No. 19-60133

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

JOSEPH THOMAS; VERNON AYERS; MELVIN LAWSON,

Plaintiffs – Appellees

v.

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

Defendants – Appellants

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

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

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ARGUMENT

Introduction

Plaintiffs-Appellees have restated the issues in a way they find more congenial to the result they seek. A clear understanding of the actual issues presented by this appeal is crucial to any proper analysis.

The jurisdictional question in this case is whether 28 U.S.C. § 2284(a) requires a court of three judges for any "action challenging the apportionment of a state legislative district." Appellants' Br. at 2. This Court need not determine whether "challenges are heard by single-judges for congressional districts," Appellees' Br. at 2, because no such challenge is presented here.[1] Any incongruity between procedures for legislative districting and congressional redistricting arises only after this Court has agreed with appellants that the language actually chosen by Congress requires three judges for an action "challenging . . . the apportionment of any statewide legislative body." A single judge should never have heard this case.

Nor do plaintiffs challenge "a single state senate district." Appellees' Br. at 2. A change to any district necessarily requires a change to other districts, necessitating the involvement of legislators and election officials from multiple counties. The district court's clear error in finding no prejudice is demonstrated by

[1] That issue has been raised by the State of Louisiana in *Johnson v. Ardoin*, No. 18-625-SDD-EWD [Dkt. # 66] (M.D. La. May 1, 2019).

the fact that this case is scheduled for oral argument on June 11, 2019, six days before federal law requires that ballots be sent overseas, and we still do not know in what districts some of those absent voters reside. On this record, no court should have invalidated this district, particularly so late in the election cycle.

Defendants have never claimed "an absolute prohibition" on valid claims under § 2 of the Voting Rights Act, 52 U.S.C. § 10301, "when the district contains a majority-minority voting age population." Appellees' Br. at 2. A plaintiff is always free to prove, as these plaintiffs did not, that such a district may not contain a majority of registered voters for various reasons. However, where, as here, a racial group composes a majority of the registered voters in a district, it is hard to imagine how that majority may "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," as § 2(b) requires. All these plaintiffs have proven is that plaintiff Joseph Thomas lost an election in this majority-black district in 2015, as he did in a different majority-black district in 2007. ROA.795, RE 9.

Finally, the district court's error was not in evaluating turnout in "the last four state senate elections in District 22," Appellees' Br. at 2, but in concluding that four elections had been conducted. Only one election has been held, in 2015, in Senate District 22 ("SD22") as adopted by the Mississippi legislature in 2012. Neither plaintiffs' expert nor the district court made any effort to explain how

election results in a district with different borders in 2003, 2007, and 2011 could shed any light on political conditions in SD22 in 2019.

I. 28 U.S.C. § 2284(a) is jurisdictional, and the district court lacked jurisdiction as a result of its failure to convene a three-judge court.

Section 2284(a) requires a three-judge court for this case, and plaintiffs have produced no binding precedent to the contrary.[2] Because no appellate court has ever addressed and resolved this issue, the application of §2284(a) consistently with the language and intent of Congress will create no conflict. The best plaintiffs can muster are mistaken assertions that defendants' interpretation of the statute produces a nonsensical result and that defendants have changed positions. And, for the first time in this appeal, plaintiffs tepidly assert a waiver argument.[3]

We can quickly dispense with plaintiffs' newfound jurisdictional argument. This Court has held that § 2284(a) is jurisdictional and therefore not waivable in *LULAC of Texas v. Texas*, 318 F. App'x 261 (5th Cir. 2009). Recognizing that nothing in the legislative history of § 2284(a) "suggests an intent to alter its

[2] Plaintiffs assert that a "number of state legislative redistricting Section 2 only cases have been tried to a single judge, but never in front of three judges." Appellees' Br. at 22-23. Plaintiffs reference the motion panel finding to this effect. Appellees' Br. at 26. The lack of any reported decision of a three-judge court deciding a sole § 2 claim does not neuter the plain language of § 2284(a). Of the cases cited by the motions panel, none gave any explanation for construing the statutory language. Certainly, none employed the series qualifier canon of construction to interpret § 2284(a), as the district court attempted to apply in this case.

