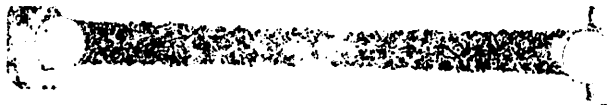
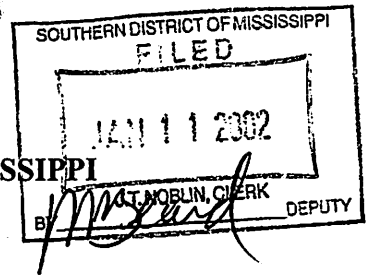





**UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**
**JACKSON DIVISION**

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

**CIVIL ACTION NO. 3:01CV855WS**

**VERSUS**

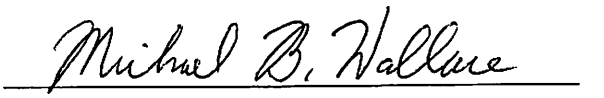
**ERIC CLARK, Secretary of State of MISSISSIPPI; MIKE MOORE, Attorney General for the State of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE** — **DEFENDANTS**

**SUPPLEMENTAL SUBMISSION OF**
**MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE**
**IN CONNECTION WITH MOTION FOR PRELIMINARY INJUNCTION**

COMES NOW the Mississippi Republican Executive Committee and respectfully submits for this Court's consideration in connection with the pending motion for preliminary injunction a true and correct copy, attached hereto and made a part hereof as Exhibit A, of the letter of January 11, 2002, from its Chairman, the Honorable James Herring, to the United States Department of Justice concerning the submission made on December 26 and 27, 2001, by the Honorable Mike Moore, Attorney General of Mississippi.

Respectfully submitted,

PHELPS DUNBAR LLP

By: 

Michael B. Wallace (Bar No. 6904)
Christopher R. Shaw (Bar No. 100393)
Suite 500, SkyTel Centré
200 S. Lamar Street
Post Office Box 23066
Jackson, Mississippi 39225-3006
Telephone: (601) 352-2300
Facsimile: (601) 360-9777

ATTORNEYS FOR MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE

## CERTIFICATE OF SERVICE

I do hereby certify that I have on this 11TH day of January, 2002, served by hand, a copy of the foregoing pleading to:

Arthur F. Jernigan, Jr.
Staci B. O'Neal
Watson & Jernigan, P.A.
Mirror Lake Plaza, Suite 1502
2829 Lakeland Drive
P.O. Box 23546
Jackson, MS 39225-3546

Robert McDuff
767 North Congress Street
Jackson, MS 39202

Carlton W. Reeves
Pigott, Reeves, Johnson & Minor, P.A.
775 N. Congress Street
P.O. Box 22725
Jackson, MS 39225-2725

Mike Moore
T. Hunt Cole
Carroll Gartin Justice building
450 High Street
P.O. Box 220
Jackson, MS 39205-0220

John Griffin Jones
513 N. State Street
P.O. Box 13960
Jackson, MS 39286-3960

Herbert Lee
2311 W. Capitol Street
Jackson, MS 39209

Michael B. Wallace

MICHAEL B. WALLACE

THE

# Mississippi Republican Party

James H. Herring
*Chairman*

Kim Gallaspy
*Executive Director*

January 10, 2002

Mr. Joseph D. Rich, Acting Chief
Voting Section, Civil Rights Division
Department of Justice
1800 G Street, N.W., Room 7254
Washington, D.C. 20006

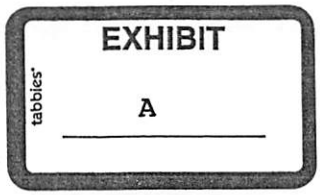
Re: Submission by the State of Mississippi of Congressional Redistricting Plan Pursuant to Opinion and Order of the Chancery Court of the First Judicial District of Hinds County, Mississippi

Dear Mr. Rich:

Pursuant to 28 C.F.R. § 51.29, the Mississippi Republican Executive Committee offers the following comments on the three changes submitted by Attorney General Mike Moore in his letter to you of December 26, 2001.

Although General Moore submitted a single document, pages 3-4 of that submission make clear that he is seeking approval of three separate changes. Each of those three changes must be separately analyzed to determine that it does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. (Although there are some language minority groups in Mississippi, we are aware of no contention that any of the three changes would have any particular impact on such groups.) Although General Moore's submission discussed the three changes collectively, our comments will attempt to analyze them separately.

We begin, however, with a concern that is common to at least the first and third changes identified by General Moore, and perhaps to the second as well. The Department's controlling regulation provides in pertinent part:




JO:99130502.1

0369

Cochran-Lott Statesmen Hall, 415 Yazoo Street, Suite 200, Jackson, MS 39201
P. O. Box 60 / Jackson, Mississippi 39205-0060 / (601) 948-5191 / Fax (601) 354-0972
e-mail: party@msgop.org / web site: www.msgop.org

> The Attorney General will not consider on the merits:
>
> (a) Any proposal for a change affecting voting submitted prior to final enactment . . . .
>
> . . .
>
> However, with respect to a change for which approval by . . . a State . . . court . . . is required, the Attorney General may make a determination concerning the change prior to such approval if the change is not subject to alteration in the final approving action . . . .

28 C.F.R. § 51.22. The first change is Mississippi's proposed new congressional redistricting plan, and the third is the decision to disregard Miss. Code Ann. § 23-15-1039 (Rev. 2001), which requires election of Representatives at large when Mississippi loses a seat and the Legislature does not adopt new districts; both of these changes were enacted by the Chancery Court of the First Judicial District of Hinds County in its final judgment of December 31, 2001. (The document actually submitted by General Moore was not the final judgment, but was the Chancery Court's interlocutory order of December 21, 2001.) The Mississippi Republican Executive Committee will appeal that judgment to the Supreme Court of Mississippi, and that judgment is "subject to alteration in the final approving action" of the Supreme Court in its disposition of the appeal. The regulation gives the Attorney General discretion to consider such changes only when they are not subject to alteration; because regulations are generally binding on the agency which promulgates them, § 51.22 deprives the Attorney General of power to approve these two changes until after they have been finally considered and approved by the Supreme Court of Mississippi.

The second change submitted by General Moore was the order of the Supreme Court of Mississippi in In re: Mauldin, No. 2001-M-01892, which conferred upon the Chancery Court jurisdiction to hear a congressional redistricting case, effectively overruling contrary decisions issued in 1932 and followed ever since. That order is not subject to further review by any authority other than the Supreme Court itself. Nevertheless, as part of its appeal, the Mississippi Republican Executive Committee will ask the Supreme Court to reconsider that decision. Particularly where the Supreme Court has given no explanation for the submitted change, we believe that it is well within the Attorney General's discretion to await the resolution of the appeal before considering the merits of the second change.

The Attorney General is aware from General Moore's submission that three voters have filed suit in the United States District Court for the Southern District of Mississippi against state election

officials, as well as the executive committees of the political parties. Smith v. Clark, No. 3:01CV855WS (S.D.Miss.). Plaintiffs in that case have been permitted to file an amended complaint in which they seek to enjoin all three of the changes which General Moore has included in his submission. A hearing was held on plaintiffs' motion on December 28, 2001, and the Court requested briefing. No decision has yet been rendered.

The Committee has additional comments on each of the three changes submitted by General Moore.

1. The Branch Congressional Redistricting Plan

Based on the standards announced by the Department in 66 Fed. Reg. 5412 (Jan. 18, 2001), the redistricting plan adopted in the Branch case is plainly retrogressive; because no sufficient reason has been given for rejecting less retrogressive plans, the Attorney General should interpose an objection. That notice declares that the Department will "evaluate redistricting submissions using the 2000 Census population data." Id., at 5414. With regard to retrogression from the existing population level, the notice declares:

> A proposed redistricting plan ordinarily will occasion an objection by the Department of Justice if the plan reduces minority voting strength relative to the benchmark plan and a fairly-drawn alternative plan could ameliorate or prevent that retrogression.
>
> . . .
>
> . . . If it is determined that a reasonable alternative plan exists that is non-retrogressive or less retrogressive than the submitted plan, the Department will interpose an objection.

Id., at 5413.

As revealed on page 7 of the Chancery Court's opinion in Branch, existing District 2 in 2000 had a black voting age population of 61.1%. Under the plan adopted by the Chancery Court, the black voting age population of new District 2 is 59.03%, but the Intervening Defendants in that case proposed at trial an alternative District 2 with a black voting population of 59.94%; their motion to vacate or amend, filed December 26, 2001, proposed another plan in which District 2 would have a black voting age population of 59.1%. The Chancery Court's order of December 31, 2001, gave no reason for rejecting the second alternative plan. At page 7 of its opinion of December 21, 2001, the Chancery Court explained its rejection of the first alternative plan, declaring, "The difference in the

deviation of the Black voting age population between the Branch plan 2A and the modified Kirksey plan is of no consequence in this Court's opinion since the majority-minority status of District 2 is not affected." According to the notice, this Department does not permit retrogression even where the majority-minority status is not affected; to the contrary, a retrogressing plan will not be approved where "a reasonable alternative plan exists that is non-retrogressive or less retrogressive than the submitted plan." 66 Fed. Reg. at 5413. General Moore has submitted no basis upon which the Attorney General could conclude that the alternative less retrogressive plans proposed by the Intervening Defendants are not reasonable. On the basis of its own declared standards, this Court must interpose an objection to the plan adopted in Branch.

The Attorney General must also interpose an objection where there is insufficient proof that a change does not have the purpose of denying or abridging the right to vote on account of race or color. The purpose to be examined here is not that of the Chancery Court, but of the plaintiffs who devised the plan. It has been clear since Shelley v. Kraemer, 334 U.S. 1 (1948), that a court may not enforce private discriminatory intent, and that principle has been applied under § 5 to require even federal courts to submit for approval plans which were prepared by state officers. Wise v. Lipscomb, 437 U.S. 535 (1978). In Branch, plaintiff L.C. Dorsey testified that her purpose was to maximize black voting strength. While a purpose of maximizing a partisan vote is permissible even where it has a racial effect, it is unconstitutional and therefore objectionable under § 5 for race to be the primary motivating factor in devising a plan. Compare Hunt v. Cromartie, ___ U.S. ___, 121 S.Ct. 1452 (2001), with Shaw v Hunt, 517 U.S. 899 (1996) (invalidating redistricting plan because race was the predominant consideration). General Moore has the burden of proving that plaintiff Dorsey did not mean what she said, and his submission does not even attempt to carry that burden.

2. Delegation of Redistricting Power to the Chancery Court

Article I, § 4 of the United States Constitution requires the legislatures of each state to determine the manner of election of Representatives to Congress. The Mississippi Legislature has discharged that duty at each census after its admission to the Union, until its failure to agree upon a redistricting plan for use in 2002. The Legislature of Mississippi as elected in 1999 is fairly districted so as to represent all voters of whatever race. Attorney General Barr approved the redistricting plan for the Mississippi House of Representatives on March 30, 1992, and the plan for the Mississippi Senate on May 8, 1992.

As General Moore acknowledges at page 4 of his submission, Mississippi courts have always lacked jurisdiction to adjudicate challenges to congressional redistricting plans, much less to devise and impose their own plans. Wood v. State ex rel. Gillespie, 169 Miss. 790, 142 So. 747 (1932); Brumfield v. Brock, 169 Miss. 784, 142 So. 745 (1932). The order issued by the Supreme Court of

Mississippi in In re: Mauldin on December 13, 2001, authorizing the Chancery Court to impose its own redistricting plan necessarily constituted a change in Mississippi's prior election practices. The Department's prior statement of its position clearly supports this conclusion: "Some transfers of authority between government officials . . . clearly have a direct relation to voting if they concern authority over voting procedures, such as a change in who has authority to adopt the redistricting plan . . . ." See www.usdoj.gov/crt/voting/sec_5/types.htm. See also Foreman v. Dallas County, 521 U.S. 979 (1997).

At the hearing in the Smith litigation on December 28, the Court preliminarily indicated its belief that In re: Mauldin represented a change covered by § 5. Circuit Judge Grady Jolly observed, "That Supreme Court decision went into effect without preclearance." Transcript at 34. Explaining his view later in the proceedings, Judge Jolly said:

> I mean, I didn't foresee or didn't think about the state Supreme Court issuing an opinion in the way they did that gave the Chancery Courts the jurisdiction to apportion the whole state. I didn't – I mean, I just didn't think about it. I didn't think about the huge change that was involved from what was established procedure.

Id., at 60-61. The Supreme Court's failure to explain that change complicates the Attorney General's task in determining whether it has the purpose or effect of denying or abridging the right to vote on account of race or color, and General Moore's submission offers no argument or evidence on the issue.

The Supreme Court did not specify standards for determining which chancery court should have authority to impose congressional redistricting plans. The statute which governs venue of chancery proceedings declares that cases "may be brought in the chancery court of any county where the defendant, or any necessary party defendant, may reside or be found." Miss. Code Ann. § 11-5-1 (Rev. 1991). Although the three official defendants in Branch may all be found in Hinds County, where they perform their official duties, they reside elsewhere; Governor Musgrove is a resident of Panola County, General Moore of Jackson County, and Secretary of State Clark of Smith County. Moreover, the Supreme Court held in Wood that any judgment imposing a congressional redistricting scheme would lack effect if it did not bind the executive committees of the political parties, 142 So. at 751-52; members of those committees may be elected from any of the state's 82 counties. Thus, whether the executive committees are necessary or merely proper parties, a complaint joining those committees as defendants could potentially be filed in any chancery court in the state.

Mississippi's 82 counties are divided into 20 chancery court districts. Miss. Code Ann. §§ 9-5-1 to -57 (Rev. 1991). The chancellors for the 20 districts are elected by a bewildering number of

methods. The traditional method, and still the most common, is that all chancellors from each district are elected from the district at large and may reside anywhere within the district. However, in the Tenth District, all three chancellors are elected at large, but each must reside in a particular county or group of counties. Miss. Code Ann. § 9-5-36 (Supp. 2001). More recently, many of the districts have been divided into subdistricts; although the electorate for each position is limited to residents of the subdistrict, a candidate for chancellor "shall not required to be a resident of subdistrict." Miss. Code Ann. § 9-5-1 (Supp. 2001). Each chancellor, regardless of the mode of election, may preside over any case filed in any portion of the district.

Obviously, given the broad rules of venue and the inconsistent methods of election, General Moore cannot give assurances that the chancellor who prepares and imposes Mississippi's congressional redistricting plans now or in the future will have been chosen by a method which guarantees equal influence by all racial groups, as is now guaranteed for the election of the Mississippi Legislature. For instance, Miss. Code Ann. § 9-5-13(2) (Supp. 2001), requires that one chancellor be elected from DeSoto County alone, while two additional chancellors are elected from Grenada, Montgomery, Panola, Tate, and Yalobusha Counties. The black voting age population of DeSoto County in 2000 was only 10.56%, but a redistricting decision entered by that Court would bind the entire state, in which the black voting age population is 33.29%. By contrast, in the Seventh District, one chancellor is elected from a subdistrict composed of Bolivar and Coahoma Counties. Miss. Code Ann. § 9-5-23(2)(a) (Supp. 2001). Blacks comprise 61.96% of the combined voting age population for those two counties, almost twice their percentage in the state at large.

The haphazard possibilities created by the assignment of redistricting authority to the chancery courts is best illustrated by the Fifth District itself, where the Branch case was actually decided. The district, consisting solely of Hinds County, formerly elected all four of its chancellors at large. In Martin v. Allain, 658 F.Supp. 1183 (S.D. Miss. 1987), the District Court held that the old scheme did not afford blacks an equal opportunity to elect the chancellors of their choice. The Court subsequently ordered the division of the county into four subdistricts; the boundaries of those subdistricts are currently defined in Miss. Code Ann. § 9-5-17 (Supp. 2001). Two of those subdistricts are designed to allow black voters to elect chancellors of their choice, while the other two districts afford the same opportunity to white voters. The Fifth District's Local Rule 4.A, filed April 16, 1999, describes the method of division of cases among the four chancellors:

> General docket civil actions shall be given a sequential number by the Chancery Clerk in the order being filed and then shall be divided in rotation by number in sequence to divisions of the Court and Judges as part of the docket number.

