

No. 11-82

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In The

SUPREME COURT OF THE UNITED STATES  
October Term, 2011  
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MISSISSIPPI STATE CONFERENCE OF THE NATIONAL ASSOCIATION  
FOR THE ADVANCEMENT OF COLORED PEOPLE, *et. al.*,

*Appellants,*

VS.

HALEY BARBOUR, in his official capacity as Governor of the State of Mississippi, *et. al.*,

*Appellees.*

On Appeal from Decisions Of The Three-Judge Court  
Of The United States District Court For The  
Southern District of Mississippi

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BRIEF OPPOSING THE MOTION TO DISMISS OR AFFIRM  
FILED BY GOVERNOR HALEY BARBOUR AND THE  
MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE,  
THE MOTION TO DISMISS OR AFFIRM FILED BY  
SECRETARY OF STATE DELBERT HOSEMANN,  
AND THE MOTION TO DISMISS FILED BY  
ATTORNEY GENERAL JIM HOOD  
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**BRIEF OPPOSING THE MOTIONS TO DISMISS OR AFFIRM**

This Brief Opposing the Motion to Dismiss or Affirm filed by Governor Haley Barbour and the Mississippi Republican Party Executive Committee (“Barbour and the Republican Party”), the Motion to Dismiss or Affirm filed by Secretary of State Delbert Hosemann (“Hosemann”), and the Motion to Dismiss filed by Attorney General Jim Hood (“Hood”) is submitted pursuant to Sup. Ct. Rule 18.8. The appellees collectively raise four issues. Those issues are:

- 1. Whether the orders entered by the three-judge district court effectively denied appellants’ request for a preliminary injunction within the meaning of 28 U. S. C. § 1253? .....
- 2. Whether the issue decided by the three-judge district court - the United States Constitution does not require legislative districts that have been in existence less than ten years to be reapportioned before the next election after a new census establishes the districts are malapportioned - is moot? .....
- 3. Even if the issue decided by the three-judge district court is moot, is it capable of repetition, yet evading review? .....
- 4. Whether the three-judge district court abused its discretion by declining to grant injunctive relief? .....

Appellants address each issue below.



**ARGUMENT**

- 1. The orders entered by the three-judge district court effectively denied appellants’ request for a preliminary injunction within the meaning of 28 U. S. C. § 1253.

Barbour and the Republican Party argue that “the district court’s ruling did not rest upon

resolution of the merits of any constitutional claim.”<sup>1</sup> [Barbour and the Republican Party, Motion to Dismiss or Affirm, p. 11]. This argument is misleading. The district court effectively denied appellants’ request for declaratory and injunctive relief. Appellants requested “a declaratory judgment that the current Mississippi House and Senate districts are unconstitutionally malapportioned, and an injunction prohibiting use of those districts in the 2011 elections.” J. S. App. 14. The district court denied appellants’ request. J. S. App. 3-27. Thereafter, appellants requested the court to declare “the present apportionment scheme to be unconstitutionally malapportioned based on the 2010 census”...and ... “to give the Legislature until January 6, 2012 to remedy the malapportionment and schedule elections to coincide with the 2012 primary and general election schedule.” J. S. App. 15, 60. The district court denied this request as well. J. S. App. 2. In essence, the district court effectively denied appellants’ request for a declaratory judgment that legislative districts were unconstitutionally malapportioned and a preliminary injunction enjoining elections using those districts. J. S. App. 2-27. The district court denied also appellants’ request to set aside elections using those districts and order new elections in 2012 that coincide with the 2012 federal election. J. S. App. 2, 46-60. This Court has jurisdiction of appellants’ appeal from these orders. See, *Florida Lime & Advocado Growers, Inc. v. Jacobsen*, 362 U. S. 73 (1960).

Attorney General Hood argues that the district court did not affirmatively grant or deny

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<sup>1</sup>Barbour and the Republican Party also argue that this Court lacks jurisdiction because appellants waived any right to challenge the constitutionality of Art. 13, § 254, Miss. Const. (1890). Their argument misconstrues appellants’ claim. Appellants challenged “the constitutionality of the state statutes upon which the apportionment scheme is based.” J. S. App. 50. Appellants may challenge a statutory apportionment scheme without necessarily challenging the state constitutional provision which authorizes reapportionment. *Davis v. Mann*, 377 U. S. 678, at 691 (1964) (“Nevertheless, state legislative malapportionment, whether resulting from prolonged legislative inaction or from failure to comply sufficiently with federal constitutional requisites, although reapportionment is accomplished periodically, falls equally within the proscription of the Equal Protection Clause.”).

injunctive relief but rather stayed its hand. [Hood, Motion to Dismiss, pp. 6-9]. This argument is misleading as well. As argued above, the district court orders effectively denied appellants' request for a preliminary injunction. See, *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, supra.

