

**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

JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi
Intervenor Defendant - Appellee

SUPPLEMENTAL BRIEF FOR APPELLANTS

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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
Situating; LEAH PARSON, on Behalf of Themselves and all Others Similarly Situated,
Plaintiffs - Appellants

v.

ADAMSCOUNTY, 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

(CONSOLIDATED WITH)

Case No. 11-60676

TALLAHATCHIE COUNTY, MISSISSIPPI BRANCH OF THE NAACP; JOHNNY THOMAS, on behalf
of themselves and all others similarly situated,
Plaintiffs - Appellants
DOROTHY CHESTNUT,
Appellant

v.

TALLAHATCHIE COUNTY, MISSISSIPPI BOARD OF SUPERVISORS; TALLAHATCHIE COUNTY,
MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE; TALLAHATCHIE COUNTY,
MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE; TALLAHATCHIE COUNTY,
MISSISSIPPI BOARD OF ELECTION COMMISSIONERS; STEPHANIE SIMS, 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

TABLE OF CONTENTS

	<u>PAGE(S)</u>
Table of Contents	i
Table of Authorities	ii
Statement of Issues	1
1. Whether plaintiffs’ requested relief will redress their alleged injuries?	1
2. Whether this controversy is moot in light of the fact that the election itself has already been conducted?	1
Argument	1-10
1. Plaintiffs’ requested relief will redress their alleged injuries	1-9
a. The malapportioned districts	1-2
b. The injuries suffered by the plaintiffs	2-6
1. The individual plaintiffs	2-4
2. The associational plaintiffs	4-6
c. The time line of events	6-7
d. Plaintiffs have satisfied the redressibility element of standing ..	7-9
2. This controversy is not moot in light of the fact that plaintiff sought pre-election relief and the controversy is capable of repetition yet evading review	9-10
Conclusion	10
Certificate of Service	11-14
Certificate of Compliance	15

TABLE OF AUTHORITIES

<u>CASE(S)</u>	<u>PAGE(S)</u>
<i>Association of Community Organizations for Reform v. Fowler</i> , 178 F. 3d 350 (5 th Cir. 1999)	5
<i>Bell v. Southwell</i> , 376 F. 2d 659 (5 th Cir. 1967)	8, 9, 10
<i>Chargois v. Vermillion Parish School Board</i> , 348 F. Supp. 498 (W. D. La. 1972)	9
<i>Chavis v. Whitcomb</i> , 307 F. Supp. 1362 (Ind. 1969) (three-judge court) (per curiam)	9, 10
<i>Fain v. Caddo Parish Police Jury</i> , 312 F. Supp. 54 (W. D. La. 1970)	9, 10
<i>Fairley v. Hattiesburg, Mississippi</i> , 584 F. 3d 660 (5 th Cir. 2009)	1, 2
<i>Fairley v. Patterson</i> , 493 F. 2d 598 (5 th Cir. 1974)	8
<i>Family & Children’s Center, Inc. v. School City of Mishawaka</i> , 13 F. 3d 1052 (7 th Cir. 1994)	5
<i>Florida State Conference of the NAACP v. Browning</i> , 522 F. 3d 1153 (11 th Cir. 2008)	5
<i>Georgia v. Ashcroft</i> , 539 U. S. 461, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003)	8, 9
<i>Hamer v. Campbell</i> , 358 F. 2d 215 (5 th Cir. 1966)	8, 9, 10
<i>Henderson v. Stadler</i> , 287 F. 3d 374 (5 th Cir. 2002)	8
<i>Keller v. Gilliam</i> , 454 F. 2d 55 (5 th Cir. 1972)	9, 10

<i>Lujan v. Defenders of Wildlife</i> , 504 U. S. 555, 118 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)	8
<i>Moore v. Itawamba County, Mississippi</i> , 431 F. 3d 257 (5th Cir. 2005) (per curiam)	1, 2
<i>Moore v. Leflore County Board of Election Commissioners</i> , 351 F. Supp. 848 (N. D. Miss. 1971) (three-judge court)	9, 10
<i>Reynolds v. Sims</i> , 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964)	2, 8, 10
<i>Riddell v. National Democratic Party</i> , 344 F. Supp. 908 (S. D. Miss. 1972), <i>reversed on other</i> <i>grounds</i> , 508 F. 2d 770 (5 th Cir. 1975)	5
<i>Saxon v. Fielding</i> , 614 F. 2d 78 (5 th Cir. 1980)	8, 9, 10
<i>Storer v. Brown</i> , 415 U. S. 724, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974)	10
<i>Texas Democratic Party v. Benkiser</i> , 459 F. 3d 582 (5 th Cir. 2006)	5, 6, 8
<i>United States v. Hayes</i> , 515 U. S. 737, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995)	8

STATEMENT OF ISSUES FOR SUPPLEMENTAL BRIEFING

The oral argument Panel has requested supplemental briefs on the following issues:

1. Whether plaintiffs' requested relief will redress their alleged injuries? Put differently, whether plaintiffs have satisfied the 'redressability' element of standing?
2. Whether this controversy is moot in light of the fact that the election itself has already been conducted?