Thus, under the Local Rules, an attorney familiar with the rotation method can assure assignment of his case to a particular chancellor, whether white or black, simply by ascertaining the next available docket number before filing his complaint. Whether or not Local Rule 4.A was so manipulated in Branch, it could have been and can be again in future congressional redistricting disputes.

At the hearing the Smith case on December 28, the District Court displayed deep concern about the possibilities of abuse. Judge Jolly observed:

> I just want to make it clear, I have the highest respect for Judge Wise and did not suggest anything other. But lawyers are something else, I mean, as far as judge-shopping.

Transcript at 67. Judge Jolly had earlier explained how that judge-shopping could take place:

> What I'm talking about is here the minorities that the law is supposed to protect are jeopardized by the very act of allowing a single Chancery Judge to engage in reapportionment, particularly of the whole state. What if the – another group – What if the Republicans had gone to someone who was completely sympathetic to them and had drafted a plan that was unfavorable to the minorities? – which easily could have happened. Why would the Justice Department preclear a plan that would come back and have the potential adverse effect on minorities such as that?

Id., at 47. District Judge David Bramlette added:

> And especially when this case was put on a fast track and there are due process concerns, discovery, preparation for trial issues that have been raised by Mr. Jernigan. All of these things concern me, and I hear Judge Jolly and I think they concern him as well.

Id., at 48. Judge Jolly elaborated:

> [T]hose due process concerns have some effect on preclearance, not on our authority but on preclearance. Whenever the Justice Department looks at the total picture and sees how all of this occurred, then they say, Wait just a minute. We need to send this back for further investigation.

Id., at 49-50.

Under these circumstances, General Moore's failure to provide evidence that the order in In re: Mauldin lacks discriminatory effect is entirely understandable. The prior system of redistricting by act of the Legislature, as required by Article I, § 4 of the United States Constitution, assures representation of all racial groups throughout the state. The reassignment of that authority to the chancery courts assures nothing but chaos.

3. Decision to Disregard § 23-15-1039

After Attorney General Smith objected to the congressional redistricting plan adopted by the Mississippi Legislature after the 1980 census, the United States District Court for the Northern District of Mississippi imposed a plan designed to "create a rural Delta-River area district with a black voting age population majority." Jordan v. Winter, 604 F.Supp. 807, 814 (N.D.Miss.), aff'd 469 U.S. 1002 (1984). The District Court acknowledged "that the creation of a Delta district with a majority black voting age population implicates difficult issues concerning the fair allocation of political power." 604 F.Supp. at 814. In particular, the Court was concerned that the inclusion of an even greater number of black voters in the new Second District would "unnecessarily dilute black voting strength in the Fourth District." Id. The small black majority devised for the Second District assured "the least adverse impact on the black voting influence in the Fourth District." Id., at 815. A black candidate was elected in the Second District in 1986 and in each election thereafter. However, as the District Court had feared, blacks residing outside the Second District have not exercised comparable influence over elections of Representatives; although each of the other four districts has elected both Republicans and Democrats since 1984, no district has elected a black.

By letter of December 31, 1986, shortly after the second set of elections held under Jordan, Gerald W. Jones advised Attorney General Pittman of Mississippi that Attorney General Meese had found no discriminatory purpose or effect in Miss. Code Ann. § 23-15-1039, which provides in material part:

> Should an election of representatives in Congress occur after the number of representatives to which the state is entitled shall be changed, . . . and before the districts shall have been changed to conform to the new apportionment, representatives shall be chosen as follows: . . . [I]f the number of representatives shall be diminished, then the whole number shall be chosen by the electors of the state at large.

Under procedures then being applied by the Department, which were codified into law less than a week later, the approval also represented a finding that § 23-15-1039 did not constitute "a clear violation of amended Section 2." 52 Fed. Reg. 486, 498 (Jan. 6, 1987), promulgating 28 C.F.R.

§ 51.55(b). The letter of approval was issued in response to the submission of 1986 Miss. Gen. Laws ch. 495, and, although the Attorney General withheld or qualified his approval of certain sections of that statute, no such limitation was placed upon the approval of § 308, which became § 23-15-1039. The letter therefore represents a finding by Attorney General Meese that § 23-15-1039 fully complied with the Voting Rights Act and the Fifteenth Amendment.

Attorney General Ashcroft must now determine whether a decision in Branch to disregard § 23-15-1039 by imposing four new districts has either the purpose or effect of denying or abridging the right to vote on account of race or color. This task is complicated by the fact that the Chancery Court did not even mention § 23-15-1039, much less state its reasons for disregarding it. At page 5 of his submission, General Moore simply states in conclusory fashion that there was no discriminatory purpose or effect, and adds "that an-large method of election may have the potential for being retrogressive with regard to black electoral voting strength, and that single member districts are now the favored standard for congressional reapportionment." As to those issues, when Attorney General Meese approved § 23-15-1039 in 1986, he was certainly aware of the standards for retrogression, and was doubtless also aware of the statutes controlling redistricting by the states, 2 U.S.C. §§ 2a(c)(5) & 2c. Certainly, nothing in General Moore's submission carries the burden of demonstrating that the negation of this previously approved statute has no discriminatory purpose or effect.

Indeed, there is no case law to assist the Attorney General in determining whether the election of Mississippi's four representatives at large should be considered retrogressive. The issue of comparing a five-member benchmark plan with a new four-member plan seems never to have arisen. As the District Court recognized in Jordan, the concentration of black voters into a single district has both positive and negative effects. Here, the evidence in General Moore's submission reveals that 33.29% of Mississippi's voting age population in 2000 was black, and that 222,532 potential black voters, or 32.30% of all black voters, were concentrated in old District 2. Those black voters would certainly see their influence diminished by the election of Representatives at large, but the remaining 68.70% of Mississippi's black voters would have their influence increased.

It is certainly not clear that the influence to be exercised by black voters in at-large elections would be insubstantial. Although the District Court in Jordan found racially polarized voting to be common two decades ago, 604 F.Supp. at 812-13, more recent decisions have found to the contrary. For purposes of election of Supreme Court Justices, Public Service Commissioners, and Transportation Commissioners, Mississippi is divided into three districts, none of which has a black majority, but claims that black voters lack an equal opportunity to elect representatives of their choice in those districts have been consistently rejected. National Ass'n for the Advancement of Colored People v. Fordice, 252 F.3d 361 (5th Cir. 2001); Magnolia Bar Ass'n. Inc., v. Lee, 994 F.2d

1143 (5th Cir. 1993). It cannot simply be assumed, then, that the Chancery Court's refusal to allow all black voters to participate in the election of all Mississippi's Representatives in 2002 lacks a discriminatory effect. Certainly, General Moore has not even attempted to carry the burden of demonstrating that there is no such effect on Mississippi's black voters taken as a whole.

For all these reasons, General Moore has failed to show that any of the three submitted changes does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. The Attorney General, pursuant to 28 C.F.R. § 51.22, should advise General Moore that he will refuse to consider any of these changes until after the resolution of the appeal in Branch. Thereafter, the Attorney General should interpose an objection to each of the changes submitted by General Moore.

The population statistics presented in these comments are all derived from data included in General Moore's original submission of December 26, 2001. The modified Kirksey plan presented by the Intervening Defendants in the Branch trial, is included in General Moore's submission. Enclosed herewith are copies of: (1) motion of intervenors and Mississippi Republican Executive Committee to vacate or amend judgment and for other relief, filed in Branch on December 26, 2001; (2) order of December 31, 2001, overruling that motion; (3) Fifth District Chancery Court Local Rules filed April 16, 1999; and (4) transcript of the proceeding of December 28, 2001, in Smith v. Clark.

We thank Attorney General Ashcroft for his consideration of these comments.

Respectfully submitted,

James H. Herring
Chairman

JO:99130502.1

cc: Robert Berman, Deputy Chief (facsimile: 202-307-2569)

Amy Nemko (facsimile: 202-307-3961)

FILED

DEC 26 2001

IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI

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

PLAINTIFFS

V.

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

**MOTION OF INTERVENORS AND
MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE
TO VACATE OR AMEND JUDGMENT AND FOR OTHER RELIEF**

COME NOW intervening defendants Carolyn Mauldin, Stacy Spearman, David Mitchell, and James Clay Hays, Jr., together with defendant Mississippi Republican Executive Committee, and respectfully move this Court, pursuant to M.R.C.P. 59, to vacate or amend its judgment entered December 21, 2001, or, in the alternative, for a new trial, and for other relief, and would show unto the Court in support thereof the following:

1. In order to preserve such rights as they may have on appeal from this Court's judgment, movants incorporate herein their motions to dismiss filed before trial, and ask this Court to vacate its judgment and to dismiss the complaint or, in the alternative, to transfer this action to the Circuit Court for the First Judicial District of Hinds County.

2. Movants ask this Court to reconsider and vacate its orders of December 7 and December 13, 2001, to the extent that they vacate this Court's order of December 6, 2001, granting the motion of the State Defendants to add indispensable parties. In its December 7 order, the Court declared "that the purpose of redistricting is not to satisfy the fancy of any political party or



EXHIBIT
A

candidate." Nevertheless, over Intervenors' objections, the Court admitted partisan political data into evidence. If the Court was correct in admitting such evidence, then it was in error in excluding the political parties from this action by vacating its order of December 6 and by placing conditions on their right to intervene voluntarily. This Court should therefore vacate the judgment, reinstate its order of December 6, and conduct a new trial in which the Executive Committees of the political parties may participate consistent with their rights under the Mississippi Rules of Civil Procedure.

3. A new trial should be ordered for the additional reason that Intervenors were denied due process in that they received no notice of the applicable law until this Court adopted that law in its judgment filed after the trial was over. No party asked this Court to rule that "fairness to incumbents is a paramount consideration," Judgment at 14, and no precedent of any court supports it. Had Intervenors received any notice of that criterion, they could have submitted evidence of plans which meet that criterion, while satisfying other criteria better than does the Court's judgment; one such plan is attached hereto and made a part hereof as Exhibit A. This Court should grant a new trial so that this evidence may be considered under the law as adopted for the first time by this Court.

4. In the alternative, this Court should amend its judgment because the remedy imposed is unsupported by the facts and the law. First, the remedy in this case is controlled by Miss. Code Ann. § 23-15-1039 (Rev. 2001) and 2 U.S.C. § 2a(c)(5); this Court's judgment should mandate the at-large election of Representatives as required by both those statutes.[1] In the alternative, should this Court adhere to its determination to require the election of Representatives by district, then it should order the implementation of the modified Kirksey plan, which best meets all federal requirements

[1]This Court's judgment does not mention either of these statutes. Absent a finding that, for some reason, these statutes do not apply, they require election of Representatives from the State at large.

and satisfies neutral districting criteria.[2] Further in the alternative, this Court should order the State Defendants to provide the resources so that this Court can devise and enforce its own plan applying those neutral redistricting criteria.

5. In any event, this Court should, for procedural and substantive reasons, vacate that portion of its judgment which requires defendant Mike Moore to submit the judgment for approval to the Attorney General of the United States under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

a. The amended complaint seeks no such relief against the defendant Moore. The prayer of the amended complaint simply asks this Court to "issue an injunction adopting and directing the implementation of a congressional redistricting plan for the state of Mississippi." When the State Defendants objected that they had not been properly joined, plaintiffs explained the basis of their joinder:

> Instead, the plaintiffs are simply asking that the Court implement a lawful plan for the congressional elections in the event legislature does not do so on its own. . . . [T]hese 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.

Plaintiffs' Response in Opposition to Defendants' Supplemental Motion to Dismiss at 9 n.9. The plain objective of the amended complaint was to require defendant Moore to perform ministerial acts in his capacity as an administrator of state elections, not to control his discretion in his performance of his duties as the state's chief legal officer. Because the amended complaint seeks no such relief against the defendant Moore, the judgment must be vacated to the extent that it grants that relief.

b. In addition to the procedural defect, the judgment is substantively erroneous because it purports to control the defendant Moore's conduct as the state's chief legal officer. The federal

---

[2]In this regard, the Court erred in considering the views of the Joint Standing Committee on Congressional Redistricting in rejecting the criterion of compactness because the views of a mere committee of the Legislature have no legal effect.

regulations implementing § 5 of the Voting Rights Act make plain that only "the chief legal officer" of the state may submit an application for approval of a statewide redistricting. 28 C.F.R. § 51.23(a). The defendant Moore has traditionally strongly defended the prerogatives and duties conferred upon him by Mississippi law:

> In Mississippi, only the Attorney General has the authority, right and duty to initiate and manage civil litigation on behalf of the State where the subject matter of such litigation is of statewide interest. . . .
>
> The foregoing cases and § 7-5-1 of the Mississippi Code speak of the Attorney General's "prerogative," "right," "power," "authority," and "duty" to institute suits necessary for the enforcement of the laws of this State, the preservation of order and protection of the public rights. . . . That, of course, is so that there be consistency in litigation concerning all interests of state government.

Fordice v. Moore, No. 96-M-114 (Miss.), Respondent's Brief at 30-31. Just as this Court could not order defendant Moore to file civil litigation in the United States District Court for the District of Columbia, as permitted by § 5 of the Voting Rights Act, so too it lacks authority to order him to employ the alternative course of submission to the Attorney General of the United States. The decision of how and when to advance the legal interests of the state of Mississippi is strictly committed to the discretion of the attorney general.

5. In the alternative, movants, pursuant to M.R.C.P. 62(b), seek a stay pending appeal of that portion of the judgment which requires the defendant Moore to submit the judgment to the Attorney General of the United States.

a. In the first place, any such submission before appellate review is likely to be ineffective. The regulations provide that, "with respect to a change for which approval by . . . a State . . . court . . . is required, the Attorney General may make a determination considering the change prior to such approval if the change is not subject to alteration in the final approving action." 28 C.F.R. § 51.22(b). Here, this Court's judgment, like any judgment of a trial court, is

subject to alteration by the Supreme Court on appeal. It is likely wasteful for the defendant Moore to undertake the major effort necessary to prepare and submit the information required under § 5 where it is unlikely that the Attorney General of the United States will consider it before a resolution of the appeal.

b. Alternatively, if the defendant Moore is successful in obtaining approval of this Court's judgment under § 5, it may inhibit the ability of the Supreme Court or the Legislature to make changes in Mississippi's redistricting plan. The regulations provide, "In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting practice or procedure in effect at the time of the submission." 28 C.F.R. § 51.54(b)(1). Thus, if the Attorney General approves this Court's judgment, thereby placing it into legal effect, it may be difficult or impossible for the Supreme Court or the Legislature to deviate in the future from this Court's judgment.

c. Pursuant to M.R.A.P. 8(b)(5), that portion of this Court's judgment which requires the defendant Moore to submit the judgment to the Attorney General of the United States is automatically stayed through the hearing on December 28, 2001, and until the expiration of ten days after this Court's ruling on the motion.

WHEREFORE, PREMISES CONSIDERED, Intervenors and the Mississippi Republican Executive Committee respectfully move this Court to vacate or to amend its judgment in whole or in part, or, in the alternative, they seek a new trial, or, further in the alternative, they seek a stay

pending appeal of that portion of the judgment which requires the defendant Moore to submit the judgment to the Attorney General of the United States for approval under § 5 of the Voting Rights Act.

Respectfully submitted,

CAROLYN MAULDIN, STACY SPEARMAN, DAVID MITCHELL, AND JAMES CLAY HAYS, JR.

