (2012 Long Report (TRP1 Plan)). In the only election ever held in District 22, the white Republican incumbent, Eugene Clarke, Chairman of the Senate Appropriations Committee, defeated former Senator Joseph Thomas,[1] a black Democrat. [Dkt. # 52, § 8 at 6]. Although the certified returns showed 8,149 votes for Senator Clarke and 6,985 votes for Senator Thomas, *id*., those returns are indisputably wrong because of serious errors in Bolivar County, where 654 voters who lived in other Senate districts were allowed to cast votes in District 22, and 1,508 voters resident in District 22 were recorded as voting in other districts. Plntfs.' Exh. P-3 at 4 (Plntfs.' Explanation of Precinct Boundaries).

Instead of filing a challenge to the obviously defective results of the 2015 election, Senator Thomas waited almost three years to file this action, along with two other plaintiffs residing in District 22, claiming that the boundaries of District 22 caused black voters to "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," in violation of the results test described in § 2(b) of the

[1] Senator Thomas was previously elected state senator for District 21 for the term 2004-2008. Tr. at 95. "Tr." refers to the Trial Transcript from the trial held in this matter February 6-7, 2019.

Voting Rights Act, 51 U.S.C. § 10301(b). Before a court may examine "the totality of circumstances," as § 2(b) requires, the Supreme Court, in *Thornburg v. Gingles*, 478 U.S. 30 (1986), has mandated that plaintiffs must establish three prerequisite facts:

> (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."

*League of United Latin American Citizens v. Clements*, 999 F.2d 831, 849 (5th Cir. 1993), citing *Gingles*, 478 U.S. at 50-51, and *Growe v. Emison*, 507 U.S. 25, 40 (1993).

This is not a case "[w]here an election district could be drawn in which minority voters form a majority but such a district is not drawn." *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009) (opinion of Kennedy, J.).[2] District 22 includes a BVAP majority. Plaintiffs submitted into evidence three different maps, each including parts of District 22 and adjoining districts, in which the BVAP majority is larger. *See* Plntfs.' Exhs. P-6, P-7 and P-8 (Maps of Illustrative Plans 1, 2 and 3 of Senate District 22). They claim this evidence meets the first requirement of *Gingles*, even though a BVAP majority district already exists.

Plaintiffs introduced statistical estimates to attempt to satisfy the second and third *Gingles* prerequisites. *See* Plntfs.' Exh. P-1 (Expert Report of Dr. Maxwell Palmer). However, because of the election errors in Bolivar County, they do not have a single election for Senator that has ever been properly conducted in District 22. Instead, they offer analyses of the outcome of certain statewide elections in 2015 in District 22, as well as other elections in other districts in other years. *Id.* Accordingly, plaintiffs must carry the burden of demonstrating that "the white majority votes sufficiently as a bloc to enable it *usually* to defeat the minority's preferred candidate," *LULAC*, 999 F.2d at 849 (emphasis added), without being able to prove that white

[2] Because Justice Kennedy's opinion is the narrowest rationale supporting the judgment, it is treated as the holding of the Court. *Marks v. United States*, 430 U.S. 188, 193 (1977).

voters have *ever* actually defeated "the minority's preferred candidate" for Senator for District 22.

Only if these three factual prerequisites are established does the Court turn to the totality of the circumstances, examining factors specified in *Gingles*, 478 U.S. at 44-45. Plaintiffs introduced evidence on some, but not all of these factors.

**The history of voting-related discrimination in the State or political subdivision.** Through the statements of Senator John Hohrn and Justice Fred Banks, plaintiffs made reference to unconstitutional practices in Mississippi's past. *See* Plntfs.' Exhs. P-9 and P-10 (Reports of Fred L. Banks, Jr., and John Hohrn). However, because plaintiffs' complaint declined to assert a claim under the Constitution, they did not ask the Court to adjudicate that any constitutional violations had taken place or that any such violations had any effect on plaintiffs' ability to elect representatives of their choice under § 2(b).

**The extent to which voting in the elections in the State or political subdivision is racially polarized.** Plaintiffs sought to establish this factor by statistical evidence drawn from elections for other offices or other areas. *See* Plntfs.' Exh. P-1 (Expert Report of Dr. Maxwell Palmer).

**The extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting.** Senator Thomas testified that, although he lives in Yazoo County at the southern end of District 22, he was able to travel to Cleveland at the northern end to campaign in person. Tr. at 114. Mississippi does not have a majority vote requirement in general elections. Mississippi does have a majority vote requirement in primary elections, Miss.

Code Ann. § 23-15-305, which enables the black majority in District 22 to cohere around a consensus candidate, rather than allowing an unfavored candidate to win with a minority in a fractured field. Bullet voting does not apply to the election of a single Senator. The Court found this factor to be irrelevant. [Dkt. # 61 at 27].

**The exclusion of members of the minority group from candidates slating processes.** Because there is no candidate slating process in District 22, the Court also found this factor to be irrelevant. [Dkt. # 61 at 27].

**The extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process.** Although plaintiffs introduced proof that blacks in District 22 trail whites in socioeconomic categories, they offered no proof to connect that fact to past discrimination. *See* Plntfs.' Exh. P-1 (Expert Report of Dr. Maxwell Palmer). Nor did they prove that those socioeconomic circumstances hinder their ability to participate effectively in the political process. Plaintiffs' expert presented a statistical estimate that black turnout in the 2015 Senate election was 29.6% of the voting age population, while the white turnout was 36.9%. *See also* Plntfs.' Exh. P-1 at 7, ¶ 20 (Expert Report of Dr. Maxwell Palmer). However, the expert admitted that he had excluded from his analysis the precincts in Bolivar County in which voters had been assigned to the wrong districts, thereby affecting the accuracy of his estimates. Tr. at 76-77. Although Census Bureau statistics show that black turnout has exceeded white turnout in even-numbered election years since at least 2004, Defs.' Exh. D-14 at 3 (Supplemental Expert Report of Dr. Peter A. Morrison), the Court declared that black voters "are less likely to have

transportation options that facilitate voter turnout in odd-year elections." [Dkt. # 61 at 28].[3]

**The use of overt or subtle racial appeals in political campaigns.** Plaintiffs offered no evidence of the use of racial appeals anywhere in Mississippi since 2004. They offered no evidence of any use of racial appeals in an election in District 22.

**The extent to which members of the minority group have been elected to public office in the jurisdiction.** More blacks have been elected to public office in the jurisdiction of Mississippi that in any other state. Tr. at 235; *see also* Defs.' Exh. P-14 at 3, n.3 (Supplemental Expert Report of Dr. Peter A. Morrison). The voting age population of Mississippi in the 2010 census was 34.7% black, Defs.' Exh. 15 at 37, and 25% of Senators are black. Blacks are elected to local office throughout the area encompassed by District 22. *See* Defs.' Exh. P-14 (Supplemental Expert Report of Dr. Peter A. Morrison). The Court observed that a black candidate was not elected in the only election held in District 22. [Dkt. # 61 at 29].