[3] Plaintiffs never argued waiver before the district court, ROA.302, so this argument has been waived. *See Anderson v. Jackson State University*, 675 Fed. Appx. 461, 462-63 (5th Cir. 2017) (citing and quoting *Celanese Corp. v. Martin K. Eby Costr. Co.*, 620 F.3d 529, 531 (5th Cir. 2010) ("The general rule of this court is that arguments not raised before the district court are waived and will not be considered on appeal," and holding appellant "waived his 'waiver' argument by failing to raise it below.").

jurisdictional nature," this Court held that "[t]he absence of a formal request for a three-judge court does not constitute waiver." *Id*. at 264. In this case, before trial, defendants made a formal request for a three-judge court which the district court denied. ROA.243; ROA.331. Without doubt, § 2284 is jurisdictional and there has been no waiver.

Plaintiffs claim that defendants' construction of the statute "would mean that state legislative redistricting cases brought solely under Section 2 would be heard by three-judge courts while similar congressional redistricting cases would be heard by single judges, a nonsensical result." Appellees' Br. at 23. The question of whether § 2284(a) would require congressional redistricting cases to be heard by a single judge or a three-judge court is not presented by this case and is thus irrelevant. Nevertheless, in her motion panel dissent, Judge Clement addressed this result, providing a very sensible explanation:

> Indeed, a more relevant question than the one asked by the district court is why the statute would treat challenges to congressional redistricting differently from challenges to statewide legislative redistricting. The answer to that challenge may well lie in federalism. It is entirely plausible that Congress wanted federal courts to show more deference to state reapportionment plans that only affect state interests than to state reapportionment plans which affect national interests. The majority suggests that federalism would actually support the opposite inference, considering that a state's power to select its congressional representatives stems directly from Article I, Section II of the Constitution. But the line of reasoning is undermined by Supreme Court precedent, which has

> allowed the states greater latitude in creating state legislative districts than in creating congressional districts. *See Gaffney v. Cummings,* 412 U.S. 735, 742-44 (1973).

Thomas v. Bryant, 919 F.3d 298, 323 (5th Cir. 2019) (Clement, J., dissenting).

This approach is supported by the reasoning of the only relevant precedent addressing the applicability of § 2284 in this context. After examining the legislative history of § 2284(a), the Third Circuit reasoned that "[q]uestions regarding the legitimacy of the state legislative apportionment (and particularly its review by the federal courts) are highly sensitive matters, and are regularly recognized as appropriate for resolution by a three-judge district court." *Page v. Bartels,* 248 F. 3d 175, 190 (3d Cir. 2001).

Given the federalism considerations, the Third Circuit concluded that it did not "believe that Congress made a deliberate choice to distinguish between constitutional apportionment challenges and apportionment challenges brought under § 2 of the Voting Rights Act." *Id.* at 189. Simply put, there are legitimate policy and federalism reasons for having a three-judge court review a state legislative apportionment which are quite sensible and understandable.

Finally, plaintiffs attempt to argue that defendants have changed positions regarding the statutory construction argument, but they have not demonstrated how, even if true, that somehow undermines the proper interpretation of the statute. Defendants have consistently argued that the language of § 2284(a) and its

legislative history compel a three-judge court. It was the district court that introduced the series qualifier canon of construction in an effort to buttress its misreading of the statute,[4] prompting defendants to address how the district court misapplied that canon of construction in arriving at its conclusion. Whether § 2284(a) requires a three-judge court to hear this case ultimately is a question of statutory interpretation which rests with this Court.

Whether the language of § 2284(a) is plain or ambiguous, this Court must reach the same result. Although plaintiffs assert without explanation that its "plain language" requires a three-judge court only for constitutional challenges to legislative redistricting, Appellees' Br. at 25, they do not and cannot deny that §2284(a) can be read to say the following: "A district court of three judges shall be convened … when an action is filed challenging … the apportionment of any statewide legislative body." The second use of the word "apportionment" indisputably can be read as the second direct object of the gerund "challenging," and plaintiffs do not dispute it. Even if that word can also be read as the second object of the preposition "of," that merely creates ambiguity.

