UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 19-60133

JOSEPH THOMAS; VERNON AYERS; and MELVIN LAWSON

Plaintiffs-Appellees,

– v. –

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

Defendants-Appellants.

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

RESPONSE TO APPELLANTS' EMERGENCY MOTION FOR STAY OF JUDGMENT

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Plaintiffs-Appellees,
v. No. 19-60133

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

CERTIFICATE OF INTERESTED PERSONS

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

1. Joseph Thomas, Appellee
2. Vernon Ayers, Appellee
3. Melvin Lawson, Appellee
4. Robert B. McDuff, Lead Counsel for Appellees
5. Beth L. Orlansky, Mississippi Center for Justice, Counsel for Appellees
6. Jon Greenbaum, Lawyers' Committee for Civil Rights Under Law, Counsel for Appellees
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14. Phil Bryant, Governor of Mississippi, Appellant

15. Delbert Hosemann, Secretary of State of Mississippi, Appellant

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21. Jim Hood, Attorney General of Mississippi

22. Douglas T. Miracle, Counsel for the Office of the Mississippi Attorney General

Respectfully submitted,

s/Robert B. McDuff
March 11, 2019

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APPELLEES' ADDITIONAL EXHIBITS

A. Transcript of March 4, 2019 District Court Hearing on Motion for Stay Pending Appeal

B. Census Place Splits (Plaintiffs' Tr. Ex. 21)

C. Excerpts from Trial Court Transcript Volume I Dated February 6, 2019 (cover page, tables of contents, and pages 52–54, 64–67, and 85–86)

D. Excerpts from Trial Court Transcript Volume 2 Dated February 7, 2019 (cover page, table of contents, and pages 262–64)

The district court has denied a stay twice (first after the merits opinion, Ex. 18, and again after final judgment, Ex. 26), and Appellants' motion, which is largely premised upon inaccurate and misleading claims, does not demonstrate the abuse of discretion and the clear error of judgment required before a lower court's stay denial can be overridden on appeal. *Wildmon v. Berwick Universal Pictures,* 983 F.2d 21, 23 (5th Cir. 1992).[1]

In this racial vote dilution claim involving one Mississippi legislative district, Senate District 22, the candidates of choice of African-American voters lost in every state senate election from 2003 to the present and also lost within District 22 in every statewide election since 2003 involving black and white candidates. The district court correctly concluded that even though District 22 is presently 50.77 percent in black voting age population, "white bloc voting in District 22 defeats the African-American community's candidate of choice." Ex. 12, 26–27.[2] This showing of the three § 2 preconditions under *Thornburg v. Gingles*, 478 U.S. 30 (1986) was bolstered by Plaintiffs' evidence on the Senate factors. *Id.* at 27–30. The district court agreed with Plaintiffs' expert's conclusion, based on ecological inference analysis, that "[o]n average, white

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[1] The appeal was brought by the Governor and Secretary of State. The other member of the State Board of Election Commissioners, the Attorney General, did not join the appeal.
[2] Exhibits filed by Appellants will be referred to by Appellants' exhibit number and the internal exhibit page number in the format of "Ex. ___,___" except some citations will refer to the "stamped page" number from the file-stamped exhibits.

turnout is 10.2 percentage points higher than black turnout" in the last four state senate elections in District 22. *Id.,* 7. The court explained that "Mississippi's Senate is much whiter than Mississippi," *id.,* 30, and found that "the plaintiffs have established District 22's lines result in African-Americans having less opportunity than other members of the electorate to elect the State Senator of their choice." *Id.*

The court also found that "although African-American voters in District 22 are already sufficiently numerous and geographically compact as to constitute a majority, the District could be redrawn to increase the BVAP by at least 10 additional percentage points" with plans that "satisfy traditional redistricting criteria" and "show that the BVAP can be increased without impairing the District's compactness." Ex. 12, 8, 11, 24. This could be done, said the court simply by redrawing District 22 and one adjacent district, leaving the other 50 districts undisturbed. A remedial plan can easily be implemented for the August 6, 2019 primary election. The Secretary of State's office confirmed that the elections can proceed on schedule as long as the official ballot is available by June 17, 2019. Ex. 13, stamped page 208. And Mississippi's legislative leadership confirmed that this can be done when it informed the district court on February 26 that "*in the event the stay motions* . . . *are denied*, the Senate desires . . . to . . . enact a redistricting plan redrawing Senate District 22" and presumably postpone the qualifying deadline in the relevant districts since the March 1 deadline will have

passed. Ex. 24, stamped page 266.

The misleading claims upon which much of Appellants' motion is premised begin with the very first sentence: "The District Court . . . failed to give the Mississippi Senate the reasonable opportunity it had requested to adopt a new districting plan." Mot. at 1. But Appellants know that a week ago, during argument on the Motion to Stay, the district court stated that it had adopted a remedy on February 26 only because of the legislature's delay and that *the legislature could still adopt a plan in lieu of the court-ordered plan*: "[T]he Court noted that it felt compelled to issue [a] remedy, because the legislature would only take it up if the motion to stay was denied by this Court and the Fifth Circuit . . . The legislature still has every opportunity and . . . is encouraged to act on the orders that have been entered by this Court . . . " Appellees' Exhibit A, 19–20.[3]

Appellants wrongly imply chicanery when they state that the court "imposed a remedy, proposed by plaintiffs, that moved from Senate District 22 to Senate District 23 the resident precincts of both individuals qualified to run as Republicans, leaving plaintiff Joseph Thomas, a Democrat, without Republican opposition." Mot. at 1. But Appellants fail to acknowledge what they did acknowledge in the district court—that this result was "unanticipated," that no one

[3] Appellees' exhibits are denominated by letters rather than numbers and will be cited as "Ex. __, ___."

knew these facts in advance of preparing or adopting this plan, and that it would have been improper for the district court to consider candidate locations in adopting a court-ordered remedy. Ex. A, 5, 7–8. Moreover, the district court specifically recognized that the legislature (which is Republican dominated) can consider candidate location in adopting a plan if it chooses. *Id.,* 20.

Appellants' other misleading claims—including contentions relating to the entirely proper exclusion by Plaintiffs-Appellees' expert of two District 22 precincts from his analysis because most of the voters were erroneously given ballots for an adjacent Senate district—will be addressed later in this response.

Appellants have made no showing of likelihood of success on the merits. Contrary to their contention, the district court has confirmed that the legislature can *still* adopt a remedy that will supersede the court-adopted plan. Appellants argue that the court's remedy is "predominantly based on race" but there is nothing improper about increasing the African-American voting age population to cure a § 2 violation where the plan follows traditional redistricting criteria. Appellants raise two other legal claims—that a three-judge district court was required and that § 2 claims can never be brought in a bare majority-minority district— in which the weight of authority supports the court's contrary rulings. They challenge the court's factual finding that African-American turnout in District 22 is lower than white turnout but that finding is supported by the evidence, is not clearly

erroneous, and is not essential to the court's ultimate conclusion. They raise the equitable defense of laches but fail to demonstrate clear error in the district court's finding of no undue prejudice, which is an essential element of a laches claim.

The other factors—balancing of the harms regarding the parties and the public interest—weigh against a stay. *See Veasey v. Abbott,* 830 F.3d 216, 270 (5th Cir. 2016) (en banc) (July 20, 2016 decision stating that "[i]t would be untenable to permit a law with a discriminatory effect to remain in operation for [the upcoming November] election").

ARGUMENT

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

A. Despite the Legislature's Delay, the District Court Has Confirmed that the Legislature Still Has the Opportunity to Adopt a Remedial Plan

Appellants claim that the legislature was not given a reasonable opportunity to adopt a plan *but fail to mention* the district court's emphatic statement to the contrary one week ago: "The Court . . . felt compelled to issue [a] remedy, because the legislature would only take it up if the motion to stay was denied by this Court and the Fifth Circuit . . . [t]he legislature still has every opportunity and . . . is encouraged to act on the orders that have been entered by this Court . . . " Ex. A, 19–20. The court noted that "they still have every right to seek to implement a

remedy" and added: "[I]t's pretty clear through the earlier orders that this Court . . . has put itself in the second position to the legislature. . . . I just don't think the legislature should be under the assumption that they cannot act." *Id.*, 9, 21.

In its earlier February 13 order announcing a violation and its subsequent February 16 opinion, the district court stated that "the legislature is entitled to the first opportunity to redraw District 22." Ex. 11; Ex. 12, 31. The initial reaction of legislative leadership to the court's decision was to wait for an appeal. Ex. 18, 1, n.2. Nothing happened until the judge asked for an update by February 26. Ex. 15. The leadership then authorized Appellants' counsel to inform the court that "*in the event that the stay motions . . . are denied*, the Senate desires the opportunity to perform its constitutional duty and enact a redistricting plan redrawing Senate District 22." Ex. 24, 266.

Only then, with no imminent legislative action, did the court adopt a plan and postpone the qualifying deadline by two weeks in the two affected districts. Ex. 17. But as the district court confirmed, the legislature can still adopt its own plan.

