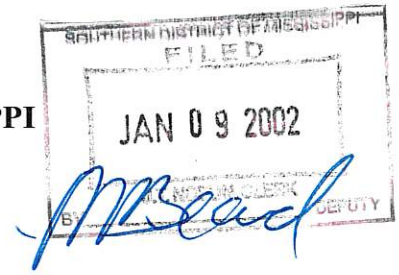
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



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

VS. — **CIVIL ACTION NO. 3:01CV855 WS**

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' SUPPLEMENTAL RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

State Defendants, Eric Clark, Secretary of State, Mike Moore, Attorney General, and Ronnie Musgrove, Governor, by and through undersigned counsel, hereby respond to the Court's request for additional briefing.

1. State Defendants reiterate and continue to rely on their December 21, 2001, response to plaintiffs' new motion for preliminary injunction and respectfully submit that the points made in that response resolve the issues presented in that motion.

2. Moreover, to the extent that the amended complaint continues to substantively complain of a failure of the State to effectuate in timely manner a congressional redistricting plan for 2002 elections, whether the claim is based upon a failure to redistrict from 5 seats to 4 seats in accord with the statutory requirement of the new congressional apportionment for Mississippi under 2 U.S.C.A.

§ 2a(a) and 2a(b), or upon constitutional one-man one-vote principles, it is undeniable that the federal three-judge court has subject matter jurisdiction over such substantive claims. *E.g., Carstens v. Lamm*, 543 F.Supp. 68 (D.Col. 1982) (three-judge court); *Shayer v. Kirkpatrick*, 541 F.Supp. 922 (W.D. Mo. 1982), *aff.*, 456 U.S. 966 (1982). However, under the principles of *Growe v. Emison*, 507 U.S. 25, 113 S.Ct. 1075 (1993), before imposing its own remedy a federal court must defer for the maximum practicable time to permit a state, either by legislative enactment or through a valid court judgment, to effectuate a congressional redistricting plan for upcoming elections. While *Growe* involved Minnesota, a non - § 5 state, and a Mississippi state court redistricting judgment by contrast is not yet effective as law until § 5 approval is obtained, *Cf. Growe*, 113 S.Ct. at 1082, the central message of *Growe* is nevertheless clear: that a state should be allowed the maximum practicable amount of time to effectuate its own redistricting plan before a federal court orders its own permanent remedy.

3. To the extent, however, that the amended complaint relies on § 5 claims, 42 U.S.C.A. § 1973c, the remedial options of this Court are limited under the circumstances here and under well established Supreme Court precedent in this area. See generally *Berry v. Doles*, 438 U.S. 190, 98 S.Ct. 2692 (1978); *Clark v. Roemer*, 500 U.S. 646, 652 - 655, 111 S.Ct. 2096 (1991); *Lopez v. Monterey Co.*, 519 U.S. 9, 20 - 25, 117 S.Ct. 340 (1996). As previously observed, the Mississippi Attorney General submitted the Chancery Court's substantive redistricting plan to the Justice Department for approval on December 26, 2001, as specifically ordered by the Chancery Court, and also submitted for approval a change from a legislative method of congressional redistricting to a judicial method through state court litigation, along with the Chancery Court's departure from the at-large temporary remedy set forth in Miss. Code Ann. § 23-15-1039. No one contends that the

Chancery Court redistricting plan is effective as law in any manner until § 5 approval is obtained, and the central goal of § 5 remedial decisions has already been satisfied by the prompt and expeditious submission of any changes with respect to voting to the Justice Department. As stated in *Lopez*,

> [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.

While the circumstances of this matter may not directly implicate case-or-controversy concerns, no § 5 remedy by this Court is appropriate at this point. Absent any indication that the Chancery Court, or anyone else for that matter, will seek to administer[1] the Chancery Court redistricting plan until a final judgment is approved by the Justice Department under § 5, there is no basis for even a *Berry* remedy here. In *Berry*, where a change in law had not been submitted, the Supreme Court remanded to the district court for the entry of an order allowing the covered jurisdiction 30 days to submit the matter to the Justice Department.

> We conclude that the requirement of federal scrutiny imposed by § 5 should be satisfied by appellees without further delay. Accordingly, we adopt the suggestion of the United States that the District Court should enter an order allowing appellees 30 days within which to apply for approval of the 1968 voting change. *If approval is obtained the matter will be at an end.*.

Berry, 438 U.S. at 192-193 (emphasis supplied).

4. As to plaintiffs' contentions that this Court should now injunctively invalidate the change from a legislative method to a judicial method of redistricting, and the Chancery Court's departure

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[1]See *Lopez v. Monterey County*, 119 S.Ct. 693, 701 (1999) (Lopez II).

from the at-large statutory remedy, it is noted that the plaintiffs in their cover letter to the Court with the motion indicated that they did not seek to enjoin the ongoing state court proceedings. Accordingly, those proceedings are now over, and a *Clark v. Roemer* type of § 5 remedy is not appropriate. See *Lopez*, 519 U.S. at 20-21. Under *Berry*, those changes have already been submitted to the Justice Department, and if approval is obtained, the "matter will be at an end," 438 U.S. at 193, for § 5 purposes. If § 5 approval is ultimately not obtained as to any of the changes, a federal court must exercise its equitable discretion as to an appropriate remedy. *Perkins v. Matthews*, 400 U.S. 379, 91 S.Ct. 431 (1971).

5. Finally, with respect to this Court's question concerning its remedial authority under § 5 to adopt a congressional redistricting plan as a remedy – as opposed its remedial authority for substantive one-man one-vote constitutional questions – that authority is similarly limited. Assuming arguendo that § 5 approval requirements are not satisfied, e.g. the change is not submitted or the Justice Department objects, and some remedy is proper, the § 5 remedy is temporary in nature. *Lopez*, 519 U.S. at 23. As stated in *Lopez*, if the three-judge § 5 injunction court determines that § 5 approval requirements were not satisfied, the question becomes "what temporary remedy, if any, is appropriate." *Id.* While it appears that a federal three-judge court may in some circumstances fashion its own redistricting plan as a remedy for § 5 problems, that redistricting plan can only be temporary and on an interim basis lasting only until such time as the State obtains any necessary § 5 approval or another constitutionally valid plan is enacted by the State and approved. *Connor v. Waller*, 421 U.S. 656, 95 S.Ct. 2003 (1975); *Jordan v. Winter*, 541 F.Supp. 1135, 1141 (N.D. Miss. 1982) (three-judge court), vacated on other grounds, 461 U.S. 921 (1983); *Terrazas v. Clements*, 537 F.Supp. 514, 537 - 539 (N.D. Tex. 1982) (Three-Judge Court), stay denied, 456 U.S. 902 (1982).

Assuming a § 5 remedy is appropriate, any court-drawn redistricting plan can only be temporary pursuant to that section, not permanent in nature.

6. Accordingly, for the reasons set forth in these defendants' original Response, and above, the plaintiffs' motion 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

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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' Supplemental Response to Motion for Preliminary Injunction*** to the following:

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This the 9 day of January, 2002.

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