At that point, this Court may consult both canons of construction and the legislative history of the 1976 statute, both of which support the convening of a

[4] In its order denying defendants' Motion for Three-Judge Panel, the district court introduced the "series-qualifier canon of construction" advanced by Justice Scalia and Bryan Garner. ROA.333; *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012).

three-judge court for the reasons described in defendants' opening brief.[5] Plaintiffs cite not a word from the legislative history of the 1976 statute to indicate that Congress ever dreamed that a single district judge could ever order redistricting of a state legislature, and plaintiffs' discussion of what Congress declined to do in later years sheds little light on what it did in 1976. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 243 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.") (citations omitted); *District of Columbia v. Heller*, 554 U.S. 570, 662 n.28 (2008) (noting that post-enactment legislative history "is generally viewed as the least reliable source of authority for ascertaining the intent of any provision's drafters").

Based on the language of the statute, the proper application of the series qualifier and surplusage canons of construction, and the legislative history, the district court erred as matter of law in refusing to empanel a three-judge court to hear this case.

II. Relief is barred by laches due to plaintiffs' inexcusable delay in asserting their § 2 claim and resulting prejudice.

Laches applies to bar relief when plaintiffs (1) delay in asserting their right or claim, (2) which delay is inexcusable, and (3) such delay inflicts undue

[5] Plaintiffs assert that defendants' construction would "read[] 'constitutionality' out of the statute," Appellees' Br. at 30, but that is not true if this Court reads the statute as requiring three judges when "challenging the constitutionality of the apportionment of congressional districts." The State of Louisiana has argued that Congress meant to require three judges in any challenge to congressional districting, but that case is not yet before this Court. *See supra, Johnson* n.1.

prejudice to the party against whom the claim was asserted. *See Tucker v. Hosemann,* 2010 WL 4384223 at *4 (N.D. Miss. Oct. 28, 2010) (citing *Save Our Wetlands, Inc. v. U.S. Army Corps of Engineers,* 549 F. 2d 1021, 1026 (5th Cir. 1977)).

A. Inexcusable Delay of Three Years Established

Plaintiffs offer no excuse for waiting almost three years after the 2015 election to bring their claim. None. Nor do they seriously contest the fact that the district court made a legal error in looking to the subjective knowledge of the plaintiffs rather than to the objective facts when judging the length of the delay and whether it was excusable. *See* Appellees' Br. at 26-27. They devote a footnote to the facts of subjective knowledge but offer no law to support this half-hearted claim that individual knowledge counts. *See* Appellees' Br. at 36, n.9.

Because the district court erred as a matter of law in measuring the delay and whether there was an excuse, it abused its discretion. Because it failed to consider relevant factors, such as the legal standard for accrual of the cause of action, the undisputed knowledge of a factual basis in 2015, the need for the courts to have time to act in an orderly fashion, and the pending 2020 Census, it abused its discretion. And because plaintiffs make no claim that these factors are irrelevant, they wholly fail to defend that abuse, even though they seek to take refuge in it.

Once an abuse of discretion is established, the appellate court owes no deference to the district court and must weigh the relevant factors itself, at least in a situation like this where there is no time for remand or reconsideration by the district court – because of the plaintiffs' delay.

In measuring the delay, the legal standard for the cause of action accruing is objective. It is when a plaintiff knew or reasonably should have known of the cause of action. *White v. Daniel,* 909 F.2d 99, 102 (4th Cir. 1990); *Arizona Minority Coalition for Fair Redistricting v. Arizona Indys. Redistricting Comm'n*, 366 F. Supp. 2d 887, 908 (D. Ariz. 2005); *Fouts v. Harris,* 88 F. Supp. 2d 1352, 1354 (S.D. Fla. 1999), *aff'd*, 529 U.S. 1084 (2000) (ignorance no excuse); *see Elvis Presly Enters. v. Capece*, 141 F.3d 180, 205 (5th Cir. 1998). The district court gave lip service to this standard, but then applied a subjective test concerning knowledge of individual plaintiffs, which was error. ROA.377, RE 5.

