

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Case No. 11-60446

HANCOCK COUNTY BOARD OF SUPERVISORS,

Plaintiff

v.

KAREN LADNER RUHR, in her official capacity as Hancock County Circuit Clerk and Hancock County Registrar; ET AL,

Defendants

JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi

Intervenor Defendant - Appellee

HAZLEHURST, MISSISSIPPI BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on behalf of themselves and all others similarly situated; NANETTE THURMOND-SMITH,

Plaintiffs - Appellants

v.

COPIAH COUNTY, MISSISSIPPI BOARD OF SUPERVISORS; COPIAH COUNTY, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE; COPIAH COUNTY, MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE; COPIAH COUNTY, MISSISSIPPI BOARD OF ELECTION COMMISSIONERS; EDNA STEVENS, in her official capacity as Circuit Clerk,

Defendants - Appellees

BRIEF FOR APPELLANTS

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**Mr. McClellan died on September 20, 2011

JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi

Intervenor Defendant - Appellee

REVEREND FRANK LEE; PIKE COUNTY, MISSISSIPPI BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on behalf of themselves and all others similarly situated,

Plaintiffs - Appellants

v.

PIKE COUNTY, MISSISSIPPI BOARD OF SUPERVISORS; PIKE COUNTY, MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE; PIKE COUNTY, MISSISSIPPI BOARD OF ELECTION COMMISSIONERS; ROGER GRAVES, in his official capacity as Circuit Clerk; PIKE COUNTY, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE,

Defendants - Appellees

JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi

Intervenor Defendant - Appellee

SIMPSON COUNTY, MISSISSIPPI BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on behalf of themselves and all others similarly situated; L. J. CAMPER, on behalf of themselves and all others similarly situated,

Plaintiffs - Appellants

v.

SIMPSON COUNTY, MISSISSIPPI BOARD OF SUPERVISORS; SIMPSON COUNTY, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE; SIMPSON COUNTY, MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE; SIMPSON COUNTY, MISSISSIPPI BOARD OF ELECTION COMMISSIONERS; CINDY JENSEN, in her official capacity as Circuit Clerk,

Defendants - Appellees

JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi

Intervenor Defendant - Appellee

AMITE COUNTY, MISSISSIPPI BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on Behalf of Themselves and all others Similarly Situated; GLENN WILSON, on Behalf of Themselves and all others Similarly Situated,

Plaintiffs - Appellants

v.

AMITE COUNTY, MISSISSIPPI BOARD OF SUPERVISORS; AMITE COUNTY, MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE; AMITE COUNTY, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; AMITE COUNTY, MISSISSIPPI BOARD OF ELECTION COMMISSIONERS; SHARON WALSH, in Her Official Capacity as Circuit Clerk,

Defendants - Appellees

JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi

Intervenor Defendant - Appellee

WAYNE COUNTY, MISSISSIPPI BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on Behalf of Themselves and all Others Similarly Situated; LEAH PARSON, on Behalf of Themselves and all Others Similarly Situated,

Plaintiffs - Appellants

v.

WAYNE COUNTY, MISSISSIPPI BOARD OF SUPERVISORS; WAYNE COUNTY, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE; WAYNE COUNTY, MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE; WAYNE COUNTY, MISSISSIPPI BOARD OF ELECTION COMMISSIONERS; ROSE BINGHAM, in her official Capacity as Circuit Clerk,

Defendants - Appellees

JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi

Intervenor Defendant - Appellee

VICKSBURG, MISSISSIPPI BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on Behalf of Itself and all Others Similarly Situated,

Plaintiffs - Appellants

v.

WARREN COUNTY, MISSISSIPPI BOARD OF SUPERVISORS; WARREN COUNTY,

MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE; WARREN COUNTY, MISSISSIPPI BOARD OF ELECTION COMMISSIONERS; SHELLY ASHLEY-PALMERTREE, in his official Capacity as Circuit Clerk,

Defendants - Appellees

JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi

Intervenor Defendant - Appellee

CLAIBORNE COUNTY, MISSISSIPPI BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on Behalf of Itself and all Others Similarly Situated; LEAH PARSON, on Behalf of Themselves and all Others Similarly Situated,

Plaintiffs - Appellants

v.

CLAIBORNE COUNTY, MISSISSIPPI BOARD OF SUPERVISORS; CLAIBORNE COUNTY, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE; CLAIBORNE COUNTY, MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE; CLAIBORNE COUNTY, MISSISSIPPI BOARD OF ELECTION COMMISSIONERS; SAMMIE GOOD, in her official Capacity as Circuit Clerk,

Defendants - Appellees

JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi

Intervenor Defendant - Appellee

ADAMS COUNTY, MISSISSIPPI BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, on Behalf of Themselves and all Others Similarly Situated; LEAH PARSON, on Behalf of Themselves and all Others Similarly Situated,

Plaintiffs - Appellants

v.

ADAMS COUNTY, MISSISSIPPI BOARD OF SUPERVISORS; ADAMS COUNTY, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE; ADAMS COUNTY, MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE; ADAMS COUNTY, MISSISSIPPI BOARD OF ELECTION COMMISSIONERS; EDWARD WALKER, in his official Capacity as Circuit Clerk,

Defendants - Appellees

JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi

Intervenor Defendant - Appellee

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Case No. 11-60446

HANCOCK COUNTY BOARD OF SUPERVISORS, ET AL,

Plaintiff

v.

KAREN LADNER RUHR, in her official capacity as Hancock County Circuit Clerk
and Hancock County Registrar; ET AL,

Defendants

JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of
Mississippi

Intervenor Defendant - Appellee

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Hazlehurst, Mississippi Branch of the NAACP and Nanette Thurmond-Smith, on behalf of themselves and all others similarly situated - plaintiffs-appellants.

2. Pike County, Mississippi Branch of the NAACP and Rev. Frank Lee, on behalf of themselves and all others similarly situated - plaintiffs-appellants.
3. Simpson County, Mississippi Branch of the NAACP and L. J. Camper, on behalf of themselves and all others similarly situated - plaintiffs-appellants.
4. Amite County, Mississippi Branch of the NAACP and Glenn Wilson, on behalf of themselves and all others similarly situated - plaintiffs-appellants.
5. Wayne County, Mississippi Branch of the NAACP and Leah Parson, on behalf of themselves and all others similarly situated - plaintiffs-appellants.
6. Vicksburg, Mississippi Branch of the NAACP, on behalf of itself and all others similarly situated - plaintiff-appellant.
7. Claiborne County, Mississippi Branch of the NAACP, on behalf of itself and all others similarly situated - plaintiff-appellant.
8. Adams County, Mississippi Branch of the NAACP and Jacqueline Marsaw, on behalf of themselves and all others similarly situated - plaintiffs-appellants.
9. Jim Hood, Attorney General for the State of Mississippi, ex rel. the State of Mississippi - defendant-intervenor.

