IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JOHN ROBERT SMITH, SHIRLEY HALL, and GENE WALKER,

Plaintiffs,

vs. **No. 3:01cv855**

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,

Defendants,

and

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

Intervenors

RESPONSE OF INTERVENORS TO MOTION FOR LEAVE TO AMEND AND MOTION FOR PRELIMINARY INJUNCTION

The intervenors have no objection to the motion for leave to amend the complaint. However, we oppose the motion for preliminary injunction. This is for a number of reasons, including the following:[1]

The Section 5 Issue

1. As is clear both from the Chancery Court's scheduling orders and the state defendants'

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[1] In addition to the reasons cited here, the intervenors also agree with, and adopt by reference, the reasons given by the state defendants in opposition to the motion for preliminary injunction.

response to the motion for preliminary injunction in this Court, no one intends to implement and enforce any plan adopted by the Chancery Court absent preclearance. Thus, there is no need for, and no basis for, a preliminary injunction in that regard.

2. In the state defendants' response, the Attorney General has said he will submit for preclearance not only the change from the old districting plan to the new one adopted by the Chancery Court, but also "any departure by the Chancery Court in its substantive redistricting order from the at-large method of congressional elections described in Miss. Code Ann. § 23-15-1039, in favor of the adoption of single-member districts," as well as any change resulting from the orders of the Chancery Court and Mississippi Supreme Court asserting jurisdiction to adopt a plan in light of the legislative default. So again, there is no need for, and no basis for, a preliminary injunction regarding these matters.

3. Even if the Attorney General were not submitting for preclearance the use of single-member districts rather than at-large elections, a preliminary injunction would not be justified since no voting change is involved. Mississippi has used single-member districts to elect members of the United States House of Representatives for a very long time. Mississippi's election laws clearly contemplate and require election of members of Congress by districts. ***See***, Miss. Code Ann. § 23-15-1033 (Rev. 2000) ("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 . . . ."). § 23-15-1039 requires at-large voting only if the election is actually held (in the words of the statute) "before the districts have changed to conform to the new apportionment."[2] Once the state court adopts a plan, the "districts [will] have changed

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[2] The entire statute reads:

> Should an election of representatives in Congress occur after the number of representatives to which the state is entitled shall be changed, in consequence of a new apportionment being made

to conform to the new apportionment," and there will be no need for at-large elections under the terms of the statute. Nothing in the statute talks about who has the authority to implement a districting plan, and nothing in it remotely suggests that the state courts do not have that authority when the legislature defaults. Thus, the statute does not require at-large elections in the situation that exists here. The use of single-member districts rather than at-large elections in the Chancery Court plan will not constitute a voting change.

4. Similarly, the assumption of jurisdiction by the state courts does not constitute a voting change. Chancery courts always have had the authority to enforce the law by means of injunctive relief. Although this authority may not have been previously exercised with respect to congressional redistricting, that does not make the decision to exercise it a voting change. In ***Hathorn v. Lovorn***, 457 U.S. 255, 269-270 (1982), the United States Supreme Court held that where a chancery court orders a new election plan implemented, the substantive change must be precleared, but the Court never suggested that preclearance was required with respect to the decision to exercise jurisdiction in the first place. ***See also, Adams County Election Commission v. Sanders***, 586 So.2d 829, 830 (Miss. 1991) (same).

The Article 1, Section 4 Issue

5. The plaintiffs contend that Article I, § 4 of the United States Constitution prevents any state court from enacting a congressional redistricting plan. Article I, § 4 reads: "The Times, Places and Manner

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> by Congress, and *before the districts shall have changed to conform to the new apportionment*, representatives shall be chosen as follows: In case the number of representatives to which the state is entitled be increased, then one (1) member shall be chosen in each district as organized, and the additional member or members shall be chosen by the electors of the state at large; and if the number of representatives shall be diminished, then the whole number shall be chosen by the electors of the state at large.

Miss. Code Ann. § 23-15-1039 (Rev. 2000) (emphasis added).

of Holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof...." But, here, the state courts are not being asked to take that power away from the legislature. Instead, they are asked to enact a plan only because the legislature has failed to do so. Nothing in Article I, § 4 suggests that this is unconstitutional. If it were unconstitutional, the Supreme Court would not have issued its unanimous decision in ***Growe v. Emison***, 507 U.S. 25, 34 (1991), holding that, in the context both of legislative *and congressional* redistricting, "state courts have a significant role in redistricting," 507 U.S. at 33, and noting that "[t]he 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). In order to accept the plaintiffs' contention, this Court would be required to repudiate the decision in ***Growe***.

