APPENDIX 3

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; MELVIN HORTON; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL,

Plaintiffs,

vs. **No. G-2001-1777 W/4**

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi,

Defendants.

SUPPLEMENTAL RESPONSE OF THE PLAINTIFFS TO THE PENDING MOTIONS TO DISMISS

This supplemental response summarizes and adds to the two responses previously filed by the plaintiffs in opposition to (1) the supplemental motion to dismiss of the defendants (response filed November 26, 2001, and (2) the motion to dismiss of the intervenors (response filed November 28, 2001). Because the two motions make different arguments, we believe it useful to summarize our arguments to both motions in a single response and to elaborate upon at least one of those arguments.

I.

Both the defendants and the intervenors contend this Court has no subject mater jurisdiction. But the United

States Supreme Court has said that "state courts have a significant role in redistricting," *Growe v. Emison*, 507 U.S 25, 33 (1993), and also has said: "The power of the judiciary of a State to require valid reapportionment or to require a valid redistricting plan has not only been recognized by this Court, but . . . has been specifically encouraged." *Id., quoting, Scott v. Germano*, 381 U.S. 407, 409 (1965). The Mississippi Supreme Court has made it clear that chancery courts have jurisdiction in election law cases such as this one. *Carter v. Lake*, 399 So.2d 1356, 1357-1358 (Miss. 1981); *Adams County Election Commissions v. Sanders*, 586 So.2d 829, 380 (Miss. 1991). *See also, Hathorn v. Lovorn*, 457 U.S 255, 269-270 (1982).[1]

II.

The intervenors argue that the only remedy for this situation is an at-large statewide election for all members of Congress pursuant to Miss. Code § 23-15-1039. They contend, accordingly, that this Court has no jurisdiction. As we previously noted in our response to the intervenors' motion, their argument regarding this remedy in no way deprives this Court of jurisdiction. Moreover, this is not a viable remedy for a number of reasons.

In filing this case, we have asked this Court to enforce Mississippi law and implement an election plan that complies with Mississippi law. Mississippi law sets

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[1] These authorities are discussed in more detail at pages 2-9 of our response to the defendants' supplemental motion to dismiss.

out an election schedule that requires candidate qualification on March 1, 2002, primary elections on June 4, 2002, and the general election on November 5, 2002. Mississippi law also clearly contemplates and requires election of members of Congress by districts. *See*, Miss. Code § 23-15-1033 ("Representatives in the Congress of the United States shall be chosen *by districts* on the first Tuesday after the first Monday of November in the year 1986, and every two (2) years thereafter. . . . "); § 5-3-123 (members of the Standing Joint Congressional Redistricting Committee of the legislature shall draw a plan to redistrict no later than 30 days preceding the next regular session of the legislature and shall submit it to the Governor and the legislature).[2]

But the intervenors contend that the remedy for a legislative impasse resulting from a decrease in the number of seats is set out in Miss. Code § 23-15-1039. They argue that this statute requires at-large elections. However, the statute does not, in fact, require at-large elections. Instead, it mandates at-large balloting only if the election is actually held "before the districts have changed to conform to the new apportionment." The present case is being brought so that this Court can adopt

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[2] Although the legislature obviously can adopt a plan without a recommendation from the Committee, the state law giving the Committee the authority to draw such a plan clearly contemplates that districts will be used. Otherwise, there would be no need to draw a plan. And, as just mentioned, § 23-15-1033 specifically states that members of Congress "shall be chosen by districts." ***See also, Adams County Election Commission v. Sanders***, 586 So.2d at 381 (referring to the one-person, one-vote principle of Art 3, § 14 of the Mississippi Constitution).

and implement a redistricting plan containing four congressional districts in time for the 2002 election schedule. Once that is done, the "districts [will] have changed to conform to the new apportionment," and there will be no need for at-large elections under the statute. Nothing in that statute remotely suggests that this Court, as a court of equity, does not have the authority to implement a districting plan in the wake of the legislative default that has occurred here. Thus, the statute does not require at-large elections in the situation that exists here, and it does not deprive this Court of jurisdiction.