10. Carroll Rhodes, Esq., Deborah McDonald, Esq., and Leonard McClellan, Esq.,* counsel for plaintiffs-appellants - Hazlehurst, Mississippi Branch of the NAACP and Nanette Thurmond-Smith, on behalf of themselves and all others similarly situated; Pike County, Mississippi Branch of the NAACP and Rev. Frank Lee, on behalf of themselves and all others similarly situated; Simpson County, Mississippi Branch of the NAACP and L. J. Camper, on behalf of themselves and all others similarly situated; Amite County, Mississippi Branch of the NAACP and Glenn Wilson, on behalf of themselves and all others similarly situated; Wayne County, Mississippi Branch of the NAACP and Leah Parson, on behalf of themselves and all others similarly situated; Vicksburg, Mississippi Branch of the NAACP, on behalf of itself and all others similarly situated; Claiborne County, Mississippi Branch of the NAACP, on behalf of itself and all others similarly situated; and Adams County, Mississippi Branch of the NAACP and Jacqueline Marsaw, on behalf of themselves and all others similarly situated.
11. Copiah County, Mississippi Board of Supervisors, Copiah County, Mississippi Democratic Party Executive Committee, Copiah County, Mississippi Republican Party Executive Committee, Copiah County, Mississippi Board of Election Commissioners, and Edna Stevens, in her official capacity as Circuit Clerk - defendants-appellees.
12. Pike County, Mississippi Board of Supervisors, Pike County, Mississippi Democratic Party Executive Committee, Pike County, Mississippi Republican Party Executive Committee, Pike County, Mississippi Board of Election Commissioners, and Roger Graves, in his official capacity as Circuit Clerk - defendants-appellees.
13. Simpson County, Mississippi Board of Supervisors, Simpson County, Mississippi Democratic Party Executive Committee, Simpson County, Mississippi Republican Party Executive Committee, Simpson County, Mississippi Board of Election Commissioners, and Cindy Jensen, in her official capacity as Circuit Clerk - defendants-appellees.

*Leonard McClellan, Esq. died on September 20, 2011.

14. Amite County, Mississippi Board of Supervisors, Amite County, Mississippi Democratic Party Executive Committee, Amite County, Mississippi Republican Party Executive Committee, Amite County, Mississippi Board of Election Commissioners, and Sharon Walsh, in her official capacity as Circuit Clerk - defendants-appellees.
15. Wayne County, Mississippi Board of Supervisors, Wayne County, Mississippi Democratic Party Executive Committee, Wayne County, Mississippi Republican Party Executive Committee, Wayne County, Mississippi Board of Election Commissioners, and Rose Bingham, in her official capacity as Circuit Clerk - defendants-appellees.
16. Warren County, Mississippi Board of Supervisors, Warren County, Mississippi Democratic Party Executive Committee, Warren County, Mississippi Republican Party Executive Committee, Warren County, Mississippi Board of Election Commissioners, and Shelly Ashley-Palmtree, in his official capacity as Circuit Clerk - defendants-appellees.
17. Claiborne County, Mississippi Board of Supervisors, Claiborne County, Mississippi Democratic Party Executive Committee, Claiborne County, Mississippi Republican Party Executive Committee, Claiborne County, Mississippi Board of Election Commissioners, and Sammie Good, in her official capacity as Circuit Clerk - defendants-appellees.
18. Adams County, Mississippi Board of Supervisors, Adams County, Mississippi Democratic Party Executive Committee, Adams County, Mississippi Republican Party Executive Committee, Adams County, Mississippi Board of Election Commissioners, and Edward Walker, in his official capacity as Circuit Clerk - defendants-appellees.

19. Elise Berry Munn, Esq., Michael G. Berry, Esq., and Berry & Munn, P.A. - counsel for defendants-appellees - Copiah County, Mississippi Board of Supervisors, Copiah County, Mississippi Democratic Party Executive Committee, Copiah County, Mississippi Republican Party Executive Committee, Copiah County, Mississippi Board of Election Commissioners, and Edna Stevens, in her official capacity as Circuit Clerk.
20. Wayne Dowdy, Esq., and Dowdy & Cockerham - counsel for defendant-appellee - Pike County, Mississippi Board of Supervisors.
21. Alfred Lee Felder, Esq. - counsel for defendant-appellee - Pike County, Mississippi Democratic Party Executive Committee.
22. Benjamin E. Griffith, Esq., Daniel J. Griffith, Esq., Michael S. Carr, Esq., Griffith & Griffith, and Robert Daniel Welch, Esq. - counsel for defendant-appellee - Simpson County, Mississippi Board of Supervisors, Simpson County, Mississippi Board of Election Commissioners, and Cindy Jensen, in her official capacity as Circuit Clerk.
23. Benjamin E. Griffith, Esq., Griffith & Griffith, Charles Martin Leggett, Esq., Cooper Martin Leggett, Esq., and Leggett Law Office, PLLC - counsel for defendant-appellee - Wayne County, Mississippi Board of Supervisors and Rose Bingham, in her official capacity as Circuit Clerk.
24. Benjamin E. Griffith, Esq., Daniel J. Griffith, Esq., Michael S. Carr, Esq., Griffith & Griffith, and James R. Sherard, Esq. - counsel for defendant-appellee - Warren County, Mississippi Board of Supervisors, Warren County, Mississippi Board of Election Commissioners, and Shelly Ashley-Palmertree.
25. Tommie S. Cardin, Esq., Leslie Scott, Esq., John H. Dollarhide, Esq., and Butler, Snow, O'Mara, Stevens & Cannada - counsel for defendants-appellees - Amite County, Mississippi Board of Supervisors and Claiborne County, Mississippi Board of Supervisors.

26. Bryan H. Callaway, Esq., - counsel for defendants-appellees - Adams County, Mississippi Board of Supervisors, Adams County, Mississippi Board of Election Commissioners, and Edward Walker, in his official capacity as Circuit Clerk.
27. Bobby L. Cox, Esq., and Truly, Smith & Latham - counsel for defendant-appellee - Adams County, Mississippi Democratic Party Executive Committee.
28. Honorable Jim Hood, Harold Edward Pizetta, III, Esq., and Justin L. Matheny, Esq., - counsel for defendant-intervenor - JIM HOOD, Attorney General for the State of Mississippi, ex rel. the State of Mississippi.