By their attorneys

Grant M. Fox /mbw by permission

Grant M. Fox
Fox & Fox, P.A.
P. O. Box 797
Tupelo, MS 38802-0797
(662) 844-2068

F. Keith Ball /mbw by permission

F. Keith Ball
P. O. Box 539
Louisville, MS 39339
(662) 779-0909

MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE

By its attorneys

PHELPS DUNBAR LLP

By: Michael B. Wallace

Michael B. Wallace
Christopher R. Shaw
Phelps Dunbar LLP
P. O. Box 23066
Jackson, MS 39225-3066
(601) 352-2300

## CERTIFICATE OF SERVICE

I, Michael B. Wallace, do hereby certify that I have this day hand-delivered a true and correct copy of the above and foregoing to the following:

Mike Moore
T. Hunt Cole
Carroll Gartin Justice building
450 High Street
P.O. Box 220
Jackson, MS 39205-0220

Robert McDuff
767 North Congress Street
Jackson, MS 39202

John Griffin Jones
513 N. State Street
P.O. Box 13960
Jackson, MS 39286-3960

and mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing to the following:

Carlton W. Reeves
Pigott, Reeves, Johnson & Minor, P.A.
775 N. Congress
P.O. Box 22725
Jackson, MS 39225-2725

Herbert Lee
2311 W. Capitol Street
Jackson, MS 39209

THIS, the 26th day of December, 2001.

Michael B. Wallace
MICHAEL B. WALLACE

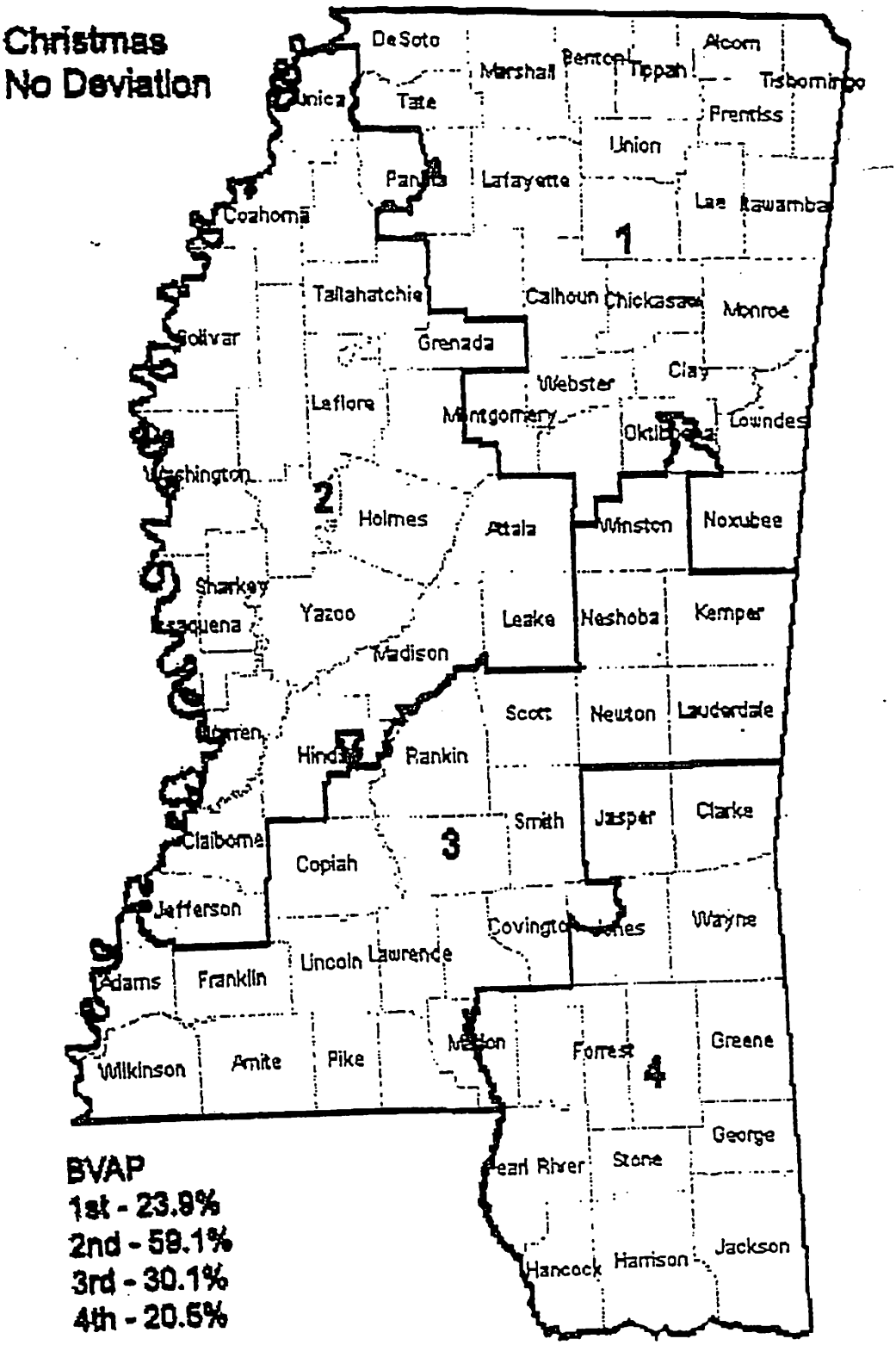



EXHIBIT
A

0387

Plan: ristmas No Deviation
Plan Type
Administrator
User:

# Population Summary Report

Wednesday December 26, 2001 12:02 PM

| DISTRICT | POPULATION | DEVIATION | % DEVN. | [% 18+_BM] |
|---|---|---|---|---|
| 1 | 711,164 | -1 | 0.00 | 23.88% |
| 2 | 711,165 | 0 | 0.00 | 59.08% |
| 3 | 711,164 | -1 | 0.00 | 30.12% |
| 4 | 711,165 | 0 | 0.00 | 20.48% |

| | |
|---|---|
| Total Population: | 2,844,658 |
| Ideal District Population | 711,165 |

Summary

| | |
|---|---|
| Population Range: | 711,164 to 711,165 |
| Ratio Range: | 1.00 |
| Absolute Range: | -1 to 0 |
| Absolute Overall Range: | 1.00 |
| Relative Range: | 0.00% to 0.00% |
| Relative Overall Range: | 0.00% |
| Absolute Mean Deviation: | 0.50 |
| Relative Mean Deviation: | 0.00% |
| Standard Deviation: | 0.58 |

Plan Name: Chi .as No Deviation
Plan Type:
Administrator:

# Political Subdivisions Split Between Districts

Wednesday December 26, 2001 11:51 AM

Number of subdivisions not split:

| | |
|---|---|
| County | 76 |
| Tract | 571 |

Number of subdivisions split into more than one district:

| | |
|---|---|
| County | 6 |
| Tract | 34 |

County
Cases where a County is split among 2 Districts: 6
*Number of times* a County has been split into more than one district: 6
*Total* of County splits: 12

Tract
Cases where a Tract is split among 2 Districts: 42
*Number of times* a Tract has been split into more than one district: 42
*Total* of Tract splits: 84

| County | Tract | District |
|---|---|---|
| *Split Counties :* | | |
| Hinds | | 2 |
| Hinds | | 3 |
| Jones | | 3 |
| Jones | | 4 |
| Madison | | 2 |
| Madison | | 3 |
| Marion | | 3 |
| Marion | | 4 |
| Oktibbeha | | 1 |
| Oktibbeha | | 3 |
| Panola | | 1 |
| Panola | | 2 |
| *Split Tracts :* | | |
| Hinds | 102.01 | 2 |
| Hinds | 102.01 | 3 |
| Hinds | 103.04 | 2 |
| Hinds | 103.04 | 3 |
| Hinds | 104 | 2 |
| Hinds | 104 | 3 |
| Hinds | 105 | 2 |
| Hinds | 105 | 3 |
| Hinds | 107 | 2 |
| Hinds | 107 | 3 |
| Hinds | 108.01 | 2 |
| Hinds | 108.01 | 3 |
| Hinds | 108.02 | 2 |
| Hinds | 108.02 | 3 |

Plan Name: Christ[illegible] lo Deviation Administrator:
Plan Type: User:

| County | Tract | District |
|---|---|---|
| *Split Tracts* (continued): | | |
| Hinds | 108.04 | 2 |
| Hinds | 108.04 | 3 |
| Hinds | 108.06 | 2 |
| Hinds | 108.06 | 3 |
| Hinds | 108.07 | 2 |
| Hinds | 108.07 | 3 |
| Hinds | 109.01 | 2 |
| Hinds | 109.01 | 3 |
| Hinds | 111.01 | 2 |
| Hinds | 111.01 | 3 |
| Hinds | 111.03 | 2 |
| Hinds | 111.03 | 3 |
| Hinds | 112 | 2 |
| Hinds | 112 | 3 |
| Hinds | 13 | 2 |
| Hinds | 13 | 3 |
| Hinds | 16 | 2 |
| Hinds | 16 | 3 |
| Hinds | 27 | 2 |
| Hinds | 27 | 3 |
| Hinds | 30 | 2 |
| Hinds | 30 | 3 |
| Hinds | 37 | 2 |
| Hinds | 37 | 3 |
| Hinds | 38 | 2 |
| Hinds | 38 | 3 |
| Hinds | 4 | 2 |
| Hinds | 4 | 3 |
| Jones | 9501-2 | 3 |
| Jones | 9501-2 | 4 |
| Jones | 9502-2 | 3 |
| Jones | 9502-2 | 4 |
| Jones | 9503 | 3 |
| Jones | 9503 | 4 |
| Jones | 9504-2 | 3 |
| Jones | 9504-2 | 4 |
| Jones | 9505 | 3 |
| Jones | 9505 | 4 |
| Jones | 9506-2 | 2 |
| Jones | 9506-2 | 4 |
| Madison | 301.01 | 2 |
| Madison | 301.01 | 3 |
| Madison | 301.03 | 3 |
| Madison | 301.03 | 4 |
| Marion | 9501-2 | 3 |
| Marion | 9501-2 | 4 |
| Marion | 9502-2 | 3 |
| Marion | 9502-2 | 4 |
| Marion | 9504-2 | 1 |
| Marion | 9504-2 | 3 |
| Oktibbeha | 9501 | 1 |
| Oktibbeha | 9501 | 3 |
| Oktibbeha | 9502 | 1 |
| Oktibbeha | 9502 | 3 |
| Oktibbeha | 9504 | |

Plan Name: Christ No Deviation Administrator:
Plan Type: User

| County | Tract | District |
|---|---|---|
| *Split Tracts* (continued): | | |
| Oktibbeha | 9504 | 3 |
| Oktibbeha | 9506 | 1 |
| Oktibbeha | 9506 | 3 |
| Oktibbeha | 9507 | 1 |
| Oktibbeha | 9507 | 3 |
| Panola | 9501-2 | 1 |
| Panola | 9501-2 | 2 |
| Panola | 9502-2 | 1 |
| Panola | 9502-2 | 2 |
| Panola | 9503 | 1 |
| Panola | 9503 | 2 |
| Panola | 9505 | 1 |
| Panola | 9505 | 2 |
| Panola | 9506-2 | 1 |
| Panola | 9506-2 | 2 |

ATTEST A TRUE COPY
FILED
DEC 31 2001
L. GLYNN PEPPER, CHANCERY CLERK
BY _____ D.C

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

ORDER

This matter came on for hearing on the Motion of Intervenors and Mississippi Republican Executive Committee to Vacate or Amend Judgment and for Other Relief. After reviewing the pleadings submitted and the arguments of counsel, the Court hereby finds the motion not well taken and denies same in all respects.

SO ORDERED AND ADJUDGED, this the 31st day of December, 2001.

CHANCERY COURT JUDGE

SUBMITTED BY COUNSEL FOR PLAINTIFFS

CARLTON W. REEVES (MSB # 8515)
PIGOTT REEVES JOHNSON & MINOR

ROBERT B. McDUFF (MSB #2532)

EXHIBIT B

FIFTH CHANCERY DISTRICT OF MISSISSIPPI
FIRST JUDICIAL DISTRICT, HINDS COUNTY, JACKSON
SECOND JUDICIAL DISTRICT, HINDS COUNTY, RAYMOND

# LOCAL RULES

EFFECTIVE WHEN APPROVED BY THE MISSISSIPPI SUPREME COURT PURSUANT TO RULE 83 M. R C. P.

1. The Chancery Court of the Fifth Chancery District is divided into four divisions, and the Chancellors are as follows: Division 1, Stuart Robinson; Division 2. William H. Singletary; Division 3, Denise Owens; and Division 4, Patricia D. Wise. The division will hold hearings in the courtroom of the same number.

2. Administrative acts and policy decisions for the Fifth Chancery District will be determined by majority vote.

3. Ex Parte days are as follows: Division 1, Wednesday morning (9:00 - 11:30) by appointment: Division 2, Thursday morning (9:00 - 11:30) by appointment; Division 3, Tuesday morning (9:00 -11:30) by appointment; Division 4 Monday morning (9:00 - 11:30) no appointed needed.

4. Division of civil cases shall be as follows:

A. General docket civil actions shall be given a sequential number by the Chancery Clerk in the order being filed and shall then be divided in rotation by number in sequence to divisions of the Court and Judges as part of the docket number.

B. Ex parte civil actions are distributed in the same manner to divisions but may be presented to any division on the ex parte day designated for that division, except for contested matters, which must be heard by the

EXHIBIT
C

division designated.

C. Probate civil actions will also be so distributed and heard until they become controverted, at which time the Court Administrator shall put them in line to be heard in regular sequence by the division assigned.

D. Division 1 shall supervise the handling of mental cases for commitment, etc., appoint necessary special masters, defendant's attorneys, and doctors.

E. When a civil action is designated for a division, that division shall hear all matters and sign all judgments except as otherwise set forth herein.

5. Motions for modification of former judgments shall be heard by the division assigned to, or his successor, but not until after a contempt, if pending.

6. By prior arrangements with the Chancellor, ex parte matters may be heard at other times, and, in case of emergency, at any time, but attorneys are urged to remember that Judges need a break during trials and an opportunity to study, write opinions etc., during time when not engaged in trials.

7. Trial shall begin at 9:00 a.m. and terminate at 5:00 p.m., unless otherwise specified in the setting or by the Chancellor.

8. Irreconcilable differences divorces will be heard during ex parte assigned periods.

9. Uncontested divorces, which must be tried in open court, will be tried between the hours of 9:00 a.m. and 10:00 a.m. as follows: Division 1, on 1st Friday of each month; Division 2, on the 2nd Friday of each month; Division 3, on the 3rd Friday of each month; and Division 4, on the 4th Friday of each month.

10. All trials and motions requiring testimony or lasting over fifteen minutes will be set by the Court Administrator for all divisions. (Phone: 968-6521). Short motions will be heard in chambers on ex parte mornings. This arrangement will avoid long delays when many lawyers and clients are waiting on ex parte periods.

11. The Court Administrator may continue and reset trials by agreement of counsel at any

time. Otherwise, the Chancellor must approve if the setting is within ten days of the motion for continuance.

12. Attorneys trying civil actions involving alimony or child support on original trial or subsequent modification, including irreconcilable differences, shall prepare and file with the Chancery Clerk a financial statement and disclosure in accordance with the form which appears as Exhibit"A" to Rule 8.05 of the Uniform Chaancery Court Rules. The required financial statements shall be filed during the time frame set out in Rule 8.05. It shall be the responsibility of the plaintiff or movant to ascertain that all financial statements are in the court file before requesting a setting of the case.

13. *(Rule 13 is omitted, it having been disapproved by the Supreme Court.)*

14. A case may be transferred to another division by agreement of the Chancellors of the divisions involved.

15. Court terms for the Second Judicial District, Raymond, Mississippi, are set and hearings will be conducted by the Judges in rotation on the second Mondav in February, the second Monday in June, and the second Monday in October. Court terms for the First Judicial District have been abolished by Section 9-5-3 (as amended September, 6, 1994) of the Mississippi Code of 1972.

