IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 11-60446

HANCOCK COUNTY BOARD OF SUPERVISORS,

Plaintiff

v.

KAREN LADNER RUHR, in her official capacity as Hancock County Circuit Clerk and Hancock County Registrar; ET AL,

Defendants

JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi

Intervenor Defendant - Appellee

HAZLEHURST, MISSISSIPPI BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on behalf of themselves and all others similarly situated; NANETTE THURMOND-SMITH,

Plaintiffs - Appellants

v.

COPIAH COUNTY, MISSISSIPPI BOARD OF SUPERVISORS; COPIAH COUNTY, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE; COPIAH COUNTY, MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE; COPIAH COUNTY, MISSISSIPPI BOARD OF ELECTION COMMISSIONERS; EDNA STEVENS, in her official capacity as Circuit Clerk,

Defendants - Appellees

REPLY BRIEF FOR APPELLANTS

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**Leonard McClellan, Esq., MSB #2221
**Mr. McClellan died on September 20, 2011

JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi

Intervenor Defendant - Appellee

REVEREND FRANK LEE; PIKE COUNTY, MISSISSIPPI BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on behalf of themselves and all others similarly situated,

Plaintiffs - Appellants

v.

PIKE COUNTY, MISSISSIPPI BOARD OF SUPERVISORS; PIKE COUNTY, MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE; PIKE COUNTY, MISSISSIPPI BOARD OF ELECTION COMMISSIONERS; ROGER GRAVES, in his official capacity as Circuit Clerk; PIKE COUNTY, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE,

Defendants - Appellees

JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi

Intervenor Defendant - Appellee

SIMPSON COUNTY, MISSISSIPPI BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on behalf of themselves and all others similarly situated; L. J. CAMPER, on behalf of themselves and all others similarly situated,

Plaintiffs - Appellants

v.

SIMPSON COUNTY, MISSISSIPPI BOARD OF SUPERVISORS; SIMPSON COUNTY, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE; SIMPSON COUNTY, MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE; SIMPSON COUNTY, MISSISSIPPI BOARD OF ELECTION COMMISSIONERS; CINDY JENSEN, in her official capacity as Circuit Clerk,

Defendants - Appellees

JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi

Intervenor Defendant - Appellee

AMITE COUNTY, MISSISSIPPI BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on Behalf of Themselves and all others Similarly Situated; GLENN WILSON, on Behalf of Themselves and all others Similarly Situated,

Plaintiffs - Appellants

v.

AMITE COUNTY, MISSISSIPPI BOARD OF SUPERVISORS; AMITE COUNTY, MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE; AMITE COUNTY, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; AMITE COUNTY, MISSISSIPPI BOARD OF ELECTION COMMISSIONERS; SHARON WALSH, in Her Official Capacity as Circuit Clerk,

Defendants - Appellees

JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi

Intervenor Defendant - Appellee

WAYNE COUNTY, MISSISSIPPI BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on Behalf of Themselves and all Others Similarly Situated; LEAH PARSON, on Behalf of Themselves and all Others Similarly Situated,

Plaintiffs - Appellants

v.

WAYNE COUNTY, MISSISSIPPI BOARD OF SUPERVISORS; WAYNE COUNTY, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE; WAYNE COUNTY, MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE; WAYNE COUNTY, MISSISSIPPI BOARD OF ELECTION COMMISSIONERS; ROSE BINGHAM, in her official Capacity as Circuit Clerk,

Defendants - Appellees

JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi

Intervenor Defendant - Appellee

VICKSBURG, MISSISSIPPI BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on Behalf of Itself and all Others Similarly Situated,

Plaintiffs - Appellants

v.

WARREN COUNTY, MISSISSIPPI BOARD OF SUPERVISORS; WARREN COUNTY,

MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE; WARREN COUNTY, MISSISSIPPI BOARD OF ELECTION COMMISSIONERS; SHELLY ASHLEY-PALMERTREE, in his official Capacity as Circuit Clerk,

Defendants - Appellees

JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi

Intervenor Defendant - Appellee

CLAIBORNE COUNTY, MISSISSIPPI BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on Behalf of Itself and all Others Similarly Situated; LEAH PARSON, on Behalf of Themselves and all Others Similarly Situated,

Plaintiffs - Appellants

v.

CLAIBORNE COUNTY, MISSISSIPPI BOARD OF SUPERVISORS; CLAIBORNE COUNTY, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE; CLAIBORNE COUNTY, MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE; CLAIBORNE COUNTY, MISSISSIPPI BOARD OF ELECTION COMMISSIONERS; SAMMIE GOOD, in her official Capacity as Circuit Clerk,

Defendants - Appellees

JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi

Intervenor Defendant - Appellee

ADAMS COUNTY, MISSISSIPPI BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on Behalf of Themselves and all Others Similarly Situated; LEAH PARSON, on Behalf of Themselves and all Others Similarly Situated,

Plaintiffs - Appellants

v.