/s/ Carroll Rhodes

CARROLL RHODES
COUNSEL OF RECORD FOR
PLAINTIFFS-APPELLANTS

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants, Hazlehurst, Mississippi Branch of the NAACP and Nanette Thurmond-Smith, on behalf of themselves and all others similarly situated; Pike County, Mississippi Branch of the NAACP and Rev. Frank Lee, on behalf of themselves and all others similarly situated; Simpson County, Mississippi Branch of the NAACP and L. J. Camper, on behalf of themselves and all others similarly situated; Amite County, Mississippi Branch of the NAACP and Glenn Wilson, on behalf of themselves and all others similarly situated; Wayne County, Mississippi Branch of the NAACP and Leah Parson, on behalf of themselves and all others similarly situated; Vicksburg, Mississippi Branch of the NAACP, on behalf of itself and all others similarly situated; Claiborne County, Mississippi Branch of the NAACP, on behalf of itself and all others similarly situated; and Adams County, Mississippi Branch of the NAACP and Jacqueline Marsaw, on behalf of themselves and all others similarly situated , (hereinafter referred to as “plaintiffs”), submit that oral argument is not necessary in this case inasmuch as the facts and issues are not complex, and oral argument would not aid the Court.

/s/ Carroll Rhodes

CARROLL RHODES
COUNSEL OF RECORD FOR
PLAINTIFFS-APPELLANTS

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JURISDICTIONAL STATEMENT

This appeal is from an Order Denying Motions to Alter, Amend, or Correct Order of Dismissal, [R.¹ 1839-1841, R. E.² 101a³-103a, Tab 11], which is equivalent to an order denying a motion to amend the final judgment. This appeal is also from the Memorandum Opinion and Order of Dismissal. [R. 1711-1729, R. E. 82a-100a, Tab 10], which is equivalent to a final judgment. The Memorandum Opinion and Order of Dismissal was rendered by the United States District Court for the Southern District of Mississippi on May 16, 2011. [R. 1711-1729, R. E. 82a-100a, Tab 10]. The Order Denying Motions to Alter, Amend, or Correct Order of Dismissal was rendered by the United States District Court for the Southern District of Mississippi on June 13, 2011. [R. 1839-1841, R. E. 101a-103a, Tab 11]. Plaintiffs-appellants⁴ filed their Notice of Appeal on June 28, 2011, [R. 1842-1850], and their Amended Notice of Appeal on June 29, 2011. [R. 1851-1860, R. E. 183a-192a, Tab 20]. Appellate jurisdiction is based on **28 U. S. C. § 1291**. The district court exercised federal question jurisdiction pursuant to **28 U. S. C. §§ 1331 and 1343**.

¹The initial “R.” refers to the original record followed by page numbers.

²The initials “R. E.” refer to the original record excerpts followed by page numbers.

³The letter “a” following the page numbers indicate that these pages are contained in the original record excerpts.

⁴The plaintiffs-appellants will hereinafter be referred to as “plaintiffs.”

STATEMENT OF THE ISSUE IN THE CONSOLIDATED CASE

The issues on appeal are:

1. Whether the district court abused its discretion by denying plaintiffs’ motions to amend their complaints.
2. Whether the district court erred in holding that plaintiffs did not have standing.
3. Whether the district court erred in holding that plaintiffs failed to state an equal population vote dilution claim, and the court abused its discretion by denying preliminary and permanent injunctions enjoining elections in supervisor districts that violated the one-person one-vote principle.

STATEMENT OF THE CASE

a. Nature of the Case.

This is an equal population vote dilution case involving the one-person, one-vote principle of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the appropriate remedy under **42 U. S. C. § 1983**.

b. Course of Proceedings and Disposition Below.

The Hancock County Board of Supervisors (“Hancock County”) filed its complaint on December 14, 2010 asserting an equal population vote dilution claim⁵

⁵An equal population vote dilution claim is one brought under the equal population principle, which is commonly referred to as the one-person one-vote principle of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. See, *Reynolds v. Sims*, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

and seeking declaratory and injunctive relief against the Republican Party Executive Committee, the Democratic Party Executive Committee, and Karen Ruhr - the Circuit Clerk and Registrar. [R., 40-48]. The county sought a declaratory judgment that current supervisor districts were unconstitutionally malapportioned and an injunction staying the imposition of the candidate qualification deadline. [R., 47-48]. The relief requested was limited to Hancock County only. [R., 40-48].

On February 28, 2011, plaintiffs, the Adams County, Mississippi Branch of the NAACP and Jacqueline Marsaw (“Adams County NAACP”), the Amite County, Mississippi Branch of the NAACP and Glenn Wilson (“Amite County NAACP”), the Claiborne County, Mississippi Branch of the NAACP (“Claiborne County NAACP”), the Hazlehurst, Mississippi Branch of the NAACP and Nanette Thurmond-Smith (“Copiah County NAACP”), the Pike County, Mississippi Branch of the NAACP and Rev. Frank Lee (“Pike County NAACP”), the Simpson County, Mississippi Branch of the NAACP and L. J. Camper (“Simpson County NAACP”), the Vicksburg, Mississippi Branch of the NAACP (“Warren County NAACP”), and the Wayne County, Mississippi Branch of the NAACP and Leah Parson (“Wayne County NAACP”), filed complaints and motions seeking declaratory and injunctive relief against election officials in Adams, Amite, Claiborne, Copiah, Pike, Simpson,

Warren, and Wayne Counties.⁶ [R. E. 43a, 47a, 51a, 56a, 61a, 67a, 73a, and 79a, Tabs 2-9]. The basis for each complaint and motion for a preliminary injunction was that each county's apportionment scheme for supervisor districts was unconstitutionally malapportioned.⁷ Plaintiffs sought to enjoin the 2011 elections for supervisor in each county and to implement an apportionment scheme that was not retrogressive, did not dilute black voting strength, and complied with the equal population principle. [R. 521-530, 580-589, 601-609, 618-627, 743-752, 764-773, 785-794, 802-811, R. E. 104a-182a, Tabs 12-19].

On March 1, 2011, intervenor, Mississippi Attorney General Jim Hood, filed a motion to consolidate the Adams County NAACP case, the Amite County NAACP case, the Claiborne County NAACP case, the Copiah County NAACP case, the Pike County NAACP case, the Simpson County NAACP case, the Warren County NAACP case, and the Wayne County NAACP case with the Hancock County case. [R. 19-310]. Attorney General Hood filed a supplemental motion to consolidate the cases on March 2, 2011. [R. 311-324]. The district court entered an Order on March 23,

⁶The election officials are the Board of Supervisor, the Board of Election Commissioners, the Republican Party Executive Committee, the Democratic Party Executive Committee, and the Circuit Clerk for each county. See, R. E. 43a, 47a-48a, 51a, 56a, 61a, 67a, 73a, and 79a, Tabs 2, 3, 4, 5, 6, 7, 8, and 9.