This was entirely proper. In a somewhat similar situation, this Court held that "although legislative intercession may occur . . . . [we] permit the district court

to enter an order that remedies SB 14's discriminatory effects." *Veasey,* 830 F.3d at 271.[4]

B. The District Court's Remedial Plan Properly Increases the African-American Voting Age Population in District 22 in order to Cure the Violation

The remedy for racial vote dilution stemming from a districting plan where white bloc voting consistently defeats the African-American candidate of choice is to increase the African-American voting age population in the challenged district. Appellants claim that the district court's plan, which increases the 50.77 percent BVAP in District 22 to approximately 62 percent, constitutes "intentional discrimination" because it concomitantly "reduces minority voting strength in [the adjacent majority-white] District 23 by more than 10%." Mot. at 10 n. 2. But this Court firmly rejected a similar claim in *Clark v. Calhoun County,* 21 F.3d 92, 95 (5th Cir. 1994): "Whenever a majority-black district is created to remedy a § 2

[4] At the end of this section claiming the legislature never had a reasonable opportunity, Appellants state that the court-ordered plan splits Vicksburg—a point never raised in any of their prior stay motions in this Court or the district court. Mot. at 9. However, Appellants never challenge the district court's factual finding that this plan "satisf[ies] traditional redistricting criteria" or its discussion in that regard. Ex. 12, 11. The existing statewide Senate plan already splits 70 municipalities and places, Ex. B, and Defendants' expert admitted that none of Plaintiffs' proposed plans (including the plan adopted by the court) raise "matter[s] of grave concern" with respect to splitting communities of interest. Ex. D, 263. Moreover, Plaintiffs submitted a proposed plan that offset the Vicksburg split by reuniting Yazoo City and another plan that reunited both Yazoo City and Cleveland. Ex. 12, 9–10. This demonstrates the legislature can remedy the violation without increasing the number of split municipalities if it chooses.

violation, the number of black voters in the other districts must necessarily be reduced."[5]

Appellants contend that "nothing was known but the race of the residents" in the court-ordered plan. Mot at 1. To the contrary, there is a history of racial bloc voting in Mississippi, *see Martin v. Allain*, 658 F. Supp. 1183, 1194 (S.D. Miss. 1987) ("racial polarization of voters exists throughout the State of Mississippi"), that persists in District 22. Ex. 12, 7, 26–27. Seventy percent of the residents of District 22 remain there under the court-ordered plan. *Id.,* 9. In light of this polarization, the court was justified in adopting a remedy that—like every other remedy in similar districting cases—increases the African-American population in the challenged district by moving population from adjacent districts.

Appellants contend that "[b]ecause the District Court failed to identify the precise violation, it could not narrowly tailor the remedy." Mot. at 10. But the court clearly identified the violation. It adopted a plan that was narrowly tailored by shifting only 28 precincts between two districts and leaving the other 50 districts intact. The plan enhanced communities of interest by removing from District 22 the suburban Madison County precincts that were in it, thus restoring its character as a Delta district. Ex. 12, 4–6, 8. By contrast, Appellants never

[5] Here, we are talking about an increase in the BVAP percent of a barely majority-black district rather than the creation of a majority-black district where none existed. But as discussed herein, there is no prohibition to § 2 challenges to districts with slim African-American majorities.

submitted a proposed court-ordered plan, leaving the district court with only Plaintiffs-Appellees' proposed plans to adopt pending legislative action.

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

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

The Supreme Court has recognized that "it may be possible for a citizen voting-age majority to lack real electoral opportunity." *LULAC v. Perry,* 548 U.S. 399, 428 (2006). This Court stated that "[u]nimpeachable authority from our circuit has rejected any *per se* rule that a racial minority that is a majority in a political subdivision cannot experience vote dilution." *Monroe v. City of Woodville,* 881 F.2d 1327, 1333 (5th Cir. 1989). Decisions from four other circuits that have reached the same conclusion. *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist*., 894 F.3d 924, 934 (8th Cir. 2018); *Pope v. Cty. of Albany*, 687 F.3d 565, 575 n.8 (2d Cir. 2012); *Kingman Park Civic Ass'n v.*

Williams, 348 F.3d 1033, 1041 (D.C. Cir. 2003); *Meek v. Metro. Dade Cnty*., 908 F.2d 1540, 1546 (11th Cir. 1990). Appellants argue that this principle should not be "extended" from the at-large context in *Monroe* to the single-member district context in the present case, Mot. at 13, but *LULAC*, *Kingman*, and *Pope* all involved challenges to districts.

The primary case Appellants cite, *Bartlett v. Strickland*, 556 U.S. 1 (2009), involves a fundamentally different issue. In *Bartlett*, the plaintiffs attempted to meet the first *Gingles* precondition by creating an illustrative state house district where African-American voters made up less than 50 percent but could, along with white crossover voters, elect representatives of their choice. *Id*. at 6. The Supreme Court rejected this argument. *Id.* at 12–13. The Supreme Court's holding in *Bartlett* precluding a § 2 violation when the minority population is too small does not suggest a *per se* rule barring a claim on the ground that the minority population is too large. Such a rule would nullify the Court's statement four years earlier in *LULAC*, which, like the *Bartlett* plurality opinion, was authored by Justice Kennedy.

Appellants claim that "Plaintiffs cite no case holding that a majority-minority district violates § 2," Mot. at 11, but the Eighth Circuit, in *Ferguson-Florissant*, affirmed the lower court's holding that even if the population of the challenged district was majority-minority, the district's election system still

violated § 2. 894 F.3d at 933–34, 941. Even if majority-minority districts rarely violate § 2, the case law makes it clear that it is possible. The violations will most likely occur in cases like this one, where the majority is extremely slim and the other elements of a violation are proven.

Regarding turnout, the court described Dr. Palmer's conclusion based on an ecological inference analysis of the last four District 22 senate elections: "[T]here is a sizable turnout gap between African-American and white voters in District 22. On average, white turnout is 10.2 percentage points higher than black turnout." Ex. 12, 7. Appellants claim the court should have disregarded this analysis and relied on self-reporting statewide census surveys showing that African-American voter registration and turnout equals or exceeds that of whites in even-numbered years during presidential and congressional elections. Mot. at 14. But after hearing the expert testimony, the district court found that the surveys "look at the wrong jurisdiction [statewide rather than District 22], the wrong election years, and rely upon known issues with self-reported voting surveys—issues that EI [ecological inference], in contrast, seeks to overcome." Ex. 12, 28.[6] This is a sensible and supportable finding based on actual turnout at the polls. There is no

[6] Contrary to Appellants' claim that "the record contains [no] evidence that the Census Bureau report is wrong," Mot. at 4, Dr. Palmer testified about all of these problems, including the unreliability of self-reporting estimates. Ex. C, 64–65.

clear error.[7]

Appellants also claim the court erred by considering the 2015 District 22 election because Dr. Palmer properly excluded from his analysis two majority white precincts in Cleveland within District 22 where most voters were mistakenly given ballots for another senate district. Dr. Palmer based his conclusion on his analysis of the other approximately 50 precincts in District 22 where voters received the proper ballots. *See* Ex. C, 53. That analysis demonstrates the turnout differentials Dr. Palmer documented. Moreover, the analysis of the elections from prior District 22 elections corroborates these turnout differentials.[8]

Appellants did not present any witness who claimed that election administration errors invalidated Dr. Palmer's turnout analysis. Though Appellants claim they did not learn of this until January 31, 2019, one week before

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[7] Appellants cite the statement in *NAACP v. Fordice* that the plaintiffs' expert there "acknowledged that in recent years Mississippi's African-American and white citizens have maintained virtual parity in voter turnout." 252 F.3d 361, 368 (5th Cir. 2001). But the accompanying footnote states that white turnout was slightly higher in 1994 and 1996 while African-American turnout was slightly higher in 1995. *Id.* at 368 n.1. These statewide numbers from 1994–96 do not undermine Dr. Palmer's expert analysis regarding turnout in District 22 from 2003 to 2015.

[8] The current plan, adopted in 2012, was used for the 2015 election. The 2011, 2007, and 2003 elections were conducted under the prior plan adopted in 2002. Having claimed in their laches arguments in district court that this case should have been filed once the plan was precleared in 2012, Appellants now imply that the one election held in 2015 under the existing plan was an insufficient basis for the decision in this case. According to Appellants, "[t]his Court has reversed a decision finding legally significant white bloc voting based on a single contest." Mot. at 17, citing *Rangel v. Attorney General,* 8 F.3d 242, 246 (5th Cir. 1993). But in *Rangel,* this Court based its ruling on five statewide judicial elections where minority candidates won in the territory covered by the judicial district under challenge. *Id.* at 247. In the present case, the candidates supported by African-American voters lost due to white bloc voting in both senate and statewide elections in District 22 from 2003 to the present.

trial, and therefore they "could not examine that data," Mot. at 16, in actuality, Appellant Secretary of State knew about these errors in 2015 because he issued a public statement about them. Ex. 2, 4. Counsel for Defendants-Appellants inquired about this subject at Plaintiffs' expert's deposition and it was that inquiry that led Plaintiffs, in an abundance of caution, to provide the list that is in Exhibit 2 of their Motion. But even if Appellants had only a week, that was sufficient time for their expert to "examine that data" and analyze any alleged impact of excluding the two precincts where voters received the wrong ballot. At trial, Defendants-Appellants did not claim or establish a record that they were prejudiced by this January 31 disclosure. Instead, they sat quietly by and complained about the timing of the disclosure only after trial. As the district court stated: "The defendants presented no evidence indicating that Dr. Palmer's approach was in error or would cast any shadow on his conclusions." Ex. 12, 24.

