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 other similarly situated, PLAINTIFFS

v. CIVIL ACTION NO. 3:11-cv-00159-TSL-EGJ-LG-MTP

PHIL BRYANT, 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 JERMEL CLARK, in his 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; and TERRY C. BURTON, SIDNEY BONDURANT, BECKY CURRIE, and MARY ANN STEVENS INTERVENORS

GOVERNOR PHIL BRYANT'S RESPONSE TO PLAINTIFFS' MOTION TO SET ASIDE THE 2011 LEGISLATIVE ELECTION RESULTS AND ORDER SPECIAL LEGISLATIVE ELECTIONS FOR ALL LEGISLATIVE DISTRICTS IN 2013

INTRODUCTION

This Court previously held, in a ruling affirmed by the Supreme Court, that the State's 2011 legislative elections could proceed under the State's then-existing apportionment plan because Section 254 of the State Constitution (a) did not require reapportionment until 2012 and (b) is fully consistent with the requirements of the Federal Constitution, as interpreted by *Reynolds v. Sims* and progeny. [Doc. 124 at 2, 12]. Consistent with this Court's ruling the 2011 elections were held, the Legislature redistricted itself in 2012, and the State's new apportionment plan was precleared by the United States Department of Justice, signifying that the plan does not deny or abridge the right to vote on account of race. Consistent with the State Constitution, those plans will be implemented at the next regular elections in 2015.

Plaintiffs now argue that the 2011 election results should be tossed aside and new elections ordered. Not only that, they also allege—based on demonstrably false data—that, despite Justice Department approval, the new apportionment plan is racially discriminatory. Plaintiffs' motion should be denied in full. As explained below, the reasoning of this Court's prior opinion and the decisions of other courts demonstrate that the drastic remedy of special elections is inappropriate. Given that the 2011 elections were consistent with the State and Federal Constitutions, there is no justification for federal judicial interference in the state electoral process. Nor is there any basis for burdening the State and its taxpayers with the great expense and disruption that 174 special elections would entail. Finally, because special elections are unnecessary, the Court need not address plaintiffs' baseless attacks on the new apportionment plan; but if the Court reaches the issue, the new plan fully complies with the State and Federal Constitutions and the Voting Rights Act ("VRA").

I. The 2011 state legislative elections were consistent with *Reynolds v. Sims*, and the "extraordinary remedy" of setting aside the results of those elections and ordering special elections is unwarranted.

Section 254 of the Mississippi Constitution requires the Legislature to reapportion itself "every ten (10) years" at the regular session "in the *second* year following the … decennial census." MISS. CONST., art. 13, § 254 (emphasis added). Last year, this Court held that Section 254 is constitutional and, therefore, that the Legislature had until the end of its 2012 regular session to adopt a new apportionment plan. As the Court explained, *Reynolds v. Sims*, 377 U.S. 533 (1964), "held that legislative reapportionment every ten years meets 'the minimal requirements for maintaining a reasonably current scheme of legislative representation' under the Equal Protection Clause." [Doc. 124 at 3 (quoting 377 U.S. at 583–84)]. *Reynolds* thus establishes a clear constitutional standard that Section 254 satisfies. As this Court summarized:

> A state legislature must reapportion itself only every ten years. The Mississippi Legislature reapportioned itself in 2002. Only nine years have passed. Thus, the ten-year period to which *Reynolds* referred does not expire until 2012. The Legislature has one more year before it is required, under both the Supreme Court's holding and under State law, to reapportion itself.

[Doc. 124 at 3 (citations omitted)]. The Court therefore permitted the State's 2011 legislative elections to proceed under the State's existing apportionment plan ("the 2002 plan"), and the U.S. Supreme Court affirmed this Court's decision on appeal. *See* 132 S. Ct. 542 (2011).

Consistent with this Court's ruling, the 2011 state legislative elections were held under the 2002 plan, and the Legislature then adopted a new apportionment plan at its 2012 regular session. The new apportionment plan was precleared by the Justice Department pursuant to Section 5 of the VRA. [*See* Doc. 139]. By preclearing the new plan, the Justice Department certified that the State met its burden of proof that the plan "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a

language minority group." 28 C.F.R. § 51.52. Pursuant to Section 254 of the State Constitution, the new "apportionment shall be effective for the *next regularly scheduled elections* of members of the legislature," MISS. CONST., art. 13, § 254 (emphasis added), which "shall be held" in 2015, *see id.*, art. 12, § 252. The winners of those elections will take office the following January at the conclusion of current legislators' four-year terms of office, which are also set by the State Constitution. *See id.*, art. 4, §§ 34-36 & art. 12, § 252.