Even if the statute did require at-large elections under the present circumstances, that remedy could not be imposed because it would be unlawful both as a matter of Mississippi constitutional law and federal law. First, at-large elections would specifically violate the federal statute requiring election of congressional representatives from districts.[3] 2 U.S.C. § 2c states:

> In each State entitled . . . to more than one Representative . . . there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected *only* from Districts so established . . . .

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[3] As previously mentioned, our claim in this case is brought specifically under Mississippi law and seeks to enforce Mississippi law. In response, the intervenors have claimed that § 23-15-1039 requires at-large elections. We raise federal law at this juncture only to show that even if this at-large option were required by that statute, it is not a viable solution because it violates both federal law and the Mississippi Constitution.

(Emphasis added).[4] Second at-large elections would dilute back voting strength by requiring that all members of Congress be elected from a majority-white electorate. This dilution would violate both Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the equal protection component of Article 3, Section 14 of the Mississippi Constitution. *See, Jordan v. Winter*, 604 F.Supp. 807 (N.D. Miss. 1984) (three-judge court), *summary aff'd*, 469 U.S. 1002 (1984) (requiring that a majority black congressional district be created in Mississippi).

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[4] In 1941, the Congress passed a statute that would have allowed the remedy of at-large elections where the state lost a seat and failed to redistrict. *See*, 2 U.S.C. § 2a(c)(5). But in 1967, Congress passed the statute just quoted in the text of this brief, 2 U.S.C. § 2c, which specifically mandates that "Representatives shall be elected *only from districts.*" (Emphasis added). As the United States Supreme Court stated in *Whitcomb v. Chavis*, 403 U.S 124, 159 n. 39 (1971): "In 1941, Congress enacted a law that required that . . . if there is a decrease in the number of representatives and the number of districts in the State exceeds the number of representatives newly apportioned, all representatives shall be elected at large. . . . In 1967, Congress *reinstated the single-member district requirement.*" (Emphasis added). *See also, Shayer v. Kirkpatrick*, 541 F.Supp. 922, 926-927 (W.D. Mo. 1982) (three-judge court) ("we conclude that the later statute, section 2c, repealed section 2a(c)(5) by implication," so that "the only appropriate remedy is a court-ordered apportionment" rather than at-large elections), *summarily affirmed sub. nom. Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982); *Assembly of California v. Deukmajian*, 639 P.2d 939, 954-955 (Cal. 1982) ("Congress intended 2c to supersede the provisions of section 2a, subdivision (c)" and "an at-large election . . . would contravene the congressional mandate set forth in section 2c.").

For all of these reasons, at-large elections are not a viable option, and Miss. Code § 23-15-1039 does not deprive this Court of jurisdiction.

III.

In the supplemental motion to dismiss, the Attorney General contends that the three defendants, the Governor, the Secretary of State, and the Attorney General, are not proper defendants. But in a line of Mississippi redistricting cases going back some 35 years, these three officials always have been the lead state defendants. *See, e.g., Connor v. Johnson*, 256 F.Supp. 962, 963-964 (S.D. Miss. 1966) (legislative and congressional redistricting); *Jordan v. Winter*, 541 F.Supp. 1135, 1137 (N.D. Miss. 1982) (congressional redistricting); *Martin v. Allain*, 658 F.Supp. 1183, 1186 (S.D. Miss. 1987) (judicial districts); *Watkins v. Mabus*, 771 F.Supp. 789, 792 (S.D. Miss. 1991) (legislative redistricting); *NAACP v. Fordice*, 252 F.3d 361, 364 (5th Cir. 2001) (public service and transportation commissioners).[5] Neither the courts nor the Mississippi Attorney

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[5] Some of these cases also have named legislative leaders as defendants, while others have not (and in one case the legislators voluntarily intervened). The absence of them as defendants in some of the cases suggests, of course, that they are not necessary parties. This is particularly true in light of the fact that the plaintiffs in the present case are not asking the Court to order the legislature to do anything. Instead, the plaintiffs are simply asking that the Court implement a lawful plan for the congressional elections in the event the legislature does not do so on its own. As indicated by the cases just cited, these three state officials – as occupants of their offices and as members of the State Board of Election Commissioners – are the proper defendants for that purpose. If the legislative leaders

General appear ever to have raised a question about whether these are the proper defendants. Moreover, in the parallel federal case that is presently pending and that relates to congressional redistricting, the Attorney General has not filed any motion to dismiss based on this ground, and has not suggested to the court that these are improper defendants.