Plaintiffs sought a finding of fact that the Madison County precincts in District 22 should be transferred to a district including much of Warren County because "the population in Madison and Warren counties [*sic*] wealthier than the counties of District 22." Plntfs.' Proposed Finding of Fact at 31, ¶ 101. "[A] State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread or relevant interest." *Theriot v. Parish of Jefferson*, 185 F.3d 477, 468 (5th Cir. 1999), quoting *Miller v. Johnson*, 515 U.S. 900, 920 (1995). No case, however, obliges the State to unite "communities of interest." *Theriot*, 185 F.3d at 486. In any event, when the District Court created a congressional district in the Delta, it included most of Madison County, including those parts now encompassed within District 22. *Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss.), *aff'd*, 469 U.S. 1002 (1984).

[3] In fact, one of plaintiffs' lawyers has previously introduced evidence that black turnout was relatively higher in odd-numbered years compared to even-numbered years. *N.A.A.C.P. v. Fordice*, 252 F.3d 361, 368 n.1 (5th Cir. 2001).

Senator Thomas testified that, when he represented Yazoo County in the Senate, his district also included parts of Madison County and Attala County. Tr. at 95. Although the Court found Madison County to be "suburban" [Dkt. # 61 at 5], all three plans credited the Court would unite those suburban precincts with parts of Vicksburg, which the Court expressly found to be part of the Delta. [Dkt. # 61 at 5, quoting *Jordan v. Winter*, 541 F. Supp. 1135, 1139 n.1 (N.D. Miss. 1982), *vacated*, 461 U.S. 921 (1983)].

## ARGUMENT

### I. THERE IS A STRONG LIKELIHOOD DEFENDANTS WILL SUCCEED ON THE MERITS OF THEIR APPEAL.

This Court should have "little difficulty concluding the legal questions presented by this case are serious, both to the litigants involved and the public at large, and that a substantial question [will be] presented for [the Fifth Circuit] to resolve." *Bryant*, 773 F.3d at 57.

#### A. The Court erred as a matter of law by failing to convene a three-Judge Court under 28 U.S.C. § 2284(a).

##### 1. Section 2284(a) is grammatically ambiguous.

In response to defendants' demonstration that § 2284(a) applies to an action "challenging . . . the apportionment of any statewide legislative body," plaintiffs assert, "This proposed reading is illogical." [Dkt. # 50 at 2.] What they do not assert is that the reading is ungrammatical. As drafted by Congress, the verb "challenging" may be read as having two direct objects: "constitutionality" and the second use of the word "apportionment." Under that sentence structure, a three-Judge Court is required when any action challenges "the apportionment of any statewide legislative body." By contrast, a single Judge may preside unless "the constitutionality of the apportionment of congressional districts" is challenged.

While plaintiffs declare it "clear" and "obvious" that Congress meant no such thing [Dkt. # 50 at 6], they cannot pretend that Congress wrote no such thing. While all parties agree that

statutory construction must begin with the statutory language, *Duncan v. Walker*, 533 U.S. 167, 172 (2001), it cannot end there where, as here, the language is ambiguous.

The Court's order purported to resolve the grammatical ambiguity by applying "the series qualifier canon of construction" [Dkt. # 51 at 3], described in Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012). The Court said that "[t]he term 'the constitutionality of' modifies all of the phrases which follow it." [Dkt. # 51 at 3]. The defect in the Court's analysis is that "constitutionality" is not a modifier, but a noun, a direct object of the gerund "challenging." As the authors explain the canon, "a prepositive or postpositive modifier normally applies to the entire series." Scalia & Garner at 147. Every example given by the authors involves a modifier, not a noun. *Id*., at 147-51. The canon simply does not apply to § 2284(a).

Indeed, the Court's order properly acknowledges that its reading of the sentence renders the second use of "apportionment" superfluous. [Dkt. # 51 at 4]. The Court quotes the authors' warning that "a clever interpreter could create unforeseen meanings or legal effects from this stylistic mannerism." *Id*., at 177. Here, however, it is the Court's disregard of the surplusage canon that creates an unforeseen meaning. Neither plaintiffs nor the Court disputes that Congress in 1976 expected all challenges to "the apportionment of any statewide legislative body" to be adjudicated by a three-Judge Court. Here, the Court should have heeded the authors' warning that disregard of the second use of "apportionment" "should be regarded as the exception rather than the rule." *Id*., at 178. Applying the surplusage canon to give effect to the second use of "apportionment" compels the reading that a three-Judge Court should be convened to adjudicate any action "challenging . . . the apportionment of any statewide legislative body."

**2. The legislative history shows that Congress intended three-Judge Courts to hear all challenges to the apportionment of state legislative**

**bodies.**

Plaintiffs do not dispute that legislative history may be consulted where statutory language is ambiguous. *United States v. Kay*, 359 F.3d 738, 743 (5th Cir. 2004). They claim, however, that the legislative history proves too much, because it "would make any challenge to a congressional or state legislative apportionment subject to a three-Judge court." [Dkt. # 50 at 6-7.] Whether or not that is the case, any legislative history concerning congressional redistricting cannot override the statutory language, because there is no grammatical way to separate the word "constitutionality" from the prepositional phrase "of the apportionment of congressional districts." Regarding congressional redistricting, then, there is no ambiguity to resolve.

The Court quite appropriately assumes that Congress, as a general rule, knows what is it doing and says what it means. However, canons of statutory construction would never have arisen if Congress always succeeded in that effort. Here, it is grammatically unassailable that "the apportionment of any statewide legislative body" can have two equally proper functions in the context of § 2284(a). This Court therefore cannot avoid an examination of the legislative history.