It's likely plaintiffs' cause of action accrued in 2012 once the U.S. Department of Justice precleared the 2012 Senate Plan. ROA.1594-95 (D-10). If not in 2012, then it's a certainty that by the 2015 election for SD22, any reasonable person, including each plaintiff, would have known of the present cause of action. Yet, plaintiffs waited almost three additional years to bring their action. For this,

they offer no excuse. Because there is no excuse, the court should cast a critical eye on their assertion of no prejudice.[6]

B. Prejudice to Defendants, the Legislature and this Court

The key deadline in this case is not the first primary election day, but the first day of the candidate qualifying period, which commenced January 2, 2019. By filing suit barely five months from the beginning of this period, plaintiffs virtually guaranteed no way for the parties to litigate the claim in a timely manner so as to not disrupt the longstanding election process.

Without any excuse, plaintiffs set in motion a maddening series of events which included the following:

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

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[6] To be clear, defendants are not urging a broad rule to bar redistricting suits from being filed within any time period before a scheduled election, as asserted by plaintiffs. *See* Appellees' Br. at 34. This assertion by plaintiffs demonstrates their refusal to address the excusable delay prong of the laches test. This is understandable, though, because plaintiffs have never offered any excuse, let alone a reasonable one, for their delay in filing this suit. Defendants recognize and acknowledge that where there is excusable delay, laches will not bar a claim. But, here, plaintiffs have offered no excuse.

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

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

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

* The motions panel of this court then produced 46 pages of opinions within seven days, a compressed time table which left insufficient time for measured consideration of expression. ROA.562.

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

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

* Now this Court has had to entertain an emergency appeal with oral argument scheduled to take place only a week before ballots must be mailed to troops overseas.

This unusual series of events has resulted in manifest prejudice to defendants, election officials, and a host of other parties including the legislature, voters, and prospective candidates. Plaintiffs, whose three-year delay caused all this, basically tell this Court that this tortured process and resulting prejudice doesn't matter. Maybe not to them, but they overlook the precedent they wish to set, which is that, for no reason at all, any voter in the district can cause this kind of turmoil and get away with it.

Neither is there any merit to the claim that defendants suffered no prejudice as a result of plaintiffs' last-minute production of expert data. *See* Appellees' Br. at 37-38. Plaintiffs claim that defendants' contention of prejudice due to this untimely production of Dr. Palmer's precinct analysis is "false and misleading" is, in fact, false and misleading. Appellees' Br. at 37. The expert analysis in question is not Dr. Palmer's expert report but rather his detailed analysis of precincts that he mentioned for the first time in his deposition testimony on January 29, 2019. Two days later – five days before trial – plaintiffs produced that analysis. *See* ROA.1084-90 (P-3). This analysis revealed for the first time that there had been a "significant election administration error" in Bolivar County in the only endogenous election that plaintiffs were relying on to support their claim.[7]

[7] While Secretary Hosemann knew of the wrongful exclusion of votes in 2015, as plaintiffs assert, Appellees' Br. at 38, what he did not know until after receiving plaintiffs' expert analysis

ROA.780:11-12, RE 9. To this day, no one knows what the effect of his omission of 10% of the voters in the district had on his analysis, because even today defendants have not been able to determine its exact effect.

Plaintiffs attempt to minimize the opportunity for prejudice because their suit only contained a single senate district is misplaced. *See* Appellees' Br. at 38. This is irrelevant from a laches determination. Prejudice is prejudice, whether it's to one electoral district or many. Here, merely because the complaint asserted a violation as to one senate district, it had the possibility of affecting any of the eight neighboring districts. In fact, plaintiffs put forth remedial plans that affected multiple districts.[8] ROA.1282 (P-6); ROA.1284 (P-7); ROA.1287 (P-8). Simply because the complaint concerned only SD22 has no bearing on the prejudice to the defendants in defending this suit or to the electoral officials, candidates and voters who still have no idea what district they are in, where they are voting or who they are to vote for—all of which could have been avoided.

