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

JOHN ROBERT SMITH, SHIRLEY HALL, and GENE WALKER,

Plaintiffs,

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

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

Defendants,

and

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

Intervenors

INTERVENORS OBJECTIONS AND COMMENTS REGARDING PROPOSED FEDERAL COURT PLAN

Consistent with this Court's previous order, the intervenors submit their objections and various comments regarding the proposed federal court plan.[1]

1. As a purely logistical matter, this Court — in any final order adopting a plan — should use a map with light colors and heavy lines that will copy clearly on a black and white copy machine. The color map included by the Court in its prior order does not xerox clearly. Thus, when

[1] To some extent, this document will repeat points made in prior submissions to the Court. Also, the intervenors specifically incorporate any additional positions that they have taken, and points they have made, in prior submissions.

copies of the map are made on a xerox machine, the lines are not clear. Attached to this submission is a map the intervenors have prepared of the proposed federal court plan using light colors and heavy lines. It contains the same written information that is on the map attached to the Court's prior order. If the Court ultimately adopts this plan, it could use this map or one similar to it. If the Court changes the plan for any reason, it likely could have such a map made, or any of the parties could prepare such a map for the Court.

2. This Court has erred by substituting its own plan rather than deferring to the duly adopted state court plan.

3. If preclearance of the state court plan is granted "in time for the primaries," *Growe v. Emison*, 507 U.S. 25, 36 (1993), the state court plan must be used in the 2002 elections. As explained in prior briefs and arguments, none of the other challenges brought by the plaintiffs against the state court plan have any merit.

4. If there is no decision on preclearance in time for the primaries, this Court nevertheless is required to defer to state policy and utilize the state court plan as a temporary plan for the upcoming elections in light of the circumstances of this case. *See, Upham v. Seamon*, 456 U.S. 37, 42-43 (1982); *Terrazas v. Clements*, 537 F.Supp. 514, 537-540 (N.D. Tex. 1982) (three-judge court); *Burton v. Hobbie*, 543 F.Supp. 235, 238-239 (M.D. Ala. 1982) (three-judge court), *Burton v. Hobbie*, 561 F.Supp. 1029, 1034 (M.D. Ala. 1983) (three-judge court). This is particularly so where, as here, the state court acted expeditiously, the state court plan was submitted promptly for preclearance, the preclearance submission was made over 60 days prior to the candidate qualification deadline, the preclearance submission is proper and complete, no Section 5 objection has been lodged against the plan, the plan does not retrogress and therefore complies with the substantive standards of Section 5, the plan does not dilute minority voting strength, and the plan

is constitutional.[2]

5. In both *Burton* and *Terrazas*, the federal courts implemented unprecleared plans on a temporary basis, with only slight alterations, citing the exigencies of time and the need to adhere to state policy. The state plans were altered by the federal courts only to the extent necessary to address specifically articulated concerns of the United States Attorney General regarding the plans' compliance with the substantive requirements of Section 5. (Indeed, in *Burton*, the federal court implemented the state court plan even in areas where the Attorney General had expressed concerns). In *Upham*, the Supreme Court said that any modification of an unprecleared plan by a federal court must be limited to the specific substantive Section 5 violations articulated by the Attorney General. Here, of course, no such concerns have been articulated by the Attorney General because he has yet to render a decision or provide any response to the preclearance submission.[3]

6. Moreover, there is no basis for such concerns since there is no retrogression in the state court plan.[4] Indeed, in the majority black second congressional district, the federal court plan's population is 59.2% black voting age population (VAP), while that in the state court plan is 59.0%.

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[2] Although an unprecleared plan is not effective as law, it nevertheless reflects state policy.

[3] In most situations involving statewide redistricting plans where time is of the essence, the Attorney General has expedited consideration and rendered a prompt decision both to assist state authorities and federal courts who are presiding over litigation. However, the Attorney General here has neglected to provide any sort of timely reaction in the pending situation — responding neither by the January 7 date referenced in this Court's December 5 order, nor the January 28 trial date set by this Court, nor the January 31 date requested in the state's preclearance submission. This sort of disrespect for both the state authorities and this Court, and the failure to be helpful in the midst of the circumstances that exist while the submission is pending, is unfortunate.