Plaintiffs do not deny that the legislative history, unlike the statutory language, is clear "[T]he Committee explained that 'three-judge courts would be retained . . . in any case involving congressional apportionment or the reapportionment of any statewide legislative body." [Dkt. # 50 at 7, quoting S. Rep. 94-204, 94th Cong. 2d Sess. 1976 at 1, 1976 U.S.C.C.A.N. 1988, 1975 WL 12516.] The report clearly stated what Congress meant, because Congress believed that every statutory method of challenging any apportionment, including those under the Voting Rights Act, likewise required three-Judge Courts.[4] Congress turned out to be wrong about its

[4] Indeed, the report explicitly listed "42 U.S.C. section . . . 1973(a)," S. Rep. 94-204 at 9, 1976 U.S.C.C.A.N. at 1996, which is now § 2(a). Similarly, when Congress amended § 2 in 1982, the Senate

expectation of how § 2 would be enforced, but it nevertheless clearly expressed its intent that a three-Judge Court should be invoked in all challenges to the apportionment of state legislatures. The statute can be so read, and it should be so enforced.[5]

**3. Appellate authority supports the conclusion that constitutional claims are inextricably intertwined with § 2 claims.**

Because, until recently, complaints have regularly combined constitutional and statutory challenges to statewide legislative apportionments, there are no appellate cases squarely addressing the issue which plaintiffs have concocted here. However, in *Page v. Bartels*, 248 F.3d 175 (3d Cir. 2001), the Third Circuit considered the related question of whether a § 2 claim could be resolved by a single Judge, while reserving the constitutional claims for a three-Judge Court. Prior decisions had plainly recognized the power of a single Judge to resolve statutory claims without convening a three-Judge Court to hear constitutional claims. *Id*., at 188-89, citing *Hagans v. Lavine*, 415 U.S. 528 (1974). The Third Circuit, however, held that such a distinction could not be drawn between a § 2 challenge and a constitutional challenge. Reading the same legislative history available to this Court, the Third Circuit concluded "that Congress was concerned less with the *source* of the law on which an apportionment challenge was based than on the unique importance of apportionment cases generally." 248 F.3d at 190 (emphasis in original). The Court "conclude[d] that because statutory Voting Rights Act challenges to statewide legislative apportionment are generally inextricably intertwined with constitutional challenges to such apportionment, those claims should be considered an 'action' within the

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Report "reiterate[d] the existence of the private right of action under Section 2," citing *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). S. Rep. 97-417, 97th Cong. 2d Sess. 1982 at 30, 1982 U.S.C.C.A.N. 177, 208, 1982 WL 25033. *Allen*, of course, requires the convening of a three-Judge Court.

[5] The failure properly to enforce § 2284(a) has led to reversal by both the Supreme Court and the Fifth Circuit. *Shapiro v. McManus*, 136 S.Ct. 450 (2016); *League of United Latin American Citizens v. Texas*, 113 F.3d 53 (5th Cir. 1997).

meaning of § 2284(a)." *Id.*[6]

The fact that the complaint omits any mention of the Constitution did not prevent the Court from admitting, over Defendants' objection, evidence of unconstitutional behavior in Mississippi's past. Unconstitutional discrimination is the very first factor listed by the Supreme Court in *Gingles*, 478 U.S. at 44.[7] The failure to introduce evidence of unconstitutional behavior and to connect that behavior to the challenged practice would render any application of § 2 constitutionally suspect. The Fifth Circuit upheld the constitutionality of § 2 "as merely prescribing a potion to remove vestiges of the past official discrimination and to ward off such discrimination in the future." *Jones v. City of Lubbock*, 727 F.2d 364, 375 n.6 (5th Cir. 1984), quoting *Major v. Treen*, 574 F. Supp. 325, 347 (E.D. La. 1983).

While *Page* did not address a complaint which sought to extricate § 2 from its connection to the Constitution, plaintiffs' inability to prove their case without evidence of unconstitutionality underscores the Third Circuit's wisdom. Artful pleadings should not be allowed to deprive the Legislature of the respect for its apportionment statute which Congress plainly intended to afford it in 1976.

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[6] *Page* had not yet been decided when the Sixth Circuit decided *Rural West Tenn. African-American Affairs Council v. Sundquist*, 209 F. 3d 835 (6th Cir. 2000), so its reasoning was not available for consideration. In the Tennessee litigation, separate suits challenging the apportionment of the House and Senate had been combined for consideration by a three-Judge District Court. *Id.*, at 237. The Supreme Court had twice considered direct appeals, finally affirming denial of relief on the apportionment of the Senate. After that defeat, plaintiffs amended their remaining complaint "to challenge the House Plan on the sole ground that it violated § 2 of the Voting Rights Act. Because the amended complaint contained no constitutional claims the three-judge court disbanded itself." *Id.*, at 838. The Sixth Circuit opinion did not address the propriety of that decision, nor did it explain its decision to accept jurisdiction of the appeal. Whether or not that unexplained jurisdictional result is binding in the Sixth Circuit, the careful explanation by the Third Circuit in *Page* should be considered more persuasive here.

[7] The Court's order distinguished a § 2 claim from a constitutional claim, relying on *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 425, 442 (2006). [Dkt. # 51 at 2]. Nothing on the cited pages purports to relieve plaintiffs from the necessity of introducing evidence of unconstitutional discrimination in proving a § 2 claim.

### B. The Court erred as a matter of law by finding that the State's drawing of District 22 violated § 2 of the Voting Rights Act.

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

Section 2(a) of the Voting Rights Act prohibits the imposition by a State of any "standard, practice, or procedure" which bears certain characteristics. The standard, practice, or procedure of which plaintiffs complain here is the border of Senate District 22 as adopted in 2012 by J.R. No. 201. They claim that the border itself "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," within the meaning of § 2(a). To make the necessary showing, § 2(b) requires plaintiffs, who are black, to prove, "based on the totality of circumstances, . . . that the political processes leading to nomination or election in the state . . . are not equally open to participation by members of" the black race "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

Plaintiffs' claim that the border of District 22 grants blacks "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" is a little peculiar, since blacks made up a majority of the voting age population of the area now encompassed by District 22 when the census was taken in 2010. *See* Defs.' Exh. D-11 at 2-3 (2012 Long Report (TRP1 Plan)). As a matter of simple mathematics, it would seem that blacks have a greater opportunity than other residents of District 22 to elect a Senator of their choice. Plaintiffs nevertheless assert that a handful of other factors somehow reduce their opportunity below the level of equality, notwithstanding their unquestioned majority. They therefore seek to impose a different border for District 22 which they speculate will give them a better opportunity.

The Supreme Court of the United States in *Bartlett* rejected an invitation to permit courts

to engage in speculation in the enforcement of § 2. Plaintiffs in this case argue that a majority may not be enough to guarantee equal opportunity; plaintiffs in *Bartlett* argued that less than a majority might be enough to guarantee equal opportunity. They contended that § 2 should be construed to allow them to prove the existence of a district in which "the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." 556 U.S. at 13 (opinion of Kennedy, J.). The Court rejected this contention, holding that § 2 does not require the creation of a district in which a minority group is still a minority:

> Nothing in § 2 grants special protection to a minority group's right to form political coalitions. "[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground." [*Johnson v.*] *DeGrandy*, 512 U.S. [997], 1010 [(1994)].

*Bartlett*, 556 U.S. at 15 (opinion of Kennedy J.). The Court declined to require courts and legislatures "to scrutinize every factor that enters into districting to gauge its effect on crossover voting." *Id*., at 22.