16. Second District actions will also be divided by rotation in numerical sequence and will be tried during term time except:

A. Hearings involving temporary support, custody, maintenance, uncontested divorces, contested motions, and contempt in domestic relations action will be handled as they are in the First Judicial District and may be heard in Jackson.

17. All cases will be set by the Court Administrator in Jackson. Emergency motions, including TROs, may be heard by any division, if the civil action has not been given to a division or the division to which it is given is not available, or the Chancellor granting the initial order may hear the matter on its merits or have it placed in rotation.

18. Judgements and orders should be presented in person to the Chancellor unless prior arrangements otherwise have been made.

19. All pleadings, judgements, and orders must show the name and Mississippi State Bar number of the individual attorney actually presenting it, and it may not be presented to another Chancellor except on order of the Chancllor to whom it was first presented.

20. Civil actions which need to be consolidated with similar civil actions will, upon approval of the Chancellors involved, be all consolidated in the division where the civil action with the lowest number has been pleaded.

21. *(Rule 21 is omitted, it having been disapproved by the Supreme Court.)*

22. Stale cases, including probate matters, will be dismissed pursuant to Rule 41(d) M.R.C.P. if no action has been taken of record within the preceding twelve months if due after thirty days written notice by mail from the Clerk of the Court, unless application in writing is made to the Court and good cause shown to continue the case. These cases will be handled under the direction of Division 3.

23. In any case where an attorney who actively practices in the Fifth Chancery Court District is a party, all of the Judges recuse themselves and will submit the case to the Supreme Court for assignment to another chancellor unless the attorney's for the parties can agree that some other member of the Bar may hear the same.

24. There will be a standard fine of One Hundred Dollars ($100.00) for contempt imposed against all attorneys in any case which has been set for trial where a settlement has been reached and the Court is not advised to remove the same from the trial docket or where an attorney shall fail to appear within 15 minutes of the time for hearing without prior notification to the Court and the other attorneys.

*25.* Appeals to the Chancery Court shall be set on the trial calendar by the Court Administrator on request of the appellant after all briefs have been filed. The appellant has thirty (30) days to file the Assignment of Errors and brief after record is filed, and the appellee shall file a reply brief and or cross appeal within twenty (20) days after filing by the appellant. Appellant, at his election, may file a reply brief within ten (10) day of filing by the appellee. It is not necessary to send extra copies of the brief to the Judge, but the case must be set on the trial docket, even though oral argument is not desired, to be considered by the Court. The court may require oral argument if neither party has requested such or deny oral argument as the Court deems necessary.

0001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JOHN ROBERT SMITH, et al. PLAINTIFFS

VS. NO. 3:01cv855WS

ERIC CLARK, et al. DEFENDANTS

HEARING ON MOTION FOR PRELIMINARY INJUNCTION
Honorable E. Grady Jolly
Honorable Henry T. Wingate
Honorable David C. Bramlette
December 28, 2001
Jackson, Mississippi

REPORTED BY: Carol R. (Winstead) Gray
United States Court Reporter

0002

JUDGE JOLLY: Good afternoon, ladies and gentlemen. I think we're here today basically on the motion for a preliminary injunction, and I think the motion for leave to amend was unopposed by anybody, so that will be granted. But we do have the motion for preliminary injunction. Is that the only motion that is to be presented or argued today?

MR. JERNIGAN: I believe that's correct, Your Honor.

JUDGE JOLLY: Is that the only motion that is now pending? Do we have any other kind of motions to



EXHIBIT D

clean up or to act on or to address that you know of?

MR. JERNIGAN: Your Honor, I'm not aware of any.

MR. COLE: I'm not aware of any, Your Honor.

JUDGE JOLLY: Okay. The court also, in the course of today, would like to be informed about the status of the other proceedings, because we really -- I guess we know what we read in the newspapers, and that's not always accurate or complete. So we would like to hear about that.

We would also like to know a little something about the procedure: how long this has been pending, how did all this start, where did it get bogged down. I mean, we've kind of read about it in the newspapers, but

0003

I haven't seen an account of it in the record before us. So if we could kind of get informed about that as well.

So we will proceed, I guess, on the Motion for Preliminary Injunction; and Mr. Jernigan, representing the plaintiffs, we'll hear from you first. And let me ask you: What I would intend to do is to then just simply go down the list, with the state appearing next, with the Republican Executive Committee appearing next, with the Democratic Executive Committee appearing next, and with the intervenors appearing last. Does that seem to suit everybody? Is that the order of appearance that's satisfactory?

Okay, Mr. Jernigan. You may proceed.

MR. JERNIGAN: Please the court, Your Honor, I'm Skip Jernigan and I represent the plaintiffs in this matter. When we were here last, this court heard the arguments concerning our original Complaint for Preliminary Injunction and issued its order. In that order it stated that if the state court proceedings in the Branch v. Clark -- in the Branch case, Branch v. Clark -- Eric Clark was one of the defendants, Your Honor -- that if it was not clear to the court by January 7 that a plan could be adopted and submitted to the Justice Department and approved in time for the March 1 deadline, which this court indicated had some significance and

0004

would be honored, then this court would assume jurisdiction of this case and proceed.

Today, Your Honor, the plaintiffs would submit

to the court that we are no closer to a resolution of the underlying matter by March 1 than we were on November 30 when we last met.

JUDGE JOLLY: Well, it would seem to me that we are. I mean, you've got a plan that has been adopted and it's in the process of being precleared. We were told that it was going to be submitted for preclearance, I believe, today.

MR. JERNIGAN: Your Honor, I believe that the plan was hand-delivered to Washington yesterday, if I'm not mistaken.

My clients were not parties to that action, Your Honor. We chose not to intervene in the underlying state court proceedings. The other parties to this case are parties to that action, Your Honor, and probably can tell you what the status of that case is better than I can. But I'll do my best. I have kept up with it, obviously, Your Honor, to know what's going on.

JUDGE JOLLY: Well, let me ask you whether we really have a case in controversy here. What are you seeking from this court now? What do you want us to enjoin?

0005

MR. JERNIGAN: Your Honor, first of all, we want you to enjoin the enforcement of the order in the underlying cause of action.

JUDGE JOLLY: You mean right now?

MR. JERNIGAN: Yes, Your Honor, we do, because we believe that court lacked the authority and jurisdiction to enter a redistricting plan under Article 1, Section 4 of the United States Constitution.

JUDGE JOLLY: So you are asking us, then, to enjoin that court and the parties in that proceeding from submitting it to the Justice Department?

MR. JERNIGAN: Your Honor, regardless of whether or not it's been submitted to the Justice Department, if that court had no jurisdiction to enter the order, it makes no difference. It's a nullity.

JUDGE WINGATE: Are you asking us to review the Mississippi Supreme Court ruling and to find contrary to what its holding was? Is that it?

MR. JERNIGAN: Correct, Your Honor. We're asking this court to enter an order that would enjoin enforcement of the order entered in Branch v. Clark, that

that court had no jurisdiction under Article 1, Section 4. That's one of the numerous requests for relief that we have in our Complaint, Your Honor. The other --

JUDGE JOLLY: In other words, the way I look at this -- and you can correct me if I'm wrong, but we are strictly a preclearance -- at this point in time, this panel is strictly here for preclearance; and the only issue before us is one under Section 5, and --

MR. JERNIGAN: Our claim is based on Section 5, Your Honor.

JUDGE JOLLY: And whether -- it seems to me that whether it is constitutional or not may not even be involved at this point because the question is whether it is a precleared plan; whether it is an authorized, legal plan because it has not been precleared.

MR. JERNIGAN: That's basically correct, Your Honor; but here -- from this perspective, the court -- even though we disagreed that the Growe v. Emison case at the last hearing was applicable, apparently the court deferred to that decision and then deferred to the state court proceedings and said if it were not clear to Your Honors by January 7 that a plan could be adopted and precleared, Your Honors, by March 1, then this court would assume jurisdiction and either grant or deny the relief requested in the Complaint.

What we're here about, Your Honor, is even though there has been a state court trial, and even though this judge in the Chancery Court, Judge Wise, has entered an order adopting a redistricting plan, the status of the matter is, Your Honor, that as late as this morning they were still arguing post-trial motions. I don't know whether or not an order has been entered on those post-trial motions. But until such time as that order is entered, that case is not even appealable. You've got 30 days under the Mississippi rules to file an appeal. I am advised, and one of the lawyers -- all these lawyers for the parties are here. The lawyers for the plaintiff -- for the individual intervenors are here today, Your Honor, and can confirm that, but they do plan to file an appeal.

Under the Code of Federal Regulations, as it

pertains to submissions to the Justice Department, Judge Jolly, at 51.22, the Justice Department will not consider that submission until that order becomes final; and it cannot become final until the appeal process is concluded. Assuming that they take some time to file their notice of appeal, the record is then submitted to the Mississippi Supreme Court; and they utilize some compressed or compacted schedule like was used in the Hinds County Chancery Court. On a best case scenario, if the court please, you're looking at a six- or seven-week period, and that takes us to the middle or the latter part of February.

That matter cannot be precleared and the matter

0008

concluded prior to the March 1 filing deadline, which is what this court had as its -- in its prior order when it established January 7, Your Honor. That is the main point that the plaintiffs want to urge upon the court today. We are no better off than we were on November 30 as far as getting a plan enacted. The legislature did not -- and of course, we have questioned and, Your Honor, we submitted a brief to you yesterday on that point that not only did --

JUDGE JOLLY: You're asking, then -- the relief you're seeking is a permanent injunction, for us to enjoin now any election that might be conducted under the Hinds County Chancery Court plan.

MR. JERNIGAN: It is a -- Yes, Your Honor. Well, it could be modified. Any order could be modified down the road if the circumstances warranted. I'm not sure what those circumstances might be that would warrant that, Your Honor, but --

JUDGE JOLLY: See, what I'm trying to figure out is, What is the case in controversy here? In other words, as I read your pleadings, you are essentially seeking to enjoin the state Supreme Court's decision and the Chancery Court's decision reapportioning the state until it is precleared and on the basis that it is not precleared. Everybody agrees on that. I mean, the very

0009

relief that you are seeking seems to be that everybody agrees you're entitled to that relief, and that is that no election will be conducted until -- on the basis of that plan until it is precleared. And nobody has any

argument with that, and I wonder where is the case in controversy.

MR. JERNIGAN: The case in controversy, Your Honor, is that that cannot be accomplished by the March 1 deadline, as this court has previously recognized.

Secondly, Your Honor, there is still the question of the state court's authority to proceed under Article 1, Section 4; and I don't believe that question is going to go away, even if the Attorney General approves the entire package submitted by the Mississippi Attorney General. The question of that court's authority to act will still remain a question to be decided by this court.

JUDGE WINGATE: Now, what's your authority for that?

MR. JERNIGAN: Your Honor, Article 1, Section 4. It goes all the way back to the 1932 case of Smiley v. Holmes. And it just -- it says that that is a function of the legislature. There is no authority for the state courts to redistrict the state for a congressional election.

JUDGE JOLLY: It's not quite that clear, but --

MR. JERNIGAN: Well, it may not -- there's not a lot of authority on that point, period, Your Honor. You'll see we've cited Hamilton's Federalist Papers on that in our brief, if you read that, but --

JUDGE JOLLY: I appreciate that.

JUDGE WINGATE: Do you have any more authority besides that?

MR. JERNIGAN: Your Honor -- Well, we do cite the Smiley v. Holmes case, Your Honor, and Westberry v. Sanders, which -- wherein the federal courts have the authority to protect our federal rights here. And we are asserting our federal rights here, Your Honor, under Section 5 in our pleadings.

Your Honor, not only have they submitted the Chancery Court's order. There are two other submissions. And the -- none of the parties likewise disagree, Your Honors, that the Code of Federal Regulations do provide

that this order will not be submitted or considered by the Justice Department until it becomes final. That's also not in dispute.

But there are two other matters that have been submitted to Justice. One is the change in the voting proceedings from the legislature to the state courts, which was never precleared under Section 5 of the Voting Rights Act, and also why the general at-large statute, 23-15-1039, has been -- should not be enforced here.

Your Honor, that's our argument today. We presented our paper on that, our brief. Your Honor, unless we -- there are issues raised by the other parties, like abstention and due process and so forth --

JUDGE JOLLY: Well, you can address any of those in reply. We'll give you plenty of time to address them.

MR. JERNIGAN: That's what I intended to do, Your Honor. Thank you.

JUDGE JOLLY: Okay, Mr. Jernigan. Thank you. We'll hear from you, Mr. Cole, representing the state.

MR. COLE: Thank you, Your Honor. We submitted a brief several days ago addressing what we believe to be the issues in the preliminary injunction. We really don't have much to add to that. We were ordered -- The Attorney General specifically was ordered by the Chancery Court, in her December 21st opinion and order adopting a plan, for the Attorney General to submit the plan to the Justice Department for preclearance. On December 26 the people that do the submissions in my office put together a submission based on the court record, et cetera, in that case; and part of it was faxed to the Justice Department on the 26th; and then the remainder of it, which consisted of the trial transcript and exhibits and so on and so forth, were flown up to Washington yesterday.

I gave the law clerk, prior to the start of our hearing today, a copy of that submission. It does not, of course, contain the trial exhibits and that type of thing.

But Your Honor, the main point of a Section 5 proceeding is to make sure that the Justice Department receives a submission. The plaintiffs -- There's no

question that the redistricting -- the substantive aspects of the redistricting plan need to have preclearance. No question whatsoever about that. But Plaintiffs in this case allege that two other aspects require preclearance; and in light of the broad scope of the Voting Rights Act, we have submitted those aspects for preclearance, namely, an alleged change from a legislative method of redistricting to a judicial method of redistricting, and then secondly, the departure of the Chancery Court from the temporary statutory at-large remedy in Section 1039 of the Mississippi Code, which was, in fact, precleared. We've submitted both of those aspects of that case to the Justice Department for preclearance.

Nobody contends that this plan of the Chancery

0013

Court is effective as law until such time as the Justice Department approves the matter. I cannot disagree with--

JUDGE JOLLY: Do the plaintiffs in the state case concede that the Supreme Court decision effected a change in law that needs to be precleared?

MR. COLE: From reading their papers, Your Honor, they apparently do not. They apparently contend that that is not a change. Reading the Voting Rights Act, Your Honor, the broad scope that's given to the language with respect to voting, the change with respect to voting, and the pretty broad interpretation that's been put on that by the Supreme Court and other courts, I think it's pretty clear that the departure from the at-large method by the Chancery Court is a change for sure.

It's a little questionable, it's arguable whether or not the change from basically a legislative method that's been used throughout Mississippi's history to a judicial adoption of a plan in this case -- that's a little more arguable; but nevertheless, we have submitted that as well for approval and review by the Justice Department pursuant to Section 5.

JUDGE BRAMLETTE: Let me ask you this, sir: Do you agree, Mr. Cole, or disagree with Mr. Jernigan when he says that the Justice Department is going to do

0014

nothing by way of preclearance until this matter has been resolved by the state Supreme Court?

MR. COLE: That's just what I was getting ready to address, Your Honor. I can't disagree with Mr. Jernigan on that particular point under the Justice Department regulations. In reviewing these things, it was brought to my attention that Section 51.22 of that -- I believe it's 28 C.F.R. for the Section 5 regulations -- state in part, "Premature submission: The Attorney General will not consider on the merits any proposal for a change affecting voting submitted prior to final enactment or administrative decision," and it goes on. That's sort of a Justice Department -- that's their regulation for sure, and we presume that they will either follow or not follow their regulation in that regard.

JUDGE JOLLY: You interpret that as meaning that the state Supreme Court needs to rule on this matter before it will be reviewable on the merits by the Section 5 -- by the Civil Rights Division.

MR. COLE: Well, Your Honor, the Mississippi Supreme Court might be one stop on the train in this thing.

JUDGE JOLLY: But at least that stop.