[4] In *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000), the Supreme Court held that retrogression and an intent to retrogress are the only proper grounds for a Section 5 objection, and that to the extent the Department of Justice was objecting for other reasons in the past, those reasons are no longer sufficient grounds for an objection.

In the second highest black VAP district — the third district — the federal court plan is 30.4% black VAP, while the state court plan is 37.5% black VAP. Certainly, if the federal court plan complies with the substantive standards of Section 5 — meaning that there is no retrogression in the federal court plan --- the state court plan also complies with those standards and does not retrogress.

7. Thus, absent any objection by the United States Attorney General, the unprecleared state court plan should be utilized as an interim plan in the circumstances of this case.

8. Even if there is an objection by the United States Attorney General, this Court should not implement the plan it has proposed. Instead, consistent with *Upham v. Seamon*, it should modify the state court plan only to the extent necessary to cure the condition that prompts any objection.

9. If the Court does not utilize the state court plan (Branch Plan 2A) because it has not been precleared, the Court should — as an alternative — utilize Branch Plan 2B as an interim court-ordered plan. That plan makes some modifications to the state court plan. Utilizing Branch Plan 2B allows implementation of the state policies reflected in the state court plan without actually ordering the state court plan into effect in its entirety.

10. If the Court does not utilize the state court plan or the alternative Branch Plan 2B absent preclearance, and also determines that there is insufficient time to await preclearance and implement either of those plans in light of the March 1 qualifying deadline, the Court should postpone the qualifying deadline to await a preclearance decision rather than cast aside the state policy reflected in the state court plan. Assistant Secretary of State Leslie Scott testified that the first primary in Mississippi congressional elections occurs 60 days after the qualifying deadline in presidential election years, and over 90 days after the qualifying deadline in non-presidential years such as this one. See Miss. Code, § 23-15-299(3). She testified that the 60 day deadline — utilized in every other congressional election — has posed no problems for election officials and can easily be

implemented. She and former Hinds County Election Commissioner Ruth Shirley testified that the first task for election officials after the candidates have qualified is to prepare absentee ballots, which must be ready 45 days before the election.[5] Ms. Shirley testified that absentee ballots easily can be printed in 3-5 days.[6] Ms. Scott testified that even if the ballots are not printed by the 45 day deadline, circuit clerks can use paper ballots for the first few days of the absentee period. The primary election is June 4. The qualifying deadline easily can be postponed until Friday, April 5, which is 60 days prior thereto. Indeed, it could even be postponed until later than April 5 and still allow time for absentee ballots to be available 45 days prior to the election.

11. The Supreme Court said in ***Growe*** that "state courts have a significant role in redistricting." 507 U.S. at 33. "The power of the judiciary of a State to require valid reapportionment or to require a valid redistricting plan has not only been recognized by this Court, but . . . has been specifically encouraged." ***Id., quoting, Scott v. Germano***, 381 U.S. 407, 409 (1965). As the Court explained:

> In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself.

Growe v. Emison, 507 U.S. at 33 (emphasis in original).

12. The state courts have addressed and completed the task of redistricting. The state court

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[5] The statute, § 23-15-649 of the Mississippi Code, provides that absentee ballots shall be available "as soon as the deadline for the qualification of candidates has passed or forty-five (45) days of the election, whichever is later." Thus, if for some reason the candidate qualification deadline must be postponed to within less than 45 days of the election, the 45 day requirement for absentee ballots dissolves.

