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

MISSISSIPPI STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THOMAS PLUNKETT, ROD WOULLARD, and HOLLIS WATKINS, on behalf of themselves and all others similarly situated — **PLAINTIFFS**

VS. — **CIVIL ACTION NO. 3:11-cv-159TSL-EGJ-LG-MTP**

HALEY BARBOUR, in his official capacity as Governor of the State of Mississippi, JIM HOOD, in his official capacity as Attorney General of the State of Mississippi, and DELBERT HOSEMANN, in his official capacity as Secretary of State of the State of Mississippi, as members of the State Board of Election Commissioners; THE MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE; THE MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE; and CONNIE COCHRAN, in her official capacity as Chairman of the Hinds County, Mississippi Board of Election Commissioners, on behalf of herself and all others similarly situated — **DEFENDANTS**

AND

APPORTIONMENT AND ELECTIONS COMMITTEE OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES; MISSISSIPPI STATE SENATE DEMOCRATIC CAUCUS AND STATE DEMOCRATIC SENATORS, in their individual capacities; TERRY C. BURTON, SIDNEY BONDURANT, BECKY CURRIE, and MARY ANN STEVENS — **INTERVENORS**

PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO SET ASIDE THE 2011 LEGISLATIVE ELECTION RESULTS AND ORDER SPECIAL LEGISLATIVE ELECTIONS FOR ALL LEGISLATIVE DISTRICTS IN 2013

COME NOW the plaintiffs, the Mississippi State Conference of the National Association for the Advancement of Colored People ("NAACP"), Thomas Plunkett, Rod Woullard, and Hollis

Watkins, on behalf of themselves and all others similarly situated,[1] and pursuant to the Memorandum Opinion and Order [Doc. 124] entered by the Court on May 16, 2011, file this Memorandum of Authorities in support of their Motion to Set Aside the 2011 Legislative Election Results and Order Special Legislative Elections for All Legislative Districts in 2013. The grounds for plaintiffs' motion are set out in the motion that has been filed separately. This Memorandum will set forth a brief procedural and factual history, argument in support of the motion, and a conclusion.

BRIEF PROCEDURAL AND FACTUAL HISTORY

The United States Bureau of the Census published the 2010 decennial census for the State of Mississippi on February 4, 2011. The census shows that Mississippi's legislative districts[2] were grossly malapportioned[3] in 2011. Legislative elections were scheduled and held in 2011 with primaries being held on August 2, 2011 run-offs on August 23, 2011, and a general election on November 2, 2011. Winners of the election took office in January, 2012. They will serve a four-year term of office. The next regular elections are scheduled for 2015 with winners to take office in January, 2016.

Plaintiffs filed suit in March, 2011 seeking to enjoin the 2011 elections. However, the Court did not enjoin the 2011 elections because the Mississippi Constitution[4] did not require redistricting

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[1]Plaintiffs filed the case as a class action. However, plaintiffs have not filed a formal motion for class certification yet.

[2]The legislative districts are the districts for the Mississippi Senate and the Mississippi House of Representatives.

[3]The total population deviation percentage for the Mississippi Senate is 69.08% and 134.35% for the Mississippi House of Representatives.

[4]Art. 13, Sec. 254, Miss. Const. (1890).

until 2012.[5] The Mississippi Legislature has now redistricted and obtained preclearance of the 2012 redistricting plans.

Although the 2012 legislatively enacted Senate and House Plans comply with the one-person, one-vote principle of the 14th Amendment's Equal Protection Clause,[6] the 2012 Senate Plan dilutes black voting strength[7] and the House Plan does as well.[8] Consequently, as argued below, both Plans result in discrimination against African-American voters in violation of § 2 of the Voting Rights Act of 1965, as amended, 42 U. S. C. § 1973.