ADAMS COUNTY, MISSISSIPPI BOARD OF SUPERVISORS; ADAMS COUNTY, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE; ADAMS COUNTY, MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE; ADAMS COUNTY, MISSISSIPPI BOARD OF ELECTION COMMISSIONERS; EDWARD WALKER, in his official Capacity as Circuit Clerk,

Defendants - Appellees

JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi

Intervenor Defendant - Appellee

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 11-60446

HANCOCK COUNTY BOARD OF SUPERVISORS, ET AL,

Plaintiff

v.

KAREN LADNER RUHR, in her official capacity as Hancock County Circuit Clerk and Hancock County Registrar; ET AL,

Defendants

JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi

Intervenor Defendant - Appellee

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Hazlehurst, Mississippi Branch of the NAACP and Nanette Thurmond-Smith, on behalf of themselves and all others similarly situated - plaintiffs-appellants.

2. Pike County, Mississippi Branch of the NAACP and Rev. Frank Lee, on behalf of themselves and all others similarly situated - plaintiffs-appellants.

3. Simpson County, Mississippi Branch of the NAACP and L. J. Camper, on behalf of themselves and all others similarly situated - plaintiffs-appellants.

4. Amite County, Mississippi Branch of the NAACP and Glenn Wilson, on behalf of themselves and all others similarly situated - plaintiffs-appellants.

5. Wayne County, Mississippi Branch of the NAACP and Leah Parson, on behalf of themselves and all others similarly situated - plaintiffs-appellants.

6. Vicksburg, Mississippi Branch of the NAACP, on behalf of itself and all others similarly situated - plaintiff-appellant.

7. Claiborne County, Mississippi Branch of the NAACP, on behalf of itself and all others similarly situated - plaintiff-appellant.

8. Adams County, Mississippi Branch of the NAACP and Jacqueline Marsaw, on behalf of themselves and all others similarly situated - plaintiffs-appellants.

9. Jim Hood, Attorney General for the State of Mississippi, ex rel. the State of Mississippi - defendant-intervenor.

10. Carroll Rhodes, Esq., Deborah McDonald, Esq., and Leonard McClellan, Esq.,* counsel for plaintiffs-appellants - Hazlehurst, Mississippi Branch of the NAACP and Nanette Thurmond-Smith, on behalf of themselves and all others similarly situated; Pike County, Mississippi Branch of the NAACP and Rev. Frank Lee, on behalf of themselves and all others similarly situated; Simpson County, Mississippi Branch of the NAACP and L. J. Camper, on behalf of themselves and all others similarly situated; Amite County, Mississippi Branch of the NAACP and Glenn Wilson, on behalf of themselves and all others similarly situated; Wayne County, Mississippi Branch of the NAACP and Leah Parson, on behalf of themselves and all others similarly situated; Vicksburg, Mississippi Branch of the NAACP, on behalf of itself and all others similarly situated; Claiborne County, Mississippi Branch of the NAACP, on behalf of itself and all others similarly situated; and Adams County, Mississippi Branch of the NAACP and Jacqueline Marsaw, on behalf of themselves and all others similarly situated.

11. Copiah County, Mississippi Board of Supervisors, Copiah County, Mississippi Democratic Party Executive Committee, Copiah County, Mississippi Republican Party Executive Committee, Copiah County, Mississippi Board of Election Commissioners, and Edna Stevens, in her official capacity as Circuit Clerk - defendants-appellees.

12. Pike County, Mississippi Board of Supervisors, Pike County, Mississippi Democratic Party Executive Committee, Pike County, Mississippi Republican Party Executive Committee, Pike County, Mississippi Board of Election Commissioners, and Roger Graves, in his official capacity as Circuit Clerk - defendants-appellees.

13. Simpson County, Mississippi Board of Supervisors, Simpson County, Mississippi Democratic Party Executive Committee, Simpson County, Mississippi Republican Party Executive Committee, Simpson County, Mississippi Board of Election Commissioners, and Cindy Jensen, in her official capacity as Circuit Clerk - defendants-appellees.

*Leonard McClellan, Esq. died on September 20, 2011.

14. Amite County, Mississippi Board of Supervisors, Amite County, Mississippi Democratic Party Executive Committee, Amite County, Mississippi Republican Party Executive Committee, Amite County, Mississippi Board of Election Commissioners, and Sharon Walsh, in her official capacity as Circuit Clerk - defendants-appellees.

15. Wayne County, Mississippi Board of Supervisors, Wayne County, Mississippi Democratic Party Executive Committee, Wayne County, Mississippi Republican Party Executive Committee, Wayne County, Mississippi Board of Election Commissioners, and Rose Bingham, in her official capacity as Circuit Clerk - defendants-appellees.

16. Warren County, Mississippi Board of Supervisors, Warren County, Mississippi Democratic Party Executive Committee, Warren County, Mississippi Republican Party Executive Committee, Warren County, Mississippi Board of Election Commissioners, and Shelly Ashley-Palmertree, in his official capacity as Circuit Clerk - defendants-appellees.

17. Claiborne County, Mississippi Board of Supervisors, Claiborne County, Mississippi Democratic Party Executive Committee, Claiborne County, Mississippi Republican Party Executive Committee, Claiborne County, Mississippi Board of Election Commissioners, and Sammie Good, in her official capacity as Circuit Clerk - defendants-appellees.

