

APR 25 2013

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In The  
**Supreme Court of the United States**

MISSISSIPPI STATE CONFERENCE OF THE  
NATIONAL ASSOCIATION FOR THE ADVANCEMENT  
OF COLORED PEOPLE, *et al.*, on behalf of themselves  
and all others similarly situated,

*Appellants,*

vs.

PHIL BRYANT, in his official capacity as  
Governor of the State of Mississippi, *et al.*,

*Appellees.*

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

**BRIEF OPPOSING MOTIONS TO AFFIRM**

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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 was denied and the election was conducted in violation of the one-person, one-vote mandate?
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**BRIEF OPPOSING MOTIONS TO AFFIRM**

Appellants, pursuant to Sup. Ct. R. 18.8, file this Brief Opposing the Motions to Affirm filed by the appellees, Phil Bryant, in his official capacity as Governor of the State of Mississippi (“Bryant”), Jim Hood, in his official capacity as Attorney General of the State of Mississippi (“Hood”), and Delbert Hosemann, in his official capacity as Secretary of State of the State of Mississippi (“Hosemann”). Although Bryant, Hood, and Hosemann filed separate Motions to Affirm, their arguments are similar. Appellees essentially argue that: (1) the District Court did not err by allowing the 2011 legislative elections to proceed under the 2002 apportionment scheme because that scheme was less than 10 years old and this Court held in *Reynolds v. Sims*, 377 U.S. 533, 583 (1964), that “[d]ecennial reapportionment appears to be a rational approach to readjustment of legislative representation . . . ” and (2) the District Court did not err by refusing to void the 2011 legislative elections and order special elections because the elections were held under a constitutional scheme. However, as discussed below, the District Court and appellees misconstrue *Reynolds*. Since the appellees’ arguments are similar, this Brief Opposing Motions to Affirm will address the two issues raised by appellees.



**ARGUMENT****I. THE 2002 APPORTIONMENT SCHEME WAS MALAPPORTIONED IN 2011 AND THE ELECTIONS HELD UNDER THAT SCHEME DILUTED APPELLANTS' VOTES.**

The District Court held and appellees argue that the 2011 elections were held under a constitutional apportionment scheme. The basis for this holding and argument is that this Court, in *Reynolds*, held that “[d]ecennial reapportionment appears to be a rational approach to readjustment of legislative representation. . . .” *Id.*, at 583. There are two problems with the lower court’s holding and appellees’ argument. First, the District Court and appellees misconstrue *Reynolds*. Second, appellees misconstrue appellants’ claims. Appellants complain that the 2002 apportionment scheme under which the 2011 legislative elections were held was malapportioned and unconstitutionally diluted their vote. Appellants’ arguments are discussed, in more detail, below.

The District Court and appellees misconstrue the phrase “decennial reapportionment” used in *Reynolds v. Sims*. The lower court and appellees essentially argue that reapportionment accomplished in any random or arbitrary 10-year period satisfies the *Reynolds* “decennial reapportionment” requirement as opposed to reapportionment accomplished after a decennial census. This Court, in *Reynolds*, noted that “the Alabama Constitution requires decennial reapportionment. . . .” *Id.*, at 583. The Alabama Constitution provides that “[i]t shall be the duty of the

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legislature, at its first session after the taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census,” to reapportion legislative districts. *Id.*, at 538-539. In this regard, the phrase “decennial reapportionment” means reapportionment after a decennial census. *Id.*, at 583.

The phrase “decennial reapportionment” is linked to the concept of malapportionment. This Court has held that the Equal Protection Clause of the Fourteenth Amendment requires that “all who participate in the election are to have an equal vote. . . .” *Id.*, at 557, quoting, *Gray v. Sanders*, 372 U.S. 368, 379 (1963). A citizen’s vote is diluted by malapportionment. *Reynolds v. Sims*, supra, at 558-568. After all, “Legislators represent people, not trees or acres.” *Id.*, at 562. Whenever malapportionment occurs, “it is constitutionally impermissible under the Equal Protection Clause.” *Id.*, at 568. Consequently, *Reynolds* clearly indicates that the phrase “decennial reapportionment” means reapportionment after a decennial census before the next election as opposed to any random or arbitrary 10-year period. See *Georgia v. Ashcroft*, 539 U.S. 461, 488, n. 2 (2003); *Perry v. Perez*, 565 U.S. \_\_\_, Slip Op., pp. 3-4 (2012) (Per Curiam). Furthermore, *Reynolds* holds that

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malapportionment is “constitutionally impermissible under the Equal Protection Clause.”<sup>1</sup> *Id.*, at 568.