[6] Ms. Shirley also noted that she was an election commissioner in the first election after the post-1990 congressional redistricting, and that the congressional election was conducted without any problems despite the new redistricting plan. That election was held in 1992, which was a presidential election year. Moreover, under the version of § 23-15-299 in effect at that time, primary elections were held 60 days after the qualifying deadline for every congressional election, whether in a presidential election year or not.

plan was submitted to the United States Attorney General for preclearance on December 26, 2001, over sixty days in advance of the March 1, 2002 qualifying deadline. This is ample time for the plan to be precleared in time for the primaries, and even in time for the qualifying deadline.

13. Unfortunately, the Mississippi Republican Executive Committee, the plaintiffs in the present case, and the Mauldin intervenors in the state court case (who are represented in the state court by the same attorneys who are among co-counsel for the plaintiffs in the present case) have embarked on a concerted strategy to persuade this Court to displace the state court plan with a plan this Court deems preferable. Part of their strategy has been to delay the appeal to the Supreme Court of Mississippi and decline to seek a stay of the state court plan from that Court. (As indicated by the state court docket sheet, they waited until January 25 to file their notice of appeal on an injunction issued December 21 and a final judgment issued December 31). They have then argued to the United States Attorney General and to this Court that the preclearance submission is premature because the state trial court's decision has not been reviewed and affirmed by the Supreme Court of Mississippi. Of course, one of the reasons it has not been reviewed and affirmed is that the state court intervenors — allegedly the aggrieved party in state court — have not sought a stay or an expedited appeal. In effect, they are asking this Court to grant immediate relief from the state trial court's decision rather than asking the Supreme Court of Mississippi to do so. This course of action is inconsistent with the teachings of *Growe v. Emison*.

14. For reasons stated in our earlier filings with this Court, the preclearance submission of the state court plan is properly before the Attorney General and is not premature. The absence of a decision on the direct appeal of the state court decision is not a basis for any failure by the United States Attorney General to act on the preclearance submission. This is particularly true in the present situation, where the Mississippi Supreme Court said, in its December 13, 2001 order

declining to stay the state court proceedings, that "[a]ny congressional redistricting plan adopted by the chancery court . . . will remain in effect, subject to any congressional redistricting plan which may be timely adopted by the legislature." As we stated in a prior filing to this Court, the practice of the Department of Justice is to review submissions of state court voting changes even if they have not been affirmed on appeal or if the time for appeal has yet to expire.[7] Moreover, Section 5 of the Voting Rights Act provides that when a State "enact[s] or seek[s] to administer any voting qualifications . . . or standard, practice, or procedure with respect to voting" different from that previously in effect, the change shall be submitted for preclearance. If there's no objection within 60 days, the plan is precleared. There is no caveat allowing the Attorney General reject a submission because of a state court appeal. As confirmed by the Mississippi Supreme Court's December 13 order and the Chancery Court's December 21 order, the State has "enact[ed] and seek[s] to administer" a voting change. If the Attorney General declines to consider it because he believes it not to be final, it will be cleared as of the 61st day because there has been no objection on the basis of Section 5's substantive standards.

15. The federal court plan limits black voting strength in the new third district. As the attached declaration of Cristina Correia illustrates, the second highest black VAP concentrations in the existing plan are in the 4th and 3rd congressional districts. Those specific numbers, as well as the BVAP% in the new Third district in the federal court, state court, house, and senate plans(the Third district being the district containing the second-highest BVAP in each plan), are as follows:

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[7] Under a specific provision of Mississippi law, an annexation decision of a Chancery Court is not effective as law and is not final until approved on appeal or until the time for appeal has expired without an appeal. Miss. Code § 21-1-33. Thus, such decisions generally are not submitted for preclearance until affirmed on appeal. No such state law provision exists for most other types of cases, including this one. Indeed, the Mississippi Supreme Court's December 13 order specifies otherwise.

Current Plan BVAP% (Ex. I-12).

4th – 42.94%

3rd – 29.45%

Federal Court Plan

3rd – 30.37%

State Court Plan (Ex. I-2)

3rd – 37.53%

House Plan (Ex. I-15)

3rd – 38.24%

Senate Plan (Ex. I-17)

3rd – 34.35%

16. Thus, the federal court plan has a BVAP % in the 3rd district not only lower than the old 4th district, but almost as low as the old 3rd. The plan appears more as a mirror of the old 3rd district rather than a compromise between the old 3rd and the old 4th.