Appellees circuitously argue that the district court's orders did not deny appellants' request for an injunction, but the case is moot because the orders allowed the elections to proceed as scheduled. This argument is without merit. Since appellants requested an injunction to enjoin the elections but the district court allowed the elections to proceed, then the court effectively denied injunctive relief.

2. The issue decided by the three-judge district court - the United States Constitution does not require legislative districts that have been in existence less than ten years to be reapportioned before the next election after a new census establishes the districts are malapportioned.  
- is not moot.

Appellees, Barbour and the Republican Party, Hood, and Hosemann, argue that the issue decided by the three-judge district court - that the United States Constitution does not require legislative districts that have been in existence less than ten years to be reapportioned before the next election after a new census establishes the districts are malapportioned - is now moot. This mootness argument is based upon the facts that the candidate qualification deadline has passed, primaries have been held, and the general elections is less than two months away.<sup>2</sup> The candidate qualification deadline was June 1, 2011 and primaries were held in August, 2011. J. S. App. 12. "The general elections is scheduled for November 8, 2011." J. S. App. 12. Appellants filed their

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<sup>2</sup>Barbour and the Republican Party argue, "[i]t is unclear whether plaintiffs still seek an injunction with respect to the general elections now that the primaries have been held." [Barbour and the Republican Party, Motion to Dismiss or Affirm, p. 13, n. 6]. Appellants seek alternative injunctive relief, either an injunction enjoining the general elections, or, if that is impractical, an injunction setting aside the 2011 elections results and ordering remedial elections in 2012 to coincide with the 2012 federal elections. J. S. App. 60.

notice of appeal on June 7, 2011, J. S. App. 32-38, and their Jurisdictional Statement on July 15, 2011. In that regard, the case is not moot.

Appellees argue that the case cannot be fully briefed, argued, and decided by this Court before the general election. However, this Court may issue a per curiam decision before that date.

Even if the case becomes moot pending appeal, this Court should vacate the orders entered by the district court. See, *Camreta v. Greene*, \_\_\_ U. S. \_\_\_, Slip. Op., p. 16 (Decided May 26, 2011), citing, *United States v. Munsingwear, Inc.*, 340 U. S. 36 at 39 (1950). “A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance<sup>3</sup>...ought not in fairness be forced to acquiesce in’ that ruling.” *Id.* If the case becomes moot before this Court decides the appeal, then appellants will be prevented from obtaining the review they are entitled. “The equitable remedy of vacatur ensures that ‘those who have been prevented from obtaining the review to which they are entitled [are] not...treated as if there had been a review.’” *Id.*, Slip Op. at 17. If the case becomes moot, this Court should vacate the lower court orders denying injunctive relief. *Camreta v. Greene*, supra; *United States v. Munsingwear, Inc.*, supra.

3. Even if the issue decided by the three-judge district court is moot, it is capable of repetition, yet evading review.

The release of decennial census and legislative elections align every twenty years. In fact, this Court was presented with the same issue in 1991. See, *Watkins v. Mabus*, 771 F. Supp. 789 (S.

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<sup>3</sup>Appellees argue that appellants were not frustrated by the vagaries of circumstances. Instead, they argue appellants were dilatory in seeking review. That is incorrect. The district court finally denied appellants’ request for injunctive relief on May 26, 2011. J. S. App. 2. Appellants filed their notice of appeal on June 7, 2011, [J. S. App. 32-38], and their Jurisdictional Statement on July 15, 2011. The Term of Court begins the first Monday in October, 2011. Appellees contend that appellants should have requested a stay pending appeal. However, any request for a stay pending appeal pursuant to Sup. Ct. R. 23 had to be submitted to the district court first. In all likelihood, appellees would have opposed the stay further delaying review on appeal.