Instead, applying and explaining the holding of *Gingles*, the Court set a simple numerical standard for the evaluation of districts in a legislative apportionment to which § 2 might apply:

> Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area? That rule provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2. . . . 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.

*Id*., at 18-19 (opinion of Kennedy, J.) (citation omitted).

Here, the premise of *Gingles* is not satisfied, and the danger of speculation is as apparent as it was in *Bartlett*. This is not a case in which "such a district is not drawn." *Id*., at 18. The 2012 Legislature actually drew "an election district . . . in which minority voters form a

majority." *Id*. *See* Defs.' Exh. D-11 at 2-3 (2012 Long Report (TRP1 Plan)). Plaintiffs claim that the nature of the border deprives the black majority of an equal opportunity to compete with the white minority, but their effort to blame the border instead of other factors relies on just the sort of speculation that *Bartlett* rejected in favor of "an objective, numerical test." 556 U.S. at 18.

Of course, the Supreme Court has recognized the right of minorities to contest the number of majority-minority districts drawn in the apportionment of any legislative body. As the Court has explained:

> [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. at 430. Unless plaintiffs can show that a legislative body failed to draw as many districts as could properly be drawn, no relief is available under § 2. They cannot complain that a majority-minority district should have encompassed a different set of members of a minority group. "If the inclusion of the plaintiffs would necessitate the exclusion of others, then the State cannot be faulted for its choice." *Id*., at 429-30.

Here, plaintiffs have not challenged the total number of majority-minority districts created by J.R. No. 201, nor do they claim that an additional such district could have been created in the general vicinity of District 22. They simply argue that a different district should have been drawn which would give a different majority a better chance to win. If § 2 does not immunize a minority of black voters "from the obligation to pull, haul, and trade to find common political ground," *DeGrandy*, 512 U.S. at 1020, it certainly should not immunize a black majority from the need to do such hard political work within its own ranks.

Plaintiffs rely, in support of their suggestion that a black majority may be entitled to relief

under § 2 upon a single Fifth Circuit decision, *Monroe v. City of Woodville*, 819 F.2d 507 (5th Cir. 1987).[8] In that case, however, the City confessed liability, and the Fifth Circuit ruled that the District Court should have attempted to fashion a remedy. When the District Court tried the case, it again denied relief, and this time the Fifth Circuit affirmed. *Monroe v. City of Woodville*, 881 F.2d 1327 (5th Cir. 1989). The Court acknowledged that Fifth Circuit cases from the time before the 1982 amendment to § 2 had held that at-large forms of government could be attacked even where blacks held a voting age majority. The Court, however, expressed skepticism about the permanent vitality of such a rule:

> The caveat should be added that in *Zimmer* [*v. McKeithen*, 485 F.2d 1297, 5th Cir. 1973 (en banc), *aff'd sub nom. East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976)], at least, the black majority had recently been freed from literacy tests and impediments to voting registration. As *de jure* restrictions on the right to vote mercifully recede further 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 minority-majority population exists.

*Monroe*, 881 F.2d at 1333. Now, three decades later, the Fifth Circuit would expect to see evidence of discrimination and its still continuing effects, which plaintiffs have not offered, before extending those principles for the first time to single-member districts.[9]

The practical implications of plaintiffs' contention are immense. Every decade, the

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[8] They also rely on a single decision of the Eighth Circuit. *Mo. State Congress of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924 (8th Cir. 2018). Like *Monroe*, that case did not involve a challenge to a single-member district within a larger districting plan. Both cases involved challenges to the election of governmental bodies on an at-large basis. No reported decision of any court appears to have reached a similar result regarding a single-member district.

[9] The Court's opinion read the first *Monroe* decision as having been designed to "prohibit[] entrenched political powers from drawing a series of extremely marginal majority-minority districts with the expectation that the majority-minority group will be unable to turn out in numbers sufficient to ever elect a candidate of their choice." [Dkt. # 61 at 31 n.80]. To the contrary, the problem in *Monroe* was that there was no districting at all in an at-large form of government. These plaintiffs have not alleged any discriminatory intent, nor have they introduced evidence of any such "series" of deceptive redistrictings at any point in Mississippi's past. The days when "entrenched political powers" in Mississippi could be lawfully presumed to be malicious under the Voting Rights Act ended with *Shelby County v. Holder*, 570 U.S. 529 (2013).

Mississippi Legislature must redistrict the 52 Senators and the 122 Representatives. Plaintiffs can always offer to prove, as these plaintiffs do not, that any aspect of any district was created in violation of the intent test of § 2 and the Fourteenth and Fifteenth Amendments. *LULAC* permits a challenge under the results test of § 2 if plaintiffs can show that either chamber failed to create the maximum number of majority-minority districts meeting the requirements of *Gingles*. However, plaintiffs claim that, even where there is no evidence of discriminatory intent and no possibility of creating an additional district, the details of every single majority-minority district can require a trial in federal court. In 2012, the Legislature created 15 majority-minority Senate districts. Defs.' Exh. D-11 at 2-3 (2012 Long Report (TRP1 Plan)); Defs.' Exh. D-5 (J.R. No. 201 (2012 Senate Plan)). Plaintiffs claim that every one of them could be subject to suit, and, of course, the same would be true of every majority-minority supervisor district or city council district.

The Supreme Court has never authorized such an inquiry into the details of legislative redistricting. The Fifth Circuit has never authorized such an inquiry. Plaintiffs have not cited any case from any court where it has been held that a majority-minority district violated § 2 because other borders might have been more favorable to the electoral success of black voters and candidates.[10] Nothing in the language of § 2 or any precedent suggests that such a rule should now be established.

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

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

[10] Although not controlling here, an identical claim was rejected in *Jeffers v. Beebe*, 895 F. Supp. 2d 920, 932 (E.D. Ark. 2012).

less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." The Fifth Circuit has made plain that lesser opportunity may not be presumed; it must be proven. 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 at 368, quoting *LULAC v. Clements*, 999 F.2d at 866.

To the contrary, the uncontradicted evidence in this record shows that "African-Americans in Mississippi" participate in the political process to a greater extent than white Mississippians. Official figures maintained by the United States Census Bureau show that the percentage of eligible blacks registered to vote in Mississippi has equaled or exceeded that of whites ever since 2004. Defs.' Exh. D-14 at 3 (Table 1) (Supplemental Expert Report of Dr. Peter A. Morrison). The same statistics show that blacks have turned out to vote at a higher rate than whites in every even-numbered year between 2004 and 2016.[11] *Id.* On the basis of this and other evidence, defendants' expert, Dr. Peter A. Morrison, opined that "the data show that existing socioeconomic differences no longer diminish AAs' participation in the political process as they did in the past." *Id.*, at 3, ¶ 10. [12]

At least the first several years of this data would have been available to the Legislature when it adopted J.R. No. 201 in 2012. The Legislature would have been fully justified in

[11] There is nothing aberrational about these statistics. One of plaintiffs' own lawyers introduced expert evidence two decades ago that "in recent years Mississippi's African-American and white citizens have maintained virtual parity in voter turnout." *N.A.A.C.P. v. Fordice*, 252 F.3d at 368 (footnote omitted).

