12 No. 1019

In The
Supreme Court of the United States

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,

Appellants,

vs.

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 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,

Appellees.

On Appeal From A Judgment Of The Three-Judge Court Of The United States District Court For The Southern District Of Mississippi

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Can a State be constitutionally compelled to redistrict in time for the first election after a census even though the existing districting scheme is less than ten years old?

2. Should the results of an election be set aside and a new election ordered when pre-election relief has been denied and the election has been conducted in violation of the one-person, one-vote mandate?

LIST OF ALL PARTIES

The parties to the proceedings below were the appellants: 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; the appellees: Phil Bryant,[1] 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; and appellee-intervenors: 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.

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[1] Phil Bryant is the successor in office to Haley Barbour. Governor Bryant was substituted as a defendant in the District Court.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, the Mississippi State Conference of the National Association for the Advancement of Colored People states that the National Association for the Advancement of Colored People is a non-profit corporation that is composed of individual members. The National Association for the Advancement of Colored People does not issue any stock.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

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REFERENCE TO OFFICIAL OPINIONS BY LOWER COURTS

Appellants appeal the final judgment and adverse decisions rendered by a three-judge District Court for the Southern District of Mississippi. The final judgment was rendered on December 17, 2012, and the adverse decisions were a memorandum opinion and order denying injunctive relief rendered on May 16, 2011, an order denying a motion to amend the memorandum opinion and order rendered on May 27, 2011, and an order denying appellants'[2] motion to set aside the results of the 2011 legislative elections and order special elections rendered on November 19, 2012. The final judgment and decisions are unreported and are set out in full in the Appendix, at pages App. 1-32.

STATEMENT OF THE GROUNDS OF THE BASIS FOR JURISDICTION

This is a direct appeal from the final judgment rendered by a three-judge District Court for the Southern District of Mississippi. The final judgment was rendered on December 17, 2012. The three-judge District Court was convened pursuant to 28 U.S.C. § 2284 to decide the constitutionality of Mississippi's legislative districting scheme. Appellants timely filed a notice of appeal in the United States District Court

[2] Appellants were plaintiffs below.

for the Southern District of Mississippi on January 2, 2013. Jurisdiction was invoked in the District Court pursuant to 28 U.S.C. §§ 1331, 1343, and 2284. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1253 and 2284. This Court has jurisdiction of this appeal. *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 75-85 (1960); *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Chapman v. Meier*, 420 U.S. 1, 13-14 (1975); *N.A.A.C.P. v. New York*, 413 U.S. 345, 353-356 (1973).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Supremacy Clause, Article VI, Clause 2, of the United States Constitution, 28 U.S.C. § 2284, Article 4, Section 36 of the Constitution of the State of Mississippi, and Article 13, Section 254 of the Constitution for the State of Mississippi. The texts of these constitutional and statutory provisions are set out in App. 44-50.

STATEMENT OF THE CASE

This is a statewide legislative redistricting case for the State of Mississippi. The bicameral Mississippi Legislature consists of a 52 member Senate and a 122 member House of Representatives. App. 66. State

Senators and Representatives are elected from single-member districts and serve four-year terms. App. 66. Candidates for legislative office are nominated by party primaries or qualify as independents. App. 66. A general election is held in November, and any vacancy in office is filled by a special election called by the Governor. App. 56, 63, 67.

A primary election for current legislators was held on August 2, 2011 with run-offs held on August 23, 2011, and a general election held on November 8, 2011. App. 17. The candidate qualification deadline was June 1, 2011. App. 17. Winners of the November 8, 2011 general election took office in January, 2012 and will serve until January, 2016. App. 54.

The Mississippi Constitution[3] requires the Legislature to redistrict by the end of the session in the second year following each decennial census. App. 13-14, 24. The Legislature is in session each year.[4] The Legislature was redistricted in 2002 and again in 2012. App. 11, 54-56. The next regular election for legislators will occur in 2015. App. 54.

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[3] MISS. CONST. art. 13, § 254.

[4] The legislative session begins in January of each year and lasts for either 90 or 125 days. MISS. CONST. art. 4, § 36.