In addition, it is not at all clear that the legislature would have done the same thing had it been given more time. While the Mississippi legislature did redraw SD22, it did so under protest and on an expedited basis without the normal and

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was that plaintiffs' expert had simply excluded those two precincts with no attempt to account for them in his analysis.

[8] The remedial plan ultimately adopted by the district court affected two senate districts, at least 23 precincts, over 27,000 voters, four counties, and split two counties that had been whole since 2002. ROA.864-68; ROA.1281 (P-6). This is quite a significant effect for an allegedly simple, single district challenge.

ordinary process it should have been afforded had plaintiffs brought this suit. If the number of African American senators was the problem, as the district court thought, some other plan might have provided a better remedy. ROA.385-86, RE 5. If more time had been allowed, the legislature could have taken into account all of the necessary redistricting factors, including the impact on other districts and the need to redistrict elsewhere. In a more timely process, the parties could have had a normal trial schedule before the district court and the court could have avoided fashioning an ungainly remedy that required appellate correction.

Laches is inevitably a fact-specific determination, but where a three-year inexcusable delay has been established, coupled with the kind of turmoil visited here on the body politic and judicial, laches should be found. The precedents set by *White*, *Fouts*, *Arizona Min. Coalition* and *Maxwell v. Foster,* 1999 WL 33507675 (W.D. La. Nov. 24, 1999), and *Chestnut v. Merrill*, _ F. Supp. 3d __, 2019 WL 1376480 (N.D. Ala. March 27, 2019), discussed more fully in the Brief of Appellants at 22-28, all support the relevance of each of the items of prejudice listed above.

Because the district court erred as a matter of law and failed to consider all relevant factors, it abused its discretion by refusing to dismiss the case based on laches. And because it is now too late to remand to that court for reconsideration, this Court should find laches and vacate the decision of the district court. When the

legislature redistricts after the 2020 Census, it can give the district court's vacated opinion on the merits due consideration, but the message will be sent that this kind of sloth and haste approach will not be condoned.

III. The Court erred as a matter of law by finding that SD22 violates the results test of § 2.

Plaintiffs remain unable to cite 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. Nothing in the language of § 2 or any precedent suggests that such a rule should now be established.[9]

Plaintiffs' only attempt at persuading otherwise is yet another at-large districting case from the Eighth Circuit, *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist*., 894 F. 3d 924 (8th Cir. 2018). The "district" in that case was a school district that elected its board at-large. *Id.* at 930. There is a difference in finding a § 2 violation in an at-large system of elections versus a single-member system. The Supreme Court has instructed that *Thornburg v.*

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[9] 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 SD22 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."

Gingles, 478 U.S. 30 (1986) must be applied with the understanding that at-large plans "generally pose greater threats to minority-voter participation in the political process than do single-member districts." *Growe v. Emison,* 507 U.S. 25, 40 (1993). In examining single-member districts, "factfinders cannot rest uncritically on assumptions about the force of the *Gingles* factors in pointing to dilution." *Johnson v. DeGrandy*, 512 U.S. 997, 1013 (1994). That is why § 2 requires plaintiffs to show that additional majority-minority districts can be created. *Id.* at 1008.

Jeffers v. Beebe, 895 F. Supp. 2d 920, 932 (E.D. Ark. 2012), squarely held that § 2 cannot require increases to a black-majority district under *Bartlett v. Strickland*, 556 U.S. 1, 18-20 (2009). That is because *Gingles*, 478 U.S. at 50, requires a showing that a group is "sufficiently large," and *Bartlett*, 556 U.S. at 18, set sufficiency at "50 percent." *Bartlett*, then, may have rejected the possibility "for a citizen voting-age majority to lack real electoral opportunity." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 428 (2006).[10]

Whether or not *Bartlett* negated the *Perry dictum,* this Court need not go so far as to adopt the apparent *per se* rule of *Jeffers,* and appellants have never so suggested. Whatever the facts might show in an extreme case, the district court here gave no reason to believe that this BVAP majority is so illusory as to justify

[10] Plaintiffs completely ignore the holding of *Perry*, 548 U.S at 430, following *DeGrandy,* 512 U.S. at 1008, that plaintiffs must prove that a new majority-minority district can be created.