Their contention rests solely on one of their attorneys asserting the court could take "judicial notice that Cleveland is the location of predominantly [white] Delta State University" and had Dr. Palmer included the wrong-ballot precincts "it would necessarily have reduced the overall calculation of white turnout." Mot. at 16. But this attorney is neither a witness nor an expert; he has not conducted a statistical analysis or provided any estimates and was not subject to cross-examination. Moreover, the fact that a pocket of white college students in one

precinct might not vote because they are registered elsewhere—and ineligible to vote in District 22—does not demonstrate that African-American turnout somehow equals white turnout among eligible voters in District 22.[9]

Notably Appellants' merits claims do not include a challenge to the district court's finding that "white bloc voting in District 22 defeats the African-American community's candidate of choice." Ex. 12, 26–27. Instead, they wrongly claim in their statement of facts that no senate election has "ever been properly conducted in District 22," Mot. at 6, and that Plaintiffs never proved "that whites have *ever* actually defeated 'the minority's preferred candidate' for Senator for District 22." *Id.* (emphasis in original). While most voters in two precincts did not receive District 22 ballots in 2015, the rest of the voters across the district did. Had those two heavily white precincts received the proper ballots, they likely would have added to the winning totals of the white candidate. Ex. C, 85–86. Thus, white bloc voting did defeat the African-American candidate of choice in the 2015 senate race as it did within District 22 in the 2015 statewide elections and also in senate and statewide elections in the three earlier election cycles under the prior version of the district.

Returning to the subject of turnout, even if the district court had committed

[9] The analysis compared turnout to racial demographics because Mississippi does not keep voter registration statistics by race.

clear error in its finding regarding turnout, that subsidiary finding is not essential to the court's ultimate finding of a violation. Appellants claim that in order to win, Appellees "bore the burden to demonstrate that the African-American citizens of Mississippi 'do not in fact participate to the same extent as other citizens.'" Mot. at 14 (quoting *Fordice,* 252 F.3d at 368). But they left out part of the quote. The Fifth Circuit was referring to the impact of the Senate Report factors on the history of discrimination and socioeconomic disparities on present-day participation. The Fifth Circuit simply said that "*to support a favorable finding on these factors*, [the plaintiff-appellee] bore the burden to demonstrate that the African-American citizens of Mississippi 'do not in fact participate to the same extent as other citizens.'" 252 F.3d at 368 (emphasis added) (internal citation omitted). But the absence of proof on certain Senate factors does not usually override proof of the *Gingles* factors. "[I]t will be only the very unusual case in which Plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of the circumstances." *Clark v. Calhoun Cnty.,* 88 F.3d 1393, 1396 (5th Cir. 1996). Thus in *Clark,* this Court held that a § 2 violation had been demonstrated even though there was no proof of depressed African-American political participation. *Id.* at 1396, 1399.

D. Appellants Have Not Demonstrated Clear Error by the District Court in Its Finding of No Undue Prejudice, which is an Essential Element of Laches

In response to Defendants-Appellants' invocation of laches, the district court correctly noted that Plaintiffs-Appellees filed this case "16 months before the 2019 general election, 13 months before the primaries, and eight months before the qualification deadline." Ex. 12, 23. The court added: "[t]his timeframe is more than enough to litigate their single-district single-count claim." *Id.* Though the case could have been filed sooner, the court held that any failure to file sooner by two of the Plaintiffs-Appellees was excusable. *Id.*, 21. But the court's more important finding was that "[t]he evidence in our case weighs against a finding of undue prejudice." *Id.*, 23. As the court pointed out, defendants must prove "that there was undue prejudice to the party against whom the claim is asserted.'" *Id.*, 20 (citation omitted).

In their Motion to Stay filed in this Court in their prior appeal, Appellants did not even argue undue prejudice. Now they change course and argue that old census data "might not provide fair and accurate representation." Mot. at 17 (citation omitted). But that is the same census data underlying the existing plan that Appellants wish to use. "The true comparison is between out-of-date districts that . . . dilute the black vote, and out-of-date districts that do not." *Jeffers v. Clinton*, 730 F. Supp. 196, 202–203 (E.D. Ark. 1989), *aff'd mem*. 498 U.S. 1019

(1991). Appellants contend they were prejudiced by the timing of the disclosures related to the Cleveland precincts, Mot. at 18, but as mentioned in the prior section, they never made that claim at the trial and never proved prejudice. They claim without support that election officials are prejudiced but the Secretary of State's office confirmed that the elections can proceed on schedule as long as the official ballot is available by June 17, 2019. Ex. 13, stamped page 208. That is easily accomplished in two districts. They assert that the delay has "cleared [the] path" of Plaintiff Joseph Thomas to the Senate. Mot. at 18. That claim, which was addressed in the introduction to this response, is not accurate and does not demonstrate undue prejudice to Appellants.

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

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

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

Appellants contend the district court erred as a matter of law in denying the motion they filed days before trial to appoint a three-judge court. *See* Ex. 10, 28. U.S.C. § 2284(a) provides for the two circumstances where a three-judge court

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

Appellants contend that the language of 28 U.S.C. § 2284(a) is grammatically ambiguous and could be read so that any challenge, constitutional or statutory, to a statewide legislative reapportionment would be heard by three judges whereas congressional reapportionment would be treated differently with three judges for a constitutional claim and one for a statutory claim. Mot. at 18–19. This is illogical and inconsistent with a plain reading of the statute, where the term "the constitutionality of" serves as a series-modifier of everything that follows, as discussed by Justice Scalia and Bryan Garner. *See* Ex. 19, 3. Appellants turn to a cherry-picked version of the legislative history in 1976 of § 2284(a) to argue that "every statutory method of challenging any apportionment" must be heard by a three-judge panel. Mot. at 19. However, as noted in *Chestnut v. Merrill*, No. 2:18-00907, 2019 WL 338909, at *3 (N.D. Ala. Jan. 28, 2019): "In 1976, when Congress amended § 2284, Congress made the amendments

to *limit* the number of cases requiring a three-judge panel."

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

II. The Balance of Harms Weighs Against a Stay

As the district court noted when denying the first Motion for Stay, any stay will "substantially injure" African-American voters who have lived with this § 2 violation through four election cycles: "Given the importance of voting and the years that have elapsed without the electoral opportunity intended by § 2, the better course of action seems to be to not injure the plaintiffs for another election cycle." Ex. 18, 6. This Court's en banc ruling in *Veasey v. Abbott* applies here: "It would

be untenable to permit a law with a discriminatory effect to remain in operation for this election." 830 F.3d at 270.

III. The Public Interest Weighs Against a Stay

The public includes African-American voters. Given that Appellants have not demonstrated a likelihood of prevailing on the merits, the public interest favors enforcement of the Voting Rights Act in this election cycle.

The district court found that "there is no evidence . . . that [the] modest steps [involved in this limited remedy] will harm the efficient conduct of the 2019 election cycle." Ex. 18, 5. Appellants have cited nothing to the contrary. Appellants contend that plaintiff Joseph Thomas is the only person to have qualified in redrawn District 22 but in fact he has opposition in the Democratic primary, Ex. 12, 2, and others in both parties still have time to qualify.

Appellants cite *Watkins v. Mabus,* 771 F. Supp. 789 (S.D. Miss. 1991), where the court allowed elections to occur under an unconstitutional plan given unusual events and a much shorter timeframe than here, but it did so with the understanding that special elections from a lawful plan would be conducted the next year, which is what happened. *Id.* at 797 (setting deadlines for nominations for a special master and a status conference the following year); 791 F. Supp. 646 (S.D. Miss. 1992). Here it is far better to conduct this election under a plan that complies with § 2.

CONCLUSION

For the foregoing reasons, Appellants' Motion should be denied.

March 11, 2019 Respectfully submitted

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CERTIFICATE OF SERVICE

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

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March 11, 2019

CERTIFICATE OF COMPLIANCE

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This, the 11th day of March, 2019.

s/ Robert B. McDuff

EXHIBIT A

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

JOSEPH THOMAS, ET AL PLAINTIFFS

VERSUS CIVIL ACTION NO. 3:18CV441-CWR-FKB

PHIL BRYANT, ET AL DEFENDANTS

MOTION HEARING
BEFORE THE HONORABLE CARLTON W. REEVES
UNITED STATES DISTRICT JUDGE
MARCH 4, 2019,
JACKSON, MISSISSIPPI

APPEARANCES:

FOR THE PLAINTIFFS: ROBERT B. MCDUFF, ESQUIRE
JON GREENBAUM, ESQUIRE (TELEPHONICALLY)
POOJA CHAUDHURI, ESQUIRE (TELEPHONICALLY)

FOR THE DEFENDANTS: TOMMIE S. CARDIN, ESQUIRE
MICHAEL WALLACE, ESQUIRE
DOUGLAS T. MIRACLE, ESQUIRE

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1 **IN OPEN COURT, MARCH 4, 2019**

2

3 THE COURT: Good morning. First of all, thank you,
4 Counsel, for making yourselves available on such short notice.
5 There's a lot of moving parts, as you know partially driven by you
6 all, a lot of moving parts, and the Court, too. I take some
7 responsibility actually. Lot of moving parts in this case, and I
8 appreciate, again, the work that you all are doing to keep things
9 moving along.
10 And I wanted to have this hearing today in response to the
11 most recent, I believe, motions for stay. Obviously, everybody
12 did get from the Fifth Circuit the order from either last Thursday
13 or Friday finding that the one notice of appeal was premature, I
14 think. But -- so that I'll have -- I decided to make sure that
15 everybody did not have to appear, so I do have a couple of people
16 on the phone. So if you will, announce who you are.
17 MR. GREENBAUM: Good morning, Your Honor, John Greenbaum
18 for the plaintiffs.
19 THE COURT: Okay. Anyone with you Mr. Greenbaum there?
20 MR. GREENBAUM: Not in my -- not in my office.
21 THE COURT: Okay.
22 MS. CHAUDHURI: Good morning, Your Honor. This is Pooja
23 Chaudhuri for the plaintiff.
24 THE COURT: Okay. All right. Thank you. And Mr. McDuff
25 is in the courtroom for the plaintiff, and Mr. Carden and Mr.