Clearly, these are proper defendants to represent the interests of the State of Mississippi and to implement any new redistricting plan if the legislative impasse continues and this Court is required to order equitable relief. *See, Connor v. Finch*, 469 F.Supp. 693, 694 (S.D. Miss. 1979) (imposing new districting plan for legislative elections by issuing injunction solely against Governor, Secretary of State, and Attorney General). These three officials comprise the State Board of Election Commissioners. They all are responsible for upholding and enforcing Mississippi law, and the Secretary of State is the state's chief election officer. This is not a basis for dismissing this case.[6]

IV.

The intervenors contend that the Republican and Democratic executive committees are indispensable parties for the purpose of imposing the remedy. But the committees were not parties in at least some of statewide redistricting litigation that has occurred in Mississippi

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wish to participate, they are free to file a motion to intervene or motion for leave to participate *amicus curiae*.

[6] This is discussed more at pages 9-10 of our response to the defendants' supplemental motion to dismiss.

over the years and that has led to new redistricting plans – particularly the thirteen year battle over legislative districts that lasted from 1966-1979. *See, Connor v. Johnson,* 256 F.Supp. at 963-964; *Connor v. Finch,* 469 F.Supp. at 694. *See also, Grove v. Emison,* 507 U.S. at 27-28; *Emison v. Growe,* 782 F.Supp. 427 (D. Minn. 1992) (three-judge court) (political parties were not defendants in either the state or federal court congressional redistricting cases that led to the Supreme Court's decision in *Growe,* and no one suggested they were necessary parties for congressional redistricting litigation). Under the law, the political parties must hold primaries under whatever plan is adopted by the State or the appropriate court, and as long as the state defendants are included, the political parties need not be named as defendants. This is not a proper basis for a motion to dismiss.[7]

V.

As all parties agree, any plan adopted by this Court must be precleared under Section 5 of the Voting Rights Act. However, the intervenors argue that preclearance must be obtained before this Court even holds hearings. That is simply not correct, and the intervenors cite no case law mandating such a requirement. Indeed, all of the case law demonstrates the contrary. *See, Hathorn v. Lovorn,* 457 U.S. at 269-270 (United States Supreme Court holds that where a chancery court orders a new election plan implemented, the change must be precleared, but

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[7] This is discussed more at pages 2-3 of our response to the intervenors' motion to dismiss.

the Court never suggested that preclearance should have been obtained before the chancery court held hearings); ***Adams County Election Commission v. Sanders,*** 586 So.2d at 830 (same).[8] Redistricting litigation has proceeded in a number of state courts in other states that are covered by Section 5 of the Voting Rights Act, but no court has ever held that preclearance must be obtained before the state court holds hearings.

For all of these reasons, as well as those stated in our prior responses, the motions to dismiss should be denied.

Respectfully submitted,

/s/ Robert B. McDuff
ROBERT B. MCDUFF
Miss. Bar No. 2532
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

CARLTON W. REEVES
Miss. Bar No. 8515
PIGOTT, REEVES, JOHNSON & MINOR, P.A.
P.O. Box 22725
Jackson, MS 39225-2725
(601) 354-2121

Counsel for Plaintiffs

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[8] This is discussed more fully at page 3 of our response to the intervenors' motion to dismiss

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered by fax and by first class mail to the following:

T. Hunt Cole, Jr.
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205

Grant Fox
P.O. Box 797
Tupelo, MS 38802-0797

F. Keith Ball
P.O. Box 954
Louisville, MS 39339

This 3rd day of December, 2001.

/s/ Robert B. McDuff
Counsel for Plaintiffs