MR. COLE: That stop for sure. It's similar with due respect to the annexation-type situations in

0015

Mississippi where annexations typically go through the final process to the Mississippi Supreme Court when you're annexing an area and you have a Section 5 ramification of that. Typically those things are submitted after the Supreme Court or they're ruled on by the Justice Department after the Section 5 enactment.

Here we were ordered to make the submission. We made the submission. The Justice Department will presumably determine --

JUDGE JOLLY: Are you saying that the Attorney General, then, made this submission only because -- at this particular stage only because it was ordered to do so by the Chancery Judge?

MR. COLE: Well, Your Honor, we never had a chance to exercise any discretion in the matter because the Chancery Court's initial order said that the Attorney General will submit, and then its final order said you will submit -- first it said you will submit by the 28th, and then it said you will submit by the 26th. And Your Honor, we simply -- we complied with the order. The

Attorney General is the --

JUDGE JOLLY: What kind of Christmas did you have?

MR. COLE: Well, probably -- Your Honor, with due respect, probably better than a lot of the attorneys

0016

that are involved in this litigation. The Section 5 -- The attorney in our office that handles the Section 5 submission didn't have the greatest of Christmases.

JUDGE BRAMLETTE: Well, let me ask you this, sir, back to what Judge Jolly said a moment ago in his opening. Mr. Jernigan has said this process is going to take us to at least the middle of February. By the time the Supreme Court makes a ruling, at the very earliest it will be the middle of February, maybe toward the end of February. We have a March 1 qualifying deadline.

My question to you is, What do you think this court should do about it? We can always fall back on the at-large election, which you seem to think is problematic. That was your response to my question at the last hearing, as I recall. If that's problematic, in your view -- or do you have a view? What should this court do?

JUDGE WINGATE: And Mr. Cole, in answering the same question, also add in the latest date that you think that this court can wait to determine whether the issue has been precleared before we'd have to act.

MR. COLE: Your Honor, first of all, Judge Bramlette, I don't know how I could possibly speak to what the Mississippi Supreme Court might do -- might or might not do, or if there are further proceedings before

0017

the U.S. Supreme Court. I don't mean to evade the question. I honestly don't know.

If you assume the Mississippi Supreme Court acted by February, then you have another consideration, and that is, will they change what the Chancery Court did? Either affirm or -- in part or in whole or whatever. You don't know for sure. And if that's the case, then the Justice Department, even if they started looking at the submission that we've made, you've got another calculation in there. And maybe in terms of retrogression standard, it wouldn't be much of a distinction. I don't know. But it makes it difficult to

anticipate.
I don't mean to evade your question. It's just -- It's hard to know exactly how the Justice Department will proceed and it's hard to know exactly how the Mississippi Supreme Court will proceed, and a lot of times I've had trouble predicting with any accuracy how either of those bodies would act. So I don't mean to evade your question, but there definitely are certain time constraints built in there.
JUDGE BRAMLETTE: The fact that you do evade the question gives me the answer that I was looking for.
MR. COLE: Yes, sir. I was just trying to be honest with the court, Your Honor.

0018

JUDGE BRAMLETTE: You don't really know, and --
MR. COLE: No, sir, I don't.
JUDGE BRAMLETTE: -- we're faced with a situation where we've got to decide what to do and when to do it.
MR. COLE: Yes, sir.
JUDGE BRAMLETTE: And that's one reason we're here today.
MR. COLE: And I wish I could help, Your Honor, and give you some insight, but I honestly can't, because I just don't know.
JUDGE BRAMLETTE: Thank you, sir.
MR. COLE: And Judge Wingate, I don't mean to evade your question, sir, but sort of the same thing. That's a decision that -- I think the state processes -- and Mr. McDuff has become, I found out, a great believer in federalism lately. Sort of a new twist on things. But I do think that the state court processes should be given as much opportunity as possible to come to some resolution of the matter.
JUDGE WINGATE: So what date would you consider to be the drop-dead date that we should wait for preclearance so as not to falsely avoid confusion?
MR. COLE: Well, Your Honor, the estimates of a trial, I heard earlier in the earlier hearing on this

0019

matter, were several days or a week. And, of course, some of the parties have already gotten good practice in state court or they've gotten a pretty good preview of what's going on, so maybe that could be streamlined

somewhat. But I would think that if the March 1 date is to be preserved -- and this is just a guess -- you would have to have a week or so to figure out what you wanted to do and probably a week for your trial and maybe a few days for the court's decision. That's just --

JUDGE WINGATE: And how long before March 1 for the plan to be publicized to the public so that those interested in running and the voters interested in voting would know?

MR. COLE: Well, Your Honor, I don't have much experience in that, but I would think at least a week or so, anyway. The people who are going to run probably already have an idea that they may want to run, so I don't know that you need a lot of time in advance for that.

I don't mean to be evasive with the court. It's just that it's hard to predict exactly how that's going to play out in the Mississippi Supreme Court or other courts and how the Justice Department is going to react.

Your Honor, one other thing before I sit down,

0020

and that is that I agree with Your Honor, nobody contends that this plan is effective as law -- or that I know of, is effective as law absent preclearance by the Justice Department. And that, I believe, in light of the fact that it's been submitted, takes care of the Section 5 issue today. To the extent that other relief is sought, it seems to me that the proper course is based on Article 1, Section 4, and the other various arguments; and the intervening defendants in the state court action have a ton of arguments and a ton of federal questions. I mean, the process there would be the Mississippi Supreme Court and the U.S. Supreme Court. I believe that's -- and I believe the case law will support that that's the proper method for determining those issues that are -- and there are a number of issues arising out of the state court action.

If there's nothing further from Your Honors, I'll sit down.

JUDGE JOLLY: Thank you, Mr. Cole. Mr. Wallace, I believe we'll hear from you next, please.

MR. WALLACE: Thank you, Your Honor. May it please the court, I represent the Republican Executive

Committee, one of the defendants in the case. We have consented to the injunction. Perhaps the best help I can be to the panel is answer some of the questions Judge Jolly set out at the front as to what has happened in the state court, because as I look back through the pleading files, I think everyone in our briefs has told the court about what's going on in the state court. You haven't seen a lot of the paperwork, apparently, and I'd like to review --

JUDGE JOLLY: I was also talking about, to the extent that you know, what happened in the legislature, how long has this been pending from a legislative point of view as well.

MR. WALLACE: I'll tell you what I know about that, Your Honor, if I may. And at the end I want to say a word about why I think we have a live case of controversy here, and then I'll sit down.

The legislature, I presume at its last session, constituted the Joint Redistricting Committee. The Joint Redistricting Committee is a creature of statute. They provide that every 10 years there will be one and it will work on redistricting. The leaders of the two Houses made the appointments to that committee, and I believe it was during the 2001 session of the legislature. They had hearings all over the state during the summer. Sometime in October, I believe it was, they had their meeting. They were unable to agree among themselves on a plan to submit to the legislature.

The Governor, nevertheless, convened the legislature in special session. The House passed a plan. The Senate passed a plan. The two plans went to conference, and no conference report was ever submitted. The legislature adjourned without taking action. The legislature has not reconvened. They reconvene as a matter of course -- If it's not next week, it's the week after. I think they may be coming -- I think they're supposed to come in on the 3rd, but I think they've agreed to come in on the 7th or thereabouts.

MR. COLE: The 8th.

MR. WALLACE: The 8th, perhaps. So the legislature has done nothing and will do nothing until the 8th.

On October 5 Beatrice Branch and one other plaintiff filed a Complaint in state court. The Complaint has been described to this court. Apparently it's not in the record. The Complaint relies entirely on state law. There is no allegation of federal rights. There is no allegation that there is a one-man one-vote problem, no allegation of a Voting Rights Act problem. It simply says, As a matter of state law the legislature has not acted, and we want this law to act. It is purely a state law Complaint.

No process was served on that Complaint for a month. It sat there below radar for the entire month of October. On November 2 process was served on the state defendants. No truly adverse parties were served in that case. The state defendants have taken, I think commendably, the position that it is their job to enforce the law and not to make the law. While the state defendants have raised issues about the court's jurisdiction and the standards to be followed, at no time in the state court did the state defendants ever present a redistricting plan or did they present any criticisms of that the redistricting plan the plaintiffs had proposed. So as a matter of true adversity, there was no adversity in that plan. In that proceeding --

JUDGE JOLLY: Let me ask you this, Mr. Wallace, about the matter pending before the Justice Department.

MR. WALLACE: Yes, sir.

JUDGE JOLLY: Will anybody have an opportunity there to respond to the filing that the state has made, to make objections or whatever it may be?

MR. WALLACE: Absolutely, Your Honor, under the regulations which are found in 28 C.F.R. Part 51; and there is five or six pages of them. But the filing is listed on public register. Everyone will know that it's there. I believe that the filing has to be made available for public examination. I think anybody could go to the Attorney General's office and see it right now. The Justice Department keeps a register of people in Mississippi who have been -- who have asked in advance to be informed of Section 5 submissions, so the public will be invited to comment and comments will be made.

JUDGE JOLLY: All right. Now, how long will

that process take? Under the regulations, how long will it be before the people at the Justice Department will be able to consider it on the merits, having all the views of the respective parties presented?

MR. WALLACE: The regulations do not set a deadline for comments. They simply say that the Justice Department must act within 60 days. So the burden is on the commenters to get busy and comment if that's what they're going to do. The Justice Department can approve it faster than 60 days if they want to; but as Counsel for the state has properly pointed out, Reg. 51.22 says they will not consider it when it is subject to appeal.

I don't believe that's a discretionary regulation. As I read the regulation, and as the court knows, federal agencies are bound by their own regulations. I do not believe the Attorney General has power to consider the submission until the Supreme Court of Mississippi has passed on the appeal, but --

JUDGE WINGATE: Now, they can get -- they can

0025

ask for additional time beyond 60 days.

MR. WALLACE: It happens all the time, Your Honor. The Justice Department -- They have a long string of things that are required to be submitted, and then another section is a long string of things that you can submit if you want to. And if Ms. Waggoner managed to get everything mandatory submitted by yesterday, she has my undying admiration, because that is real hard to do.

The regulation also provides that if the state sends anything material up there later, then the 60 days start over again. So if the Attorney General, despite best efforts to comply with the Chancery Court's order, has omitted anything, they're going to have to send it up later; and then the 60 days would start all over again.

JUDGE JOLLY: Do you intend, representing the Republican Party Executive Committee, to get into this fray before the Justice Department?

MR. WALLACE: We expect that we will make public comments. We have been discussing that. Obviously, we were over in state court this morning. As I was about to tell the court, we were parties to that case for about three hours on Pearl Harbor Day. We were served with process in the morning and thrown out sua sponte in the afternoon. But having once been in the

case, we felt the need to be over there and protect our interests. So we have not prepared a Section 5 submission response.

The Attorney General has graciously agreed to give us a copy of what they have submitted to the Justice Department, so we will be looking at that; and I would expect within the next week or two we will be filing something with the Justice Department stating the Party's position. But again, not having seen the submission yet, we're not in a position to get something off next Monday. It's going to take a little while to get that done.

JUDGE BRAMLETTE: Mr. Wallace, Mr. Jernigan, in his brief, raises some due process issues --

MR. WALLACE: Yes, sir.

JUDGE BRAMLETTE: -- as you are aware, saying that his clients had no time for discovery, that the Chancery Court matter did not allow him to prepare in time and so forth.

My question to you is this: The matter now is headed to the Mississippi state Supreme Court. Do you have any idea or any information as to how that court will treat the appeal? I assume that court will allow each side to submit briefs, as they routinely do. Or do you think there will be some sort of expedited hearing there before the Supreme Court? Do you have any thoughts about it?

MR. WALLACE: The answer to that, Your Honor, may be both. I would certainly expect the Supreme Court of Mississippi is going to allow both sides to be heard and to file briefs, as they always do. They may do that, however, on an expedited basis. Until a notice of appeal is filed, I don't suppose they'll be doing anything at all; and until the orders are entered that were -- She ruled from the bench this morning overruling post-trial motions. So at some point an order will be entered. It will be time -- That case will finally be final. Then an appeal can be taken, and then the Supreme Court can look to what extent they want to expedite it.

I'd be surprised if they didn't expedite it, Your Honor, given the public interest in the case; but I couldn't sit here and tell you that there's any precedent for that. I've never heard of it being done. But could

it happen? Yes, Your Honor, it certainly could happen. But even so, once they've heard the argument, they've got to decide it; and the court's aware that sometimes takes awhile. So I think Mr. Jernigan's estimate that we're looking at the middle of February at the earliest for a decision by the Supreme Court of Mississippi, that strikes me as realistic and even optimistic. I would think it could easily take much longer than that.

I do want to say one thing about the due process issues. The due process issues are relevant here, I think, because of the abstention arguments. Mr. Cole has argued that this court ought not to deal with any of the issues in this case because they're on the way to the Supreme Court of Mississippi, and that's what makes due process relevant here. This court has some discretion to abstain in favor of other state court proceedings but not where the plaintiffs were not parties to that case -- Johnson v. deGrande says that; Roe v. Alabama says that -- and not where the parties who were in that case lacked a full and fair opportunity to present arguments.

I intend no criticism of the Chancery Court. The Chancery Court, like this court, was placed in a difficult position by the legislature; and it was placed in an even more difficult position where plaintiffs filed their case and then sat on process for a month. But eventually, the same day that the Republican Party came in and was thrown out, a new scheduling order was entered that said, Plaintiffs, reveal your plan at noon on December 13; and intervenors, be prepared to go to trial at 9 o'clock the next morning.

Now, in Texas, in the Del Rio case, the Supreme Court of Texas said that's a violation of due process. In that case the court put a new plan on the table, gave people less than 24 hours to comment on it, and then put it into effect. The intervenors in that case had less than 24 hours. We think there was clear denial of due process in many aspects of that case. And because of that, Johnson v. deGrande says that because they weren't

parties, because there was no due process, this court need not defer to the litigation going on in state court.

Let me tell you why I think there's a case of controversy here; and in the case of my clients, it's a case of bewilderment. We are state actors required by statute to conduct nominating primaries for candidates for Congress. To that extent, we are servants of the state, and that's why we have been served here as necessary parties to carry out whatever order this court may want to offer.

We are not parties to the state court proceeding. That court has issued a judgment -- it's issued an opinion which orders -- Well, this is what it says. "The Branch plan 2-A be and is hereby adopted as the court's redistricting plan, as set forth in the appendix, and said plan shall govern the nomination and election of members of the House of Representative of the State of Mississippi."

Now, clearly, the state defendants have been ordered to get out and implement that plan. It's fine to

0030

sit here and tell this court that they don't intend to do that without permission from the Justice Department, but they're under an order from this court and they're under an order from the Supreme Court of Mississippi which says the Chancery Court plan shall be in effect until it's overruled by the legislature. They've been ordered to go do it. If they don't get Justice Department approval, I suppose some court somewhere will cut them some slack. But right now, they've been ordered to implement that plan.

My clients, who have to do the nomination, haven't been ordered by anybody to do anything. There's nobody that's told us what to do. We are here in this case hoping that somebody will give us some guidance; and the guidance we think ought to be given is the guidance that the Supreme Court ordered in the case of Berry v. Doyles, which is cited, I believe, in the Branch intervenors -- no, I think it's in the state defendants' brief and it's mentioned in Mr. Jernigan's brief.

The injunction in Berry v. Doyles says, You are

ordered not to implement this plan unless and until it's approved by the Justice Department. And, of course, here the plan has been submitted to the Justice Department but it hasn't been approved; and in light of the discussion we've just had, it may be a long time, if ever, before it gets approved.

There is a real live controversy. We have people who have a crucial role in the election plan who weren't even parties to that case. We have a judgment which everybody admits has no force of law, even though it orders people to do things. And this court ought to clarify the situation. It ought to say, No matter what that judgment says, under Section 5 you may not obey that judgment until it's been approved by the Justice Department.