1 Wallace and Mr. Miracle are here for the defendants.
2 And, again, I say we're here I believe on the most -- on
3 the last motion to stay, I think, that was filed Thursday evening
4 or Friday. There's been a lot of filings, I know, including from
5 this Court.
6 Okay. The -- the motion to stay proceedings or stay of
7 final judgment pending appeal that was filed on February 28th,
8 2019, that's the last outstanding motion that the Court sees on
9 its docket. I realize there's been responses to that motion's
10 replies, supplemental response, supplemental reply, so I'll hear
11 from the defendants on their motions.
12 MR. WALLACE: Your Honor, Mike Wallace for the secretary
13 and for the governor.
14 THE COURT: Is your microphone on, Mr. Wallace?
15 MR. WALLACE: There, I think it is now.
16 THE COURT: Okay. I mean, I can hear you fine without it.
17 MR. WALLACE: Everybody hears me fine, Judge, but she's
18 got earphones on, I know. As I say, I speak for the secretary and
19 the governor. Mr. Miracle's here for the attorney general.
20 We don't have much to say about our motion except to
21 answer the two questions the Court answered us in the order we
22 received the other evening, the court's jurisdiction, and the
23 purpose and propriety of evidence.
24 The jurisdiction the Court has is to enforce its judgment
25 not to change it now that an appeal has been filed. The Court has

1 two choices. It can enforce the judgment as it is, or it can stay
2 the judgment in whole or in part.
3 What the Court cannot do at this point is to modify the
4 judgment, and we've not asked the Court to modify the judgment,
5 but only to stay it. The evidence we have submitted is not in
6 support of any change to the remedy the Court has ordered but
7 simply to demonstrate the consequences of the -- of the order that
8 the Court issued.
9 Again, that casts no aspersions on anybody. As we've
10 known for sometime now, nothing in this case has anything to do
11 with intent. As you've heard from Senator Flowers, the
12 legislature, acting in perfect innocence and with complete
13 fidelity to the law, made a decision that interacted with unknown
14 facts on the ground to produce an unanticipated result. This
15 Court's order has interacted with unanticipated facts on the
16 ground to clear out all the republican candidates in District 22.
17 We think that's contrary to the public interest, and we think it's
18 unfair to the folks that have worked so hard to put themselves in
19 to that position for so long.
20 The folks filed a paper the other day that says, well, you
21 can fix it by extending it to the 15th, and that will give anybody
22 a chance to get in under the new rules. I know I've been
23 criticized for testifying already, but the Court has taken
24 judicial notice of political realities in Yazoo County as we were
25 talking about who got elected to what during the course of the

1 trial. And I think the Court will agree that neither in Yazoo
2 County or anywhere else does anybody get up on the morning of
3 March 1st and say I think I'll run for office. And if they do,
4 they probably don't have much luck with it. This has been go --
5 people have been working very hard for a long, long time.
6 I stood up here during the trial, and I guaranteed you
7 that somebody was running from Madison County. I had no idea who
8 it was. There are a lot of Selfs in the Delta, but I don't think
9 I've ever met this one.
10 But what the Court has done is move people who worked very
11 hard to do one thing and tell them you can't do it anymore. We
12 think that's contrary to the public interest. This case is not
13 quite as chaotic as Watkins, but that's probably because the
14 lawyers' committee didn't sue all the people it sued in Watkins.
15 You haven't had everybody before you to tell you everything that's
16 going on.
17 In Watkins they decided that the world would not come to
18 an end if we had one more election under the old plan, and after
19 that happened, then things worked themselves out the next year. I
20 think Watkins is a perfectly good precedent for this case. You --
21 the Court has the litigation, let's put it that way, that has put
22 people into unanticipated and unhappy situations, and we think we
23 should go ahead and continue the election on the plan we started
24 with. And if there is a need for a remedy, we can all be back
25 here next year and talk about it.

1 But the only thing this Court has to do is one of two
2 things: keep the judgment it has or stay the judgment it has,
3 that's what the Court has jurisdiction to do. We ask you to stay
4 it.
5 THE COURT: With respect to the legislature was not
6 necessarily concerned about when they drew the plans who might be
7 running, that was not one of the factors that they were concerned
8 about. They were concerned, I think as Mr. Flowers testified, I
9 think -- or as the evidence ultimately showed protecting
10 incumbents, and in this district, you don't have an incumbent, and
11 even if you did, the incumbent's residence would have been
12 maintained in -- in the -- I think in all three plans that the
13 plaintiffs put forth, obviously they cannot anticipate who all
14 might have run, who all would run, and I know one candidate
15 actually had qualified we learned in the pleadings as -- as far
16 back as January the 22nd. But there was no evidence about where
17 his residence was, and that candidate that I'm talking about is
18 Hayes Dent. And so when -- and I don't know which of the three
19 plans, if any, would have maintained his residence.
20 Do we know that now?
21 MR. WALLACE: I don't know that, Your Honor, and I don't
22 know that any of that would have been necessarily relevant to the
23 remedy. I think when the Court -- again, plaintiffs have
24 presented this as a claim divorced from intent, so we really don't
25 know what the legislature intended in 2012. We heard the

1 procedures they went through, but why they drew these particular
2 lines the way they did, we don't know. The fact that there is no
3 incumbent really shouldn't change the legality of a plan.
4 Incumbents come and go throughout the decade, and a plan
5 shouldn't become more invalid or less invalid when an incumbent
6 decides whether to come and go. And a remedy -- I mean, if it's
7 really true that the law compels the remedy that the Court has
8 imposed, then I don't -- it may not be relevant in the long term
9 as to who lives where, and indeed it might be improper in the
10 short term for the Court to take consideration of who lives where
11 in imposing a final judgment that's going to last for a long time.
12 But for the limited purpose of determining whether the
13 final judgment the Court has determined to be necessary should be
14 imposed now or later, then I think it is relevant to look at what
15 is actually happening on the ground, what sort of commitments have
16 been made, what sort of people have been inconvenienced. And it
17 is only for that purpose that we ask you to consider the fact that
18 at least two people have made a major effort in this case, and
19 that effort is about to be wiped away by the remedy that this
20 Court has found to be legally necessary.
21 THE COURT: Speaking of acting on the ground, what if the
22 legislature this morning decided that they would forego what I
23 understood their wish to be, that is wait until rulings come from
24 this Court or the Fifth Circuit on the motions to stay. What if
25 the legislature, in its infinite wisdom today, decided to adopt a

1 plan in response to what the Court's -- what the Court heard and
2 what the Court's rulings were?
3 Could this Court -- I know that -- could this Court modify
4 its judgment, or is it the defendant's view the Court cannot do
5 anything because the judgment that it entered the other day is on
6 appeal?
7 MR. WALLACE: I think the only thing this Court could do
8 is -- is vacate its judgment and dismiss it moot. When the
9 legislature passes a law, it's a law. And at -- when that law is
10 passed, everybody in the state is obligated to enforce it until
11 such time as that law is declared illegal or unconstitutional.
12 There was a long time in Mississippi, as everyone in this
13 courtroom knows, when Mississippi did not have the authority to
14 enact electoral laws without permission, but that time is over. I
15 believe -- and, you know, I will confess to Your Honor there isn't
16 much law on it lately, because the legislature hasn't had the
17 authority to pass its own laws without permission lately.
18 But I think the answer is if they pass a law today, it's
19 the law today, and this case is moot.
20 THE COURT: Okay. And they still have every right to --
21 they still have every right to seek to implement a remedy in
22 response to what the Court -- what this Court has submitted at
23 this point, right?
24 MR. WALLACE: I would not characterize it as a remedy,
25 Your Honor. I would characterize it as a law. Once the illegal

1 law is gone, it is gone. The legislature can adopt a new law, and
2 that is the law until somebody tries a case and says there's
3 something wrong with it.
4 Again, that is what I believe the law to be, but I confess
5 to Your Honor that after 50 years of Section 5 it may not be
6 terribly clear. But I think that's the law.
7 THE COURT: Okay. Do you -- and has the legislature
8 informed you at all that any differing opinion from your February
9 the 26th letter that said -- I think that letter specifically says
10 the legislature wishes to adopt -- wishes to do something, adopt a
11 plan, or -- or wishes to do something only after this Court and
12 the Fifth Circuit rules on the motions to stay.
13 MR. WALLACE: I haven't heard anything different from
14 that, Your Honor. What we said in the letter is that if the stay
15 motions are denied, the Senate desires the opportunity to perform
16 its constitutional duty and enact a redistricting plan redrawing
17 Senate District 22. We told you that in a letter on
18 February 26th, and we said the same thing in the short brief we
19 filed that afternoon. And as far as I know, that is still the
20 Senate's -- the message the Senate has for us to give to this
21 Court.
22 THE COURT: All right. And any plan that might ultimately
23 be passed by the Senate, it would be -- I guess go to the House as
24 well and then they would -- I think that's how they've done it in
25 the past.