The Court has allowed any interested party to file a motion requesting special elections after the Plans were precleared. The United States Department of Justice precleared the Plans on September 14, 2012. Mississippi Attorney General Jim Hood gave the parties notice of the preclearance on September 17, 2012. Plaintiffs have filed a motion asking the Court to void the 2011 legislative election results and order special elections in November, 2013. The reasons for this request are contained in plaintiffs' motion. Those reasons are incorporated herein by reference. As

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[5]The Legislature was redistricted in 2002. Mississippi's Constitution requires redistricting every 10 years in the second year after the census is published. Art. 13, Sec. 254, Miss. Const. (1890). Therefore, redistricting was not required until 2012. *Mississippi State Conference of N.A.A.C.P. v. Barbour*, 2011 WL 1870222 (S. D. Miss. 2011) (three-judge court), *aff'd*, ___ U. S. ___, 132 S. Ct. 542, 181 L. Ed. 2d 343 (2011).

[6]The total deviation percentage for the Senate and House Plans is less than 10%.

[7]The 2012 Plan contains 12 majority black districts and 12 majority black voting age population districts when compared to the Benchmark Plan that contains 14 black majority districts and 13 black voting age majority districts and the 2011 Interim Plan offered by plaintiffs that contained 15 black majority districts and 15 black voting age majority districts.

[8]The 2012 Plan contains 39 majority black districts and 39 majority black voting age population districts when compared to the Benchmark Plan that contains 41 black majority districts and 41 black voting age majority districts and the 2011 Interim Plan offered by plaintiffs that contained 44 black majority districts and 44 black voting age majority districts.

argued below, the equities of the case weigh in favor of ordering special legislative elections.

ARGUMENT IN SUPPORT OF THE MOTION

The 2010 federal decennial census was published on February 4, 2011 showing that legislative districts were grossly malapportioned. Legislative elections were scheduled later in 2011. Plaintiffs, individual voters and a civil rights organization representing voters in every legislative district sought to enjoin the 2011 elections until redistricting plans could be crafted that complied with the one-person, one-vote constitutional requirement and the non-dilution statutory requirement. Plaintiffs argued that they would be injured if elections were held in the grossly malapportioned districts. Plaintiffs also argued that they would be injured if Legislators elected in the grossly malapportioned districts would serve a full four-year term. The Court, following *Reynolds v. Sims*,[9] declined to enjoin the 2011 elections. However, the Court held open the question of whether or not to throw out those election results and order special elections. Plaintiffs urge the Court to do just that.

The United States Supreme Court has recognized on several occasions that elections held under an unconstitutional plan may be voided. See, *Davis v. Mann*, 377 U. S. 678, 84 S. Ct. 1441, 12 L. Ed. 2d 609 (1964);[10] *Swann v. Adams*, 383 U. S. 210, 211-212 (1966) (per curiam); *Whitcomb v. Chavis*, 403 U. S. 124, 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971); *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U. S. 187, 92 S. Ct. 1477, 32 L. Ed. 2d 1 (1972); *Georgia v. Ashcroft*, 539 U. S. 461, 488, fn. 2, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003). In *Georgia v. Ashcroft*, the Court held:

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[9]377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

[10]The Supreme Court approved the district court's retaining jurisdiction to consider an appropriate remedy after the district court found existing districts to be malapportioned. *Davis v. Mann*, supra, 84 S. Ct. at 1449.

> When the decennial census numbers are released, States must redistrict to account for any changes or shifts in population. But before the new census, States operate under the legal fiction that even 10 years later, the plans are constitutionally apportioned. After the new enumeration, no districting plan is likely to be legally enforceable if challenged, given the shifts and changes in a population over 10 years. And if the State has not redistricted in response to the new census figures, a federal court will ensure that the districts comply with the one-person, one-vote mandate before the next election.

Georgia v. Ashcroft, supra, at 488, fn. 2.