[12] Plaintiffs offered no statistics to contradict those prepared by the Census Bureau, but observed that the Bureau itself acknowledges that individuals tend to report a somewhat higher level of political participation than is actually the case. *See* Tr. at 65. However, because the Bureau has never suggested that blacks are more likely to over-report their participation than whites, the conclusion that black participation is greater than white participation remains sound.

believing that blacks would comprise a majority of the turnout in any district in which they held a majority of the black voting age population. Where black turnout exceeds white turnout in a black majority district, it is mathematically impossible to prove "that minority voters *in this case* failed to participate equally in the political processes." *LULAC v. Clements*, 999 F.2d at 867 (emphasis in original).

Plaintiffs, however, claim that black voters in District 22 have a lower rate of turnout than whites. That supposed lower rate of turnout is the indispensable foundation of their contention "that minority voters *in this case* failed to participate equally in the political process." *Id*. There are two problems with that argument, one legal and one factual.

Every decade, the 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 174 districts can be challenged at any time on the basis of statistical estimates of which the Legislature could not have been aware at the time of enacting the statute.[13] The law should bar the imposition of any such burden.

[13] Litigants before the Supreme Court have disputed which Census Bureau statistics ought to be applied in redistricting. Plaintiffs sought to compel Texas to use "citizen-voting-age-population (CVAP) data from the Census Bureau's American Community Survey (ACS), an annual statistical sample of the U.S. population," but the Court found it "permissible for jurisdictions to measure equalization by the total population of the state and local legislative districts," as reported in the decennial census. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1126-27 (2016). Plaintiffs cite no case in which legislators have been held unable to rely on Census Bureau figures on any subject.

Moreover, the statistical estimates offered by plaintiffs in this case are unreliable because no properly conducted election has ever been held in District 22. Plaintiffs' own evidence shows that the Bolivar County Election Commission misdirected over 2,162 votes cast in the City of Cleveland. Plntfs.' Exh. P-3 at 4 (Plntfs.' Explanation of Precinct Boundaries). In the Stringtown and West Central Cleveland precincts, 654 voters, who lived in other Senate districts, cast votes in District 22. *Id.* In Northwest Cleveland and West Cleveland, 1,508 voters who lived in District 22 had their votes diverted to other districts. *Id*. Because the official returns show that the incumbent Senator defeated plaintiff Joseph Thomas by 8,149 votes to 6,985 votes, it is impossible to determine from this record who should have actually won the only election ever held in District 22. [Dkt. # 52, § 8 at 6].

More 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. Plntfs.' Exh. P-1 at 7, ¶ 20 (Expert Report of Dr. Maxwell Palmer). The exclusion of the Cleveland precincts, however, distorted both of those estimates, particularly with regard to white participation. Dr. Palmer testified that the population of the 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. *See* Tr. at 85-86. 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.[14] Had those non-voting white students been taken into consideration in plaintiffs' turnout estimates, the level of

[14] 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).

estimated white participation throughout District 22 would necessarily have fallen.

The Court described the 2003, 2007, and 2015 Senate elections as "the 'endogenous' elections most relevant to this case" [Dkt. # 61 at 2], 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. Tr. 80:11-12. Endogenous elections "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). Here, the vote totals from the only endogenous election involving the challenged districting boundaries *excluded* votes from two District 22 precincts and *included* votes from two non-District 22 precincts. Tr. at 75:22-78:11. 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 from his analysis. Tr. 79:9-14. The Fifth Circuit 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.") There, the Fifth Circuit reversed the District Court's decision finding legally significant white bloc voting based on a single contest.[15]

Dr. Palmer's analysis hinges on his ability to estimate racial turnout on the precinct level, but he admittedly was unable to "estimate turnout as a share of registered voters by race."

[15] *Rangel* was followed in *Hall v. Louisiana*, 108 F. Supp. 3d 419 (M.D. La. 2015). "[P]laintiffs here expected the Court to rely on the results of only a single election cycle to support a finding of vote dilution while ignoring other relevant election data, whereas controlling legal authority, binding on this Court, restricts this Court from doing so." *Id.*, at 422. Plaintiffs here attempt to rely on 2015 returns for statewide elections within the borders of District 22, but *Hall* rejected a similar effort. "Although neither the parties nor this Court have identified an instance in which a majority of the U.S. Supreme Court has held that a district court's reliance on multiple contests from a single election is per se insufficient to show a pattern of vote dilution, this Court is bound by the general principle set forth in *Gingles* that the 'loss of political power through vote dilution is distinct from the mere inability to win a particular election.' *Gingles*, 478 U.S. at 57." 108 F. Supp. 3d at 135.

Plntfs.' Exh. P-1 (Expert Report of Dr. Maxwell Palmer). Instead, he estimated the share of voting age population of the turnout and applied that to the estimated racial profile of the precinct. The Court erred in giving more weight to Dr. Palmer's process of compounding racial assumptions to estimate voter turnout by race over the Census's Voting and Registration data relied on by Dr. Morrison. The Voting and Registration tables maintained by the Census are the result of direct reporting from the actual voters and are authoritative in evaluating Black voter registration and turnout in the Southern states, including Mississippi. *See Shelby Cty.*, 570 U.S. at 535 (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").

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. Tr. at 125; 134. 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.

In this black 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.

**3. Any expansion of the scope of § 2 must be considered in light of the canon of constitutional avoidance.**

Over the years since 1982, the Supreme Court has often been asked to consider the contours of the results test of § 2 as applied to different circumstances. Plaintiffs here seek to

take a road not previously taken by altering the border of a single-member legislative district to enlarge a majority-minority voting age population that already exists. When asked to resolve doubtful expansions of the reach of § 2, the Supreme Court has previously "resolve[d] that doubt by avoiding serious constitutional concerns under the Equal Protection Clause." *Bartlett*, 556 U.S. at 21 (opinion of Kennedy, J.).

The Supreme Court does not appear ever to have addressed the constitutionality of any application of § 2 in any circumstances. Plaintiffs, however, assert that the Fifth Circuit has approved the constitutionality of § 2 as applied in all circumstances in *Jones v. City of Lubbock*. *Jones* is not so broad.[16] As plaintiffs here acknowledge, the City argued that § 2 preserved the intent standard [Dkt. # 50 at 8], and the Fifth Circuit simply held, "Assigning a non-intent standard to an enforcement measure does not pose a serious constitutional obstacle." 727 F.2d at 375.