D. Miss.) (three-judge court), *aff'd in part and vacated in part as moot*, 502 U. S. 954 (1991). An exception to the mootness doctrine exists when the issues involved in an election case are capable of repetition, yet evading review. *Federal Elections Commission v. Wisconsin Right to Life, Inc.*, 551 U. S. 449 (2007). The exception applies when the action is too short in duration to be fully litigated before expiration and a reasonable expectation exists that the plaintiff will endure the same action again. *Ibid.* Every twenty years the census data is released in the Spring and legislative elections are held during the Summer and Fall. The legislative session does not end until late Spring. It is virtually impossible to have the issue involved in this case fully litigated in such a short time frame. Appellants in this case as well as the *Watkins* case pursued litigation as a class action on behalf of African-American voters. The same voters will endure the same action every twenty years. Therefore, the issue involved in this case is capable of repetition, yet evading review. *Ibid.*

4. The three-judge district court abused its discretion by declining to grant injunctive relief.

Appellees, Barbour, the Republican Party, and Hosemann, argue that the district court's refusal to grant a preliminary injunction was not an abuse of discretion. Appellees premise their argument on the fact that appellants did not challenge the constitutionality of Section 254 of the Mississippi Constitution.<sup>4</sup> Without challenging the constitutionality of the state constitutional provision, they argue, appellants cannot prevail on the merits. This Court rejected a similar argument in *Davis v. Mann*, *supra*. In that case the Court held:

Undoubtedly the situation existing in Virginia, with respect to legislative apportionment, differs not insignificantly from that in Alabama. In Virginia the legislature has consistently reapportioned itself decennially as required by the State Constitution. Nevertheless, state legislative malapportionment, whether resulting from prolonged legislative inaction or

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<sup>4</sup>Art. 13, § 254, Miss. Const. (1890).

from failure to comply sufficiently with federal constitutional requisites, although reapportionment is accomplished periodically, falls equally within the proscription of the Equal Protection Clause.

*Idid.*, at 691.

Although appellants did not challenge the constitutionality of Section 254 of the Mississippi Constitution, they challenged the constitutionality of the state statutory apportionment scheme and the Legislature's failure to comply with the federal constitutional requirements. J. S. 14-15, 49-52. Appellants argued that Section 254 of the Mississippi Constitution authorized the Legislature to act.<sup>5</sup> The Legislature's failure to act after release of census data before the next election was the catalyst for the present action. When the census data establishes legislative districts are malapportioned and the Legislature fails to act after release of the data before the next election, an aggrieved plaintiff is entitled to injunctive relief. *Georgia v. Ashcroft*, 539 U. S. 461, 488, n. 2 (2003).

Hosemann also argues that appellants cannot show irreparable harm and the balance of the equities weigh against granting an injunction. This argument is without merit. A voter suffers irreparable harm by the debasement or dilution of his or her vote. *Purcell v. Gonzales*, 549 U. S. 1 (2006) (per curiam), quoting, *Reynolds v. Sims*, 377 U. S. 533, at 555 (1964). Appellants suffered irreparable harm in the 2011 elections by being forced to vote in elections where their votes were underrepresented. *Reynolds v. Sims*, supra; *U. S. v. Louisiana*, 515 U. S. 737 (1995); *Connor v. Coleman*, 425 U. S. 675 (1976) (per curiam); *Fairley v. Patterson*, 493 F. 2d 598 (5<sup>th</sup> Cir. 1974). Furthermore, the balance of equities favor granting an injunction. See, *Georgia v. Ashcroft*, supra, 488, n. 2.

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<sup>5</sup>Appellants argued that Section 254 of the Mississippi Constitution authorized the Legislature to reapportion after the 2011 census data was released. J. S. App. 59, n. 10 (“[Appellants] interpret Section 254 as allowing the Legislature to redistrict at any time but placing a deadline on legislative efforts as the second year after the decennial census.”).

Barbour and the Republican Party argue that appellants cannot prevail because they did not offer additional alternative apportionment plans. However, appellants did not have to offer alternative plans when requesting an interim remedy. The district court could have used the plans introduced in the Legislature as an interim remedy. See, *Upham v. Seamon*, 456 U. S. 37 (1982) (per curiam); *Watkins v. Mabus*, supra. This is the interim remedy appellants requested and the lower court initially indicated would be granted. J. S. 28-31. Appellants did not have to offer any other plan as an interim remedy. *Upham v. Seamon*, supra.



### **CONCLUSION**

Since the three-judge district court erroneously denied appellants' motion for a preliminary injunction, this Court should note probable jurisdiction, reverse the decision of the three-judge court and remand the case with instructions to enjoin scheduled elections and fashion an interim remedy, or, in the alternative, allow the elections to proceed and then promptly set the results of the elections aside and order new elections to coincide with the 2012 federal elections.

Dated: September 29, 2011.

Respectfully submitted,

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