The 2010 decennial census was released on February 3, 2011.[5] App. 15. All parties agree that the Legislature is grossly malapportioned. App. 9, 53. The population variance[6] is 69.08% in the Senate[7] and 134.35%[8] in the House of Representatives.[9] App. 53, 67-70. A number of Senate and House districts exceed ± 5% deviation.[10] App. 67-70.

The Mississippi Legislature failed to redistrict in 2011, and appellants filed a complaint on March 17, 2011 challenging the 2002 districting scheme as violative of the one-person, one-vote mandate.[11] App. 17, 59-78. Appellants alleged that they were aggrieved voters[12] who would continue to be aggrieved

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[5] The state population, according to the 2010 census, consists of 2,967,297 persons. App. 66, 82, 87.

[6] The ideal population for Senate districts is 57,063 persons. App. 67, 87.

[7] The total range of population deviation is 39,422 persons in Senate districts. App. 68.

[8] The ideal population for House districts is 24,322 persons. App. 69, 82.

[9] The total range of population deviation is 32,677 persons in House districts. App. 70.

[10] A total of 14 Senate and 38 House districts have a population deviation greater than 5%, and a total of 19 Senate and 58 House districts have a population deviation less than 5%. App. 67-70, 81-89.

[11] U.S. Const. amend. XIV, § 1.

[12] The NAACP has members who are aggrieved voters in overpopulated and under-represented Senate and House districts. App. 71. Plunkett is an aggrieved voter in overpopulated and under-represented Senate and House districts. App. 70-71.

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if elections were held in the malapportioned districts and persons elected allowed to serve a full four-year term of office. App. 54. Appellants requested a declaratory judgment declaring that the districting scheme violates the one-person, one-vote mandate, a preliminary injunction enjoining the 2011 elections, an injunction voiding the 2011 elections and scheduling special elections, and a districting scheme that was neither discriminatory nor retrogressive. App. 19, 51-78.

Appellee, Delbert Hosemann, Secretary of State for the State of Mississippi, filed a Rule 12(b)(1)[13] motion to dismiss the complaint on April 1, 2011. App. 20. Hosemann argued that the action was not ripe because redistricting was not required before the end of the 2012 legislative session. App. 20. Hosemann also argued that it was not unconstitutional for the elections to be conducted in the malapportioned districts. App. 20.

A three-judge District Court was convened on April 13, 2011 and issued an order on April 29, 2011 indicating an inclination to order interim elections using the 2011 legislative plans.[14] App. 33-36.

Woullard is an aggrieved voter in an overpopulated and underrepresented House district. App. 71.

[13] Fed. R. Civ. P. 12(b)(1).

[14] The 2011 Senate plan had a maximum population deviation of 9.60%, and the 2011 House plan had a maximum population deviation of 9.96%. However, these plans were not approved by a majority of the members of both Houses of the

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However, the lower court subsequently decided not to use those plans and denied appellants' request for an injunction. App. 8-32. The lower court held that the Mississippi Constitution did not require redistricting before 2012. App. 8-32. Nevertheless, the lower court retained jurisdiction "to order appropriate relief, including special elections, if appropriate, upon motion of any party, following completion – or failure [to complete – the redistricting process] prescribed by Article 13, Section 254 of the Mississippi Constitution." App. 29. The lower court denied appellants' request for reconsideration of the denial of an injunction. App. 6-7. Appellants filed an interlocutory appeal, and this Court affirmed the District Court's decision on October 31, 2011. *Mississippi State Conference NAACP v. Barbour*, 565 U.S. ___ (2011). Legislative elections were held as scheduled in 2011. App. 51-57.

The Legislature redistricted both Chambers during the 2012 session and obtained administrative preclearance of the plans on September 14, 2012. App. 79-80. The Mississippi Attorney General gave notice of the preclearance to the lower court and all parties on September 17, 2012. Thereafter, on October 14, 2012, the appellants filed a motion requesting that the 2011 election results be set aside and special

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Legislature as required by state law. App. 17. See MISS. CONST. art. 13, § 254.

elections ordered under a court ordered plan.[15] App. 51-57. The District Court denied the motion on November 19, 2012. App. 3-5. A final judgment was entered on December 17, 2012. App. 1-2.