Nothing can possibly be found in the language Congress adopted as § 2 to suggest that a single-member majority-minority district is in any way forbidden. No one has previously found in the legislative history or the case law any congressional authorization to strike down such a district "to remove vestiges of past official discrimination and to ward off such discrimination in the future." *Id*., at 375 n.6, quoting *Major*, 574 F. Supp. at 347.[17] To accept such an expansion § 2 so as to alter the border of District 22 to add new voters about whom nothing is known but

[16] If it were, it would have been peculiar for five Judges of the Fifth Circuit to apply the canon of constitutional avoidance to a new application of § 2 in *Veasey v. Abbott*, 830 F.3d 216, 314-17 (5th Cir. 2016) (*en banc*) (Jones, J., dissenting). The majority upheld the constitutionality of § 2 "as applied here." *Id*., at 253 n.47. The Court did not suggest that all possible applications of § 2 would prove constitutional.

[17] Indeed, the authors of the Senate Report defended the constitutionality of the new § 2 by declaring that it "would only invalidate those election laws where a court finds that discrimination, in fact, has been proved." S. Rep. 97-417 at 43, 1982 U.S.C.C.A.N. at 221. Here, plaintiffs disclaimed any effort to prove any sort of unconstitutional racial discrimination at any time so as to avoid convening a three-Judge Court.

their race runs squarely into the prohibition of using race as the predominant factor in devising legislative districts, as set forth in *Miller*, 515 U.S. at 916. No such expansion should be permitted.

**C. Relief is barred by the statute of limitations and laches.**

The Court erred in assuming that plaintiffs' suit would be considered timely when applying the analogous state statute of limitations. The applicable three year statute of limitations for this claim, Miss. Code Ann. § 15-1-49, started running when the cause of action accrued. Miss Code Ann. § 15-1-49(1). Plaintiffs' claim accrued when the United States Department of Justice ("USDOJ") precleared J. R. No. 201, on September 14, 2012. The Court's application of the continuing violation theory to support its view of timely filing [Dkt. # 61 at 21] has been specifically rejected. *See Fouts v. Harris,* 88 F. Supp. 2d 1351, 1354 (S. D. Fla. 1999), *aff'd sub nom. Chandler v. Harris,* 529 U. S. 1084 (2000); *White v. Daniel*, 909 F. 2d 99 (4th Cir. 1990).

The Court further erred in holding that plaintiffs' claims are not barred by the doctrine of laches. "Laches is an equitable doctrine that, if proved, is a complete defense to an action *irrespective of whether the analogous state statute of limitations has run*." *Mecom v. Levingston Shipbuilding Co*., 622 F. 2d 1209, 1215 (5th Cir. 1980) (emphasis added). There does not appear to be any dispute in the appellate courts that the doctrine of laches may apply to a proceeding under the Voting Rights Act.[18] The Fourth Circuit squarely so held in *White v. Daniel*.[19] Any

[18] The Ninth Circuit in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991), did not hold that laches could never apply. "Although plaintiffs could have filed an action as early as 1981 . . . the injury they suffered at that time has been getting progressively worse." *Id*., at 772. Certainly, these plaintiffs have made no similar showing on this record. Even more importantly, the County of Los Angeles was hardly in a position to rely on an equitable defense where the Court affirmed a finding of intentional racial discrimination. *Id*., at 771.

notion that laches is unavailable as a defense in the reapportionment context due to the ongoing violation theory "is contrary to well settled reapportionment and laches case law." *Fouts*, 88 F. Supp. 2d at 1354.

In reliance on *White*, at least three different District Courts have upheld a laches defense. *Arizona Minority Coalition for Fair Redistricting v. Arizona Ind. Redistricting Comm'n*, 366 F. Supp. 2d 887 (D. Ariz. 2005); *Maxwell v. Foster*, 1999 WL 33507675 (W.D. La. Nov. 24, 1999); *Fouts v. Harris*. This Court is fully capable of comparing the particulars of each of these cases with the record made here. Defendants would only point out that the Court in *Maxwell* found it important that those defendants had timely followed the law and that "the plan in the instant matter was precleared." 1999 WL 33507675 at *2.

Here, the evidence shows without dispute that the Legislature worked diligently and properly to comply with all applicable laws. The State of Mississippi properly submitted J.R. No. 201 to the USDOJ and received preclearance. Defs.' Exh. D-10 (USDOJ Preclearance Approval Letter). Unlike *Garza*, these plaintiffs do not contend that the plan is in any respect infected with intentional racial discrimination. Defendants come into this Court with indisputably clean hands.

By contrast, plaintiffs and their lawyers have known the contours and composition of District 22 from the day the Legislature adopted it. In fact, plaintiff Joseph Thomas was actively engaged in opposing District 22 with the USDOJ back in 2012 when J.R. No. 201 was under consideration for preclearance. Tr. at 104-11; *see* Defs.' Exh. D-16 (August 20, 2012, Letter from

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[19] Even the District Court in *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), *aff'd*, 498 U.S. 1019 (1991), did not deny that laches could be applied in a proper case. "The question is essentially one of judgment and degree." 730 F. Supp. at 203. The Court found it important that plaintiffs had attempted to initiate their suit less than two years after the Supreme Court had established the law in *Gingles*, and noted that two months remained before candidates could file to run for office. *Id.*, at 202-03. Here, by contrast, filing for candidates to run for the Legislature opened on January 2, 2019, and closes on March 1.

Joseph Thomas to USDOJ). Because of this activity, the Court acknowledges that defendants "make a compelling case that plaintiff Thomas unnecessarily delayed bringing this suit," but commends him for deciding to run for the District 22 seat in 2015 and seeking "to remedy the problem through the political process." [Dkt. # 61 at 22]. However, the Court completely ignores the time period following the election in 2015 when Senator Thomas clearly knew or should have known that he saw an issue with District 22, having just lost the election. Senator Thomas offers no evidence proving that his decision to wait almost three years until the eve of the next election cycle constituted an excusable delay.

The Court misapplies the legal standard for determining whether laches bars the claim of the remaining plaintiffs. On the one hand, the Court cites plaintiff Thomas's "unawareness of the law in 2012" [Dkt. # 61 at 22] as not enough to excuse his delay in pursuing a remedy, yet apparently found plaintiffs Ayers's and Lawson's unawareness of any problem in 2012 was sufficient for them to delay. [Dkt. # 61 at 21]. Neither Ayers nor Lawson offers any evidence whatsoever of excusable delay in filing this suit. The only evidence offered as to Ayers is that he is an African-American resident and a registered voter in Washington County who votes in District 22. Tr. at 16. Lawson testified that he had been politically active in some campaigns over the years and that he had voted in the last several District 22 elections, yet he was unaware he could file the instant suit until he encountered one of plaintiffs' counsel shortly before suit was filed in 2018. Tr. at 131; 123. As the Court noted, laches "does not depend on the subjective awareness of the legal basis on which a claim can be made." [Dkt. # 61 at 22]. Rather, the test for determining whether laches applies is whether plaintiffs knew or should have known of defendants' injurious conduct. *See Elvis Presley Enters., Inc. v. Capece,* 141 F. 3d 188, 205 (5th Cir. 1998); *see also Brown v. Bridges,* 692 Fed. Appx. 215, 216 (5th Cir. 2017); *Save Our*

*Wetlands, Inc. v. U. S. Army Corps of Engineers*, 549 F. 2d 1021, 1028 (5th Cir. 1977). Just as Senator Thomas's unawareness of the law in 2012 is not enough to excuse his delay in pursuing a remedy, neither is that of Lawson or Ayers.