17. This is confirmed by the population analysis of the federal court plan. That analysis is contained in the Correia declaration. One of the factors that motivated the state court to adopt Branch Plan 2A is that it addressed the loss of a seat in a fair and balanced way by combining roughly equivalent population portions of the old 3rd and 4th districts. (See p. 14of the state court's Dec. 21 opinion). But rather than combine equivalent population portions, 60% of the combined district in the federal court plan (District 3) is composed of the old 3rd district, while only 39% is composed of the old 4th district.

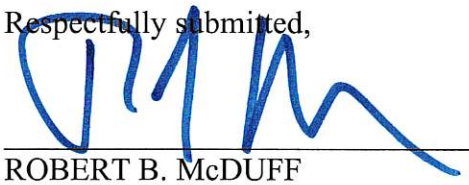
18. As stated in the Correia declaration, the proposed federal court plan dismantled the black population in the old 4th district, sending nearly 50% of it to the new 2nd district, and retaining just

42.5% of it in the new combined 3rd district. In the state court plan, by contrast, only 38.6% of the black population in the old 4th went to the new 2nd, and 52.7% of it stayed in the combined 3rd.

19. Moreover, the state court cited the testimony of Dr. Leslie McLemore, an expert in Mississippi politics, who testified that the 3rd district in Branch Plan 2A (adopted by the state court) slightly favored Republicans, but was politically competitive. He testified to this on the basis of the 2000 presidential performance numbers, which showed a 59-41% Bush-Gore performance (see ex. I-4 in the present case), and the 1999 gubernatorial election, in which the Republican candidate, Mike Parker, received over 50% of the vote. (See the rebuttal testimony of Cristina Correia in the state court trial). Based on his experience, Dr. McLemore concluded that this would be a competitive district in a congressional election. In addition, testimony in the present case showed that Republicans received 54% of the vote in the 2000 congressional elections in that district, while Democrats received 44%. .

20. But in the federal court plan, the Democratic presidential candidate only received 35% of the vote in the proposed 3rd district in 2000, while the Republican received 65%. The Republican candidate for Governor in 1999 received 57% while the Democrat received only 41%. And Republican candidates for Congress received 58% of the vote while Democrats received only 41%. The federal court is not a balanced plan and does not comply with the policies set forth in the state court plan and the order adopting it.