18. Adams County, Mississippi Board of Supervisors, Adams County, Mississippi Democratic Party Executive Committee, Adams County, Mississippi Republican Party Executive Committee, Adams County, Mississippi Board of Election Commissioners, and Edward Walker, in his official capacity as Circuit Clerk - defendants-appellees.

19. Elise Berry Munn, Esq., Michael G. Berry, Esq., and Berry & Munn, P.A. - counsel for defendants-appellees - Copiah County, Mississippi Board of Supervisors, Copiah County, Mississippi Democratic Party Executive Committee, Copiah County, Mississippi Republican Party Executive Committee, Copiah County, Mississippi Board of Election Commissioners, and Edna Stevens, in her official capacity as Circuit Clerk.

20. Wayne Dowdy, Esq., and Dowdy & Cockerham - counsel for defendant-appellee - Pike County, Mississippi Board of Supervisors.

21. Alfred Lee Felder, Esq. - counsel for defendant-appellee - Pike County, Mississippi Democratic Party Executive Committee.

22. Benjamin E. Griffith, Esq., Daniel J. Griffith, Esq., Michael S. Carr, Esq., Griffith & Griffith, and Robert Daniel Welch, Esq. - counsel for defendant-appellee - Simpson County, Mississippi Board of Supervisors, Simpson County, Mississippi Board of Election Commissioners, and Cindy Jensen, in her official capacity as Circuit Clerk.

23, Benjamin E. Griffith, Esq., Griffith & Griffith, Charles Martin Leggett, Esq., Cooper Martin Leggett, Esq., and Leggett Law Office, PLLC - counsel for defendant-appellee - Wayne County, Mississippi Board of Supervisors and Rose Bingham, in her official capacity as Circuit Clerk.

24. Benjamin E. Griffith, Esq., Daniel J. Griffith, Esq., Michael S. Carr, Esq., Griffith & Griffith, and James R. Sherard, Esq. - counsel for defendant-appellee - Warren County, Mississippi Board of Supervisors, Warren County, Mississippi Board of Election Commissioners, and Shelly Ashley-Palmertree.

25. Tommie S. Cardin, Esq., Leslie Scott, Esq., John H. Dollarhide, Esq., and Butler, Snow, O'Mara, Stevens & Cannada - counsel for defendants-appellees - Amite County, Mississippi Board of Supervisors and Claiborne County, Mississippi Board of Supervisors.

26. Bryan H. Callaway, Esq., - counsel for defendants-appellees - Adams County, Mississippi Board of Supervisors, Adams County, Mississippi Board of Election Commissioners, and Edward Walker, in his official capacity as Circuit Clerk.

27. Bobby L. Cox, Esq., and Truly, Smith & Latham - counsel for defendant-appellee - Adams County, Mississippi Democratic Party Executive Committee.

28. Honorable Jim Hood, Harold Edward Pizetta, III, Esq., and Justin L. Matheny, Esq., - counsel for defendant-intervenor - JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi.

/s/ Carroll Rhodes
CARROLL RHODES
COUNSEL OF RECORD FOR
PLAINTIFFS-APPELLANTS

TABLE OF CONTENTS

PAGE(S)

Certificate of Interested Persons . . . . I-vi

Table of Contents . . . . vii-viii

Table of Authorities . . . . ix-xi

Statement of Issues Raised by Appellees 1

a. Is an equal population claim established when a new census establishes that the total range of population deviation in current election districts that have been in existence for 10 years or more greatly exceeds 10% and county officials do not have sufficient time to complete the task of redistricting prior to the candidate qualification deadline although they have sufficient time to complete the task of redistricting prior to the primary and general elections? 1

b. When a plaintiff in an overpopulated and malapportioned district timely files an equal population claim prior to the date of the election but there is insufficient time to redistrict prior to the election, should the election results be set aside and new elections ordered? 1

c. Did the NAACP allege facts to establish its standing? 1

Argument in Reply to Statement of Issues Raised by Appellees 1

a. An equal population claim is established when a new census establishes that the total range of population deviation in current election districts that have been in existence for 10 years or more greatly exceeds 10% and county officials do not have sufficient time to complete the task of redistricting prior to the candidate qualification deadline although they have sufficient time to complete the task of redistricting prior to the primary and general elections 1-13

b. When a plaintiff in an overpopulated and malapportioned district timely files an equal population claim prior to the date of the election but there is insufficient time to redistrict prior to the election, the election results should be set aside and new elections ordered 13-14

c. The NAACP alleged facts to establish its standing 14-15

Conclusion 15

Certificate of Service 16-19

Certificate of Compliance 20

TABLE OF AUTHORITIES

CASE(S) **PAGE(S)**

Bryant v. Lawrence County, Mississippi, 814 F. Supp. 1346 (S. D. Miss. 1993) 4, 5, 6, 9, 12, 13