None of the plaintiffs have offered any excusable reason for delaying six years, until just before the final election under the plan, to assert their claim. Neither have any of the plaintiffs offered any excusable reason for waiting almost three years after the last statewide election to assert their claim. On this record, plaintiffs knew or should have known that they could have filed suit challenging District 22 under Section 2 as far back as 2012, and certainly by 2015. Yet, plaintiffs delayed and filed this action on the eve of an election cycle resulting in a number of consequences, all of which are unfairly prejudicial to the voters in and around District 22, as well as to the parties.[20]

We are now less than two weeks away from a qualifying deadline for all statewide offices which has been in place since the 2015 election. If changes are made to District 22 as now required by the Court, approximately 27,000 voters in four counties and 28 precincts will be affected. *See* Tr. 167-68; [Dkt. # 61 at 8-9]. In addition to their normal duties in preparing for a

[20] In addition to the disruption of the established election process set forth by state law, the compressed schedule imposed by the Court illustrates the very problem that laches is designed to avoid when parties inexcusably delay in filing a claim of this nature. Here, plaintiffs filed suit on July 9, 2018 [Dkt. # 1], followed by an amended complaint on July 25, 2018 [Dkt. # 9]. Defendants promptly answered on August 8, 2018 [Dkt. # 10], and filed their motion for summary judgment [Dkt. # 19] asserting, *inter alia*, their laches defense on September 4, 2018. Though plaintiffs filed a motion requesting an expedited schedule on August 30, 2018 [Dkt. # 17], to which defendants promptly objected [Dkt. # 21], the Court did not rule on this motion until November 16, 2018 [Dkt. # 28]. The Court set an expedited schedule for designation of plaintiffs' experts on December 10, 2018; designation of defendants' experts on January 7, 2019; a discovery deadline of January 18, 2019; and, a trial date of February 6, 2019. Faced with a candidate qualifying period of January 2 through March 1, 2019, the Court set an extraordinarily compressed schedule for defendants to prepare and defend a § 2 claim so as to finish a trial before the end of the qualifying period and the end of the current legislative session. Yet, had plaintiffs filed this suit within the ample time afforded after USDOJ preclearance, the voters, prospective candidates, and defendants could have been spared the unnecessary confusion and uncertainty that is now certain to occur as a result of their delay and the Court's order. Furthermore, defendants would not have been forced to prepare and defend this claim under the unreasonably compressed schedule, while plaintiffs had been preparing since at least January of 2018. Tr. at 160.

statewide election, local election officials will have to scramble to make all of the necessary changes to the voter rolls and the Statewide Election Management System in time to make absentee ballots available to our troops by the statutory deadline of June 22, 2019. *See* Miss. Code. Ann. § 23-15-685. All of this chaos and confusion is unnecessary and could have easily been avoided had plaintiffs not sat on their rights. Accordingly, the doctrine of laches should be applied to deny plaintiffs any relief.

## II. IRREPARABLE HARM TO THE STATE OUTWEIGHS ANY POSSIBLE INJURY TO THE PLAINTIFFS.

Defendants, who are sued only as representatives of the State, will suffer irreparable harm if the judgment is not stayed. Whenever government conduct is enjoined, "the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Planned Parenthood of Greater Tex. Surg. Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) (citations omitted). *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people ... is enjoined.").

The Supreme Court has ordered stays in reapportionment cases alleging violations of the Voting Rights Act. *See Bullock v. Weiser*, 404 U.S. 1065 (1972) (ordering stay pending appeal of Texas reapportionment case decided in *White v. Weiser*, 412 U.S. 783 (1973)); *Whitcomb v. Chavis*, 396 U.S. 1064 (1970) (granting stay pending appeal of a state reapportionment plan ordered by a three-Judge Court in Indiana and allowing an election to be conducted under an invalidated state apportionment plan). *McDaniel v. Sanchez*, 448 U.S. 1318, 1322 (1980) (Powell, J., in chambers), held that the expenditure of state funds in effectuating the ordered

relief in an apportionment case was worthy of a stay pending appeal. In an earlier case Justice Brennan, in chambers, granted a stay pending appeal, noting that the District Court's order held that the State's statute drawing districts for election of the United States Representatives was unconstitutional and that the State's appeal presented important legal questions worthy of appellate review. *Karcher v. Daggett*, 455 U.S. 1303, 1306-07 (1982) (Brennan, J., in chambers). Under the District Court's order, Justice Brennan wrote that the State "would plainly suffer irreparable harm were the stay not granted" since the order required the New Jersey Legislature "either adopt an alternative redistricting plan before [the election date] or face the prospect that the District Court will implement its own redistricting plan." *Id*. at 1306. Similarly, in *Davis v. Bandemer*, 478 U.S. 109 (1986), the Supreme Court heard an appeal involving a state districting plan that had been invalidated by a three-Judge Court. On appeal, the Supreme Court granted a stay of the order declaring the plan unconstitutional. *See* 474 U.S. 991 (1985).

The above discussed cases are not anomalies. When three-Judge Courts were frequently deciding redistricting cases during the 1960s and 1970s, the Supreme Court routinely issued stays pending appeals of a court orders holding plans unconstitutional. *See Wise v. Lipscomb*, 434 U.S. 1329, 1333-34 (1977) (Powell, J., in chambers); *Gaffney v. Cummings*, 407 U.S. 902 (1972); *Kirkpatrick v. Preisler*, 390 U.S. 939 (1968). More recently, during the lengthy litigation involving Texas's recent redistricting plans, the Supreme Court issued stays pending appeals pursued by the State. *See Abbott v. Perez*, 138 S. Ct. 1 (2017); *Abbott v. Perez*, 138 S. Ct. 49 (2017). "[I]f a plan is found to be unlawful very close to the election date, the only reasonable option may be to use the plan one last time." *Abbott v. Perez*, 138 S. Ct. at 2324.