1 MR. WALLACE: It is passed by joint resolution, requires
2 the concurrence of both houses, does not require the signature of
3 the governor. So as soon as both houses -- I don't know whether
4 they have to deliver it to the secretary of state or not. I don't
5 know when a law becomes effective, but there's no involvement of
6 the governor when the two -- when both houses act, it's over.
7 THE COURT: Is there anything from the defendants -- do
8 the defendants have any position on whether they believe that the
9 order that's been entered by this Court prevents in any way the
10 legislature from taking a course to adopt another plan, if it
11 chooses?
12 MR. WALLACE: It is not directed to the legislature. And
13 even under Section 5, the legislature was never denied the power
14 to enact something. It's just a question of when and how they got
15 to do something with it.
16 Without Section 5, I think the legislature's power to
17 enact laws is absolute subject to attack in any court of proper
18 jurisdiction like any other law.
19 THE COURT: Okay. All right. Thank you, Mr. Wallace. I
20 appreciate you.
21 MR. WALLACE: Thank you, Your Honor.
22 THE COURT: Anything from the attorney general? Because I
23 know the attorney general has not been joining in the pleadings of
24 the other two defendants.
25 MR. MIRACLE: No, Your Honor, nothing further today.

1 THE COURT: All right. Thank you. Mr. McDuff?
2 MR. MCDUFF: Thank you. Your Honor, good morning.
3 THE COURT: Good morning.
4 MR. MCDUFF: Just for the record, we filed in response to
5 the plaintiffs -- I mean, I'm sorry, in response to the governor
6 and secretary of state's motion, which they filed on Thursday, we
7 filed a response on Friday. Later on Friday, they filed a
8 supplemental memorandum primarily regarding the case law around
9 Rule 60, and then we filed last night our own supplemental
10 response. And then this morning, I just filed a second
11 supplemental response that deals with a relatively minor point,
12 but just for clarity, the -- the defendants had argued previously
13 that the Court's extension of the qualifying deadline would
14 require the party executive committees to convene twice. First to
15 certify the candidates who had to qualify by March 1st, and second
16 to then later certify the candidates who have to qualify by the
17 extended date for Senate District 22 and 23. And we just
18 attached -- because I saw it this morning -- the secretary of
19 state's election calendar, which said certification actually
20 doesn't need to happen until June the 7th.
21 So I think the party executive committees will only have
22 to engage in one certification prior to June 7th. And at any rate
23 even if they did have to "convene twice," I think they could
24 convene by e-mail or phone or whatever, so that's a minor point.
25 The larger point --

1 THE COURT: Do we know how they've convened in the past?
2 MR. MCDUFF: I do not. Mr. Wallace might as counsel to
3 the executive committee.
4 MR. WALLACE: Do you want me to respond to that, Your
5 Honor?
6 THE COURT: Yes, if you --
7 MR. WALLACE: As far as our -- as far as the Republican
8 Party is concerned, you have to have a physical meeting in order
9 to do any business. You cannot phone in your vote. There is a
10 provision under certain circumstances for some people to vote by
11 proxy, but physical meeting is required for all business.
12 THE COURT: Okay. All right. And that may or may not be
13 the case for the Democratic Party.
14 MR. MCDUFF: My understanding -- this would be hearsay,
15 but my understanding from a conversation this morning is the
16 Democratic Party does allow it to be done by e-mail and phone.
17 But at any rate, it doesn't need to be done until June 7th.
18 THE COURT: Okay. Thank you.
19 MR. MCDUFF: The larger point I think is one that was --
20 that was explored in your colloquy with Mr. Wallace, which is the
21 legislature still has the opportunity to adopt a plan. So as
22 indicated in the pleading we filed last night, we -- if this Court
23 denies the motion for stay, which we believe you should for the
24 same reasons you've already denied the prior motion for stay, we
25 just want to make sure it's clear for the record that the

1 legislature still has the opportunity to adopt a plan, and that
2 nothing in this Court's prior remedial order, including the final
3 judgment you entered, would prevent them from doing so.
4 Now, our notion was that if -- if they adopt a plan, then
5 it would be proper for it -- the Court to be informed of this
6 through a motion to alter or amend the judgment under Rule 59,
7 which can either be brought by a party or the Court. Under Rule
8 59(d) can actually, on its own initiative, order a "new trial" on
9 the issue of remedy, and then the -- the question of whether the
10 legislative plan remedies the violation could be considered at
11 that stage, and if it does, then obviously it's the plan.
12 So we just want the legislature to know and the record to
13 be clear for purposes of any review on a stay motion in the Fifth
14 Circuit that the legislature still has the opportunity to draw a
15 plan. Our notion, as we expressed in the filing last night, is
16 that the legislature should be given a deadline of, you know,
17 maybe this coming Friday to pass a plan. They could always make
18 it contingent upon the stay being denied, so that we can all move
19 forward and the candidates can move forward and we can know when
20 the qualifying deadline is going to be.
21 But Mr. Wallace seems to suggest that even if they did it
22 after the Court set a deadline that it would be "the law." I
23 don't know about that. I mean, I certainly think there is some
24 need for everyone to move quickly, as the Court has clearly
25 recognized, which is why -- you know, after the legislature said,

1 yes, well, we've waited 13 days, and we're finally telling you
2 that, yeah, we're going to do something if and when the motions
3 for stay are denied.
4 You know, quite understandably, the Court recognized the
5 need to move forward without continuing to wait on the
6 legislature. But the legislature still has the opportunity to do
7 so. There's still time to do so, because, again, we're dealing
8 with a small number of districts. The Court has already postponed
9 the qualifying deadline to March 15th. I presume it could be
10 extended a little further if need be, but we certainly believe the
11 legislature has the opportunity. We certainly think the Court
12 should make that clear in the record in its ruling on its motion
13 for stay.
14 We believe it's appropriate for the Court to impose a
15 deadline and to say to the legislature for purposes of the orderly
16 processes of this election, and so that everyone will know what
17 the final plan is going to be, that it should be done by this
18 coming Friday. But that's obviously up to the Court as to whether
19 to impose that deadline, but it certainly would be helpful if they
20 moved quickly. We know the Court is moving quickly, and we just
21 want the record to be clear that the legislature still has the
22 opportunity to pass a remedial plan. And that's all I have.
23 THE COURT: Okay. Any rebuttal?
24 MR. WALLACE: May it please the Court?
25 I think that's the first time I've heard Rule 59(d)

1 mentioned with a suggestion that this Court, on its own, should
2 vacate the judgment and order a new trial on remedy. The evidence
3 I've brought the Court today is not on remedy. It's simply on the
4 equities of using the old plan or the new plan.
5 Plaintiffs are not asking for a new remedy. We're not
6 asking for a new remedy. We're asking for no remedy, so the only
7 quest- -- we don't need a new trial. The Court either needs to
8 stick with the order it's got and tell us to go forward, or to
9 stay the order its got and come back and fix this at a later date
10 should the Court's judgment be upheld on appeal. And that's what
11 we ask the Court to do.
12 THE COURT: Okay.
13 MR. WALLACE: Thank you, Judge.
14 THE COURT: Thank you. Mr. --
15 MR. MCDUFF: May I respond?
16 THE COURT: Yes.
17 MR. MCDUFF: Just to be clear, we are -- oh, I apologize,
18 Your Honor. I'll get my checkbook if I need to, and I will turn
19 it off so it doesn't happen again.
20 We -- we obviously are not at this stage asking for the
21 Court to order a new trial or to amend the judgment. This would
22 be only in the event the legislature passes a plan because that --
23 assuming that plan was acceptable and remedied the problem, then
24 that would effect the Court's judgment, so it would be appropriate
25 for proceedings under Rule 59.

1 I will say with respect to where candidates live, that is
2 something I assume that the legislature can take into account.
3 And so Mr. Wallace is raising that as a reason why perhaps a stay
4 should be granted, but we, of course, believe the stay should be
5 denied. But if there is a concern of candidates who thought they
6 were going to be in District 22 and would be in District 23 under
7 the Court's remedial order, they can go to the legislature and
8 say, you know, please put me back in District 22 under whatever
9 plan you draw, and the legislature can certainly consider that. I
10 think it's not appropriate for the Court to consider. I don't
11 think it's sufficient to justify a stay, and so we think the Court
12 should, as it has done in the past, deny the motion for stay, and
13 make it clear that the legislature still has the opportunity to
14 adopt a remedial plan, if it chooses to do so. Thank you, Your
15 Honor.
16 THE COURT: Thank you. Thank you, Counsel. I was going
17 back through the truncated chronology of this case starting with
18 the trial on remedies -- or excuse me, the trial itself back on
19 February the 6th and February the 7th. We did have the trial, and
20 on February the 13th, the Court entered an order that suggested
21 that -- that said -- not just suggested, said evidence supports
22 plaintiffs' allegation.
23 Plaintiff put forth three plans, but that a legislative
24 plan would be a preferred plan. The Court said that in that order
25 of 2/13, and I think it closed the order with the -- maybe not a