Common Cause/Georgia v. Billups, 554 F. 3d 1340 (11th Cir. 2009) 15

*Fairley v. Forrest County, Mississippi*814 F. Supp. 1327 (S. D. Miss. 1993) 4, 8, 9, 13

Fairley v. Patterson, 493 F. 2d 598 (5th Cir. 1974) 15

French v. Boner, 963 F. 2d 890 (6th Cir. 1992), *cert. denied*, 506 U. S. 954 . . . . 5, 9, 11, 13

Howard v. Adams County Board of Supervisors, 453 F. 2d 455 (5th Cir. 1972) 9

Keller v. Gilliam, 454 F. 2d 55 (5th Cir. 1972) 9, 10

Larios v. Cox, 305 F. Supp. 2d 1335 (N. D. Ga. 2004) (three-judge court) (per curiam) 3

Louisiana v. N.A.A.C.P., 366 U. S. 293, 81 S. Ct. 1333, 6 L. Ed. 2d 301 (1961) 15

Lujan v. Defenders of Wildlife, 504 U. S. 555, 112 S. Ct. 2130 (1992) 15

Martinolich v. Dean, 256 F. Supp. 612 (S. D. Miss. 1966) 10

Mississippi State Conference of the NAACP v. Barbour, 2011 WL 1870222 (S. D. Miss. 2011) (three-judge court) 4, 11, 12

N.A.A.C.P. v. State of Alabama, 357 U. S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958) 15

Political Action Conference of Illinois v. Daley, 976 F. 2d 335 (7th Cir. 1992) 4, 5, 9, 10, 13

Reno v. Bossier Parish School Board, 520 U. S. 471, 117 S. Ct. 1491 (1997) 3

Reynolds v. Sims, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) 10

Republican Party of Oregon v. Keisling, 959 F. 2d 144 (9th Cir. 1992) (per curiam) 5, 12

Taylor v. Monroe County Board of Supervisors, 421 F. 2d 1038, 1039 (5th Cir. 1970) 9

Texas Democratic Party v. Benkiser, 459 F. 3d 582 (5th Cir. 2006) 15

Tucker v. Buford, 603 F. Supp. 276 (N. D. Miss. 1985) 6, 7, 9, 13, 14

Watkins v. Mabus, 771 F. Supp. 789 (S. D. Miss. 1991) (three-judge court) (per curiam), *aff'd, in part, and vacated, in part*, 502 U. S. 954 . . . . 7, 8, 9, 11, 12, 13, 14

Wyche v. Madison Parish Police Jury, 635 F. 2d 1151 (5th Cir. 1981) 6

Statutes and Other Authorities:

42 U. S. C. § 1973(c) **6**

Art. 13, § 254, Miss. Const. (1890) 4

STATEMENT OF ISSUES RAISED BY APPELLEES

The defendants-appellees (hereinafter referred to as "appellees") have raised the following issues:

1. Is an equal population claim established when a new census establishes that the total range of population deviation in current election districts that have been in existence for 10 years or more greatly exceeds 10% and county officials do not have sufficient time to complete the task of redistricting prior to the candidate qualification deadline although they have sufficient time to complete the task of redistricting prior to the primary and general elections?

2. When a plaintiff in an overpopulated and malapportioned district timely files an equal population claim prior to the date of the election but there is insufficient time to redistrict prior to the election, should the election results be set aside and new elections ordered?

3. Did the NAACP allege facts to establish its standing?

ARGUMENT IN REPLY

Plaintiffs submit this reply to the argument and issues raised by appellees. The reply addresses each issue separately.

1. An equal population claim is established when a new census establishes that the total range of population deviation in current election districts that have been in existence for 10 years or more greatly exceeds 10% and county officials do not have sufficient time to complete the task of redistricting prior to the candidate qualification deadline although they have sufficient time to complete the task of redistricting prior to the primary and general elections.

Appellees argue that an equal population claim is not established when a new census shows that the total range of population deviation in current election districts that have been in existence for 10 years or more greatly exceeds 10% and county officials do not have sufficient time to complete the task of redistricting prior to the candidate qualification deadline although they have sufficient time to complete the task of redistricting prior to the primary and general elections. However, the facts and law indicate that an equal population claim is established under this scenario.

Appellees correctly state that current supervisor districts were adopted "following the 2000 decennial Census and subsequently pre-cleared by [the] Department of Justice." [Brief for Appellees, p. 11]. Plaintiffs-Appellants (hereinafter referred to as "plaintiffs) alleged in their complaints that the apportionment scheme in each county was "unconstitutionally malapportioned." [R. 528, 587, 607, 625, 750, 771, 792, 809, R. E. 110a, 121a, 130a, 140a, 150a, 160a, 170a, 180a, Tabs 12-19]. The total range of population deviation in each of the eight counties, according to the 2010 decennial census, greatly exceeded 10%. [R. 521-531, 580-589, 601-609, 618-627, 743-752, 764-773, 785-794, 802-811, R. E. 103a-182, Tabs 12-19]. In essence, plaintiffs alleged that the last redistricting occurred more than 10 years ago and current election districts are significantly malapportioned.

