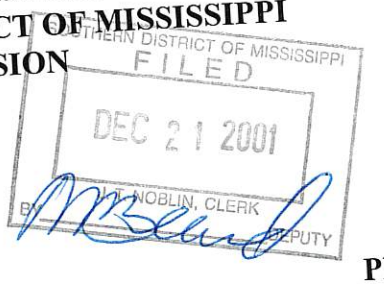
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



JOHN ROBERT SMITH,
SHIRLEY HALL, and
GENE WALKER **PLAINTIFFS**

CIVIL ACTION NO. 3:01CV855 WS

VS.

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

STATE DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT AND FOR PRELIMINARY INJUNCTION

State Defendants Eric Clark, Secretary of State, Mike Moore, Attorney General, and Ronnie Musgrove, Governor, hereby respond to Plaintiffs' motion for leave to amend their complaint and motion for preliminary injunction, served on or about December 17, 2001. Undersigned counsel was telephonically advised on December 19 that any response to these motions was to be filed by December 21.

I. PLAINTIFFS' MOTION FOR LEAVE TO AMEND THE COMPLAINT

1. With respect to plaintiffs' motion for leave of court to file their proposed Amended Complaint, these defendants do not oppose the Court's granting of permission to file the Amended Complaint. Under F.R.Civ.P. Rule 15 (a), leave to amend a complaint "shall be freely given [by a court]." Accordingly, these defendants do not oppose this motion.

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II. PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

2. On December 5, 2001, this Three-Judge Court entered an order which, ruled, *inter alia*, that: (1) "in light of *Emison [v. Growe*, 507 U.S. 25, 34], a ruling on the plaintiffs' Motion for Preliminary Injunction is hereby deferred, in order that State authorities may have further opportunity to timely carry out their duty" [to adopt a redistricting plan]; and that (2) "if it is not clear to this court by January 7, 2002, that the State authorities can have a redistricting plan in place by March 1, we will assert our jurisdiction and proceed expeditiously to rule on the Plaintiffs' Motion for Preliminary Injunction, and if necessary, we will draft and implement a plan for reapportioning the state congressional districts." Order of December 5, 2001, at p. 2.

3. Plaintiffs' new motion for preliminary injunction is based on Section 5 of the Voting Rights Act, as amended, 42 U.S.C.A. § 1973c. Plaintiffs contend that the Mississippi Chancery Court's entertaining of a congressional redistricting suit to adopt a plan and the Mississippi Supreme Court's December 13, 2001 Order in *In Re Mauldin*, No. 2001-M-01891, holding that "the Hinds County Chancery court has jurisdiction of this matter," constitute a change in practices and procedures with respect to voting covered by the preclearance requirements imposed by Section 5. Plaintiffs further contend that any Chancery Court judgment which adopts a plan other than an at-large method of election where no redistricting plan has been enacted, as set forth in Miss. Code Ann. § 23-15-1037 (Rev. 2001), itself precleared by the Justice Department in 1986, is a change requiring preclearance.

4. It is now hornbook law that in a § 5 injunction action the issues for determination by the Three-Judge Court are:

> (i) whether a change [is] covered by § 5, (ii) if the change is covered, whether § 5 approval requirements [have been] satisfied, and (iii) if the requirements [have not been satisfied], what relief [is] appropriate.

City of Lockhart v. United States, 460 U.S. 125, 129 n.3, 103 S.Ct. 998 (1983); *Lopez v. Monteray County*, 519 U.S. 9, 23 -24, 117 S.Ct. 340 (1996). The Three-Judge Court does not pass on the purpose or effect of the change. *Id.*

5. In this regard, these State defendants acknowledge, and it is inarguable, that whether a State practice or enactment constitutes a covered change in a standard, practice, or procedure "with respect to voting" must be given its "broadest possible scope" for § 5 purposes, *Allen v. Board of Elections*, 393 U.S. 544, 567, 89 S.Ct. 817 (1969). Moreover, the United States Attorney General's interpretations of § 5 are entitled to deference because of his extensive role in drafting the statute and explaining its operation to Congress. *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 179, n. 29, 105 S.Ct. 1128 (1985).