1 question, but may it was a question. Can a political solution be
2 put in place? That would sort of suggest the legislature ought to
3 act in my mind, that was the language the Court used.
4 Then on February the 16th, the Court entered its ruling,
5 and as a part of that ruling, there was a section about the
6 possible remedies. There was maybe Section E of the order. But,
7 again, in that section the Court said we encourage the legislature
8 to act. The Court -- the Court declined to order any specific
9 relief while the legislature considers whether to redraw and
10 extend the qualifications deadline is -- is a line taken from that
11 particular order from February the 16th.
12 I think it was clear to the legislature I'm inviting them,
13 asking them to please come forward with something or to do -- or
14 to -- at least indicating to them that they -- that this Court
15 believed that they had the right. And I believe the Court
16 would -- again, by saying we encourage them to act should not be
17 interpreted in any other way than that they would have the
18 opportunity to act.
19 But an appeal was filed on 2/19. Motion to stay was filed
20 on that same day. We had the telephone conference on 2/21 wherein
21 we talked about the possible remedy. And, you know, I think
22 everybody's operating from the assumption that you have these firm
23 deadlines already in place, and -- and you had the other issues
24 going on. The firm deadline that was in place was March 1st. The
25 qualifying deadline, which was in place and we knew we were

1 staring down that deadline. There was an opposition after that
2 file -- after that telephone conference where the Court talked to
3 the parties I believe about a possible date that we might ought to
4 set aside to have a hearing or something specifically on remedy.
5 I think the plaintiffs' position was, well, Judge, maybe
6 you don't need to take anymore testimony at this time. And I
7 think the parties sort of agreed to that fact and -- and the
8 plaintiff had already offered their three plans, and I think the
9 plan you suggested during that call and otherwise that one of the
10 plans can be adopted if -- if it becomes necessary.
11 So after that call on February 22nd, the plaintiffs filed
12 their opposition to the motion to stay. On -- on February 25th,
13 the plaintiffs filed a motion to extend the qualification
14 deadline. The attorney general responded to the motion to extend
15 the qualifying deadline by saying it's a non -- a no opposition or
16 no response I think. We don't really have -- he doesn't really
17 have a dog in the fight is how I sort of couched his response.
18 The Court entered its order denying the motion to stay,
19 but granted the motion to extend the qualification deadline. The
20 appeal was filed on February 27th from that order, and now we're
21 dealing with the motions to stay that were filed on February 28th
22 and that the Court then issued an order deferring a ruling on its
23 motion.
24 But, again, the Court noted that it felt compelled to
25 issue remedy, because the legislature would only take it up if the

1 motion to stay was denied by this Court and the Fifth Circuit, so
2 that brings us to where we are today.
3 The legislature, I think, still has every opportunity and
4 is -- and is encouraged to act on the orders that have been
5 entered by this Court up until this moment. And -- but until then
6 something, I believe, needs to be in place, so that persons will
7 be able to participate in the democratic process through electing
8 candidates of their choice.
9 I'm not -- this is no ruling. I'm just saying what the
10 Court, I believe, has said throughout its many orders and
11 throughout -- and even what I've heard from the parties and
12 otherwise throughout the testimony and the briefings and the
13 filings in this case.
14 So, again, I would encourage the parties to seek a
15 solution through the legislature, but at some point in time, there
16 is going to have to be something in place permanently for the
17 people of District 22, and I know that impacts District 23.
18 According to what the Court has already said, the plan that --
19 that it prefers or the -- but of course the legislature, I think
20 as Mr. McDuff said, I mean, they can decide that they can take up
21 those residencies of the people who sought to qualify, if those
22 candidates have the juice to convince the legislature that that's
23 something that they ought to consider. The legislature can
24 consider a lot of things, some of which none of us may agree with
25 as far as the redistricting process, but certainly it's their

1 prerogative.
2 And, again, I would encourage the parties to -- to -- I
3 mean, because I guess my big question is if the -- if I deny the
4 stay and the Fifth Circuit agrees with me that the stay ought to
5 be denied but doesn't come with that ruling immediately -- I mean,
6 they've seen the -- I think they've seen the deadlines in the
7 stuff that was going forward. But if they do not do it
8 immediately and the legislature simply waits upon their ruling to
9 even rev up the engines -- I don't know what they're doing over
10 there. You know, then where does that put us?
11 And, of course, the Fifth Circuit could disagree with me.
12 But, again, if they disagree with me and that decision does not
13 come as immediate to when the legislature thinks it ought to have
14 come for them to engineer some changes, then what does that do
15 with the voters in District 22 and/or District 23 or -- or some
16 other district?
17 So that -- I mean, I think the legislature and I think the
18 parties -- I think everybody understands that we're operating on
19 a -- on a schedule that's passing us by. And I also think that
20 it's pretty clear through the earlier orders that this Court is
21 going -- you know, has played -- has put itself in the second
22 position to the legislature. I don't think anybody could argue
23 otherwise. I mean, I just don't think that the legislature ought
24 to be under the assumption that they cannot act. That's all I'll
25 say now. I mean, I'll try to get you an order, a firm order on

1 this.
2 MR. MCDUFF: May I add one thing, Your Honor?
3 THE COURT: Yes, sir.
4 MR. MCDUFF: Listening to you just then, I do believe it
5 is appropriate as we suggested in our filing last night for the
6 Court to set a deadline for the legislature to act. Because right
7 now, we have the Court's judgment. The legislature could
8 supersede that if it adopts a plan that remedies the violation,
9 but as you have just said, there has to be some finality at some
10 point as to what the plan is going to be.
11 The legislature has had since February 13th to be
12 considering what kind of plan it would adopt, if it adopts a plan.
13 They've had plenty of time to rev up the engines. Plans can be
14 drawn very quickly with modern technology, and I think it's
15 important for the Court to set a deadline of this coming Friday
16 for the legislature to adopt a plan. And then if it doesn't, if
17 it doesn't adopt a plan, or it doesn't adopt a plan that remedies
18 the violation, then the Court's judgment will remain in place, and
19 we'll go forward with the plan the Court has adopted.
20 If they do submit a plan by Friday, we can certainly
21 review it quickly and let the Court know if we're going to have
22 any claim that the plan doesn't remedy the violation. And that
23 could be -- you know, we could present that very easily next week
24 to the Court, but I do think it is appropriate for the Court to
25 set a deadline.

1 THE COURT: Since the Court has already extended the
2 deadline to the 15th for qualification and said that this is the
3 plan that it believes will go forward, why is it necessary to --
4 to issue another deadline for the legislature to act?
5 MR. MCDUFF: Simply because I think otherwise we could be
6 in a position where the legislature is not moving until much later
7 in the process. You know, if they meet -- if they -- if they
8 don't pass something until the week of the 11th, which is next
9 week, or the week of the 18th, then it I think leaves the
10 candidates in a very tenuous place. Because even though they may
11 want to move forward, we are still wondering, well, is the
12 legislature going to pass a plan at the end of March?
13 So I think the deadline is appropriate just to move the
14 process along. I mean, they can do it as easily this week as they
15 can next week. I mean, I guess they won't know if a -- you know,
16 perhaps as you pointed out, the Fifth Circuit may not issue a
17 ruling on whatever motion for stay is filed with them. Maybe they
18 won't issue it this week. Maybe they'll issue it next week.
19 But the legislature could pass a plan that's contingent
20 upon the stays being denied. And of course, if the stay is
21 granted, that ends the matter, anyway. And if the legislature has
22 passed a plan, it wouldn't -- obviously it wouldn't go into
23 effect. The preexisting plan would remain in effect.
24 But I do think a deadline sooner rather than later is
25 important just to keep the process moving, so that everyone can

1 know what the plan is going to be for the 2019 election as quickly
2 as possible. And I think it's appropriate to tell the legislature
3 if it's going to do a plan consistent with this Court's order of
4 February 13th, go ahead and get it done now, so we can the process
5 along more quickly.
6 THE COURT: Okay. Mr. Wallace, I'll hear from you. I
7 mean, it's your --
8 MR. WALLACE: Thank you, Your Honor.
9 The function of a deadline in a pending case is to say if
10 a party or somebody else doesn't act by the deadline, the Court
11 will act. In any kind of a case, the Court has the authority to
12 set that kind of a deadline. But in this case, the Court has
13 acted and has issued a final judgment. And there is nothing out
14 there for the Court to do other than enforce it or not enforce it.
15 The Court has no power to set a deadline on the authority
16 of the legislature to legislate. They -- we learned from the
17 Texas case I think in the last redistricting cycle, a legislature
18 can redistrict anything it wants whenever it wants to do so. It
19 has that authority, and I don't think a deadline will effect that
20 in any way, shape, and form.
21 I am in absolute agreement with what the Court has said
22 about the need to move quickly in this case. The Court has moved
23 quickly, which we appreciate, and every lawyer in the room has
24 moved quickly. We will keep moving quickly when we get back to
25 the office today, but we can't tell the legislature what to do.

1 Just give them the opportunity, and we deal with it when it
2 happens. I think that's where we are in the law, and that's all I
3 have, Your Honor.
4 THE COURT: So, Mr. Wallace, I'm sorry. So --
5 MR. WALLACE: You looked like you wanted to say something.
6 THE COURT: No, no, no. So the legislature is aware of
7 all the other deadlines it has in place for any orderly election
8 under its existing laws, that is everybody else in all 52 or
9 whatever senate districts and house districts, everybody else has
10 met a qualifying deadline which was Friday.
11 MR. WALLACE: Correct.
12 THE COURT: I know you don't speak for the legislature. I
13 cannot imagine -- well, I don't know what to imagine that they
14 might do.
15 But the secretary of state has also indicated what
16 timelines it has with respect to issuing ballots to people
17 overseas and otherwise and -- and all of that. I guess -- I guess
18 it's possible that we could be here two or three weeks from now
19 not knowing that the -- not knowing what the legislature might do
20 since the Court is or has in principal and theory in all of its
21 orders has said that the legislature ought to take this up.
22 Nothing prevents them from not taking it up until April 1st, for
23 example, right?
24 MR. WALLACE: Until they sine die is 90 days after they
25 convene, so it will be somewhere around April 1st, yes, sir.