The 2010 census data was published one month prior to the candidate

qualification deadline, six months prior to party primaries, and eight months prior to the general election. Appellees correctly state that the 2010 census data was released on February 4, 2011. [Brief for Appellees, p. 3]. The candidate qualification deadline was March 1, 2011, political party primaries were held on August 2, 2011 with run-offs held on August 23, 2011, and a general election was held on November 2, 2011.

Appellees argue that plaintiffs complain that the boards of supervisors failed to redistrict "in time for the March 1, 2011 candidate qualifying deadline..."[1] [Brief of Appellees, pp. 13-14]. However, that is not plaintiffs' complaint. Plaintiffs complain that the boards of supervisors failed to redistrict prior to the actual election dates of August 2 and November 8, 2011. [R. 521-531, 580-589, 601-609, 618-627,

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[1]Both appellees and the district court misconstrued plaintiffs' constitutional challenge as a challenge to the state statute that established the candidate qualification deadline. However, that was not plaintiffs' constitutional challenge. Their challenge was to having elections in August and November, 2011 under schemes that were grossly malapportioned. They requested an injunction to enjoin the elections under the malapportioned schemes. Plaintiffs also requested, as an ancillary remedy, an extension of the candidate qualification deadline to enable the boards of supervisors to redistrict in time for the August and November, 2011 elections.

Appellees also argue that any new redistricting plans would not have been precleared in time for elections because of the preclearance process and the United States Department of Justice's timetable for reviewing any new plans. [Brief of Appellees, pp. 30-31]. However, appellees fail to recognize that although the Justice Department has 60 days to review plans after a submission has been completed and an additional 60 days after an incomplete submission has been made complete, the Department may review plans on an expedited basis. See, *Larios v. Cox*, 305 F. Supp. 2d 1335 (N. D. Ga. 2004) (three-judge court) (per curiam). Furthermore, the burden of making a timely complete submission was on the boards of supervisors. See, *Reno v. Bossier Parish School Board*, 520 U. S. 471, 117 S. Ct. 1491 (1997). The best evidence that the Department of Justice could have reviewed and precleared plans prior to the primaries is the Department's preclearance of Madison County's redistricting plan. That plan was precleared and used in the August primaries and November general election.

743-752, 764-773, 785-794, 802-811, R. E. 103a-182, Tabs 12-19].

Appellees argue that the redistricting "process required many months and simply could not be completed in the short time frame available prior to the 2011 elections." [Brief for Appellees, p. 31]. However, the Madison County boards of supervisors was able to complete redistricting and obtain preclearance prior to the primary. Also, each Chamber of the Mississippi Legislature was able to adopt plans reapportioning each Chamber by March 17, 2011.[2] *Mississippi State Conf. NAACP v. Barbour*, 2011 WL 1870222 (S. D. Miss. May 16, 2011) (three-judge district court), *aff'd*, ___ U. S. __, 2011 WL 6118830 (Oct. 31, 2011). There is no evidence that the other county boards of supervisors could not have redistricted and obtained preclearance prior to the election.

Appellees essentially argue that plaintiffs could not establish an equal population claim although new census data established that the total range of population deviation in districts that had been in existence for more than 10 years greatly exceeded 10%. Appellees rely primarily on *Bryant v. Lawrence County, Mississippi*, 814 F. Supp. 1346 (S. D. Miss. 1993); *Fairley v. Forrest County, Mississippi*, 814 F. Supp. 1327 (S. D. Miss. 1993); *Political Action Conference of*

[2]However, the plans were never adopted by a joint resolution of both Chambers as required by the Mississippi Constitution. See, Art. 13, § 254, Miss. Const. (1890).

Illinois v. Daley, 976 F. 2d 335 (7th Cir. 1992); *French v. Boner*, 963 F. 2d 890 (6th Cir. 1992), *cert. denied*, 506 U. S. 954; and *Republican Party of Oregon v. Keisling*, 959 F. 2d 144 (9th Cir. 1992) (per curiam), to support this argument. [Brief for Appellees, pp. 22-34]. However, as discussed below, these cases are distinguishable.

In *Bryant*, the plaintiffs filed a motion for a preliminary injunction "[o]n September 5, 1991, **just twelve days before the regular quadrennial primary**..." *Id*., at 1348. (Emphasis added). The "motion was filed well after the deadline for qualifying for office and during the middle of quadrennial campaigning." *Id*. More importantly, "**[w]ell after the election was over, in July 1992, the [p]laintiffs amended their complaint to challenge the 1991 Plan" on grounds that the plan violated the one-person one-vote principle.** *Id*. (Emphasis added). The district court was faced with the question of whether to shortened the terms of office and order new elections for supervisor? *Id.*, at 1352. In answering this question, the district court held that a board of supervisors "must have a reasonable time after each decennial census in order to develop another plan and have it precleared by the Justice Department." *Id.*, at 1354. The plaintiffs in that case did not request relief in sufficient time before the election. Consequently, the board of supervisors did not have sufficient time to redistrict and obtain preclearance before the election. *Ibid*. Although the district court held that a board of supervisors must have sufficient time

to redistrict after census data is published, the court did not delineate the amount of time required to be considered sufficient. This Court, however, in *Wyche v. Madison Parish Police Jury*, 635 F. 2d 1151 (5th Cir. 1981), indicated that six months after an official census is published is a reasonable amount of time for a governing body to redistrict. The Court concluded:

> Accordingly, we let stand the district court's judgment adopting reapportionment Plan 3. However, if within **six months** from the date the 1980 census data for Madison Parish is officially published, the Police Jury and School Board have not reapportioned themselves, the plaintiffs may apply for further relief.