The Fifth Circuit Court of Appeals, as well, has recognized that elections held under unconstitutional plans may be voided and new elections ordered. See, *Hamer v. Campbell*, 358 F. 2d 215 (5th Cir. 1966); *Bell v. Southwell*, 376 F. 2d 659 (5th Cir. 1967); *Keller v. Gilliam*, 454 F. 2d 55 (5th Cir. 1972)*; Taylor v. Monroe County Bd. of Supervisors*, 394 F. 2d. 333 (5th Cir. 1972); *Wyche v. Madison Parish Police Jury*, 635 F. 2d 1151 (5th Cir. 1981). In *Wyche v. Madison Parish Police Jury*, the Fifth Circuit held that "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." *Wyche v. Madison Parish Police Jury*, supra, at 1163. The Fifth Circuit further held that "[s]hould census data not be available at least six months prior to the next scheduled election, the plaintiffs may apply for a stay or such other interim relief as may be appropriate." *Id.* The Fifth Circuit has clearly indicated that unconstitutional elections may be voided and new elections ordered. *Hamer v. Campbell*, supra; *Bell v. Southwell*, supra; *Keller v. Gilliam*, supra; *Wyche v. Madison Parish Police Jury*, supra.

More importantly, 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). Plaintiffs suffered irreparable harm in 2011 by being forced to vote in elections

where their votes were underrepresented. See, *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 (5th Cir. 1974).

Plaintiffs not only suffered a debasement of their vote in the 2011 elections, but they continue to suffer a debasement by being represented by persons elected in unconstitutional districts. Federal courts have held that Legislators elected to office in grossly malapportioned unconstitutional districts cannot serve a full four-year term when the plaintiffs requested and were denied pre-election relief. *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); *Keller v. Gilliam*, supra; *Chavis v. Whitcomb*, 307 F. Supp. 1362, 1367 (Ind. 1969) (three-judge court) (per curiam). In *Moore v. Leflore County Board of Election Commissioners* and *Keller v. Gilliam*, the courts voided the elections and ordered new elections. *Moore v. Leflore County Board of Election Commissioners,* supra; *Keller v. Gilliam*, supra.

The United States District Court for the Northern District of Mississippi held in *Tucker v. Buford* that an election held under unconstitutionally malapportioned districts should be set aside when pre-election relief is sought. *Tucker v. Buford*, supra. In *Tucker*, election districts for members of the board of supervisors, board of election commissioners, and school board were coterminous. *Tucker v. Buford*, supra, at 277-279. The plaintiffs did not file suit until October 3, 1984 seeking to set aside the 1983 and 1984 election results and new elections for supervisors, election commissioners, and school board members. *Id.*, at 277-279. The district court refused to set aside the 1983 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[11] when plaintiffs had requested pre-election relief.[12] *Watkins v. Mabus*, supra. In the instant case, as well, plaintiffs requested pre-election relief. Nevertheless, elections were held as scheduled and Legislators were elected and are serving in grossly malapportioned districts. Therefore, the Court should set aside the 2011 election results and order special legislative elections.

The Court should order special elections. However, those elections should not be held under the 2012 Plans. Those Plans result in discrimination against African-American voters. The 2012 Plans contain fewer black majority districts and black voting age majority districts than the plans offered by plaintiffs as interim plans in 2011. The 2011 plans are evidence that the 2012 plans result in discrimination. A Court should not order elections held under a plan that results in discrimination

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[11]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.

[12]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.*

against black voters. See, *Connor v. Finch*, 431 U. S. 407, 97 S. Ct. 1828, 52 L. Ed. 2d 465 (1977).

CONCLUSION

On the basis of the foregoing facts and authorities, the Court should set the 2011 legislative election results aside and order special legislative elections in 2013 under apportionment plans devised by the Court or plans offered by the plaintiffs.

This the 14th day of October, 2011.

Respectfully submitted,
MISSISSIPPI STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THOMAS PLUNKETT, ROD WOULLARD, and HOLLIS WATKINS, on behalf of themselves and all others similarly situated

/s/ Carroll Rhodes

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CERTIFICATE OF SERVICE

I, Carroll Rhodes, do hereby certify that I have this date electronically filed the foregoing Memorandum of Authorities with the Clerk of Court using the ECF system which sent notification of such filing to the following:

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This the 14th day of October, 2011.

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