⁷Plaintiffs alleged that each county's apportionment scheme for supervisor districts violated the one-person one-vote principle of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2011 granting the motion and supplemental motion to consolidate. [R. 373-375].

Attorney General Hood filed answers and motions to dismiss the complaints in the Adams County NAACP case on March 4, 2011, the Claiborne County NAACP case on March 7 and 8, 2011, the Simpson County NAACP case on March 16 and 17, 2011, and the Warren County NAACP case on March 22, 2011. [R. E. 44a, 52a, 67a-68a, 74a Tabs 2, 4, 7, 8]. The Simpson County, Warren County, and Wayne County Boards of Supervisors, Boards of Election Commissioners, and Circuit Clerks filed answers on April 4, 2011. [R.906-934]. The Simpson County and Warren County Boards of Supervisors, Boards of Election Commissioners, and Circuit Clerks filed joinders in Attorney General Hood's motion to dismiss on April 7, 2011. [R.947-952]. The Adams County Board of Supervisors, Board of Election Commissioners, and Circuit Clerk filed joinders in Attorney General Hood's motion to dismiss on April 8, 2011. [R.972-975]. The Amite County and Claiborne County Boards of Supervisors filed answers on April 12, 2011. [R. 1145-1159].

Attorney General Jim Hood filed an answer and a motion to dismiss in the lead consolidated case⁸ on March 25, 2011 seeking to dismiss the complaints filed by the Amite County NAACP, the Copiah County NAACP, the Pike County NAACP, and the Wayne County NAACP. [R. 393-446]. The Pike County, Mississippi Board of

⁸The lead consolidated case is the Hancock County case.

Supervisors filed an answer on March 28, 2011, [R. 447-452], and the Pike County, Mississippi Democratic Party Executive Committee filed an answer on March 29, 2011. [R. 453-465]. The Wayne County Board of Supervisors, Board of Election Commissioners, and Circuit Clerk filed joinders in Attorney General Hood's motion to dismiss on April 7, 2011. [R.953-955]. The Copiah County Board of Supervisors, Board of Election Commissioners, and Circuit Clerk filed joinders in Attorney General Hood's motion to dismiss on April 8, 2011. [R.956-959].

The Adams County NAACP filed two motions to amend the complaint, with amended complaints attached adding Brenda Proby as a plaintiff, on March 18, 2011. [R. E. 126a-169a, Tab 2]. The Adams County NAACP filed a third motion to amend the complaint, with an amended complaint attached adding Brenda Proby as a plaintiff, on March 18, 2011. [R. 517-537, R. E. 104a-113a, Tab 12]. The Adams County, Mississippi Board of Supervisors and Board of Election Commissioners filed answers on March 17, 2011. [R. E. 44a, Tab 2]. The Adams County Democratic Executive Committee filed an answer on March 31, 2011. [R. 720-723]. Attorney General Hood filed a response opposing the Adams County NAACP's third motion to amend on April 11, 2011. [R. 1074-1079].

The Amite County NAACP filed a second motion to amend the complaint, with an amended complaint attached adding Hugh McGhee as a plaintiff, on March 30,

2011. [R. 576-596, R. E. 114a-123a, Tab 13]. Attorney General Hood filed a response opposing the Amite County NAACP's second motion to amend on April 11, 2011. [R. 1080-1085].

The Claiborne County NAACP filed a second motion to amend the complaint, with an amended complaint attached adding Robert Butler as a plaintiff, on March 30, 2011. [R. 597-613, R. E. 124a-132a, Tab 14]. Attorney General Hood filed a response opposing the Claiborne County NAACP's second motion to amend on April 11, 2011. [R. 1086-1091].

The Covich County NAACP filed a second motion to amend the complaint, with an amended complaint attached adding Pamela Jefferson and Robert Catchings as plaintiffs, on March 30, 2011. [R. 614-637, R. E. 133a-142a, Tab 15]. Attorney General Hood filed a response opposing the Covich County NAACP's second motion to amend on April 11, 2011. [R. 1092-1097].

The Pike County NAACP filed a second motion to amend the complaint, with an amended complaint attached adding Gregory Partman as a plaintiff, on March 31, 2011. [R. 739-759, R. E. 143a-152a, Tab 16]. Attorney General Hood filed a response opposing the Pike County NAACP's second motion to amend on April 11, 2011. [R. 1098-1103].

The Simpson County NAACP filed a second motion to amend the complaint,

with an amended complaint attached adding Laster Smith as a plaintiff, on March 31, 2011. [R. 760-780, R. E. 153a-162a, Tab 17]. Attorney General Hood filed a response opposing the Simpson County NAACP's second motion to amend on April 11, 2011. [R. 1104-1109].

The Warren County NAACP filed a second motion to amend the complaint, with an amended complaint attached adding Fannie Tonth as a plaintiff, on March 31, 2011. [R. 781-797, R. E. 163a-172a, Tab 18]. Attorney General Hood filed a response opposing the Warren County NAACP's second motion to amend on April 11, 2011. [R. 1110-1115].

The Wayne County NAACP filed a second motion to amend the complaint, with an amended complaint attached adding Jimmie Green as a plaintiff, on March 31, 2011. [R. 798-820, R. E. 173a-182a, Tab 19]. Attorney General Hood filed a response opposing the Wayne County NAACP's second motion to amend on April 11, 2011. [R. 1116-1121].

The Adams County NAACP, the Amite County NAACP, the Claiborne County NAACP, the Copiah County NAACP, the Pike County NAACP, the Simpson County NAACP, the Warren County NAACP, and the Wayne County NAACP filed a joint response to Attorney General Hood's motion to dismiss on May 9 and 12, 2011. [R. 1624-1707].

A hearing was held in the district court on Attorney General Hood's motions to dismiss the complaints. The district court issued its Memorandum Opinion and Order dismissing plaintiffs' complaints and denying their motions to amend the complaints and their motions for preliminary and permanent injunctions. [R. 1711-1729, R. E. 82a-100a, Tab 10]. The Adams County NAACP, the Amite County NAACP, the Claiborne County NAACP, the Copiah County NAACP, the Pike County NAACP, the Simpson County NAACP, the Warren County NAACP, and the Wayne County NAACP filed a joint Motion to Alter the Judgment and a joint Motion to Amend or Correct the Memorandum Opinion and Order on May 20, 2011. [R. 1742-1775]. Attorney General Hood filed responses to the joint motions on June 3, 2011. [R. 1790-1800]. The NAACP plaintiffs filed their rebuttal on June 7, 2011. [R. 1801-1810]. The Copiah County, Simpson County, Warren County, and Wayne County Boards of Supervisors, Boards of Election Commissioners, and Circuit Clerks filed joinders in the Attorney General's response to the joint motions on June 8, 2011. [R. 1811-1828p]. The Adams County Board of Supervisors, Board of Election Commissioners, and Circuit Clerk filed a joinder in the Attorney General's response to the joint motions on June 9, 2011. [R. 1829-1834].