Respectfully submitted,



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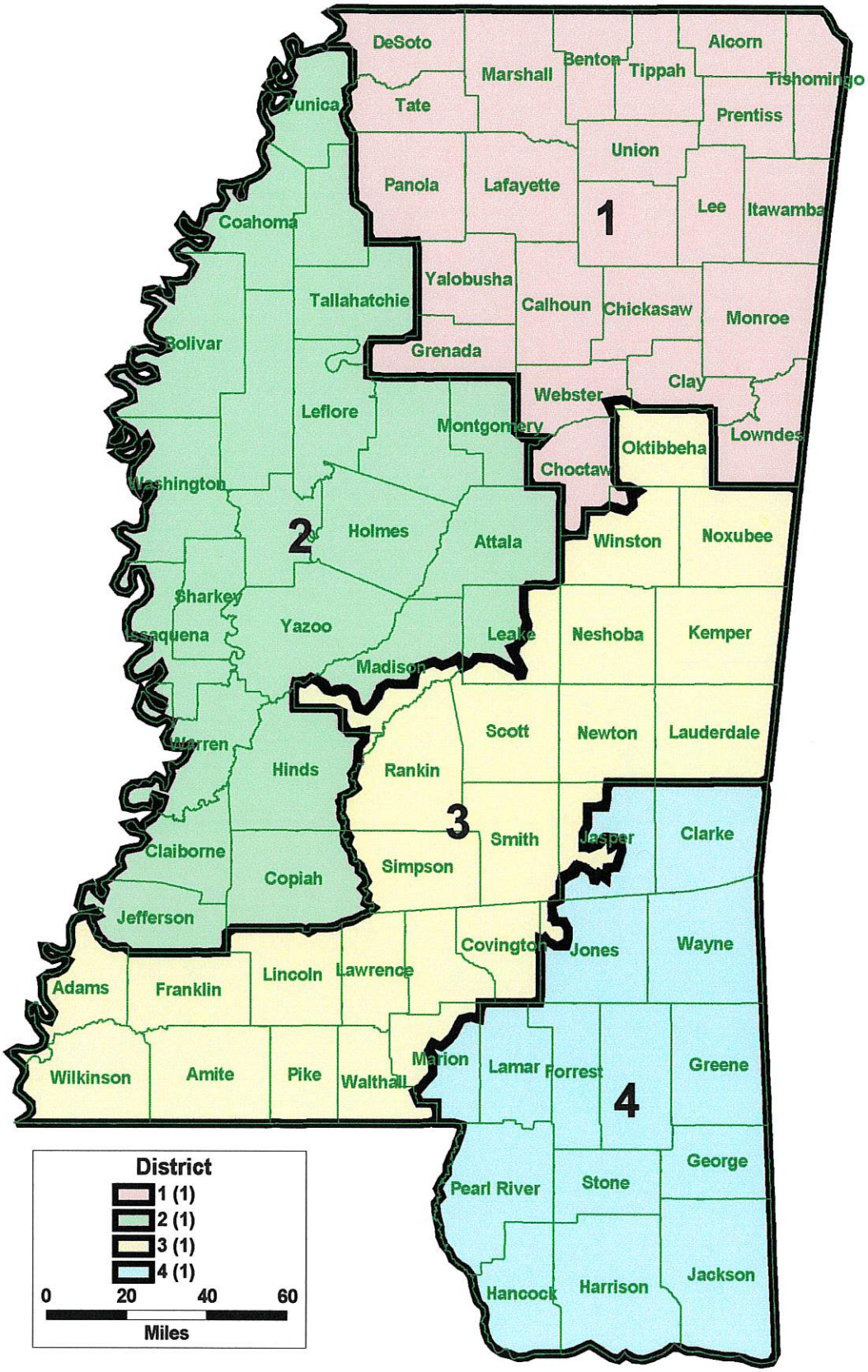
Congressional Redistricting Plan

Smith v. Clark

United States District Court

Southern District of Mississippi

February 4, 2002



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

SMITH, ET AL.,

Plaintiffs,

CA No. 3:01-CV-855WS

v.

CLARK, ET AL.,

Defendants.
_____/

AFFIDAVIT OF CRISTINA CORREIA

My name is Cristina Correia, I reside at 3276 Wynn Drive in Avondale Estates, Georgia and state the following:

1. I testified as an expert witness on behalf of the plaintiffs in Branch v. Clark (Chancery Court, Hinds County, Miss.).

2. I have reviewed the proposed redistricting plan encompassed in this Court's Order dated Feb. 4, 2002. I have prepared a chart titled "Population Overlap Analysis of Federal Court Proposed Plan and Current Congressional Districts" which is attached hereto as Exhibit 1. This chart describes for each of the districts in the Federal Court Proposed Plan what percentage of the district's population is made up of the population from each of the five current congressional districts. The percentages were calculated by comparing the census block assignments for each of the districts in the Federal Court Proposed Plan to the census block assignments for each of the five current congressional districts.

3. I have prepared two charts titled "Analysis of Shifts in Black Population in the State

Court Plan" and "Analysis of Shifts in Black Population in the Federal Court Proposed Plan." They are attached hereto as Exhibits 2 and 3. These charts describe what percentage of the black population in each of the five current congressional districts was placed in each of the four districts under the State Court Plan and the Federal Court Proposed Plan. These percentages where calculated by comparing the census block assignments for each of the districts in the Federal Court Proposed Plan to the census block assignments for each of the five current congressional districts.