1 THE COURT: Okay.
2 MR. WALLACE: Your Honor, all -- all I can say is when the
3 legislature acts, if it acts, I hope it will take into
4 consideration all the things Your Honor has had to take into
5 consideration about filing deadlines and election calendars. The
6 three people who have actually been sued in this case, the
7 election commissioners, are responsible for making the elections
8 run as smoothly as possible. And I think I can safely say that
9 all three of them share your concern that whatever is going to be
10 done ought to be done quickly, but the concerns of people who run
11 elections and the concerns of people who run in elections are
12 different. And we can't speak for the legislature, and we don't
13 know when they will act or what they will do.
14 THE COURT: Okay. Thank you.
15 MR. WALLACE: Thank you, Your Honor.
16 THE COURT: All right. Well, thank you. Well, let me ask
17 you, Mr. Wallace, again, I take it it's the state defendants'
18 position basically that there's nothing else for this Court to do,
19 because it can't do anything, because it entered its judgment and
20 that judgment is now on appeal?
21 MR. WALLACE: I don't think the attorney general has said
22 one way or another what he thinks the Court's jurisdiction is.
23 But as for the governor and the secretary of state, the answer we
24 gave to your question is that we think the jurisdiction now is to
25 enforce the judgment or stay the judgment. We don't think it has

1 jurisdiction to change it. I think that's the simplest way we can
2 put our position.
3 THE COURT: Okay. Thank you. Oh, Mr. Miracle?
4 MR. MIRACLE: We don't -- we certainly don't disagree with
5 the position that by filing that appeal, what impact it has on the
6 Court's jurisdiction. There's no space on that question.
7 THE COURT: Okay. All right. All right. Well, thank
8 you, Counsel, for -- again, for making yourselves available. The
9 Court will try to act on these motions as expeditiously as
10 possible, because I know whatever this Court will do will be
11 subject to review.
12 As Mr. Wallace said when we go back to the office, we'll
13 be working, as I know the plaintiffs will be, too.
14 So, again, thank you all so much, and we'll see where we
15 are. Thank you. Court's in recess. Thank you, Mr. Greenbaum.
16 MR. GREENBAUM: Thank you, Your Honor.
17 THE COURT: All right. And your co-counsel, now I
18 forgot -- I don't want to call her by her first name. I'm sorry.
19 All right. Thank you. We're in recess.
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1 **COURT REPORTER'S CERTIFICATE**

2

3 I, Candice S. Crane, Certified Court Reporter, in and for
4 the State of Mississippi, Official Court Reporter for the United
5 States District Court, Southern District of Mississippi, do hereby
6 certify that the above and foregoing pages contain a full, true,
7 and correct transcript of the proceedings had in the aforenamed
8 case at the time and place indicated, which proceedings were
9 recorded by me to the best of my skill and ability.
10 I further certify that the transcript fees and format
11 comply with those prescribed by the Court and Judicial Conference
12 of the United States.
13 THIS the 6th day of March, 2019.
14
15 /s/ Candice S. Crane, CCR
16 Candice S. Crane, CCR #1781
Official Court Reporter
17 United States District Court
Candice_Crane@mssd.uscourts.gov
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EXHIBIT B

Places that are split between two or more Senate Districts in 2012 Plan -- Yellow highlights are places with populations about the same as Vicksburg

Places	Districts	Population
Aberdeen	2	5612
Algoma	2	590
Baldwyn	2	3297
Batesville	2	7463
Belzoni	2	2235
Biloxi	2	44054
Bogue Chitto	2	887
Brandon	2	21705
Byhalia	2	1302
Canton	2	13189
Carthage	2	5075
Charleston	2	2193
Clarksdale	2	17962
Cleveland	2	12334
Clinton	5	25216
Cloverdale	2	645
Coffeeville	2	905
Collinsville	2	1948
Columbus	2	23640
Crosby	2	318
Crystal Springs	2	5044
Durant	2	2673
Flowood	2	7823
Gautier	2	18572
Georgetown	2	286
Gloster	2	960
Greenwood	2	15205
Grenada	2	13092
Gulf Hills	2	7144
Gulfport	2	67793
Hattiesburg	4	45989
Horn Lake	2	26066
Jackson	5	173514
Laurel	2	18540
Leland	2	4481
Louisville	2	6631
Lyman	2	1277
Macon	2	2768
Madison	3	24149
Mantachie	2	1144
McComb	2	12790
Meridian	2	41148

Places that are split between two or more Senate Districts in 2012 Plan -- Yellow highlights are places with populations about the same as Vicksburg

Places	Districts	Population
Meridian Station	2	1090
Natchez	2	15792
Nicholson	2	3092
Ocean Springs	2	17442
Olive Branch	2	33484
Pascagoula	2	22392
Pass Christian	2	4613
Pearl	2	25092
Petal	2	10454
Picayune	2	10878
Poplarville	2	2894
Redwater	2	633
Richland	2	6912
Ridgeland	2	24047
Sardis	2	1703
Saucier	2	1342
Sebastopol	2	272
Sherman	2	650
Southaven	3	48982
Starkville	2	23888
Summit	2	1705
Tupelo	3	34546
Tylertown	2	1609
Union	2	1988
Webb	2	565
Wesson	2	1925
Winona	2	5043
Yazoo City	2	11403
1	**Vicksburg**	**26407**

EXHIBIT C

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

JOSEPH THOMAS, ET AL PLAINTIFFS

VS. CIVIL NO. 3:18CV441-CWR-FKB

PHIL BRYANT, ET AL DEFENDANTS

TRANSCRIPT OF TRIAL
VOLUME 1

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

APPEARANCES:

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

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

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

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1 Q So once you had determined the precinct boundaries, what
2 did you do next?
3 A Once we knew the geographic boundaries of each precinct,
4 each year we could match those boundaries to census data to
5 determine the demographics of the populations within each
6 precinct. For the 2003 elections, we used the census data from
7 2000. And for the 2007, 2011 and 2015 elections, we used
8 census data from 2010.
9 Q Why did you use the 2010 census data for the 2007 election?
10 A It was closer to 2007 than the 2000 census was.
11 Q Okay. Now that you compiled the data, what did you do
12 next?
13 A Once the data set was complete, I was able to run the
14 ecological inference analysis.
15 Q Can you explain to the court what ecological inference is?
16 A Ecological inference is a statistical technique designed to
17 make estimates about the behaviors of different groups from
18 aggregate data. And so in this case, I used ecological
19 inference to estimate three different things for black voters
20 and white voters. And the first thing -- and they are
21 estimated together in one process -- is the percentage of the
22 voting age population that did not vote in each contest and
23 then the percentage of the voting age population within each
24 group that voted for each of the two major candidates.
25 Q What are some of the advantages of using the ecological

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

1 Q Are you familiar with homogenous precinct analysis?
2 A I am.
3 Q What is it?
4 A Homogenous precinct analysis is a different approach to
5 trying to estimate group behaviors from aggregate data. But
6 unlike EI, it relies on just precincts that are considered
7 homogenous, that is, are overwhelmingly -- consist
8 overwhelmingly of one racial group or another. And so
9 generally we would only look at precincts that were either
10 90 percent or higher black voting age population or less than
11 10 percent black voting age population.
12 Q Did you use homogenous precinct analysis in this case?
13 A No.
14 Q Why not?
15 A Ecological inference provides several advantages over
16 homogenous precinct analysis. First, it's using all of the
17 available data, and so when I run an EI, I would have around 50
18 precincts for each election. But with homogenous precinct
19 analysis, there would be far fewer precincts that would be
20 sufficiently homogenous to include, usually less than 10.
21 Additionally, EI, unlike homogenous precinct analysis,
22 includes a measure of uncertainty which is important when
23 making statistical estimates. And then third, ecological
24 inference uses -- by using all of the data, it is including not
25 just the homogenous precincts but also all the racially mixed

1 THE COURT: I am.
2 MR. GREENBAUM: I appreciate you taking the time so
3 that you are clear in your mind as to what his testimony is on
4 that.
5 THE COURT: All right. Thank you.
6 MR. GREENBAUM: Thank you.
7 BY MR. GREENBAUM:
8 Q So now we're going to move on to the document entitled
9 Supplemental Report of Peter A. Morrison, Ph.D, in *Thomas v.*
10 *Bryant* dated January 18, 2019. Have you seen this document
11 previously?
12 A I have.
13 Q Okay. I want to turn your attention to Page 3 of Exhibit
14 D-14 or Dr. Morrison's supplemental report. And there is a
15 table there on Page 3 that talks about political participation
16 by race in Mississippi.
17 Dr. Palmer, do you have any critiques regarding the
18 relevance of this chart?
19 A Yes.
20 Q What are they?
21 A I don't find this chart to be particularly relevant to the
22 politics of -- to District 22 for several reasons. First, this
23 is survey data conducted through the U.S. Census Bureau's
24 current population survey which is taken after federal
25 elections. And so we see here, estimate from the even-yeared