Plaintiffs have now returned to this Court, asking it to set aside the results of the 2011 elections and order special elections in 2013. Although the Court retained jurisdiction to decide such a motion, the reasoning of the Court's prior opinion, which is now the law of the case, requires that the motion be denied. This Court's prior opinion did not merely hold that the 2011 elections could proceed under the 2002 plan because there was insufficient time to implement a new plan. Rather, this Court affirmatively held that the Federal Constitution permitted the 2011 elections to proceed under that plan. Given that, just last year, this Court held that it was constitutional for legislators to be elected to new terms under the 2002 plan [Doc. 124 at 2, 12], it cannot now be unconstitutional for them to complete those same terms. As the Court emphasized, "judicial relief" in redistricting cases is "appropriate *only* when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." [Doc. No. 124 at 3, 12 (emphasis added) (quoting *Reynolds*, 377 U.S. at 586; *Upham v. Seamon*, 456 U.S. 37, 41 (1981)]. Here, the Legislature *did* reapportion itself "in a timely fashion," under *Reynolds v. Sims* and Section 254 of the State Constitution. Therefore, federal judicial interference in the state electoral process is unwarranted.

Moreover, the Fifth Circuit has consistently held that the setting aside of election results and ordering of new elections is "an extraordinary remedy that can only be employed in

exceptional circumstances, usually when there has been egregious defiance of the Voting Rights Act," *Lopez v. City of Houston*, 617 F.3d 336, 340 (5th Cir. 2010); "egregious conduct striking at the very heart of the fairness of an election; … an improper refusal by a district court to enjoin an election prior to its occurrence; or … constitutionally suspect racially discriminatory practices and a strong showing that the results of the election had possibly been affected," *Saxon v. Fielding*, 614 F.2d 78, 79 (5th Cir. 1980) (internal citations, quotation marks omitted). That is, the remedy is sparingly—not automatically—employed *even when the challenged elections actually violated the Constitution or the VRA*. There is no authority for voiding the results of elections, such as the 2011 state legislative elections, that were *entirely consistent with federal constitutional and statutory requirements*. In essence, plaintiffs ask this Court to set aside validly conducted elections and order new ones simply because, in their view, the State's next regular elections will not occur soon enough. That is no basis for the drastic remedy sought.

Indeed, courts have repeatedly refused to set aside elections in similar circumstances. For instance, in *Bryant v. Lawrence County, Mississippi*, 814 F. Supp. 1346 (S.D. Miss. 1993), the plaintiffs argued that county "supervisors elected for four years in 1991 should have their terms shortened and new elections held" because census data released prior to the 1991 elections showed population deviations that exceeded the limits of the one person, one vote principle. *Id.* at 1352. Judge Pickering rejected this argument, however, reasoning that "when a political body is operating under a constitutional plan," "such body must have a reasonable time after each decennial census in order to develop another plan and have it pre-cleared by the Justice Department." *Id.* Therefore, "[e]lections held under such a previously pre-cleared plan, in the year that new census data becomes available, but before redistricting can take place, should not be set aside and new elections ordered." *Id.*

Bryant relied on decisions of the Sixth and Seventh Circuits that reached the same conclusion. In *Political Action Conference v. Daley*, 976 F.2d 335 (7th Cir. 1992), the Seventh Circuit held that Chicago city council members could serve full four-year terms, starting in 1991 and ending in 1995, even though census data released just before the 1991 elections showed constitutionally excessive population deviations among their wards. *Id.* at 337–40. The court emphasized that *Reynolds* requires only the *enactment* a new apportionment plan decennially. Immediate special elections are not required simply because the new plan is adopted soon after four-year terms have begun. Rather, the Constitution permits implementation of the new plan at the next regularly scheduled elections. *See id.*; *accord Graves v. City of Montgomery*, 807 F. Supp. 2d 1096, 1110–1111 (M.D. Ala. 2011) (holding that a four-year delay in implementing a new apportionment caused by four-year terms "is of no constitutional consequence").