The Adams County NAACP, the Amite County NAACP, the Claiborne County NAACP, the Copiah County NAACP, the Pike County NAACP, the Simpson County

NAACP, the Warren County NAACP, and the Wayne County NAACP filed their second Motion for a Preliminary Injunction and Motion for a Stay Pending Appeal on June 1, 2011. [R. 1783-1789]. Attorney General Hood filed his response to this motion on June 10, 2011. [R. 1835-1839].

The district court entered orders denying the NAACP plaintiffs' Motion to Alter or Amend the Judgment, their Motion to Amend or Correct the Memorandum Opinion and Order, and their second Motion for a Preliminary Injunction and Stay Pending Appeal on June 13, 2011. [1839-1841, R. E. 101a-103a, Tab 11].

The Adams County NAACP, the Amite County NAACP, the Claiborne County NAACP, the Copiah County NAACP, the Pike County NAACP, the Simpson County NAACP, the Warren County NAACP, and the Wayne County NAACP filed their Notice of Appeal on June 28, 2011, [R. 1842-1850], and their Amended Notice of Appeal on June 29, 2011. [R. 1851-1860, R. E. 183a-192a, Tab 20].

STATEMENT OF FACTS

This appeal concerns redistricting for eight counties in Southern Mississippi. [R. 1711-1712, R. E. 82a-83a, Tab 10]. The eight counties are Adams, Amite, Claiborne, Copiah, Pike, Simpson, Warren, and Wayne. [R. 1712, R. E. 83a, Tab 10]. Each county is governed by a five member board of supervisors whose members are elected by popular vote every four years. [R. 525, 584, 604, 622, 747, 768, 788-789,

806, R. E. 108a, 118a, 128a, 137a, 147a, 157a, 166a-167a, 177a, Tabs 12-19]. The term of office for current supervisors expires on December 31, 2011. [R. 525, 584, 604, 622, 747, 768, 789, 806, R. E. 108a, 118a, 128a, 137a, 147a, 157a, 167a, 177a, Tabs 12-19]. It is the duty of the board of supervisors for each county to redistrict supervisor districts before the next election in compliance with the equal population principle. [R. 527, 586, 606-607, 624, 749, 770, 790-791, 808, 1712, R. E. 83a, 110a, 120a, 129a-130a, 139a, 149a, 159a, 168a-169a, 179a, Tabs 10, 12-19].

This year is an election year for the next term of office for county supervisor. The candidate qualification deadline was March 1, 2011, and party primaries were held on August 2, 2011 with run-offs held on August 23, 2011. [R. 525, 584, 604, 622, 747, 768, 789, 806, 1712, R. E. 83a, 108a, 118a, 128a, 137a, 147a, 157a, 167a, 177a, Tabs 10, 12-19]. A general election is scheduled for Tuesday, November 8, 2011. [R. 525, 584, 604, 622, 747, 768, 789, 806, 1712, R. E. 83a, 108a, 118a, 128a, 137a, 147a, 157a, 167a, 177a, Tabs 10, 12-19].

The federal decennial census for all Mississippi counties was published on February 4, 2011. [R. 1712, R. E. 83a, Tab 10]. The census data showed that supervisor districts in each of the eight counties was unconstitutionally

malapportioned.⁹ [R. 525-526,584-585, 605-606, 622-623. 747-748, 768-769. 789-790, 806-807, R. E. 108a-109a, 118a-119a, 128a-129a, 137a-138a, 147a-148a, 157a-158a, 167a-168a, 177a-178a, Tabs 12-19]. Aggrieved by the unconstitutional malapportionment, plaintiffs, local branches of the NAACP¹⁰ and individual voters, filed suit against election officials in the eight counties on February 28, 2011 seeking to enjoin the 2011 elections for supervisor under the current unconstitutionally malapportioned schemes. [R. 521-530, 580-589, 601-609, 618-627, 743-752, 764-773, 785-794, 802-811, 1712, R. E. 43a, 47a, 51a, 56a, 61a, 67a, 73a, 79a, 83a, 104a-182a, Tabs 2-10]. The plaintiffs also sought an extension of the candidate qualification deadline until new apportionment schemes that complied with the equal population principle could be implemented. [R. 521-530, 580-589, 601-609, 618-

⁹The census data shows that the total population deviation in each of the eight counties is:

<u>County</u>	<u>Total Deviation Percentage</u>
Adams	39.46%
Amite	49.05%
Claiborne	56.17%
Copiah	40.36%
Pike	18.86%
Simpson	26.70%
Warren	52.74%
Wayne	30.20%

[R. 526, 585, 606, 623, 748, 769, 790, 807, R. E. 109a, 129a, 138a, 148a, 158a, 168a, 178a, Tabs 12-19]

¹⁰“NAACP” is the acronym for the National Association for the Advancement of Colored People.

627, 743-752, 764-773, 785-794, 802-811, R. E. 43a, 47a, 51a, 56a, 61a, 67a, 73a, 79a, 104a-182a, Tabs 2-19]. Plaintiffs alleged that current supervisor districts are unconstitutionally malapportioned and the board of supervisors for each county has “failed to redistrict...and obtain preclearance¹¹ of any new redistricting plan” in a timely manner. [R. 527, 586, 606-607, 624, 749, 770, 790-791, 808, R. E. 110a, 120a, 129a-130a, 139a, 149a, 159a, 168a-169a, 179a, Tabs 12-19].

The district court granted Mississippi Attorney General Jim Hood (“Attorney General Hood”) leave to intervene in the lead case.¹² [R. 140]. The NAACP cases were consolidated with the lead case on March 23, 2011. [R. 373-375]. Attorney General Hood filed motions to dismiss the NAACP cases between March 4, 2011 and March 25, 2011. [R. 421-446, R. E. 44a, 52a, 67a-68a, 74a Tabs 2, 4, 7, 8]. Attorney General Hood argued “the [district] [c]ourt lack[ed] subject matter jurisdiction ...because [p]laintiffs [did] not have standing to bring challenges based on ‘one person, one vote’ violations.” [R. 1713, R. E. 84a, Tab 10]. Attorney General Hood also argued “that the [p]laintiffs’ claims fail on the merits.” [R. 1713, R. E. 84a, Tab

¹¹Plaintiffs alleged the counties were covered by the preclearance requirements of § 5 of the Voting Rights Act of 1965. 42 U. S. C. § 1973c. [R. 526-527, 585-586, 606, 624, 748-749, 770, 790, 808, R. E. 109a-110a, 119a-120a, 129a, 139a, 148a-149a, 159a, 168a, 179, Tabs 12-19].