6. Under the United States Department of Justice Section 5 regulations, a change "with respect to voting" plainly includes "redistricting" and "reapportionment," 28 C.F.R. § 51.13(e), and the statute on its face would accordingly cover a change in "practice" or "procedure" with respect to redistricting different from that in force or effect on November 1, 1964, – the main benchmark date for Mississippi. See 28 C.F.R. § 2. Furthermore, under 28 C.F.R. § 51.14, a covered change can occur, *inter alia*, "the first time such a practice or procedure is implemented by the jurisdiction." See also § 51.15 (enabling legislation). Moreover, the apparent Justice Department position is that a covered change occurs where there is a transfer of authority with respect to the authority to adopt a redistricting plan.

7. The Attorney General of Mississippi is the chief legal officer of the State and is the State official with the primary responsibility of making § 5 submissions to the United States Department of Justice. The Attorney General will submit the Order and Judgment of the Chancery Court substantively adopting a new congressional redistricting plan for Mississippi, as ordered by the Chancery Court.[1] Moreover, in accord with the foregoing legal authorities, the Attorney General of Mississippi has also determined to submit, and will submit at the same time for preclearance: (1) the procedural orders of the Chancery Court and Supreme Court of Mississippi asserting jurisdiction by the Chancery Court, in the Judicial Branch of government, to adopt a congressional redistricting plan through court proceedings where the Legislature, which traditionally enacts such plans, has failed to act; and (2) 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 congressional districts based on the 2000 Census results. For § 5 purposes, neither of the foregoing had the purpose or effect of retrogressively abridging or denying the right to vote because of race, *Beer v. United States*, 425 U.S. 130, 96 S.Ct. 1357 (1976), and the United States Justice Department will be so advised in the submission.

8. It is anticipated that the Chancery Court judgment adopting a congressional redistricting plan will be entered on December 21, 2001, and barring unforseen circumstances, the Attorney General's submission to the Justice Department will be filed on December 28, 2001, – more than

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[1]The Chancery Court scheduling order dated December 7, 2001, contemplates ordering the Attorney General to make the submission on or before December 28. The Attorney General will comply with the order of the Chancery Court. In this regard, it is noted that an appeal to the Mississippi Supreme Court may result from the Chancery Court judgment, thus potentially affecting its finality. The Attorney General will advise the Department of Justice of the pending nature of any appeal, either in the submission itself or as a matter of course. 28 C.F.R. § 51.22.

60 days prior to the March 1 qualification date.

9. It is well established, and acknowledged by these State defendants, that any Chancery Court order substantively adopting a congressional redistricting plan, and any change or departure with respect to the method of adopting a redistricting plan, as outlined above, are not effective as law until § 5 approval is obtained from the United States Attorney General or from the United States District Court for the District of Columbia. *Connor v. Waller*, 421 U.S. 656, 95 S.Ct. 2003 (1975). Accordingly, to the extent that they could do so, these State defendants have no intention of taking any steps to administer, implement, or enforce these changes until § 5 approval is obtained.

10. As set forth by the Supreme Court in *Lopez v. Monteray County*, 519 U.S. 9, 24, 117 S.Ct. 340 (1996),

> [t]he goal of a three-judge district court facing a § 5 challenge must be to ensure that the covered jurisdiction submits its election plan to the appropriate federal authorities for preclearance as expeditiously as possible.

11. Under the circumstances of the instant matter, there is no substantial basis for a § 5 injunction remedy against these State defendants. This Three-Judge Court deferred to State authorities for adoption of a redistricting plan until at least January 7, 2002. The Attorney General is in fact submitting the alleged change about which plaintiff complain as to the method of adoption of a redistricting plan to the Justice Department for preclearance, along with any Chancery Court order substantively adopting a congressional redistricting plan. That submission to the Justice Department will be made in extremely expeditious fashion on December 28. Any redistricting plan adopted by the State court will not be used and will not be effective as law until § 5 approval is obtained. Even the normal remedy imposed in § 5 injunction cases – to order that a matter be

submitted to the Justice Department for § 5 approval without further delay, etc., e.g. *Berry v. Doles*, 438 U.S. 190, 192 - 193, 98 S.Ct. 2692 (1978) – is inappropriate here, where the submission is being made forthwith and in an expedited manner.