ARGUMENT

- 1. Plaintiffs' requested relief will redress their alleged injuries. Put differently, plaintiffs have satisfied the redressability element of standing.**

Plaintiffs' requested relief will redress their alleged injuries. The relief is based on the malapportioned districts, the injuries suffered, and the time-line of events.

a. The malapportioned districts.

Plaintiffs allege that the counties are unconstitutionally malapportioned. A total population deviation in a jurisdiction greater than 10% is a *prima facie* case of invidious discrimination and malapportionment. *Fairley v. Hattiesburg, Mississippi*, 584 F. 3d 660, at 675 (5th Cir. 2009); *Moore v. Itawamba County, Mississippi*, 431 F. 3d 257, at 259 (5th Cir. 2005 (per curiam)). The total population deviation in each of the challenged counties is as follows: 39.46 % in Adams County, 49.05% in Amite

County, 56.17% in Claiborne County,¹ 40.36% in Copiah County, 18.86% in Pike County, 26.70% in Simpson County, 52.74% in Warren County, 30.20% in Wayne County, and 113.53% in Tallahatchie County. This deviation is proof that each county is unconstitutionally malapportioned.²

b. The injuries suffered by the plaintiffs.

The individual and organizational plaintiffs alleged that their votes and the votes of class members would be diluted if the 2011 supervisor elections were held under malapportioned districts. “[A]n individual’s right to vote for [county supervisor] is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the [county].” *Reynolds v. Sims*, 377 U. S. 533, at 568, 84 S. Ct. 1362, at 1385, 12 L. Ed. 2d 506 (1964). An apportionment scheme that exceeds 10% total population deviation is presumptively unconstitutional. *Fairley v. Hattiesburg, Mississippi*, supra, at 675; *Moore v. Itawamba County, Mississippi*, supra, at 259. Plaintiffs alleged an injury.

1. The individual plaintiffs.

The individual plaintiffs filed separate cases on behalf of themselves and a class defined as “all African-American citizens and voters in [each of the challenged

¹Counsel for the Claiborne County plaintiffs has withdrawn from representation of the Claiborne County plaintiffs because of a conflict of interest.

²The case against Tunica County, Mississippi has been dismissed.

counties].” The 2010 census, incorporated into the complaints, demonstrate black citizens reside in each supervisor district in each county. The only original individual plaintiff who is an aggrieved voter in an overpopulated and under represented supervisor district is Frank Lee, a registered voter in Pike County’s District 4. The ideal population for districts in the county is 8,081 persons. District 4 has a population of 8,574 persons and a deviation of +493 persons or +6.1%. District 2 has a deviation of -580 persons or -7.18%. District 3 has a deviation of +944 persons or +11.68%. Consequently, Frank Lee has standing.

The individual plaintiffs filed amended complaints adding aggrieved voters as plaintiffs in over populated and under represented supervisor districts in each county after Mississippi Attorney General Jim Hood filed a motion to dismiss but before the district court ruled on the motion. Brenda Proby, an aggrieved voter in Adams County District 5 was added as a plaintiff.[R. 523, 526, R. E. 105a, 108a, Tab 12]. Hugh McGee, an aggrieved voter in Amite County District 4 was added as a plaintiff.[R. 582, 585, R. E. 116a, 119a, Tab 13]. Pamela Jefferson, an aggrieved voter in Copiah County District 5, and Robert Catchings, an aggrieved voter in the county’s District 2 were added as plaintiffs. [R.620, 623-624, 526, R. E. 135a, 138a-139a, 108a, Tab 15]. Gregory Partman, an aggrieved voter in Pike County District 3 was added as a plaintiff.[R.745, 748, R. E. 145a, 148a, Tab 16]. Laster Smith, an aggrieved voter

in Simpson County District 5 was added as a plaintiff. [R. 766, 769, R. E. 155a, 158a, Tab 17]. Fannie Tonth, an aggrieved voter in Warren County District 1 was added as a plaintiff.[R. 787, 790, R. E. 165a, 168a, Tab 18]. Jimmie Green, an aggrieved voter in Wayne County District 2, and David Jones, an aggrieved voter in the county's District 3, were added as plaintiffs.[R. 804, 807, 808, R. E. 175a, 178a, 179a, Tab 19]. Dorothy Chestnut, an aggrieved voter in Tallahatchie County District 5 was added as a plaintiff. [R.139, 143 (Tallahatchie), R. E. 12a, 16a (Tallahatchie), Tab 4 (Tallahatchie)]. In sum, the added plaintiffs alleged standing.