¹²The district court granted Mississippi Attorney General Jim Hood leave to intervene in the lead case on February 22, 2011, [R. 140], eight days before plaintiffs involved in this appeal filed suit.

10].

The plaintiffs had filed motions to amend some of the complaints by adding plaintiffs who were voters in under represented supervisor districts prior to entry of the order of consolidation. However, after the cases were consolidated, the plaintiffs filed new motions to amend all of the complaints by adding voters from under represented supervisor districts as plaintiffs. [R. 517-537, 576-637, 739-820, R. E. 104a-182a, Tabs 10-19]. Amended complaints and declarations executed by the individual voters establishing their standing were attached to the motions to amend. [R. 517-537, 576-637, 739-820]. “The NAACP claims institutional standing in each of [the] complaints,” including the amended complaints. [R. 521-530, 580-589, 601-609, 618-627, 743-752, 764-773, 785-794, 802-811, 1718, R. E. 89a, 104a-182a, Tabs 10-19].

Attorney General Hood argued and the district court held that although the plaintiffs alleged an injury in fact, they failed to allege a particularized and concrete injury that was imminent or actual instead of hypothetical or conjectural. [R. 1718-1728, R. E. 89a-99a, Tab 10].

The district court entered a Memorandum Opinion and Order on May 16, 2011 denying plaintiffs’ motion to amend the complaints, dismissing the complaints, and denying plaintiffs’ motions for preliminary and permanent injunctions. [R. 1711-

1729, R. E. 82a-100a, Tab 10]. The district court found that the boards of supervisors had insufficient time to redistrict after the census data was published. [R. 1726-1727, R. E. 97a-98a, Tab 10]. However, on May 9, 2011, plaintiffs filed a transcript of a status conference in *Mississippi State Conference of the NAACP v. Barbour*, 2011 WL 1870222 (S. D. Miss. 2011) (three-judge court) held on April 22, 2011.¹³ [R. 1624-1694]. The transcript shows that the Mississippi House of Representatives and the Mississippi Senate separately adopted legislative redistricting plans after publication of the census. [R. 1624-1694]. Additionally, Madison County filed a motion for a preliminary injunction on March 30, 2011 which included evidence that Madison County had timely redistricted after publication of the census. [R. 482-516].

Plaintiffs filed motions to amend the Memorandum Opinion and Order or to Correct the Memorandum Opinion and Order on May 20, 2011. [R. 1742-1782]. The district court entered an order on June 13, 2011 denying the motions. [R. 1839-1841, R. E. 101a-103a, Tab 11].

Plaintiffs filed a timely notice of appeal. [R.1842-1860, R. E. 183a-192a, Tab 20].

¹³Hancock County filed the same transcript on April 28, 2011, [R. 1406-1478], and the Madison County, Mississippi Board of Supervisors (“Madison County”) filed the transcript on April 29, 2011. [R. 1479-1553].

SUMMARY OF THE ARGUMENT

The district court granted Attorney General Hood's motion to dismiss and denied plaintiffs motions for preliminary and permanent injunctions. The standard of review on a motion to dismiss is *de novo* regardless of whether it is a Rule 12(b)(1)¹⁴ motion or a 12(b)(6)¹⁵ motion. *Walch v. Adjutant General's Department of Texas*, *infra*; *Causey v. Sewell Cadillac-Chevrolet, Inc.*, *infra*; *Menchaca v. Chrysler Credit Corp.*, *infra*. When considering plaintiffs' complaints under a Rule 12(b)(6) standard or the record evidence under a Rule 12(b)(1) standard, it is clear that the motion to dismiss should be denied.

This Court employs an abuse of discretion standard of review when considering the denial of a preliminary or permanent injunction, and the Court reviews underlying questions of law *de novo*. *Qureshi v. United States*, *infra*. A *de novo* review of the underlying questions of law reveals that plaintiffs had standing and were entitled to injunctive relief. A review also reveals that the district court abused its discretion by denying plaintiffs' request for preliminary and permanent injunctions.

The district court also denied plaintiffs' motions to amend their complaints.

¹⁴Fed. R. Civ. P. 12(b)(1).

¹⁵Fed. R. Civ. P. 12(b)(6).

This Court employs an abuse of discretion standard when reviewing a district court's denial of a motion to amend a complaint. *Daly v. Sprague*, *infra*. It is an abuse of discretion for a district court to refuse a plaintiff's request to amend his or her complaint before a responsive pleading is filed. *Zaidi v. Erhlich*, *infra*. Since plaintiffs sought to amend their complaints before all the defendants filed responsive pleadings, their request to amend should have been granted. *Zaidi v. Erhlich*, *infra*; *McKinney v. Irving Independent School District*, *infra*.

Plaintiffs had standing to bring the equal population vote dilution action. The district court erred by dismissing plaintiffs' complaints. See, *Georgia v. Ashcroft*, *infra*; *Davis v. Mann*, *infra*; *Sixty-Seventh Minnesota State Senate v. Beens*, *infra*. The district court abused its discretion by not granting plaintiffs' request for injunctive relief. *Georgia v. Ashcroft*, *infra*; *White v. Weiser*, *infra*; *Wise v. Lipscomb*, *infra*.

ARGUMENT

1. The standard of review.

The district court granted Attorney General Hood's motion to dismiss and denied plaintiffs motions for preliminary and permanent injunctions. The district court considered the motion to dismiss under Fed. R. Civ. P. 12(b)(1) since Attorney

General Hood argued the court lacked subject matter jurisdiction.¹⁶ [R. 1713, R. E. 84a, Tab 10]. The standard of review of a dismissal under Fed. R. Civ. P. 12(b)(1) or 12(b)(6)¹⁷ is de novo. *Walch v. Adjutant General's Department of Texas*, 533 F. 3d 289, 293 (5th Cir. 2008). Attorney General Hood made a facial attack on plaintiffs' complaint. The Attorney General argued the district court lacked subject matter jurisdiction based upon a review of the complaints. Apparently the Attorney General's motion to dismiss was a Rule 12(b)(1)¹⁸ "facial attack" on plaintiffs' complaints. When a facial attack is made on a complaint under Rule 12(b)(1), the allegations of the complaint are taken as true. *Menchaca v. Chrysler Credit Corp.*, 613 F. 2d 507 (5th Cir. 1980). The court only reviews the allegations of the complaint to determine whether or not subject matter jurisdiction exists. *Menchaca v. Chrysler Credit Corp.*, supra. A review of plaintiffs' complaints in the instant case reveals the court has subject matter jurisdiction and the motion to dismiss should be denied.