6. As for plaintiffs' complaint that the Chancery Court's action wrests power from the legislature by ignoring the legislative solution set forth in § 23-15-1039, we have explained that court adoption of a single-member district plan does not in any way violate that statute. Even the federal court decision upon which the plaintiff's rely, ***Carstens v. Lamm***, 543 F. Supp. 68, 77-78 (D. Colo. 1982), makes it clear that the federal at-large statute — which parallels the Mississippi statute — "provides emergency statutory relief" to be utilized only when neither the legislature nor a court can devise a plan in time for the election. Since the state court here is devising a plan in time for the election, § 23-15-1039 has not been violated.

7. Moreover, if the statute did require at-large elections under the present circumstances, that remedy could not be imposed because it would be unlawful as a matter of federal law. While the first clause of Article 1, § 4 states that legislatures shall prescribe "the time, places, and manner" of choosing members of Congress, the second clause says "Congress may at any time by Law make or alter such

Regulations." At-large elections would specifically violate the federal statute requiring election of congressional representatives from districts. 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 . . . .

(Emphasis added).[3] In addition, at-large elections would require that all members of Congress be elected from a majority-white electorate under conditions that would dilute black voting strength and violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. ***See, Jordan v. Winter***, 604 F.Supp. 807 (N.D. Miss. 1984) (three-judge court), ***summarily aff'd***, 469 U.S. 1002 (1984) (requiring that a majority black congressional district be created in Mississippi).

The Due Process Issue

8. The plaintiffs fail to explain how they have standing to raise a claim of a denial of due process in a state court case in which they neither participated nor asked to intervene. The intervenors in that case

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[3] 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 prior to the election. ***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). Although this language from the Supreme Court is dictum, it makes perfect sense. Most of the lower courts that have addressed the question appear to agree that the 1967 statute supersedes the one from 1941. ***See, 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.")

have suggested both to the Chancery Court and the Mississippi Supreme Court in an interlocutory appeal that the Chancery Court schedule – imposed as a result of the January 7 date mentioned in this Court's December 5 order — violated their due process rights. But neither the Chancery Court nor the Mississippi Supreme Court has agreed. Any further claim by the state court intervenors must be raised in any future appeal to the Mississippi Supreme Court, and if unsuccessful, in a petition to the United States Supreme Court. This Court is not the forum to adjudicate that claim.

9. Moreover, no due process violations occurred in the state court case. As with most redistricting cases, expedited proceedings were necessary. The legislative default did not occur until early November, when the special legislative session adjourned without enactment of a plan. Even then, the Attorney General contended that the Chancery Court should give the legislature more time, and the Chancery Court specifically "urge[d] the legislature and the Governor to renew their efforts to enact and implement a congressional redistricting plan, and to do so as soon as possible." (Nov. 19, 2001 order denying motion to dismiss). Still hoping to allow the legislature more time, the Chancery Court set a schedule by which the parties would have until the end of December to complete discovery and the trial would be held on January 14. (December 3 order). It was only after this court referred to the date of January 7 in its December 5 order that the Chancery Court, acting quite responsibly, moved its trial to December 14. (Scheduling order signed December 6 and filed December 7; amended scheduling order signed and filed December 7). As is clear from the amended scheduling order dated December 7, the Chancery Court did not eliminate or preclude discovery, but simply clarified that the parties should cooperate and that discovery should be completed by December 13, the day before trial. This case has been pending since the special legislative session adjourned in early November. The state court intervenors were orally permitted to intervene on

November 13, the day they filed their motion to intervene. (That oral ruling was memorialized in a written order dated November 19). Everyone knew from the beginning that the case would proceed on an expedited basis. None of the parties — including the state court intervenors — filed any discovery requests, took any discovery, sought to shorten the time for discovery responses, or sought to expedite the expert reporting deadline, except the intervenors filed discovery requests on December 11, three days before the trial. All parties were required to comply with the same schedule. The trial itself involved the presentation by the parties of proposed redistricting plans, and the parties had an ample opportunity to discuss and debate the merits of them. Out of an abundance of caution, the Chancery Court set aside five days for the trial, but the full amount of time was not required. No party was precluded from calling any witness or presenting any particular piece of evidence. No due process violation occurred

Conclusion

For all of these reasons, the motion for preliminary injunction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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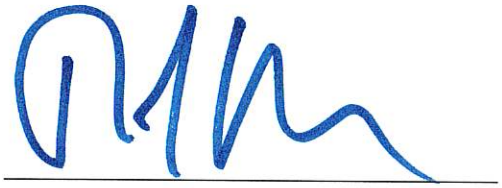
This 21st day of December, 2001.



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