Now, if you do that, then the court may need to do a lot of other things, because as the request was made, how fast does this court have to move, it seems to me you ought to start moving very quickly. If this court is going to have to impose a plan -- I watched briefly from the inside how fast they had to move in state court. I think if I'm going to be a party to a case like that, I'd like to get a scheduling order entered very soon, get about the process of discovery --

JUDGE WINGATE: How much discovery? How long for discovery?

MR. WALLACE: For discovery, Your Honor?

JUDGE WINGATE: Um-hmm.

MR. WALLACE: Well, first of all, if it's going to be at large, you don't need any discovery. But if this court wants to draw its own plan, seems to me we ought to spend the month of January in discovery and let anybody who's in this case say what kind of plan they want, say who their expert is going to be. Let's have depositions of the experts instead of seeing them for the first time in the courtroom, as happened in the Chancery Court. We'll be on an expedited basis. Let's have something resembling preparation for trial, and then we ought to be in here early in February having the trial, giving this court time to review it. And then, if anybody is unhappy with this court's decision, there will be an appeal from that court's decision; and we at least

ought to give folks a chance to get an emergency stay application before the filing deadline.

JUDGE JOLLY: Let me ask you this question about jurisdiction. Under Growe v. Emison, we make a determination that it is unlikely that the -- or improbable that there will be a plan in place -- precleared plan in place on March 1. Do we at that point declare exclusive jurisdiction and, assuming a plan is precleared, assuming the Justice Department plan is precleared, we ignore that because they failed timely to act, or must we at that point yield to the precleared plan of the Chancery Court?

MR. WALLACE: It depends on where the point is, Your Honor. It seems to me -- and again, I'm not sure there's any clear guidance from anywhere on this subject. Growe doesn't give it to you. But it does seem to me that if you were to do what Berry v. Doyles did and say today, or anytime in the near future, the Chancery Court order is enjoined until it is precleared, once preclearance comes along this court's injunction would expire of its own force.

Now, as Judge Wingate said, people really do need time to decide when and if they're running for Congress. I'm sure people are making preparations now; but if your biggest supporters get thrown off into somebody else's district on February 27, you're in a heck of a mess.

I would think if we got a week away, 10 days away from March 1 and the Justice Department hadn't done anything, at that point I think this court, in its equitable discretion, would be well entitled to say, Time's up; people have to know and things have to go forward on time; this is the plan. Whether it's a week, 10 days, two weeks, I don't know. But that's my thought as being well within your power.

Tell the state of Mississippi, Get busy; if you can get it approved, you can enforce it. But if we're down to the last week and people have to make decisions, I think at that point this court's injunction ought to

become permanent, permanent for this election. There's going to be another election in 2004. And if a plan has been adopted and approved by the Justice Department, then it will go into effect.

JUDGE JOLLY: I don't know that the argument is here, but it occurs to me that the argument would -- might be that the decision of the state Supreme Court was not precleared, and that was a change, and that any conduct that resulted after that was illegal, including the apportionment by the Chancery Court; and consequently we would enjoin the plan permanently because there was no preclearance of the authority initially. But --

MR. WALLACE: Your Honor, the order of the Supreme Court of Mississippi is before you in the Amended Complaint, and the argument is made that it must be precleared. So that is before you. It has not been suggested --

JUDGE JOLLY: It's not precleared --

MR. WALLACE: It's certainly not precleared --

JUDGE JOLLY: -- and it's got to be cleared because, I mean, usually you're talking about before anything goes into effect it must be precleared. That Supreme Court decision went into effect without preclearance.

0035

MR. WALLACE: And Your Honor, I think an argument can be made that everything after that point was permanently void. I would be less than candid if I didn't say to the court that I believe there are some voting rights cases out there that talk in terms of post-clearance where things have happened, you figure out you need to get it fixed, and if the Justice Department approves it it's a no-harm, no-foul basis. But I haven't been back in the books in order to be able to give you a hard answer.

JUDGE JOLLY: Nunc pro tunc. They can do it -- Maybe they can do it that way.

MR. WALLACE: I know there are cases where that has been suggested. I can't tell you.

But, you know, not only may the Supreme Court's order permanently mess everything up, but there is a constitutional issue here. And if Article 1, Section 4 means legislature when it says legislature, then nothing that has happened in the last month makes any difference

to anybody; and this court's going to have to face that question.

I will remind the court that it was a state law claim that was being litigated in that court. Certainly state courts can enforce federal law. The plaintiffs were very careful to take no federal law into that court.

0036

And I think Alexander Hamilton would have been very surprised to say that a state, as a matter of state law, could delegate line-drawing to judges. I just don't think --

JUDGE JOLLY: But your answer earlier that this court could not declare a permanent injunction until 10 days before the qualifying date simply seems to me to support the fact that we have no actual case of controversy before us at this point.

MR. WALLACE: Your Honor, I think you do. I think you do because, as I say, as I read the plan, they're ordered to do something. And even though they're saying they're not going to do it, unless somebody gives them relief, they're required to do it. The Supreme Court -- As Your Honor pointed out, the Supreme Court told us to go have a trial. Everybody went and had a trial, and that trial itself may have been illegal because it's not precleared. You clearly have people before you -- The Declaratory Judgment Act says people need guidance on their rights.

JUDGE JOLLY: Under what authority do we have the jurisdiction -- under what statute do we have jurisdiction to fashion a plan, to grant a remedy in this case by fashioning a reapportionment plan?

MR. WALLACE: Your Honor would have to go back

0037

to the old Conner cases against -- where Conner sued every governor of Mississippi from J. P. Coleman forward, I think. And while I do not remember everything that happened in that case, once a three-judge district court declares, for whatever reason, that a state's congressional redistricting plan is unenforceable, then the people of Mississippi are entitled to representation. If they can't get representation under the law provided for them by the state of Mississippi, then the federal court has a remedial and equitable responsibility to put

something into place --
JUDGE JOLLY: But again, if we're sitting as a Section 5 court, it's a general rule that Section 5 courts have no remedial powers.
MR. WALLACE: That's not the way I read the Hathorn decision and many others, Your Honor. First of all, enjoining a plan that has not been precleared is equitable remedy. That injunction is a remedy. And then the next question is, Do you put anything into its place? And what the Hathorn court said is that internal relief is for the federal court to decide.
I think this has been done in Section 5 cases over and over again, where one plan is thrown out; the federal court, of necessity, has to put another plan in its place. And I think you'll find that done in Conner.

0038
I'm not sure Section 5 ever got into the Conner case, but I think over the last two decades you will find cases where there have been Section 5 objections entered and the federal court stepped in.
I litigated Jordan v. Winter, and I'm embarrassed to say I don't remember whether it began with a Section 5 objection, but I think it did. And once there was a Section 5 objection, the Northern District had to impose a plan. They did so twice, it went to the Supreme Court twice, and it finally stayed in effect for a few elections.
JUDGE JOLLY: You know, often, if not the vast majority of the time in Section 5 cases, the question is determined whether the matter before you needed preclearance, whether it must be precleared. And you say it needs preclearance, you order preclearance, and it goes up there; and if they don't preclear, it comes back to the state to do something about it, not to the federal court to do something about it.
MR. WALLACE: I think that is very often the case. If you're moving a polling place, for instance, you just keep using the old polling place until you get preclearance.
But this isn't a case simply of a discretionary

change from one procedure to another. This change has been forced by federal law. We have lost a seat. We are obligated to stop doing what we were doing and start doing something new. And if we are unable to come up with anything new that's enforceable, I think you'll find that Section 5 courts have been willing and indeed required to put remedies into place where you can't just go back to the old plan because it's -- it's illegal.

JUDGE JOLLY: I would be interested in seeing a case -- finding a case that would authorize this court to do what you're asking us to do under these circumstances, that is, reapportion congressional -- do congressional reapportionment in a Section 5 case.

MR. WALLACE: Again, I'm thinking of Jordan from memory. I was there for the 1983 phase of the case, but I believe it began with a Section 5 objection in 1981, and the court put a plan into place. Now, I may have a copy of the case with me, and when I sit down I may be able to confirm that, or Mr. McDuff may remember when he stands up. But I do think you have that authority, and I do think why you have a declaratory judgment action is people need to be advised of their rights and duties.

My clients are sitting here with an election to run, we've got litigation going on all around us, and nobody in anything we've been a party to has told us what to do. We think this court has jurisdiction to do that; and we think that it had better start now, because we could be here the last week of February with no decision from the Supreme Court or the Justice Department and be in the same mess that the Chancery Court, through no fault of its own, has been in for the last couple of weeks.

JUDGE WINGATE: So again, what is the last date that you would give the Justice Department an opportunity to preclear before any plan crafted by this court should go into effect as to minimize voter confusion?

MR. WALLACE: Your Honor, I think if the Justice Department doesn't have a plan at least 10 days in advance -- and again, I haven't run for Congress either, but I've seen people who have. I think you need

at least 10 days' notice of what your district is so you can go out and talk to your supporters and see if you can do it and see if you can commit yourself and your family to that big an operation. And if they're going to have to qualify on March 1, some court ought to tell them what the district is at least 10 days before that. If this court's going to do this, as I've said already, we need to get busy on discovery now so we can put whatever remedy we want into place in time for people to know what it is.

0041

JUDGE WINGATE: So to summarize, then, what you would like to see us do, you'd like to see us formulate a schedule for discovery -- well, first of all you've like to see the Motion for Preliminary Injunction granted.

MR. WALLACE: We've consented to that and we'd like to see that.

JUDGE WINGATE: All right. Then you would like to have a time period for discovery formulated.

MR. WALLACE: Yes, Your Honor.

JUDGE WINGATE: All of January, you said.

MR. WALLACE: That sounds reasonable to me.

JUDGE WINGATE: Then some hearing the first part of February.

MR. WALLACE: Yes, Your Honor.

JUDGE WINGATE: And then for this court to issue its plan by the middle of February, no later than the middle of February, perhaps.

MR. WALLACE: Yes, Your Honor.

JUDGE WINGATE: If, by that time, the state plan has not received the appropriate preclearance, then this court should permanently enjoin that state plan and put into effect this court's plan.

MR. WALLACE: Permanently for the 2002 election, Your Honor. If the state can get something approved before 2004, that's just fine. But I do think

0042

it's important to have people qualifying by March 1; and if they're going to do that, I think 10 days or two weeks' notice of the line is the least they're entitled to.

JUDGE WINGATE: So even if the state plan is precleared after that two-week time period preceding the election, then the injunction would take effect and that

plan would not -- the state plan, then, would not -- would just be a nullity.

MR. WALLACE: Certainly if it's precleared after March 1, I don't think you should go back and restart the race after it's started. If it's precleared between the time of this court's order and March 1, my preference would be that this court's order should prevail because I don't think somebody ought to get new lines on February 26 and have to decide in two days whether they're in or they're out. Fair is fair. You ought to have some notice before you have to commit yourself and your family to a burden like that.

JUDGE JOLLY: Let me ask you one other question. I'm not quite understanding why you're saying there's a case of controversy that is peculiar to you, that you don't know what to do because no one has directed you, directed the Executive Committee of the Republican Party what to do. Why wouldn't you just --

0043

Why do you need any direction other than the -- you don't know where the boundaries are in the district?

MR. WALLACE: Your Honor, when the legislature passes a statute, we know what to do. Our people ran for this job. They're willing to serve. They don't get paid for it. There's a statute out there and it says follow the boundaries; we follow the boundaries. But there's no statute out there. There is a court order to which we're not a party, of doubtful validity; and we do not know what to do at that point. We think a court order to which we are a party is the minimum requirement for the guidance and for the security of the committee.

JUDGE JOLLY: But you're really in no worse shape than anybody else. Nobody knows what to do now.

MR. WALLACE: Well, nobody knows what to do; but since we have public duties, we are, at least theoretically, subject to a mandamus action if somebody comes in and says, "Take my money. I want to run for Congress," and we say, "We're not quite sure what to do with you and your money."

We have duties. We'd like to carry them out. And since the legislature has not given us a statute and the court did not see fit to have us in the -- since the Chancery Court didn't see fit to have us in the case, we're in a position where if somebody comes up with their

0044

$100 or whatever it is, we're not really in a position to take it right now. We don't know what to do with it, and we are supposed to be carrying out public duties.

JUDGE JOLLY: Okay.

MR. WALLACE: Thank you, Your Honor.

JUDGE JOLLY: Thank you, Mr. Wallace. We'll hear now from Mr. Jones representing the Democratic Party, the Democratic Executive Committee.

MR. JONES: Yes, sir. Please the court, on behalf of the Executive Committee of the Democratic Party, we adopt the arguments submitted to the court by the Branch intervenors, and I would defer to Mr. McDuff on those arguments.

JUDGE JOLLY: Okay, Mr. Jones. Thank you. Mr. McDuff representing the intervenors.

MR. McDUFF: Thank you, Your Honor. Good afternoon.

First I want to take strenuous issue with the statement that was suggested -- in fact, made explicit by Mr. Wallace when he said that Section 51.22 of the Justice Department regulations provide that a plan may not be submitted until affirmed on appeal. That's just completely wrong. There is nothing in that regulation that talks about court-adopted plans and appeals of those plans.

0045

JUDGE JOLLY: What do you have to say about the practice of submitting annexation plans only after the final judgment of the highest court?

MR. McDUFF: That may be the practice of the Attorney General. I don't know. But the regulation says, quote, final enactment, end quote. That's the phrase that's used in Regulation 51.22.

JUDGE JOLLY: But why isn't it plausible? Maybe it's not explicit, but it seems plausible to say that would require the final court of the state to rule on it for it to be final in the sense of the regulation.

MR. McDUFF: Well, I'll give you three reasons. First, in the Mississippi Supreme Court's order of December 13, which is attached to the Motion for Preliminary Injunction filed by Mr. Jernigan, the court said, "After due consideration the court finds that the Hinds County Chancery Court has jurisdiction of this

matter," and then it goes on to deny the interlocutory appeal filed by the intervenors in that case and the Republican Party. And then it says, "Any congressional redistricting plan adopted by the Chancery Court in Cause No. G-2001-177-W4 will remain in effect subject to any congressional redistricting plan which may be timely adopted by the legislature."

JUDGE JOLLY: All right. Now, I caught onto

0046

that language myself, and I was wondering whether the Supreme Court was saying, We are acknowledging that there will be no appeal in this case because we don't have time, and this is going to be the way the state will be reapportioned unless the legislature in the meantime adopts a plan. Is that the way you read that?

MR. McDUFF: What I read that to say is that the Chancery Court's plan will be the plan unless the legislature adopts it. I think that's right.

Now, obviously, if the Mississippi Supreme Court decides, upon an appeal by the intervenors in that case and upon a motion for stay of the Chancery Court order, if it stays the Chancery Court order, or if it vacates it, then the Chancery Court order is no longer the plan of the state authorities. I accept that. But I think the Mississippi Supreme Court --

JUDGE JOLLY: This is very complicated, obviously. But it seems to me that, one, you've got certain problems that -- I wonder whether the Justice Department or anybody would preclear a change that would put into the hands of a single Chancery Judge the authority to reapportion the entire state with no effective appeal to the state Supreme Court. It just seems to me that that is a huge leap.

JUDGE WINGATE: Well, look -- Judge Jolly, look

0047

at what the United States Supreme Court said in its unanimous decision in Growe v. Emison.

JUDGE JOLLY: I understand, but we're talking about a Section 5 state. That was not a Section 5 state. And I agree. What I'm talking about is here the minorities that the law is supposed to protect are jeopardized by the very act of allowing a single Chancery Judge to engage in reapportionment, particularly of the

whole state. What if the -- another group -- What if the Republicans had gone to someone who was completely sympathetic to them and had drafted a plan that was unfavorable to the minorities? -- which easily could have happened. Why would the Justice Department preclear a plan that would come back and have the potential adverse effect on minorities such as that? I just --

MR. McDUFF: What the Justice Department does, they don't look at who drafted the plan or who decided it, Your Honor. They look at whether the plan denies or abridges that black voting strength, as that term is defined in Section 5. I mean, there's no more danger of minority voting rights being diluted by a single Chancery Judge in Hinds County than there is by a single federal judge or a panel of three federal judges or whatever. I mean, it's not -- It's not who the judge is. It's what the judge does that's reviewed under Section 5 and any

0048

other part of the Voting Rights Act.