Appellants timely filed their notice of appeal on January 2, 2013. App. 37-43.

ARGUMENT

I. A STATE CAN BE CONSTITUTIONALLY COMPELLED TO REDISTRICT IN TIME FOR THE FIRST ELECTION AFTER A CENSUS EVEN THOUGH THE EXISTING DISTRICTING SCHEME IS LESS THAN TEN YEARS OLD.

The one-person, one-vote mandate requires substantial population equality in legislative districts. *Reynolds v. Sims*, 377 U.S. 533 (1964). The mandate is generally satisfied when the total range of population deviation is less than 10%. *Brown v. Thomson*, 462 U.S. 835 (1983). The mandate is important because the right to vote is fundamental and "preservative of other basic civil and political rights."

[15] Although the 2012 legislative redistricting scheme was precleared by the United States Attorney General, appellants challenged that scheme as discriminatory under § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. The lower court dismissed the challenge. App. 3-5. The issue of whether this scheme is discriminatory is not involved in nor necessary for this appeal. App. 20, n. 2.

Reynolds v. Sims, supra, at 561-562. A citizen's vote can be infringed just as much by dilution as it can be by outright denial. *Reynolds v. Sims*, supra, at 554-556.

States may satisfy the one-person, one-vote mandate by adopting "some reasonable plan for periodic revision of their [districting] schemes." *Reynolds v. Sims*, supra, at 583. Decennial redistricting "appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth." *Ibid.* However, this Court has indicated that a State can "be compelled to [redistrict] itself more than once in a 10-year period." *Whitcomb v. Chavis*, 403 U.S. 124, 163 (1971). This Court has also affirmed a District Court's decision compelling legislative redistricting after a new census reflects a dramatic shift in a State's population. *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 195 (1972) (Per Curiam) ("The 1966 Minnesota [redistricting] legislation, the court found, in the light of the 1970 census figures no longer provided a constitutionally acceptable [redistricting] of either house"). After all, it is a "legal fiction that even 10 years later, the plans are constitutionally apportioned." *Georgia v. Ashcroft*, 539 U.S. 461, 488, n. 2 (2003). After a census is released, "no districting plan is likely to be legally enforceable if challenged, given the shifts and changes in a population over 10 years." *Ibid.* When a new census "renders the current plan unusable, a court must undertake the 'unwelcome obligation' of creating an interim plan." *Perry v. Perez*, 565 U.S. ___, Slip Op., pp. 3-4 (2012), *quoting*, *Connor*

v. Finch, 431 U.S. 407, 415 (1977). Furthermore, when a "State has not redistricted in response to the new census figures, a federal court will ensure that the new districts comply with the one-person, one-vote mandate before the next election." *Georgia v. Ashcroft*, supra, at 488, n. 2.

The District Court, below, held that the Mississippi Constitution did not require redistricting before 2012, and the Court could not compel the State to redistrict even though the census revealed that the 2002 scheme was grossly malapportioned. App. 8-32. However, this Court has held "that a state legislative apportionment scheme is no less violative of the Federal Constitution when it is based on state constitutional provisions which have been consistently complied with than when resulting from a noncompliance with state constitutional requirements." *Reynolds v. Sims*, supra, at 584. The Supremacy Clause[16] elevates the requirement to comply with the one-person, one-vote mandate for the next election after a census above any state constitutional provision that does not require such compliance. See *Reynolds v. Sims*, supra, at 584. "When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls." *Ibid.* Therefore, the District Court erred by refusing to elevate compliance with the one-person, one-vote mandate before the 2011 elections over

[16] U.S. Const. art. VI, cl. 2.

Mississippi's constitutional provision that allowed elections to be conducted in malapportioned districts. *Reynolds v. Sims*, supra, at 584.

The 2010 census was released on February 3, 2011, and appellants challenged the 2002 districting scheme as unconstitutionally malapportioned on March 17, 2011. The next elections following release of the census were the August, 2011 primaries and November, 2011 general election. The three-judge District Court refused to enjoin the elections. This refusal conflicts with decisions of this Court. See *Whitcomb v. Chavis*, supra, at 163; *Sixty-Seventh Minnesota State Senate v. Beens*, supra, at 195; *Georgia v. Ashcroft*, supra, at 488, n. 2; *Perry v. Perez*, supra.