The plaintiffs requested declaratory judgments that the apportionment schemes were unconstitutionally malapportioned. They requested an injunction enjoining the defendants from conducting elections under the districts, a delay in the candidate qualification deadline and an opportunity for the counties to redistrict and obtain preclearance of plans that were not retrogressive and did not result in discrimination against black voters. Also, plaintiffs requested general relief.

2. The organizational or associational plaintiffs.

The local branches of the NAACP filed class actions on behalf of the organizations and a class defined as “all African-American citizens and voters in [each of the challenged counties].” The branches allege that the organizations are civil

rights organization³ whose members are primarily African-American citizens and voters in each of the challenged counties' supervisor districts.⁴ Specifically, the branches allege their members include aggrieved voters in overpopulated and under represented malapportioned supervisor districts in each of the counties. [R. 521-531, 580-589, 618-627, 743-752, 764-773, 785-794, 802-811, (138-153 Tallahatchie), R. E. 103a-123a, 133a-182a, (11a-26a Tallahatchie), Tabs 12-13, 14-19 (4 Tallahatchie)]. An organization has associational standing to bring an action on behalf of its members. *Texas Democratic Party v. Benkiser*, 459 F. 3d 582, at 587 (5th Cir. 2006); *Association of Community Organizations for Reform v. Fowler*, 178 F. 3d 350 (5th Cir. 1999). “Associational standing is a three-part test: (1) the association’s members would independently meet the Article III standing requirement; (2) the interests the association seeks to protect are germane to the purpose of the organization; and (3) neither the claim asserted nor the relief requested requires

³Although not specifically alleged, the NAACP is an organization that organizes and participates in voter registration drives, voter turnout efforts during elections, and election integrity. See, *Florida State Conference of the NAACP v. Browning*, 522 F. 3d 1153, 1159-1166 (11th Cir. 2008); *Riddell v. National Democratic Party*, 344 F. Supp. 908, 914 (S. D. Miss. 1972), *reversed on other grounds*, 508 F. 2d 770 (5th Cir. 1975). This Court may infer the NAACP’s standing. See, *Family & Children’s Center, Inc. v. School City of Mishawaka*, 13 F. 3d 1052, 1058-1059 (7th Cir. 1994) (“The party invoking federal jurisdiction has the burden of establishing these elements [of standing], but at the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice.....Accepting as true all facts alleged in the well-pleaded complaint and drawing all reasonable inferences in favor of the plaintiff, as we must,...., we agree that [the plaintiff] fulfills the Article III standing requirements.”)

⁴The NAACP alleged to have members who were voters in Supervisor Districts 1, 2, 3, 4, and 5 of each challenged county.

participation of individual members.” *Id.* The branches allege their members are voters in each of the malapportioned districts. One purpose of the NAACP is to fight discrimination in all forms, including discrimination based on dilution of an individual’s vote. Another purpose is to register voters and take voters to the polls. Although the NAACP does not endorse candidates, the organization ensures that all eligible citizens who have a right to vote have an opportunity to do so. The NAACP has long been involved in voter registration, voter turnout, and voter integrity efforts. Finally, neither the claims asserted nor the relief requested requires participation of each individual member of the organization. In short, the NAACP has associational standing. *Texas Democratic Party v. Benkiser*, *supra*, at 587.

The NAACP branches requested a declaratory judgment declaring the supervisor districts unconstitutionally malapportioned and injunctions enjoining elections until new supervisor districts that complied with the one person, one vote principle in a non-discriminatory manner could be drawn and precleared. And, the NAACP requested general relief.

c. The time line of events.

The 2010 decennial census for Mississippi was released on February 4, 2011, and plaintiffs filed their cases challenging the counties’ apportionment schemes on February 28, 2011. [R. 1712, 521-531, 580-589, 618-627, 743-752, 764-773, 785-

794, 802-811, (138-153 Tallahatchie), R. E. 83a, 103a-123a, 133a-182a, (11a-26a Tallahatchie), Tabs 10, 12-13, 14-19 (4 Tallahatchie)]. The candidate qualification deadline was March 1, 2011, with primary elections on August 2, 2011, run-off elections on August 23, 2011, and a general election on November 8, 2011.

Mississippi Attorney General Jim Hood filed a motion to intervene in the cases on March 1, 2011, and the district court in the Southern District of Mississippi consolidated seven of the cases on March 23, 2011.⁵ The Tallahatchie County case was never consolidated in the district court.⁶ The district court for the Southern District of Mississippi entered a Memorandum Opinion and Order of Dismissal denying plaintiffs any relief and dismissing the cases on May 16, 2011 and the district court for the Northern District of Mississippi entered a Final Judgment denying the requested relief and dismissing that case on September 14, 2011.

d. Plaintiffs have satisfied the redressability element of standing.