The Fifth Circuit is no stranger to granting stays of orders regarding reapportionment

while the merits of injunctive relief are heard on appeal. *See Chisom v. Roemer*, 850 F.3d 1051, 1052-53 (5th Cir. 1988) (granting stay of District Court's order granting preliminary injury requiring that the system of electing Louisiana Supreme Court Justices be changed because it violated § 2 of the Voting Rights Act).

The Court's order will require that the Legislature spend a substantial amount of time drawing new districts for District 22 and the surrounding affected districts if the order is not stayed. Ultimately, if this Court does not stay the order, a reversal on appeal would likely require the State to run the November 2019 election over *again* with the original district maps. Needless to say, special elections are costly and voter turnout in such elections are traditionally lower than those held in November of a normal election year. "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (*per curiam*).

Changing district lines can lead to confusion even when there is plenty of time to prepare. The Bolivar County Election Commission had three years to prepare for the 2015 election, but they still assigned 2,162 voters to the wrong Senate Districts. Nor does the changing of a qualifying deadline eliminate confusion. A state court changed a qualifying deadline in the process of litigating an earlier dispute under the Voting Rights Act, with the result that a Supreme Court Justice was elected without opposition even though people were lining up to oppose him. *Latham v. Molpus*, 642 So. 2d 1340 (Miss. 1994). Every action produces unpredictable results, and those results should be avoided until this Court's order has been reviewed on appeal.

By contrast, plaintiffs have identified no concrete injury they might suffer from a delay in

enforcement of the order. They will continue, for the rest of 2019, to be represented by a Senator they do not approve, but they make no claim that Senator Clarke, who is not running for reelection in 2019, has been unresponsive to any of his constituents. Should the order be affirmed and their injury deemed sufficient, the Court can then order such relief as may be appropriate.

## III. A STAY PROTECTS THE INTEREST OF THE PUBLIC.

The drawing of new borders for District 22 and surrounding affected districts would cause, not only an undue burden on state officials, but an interference in the orderliness and timeliness of the upcoming election process.[21] As the Fifth Circuit noted in *Veasey v. Perry*, "the State has a significant interest in ensuring the proper and consistent running of its election machinery . . .". 769 F.3d at 895-96. Specifically, the qualifying period to run for all State and County offices in Mississippi, including the Legislature, ends March 1. However, the Court's order requiring a redrawing of District 22 and others will require a new qualifying period, thereby significantly shortening the time qualified candidates have to campaign for those seats. Moreover, because District 22 borders on eight other Senate districts, potential candidates all over a multi-county stretch of northwest Mississippi cannot make plans because they cannot know the boundaries of the districts in which they or others may wish to run for office. In the stay context, filing or qualifying periods "cannot be considered in isolation from the election of which [they] form a part." *N.A.A.C.P. v. Hampton County Election Comm.*, 470 U.S. 166, 177 (1985).

Beyond this, the Court's order requiring a redrawing of District 22 and adjacent districts comes less than six months before the first primary. Inevitably, once the redrawing of the

[21] Attached to the motion as Exhibit 1 is the affidavit of Kimberly P. Turner, Assistant Secretary of State for the Elections Division, explaining the massive amount of work that must be done before primary ballots must be sent to troops overseas, no later than June 17, 2019.

districts is finished, the candidates will have to undertake the arduous process of informing registered voters in those districts about which district in which those voters reside. It is undisputed that the redrawing of those districts will affect substantial number of voters in District 22 and surrounding districts.[22]

The public is best served by allowing it to elect its own representatives on its own terms, rather than requiring it to comply with an electoral scheme it did not choose while the appeal in this matter remains pending. In cases like this, where "the State is the appealing party, its interest and harm merges with that of the public." *Planned Parenthood*, 734 F.3d at 419 (citation omitted).

The fact that an election would proceed under a plan invalidated by this Court is not an impediment to entry of a stay pending appeal. Allowing elections to go forward is a recognition of the significant public interest in a smooth rendition of the state's election process. For example, in *Watkins v. Mabus*, 771 F. Supp. 789, 802 (S.D. Miss. 1991), *aff'd in part and vacating challenge as moot*, 502 U.S. 954 (1991), the Court invalidated a state reapportionment plan, but allowed previously scheduled elections to go forward due to the "imminent elections and lack of advisable options." The Court noted that "it [wa]s constitutionally permissible to utilize the 1982 plan in fashioning interim relief." *Id*. Likewise, the stays entered in *Chavis*, 396

[22] The stay relief requested here contrasts with the stay relief requested in *Patino v. City of Pasadena*, 229 F. Supp. 3d 582, 588-89 (S.D. Tex.), *aff'd*, 677 Fed. App'x 950, 955 (5th Cir. 2017). In that case, which involved the City of Pasadena, Texas, instituting a new method for electing city council members, the District Court denied the City's motion for stay pending appeal and acknowledged that the denial of the stay "in effect maintain[ed] the prelitigation status quo" since the District Court's order required the City to "use the same map and plan it approved in 2011 and used as recently as the 2013 election." *Id*. at 589. The District Court noted that its order did not require "extensive reprinting and retraining that concerned the *Veasey* panel about a statewide injunction." *Id*. Unlike the passive nature of the order at issue in *Patino*, this Court's order disrupts the status quo of the election procedure in District 22. Likewise, the stay requested here can be contrasted with the stay requested in *Barber v. Bryant*, 2016 WL 4096726, at *1, *3 (S.D. Miss. Aug. 1, 2016), where this Court recognized that maintenance of the status quo was an important factor in denying the stay. ("In this case the public interest is better served by maintaining the status quo—a Mississippi without HB 1523.").

U.S. at 1055, *Davis*, 478 U.S. at 109, and *Karcher*, 455 U.S. at 1303, required elections to proceed under the previously existing districting scheme pending appeal of the District Court's orders.[23]

**CONCLUSION**

For the reasons stated above, this Court should enter a stay of its judgment pending defendants' appeal to the Fifth Circuit Court of Appeals.

This the 19th day of February, 2019.

Respectfully submitted,

*s/ Michael B. Wallace*

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[23] A similar scenario arose in *Martin v. Venables*, 401 F. Supp. 611 (D. Conn. 1975), where the District Court invalidated a municipality's apportionment scheme as being violative of the Fourteenth Amendment. Rather than ordering that the upcoming election proceed forward under a new scheme, the Court ordered that the remedial action ordered would not have to be taken for the upcoming election given that the election process was already in progress and the plaintiffs delayed in filing the action. *Id.* at 620-21. *Accord*, *Common Cause v. Rucho*, 2018 WL 4214334 (M.D.N.C. Sept. 4, 2018).

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ATTORNEYS FOR ALL DEFENDANTS

**CERTIFICATE OF SERVICE**

I, Michael B. Wallace, 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 19th day of February, 2019.

*s/ Michael B. Wallace*
Michael B. Wallace