The three-judge District Court's refusal to enjoin the elections also conflicts with a decision issued by a three-judge District Court for the State of Rhode Island. See *Farnum v. Burns*, 548 F. Supp. 769 (D. Rhode Island 1982) (three-judge court). In that case, the Rhode Island Legislature redistricted Senate districts in 1974 based on the 1970 census. *Farnum v. Burns*, supra, at 770. The 1980 census revealed that Senate districts were malapportioned. *Id.*, at 771. The Governor and Legislature enacted a bill that required the 1974 redistricting plan to be used in the 1982 elections. *Ibid.* The bill also required the implementation of a new plan beginning with the 1984 elections. *Ibid.* State citizens and voters filed suit prior to the 1982 elections seeking "a judgment declaring the proposed use of the 1974 senatorial lines in 1982 to

be unconstitutional." *Ibid.* The three-judge District Court acknowledged that an argument could be made that "Rhode Island [was] not constitutionally compelled to [redistrict] its senate lines until 1984, because its last senatorial [redistricting] occurred in 1974." *Farnum v. Burns*, supra, at 773. However, the three-judge District Court rejected this argument holding that "opinions of the Supreme Court indicate that a state can constitutionally be compelled to [redistrict] in time for the first election after a census, even where the existing [redistricting] scheme is less than ten years old." *Ibid.* Furthermore, the three-judge District Court held that where a State's election machinery is not fully engaged and the election districts are unconstitutionally malapportioned, a court is compelled to enjoin elections in those districts. *Farnum v. Burns*, supra, at 774-775. In this case, the State election machinery was not fully engaged when appellants requested an injunction. Notwithstanding, the lower court refused to enjoin the elections. In this regard, the refusal conflicts with the decision of the Rhode Island three-judge District Court. *Farnum v. Burns*, supra.

In sum, a State can be constitutionally compelled to redistrict in time for the first election after a census even though the existing districting scheme is less than ten years old. *Reynolds v. Sims*, supra; *Whitcomb v. Chavis*, supra, at 163; *Sixty-Seventh Minnesota State Senate v. Beens*, supra, at 195;

Georgia v. Ashcroft, supra, at 488, n. 2; *Perry v. Perez*, supra; *Farnum v. Burns*, supra.

ARGUMENT

II. THE RESULTS OF AN ELECTION SHOULD BE SET ASIDE AND A NEW ELECTION ORDERED WHEN PRE-ELECTION RELIEF HAS BEEN DENIED AND THE ELECTION HAS BEEN CONDUCTED IN VIOLATION OF THE ONE-PERSON, ONE-VOTE MANDATE.

The 2010 census for Mississippi was released on February 3, 2011 and revealed that the 2002 legislative districts were malapportioned. App. 9, 15. Legislative elections were scheduled for August and November, 2011. App. 8-32. In March, 2011, before the State's election machinery became fully engaged, appellants requested a preliminary injunction enjoining the elections and ordering use of an interim scheme that satisfied federal constitutional and statutory requirements. App. 15-17, 59-78. The Legislature had an opportunity to redistrict prior to the election but failed to do so. App. 15-17. This Court has held that "judicial relief becomes appropriate . . . when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *White v. Weiser*, 412 U.S. 783, 794-795 (1973). Furthermore, it becomes the unwelcome obligation of the federal courts to fashion a remedy for malapportioned

districts if "the imminence of a state election makes it impractical" for the legislature to fashion a remedy. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). A court should enjoin the next election upon request if a State fails to reapportion after new census figures reveal that existing districts fail to comply with the one-person, one-vote mandate. *Georgia v. Ashcroft*, supra, at 488, n. 2; *Perry v. Perez*, supra, Slip Op., pp. 3-4. Appellants were entitled to an injunction requiring compliance with the one-person, one-vote mandate before the August, 2011 primaries and the November, 2011 general election. *Georgia v. Ashcroft*, supra, at 488, n. 2; *Perry v. Perez*, supra, Slip Op., pp. 3-4. As discussed below, when the requested relief was not granted, the lower court should have voided the election results and promptly ordered new elections.