Id., at 1163. (Emphasis added). Thus, *Bryant* is distinguishable from the instant case. Unlike *Bryant* where the plaintiffs sought relief 12 days before the election, plaintiffs, here, sought relief six months before the primary and eight months before the general election. As indicated in *Wyche*, six months is a reasonable amount of time within which to complete redistricting and obtain Section 5[3] review.

The United States District Court for the Northern District of Mississippi has held that an election held under unconstitutionally malapportioned districts should be set aside when pre-election relief is sought. *Tucker v. Buford*, 603 F. Supp. 276 (N. D. Miss. 1985). In *Tucker*, election districts for members of the board of

[3]42 U. S. C. § 1973c.

supervisors, board of election commissioners, and school board were coterminous. *Tucker v. Buford*, supra, at 277-279. According to the 1980 decennial census, the districts had a total population deviation of 30.96%. *Tucker v. Buford*, supra, at 277. An election for supervisors was held in November, 1983. *Id.*, at 278. The board of supervisors "had ample opportunity to take some corrective action prior to the November, 1983 election." *Id.* However, the board was tardy in its redistricting responsibility. *Id.* Elections for election commissioners were scheduled for November, 1984. *Id.*, at 277-279. Plaintiffs filed suit on October 3, 1984 seeking to set aside the 1983 and 1984 election results and order new elections for supervisors, election commissioners, and school board members. *Id.*, at 277-279. The district court refused to set aside the election results for supervisor candidates because the plaintiffs failed to seek pre-election relief. *Id.*, at 277-279. However, the court set aside the November 6, 1984 general election results. *Id.*, at 279. The court held that "wherein officials were elected from admittedly malapportioned districts, and pre-election relief was sought, the paramount fact is that all persons in Panola County are currently represented by unconstitutionally elected officials." *Id.,* at 279. This holding clearly indicates that candidates elected to office under malapportioned districts cannot serve a full four-year term when pre-election relief is requested. *Id.,* at 279. This holding is identical to the holding in *Watkins v. Mabus*, 771 F. Supp.

789, 804 (S. D. Miss. 1991) (three-judge court) (per curiam), *aff'd, in part, and vacated, in part*, 502 U. S. 954. In *Watkins*, the three-judge district court set aside election results and shortened the term of office for legislators elected in grossly malapportioned districts[4] when plaintiffs had requested pre-election relief.[5] *Watkins v. Mabus*, supra.

In *Fairley*, plaintiffs filed suit "on October 21, 1991, **some two weeks before the November, 1991 elections** were to be held." *Id.*, at 1339. (Emphasis added). However, they did not seek pre-election relief,[6] and the board of supervisors redistricted prior to the election. *Fairley v. Forrest County, Mississippi*, supra, at 1338-1340. The board of supervisors held public hearings, approved the bi-racial committee's redistricting plan, and submitted the plan to the United States Department of Justice for preclearance. *Id.*, at 1338-1340. The district court recognized that this Court ordered special elections in grossly malapportioned

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[4]The total range of population deviation in state house of representative districts was 110.124% and 42.31% in state senate districts. *Watkins v. Mabus*, supra, 790-791.

[5]The candidate qualification deadline was August 12, 1991 Primaries were held on September 17, 1991, and a general election was held on November 5, 1991. *Watkins v. Mabus*, supra, at 791. Plaintiffs filed their complaint between June 24, 1991 and July 2, 1991. *Id.*

[6]Appellees argue that plaintiffs in the instant case did not seek pre-election relief. However, plaintiffs filed motions requesting temporary restraining orders in the Adams, Claiborne, Copiah, Pike, Simpson, and Wayne Counties cases prior to the district court consolidating the cases. Furthermore, plaintiffs requested injunctive relief in all of their complaints and at oral argument on appellees' motion to dismiss.

districts in *Keller v. Gilliam*, 454 F. 2d 55 (5th Cir. 1972), *Howard v. Adams County Board of Supervisors*, 453 F. 2d 455 (5th Cir. 1972), and *Taylor v. Monroe County Board of Supervisors*, 421 F. 2d 1038, 1039 (5th Cir. 1970). See, *Fairley v. Forrest County, Mississippi*, supra, 1340-1341. However, the district court did not order special elections because "[t]he deviation...was relatively minor,"[7] the board of supervisors acted in good faith, and the amount of time involved in the redistricting process prior to the election.[8] *Fairley v. Forrest County, Mississippi*, supra, 1345-1346. In the instant case, the deviation was substantial, the boards of supervisors did not act in good faith,[9] and there was sufficient time to redistrict and obtain preclearance prior to the elections.[10] In that regard, this case is similar to *Watkins v. Mabus*, supra, and *Tucker v. Buford*, supra.