¹⁶Attorney General Hood also argued that plaintiffs failed to state a claim upon which relief could be granted. This indicates the motion to dismiss was under Fed. R. Civ. P. 12(b)(6). This Court reviews "de novo dismissals under Rule 12(b)(6)." *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F. 3d 285, 288 (5th Cir. 2004). The well-pleaded allegations of the complaint are considered to be true. *Id.*

¹⁷Fed. R. Civ. P. 12(b)(6).

¹⁸Fed. R. Civ. P. 12(b)(1).

If, however, Attorney General Hood was making a “factual attack” on plaintiffs’ complaints under Rule 12(b)(1), then the entire record may be reviewed. *Menchaca v. Chrysler Credit Corp.*, supra. When considering a “factual attack” Rule 12(b)(1) motion to dismiss, the court may consider “(1) the complaint alone; (2) the complaint supplemented by the undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.” *Id.*, quoting, *Robinson v. TCI/US West Communications Inc.*, 117 F. 3d 900, 904 (th Cir. 1997). A review under either scenario reveals the court has subject matter jurisdiction and the motion to dismiss should be denied.

Attorney General Hood also argued that plaintiffs failed to state a claim upon which relief could be granted. A motion to dismiss based upon this argument is a Rule 12(b)(6) motion. When considering a Rule 12(b)(6) motion, the allegations of the complaint are accepted as true. *Causey v. Sewell Cadillac-Chevrolet, Inc.*, supra, at 288. “The complaint must be liberally construed, with all reasonable inferences drawn in the light most favorable to the plaintiff.” *Id.* A Rule 12(b)(6) dismissal should not be granted unless “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* A review of the complaints in the instant case reveals that plaintiffs stated claims upon which relief could have been and should have been granted. In other words, the motion to

dismiss should be denied.

This Court employs an abuse of discretion standard of review of the denial of a preliminary or permanent injunction and a *de novo* standard of review for the underlying questions of law. See, *Qureshi v. United States*, 600 F. 3d 523 (5th Cir. 2010). A *de novo* review of the facts and allegations in this case as well as the underlying law reveals that plaintiffs had standing and were entitled to injunctive relief. See, *Fairley v. Patterson*, 493 F. 2d 598 (5th Cir. 1974); *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 112 S. Ct. 2130 (1992); *Georgia v. Ashcroft*, 539 U. S. 461, 488, n. 2, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003); *Reynolds v. Sims*, supra; *Davis v. Mann*, 377 U. S. 678, 691, 84 S. Ct. 1441 (1964). Furthermore, it is an abuse of discretion to deny an injunction enjoining elections under malapportioned districts. See, *Georgia v. Ashcroft*, 539 U. S. at 488, n. 2..

The district court also denied plaintiffs' motions to amend the complaints. This Court employs an abuse of discretion standard when reviewing a district court's denial of a motion to amend a complaint. *Daly v. Sprague*, 675 F. 2d 716, 723 (5th Cir. 1982). It is an abuse of discretion to deny a motion to amend a complaint to add parties before ruling on a motion to dismiss. See, *McKinney v. Irving Independent School District*, 309 F. 3d 308(5th Cir. 2002).

2. The district court abused its discretion by denying plaintiffs' motions to amend their complaints.

Plaintiffs had not previously amended their complaints. They had a right to amend their complaints. A plaintiff who has not previously amended his or her complaint has a right to amend the complaint before a responsive pleading is filed. See, *Zaidi v. Erhlich*, 732 F. 2d 1218 (5th Cir. 1984). "Accordingly, neither a motion to dismiss nor a motion for summary judgment extinguishes a plaintiff's right to amend a complaint." *Id.*, at 1220. The only amendment plaintiffs requested was for leave to add plaintiffs who were voters in overpopulated and under represented supervisor districts. This Court has held:

Rule 15(a) provides that '[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served.' FED. R. CIV. 15(a). Because a Rule 12(b)(6) motion to dismiss is not a 'responsive pleading,' the filing of such a motion does not extinguish a party's right to amend as a matter of course.

McKinney v. Irving Independent School District, supra, at 315. The Court stated:

The McKinneys had not previously amended their complaint. Therefore, they were entitled to amend their complaint at the time the district court granted defendants' motion to dismiss. 'When, as in this case, a plaintiff who has a right to amend nevertheless petitions the court for leave to amend, the court should grant the petition.'

Id. Plaintiffs sought leave to amend their complaints before all the defendants filed responsive pleadings. The district court abused its discretion by not allowing

plaintiffs to amend their complaints to add plaintiffs who were voters in overpopulated and under represented supervisor districts. See, *McKinney v. Irving Independent School District*, supra; *Zaidi v. Erhlich*, supra.

3. The district court erred in holding that plaintiffs did not have standing.

Attorney General Hood argued and the district court held that plaintiffs who were voters in overpopulated and under represented supervisor districts did not have standing to challenge elections in those unconstitutionally malapportioned districts. [R. 1711-1729, R. E. 82a-100a, Tab 10]. The Attorney General’s arguments and the district court’s holding were based on the false premise that redistricting is not required in the year that census data is released. “The central argument underlying the Attorney General’s motions [to dismiss] is that no constitutional injury will result from allowing supervisor elections to go forward using the current district lines, which were drawn after the 2000 census and precleared by the Department of Justice.” [R.1722, R. E. 93a, Tab 10]. This false premise and Attorney General Hood’s central arguments are based on two 1993 district court opinions - *Bryant v. Lawrence County, Mississippi*, 814 F. Supp. 1346 (S. D. Miss. 1993) and *Fairley v. Forrest County, Mississippi* 814 F. Supp. 1327 (S. D. Miss. 1993). [R. 1722, R. E. 93a, Tab 10]. Those cases are inconsistent with prior precedent and overruled by subsequent precedent. See, *Georgia v. Ashcroft*, 539 U. S. at 488, n. 2.