The three-judge District Court held that after new redistricting plans were adopted and precleared, the Court would consider granting post-election relief upon a party's timely request. App. 29-32. Appellants timely requested post-election relief of setting aside the 2011 election results and ordering special elections. App. 51-58. The three-judge District Court denied the request thus allowing legislators elected in malapportioned districts to serve a full four-year term. App. 51-58. Appellants are suffering a continuing injury by being represented by legislators elected from malapportioned districts. App. 51-78. The one-person, one-vote mandate "ensures that every person receives equal representation by his or her elected officials." *Daly v. Hunt*, 93 F.3d 1212, 1216 (4th Cir.

1996). See also, *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1981). After all, "representational equality is at least as important as electoral equality in a representative democracy." *Daly v. Hunt*, supra, at 1226-1227; *NAACP-Greensboro Branch v. Guilford County Board of Elections*, 858 F. Supp. 2d 516, at 523 (M. D. N. C. 2012).

This Court has held that legislators elected in malapportioned districts should not serve a full four-year term of office when pre-election relief has been wrongly denied. See *Swann v. Adams*, 383 U.S. 210, 211-212 (1966) (Per Curiam). Other lower courts, as well, have held that legislators elected in malapportioned districts should not be allowed to serve a full four-year term when pre-election relief was requested. See *Keller v. Gilliam*, 454 F.2d 55 (5th Cir. 1972); *Taylor v. Monroe County Bd. of Supervisors*, 394 F.2d. 333 (5th Cir. 1972); *Chavis v. Whitcomb*, 307 F. Supp. 1362, 1367 (Ind. 1969) (three-judge court) (Per Curiam); *Moore v. Leflore County Board of Election Commissioners*, 351 F. Supp. 848 (N. D. Miss.) (three-judge court); *Watkins v. Mabus*, 771 F. Supp. 789, 804 (S. D. Miss.) (three-judge court) (Per Curiam), *aff'd in part and vacated in part*, 502 U.S. 954 (1991); *Tucker v. Buford*, 603 F. Supp. 276 (N. D. Miss. 1985); *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). The three-judge District Court committed reversible error by denying appellants' pre-election

relief. *Farnum v. Burns*, supra. The lower court compounded this error by wrongly denying appellants' request to void the 2011 elections and order special elections. See *Swann v. Adams*, supra; *Keller v. Gilliam*, supra; *Taylor v. Monroe Cnty. Bd. of Supervisors*, supra; *Chavis v. Whitcomb*, supra; *Moore v. Leflore County Board of Election Commissioners*, supra; *Watkins v. Mabus*, supra; *Tucker v. Buford*, supra. Consequently, the three-judge District Court's order and judgment is erroneous and conflicts with a decision of this Court, *Swann v. Adams*, supra, and the decisions of other lower federal courts. *Keller v. Gilliam*, supra; *Taylor v. Monroe Cnty. Bd. of Supervisors*, supra; *Chavis v. Whitcomb*, supra; *Moore v. Leflore County Board of Election Commissioners*, supra; *Watkins v. Mabus*, supra; *Tucker v. Buford*, supra.

In sum, the results of the 2011 legislative elections should be set aside and new elections ordered because pre-election relief was denied and the elections were conducted in violation of the one-person, one-vote mandate. *Swann v. Adams*, supra; *Keller v. Gilliam*, supra; *Taylor v. Monroe Cnty. Bd. of Supervisors*, supra; *Chavis v. Whitcomb*, supra; *Moore v. Leflore County Board of Election Commissioners*, supra; *Watkins v. Mabus*, supra; *Tucker v. Buford*, supra.

CONCLUSION

Since the three-judge district court erroneously denied appellants' motion to enjoin the 2011 legislative elections and their motion to set aside the results of the 2011 legislative elections and order special elections, this Court should note probable jurisdiction, reverse the lower court judgment, and remand the case to the lower court.

Dated: February 8, 2013.

Respectfully submitted,

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