In order to establish standing, “a plaintiff must show: (1) an injury in fact; (2) that is traceable to the defendant’s challenged conduct; and (3) that is likely to be redressed by a favorable decision in the district court.” *Texas Democratic Party v.*

⁵The district judge consolidated all of the cases challenging county redistricting that were pending in the Southern District of Mississippi into the *Hancock County* case. The consolidated cases included the case filed by the Claiborne County Branch of the NAACP. However, since plaintiff’s counsel has withdrawn from representing the Claiborne County Branch of the NAACP that case is not mentioned in this Supplemental Brief.

⁶The Tallahatchie County case was pending in the Northern District of Mississippi.

Benkiser, supra, at 586, citing, *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *United States v. Hayes*, 515 U. S. 737, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995). In this case, plaintiffs established that their votes were diluted. A voter who votes in an election district that is over populated and under represented has standing to bring a one-person one-vote dilution challenge. *Fairley v. Patterson*, 493 F. 2d 598, 603-604 (5th Cir. 1974). Plaintiffs had standing. The “redressability” of standing requires a plaintiff to establish that his or her injury will likely be addressed by a favorable decision. *Henderson v. Stadler*, 287 F. 3d 374, at 378 (5th Cir. 2002). The district court had the authority to enjoin the election. See, *Reynolds v. Sims*, supra; *Hamer v. Campbell*, 358 F. 2d 215 (5th Cir. 1966); *Bell v. Southwell*, 376 F. 2d 659 (5th Cir. 1967); *Saxon v. Fielding*, 614 F. 2d 78 (5th Cir. 1980). The United States Supreme Court held in *Reynolds v. Sims*:

It is enough to say now that once a State’s legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.

Reynolds v. Sims, supra, 377 U. S. at 585. This is especially so when pre-election relief is requested. *Georgia v. Ashcroft*, 539 U. S. 461, 488, n. 2, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003). When pre-election relief is requested injunctive relief, including setting election results aside and ordering a new election, is appropriate.

Hamer v. Campbell, supra; *Bell v. Southwell*, supra. “The decisions in this Circuit that have voided a state election have involved ... 2) an improper refusal by a district court to enjoin an election prior to its occurrence,....” *Saxon v. Fielding*, supra, at 79. In the present case, there was an improper refusal by the district court to enjoin the election. Therefore, plaintiffs are entitled to relief. *Saxon v. Fielding*, supra, at 79.

2. This controversy is not moot in light of the fact that plaintiff sought pre-election relief and the controversy is capable of repetition yet evading review.

This controversy is not moot because plaintiffs sought pre-election relief. When a district court wrongly withholds a request for pre-election relief, the election results should be set aside and a new election ordered. *Hamer v. Campbell*, supra; *Bell v. Southwell*, supra; *Saxon v. Fielding*, supra, at 79. More importantly, supervisors elected in malapportioned districts cannot continue to serve any longer than absolutely necessary to hold new elections, *Moore v. Leflore County Board of Election Commissioners*, 351 F. Supp. 848 (N. D. Miss. 1971) (three-judge court); *Chargois v. Vermillion Parish School Board*, 348 F. Supp. 498 (W. D. La. 1972); *Fain v. Caddo Parish Police Jury*, 312 F. Supp. 54 (W. D. La. 1970), and certainly not for a full four year term. *Keller v. Gilliam*, 454 F. 2d 55 (5th Cir. 1972); *Chavis v. Whitcomb*, 307 F. Supp. 1362, 1367 (Ind. 1969) (three-judge court) (per curiam). Since plaintiffs were wrongly denied pre-election relief by the district court, the case

is not moot. *Hamer v. Campbell*, supra; *Bell v. Southwell*, supra; *Saxon v. Fielding*, supra, at 79; *Moore v. Leflore County Board of Election Commissioners*, supra; *Fain v. Caddo Parish Police Jury*, supra; *Keller v. Gilliam*, supra; *Chavis v. Whitcomb*, supra.

Furthermore, every twenty years the parties and courts will be faced with the same election cycle when census data and elections happen in the same year. Therefore, the case is capable of repetition but yet evading review. *Storer v. Brown*, 415 U. S. 724, 737, n. 8, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974).

CONCLUSION

On the basis of the foregoing facts and authorities, 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 16th day of May, 2012.

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 Supplemental Brief for Appellants, and the Court electronically served a copy of the Supplemental Brief for Appellants upon the following:

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This the 16th day of May, 2012.

/s/ Carroll Rhodes

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