In *Political Action Conference of Illinois*, the State of Illinois enacted statutes

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[7]The district court defined the deviation as *de minimis*. See, *Fairley v. Forrest County, Mississippi*, supra.

[8]Plaintiffs, in that case, filed suit two weeks before the election. The board could not redistrict in two weeks.

[9]The boards of supervisors in the eight counties had not submitted plans for § 5 review prior to the lower court decision. Some of the boards had not drafted plans, held public hearings, or received public input prior to the lower court decision.

[10]A period of six months passed between publication of the census and the primaries. This time frame was more than the time frame for similar actions in *Watkins v. Mabus*, supra; more than the time frame in *Tucker v. Buford*; and substantially more than the time frame in *Bryant v. Lawrence County, Mississippi*, supra, *Fairley v. Forrest County, Mississippi*, supra, *Political Action Conference of Illinois v. Daley*, supra, and *French v. Boner*, supra.

embodying the state policy of periodic redistricting every 10 years with aldermanic elections February every fourth year. *Political Action Conference of Illinois v. Daley*, supra. Pursuant to that statutory policy, "Chicago's aldermanic elections were held on February 26, 1991. *Id.*, at 338. **The 1990 census "figures were released on February 11, 1991, just fifteen days before the February aldermanic election**." *Id.*, at 337-338. (Emphasis added). The Seventh Circuit Court of Appeals, relying on *Reynolds v. Sims*, supra, 377 U. S. at 583-584, held "that the Illinois statutory scheme for reapportionment passes constitutional muster" because that scheme requires decennial reapportionment. *Political Action Conference of Illinois v. Daley*, supra, 339. The Court also held that "[r]edrawing Chicago's ward for that election using the new census data was not possible." *Id.*, at 340. A mere 15 days between the publication of the census and the election was not sufficient time to accomplish the complex task of redistricting. *Id.* The facts in the instant case are distinguishable in several respects. First, in the instant case, the census was published six months before the primary and eight months before the general election. Second, plaintiffs, here, did not challenge the state statutes requiring reapportionment.[11] Third, a three-

[11]The statute requiring redistricting of supervisor districts provides that the board of supervisors "may at any time...change or alter the districts..." § 19-3-1, Miss. Code Ann. (1972). This statute requires supervisors to redistrict when a new census establishes the districts are grossly malapportioned. See, *Keller v. Gilliam*, supra; *Martinolich v. Dean*, 256 F. Supp. 612 (S. D. Miss. 1966).

judge district court has held that legislators elected in malapportioned districts should not hold office for a full four year term when pre-election relief is requested. *Watkins v. Mabus*, supra. Therefore, the case is distinguishable.

In *French*, the 1990 census was released to the City of Nashville in the spring of 1991 and elections were scheduled for August, 1991. *French v. Boner*, supra, at 891. However, "[t]he date was too late for the City to devise and adopt a completely new districting plan and put it into effect with sufficient notice to allow candidates to qualify and campaign prior to the impending August city election." *Id.* Although the time line in *French* is closer to the time line in the instant case than the time line in the other cases relied on by appellees, *Boner* is still distinguishable for several reasons. First, the 2010 census was made available to the counties by February 4, 2011 - long before the spring of 2011. Second, the malapportionment in the instant case was extreme. Third, the candidate qualification deadline for state legislative candidates was June 1, 2011. *Mississippi State Conf. NAACP v. Barbour*, supra. Consequently, the state election machinery was unable to prepare ballots or otherwise put the state election machinery into effect until after June 1, 2011. Fourth, the time

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Appellees also argue that the decision in *Mississippi State Conf. NAACP v. Barbour*, supra, applies here. However, the pivotal issue in that case was whether Mississippi's constitutional provision, Art. 13, § 254, Miss. Const. (1890), requiring decennial legislative reapportionment every 10 years by the end of the legislative session in the second year following publication of the census was reasonable. There is no such issue in this case.

line in the instant case is very similar to the time line in *Watkins v. Mabus*, where the court refused to allow legislators elected in grossly malapportioned districts to remain in office for full four-year terms. *Id.* And, fifth, there was sufficient time for candidates to campaign.[12] Therefore, the instant case is distinguishable.

Finally, facts in the instant case are distinguishable from the facts in *Republican Party of Oregon v. Keisling*, supra. The most distinguishable fact is that redistricting was accomplished in response to a new census in *Republican Party of Oregon v. Keisling*, supra, whereas it was not here. Another distinguishing fact is that *Republican Party of Oregon v. Keisling* involved staggered terms which delayed voting in certain districts that had been redistricted. There are no staggered terms resulting in delayed voting involved in the instant case. If, in fact, the elections had been delayed until redistricting had been completed in the instant case, plaintiffs would not have complained. Therefore, the instant case is distinguishable.