In *French v. Boner*, 963 F.2d 890 (6th Cir. 1992), the Sixth Circuit addressed the same issue in the City of Nashville: council members were elected in August 1991 to four-year terms after census data, released in the spring of 1991, demonstrated that "the largest of the [city's] 35 council districts ha[d] almost three times as many people as the smallest district." *Id.* at 891. Despite this sizable deviation, the Sixth Circuit rejected a request for special elections, reasoning that, under *Reynolds v. Sims*, "principles of mathematical equality and majority rule are important" but do not "outweigh all other factors in reviewing the timing of elections." *Id.* at 892. As the court explained, the net effect of the council members' four-year terms was that "the 1980 census figures w[ould] govern for twelve years rather than ten years." *Id.* Under these circumstances, the court held neither the goal "of mathematical equality" nor "the presumption in favor of redistricting every ten years outweigh … considerations … concerning the validity of four-year terms, the settled expectations of voters and elected officials, the costs of elections, and

the need for stability and continuity of office." *Id.* The same considerations apply here. The fact that 2000 census data will govern Mississippi's legislative districts for twelve years rather than ten does not invalidate the four-year terms mandated by the State Constitution. Nor does it justify the significant costs and disruptions that 174 special legislative elections would entail.

The Sixth Circuit's reliance on the "validity of four-year terms," *id.*, highlights another fundamental problem with plaintiffs' argument. The source of plaintiffs' alleged injury is the interaction between Section 254 of the Mississippi Constitution, which permitted the Legislature to reapportion itself during its 2012 regular session, and Sections 34, 35, and 252 of the Mississippi Constitution, which collectively provide that legislators' terms of office shall be four years and shall begin in January 2012 and end in January 2016. This Court has already held that Section 254 is valid and consistent with the requirements of the Federal Constitution. Therefore, in order to grant the relief that plaintiffs request, the Court would have to hold that Sections 34, 35, and 252—unexceptional state constitutional provisions establishing four-year terms for state officials—are unconstitutional.[1] Plaintiffs cite no authority for such a claim.

In contrast, the cases that plaintiffs cite do not support the drastic remedy they seek. For example, they rely on *Watkins v. Mabus*, 771 F. Supp. 789, 804 (S.D. Miss.), *aff'd in part, vacated in part*, 502 U.S. 954 (1991). [*See* Doc. 141 at 7]. However, as this Court has already explained, "the court in *Watkins* was not presented with the question whether Article 13, Section 254 of the Mississippi Constitution required the court to stay its hand." [Doc. 124 at 15 n.5]. That is, *Watkins* proceeded on the *unchallenged assumption* that the 1991 elections were

[1] The relief requested by plaintiffs would also effectively gut this Court's prior ruling that Section 254 is valid and constitutional. As noted above, Section 254 itself states that the new "apportionment shall be effective for the *next regularly scheduled elections* of members of the legislature." MISS. CONST., art. 13, § 254 (emphasis added). Moreover, the constitutional option of redistricting every ten years in the second year after the census would be a hollow one if the price of its exercise were the great expense and disruption of 174 special elections.

unconstitutional. It is now the law of this case, however, that Section 254 of the Mississippi Constitution and, hence, the results of the 2011 elections comply with *Reynolds v. Sims*.[2]

Plaintiffs' reliance on *Tucker v. Buford*, 603 F. Supp. 276 (N.D. Miss. 1985), is likewise misplaced. [*See* Doc. 141 at 6–7]. There, the court ordered special elections only after a county had ignored census data released *two years before* the challenged 1984 elections. *See id.* at 278–79. *Tucker* thus involved the clear disregard of *Reynolds*'s holding, not a rational plan to comply with *Reynolds*, as this Court has already held that Section 254 reflects.

Finally, plaintiffs rely on *Wyche v. Madison Parish Police Jury*, 635 F.2d 1151 (5th Cir. 1981). [*See* Doc. 141 at 5]. However, as this Court has already explained, *Wyche* is inapposite because the requirement in that case that the parish reapportion itself within six months of receipt of census data "was derived from a state statute," not the Federal Constitution. [Doc. 124 at 14–15 n.5]. Moreover, the Fifth Circuit suggested that "the plaintiffs [could] apply for a stay or such other interim relief as may be appropriate" if the necessary "census data [was] not … available at least six months prior to *the next scheduled election*." 635 F.2d at 1163 (emphasis added). Thus, the court plainly contemplated that reapportionment would occur in time for the parish's next *regular* elections—not for any court-ordered, special elections.[3]

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[2] Similarly, in *Keller v. Gilliam*, 454 F.2d 55 (5th Cir. 1972), five months prior to scheduled elections, the district court entered an order finding that the county was malapportioned—indeed, the population of one district was eleven times the populations of two others. *Id.* at 55. After the district court nonetheless allowed those elections to proceed, the Fifth Circuit held that special elections in new districts were required. *Id.* at 57. In contrast to this case, the Fifth Circuit implicitly concluded that the elections violated the Equal Protection Clause. There was no indication that the county was following a rational decennial reapportionment plan akin to Section 254 of the State Constitution.