JUDGE JOLLY: Well, you're looking at it, it seems to me, with respect to this individual case. But I'm just looking at it from the potential of approving -- putting that much power into the hands of any Chancery Judge and the chance for mischief that -- especially with respect to minorities, that exists.

JUDGE BRAMLETTE: And especially when this case was put on a fast track and there are due process concerns, discovery, preparation for trial issues that have been raised by Mr. Jernigan. All of these things concern me, and I hear Judge Jolly and I think they concern him as well.

MR. McDUFF: Well, two things, Judge Bramlette. First of all, there's been on allegation, by the way, in the state court proceedings that the plan that Judge Wise adopted dilutes minority voting strength.

Second, the due process concerns were raised first of all in an interlocutory appeal in the state case prior to the trial. The Mississippi Supreme Court obviously did not believe that allowing that trial to go forward was going to violate due process. And the intervenors can and have stated that they are going to not only file an appeal and a request to expedite the appeal, but they can file a motion to stay and raise

0049

those due process concerns. And I'm going to address them in a minute, because I think they're totally insubstantial.

But I also don't think they're any of this court's business. I mean, nobody here -- The plaintiffs here who have raised them, who have raised the due process concerns, are not parties in the state court. They could have been. I mean, Judge Wise adopted a wide-open policy of intervention. And when the intervenors in that case first asked to come in on 13, we didn't oppose it, Mr. Cole didn't oppose it. She orally allowed them in that day. She told the Republican Party they could come in. At one point she joined them as indispensable parties but upon reconsideration said, "Well, I don't believe you're indispensable. I'm not going to force you to participate. You can participate if you want to." And they chose not to intervene voluntarily. So I think the due process -- I don't think it's properly before this court, but it's totally insubstantial --

JUDGE JOLLY: No, I agree -- to a certain extent I agree with you that it's not -- it's only that those due process concerns have some effect on preclearance, not on our authority but on preclearance. Whenever the Justice Department looks at the total picture and sees how all of this occurred, then they say,

0050

Wait just a minute. We need to send this back for further investigation. And we're all familiar or at least some of us are familiar with the way the Justice Department works in these Section 5 cases; and they constantly send back for additional investigation, which prolongs the period of preclearance. And that's what concerns me. It's --

MR. McDUFF: Well, Your Honor, if it happens, it happens. I don't think it's going to. But I don't think this court can sit here and second-guess what the Justice Department is going to do and use that as an excuse, which is what you're being asked to do, to push the state court aside and take over yourself.

JUDGE WINGATE: What's the history of the Justice Department in dealing with preclearance issues when cases are on appeal? When the matter that they're reviewing is on appeal to the state's highest court or to some other court, what is the Justice Department history

dealing with preclearance issues?

MR. McDUFF: I don't know, Your Honor, because -- Of course, this is the first time anybody has brought a congressional redistricting case -- a legislative redistricting case in federal court. On annexation cases I don't know.

JUDGE WINGATE: I don't want to limit it just

0051

to this type of case, but anything that the Justice Department has been called upon to preclear, what is their history in dealing with the matter of preclearance if the issue to be precleared is on appeal to the state's highest court?

MR. McDUFF: I don't know the answer to that, and I don't know that there's a lot of experience with that because, frankly, voting rights cases which would lead to Section 5 preclearance usually don't come out of state court.

Now, let me say a couple of things on this, though, because this business of this allegation that the Justice Department is going to require a decision by the Mississippi Supreme Court before they consider this submission I think is completely wrong. I have been talking to lawyers from the Justice Department, I know that the Mississippi Attorney General's office has been talking to them, because everyone wants this situation to go forward quickly. And it has never been suggested to me and I've never been told it was suggested to the Attorney General's office that the submission could not be made prior to affirmance on direct appeal. I mean, nobody's ever said that.

JUDGE JOLLY: I understand that. You're talking about conversations, and on the other hand you're

0052

talking about a rule that lends a certain interpretation to that argument. But again, it seems to me your strongest argument is whether we have a case of controversy here.

MR. McDUFF: Right. I want to finish this on this speculation about what the Justice Department may or may not do. Mr. Cole can correct me if I'm wrong, but my understanding is that they've told the Attorney General's office that the plan has now been submitted and that -- therefore, it means that Section 51.22 has been complied

with. The Justice Department is treating it as a final enactment because you can't submit something unless that regulation has been met. So I think the 60-day clock is running.

JUDGE WINGATE: Now, is this a matter of document that has been, quote unquote, submitted?

MR. McDUFF: I know that submission was made to the Department of Justice. I understand some response has been received. I have not seen it. Mr. Cole can answer that.

JUDGE WINGATE: Mr. Cole, has it been, quote unquote, submitted?

MR. COLE: Your Honor, it has been submitted. I think the issue here is what the regulation says. It doesn't say that you can't submit a plan.

0053

JUDGE WINGATE: Okay.

MR. COLE: What it says is that the Justice Department may not consider the merits of it until final enactment. I think that's -- It has in fact been submitted.

JUDGE WINGATE: All right. So you disagree with him.

MR. COLE: I'll stand by what I said, Your Honor. It's been submitted, but the Justice Department regulation talks about the Attorney General of the United States will not consider premature submissions. Now, what happens on that, I don't know, but that's what the regulation says.

JUDGE WINGATE: Mr. McDuff, you were looking at Mr. Cole as though he was going to -- that he would agree with you. Has he betrayed you there?

MR. McDUFF: No, I do not ever try to anticipate one way or the other whether he's going to agree with me or not. My understanding of what I said, Judge Wingate, is that the submission has been made and the Justice Department has confirmed that a submission has been made as of either yesterday or the day before.

JUDGE WINGATE: I thought you said it had been, quote unquote, submitted?

MR. McDUFF: Yes.

0054

JUDGE WINGATE: Okay.

MR. McDUFF: And therefore the 60-day clock has

started running, and by which under Section 5 the Attorney General must make a decision on preclearance.

Now, Mr. Cole is, I guess, giving an indefinite answer of whether the Attorney General must do so within 60 days. I think he must. I will be happy to brief this, if it's going to be a determining factor in what this court does. But I think there's no question in our view that the submission has been made, that you don't have to wait on affirmance on appeal.

And Judge Jolly, let me mention one thing, because you said, well, Growe v. Emison is not -- does not come out of a Section 5 case. I still think it's relevant because it talks about the -- what happens when a state court adopts a redistricting plan. It doesn't give any kind of reasoning that somehow excludes Section 5 states. It says, We fail to see the relevance of the speed of appellate review.

Germano, which, of course, talks about federal courts' deference to state courts, requires only that the state agencies adopt a constitutional plan in ample time to be utilized in the election. It does not require appellate review of the plan prior to the election, and such a requirement would ignore the reality that states must often redistrict in the most exigent circumstances.

0055

Now, if the United States Supreme Court believes that unanimously, when we're talking about federal court deference to state courts, I would expect the Justice Department is going to look at it the same way when it's talking about Section 5 review. And I really think that sort of this notion that somehow it is more suspect under Section 5 because a single Hinds County Chancery Judge issued the order is completely wrong.

And by the way, if the nine justices of the Mississippi Supreme Court have a problem -- if they have a problem with this procedure, they could have said something about it on the interlocutory appeal. If they have a problem with what happened, it's going to be in front of them in a few days on motion for a stay. They can issue a stay. And then we will have a new ball game. But right now we have a Chancery Court plan that the

Mississippi Supreme Court has said is the law as long as it gets precleared, and I think this court has --

JUDGE JOLLY: Unless the state legislature in the meantime adopts a legislative plan which itself would have to be precleared. I mean, this is kind of a mess.

MR. McDUFF: Oh, sure it is. I mean, nobody said it wasn't. But right now --

JUDGE JOLLY: And there's a lot of confusion in it, and that's --

MR. McDUFF: And I think it would be even more confusing if this court jumped in right now.

JUDGE BRAMLETTE: And you want us to just sort of sit by, Mr. McDuff; and if we do, and if it comes right down to the last week or so and we have to declare an at-large election, you're going to be far more animated then than you are now. Isn't that right?

MR. McDUFF: Oh, sure. And for good reason. And I don't think it comes to that. Here's what I think -- and this is in response to your question, Judge Wingate.

I mean, if -- I do not think this court should issue an injunction. I do not think this court should hold hearings. I do not think it should set a schedule. I think it should give the full 60 days from the time this was submitted; and then if preclearance is denied or if there is a request for more information, which is the only way the 60-day period can be extended, and it does happen -- I don't think it's going to happen here because the Attorney General has been very good about submitting it.

It can't be an extension, Judge Jolly, for more investigation. The extension can only be allowed if they haven't submitted all of the information that's required by the regulation. If that happens, then we've got a new ball game. I think that the proper thing to do then and the thing that does the least violence to state policies and that intrudes the least on state sovereignty is for this court to postpone the March 1 deadline and do what it needs to do to allow elections to take place by June, which is when they're scheduled.

JUDGE JOLLY: I don't think we're inclined to do that.

MR. McDUFF: Well, I do think, Judge Jolly, that would do much less violence to state policies than to come here and come out in the middle of February with a redistricting plan that will be some sort of competing plan with the Chancery Court plan. I think -- You talk about confusion. I think that will be very confusing.

JUDGE JOLLY: It would be.

MR. McDUFF: And I think it is much better to see if the Chancery Court's plan gets precleared. If, in the meantime, the Mississippi Supreme Court vacates it or grants a stay, then we've got a new ball game and we can reconvene and you can set a schedule. If preclearance is denied you can do that. But I think to start holding hearings, to start talking about redistricting plans while that Chancery Court plan remains the law -- remains

0058

the law as -- the plan as adopted by the state courts, and remains pending on a preclearance submission, I think would be totally wrong and much more confusing than any other scenario that's being considered.

And I think it would fly in the face of Growe v. Emison. I mean, if there's anything that case says, it says federal courts should tread cautiously when a state court --

JUDGE JOLLY: But it does say that the federal courts don't have to wait forever.

MR. McDUFF: That's right.

JUDGE JOLLY: And that once it becomes clear that the state authority, whether it's the legislature or the court, is not going to move in a timely fashion, then the federal court assumes jurisdiction. So I don't know whether that means that we assume jurisdiction exclusively, and irrespective of what the legislature or the state court does after that point, is irrelevant, or whether then, at the end of the -- if somehow before the March 1 deadline a state plan is precleared, then we have to bow to that. I don't understand all of that; and as Mr. Wallace has indicated, and I'm sure you agree, there's very little on that point.

MR. McDUFF: I think if -- and I think this would be the wrong course of action. But if you decide

0059

to hold hearings, if you did adopt a plan in early or mid-February and then the state court's plan was precleared --

JUDGE WINGATE: Precleared when?

MR. McDUFF: -- after you adopted a plan but prior to March 1, I think the state court's plan clearly controls.

JUDGE WINGATE: How much prior to March 1? Anytime prior to March 1?

MR. McDUFF: Yes, sir. I think anytime prior to March 1. I think the candidates --

JUDGE WINGATE: Last day of February would be fine?

MR. McDUFF: Yes, sir. Yes, sir. I mean, the candidates know, you know --

JUDGE JOLLY: March 15 would be all right with you, though.

MR. McDUFF: Well, I think -- I really think if something has to give, it's the filing deadline. I think that's clearly the easiest thing to move without doing violence to state policies.

JUDGE WINGATE: That would be a change in voting practice and procedure, though, wouldn't it?

MR. McDUFF: Not if you did it. If you did it as an equitable matter, no. If the state court did it,

0060

yes. But if you're talking about whether the federal court has to do something in light of this situation -- and, of course, we don't think you do, not at this point. But if you had to do something, I think that is the least intrusive, and I think that best follows the spirit of Growe v. Emison.

---

Let me mention one other thing in this connection. I mean, it was your order of December 5 that said, you know, if we don't see anything -- if we don't know by January 7 that the state authorities are going to be able to put a plan in place by the March 1 deadline, then we will assume jurisdiction and do what we need to do. I mean, we're well ahead of January 7. A plan has been submitted well over 60 days prior to the March 1 deadline.

JUDGE JOLLY: But from a certain point of view, with huge complications. I mean, I don't know. I mean,

it's just --
MR. McDUFF: Judge, they were complications that were not unforeseen as of December 5. I mean, every --
JUDGE JOLLY: They were to me. They were to me. I mean, I didn't foresee or didn't think about the state Supreme Court issuing an opinion in the way they did that gave the Chancery Courts the jurisdiction to

0061

apportion the whole state. I didn't -- I mean, I just didn't think about it. I didn't think about the huge change that was involved from what was established procedure.
MR. McDUFF: Well, if that was the court's view on December 5, that the Chancery -- that the state courts have no jurisdiction under the existing law, then you would have gone ahead and assumed jurisdiction and --
JUDGE JOLLY: No, no. No, because if you think of it in terms of jurisdiction, alone, that's not for the federal courts to determine whether they have jurisdiction as such.
MR. McDUFF: Right.
JUDGE JOLLY: It's the Section 5. It's the preclearance aspect of it that looms large now.
MR. McDUFF: Well, we -- Judge Jolly -- and I believe it's paragraphs 3 and 4 of our latest brief in this case. I mean, I do not think that was a voting change. I think Chancery Courts have always had the power in Mississippi to enforce the law by injunction --
JUDGE JOLLY: The Supreme Court expressly held that it didn't in that 1932 case. I've forgotten the name of it.
MR. McDUFF: Well, under the circumstances of that case in the congressional redistricting -- and we

0062

can go back and forth about what --
JUDGE JOLLY: That one was congressional redistricting.
MR. McDUFF: Oh, I know. I know. But it's still -- They've always had the power to enforce the law.
JUDGE JOLLY: This is a congressional redistricting case.
MR. McDUFF: And let me mention, Judge Jolly, Hathorn v. Lovorn, which is a case that's been cited

previously. There is a case where, again, Mississippi state courts had not previously been involved in voting matters. In that case the Chancery Court did get involved, and it implemented a runoff requirement for a seat, I believe, on the Board of Trustees of the Louisville Independent School District, municipal school district. And the United States Supreme Court said the -- adding that runoff provision required preclearance, but they never said that the assumption of jurisdiction by the Chancery Court or the Mississippi Supreme Court's decision saying the Chancery Court had jurisdiction in any way had to be precleared. It was only the voting change itself. So it's our position that it doesn't need to be precleared; but even if it does, it's been submitted along with the plan.

Now, if you take the view that was expressed

0063

during your colloquy with Mr. Wallace, that nothing can happen until the Supreme Court's order is precleared and that any trial court proceedings held pursuant to that Supreme Court order are somehow a nullity or the whole trial is illegal, I mean, if you assume that to be the case, then the state court in Mississippi could have never gotten involved at the beginning, given the exigencies of time. I mean, Growe v. Emison says state courts have a role.

Obviously in Mississippi, no state court has ever done a congressional redistricting case before. There's going to have to be a first time. And if you say, well, the Mississippi Supreme Court conferral of jurisdiction the first time has to be precleared before anything else can happen --

JUDGE JOLLY: But this was not the first time. The first time was in 1932, and it was rejected by the state Supreme Court.

MR. McDUFF: Well, and I actually disagree with the interpretation of that. But you're trying to say it's a change from '32 to 2001.

JUDGE JOLLY: Well, a change as well in terms of statutory law, because the statute provides -- seems to provide or suggests that if the legislature doesn't act, then we will have statewide elections.

0064

MR. McDUFF: Well, I disagree with that for the multiple reasons we've stated in our briefs.