The rule of law announced in the cases relied on by appellees can be summarized as follows: an election will not be enjoined or set aside when census data is published or an injunction is sought on the eve of an election. *Bryant v. Lawrence*

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[12]Candidates for legislative office had until June 1, 2011 to qualify. Thus, two months between the legislative candidate qualification deadline and primary elections was sufficient time for legislative candidates to campaign. See, *Mississippi State Conf. NAACP v. Barbour*, supra. If this campaign time line was sufficient for legislative candidates, it was certainly sufficient for supervisor candidates.

County, Mississippi, supra; *Fairley v. Forrest County, Mississippi*, supra; *Political Action Conference of Illinois v. Daley*, supra; *French v. Boner*, supra. The eve of an election has been defined by these cases as two weeks prior to the election. *Bryant v. Lawrence County, Mississippi*, supra; *Fairley v. Forrest County, Mississippi*, supra; *Political Action Conference of Illinois v. Daley*, supra; *French v. Boner*, supra. This rule of law does not conflict with the rule of law that election results will be set aside when an election is held under malapportioned districts and pre-election relief is requested. *Watkins v. Mabus*, supra, and *Tucker v. Buford*, supra. Pre-election relief means filing a complaint requesting injunctive relief at least one month prior to the election. *Watkins v. Mabus*, supra, and *Tucker v. Buford*, supra. In the instant case, plaintiffs sought pre-election relief in sufficient time to avoid any drastic interference with the state election process. See, *Watkins v. Mabus*, supra, and *Tucker v. Buford*, supra.

2. When a plaintiff in an overpopulated and malapportioned district timely files an equal population claim prior to the date of the election but there is insufficient time to redistrict prior to the election, the election results should be set aside and new elections ordered.

Appellees argue that plaintiffs did not request injunctive relief. However, injunctive relief was requested in plaintiffs' complaints and amended complaints as well as motions for temporary restraining order and preliminary injunctions.

Appellees also argue that new or special elections should not be ordered. However, two seminal cases contradict that argument - *Watkins v. Mabus*, supra, and *Tucker v. Buford*, supra. As argued above, these cases establish that plaintiffs were entitled to injunctive relief. Wen a plaintiff in an overpopulated and malapportioned district timely files an equal population claim prior to the date of the election but the election is not stayed, the election results should be set aside and new elections promptly ordered. *Tucker v. Buford*, supra; *Watkins v. Mabus*, supra.

3. The NAACP alleged facts to establish its standing.

Appellees argue that the NAACP "had a similar standing problem as the individuals..." [Brief for Appellees, p. 19]. That is incorrect. The NAACP alleged that it is a civil rights organization representing the interests of its members who include many registered voters in each supervisor district in each county. [R. 521-531, 580-589, 601-609, 618-627, 743-752, 764-773, 785-794, 802-811, R. E. 103a-182, Tabs 12-19]. The NAACP alleged the population of each county and each supervisor district, the ideal population, and the total range of population deviation for each county. [R. 521-531, 580-589, 601-609, 618-627, 743-752, 764-773, 785-794, 802-811, R. E. 103a-182, Tabs 12-19]. Furthermore, the NAACP alleged it would be aggrieved if elections were held in the grossly malapportioned districts. [R. 521-531, 580-589, 601-609, 618-627, 743-752, 764-773, 785-794, 802-811, R. E.

103a-182, Tabs 12-19]. These allegations are sufficient to establish standing. See, *Fairley v. Patterson*, 493 F. 2d 598 (5th Cir. 1974); *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 112 S. Ct. 2130 (1992). Furthermore, the NAACP's allegations are sufficient to establish institutional or representational standing. *N.A.A.C.P. v. State of Alabama*, 357 U. S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958); *Louisiana v. N.A.A.C.P.*, 366 U. S. 293, 81 S. Ct. 1333, 6 L. Ed. 2d 301 (1961); *Texas Democratic Party v. Benkiser*, 459 F. 3d 582 (5th Cir. 2006); *Common Cause/Georgia v. Billups*, 554 F. 3d 1340 (11th Cir. 2009).

CONCLUSION

On the basis of the foregoing facts and authorities and the facts and authorities contained in the Brief for Appellants, the Court should reverse the decision of the district court and remand the case to the district court with instructions to set the election results aside, enjoin future elections using the malapportioned districts, and order new remedial elections in 2012.

This the 22nd day of December, 2011.

Respectfully submitted,
NAACP, et. al., on behalf of themselves
and all others similarly situated

/s/ Carroll Rhodes

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CERTIFICATE OF SERVICE

I, CARROLL RHODES, hereby certify that I have this day filed and electronically filed using the Court's ECF filing system a true and correct copy of the above and foregoing Reply Brief for Appellants, and the Court electronically served a copy of the Record Excerpts upon the following:

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This the 22nd day of December, 2011.

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USDC No. 1:10-CV-564
USDC No. 3:11-CV-121
USDC No. 3:11-CV-122
USDC No. 3:11-CV-123
USDC No. 3:11-CV-124
USDC No. 4:11-CV-33
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The following pertains to your reply brief electronically filed on December 22, 2011.

You must submit the seven paper copies of your brief, with gray covers, as required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

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