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<sup>1</sup> Appellees argue that other lower federal courts, i.e., *French v. Boner*, 963 F.2d 890 (6th Cir. 1992), *cert. denied*, 506 U.S. 964 (1992); *Political Action Conference of Illinois v. Daley*, 976 F.2d 335 (7th Cir. 1992); and *Republican Party of Oregon v. Keisling*, 959 F.2d 144 (9th Cir. 1992), *cert. denied*, 504 U.S. 914 (1992), have interpreted *Reynolds* in the same manner as the District Court below. However, those cases are distinguishable from the instant case. In those cases, the state election machinery was fully engaged whereas it was not in the instant case. This Court held, in *Reynolds*, that district courts are granted broad discretion concerning whether to grant *pre-election relief*. This Court held that “under certain circumstances, such as where an impending election is imminent and a State’s election machinery is already in progress . . .” *pre-election relief* may be withheld. *Id.*, at 585. However, the Court did not hold that *post-election relief* should be withheld. “Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions.” *Ibid.*

Bryant argues that this Court, in *Connor v. Williams*, 404 U.S. 549 (1972) (Per Curiam), withheld *post-election relief*. However, the *Connor* case is distinguishable. In *Connor*, the District Court held that the apportionment scheme “passed by the Mississippi Legislature in January, 1971, failed to comply with the Equal Protection Clause because of a total variance of 26% . . .” *Id.*, at 549. The District Court, thereafter, “fashioned its own plan for the quadrennial elections. . .” *Id.*, at 549-550. The plaintiffs requested this Court to void the elections held under the court-ordered plan, and this Court refused. *Id.* That is not the scenario before the Court in the present case. In this case, the District Court did not find that the legislative scheme was unconstitutional. The District Court did not implement its own scheme, but instead, allowed elections to proceed under the malapportioned legislative scheme. As discussed above, allowing the elections to proceed under an unconstitutionally

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In this case, the District Court recognized that “[a]ll of the parties acknowledge that shifts in population, reflected in the 2010 census, have resulted in the malapportionment of Mississippi’s existing legislative districts.” App. 9. The lower court and the parties further acknowledge “that the existing state legislative districts are unconstitutionally malapportioned. . . .” App. 34. The unconstitutional malapportionment of the 2002 apportionment scheme after the 2010 census rendered the scheme unusable for the 2011 legislative elections. *Perry v. Perez*, supra.

The District Court committed reversible error by allowing elections to be held under an unconstitutionally malapportioned scheme because appellants’ votes were diluted. The Equal Protection Clause prohibits use of a malapportioned scheme to conduct legislative elections when an aggrieved voter challenges that scheme. *Reynolds v. Sims*, supra, at 568; *Perry v. Perez*, supra. Therefore, appellants’ constitutional right to an equal vote was denied.

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malapportioned scheme violates appellants’ rights. Furthermore, as discussed above, allowing legislators elected under such a scheme to hold office for a full four year term violates appellants’ rights. Importantly, this Court subsequently reversed the court-ordered plan crafted by the District Court in *Connor v. Williams*. See *Connor v. Finch*, 431 U.S. 407 (1977). Therefore, *Connor v. Williams* is inapposite.

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## **II. THE USE OF THE 2002 APPORTIONMENT SCHEME FOR THE 2011 LEGISLATIVE ELECTIONS DENIED APPELLANTS' RIGHTS OF EQUAL REPRESENTATION.**

Appellants argued below that allowing legislators elected in 2011 under an unconstitutionally malapportioned scheme to serve a full four year term of office violated their rights of equal representation. Appellees argue that appellants' rights of equal representation have not been and would not be violated by allowing legislators elected in malapportioned districts to serve a full four year term. The basic principle of equal representation "is at the heart of Lincoln's vision of 'government of the people, by the people, (and) for the people.'" *Reynolds*, at 567. The principle is inimical to a truly representative democracy. See *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). Since the District Court allowed Legislators elected in grossly malapportioned districts to serve a full four year term, the lower court committed reversible error. *Daly v. Hunt*, *supra*; *Garza v. County of Los Angeles*, *supra*.

## **III. THE DISTRICT COURT ERRED BY REFUSING TO VOID THE 2011 LEGISLATIVE ELECTIONS AND ORDER SPECIAL LEGISLATIVE ELECTIONS.**

The District Court erred by refusing to void the 2011 legislative elections and order special elections

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because the elections were held under an unconstitutionally malapportioned scheme and legislators elected under such a scheme should not be allowed to serve a full four year term of office in light of a timely challenge. Appellees argue that post-election relief is a drastic remedy that should not be granted where there has been no constitutional violation. However, as argued above, appellants' constitutional rights to an equally weighted vote and equal representation have been violated. Appellants timely requested pre-election relief which was wrongly denied. Consequently, they are entitled to post-election relief. In *Reynolds*, the plaintiffs filed suit on August 26, 1961, *Id.*, at 537, seeking to enjoin the 1962 legislative elections. *Id.*, at 541. The District Court granted pre-election relief, and this Court held:

that the action taken by the District Court in this case, in ordering into effect a reapportionment of both houses of the Alabama Legislature for purposes of the 1962 primary and general elections, by using the best parts of the two proposed plans which it had found, as a whole, to be invalid, was an appropriate and well-considered exercise of judicial power. Admittedly, the lower court's ordered plan was intended only as a temporary and provisional measure and the District Court correctly indicated that the plan was invalid as a permanent apportionment. In retaining jurisdiction while deferring a hearing on the issuance of a final injunction in order to give the provisionally reapportioned legislature

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an opportunity to act effectively, the court below proceeded in a proper fashion.

*Id.*, at 586-587. In this regard, the Court recognized that either *pre-election* relief or *post-election* relief should be awarded. Consequently, the District Court erred by refusing to grant *pre-election* or *post-election* relief. *Reynolds v. Sims*, *supra*.

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### 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: April 25, 2013.

Respectfully submitted,

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