Plaintiffs had standing because they suffered an injury-in-fact caused by the defendants' conduct which is likely to be redressed by a favorable decision. A party requesting affirmative relief who has suffered an injury-in-fact caused by the conduct complained of which is likely to be redressed by a favorable decision has standing. *Lujan v. Defenders of Wildlife*, supra; *United States v. Louisiana*, 515 U. S. 737, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995). A party suffering an injury-in-fact in an equal population vote dilution case is a voter in a district that is overpopulated and under-represented. *United States v. Louisiana*, supra; *Fairley v. Patterson*, supra. The United States Supreme Court held in *Georgia v. Ashcroft*, that after a new census, "no districting plan is likely to be legally enforceable if challenged, given the shifts and changes in a population over 10 years." *Georgia v. Ashcroft*, 539 U. S. at 488, n. 2. Plaintiffs, who suffered an injury-in-fact¹⁹ caused by the defendants' failure to timely redistrict, and plaintiffs' injury was likely to be redressed by a favorable decision had standing in these cases had standing. See, *Lujan v. Defenders of Wildlife*, supra; *United States v. Louisiana*, supra; *Fairley v. Patterson*, supra.

4. The district court erred in holding that plaintiffs failed to state an equal population vote dilution claim, and the court abused its discretion by denying preliminary and permanent

¹⁹Plaintiffs alleged they were voters who planned to vote in the August, 2011 primaries and November, 2011 general election. They alleged they would suffer an injury by having their vote diluted by being forced to vote in overpopulated and under represented districts.

injunctions enjoining elections in supervisor districts that violated the one-person one-vote principle.

The district court, relying on arguments of Attorney General Hood, held that plaintiffs failed to state an equal population vote dilution claim. [R. 1711-1729, R. E. 82a-100a, Tab 10]. The Attorney General's arguments and the district court's holding were based on two 1993 district court cases - *Bryant v. Lawrence County, Mississippi*, supra, and *Fairley v. Forrest County, Mississippi*, supra. Those cases held that county boards of supervisors do not have to redistrict in an election year when census data is released. This holding conflicts with both prior and subsequent decisions of the United States Supreme Court. The Supreme Court held 29 years prior to these district court cases that "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." *Davis v. Mann*, supra. The Supreme Court held 21 years prior to the district court cases that an existing apportionment scheme in light of new census figures can showing a total deviation in excess of 10% is presumptively unconstitutional. *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U. S. 187, 195, 92 S. Ct. 1477 (1972). Finally, the Supreme Court held 10 years after these district court decisions that after

a new census, “no districting plan is likely to be legally enforceable if challenged, given the shifts and changes in a population over 10 years.” *Georgia v. Ashcroft*, 539 U. S. at 488, n. 2. These Supreme Court decisions clearly demonstrate that an equal population vote dilution claim is established when a new census shows that an existing apportionment scheme no longer complies with the equal population principle. *Davis v. Mann*, supra; *Sixty-Seventh Minnesota State Senate v. Beens*, supra; *Georgia v. Ashcroft*, 539 U. S. at 488, n. 2. “If a population deviance exceeds 10%, it constitutes a *prima facie* case of invidious discrimination that requires the [legislature] to prove a legitimate reason for the discrepancy.” *Fairley v. Hattiesburg, Mississippi*, 584 F. 3d 660, at 675 (5th Cir. 2009). Once a *prima facie* case of malapportionment is established, the evidentiary burden shifts to the state to prove the “justification for the deviation.” *Moore v. Itawamba County, Mississippi*, 431 F. 3d 257, at 259 (5th Cir. 2005 (per curiam)). The total deviation in each of the challenged counties exceeds 10%. As a matter of law the deviation in each of these counties is presumptively unconstitutional. See, *Fairley v. Hattiesburg, Mississippi*, supra; *Reynolds v. Sims*, supra; *Brown v. Thomson*, 462 U. S. 835, at 842-843, 103 S. Ct. 2690, at 2696, 77 L. Ed. 2d 214 (1983); *Wyche v. Madison Parish Police Jury*, 635 F. 2d 1151, at 1158 (5th Cir. 1981). There is no state policy which justifies this deviation. Attorney General Hood argued below that there was insufficient time

between publication of the census and the election for the boards of supervisors to redistrict. However, there is no state policy which prohibit supervisors from redistricting after a new census is published. Furthermore, Hancock County, Madison County, the Mississippi House of Representatives, and the Mississippi Senate each passed redistricting plans after publication of the census and prior to the election.²⁰ Madison County received preclearance of its redistricting plan and used that plan to conduct elections in 2011. This evidence clearly shows there was no state policy precluding the counties from redistricting after publication of the census and before the election dates.

The district court abused its discretion by denying plaintiffs' request for an injunction. As shown above, the county boards of supervisors had an adequate opportunity to redistrict but failed to do so. The Supreme Court held in *White v. Weiser* 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, 93 S. Ct. 2348, 37 L. Ed. 2d 335 (1973) . It becomes the unwelcome obligation

²⁰Although the Mississippi House of Representatives and the Mississippi Senate, respectively, passed redistricting plans for each Chamber, they failed to pass a joint resolution containing the plans of both Chambers. Nevertheless, the passage of separate plans by each Chamber indicates that there was sufficient time to redistrict prior to the election.

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 , 98 S. Ct. 1493, 57 L. Ed. 2d 411 (1978). A plaintiff is entitled to enjoin the next election if the board of supervisors fails to reapportion after new census figures show that existing districts fail to comply with the one-person, one-vote mandate. *Georgia v. Ashcroft*, 539 U. S. at 488, n. 2. Plaintiffs 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. *White v. Weiser*, supra; *Wise v. Lipscomb*, supra; *Georgia v. Ashcroft*, supra. The district court’s holding otherwise was an abuse of discretion.

CONCLUSION

On the basis of the foregoing facts and authorities, the Court should reverse the decision of the district court and remand the case to the district court with instructions to set the election results aside, enjoin future elections using the malapportioned districts, and order new remedial elections in 2012.

This the 18th day of October, 2011.

Respectfully submitted,
NAACP, et. al., on behalf of themselves
and all others similarly situated

/s/ Carroll Rhodes

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CERTIFICATE OF SERVICE

I, CARROLL RHODES, hereby certify that I have this day filed and electronically filed using the Court's ECF filing system a true and correct copy of the above and foregoing Brief for Appellants, and the Court electronically served a copy of the Record Excerpts upon the following:

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This the 18th day of October, 2011.

/s/ Carroll Rhodes

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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October 19, 2011

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No. 11-60446, Hancock County Bd of Supr, et al v. Karen Ruhr, et al
USDC No. 1:10-CV-564
USDC No. 3:11-CV-121
USDC No. 3:11-CV-122
USDC No. 3:11-CV-123
USDC No. 3:11-CV-124
USDC No. 4:11-CV-33
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