§ 2 relief for the first time anywhere.[11] The two old cases upon which plaintiffs rely, unlike this one, contain clear demonstrations that, in the words of § 2(b), "the political processes leading the nomination or election in the state or political subdivision are not equally open to participation by" black voters.

Unlike this case, plaintiffs in *Moore v. Leflore County Board of Election Commissioners*, 502 F.2d 621 (5th Cir. 1974), proved unconstitutional intentional discrimination against black voters. After the Court found "unconstitutional malapportionment," the County submitted a single-member district plan, which the Court found to have both the purpose and effect of diluting black votes. *Id.* at 623. Because the record showed that "most of Leflore County's blacks were prevented from registering to vote by a variety of discriminatory, unconstitutional, state law devices," this Court upheld the rejection of the County's plan because, "by retaining the barest of black population majorities, it enhanced the possibility of continued black political impotence." *Id.* at 624. The district court adopted a different remedial plan, which plaintiffs attacked, as did these plaintiffs, for not being black enough. Four districts had black population majorities, but only three had black registered voter majorities, which plaintiffs claimed to "constitute[] a dilution of their voting strength." *Id.* at 625. Rejecting the argument, this Court

[11] The principal recent single-member district authority upon which plaintiffs rely held that "nothing more than a simple majority is necessary to satisfy the first *Gingles* factor." *Pope v. Cty. of Albany*, 687 F.3d 565, 577 (2d. Cir. 2012) (citing *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1117 (5th Cir. 1991)).

noted that "blacks have substantial voting age majorities in four of five districts," so that plan would achieve fairness when blacks "now and in the future register in numbers approaching their full potential." *Id.* at 626.

The same expectation of the removal of barriers was carefully discussed in *Monroe v. City of Woodville,* 881 F.2d. 1327 (5th Cir. 1989), in which this Court rejected a contention that at-large elections injured the black majority. This Court acknowledged that a black majority might in some circumstances suffer vote dilution, but the "[u]nimpeachable authority," *id.* at 1333, which it cited was *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub. nom. East Carroll Parish School Board v. Marshall,* 424 U.S. 636 (1976), in which "the black majority had recently been freed from literacy tests and impediments to voting registration." *Monroe,* 881 F.2d at 1333. This Court continued, "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." *Id.*

No such case has been assembled against this minority-majority single-member district. The record shows that blacks now register to vote at a higher rate than whites in Mississippi, ROA.1642 (Table 1) (D-14), and there is no evidence that SD22 is any different. Plaintiffs have failed to prove anything close to an

inability of the majority in SD22 to effectively participate in the political process. To the contrary, the proof establishes that plaintiffs themselves have registered to vote, actively participated in the political process for many years, and even achieved elective office. ROA.357-59, RE 5. Further, the proof establishes that more African-Americans are elected to public office in Mississippi than any other state in the Union. ROA.1642, n.3 (D-16). In this regard, the proof also establishes that African-Americans are frequently being elected to public offices throughout SD22. ROA.369-70, RE 5; ROA.1641, ¶6 (D-16). Indeed, the success of blacks in elections elsewhere in Wilkinson County, *Monroe*, 881 F.2d at 1334, was one reason the Court found "no discernible structural impediment to black success at the polls. *Id.* at 1335. Today's Mississippi is very different than the Mississippi of 1974.

Plaintiffs rely on their expert to support disregarding Census Bureau findings that black turnout exceeds white turnout in Mississippi. Appellees' Br. at 51. He said:

> And so we see here, estimate from the even-numbered year federal elections. It does not reflect actual turnout from odd-numbered year state senate elections. Second, this is statewide data, and so it's not looking at the actual voters of Senate District 22. And then third is a well-documented pattern in survey research of people over reporting their voting behavior on surveys taken after the election.