JUDGE JOLLY: I understand it's arguable, but I'm just saying --

MR. McDUFF: And this has happened, Judge Jolly, in Texas, in Alabama, where federal courts, pursuant to Growe, have stayed their hand and allowed the state courts to first look at the issue and adopt a plan if they so choose. And no one's ever suggested in any of those cases that preclearance had to be obtained -- even though it was the first time it had been done in state courts in some of those states, that preclearance first had to be obtained before the process even started in state court.

JUDGE JOLLY: But the issue has never been raised, Mr. McDuff.

MR. McDUFF: Well, I don't know if it has or not, but I'll say this: I think if it were a problem, someone would have raised it and the federal courts would have held off, both in the Balderas case and in the federal court in Alabama. I mean, those judges know what Section 5 involves. And so I just -- I think that the notion that somehow these proceedings are all illegal and should be just wiped off the slate as if they didn't happen is completely wrong. I think it's wrong as a

0065

matter of Section 5 law, and I think it would fly in the face of Growe v. Emison.

JUDGE JOLLY: It's probably wrong, maybe not completely wrong, but --

MR. McDUFF: Okay. I can go through the history of the state court proceedings if you want me to. I disagree with some of the statements Mr. Wallace made. I'm not sure how pertinent they are at this point. I do think everyone had due process. We've set out the reasons for that in our brief.

JUDGE JOLLY: One thing that did -- on the due process argument that seemed a little suggestive of absence of it was that you submitted your final plan like a day before the court made its decision, without giving

the other side an opportunity to come back and make suggestions about how it may be done differently. Is there anything to that?

MR. McDUFF: No, sir. And that was the deadline. The deadline was December 13 for a December 14 trial.

What happened was, of course, we asked the judge early on -- Everybody knew the proceedings were going to be expedited. We asked her to set a December hearing. She instead set a January 14 hearing, with an expert reporting deadline and all plans to be filed at some earlier date, and I don't recall the exact date. Then -- That was on December 3. This court issued its order on December 5 with the January 7 date. She accordingly, quite responsively, in our view, said, All right, we're going to have the trial in December, on December 14, with a December 13 deadline for submitting plans. There was never --

JUDGE JOLLY: One question that occurs to me is in connection with the preclearance again -- excuse me for getting back to this, but how was Judge Wise selected? Was she selected particularly by you or did you just file it in the Chancery Court and was it by random that she --

MR. McDUFF: The same way it's always done in Chancery Court, Judge Jolly.

JUDGE JOLLY: Well, I don't know how that is.

MR. McDUFF: Well, it's done by random selection.

JUDGE JOLLY: Okay. That's all I wanted to know.

MR. McDUFF: And there's been a lot of speculation that this is somehow a fix, and I responded animatedly --

JUDGE JOLLY: No, no, no.

MR. McDUFF: I know it's not in this court. I responded animatedly to the question because there has been speculation in the press, and it's completely wrong. It could have been any of the four judges. We filed it in the court of equity in the seat of government in Hinds County. And I don't think the Justice Department has any concern with how it was done. I don't think this court

should have any, if it does; and I think whatever she does is going to -- has been presented and will continue to be presented to the Mississippi Supreme Court.

But I think everything that was done in that case was proper. I think she considered all of the evidence. I think she considered a fair decision. She-- set out the reasons in her decision. And one can disagree with those reasons, and obviously the intervenors in that case do, but I think there's no basis for some sort of speculation that the process was wrong.

Now, let me return --

JUDGE JOLLY: I want to just make it clear, I have the highest respect for Judge Wise and did not suggest anything other. But lawyers are something else, I mean, as far as judge-shopping. Lawyers --

MR. McDUFF: Oh, sure. And these plaintiffs filed here in federal court, even though Growe v. Emison says state courts should be preferred in redistricting matters. Now, that's fine. They have a right to do

0068

that. But they did it for a reason, and we all file cases where we file them for reasons. But there's nothing untoward or improper about this, and she was selected by a random method. You know, it's just -- I think that whole line of inquiry is not relevant to what's before this court. I'm happy to answer the questions.

Now, on the business about the plan being filed on December 13, there was never a motion, Judge Jolly, by any of the parties in that case, including the intervenors, to move up the date for filing plans. Never a motion. There was never a request to take a deposition. There was never a motion to shorten the discovery deadlines. There was no formal discovery filed until some interrogatories and requests for admission were filed two days before the trial, and we worked those out. I mean, to the extent there's some disagreement about whether we worked it out, that will be raised in the Mississippi Supreme Court.

But this was not a case where the intervenors came in and said, Oh, we need expedited discovery, we need this, we need that, we want the plans to be filed sooner than December 13. Never a request for that. So

there's going to be no basis for a due process claim. I mean, you're not entitled to raise a due process claim on process you didn't ask for.

Everybody saw the other side's plans at the same time. The trial went on. It started on a Friday; it ended on a Wednesday. There were modifications made. The sides presented testimony about each other's plans. There was plenty of time for comment.

Now, granted, it was expedited; but it always is in these case. And everybody knew from the beginning, including the intervenors when they got in on November 13, that things were going to go fast. So this notion that this was somehow an unfair procedure and an unfair process in Chancery Court is completely wrong. I also think it's irrelevant to what's before this court and that that will be decided by the -- will be and should be decided by the Mississippi Supreme Court.

JUDGE BRAMLETTE: That's what I don't want to happen to this court. I'd like to have an opportunity to take a more leisurely look at the issues, and I don't want to feel rushed to judgment by having a case that's set just a few days before the March deadline. And that has been the gravamen of almost every question that I've asked to you and others as well.

MR. McDUFF: Yes, sir.

JUDGE BRAMLETTE: How much time do we have? I don't want to have to go to trial the third week in February and reach a decision and come to some type of a map or reapportionment plan by the 1st of March. I'd rather get busy on it now if it's going to be in my lap.

MR. McDUFF: Yes, sir, Your Honor. But I don't think it is going to be in your lap because I think this plan is going to be precleared; and I think -- in line with the decision in Growe v. Emison, I think this court is required to, and if not required to, at least should wait and see what happens with the preclearance. The Supreme Court said unanimously state courts are to be preferred. And unless the plan violates federal law and someone raises that, then the federal courts should not become involved, or unless there is a problem with timing. And I think this plan has been submitted in time

to be precleared before March 1.

And Judge Bramlette, if it comes to the point where it doesn't get precleared, then I think what has to give way is the March 1 filing deadline, and you hold hearings after that. I think it would be, as I've said before, the wrong course of action to start holding hearings in February while the state court plan is pending, and maybe even adopting your own plan while the state court plan is pending before the United States Attorney General for preclearance. I think that would generate much more confusion than the alternative course.

JUDGE WINGATE: I have two questions, based on what you just said. The first one is, What prejudice would you actually suffer if we just have a hearing and hold onto our plan until some appreciable period close to March 1? What prejudice would you suffer merely by making the argument, going through discovery, so that this court would have all the information it might need if it has to go forward?

MR. McDUFF: I think the only prejudice would be -- I think a couple of things. Number one, the time and expense and resources of the parties and the court for what likely will prove to be a needless exercise.

JUDGE WINGATE: Anything else that would be prejudicial?

MR. McDUFF: The only other thing is I think the confusion to the public.

JUDGE WINGATE: How could the public be confused? There would not be a plan until this court decides to publish it.

MR. McDUFF: Because there already is a plan that the state authorities adopted that is pending preclearance; and if this court is holding hearings that it might adopt some other plan, I think it adds to the confusion.

JUDGE WINGATE: My second question is, If this court moves the March 1 deadline, then what other repercussions would follow from that movement?

MR. McDUFF: I don't think any. I think there's still plenty of time to have the deadline April 1 or April 15, even, and elections still to go forward as scheduled. I mean, everybody knows -- I think most of

the people who've decided to run for Congress know they're going to run and -- so I don't think that really has any other repercussions.

That's all I have.

JUDGE JOLLY: Mr. Jernigan, rebuttal if you wish.

MR. JERNIGAN: You can tell, Your Honors, that Mr. McDuff won in state court. And like I said in the beginning, if the court please, we're no better off today than we were on November 30 when we were here. You've heard what kind of shape that this matter is in.

It's an impossibility -- In response to what Judge Bramlette asked Mr. McDuff, how much time would you need to prepare a plan and when would you need to get started, Mr. McDuff would have you wait until the plan is precleared. That means that you are to defer until February 28, I would suppose, at which time this thing would be ripe and moot at the same time. There's no time to do anything meaningfully and observe the deadline that

0073

this court has already recognized as being paramount in this matter.

Your Honors, I would suggest that the court look at the Balderas case in Texas. The same problems were encountered out there. One thing that you find in common in all of these redistricting cases is that they do wind up in the federal court.

Our clients -- My clients, Your Honor, are registered voters in the state of Mississippi. We seek this action and bring this action before this court to guarantee voting rights guaranteed to them by the United States Constitution and federal law. The basis of our claims are set forth in our Complaint.

And I think that there is a justiciable controversy because this matter cannot be concluded, as evidenced by all of the arguments of counsel and by the facts that have been presented to Your Honor this afternoon, in time for my clients to exercise those voting rights, and those similarly situated, by March 1.

Your Honor, we also filed -- in our Complaint we reserved the right to amend our Complaint. I think that we may seek to do that slightly and bring forth an additional matter that was raised here this afternoon

that the Supreme Court's action in the state of Mississippi does constitute an unprecleared change under Section 5.

This is injunctive relief that my clients ask for. We set forth in our papers, Your Honors, why we're entitled to that, and I think that we're still entitled to it, and that is the controversy and claim that's before this court.

If the court, pursuant to Growe v. Emison, as everybody has already talked about this afternoon -- it gave the state court actors, the legislatures and the state courts until January 7. That time deadline obviously cannot be met. If you are to read 51.22 in 28 Code of Federal Regulations to mean what it says, and there's been no evidence or authority to the contrary this afternoon, then the Justice Department is not going to consider the submission until it becomes final; and we can all speculate this afternoon when it might become final.

There's no way they can shorten the 30-day time period for the appeals process. After that point the Supreme Court, sure, they can enter a compacted schedule much like happened in Florida on the Bush v. Gore situation. But if they did it in a week or 10 days or two weeks, that still gets us to the middle of February. We're right back where we started.

I would suggest to you this afternoon, Your Honors, that what needs to take place is that this court enter a scheduling order and that it would be prudent if the court were to select a court-appointed expert to advise the court in this redistricting matter. There are a number of experts out there, and that would enable these proceedings to move along in a timely fashion and most likely shorten whatever evidentiary proceedings might be held before the court, to establish a briefing schedule, and to allow the parties after the briefing schedule to present such evidence as they may have in this court in order that we get a redistricting plan in place for the 2002 election and to allow these to proceed in an orderly fashion, which they certainly have not done

so to date, and the prospects for them doing so are very dim.

Alternatively, if we get in a bind and this court elects not to proceed, and we get on to the middle of February, we do have a remedy available. Nobody wants it. My clients would be satisfied with that. And that is, to continue the preliminary injunction in force and order that the elections be conducted on an at-large basis pursuant to current Mississippi law that we know has already been precleared by the Justice Department.

JUDGE WINGATE: Will we not have to consider the constitutionality of that?

0076

MR. JERNIGAN: Your Honor, I don't think that's in controversy right now. It's been precleared. It's on the books. I think this court could order the election to be conducted on an at-large basis. It may start another controversy, if the court please. But it's there and is available as a remedy this afternoon.

Your Honor, we would ask the court to grant the relief that we have requested in our preliminary injunction, to immediately proceed to enter a scheduling order, and proceed to hear this matter in order that the voters of the state of Mississippi, and particularly the plaintiffs, will have an opportunity to exercise those rights in a timely and orderly fashion, and ask this court to enter a redistricting plan pursuant to that. Thank you.

JUDGE JOLLY: All right, sir. Thank you.

MR. WALLACE: May it please the court, I don't want to argue further, but I would like to ask the court's leave -- I see from the sign on the door that the court is closed on Monday. When the court reopens on Wednesday, I'd like leave to submit portions of the state court proceedings. The parties obviously disagree about what happened over there. And rather than take the court's time to argue about it here, come Wednesday I'd like to be able to submit copies of papers in that case

0077

for the court's review.

JUDGE JOLLY: Well, I think we may -- I want to discuss it right here with these other judges, but we may need just a little additional briefing, and we welcome any kind of information, advice or briefing that you

might give us that is germane to the issues that we're considering. So surely we will receive that; and once we receive that from you, then the other parties obviously will have an opportunity to respond to it.

MR. WALLACE: Certainly, Your Honor.

JUDGE JOLLY: But give us just a second.

[Off Record.]

JUDGE JOLLY: We are not going to rule on this case until January 7 or thereafter, as we indicated in our earlier order. Consequently, if there are any developments that bear on this that occur between now and then, we would appreciate being informed of them. I think you can tell that we are somewhat concerned about whether there will be in place a precleared plan by the state authorities of some kind on or about March 1; and anything that may relate to that, we would be interested in -- any developments that occur between now and then, we would be interested in knowing.

The other issue that we are concerned about is whether there is a case of controversy here, given the

0078

way the Complaint is framed and given the way that -- the relief that is being sought. I don't know whether that requires you to amend your pleadings after you look at it, but we need that point briefed.

The second point that we need briefed is a jurisdictional one, that is, the authority that we have to fashion a reapportionment plan in this Section 5 case. So we would like for the plaintiffs, and the Republican Executive Committee is aligned with the plaintiffs, for them to submit -- they can submit the same or simultaneous briefs at that time. Then we would like for the Democratic Executive Committee, along with the intervenor, to submit simultaneous responses at that time. The state may at that time issue its brief. And then the plaintiff and the Republican Executive Committee would have a reply brief, limited solely to the issues that were raised in the responsive briefs to the opening briefs.

Now, we would like to have some date on this, and we know that this is -- we've been rushing you a little bit, perhaps. But we would like to have these briefs -- If we could have the briefs of the -- the opening briefs by Friday of next week, and then could we

have the response by Tuesday -- by Wednesday, I guess would give you a little more time. Is that enough time, Mr. McDuff?

MR. McDUFF: Yes, sir.

JUDGE JOLLY: And then have the reply brief by Friday. I don't know what dates those are. I have no calendar before me. But we can figure that out. Is that agreeable to everybody?

MR. JERNIGAN: Yes, Your Honor.

MR. WALLACE: Your Honor, I'll be working with Mr. Jernigan. I've got a family funeral in New York the end of next week, but I think I can get enough done by next Wednesday that we can have something jointly ready for the court by next Friday.

JUDGE JOLLY: If you need extensions on this, you can always come to us with that.

MR. WALLACE: Thank you, Your Honor.

JUDGE JOLLY: Okay. Is there anything else that needs to be taken up before the court at this time?

[Off Record.]

JUDGE JOLLY: Would the plaintiff submit an order to the court reflecting, one -- and this will be separate orders -- reflecting the fact that the motion had been granted for leave to intervene, and then an order -- a proposed order setting the briefing schedule that we've just referred to.

MR. JERNIGAN: Submit that to you, Your Honor, or --

JUDGE JOLLY: Submit it to us, yes.

MR. JERNIGAN: Or all three of you, Your Honor? Send it to you, Judge Jolly, or --

JUDGE JOLLY: Just send it to all three of us. Just send it to all three of us so there will be no doubt about where we stand and be no dispute about it.

Does anybody else have anything else they would like to bring up before the court at this time? This court stands adjourned.

* * * * *

0081

# CERTIFICATE

I, Carol R. Gray, Official Court Reporter, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing 80 pages contain a full, true and correct transcript of the proceedings had in the aforenamed case, at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I further certify that the transcript fees and format comply with those prescribed by the court and Judicial Conference of the United States.

This the 4th day of January, 2002.

CAROL R. GRAY
United States Court Reporter

21
22
23
24
25