12. Accordingly, no preliminary injunction should be issued as to the plaintiffs' § 5 allegations.

13. The plaintiffs further assert in their motion for preliminary injunction before the Three-Judge court that the State court proceedings to adopt a congressional redistricting plan violate U.S. Constitution Art. I § 4, which provides that "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof..." The plaintiffs also complain about the expedited procedures utilized in the Chancery Court proceeding. It is extremely unclear at this point how plaintiffs in this federal court proceeding have standing to complain about procedures allegedly unfair to third parties in the State court proceeding, *see Warth v. Seldin,* 422 U.S. 490, 498-502, 95 S.Ct. 2197 (1975),or how the substantive adoption of congressional district boundaries due to a federally mandated reapportionment constitutes a "Time, Place or Manner" of holding an election under Art. I § 4, which relates only to the "mechanics" of congressional elections, *Foster v. Love*, 522 U.S. 67, 118 S.Ct. 464, 466 (1997). More fundamentally, however, these federal questions have been specifically raised by parties in the pending Chancery Court proceeding; and this federal court should accordingly abstain and not permit a collateral attack. Under the abstention doctrine, federal courts should abstain from issuing orders which preempt State court processes, where the State court proceedings are ongoing, where important State interests are involved, and where the federal question has been raised, or may be raised, in the State court proceeding. *See, e.g., Maddlesex Ethics Comm. v. Garden State Bar Assn.*,

457 U.S. 423, 431 - 437, 102 S.Ct. 2515 (1982); *Moore v. Sims*, 442 U.S. 415, 60 L.Ed.2d 934 (1979). Similarly, a federal district court may not entertain collateral attacks on state court judgments, which may ultimately be reviewed on questions of federal law in the United States Supreme Court. *See, Hale v. Harney*, 786 F.2d 688, 691 (5th Cir. 1986) (noting that lower federal courts "hold no warrant to review even final judgments of state courts, let alone those which may never take effect because they remain subject to revision in the state appellate system," with further review of questions of federal law in the Supreme Court); *Liedke v. State Bar of Texas*, 18 F.3d 315 (5thh Cir. 1994).

14. Accordingly, for the foregoing reasons, the plaintiffs' motion for preliminary injunction should be denied.

Respectfully submitted,

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

BY: MIKE MOORE, ATTORNEY GENERAL

BY: T. Hunt Cole

T. HUNT COLE, JR., MSB No. 6349
SPECIAL ASSISTANT ATTORNEY GENERAL

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone No. (601)359-3824

CERTIFICATE OF SERVICE

This is to certify that I, T. Hunt Cole, Jr., Special Assistant Attorney General for the State of Mississippi, have this date caused to be hand delivered, a true and correct copy of ***State Defendants' Response to Plaintiffs' Motion for Leave to Amend Complaint and for Preliminary Injunction*** to the following:

Arthur F. Jernigan, Jr., Esq.
WATSON & JERNIGAN, P.A.
Mirror Lake Plaza, Suite 1502
2829 Lakeland Drive
Post Office Box 23546
Jackson, Mississippi 39225-3546

Michael B. Wallace, Esq.
PHELPS DUNBAR
200 South Lamar Street, Suite 500
Post Office Box 23066
Jackson, Mississippi 39225-3066

Shane Langston, Esq.
Omar Nelson, Esq.
Mississippi Democratic Party
832 North Congress Street
Jackson, Mississippi 39202

Robert B. McDuff, Esq.
767 North Congress Street
Jackson, MS 39202

Carolton Reeves, Esq.
Piggott, Reeves, Johnson & Minor, P.A.
775 North Congress St.
Jackson, MS 39202

John G. Jones, Esq.
513 North State Street
Jackson, MS 39286-3960

Herbert Lee, Jr., Esq.
2311 W. Capitol St.
Jackson, MS 39203

This the 21 day of December, 2001.

T. HUNT COLE, JR.