[3] The Supreme Court cases string-cited by plaintiffs [*see* Doc. 141 at 4–5] are also inapposite. In *Davis v. Mann*, 377 U.S. 678 (1964), the Court actually observed that "ample time remain[ed] for the Virginia Legislature to enact a constitutionally valid reapportionment scheme for" use in its "*next* [regular] election." *Id.* at 693 (emphasis added). There was no mention of ordering special elections. *See also Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003) (noting that if a

This is not to say that special elections to remedy flagrant violations of the Constitution or outright defiance of the VRA are *never* appropriate. As noted above, the Fifth Circuit has held that that remedy is available in such truly "exceptional circumstances." *Lopez*, 617 F.3d at 340; *see Saxon*, 614 F.2d at 79. Thus, election results have been set aside "[i]n the face of gross, unsophisticated, significant, and obvious racial discriminations in the conduct of the election," which included segregated voting booths and blatant intimidation of minority voters, *Bell v. Southwell*, 376 F.2d 659, 664 (5th Cir. 1967), or based on unconstitutional poll taxes that had long "been used as an engine of discrimination," *Hamer v. Campbell*, 358 F.2d 215 (5th Cir. 1966). In another case, an election was voided when a county abruptly switched to at-large election of supervisors without obtaining or even requesting Section 5 preclearance. *See Moore v. Leflore County Bd. of Election Comm'rs*, 351 F. Supp. 848 (N.D. Miss. 1971).

However, there is no authority for setting aside election results—and ordering new elections, at great expense to taxpayers—when, as in this case, the elections were held in compliance with the Federal Constitution and, specifically, a reasonable approach to decennial reapportionment under *Reynolds v. Sims*. Rather, as shown above, courts in materially indistinguishable circumstances have consistently refused to shorten valid terms of office and order new elections. This Court should do the same.

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state fails to timely reapportion itself, "a federal court will ensure that the districts comply with the one-person, one-vote mandate *before the next election*" (emphasis added)). Similarly, in *Swann v. Adams*, 383 U.S. 210 (1966) (per curiam), the Court simply instructed the district court to draw a valid apportionment plan prior to upcoming, mid-decade *regular* elections *after* the Florida Legislature had enacted a new plan that violated the one-person, one-vote principle. *See also Sixty-Seventh Minnesota Senate v. Beens*, 406 U.S. 187, 201 n.11 (1972) (remanding to the district court with instructions to reapportion the state prior to its 1972 *regular* elections). Nor did the Court's opinion in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), which addressed the constitutionality of multi-member districts and a longstanding failure to address statewide malapportionment, address the appropriateness of special elections.

II. The 2012 Plans are non-discriminatory and consistent with the Voting Rights Act.

Because special elections are unnecessary, the Court need not reach plaintiffs' additional argument that special elections should be held under an apportionment plan other than the one adopted by the Mississippi Legislature and precleared by the Justice Department. Moreover, plaintiffs' request that the Court draw new maps is beyond the limited purpose for which the Court retained jurisdiction. The Court ruled that "[i]f a legislative reapportionment plan is adopted by the end of the 2012 session … and that plan is precleared by the Department of Justice …, this Court, upon motion of any party, will consider whether special elections are required *using such a plan*." [Doc. 124 at 16 (emphasis added)]. The Court did not retain jurisdiction to consider additional challenges to the new plan.

In any event, plaintiffs' challenge to the new plan is meritless. To begin with, *the "facts" that form the entire basis of plaintiffs' very serious charge of racial discrimination are simply wrong*. In footnotes of their motion and memorandum, plaintiffs assert that "[t]he 2012 [Senate] Plan contains 12 majority black districts and 12 majority black voting age population districts." [Doc. 140 at 3 n.7; Doc. 141 at 3 n.7]. In fact, the 2012 Senate Plan includes *15* such districts.[4] Although plaintiffs assert that the 2012 Senate Plan is attached to their motion [*see* Doc. 140 at 3 n.6], it is not. Instead, the exhibits to plaintiffs' motion all relate to the *old* (2002) plan. Despite making various false assertions regarding the new plan, plaintiffs' motion fails to attach any documents related to it—all of which are publicly and readily available through, among other sources, the website of the Mississippi Legislature's Standing Joint Legislative Committee on Reapportionment, *see* http://www.msjrc.state.ms.us/.