ROA.764-65. Unless black voters overreport their voting to a greater extent than white voters, their relative position would be unchanged, and plaintiffs offered no such evidence. Likewise, they offered no evidence to compare turnout levels in the years of state or federal elections, although this Court has previously recognized evidence that black turnout increases in odd-numbered-years. *N.A.A.C.P. v. Fordice*, 252 F.3d 361, 368 n.1 (5th Cir. 2001). Their argument at trial was that SD22 is different from the rest of the State.

The Court described the 2003, 2007, and 2015 Senate elections as "the 'endogenous' elections most relevant to this case," ROA.363, RE 5, but the 2003 and 2007 elections were held under different SD22 boundaries, and the 2015 vote totals *excluded* votes from two SD22 precincts and *included* votes from two non-SD22 precincts, excluding 10% of the vote from the analysis. ROA.775-79, RE 9. Instead of analyzing earlier elections under reconstituted election analysis, as described in *Rodriguez v. Bexar County*, 385 F.3d 853, 861 (5th Cir. 2004), plaintiffs chose to stake their entire case on a single "endogenous" election missing 10% of the vote.

Plaintiffs assert that a single election was found insufficient in *Rangel v. Morales*, 8 F.3d 242 (5th Cir. 1993), only because this Court found it to have been outweighed by "five statewide judicial elections where minority candidates won in the territory governed by the judicial district under challenge." Appellees' Br. at

52, n.17. That is a peculiar distinction to draw here, where multiple black candidates have won judicial elections in the territory covered by SD22. *Magnolia Bar Ass'n v. Lee*, 944 F.2d 1143 (5th Cir. 1993).

Finally, plaintiffs claim that proof of depressed turnout is not essential in considering the totality of the circumstances. Appellees' Br. at 54. In *Clark v. Calhoun County*, 88 F.3d 1393, 1396 (5th Cir. 1996), the district court made no finding on depressed participation, but this Court found enough proof of other factors to justify relief. Because plaintiffs here did not prove depressed turnout, their only factor is that plaintiff Joseph Thomas lost the 2015 Senate election. Given plaintiffs' reliance on the district court's assertion that it should consider evidence in SD22, rather than statewide evidence, Appellees' Br. at 51, they can take no support from anything that might have happened in the other 51 districts in 2015 or any other year. Plaintiff Thomas has failed to show that a violation of § 2 cost him the election in 2015, and he is entitled to no relief.

Section 2(b) of the Voting Rights Act requires plaintiffs, who are black, to prove, "based on a 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 have failed to meet this burden of proof and the district court committed clear error in so holding.

IV. The district court's mandatory injunction imposing a redistricting plan has not been vacated, thus review of its error is not moot.

Plaintiffs make no attempt to defend the unprecedented and unlawful act of the district court imposing a judicial remedy without either affording to the legislature a reasonable opportunity to act, or affording to defendants an opportunity to be heard on the remedy and imposing a plan with no finding that the plan comports with state redistricting principles. Instead of addressing the merits of this assignment of error, plaintiffs argue the "claim of error is moot" because following the imposition of the court-imposed plan, the legislature exercised its authority to adopt a plan. Appellees' Br. at 55.

Plaintiffs' argument ignores the fact that the district court's mandatory injunction requiring the upcoming election be conducted pursuant to the court-imposed plan has been stayed by order of this Court, not vacated. As the Supreme Court has recognized: "An injunction issued by a court acting within its jurisdiction must be obeyed until the injunction is vacated or withdrawn." *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983) (citing *Walker v. City of Birmingham,* 388 U.S. 307, 313–14 (1967); *United States v. United Mine Workers,* 330 U.S. 258, 293–94 (1947); *Howat v. Kansas,* 258 U.S. 181, 189–90 (1922)). Thus, because the district court's mandatory injunction has been neither

vacated, nor withdrawn, it remains in effect and this assignment of error is not moot.[12]

Alternatively, as this Court recognized in *Moore v. Hosemann*, 591 F.3d 741 (5th Cir. 2009): "An important exception to the mootness doctrine, however, is attacks on practices that no longer directly affect the attacking party, but are capable of repetition while evading review." *Id.* at 744 (internal quotations and citations omitted). In applying this exception, the *Moore* Court stated (1) "[e]lection controversies are paradigmatic examples of cases that cannot be fully litigated before the particular controversy expires," and (2) even if the parties to this case would not be affected again by the unlawful practice "precedent suggest[s] that [the] case [was] not moot, because other individuals certainly [would] be affected by the continuing existence" of the challenged practice." *Id.* (citations omitted).