1 federal elections. It does not reflect actual turnout from
2 odd-numbered yeared state senate elections. Second, this is
3 statewide data, and so it's not looking at the actual voters of
4 Senate District 22. And then third is a well-documented
5 pattern in survey research of people overreporting their voting
6 behavior on surveys taken after the elections. And so we don't
7 know the reliability of these estimates.
8 Q Thank you, Dr. Palmer. We're going to now move to Appendix
9 Table 1 in Dr. Morrison's supplemental report, and you can find
10 that beginning on Page 27. And this is Dr. Morrison's analysis
11 of county elections and elections within a county. Do you have
12 any critiques of his analysis?
13 A I do, and I will refer to a few notes here as I go through
14 them. My first critique of this analysis is that Dr. Morrison
15 does not look at any of the Senate District 22 elections, those
16 four elections that I used in my report which are the most
17 relevant elections for this district.
18 He also does not look at any of the exogenous districtwide
19 elections. Each of these elections is done in different
20 jurisdictions, in some case a full county, in other cases parts
21 of a county when they are divided into districts. And
22 Dr. Morrison doesn't look at the black voting age populations
23 in these different jurisdictions which are all higher than the
24 black voting age population in District 22.
25 And so even if he can show that African-American preferred

1 candidates are winning in these different races, he is not
2 showing that African-American preferred candidates can win in
3 District 22.
4 Similarly, these are all county and subcounty elections.
5 And so even though he could look at districtwide elections, he
6 is only choosing to look at these different pieces separately.
7 Some of the counties that he looks at, including Bolivar
8 County, for example, here on Page 27, is only partially in
9 District 22, but many of these elections are countywide. And
10 so, for example, Bolivar County is 61 percent black voting age
11 population. Only a small part of it is in District 22, and
12 that part is 17 percent black voting age population.
13 So just because an African-American preferred candidate can
14 win in Bolivar County, overall it does not necessarily mean
15 that they can win in District 22.
16 Additionally, there is a large number of uncontested
17 elections in this table, and uncontested elections are not
18 going to be useful to us for looking at racially polarized
19 voting and candidates of choice because voters don't have a
20 chance to make a choice in these elections.
21 There is also a good number of elections between two
22 African-American candidates, and these elections don't provide
23 evidence of racially polarized voting for cases between black
24 and white candidates.
25 And then finally Dr. Morrison assumes that whenever an

1 African-American candidate wins an election that they are going
2 to be the African-American candidate of choice in that
3 election. But he doesn't do any analysis of the African -- of
4 voting patterns among African-Americans to identify their
5 candidates of choice.
6 Q Okay. Thank you, Dr. Palmer. What is your view regarding
7 whether Dr. Morrison's analysis is helpful in analyzing the
8 second and third *Gingles* preconditions?
9 A I don't find it helpful.
10 Q Okay. So I want to ask you a couple of questions about the
11 2015 Senate District 22 election. And you're aware that Senate
12 District 22 encompasses six counties? Is that correct?
13 A That's right.
14 Q And in how many of those counties is the majority of the
15 population within Senate District 22 African-American?
16 A Four.
17 Q And how did the African-American preferred candidate who is
18 also African-American, Mr. Thomas who is here today, how did he
19 fare in those four counties?
20 A He won all four.
21 Q Okay. And then there are two counties then where the
22 electorate that's within Senate District 22 that the electorate
23 is majority white. Correct?
24 A Yes.
25 Q And what are those counties?

1 change by a tremendous amount between the two plans, but the
2 2015 one, given it is under the new lines, is highly relevant.
3 Q Highly relevant? Is that what you said?
4 A Yes.
5 MR. CARDIN: Your Honor, if I may?
6 THE COURT: Yes.
7 (SHORT PAUSE)
8 MR. CARDIN: Your Honor, I have no further questions.
9 THE COURT: Thank you.
10 MR. GREENBAUM: Your Honor, quick redirect.
11 THE COURT: All right.
12 **REDIRECT EXAMINATION**
13 BY MR. GREENBAUM:
14 Q Dr. Palmer, we're going to pop up on the screen Exhibit
15 P-15. Page 15 of that looks at -- looks at the districts, the
16 components of the precincts that are in District 22. And we
17 have had a lot of discussion in your cross-examination about
18 the Northwest Cleveland and the West Cleveland precincts as
19 being the ones that people in those precincts should have voted
20 for District 22 but they were instead given ballots for another
21 district. Correct?
22 A That's correct.
23 Q And I just want to call your attention because it shows the
24 racial composition of those precincts. And if you look in
25 Northwest Cleveland, you have a population of 1,672 and a black

1 population of 89. And then in West Cleveland you have a total
2 population of 3,692 and a black population of 527. Correct?
3 A That's correct.
4 Q Fair to say that these precincts were -- are predominantly
5 white precincts?
6 A That's right.
7 Q And would it be fair to say that if voters in those
8 precincts would have gotten the proper ballots and the pattern
9 of voting was the same as what you had been exhibited in other
10 elections, including the exogenous elections that you analyzed
11 in 2015, that the most likely result is that there would have
12 been more votes for the white candidate in Senate District 22
13 than the black candidate in Senate District 22 had those voters
14 been given the proper ballots?
15 MR. CARDIN: Objection, Your Honor. That calls for
16 pure speculation.
17 THE COURT: Objection overruled.
18 A I think that's a reasonable conclusion.
19 MR. GREENBAUM: No further questions, Your Honor.
20 THE COURT: I have a couple of questions and the
21 parties may follow up based on the questions that I ask. And
22 if this is not the appropriate witness, let me know that as
23 well.
24 One of the issues that Mr. McDuff mentioned in his
25 opening, if the district is reconfigured that the City of

EXHIBIT D

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

JOSEPH THOMAS, ET AL PLAINTIFFS

VS. CIVIL NO. 3:18CV441-CWR-FKB

PHIL BRYANT, ET AL DEFENDANTS

TRANSCRIPT OF TRIAL
VOLUME 2

BEFORE THE HONORABLE CARLTON W. REEVES
UNITED STATES DISTRICT JUDGE
FEBRUARY 7, 2019
JACKSON, MISSISSIPPI

APPEARANCES:

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

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

REPORTED BY: BRENDA D. WOLVERTON, RPR, FCRR, CRR
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1 state, so I picked the state, the data for Mississippi.
2 Q So it wouldn't reflect whether or not there are differences
3 in different parts of the state between African-American and
4 white turnout. Correct?
5 A Correct.
6 Q And isn't it also the case that the data reported here is
7 taken at a different point in time than the elections for
8 Senate District 22? Correct?
9 A That is correct.
10 Q And wouldn't it be fair to say that turnout in the
11 elections when Senate District 22 takes place in the odd years
12 will be lower than the turnout in the November elections
13 captured here in Table 1 in November of even years?
14 A You would have to direct that question to a political
15 scientist.
16 Q So you don't know one way or the other?
17 A I only know what one would know as a layperson, and I'm not
18 prepared to offer -- I'm not prepared to say that I have any
19 conclusion as an expert about that question you asked me.
20 Q You didn't undertake any analysis to determine whether
21 current District 22 is a lawful plan, did you?
22 A It's my understanding that it was a lawful plan when it was
23 adopted. That's all I know from the record.
24 Q I want to ask you a series of questions now about
25 Dr. Cooper's plans and ask you what, if anything, would be of

1 concern from a legal standpoint. And we talked about this
2 during your deposition. Would you agree with me that none of
3 Dr. Cooper's plans would be of concern from a legal standpoint
4 in terms of population deviation?
5 A I agree with that.
6 Q Would you agree with me that none of Mr. Cooper's plans
7 would be of concern from a legal standpoint in terms of
8 contiguity?
9 A I agree with that.
10 Q Would you agree with me that none of Mr. Cooper's plans
11 would be of concern from a legal standpoint in terms of
12 compactness?
13 A I agree with that.
14 Q Would you agree with me that none of Mr. Cooper's plans
15 would be of concern from a legal standpoint in terms of
16 splitting communities of interest?
17 A I would say there that I wouldn't agree with what you said
18 but I would say that it would not be a matter of grave concern.
19 Q Would it be fair to say that your issue with Mr. Cooper's
20 Illustrative Plans is that in your view his plans result in
21 black voters losing influence in District 22 -- strike that. I
22 will start again.
23 Would it be fair to say that your issue with Mr. Cooper's
24 Illustrative Plans is that in your view his plans result in
25 black voters losing influence in District 23 and becoming

1 packed in District 22?
2 A I wouldn't say losing influence and being packed. I would
3 say being cracked and being packed.
4 Q Would you say that the -- would you say that the result in
5 your view of District 23 being packed is that the black voters
6 in District 23 lose influence?
7 A I don't have any opinion on that.
8 Q You don't have any opinion as to whether the voters in
9 District 23 lose influence under any of Mr. Cooper's plans?
10 A My only opinion is that the plan -- each of the three
11 variants of the plan that he has created would, in my
12 experience, be viewed as plans that violated the Voting Rights
13 Act by virtue of packing blacks in one district and cracking
14 them in another. I would not go beyond that.
15 Q Regarding District 22, are you able to tell us at what
16 black voting age population percentage is the threshold where
17 District 22 becomes packed?
18 A I am unable to tell you what that threshold would be. I am
19 aware of the fact that the threshold that exists in his plan to
20 me flashes a warning signal about how that would be viewed by
21 lawyers and judges.
22 MR. GREENBAUM: Can I have a second, Your Honor?
23 THE COURT: Yes, you may.
24 (SHORT PAUSE)
25 MR. GREENBAUM: No further questions, Your Honor.