[4] *See* Exhibit 1, *available at* http://www.maris.state.ms.us/pdf/MS2010SenateDist/TRP_FULLREPORT043012.pdf.

Moreover, plaintiffs' only complaint about the 2012 Senate Plan seems to be that it does not contain as many majority-minority districts as the plan they prefer, which contains 15 such districts. [*See* Doc. 140 at 3–4 n.7; Doc. 141 at 6]. Again, though, that is simply false: the 2012 Senate Plan contains 15 majority-minority districts—*just like the plan plaintiffs themselves supported last year*. Plaintiffs' demonstrably false claim is the *only* basis for their assertion that the 2012 Senate Plan violates the VRA. [*See* Doc. 140 at 3–4 n.7; Doc. 141 at 6]. Thus, with respect to the 2012 Senate Plan, plaintiffs have provided no basis whatsoever for their allegation of a Section 2 violation.

Plaintiffs' allegations regarding the 2012 House Plan are based on similar factual inaccuracies. In footnotes, plaintiffs assert that "[t]he 2012 [House] Plan contains 39 majority black districts and 39 majority black voting age population districts." [Doc. 140 at 4 n.10; Doc. 141 at 3 n.9]. That claim is also wrong. The 2012 House Plan contains *42* such districts.[5] Thus, as with the 2012 Senate Plan, plaintiffs' only substantive complaint about the 2012 House Plan is based on a demonstrably false claim about the number of majority-minority districts it contains.

Moreover, the 2012 House Plan includes one *more* majority-minority district than the "Benchmark House Plan." The Benchmark House Plan reflects application of 2010 census data to the 2002 House Plan. In other words, it was the effective starting point for the redistricting process this year. The Benchmark House Plan had only 41 majority-minority districts [*see* Doc. 140 at 4 n.10; Doc. 141 at 3 n.9]—*i.e.*, one *less* than the plan ultimately adopted by the Legislature and precleared by the Justice Department this year. That is, the 2012 House Plan *increased* the number of majority-minority districts in the State.

[5] *See* Exhibit 2, *available at* http://www.maris.state.ms.us/pdf/MS2010HouseDist/Concert1c_ver1.2.Longreport.pdf.

Thus, based on *correct* data, plaintiffs' only possible criticism of the 2012 House Plan is that although it contains one more majority-minority district than the Benchmark House Plan, it contains two less than another plan that plaintiffs prefer. [*See* Doc. 140 at 4 n.10; Doc. 141 at 3 n.9]. This criticism—that a map with additional majority-minority districts conceivably could have been enacted—fails to state a claim under Section 2. The Supreme Court has made clear that the mere "failure to maximize the number of reasonably compact majority-minority districts" does not violate Section 2. *Johnson v. De Grandy*, 512 U.S. 997, 1022 (1994); *accord Bartlett v. Strickland*, 556 U.S. 1, 15–16 (2009). Rather, a claim under Section 2 requires the plaintiff to establish three "necessary preconditions": 1) that a protected "minority group … is sufficiently large and geographically compact to constitute a majority in a single-member district"; 2) that "the minority group … is politically cohesive"; and 3) that "the white majority votes sufficiently as a bloc to enable it … usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986). "Unless these points are established, there neither has been a wrong nor can be a remedy." *Growe v. Emison*, 507 U.S. 25, 40–41 (1993).[6]

Here, although plaintiffs suggest in the most general terms that they think there should be more majority-minority districts, they fail to allege *any* specific *facts* that would satisfy the *Gingles* preconditions. Instead, they merely recite the Section 2 standard and assert that it is met. However, a plaintiff must allege "sufficient *factual matter*, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation marks omitted; emphasis added). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* Without any

[6] Even if these three points are established, a plaintiff must still prove "vote dilution" under the "totality of the circumstances." *See, e.g.*, *Bartlett*, 556 U.S. at 11–12.

specific factual allegations that could support a Section 2 claim, plaintiffs have failed to raise any possible issue under the VRA.

To reiterate, because special elections are not required, the Court need not reach plaintiffs' argument that special elections require a new, court-drawn plan. To the extent the Court reaches the issue, however, plaintiffs' Section 2 argument should be rejected because it is based on false data, conclusory allegations, and discredited legal theories.

CONCLUSION

The 2011 state legislative election results are valid, and special elections are not required. The State's new apportionment plan is valid and may be implemented at the State's next regular elections in 2015. Therefore, plaintiffs' motion should be denied.

October 29, 2012

Respectfully submitted,

s/Jack L. Wilson

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

s/Jack L. Wilson
Jack L. Wilson