The challenged practice is the imposition a judicial redistricting plan without affording to the legislature a reasonable opportunity to act or affording to

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[12] Unless vacated, the injunction will have to be followed in any special election held between now and 2023. If plaintiffs are correct that the injunction is moot, then this Court should order that it be vacated to clarify any confusion. When an order becomes moot at any point in litigation, it must be vacated and dismissed. *See, e.g., In re Cress*, 972 F.2d 351, *3 (7th Cir. 1992) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 482 (1990) (The "ordinary practice in disposing of a case that has become moot on appeal is to vacate the judgment with directions to dismiss."); *see also Center for Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d 794, 806 (9th Cir. 2009) (holding that because the ESA claims have become moot, the judgment of the district court should be vacated and the case remanded with directions to dismiss).

defendants an opportunity to be heard on remedy. That this happened in this case is by itself sufficient prejudice for the purpose of establishing laches.

This challenged practice is capable of repetition in future cases arising under § 2 of the Voting Rights Act affecting registered voters in Mississippi unless addressed by this Court. Further, the future action of the legislature to address the subsequent application of the challenged practice (i.e., adoption of a legislative redistricting plan) would have the effect of perpetuating the challenged practice while eliminating the possibility of appellate review. The mootness doctrine should not be used as a sword to prevent appellate review of a legal error committed in a Voting Rights Act case. Thus, the Court should apply this important exception to the mootness doctrine to the case at bar.[13]

The unrebutted authority cited in defendants' opening brief establishes that the district court erred by imposing a remedy without affording to the legislature a reasonable opportunity to act and without conducting a remedial hearing and making specific findings of fact. Further, plaintiffs do not dispute that the effect of the judicially-imposed plan is the court-sanctioned "cracking" of minority voters in neighboring Senate District 23 and the "packing" of minority voters in SD22 based

[13] While the issue of mootness was not directly addressed in *Rodriguez*, after the Court found that plaintiffs failed to meet their burden of proof to establish a § 2 violation, the Court went on to review the remedy imposed by the district court and held it was "an abuse of discretion." 385 F.3d. at 870. In so doing, the *Rodriquez* court implicitly recognized the application of the capable of repetition yet evading review exception to the mootness doctrine in a § 2 case.

solely on race. Accordingly, the district court's February 26, 2019 order imposing its remedial plan and the final judgment incorporating the order should be vacated.

CONCLUSION

As Judge Clement correctly recognized, this case presents "several extraordinary issues." *Thomas*, 919 F.3d at 325 (Clement, J., dissenting). First, 28 U.S.C. 2284(a) is jurisdictional, and the district court erred by failing to convene a three-judge court to hear this challenge to the apportionment of SD22. Second, when the correct legal standard is applied, plaintiffs' § 2 claim is barred by laches as plaintiffs' delay in asserting their claim is inexcusable and resulted in prejudice to defendants. Third, no court has ever held that a single majority-minority district violates § 2, and plaintiffs failed to offer sufficient evidence to establish the inability of the minority voters in SD22 to effectively participate in the political process. Fourth, it is undisputed that the district court erred when imposing a remedy, a remedy that has not been vacated. Thus, defendants respectfully request that the Court vacate the final judgment of the district court with directions to dismiss the complaint.

This the 13th day of May, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

This the 13th day of May, 2019.

s/ Tommie S. Cardin
TOMMIE S. CARDIN

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains **5,534** words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times Roman font.

s/ Tommie S. Cardin
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