4. I have calculated the number of votes for Bush and Gore in the 2000 Presidential Race in proposed District 3 in the federal court plan. The database used for this chart is part of the State of Mississippi's redistricting database. I joined the state's election database obtained from Mr. Booth to the census VTD layer using the GIS software, Maptitude for Redistricting. Once the election data is attached Maptitude will generate a report with summary totals for each candidate. The Democratic presidential candidate only received 35% of the vote in the proposed 3rd district in 2000, while the Republican received 65% (third party candidates excluded from database). By contrast, in the state court plan, the Republican received approximately 59% and the Democrat approximately 41%.

5. I also analyzed the number of Republican and Democratic votes in proposed District 3 in the federal court plan. The election data used for this chart was obtained on the Federal Elections Project website at <www.american.edu/academic.depts/spa/ccps/elections/states.html>. I was able to download the election data and add a field to the database for district assignment. I then filled in the district assignment for each precinct by matching the county name and where a county was split the precinct name to the county or precinct name in the Plan Components Report included in this

Court's Order of Feb. 4, 2002. Republican candidates for Congress received 57% of the vote in proposed District 3 while Democrats received only 41%. By contrast, in the state court plan, the Republican candidates received 54% and the Democrats 44%.

6. I have calculated the number of votes for Musgrove and Parker in the 1999 Governor's Race in proposed District 3. The database used for this chart was obtained from counsel for the Joint Congressional Redistricting Committee of the Mississippi Legislature. As I understand it, this is part of the State of Mississippi's redistricting database. I joined the election database to the census VTD layer using the GIS software, Maptitude for Redistricting. Once the election data is attached Maptitude will generate a report with summary totals for each candidate. The Republican candidate, Parker, received 57.2% of the vote in proposed District 3 while the Democrat, Musgrove, received 41.39%. By contrast, in the state court plan, Parker received 51.4% and Musgrove 46.9% in proposed District 3.

POPULATION ANALYSIS OF FEDERAL COURT PROPOSED PLAN AND CURRENT CONGRESSIONAL DISTRICTS

Federal Court Proposed Plan	Part from Current Cong. D. 1	Part from Current Cong. D. 2	Part from Current Cong. D. 3	Part from Current Cong. D. 4	Part from Current Cong. D. 5
1	83.3%	4.93%	11.77%	0	0
2	1.63%	67.27	2.83%	28.28%	0
3	.46%	.55%	60.74%	38.25%	0
4	0	0	7.48%	8.09%	84.44%

ANALYSIS OF SHIFTS IN BLACK POPULATION STATE COURT PLAN AND CURRENT CONGRESSIONAL DISTRICTS

CURRENT CONG. DIST	Total Pop.	AP Blk Pop.	Part AP Blk in State Court Plan D1	Part AP Blk in State Court Plan D2	Part AP Blk in State Court Plan D3	Part AP Blk in State Court Plan D4
1	607229	137143	100269 (73.11%)	17048 (12.43%)	19826 (14.46%)	0
2	517345	338790	4147 (1.22%)	334140 (98.63%)	503 (.15%)	0
3	588915	190351	35773 (18.79%)	4335 (2.28%)	139537 (73.31%)	10706 (5.63%)
4	530679	250703	0	96785 (38.61%)	132119 (52.7%)	21799 (8.7%)
5	600490	124721	0	0	0	124721 (100%)

Exhibit 2

ANALYSIS OF SHIFTS IN BLACK POPULATION FEDERAL COURT PROPOSED PLAN AND CURRENT CONGRESSIONAL DISTRICTS

CURRENT CONG. DIST	Total Pop.	AP Blk Pop.	Part AP Blk in Federal Court Proposed Plan D1	Part AP Blk in Federal Court Proposed Plan D2	Part AP Blk in Federal Court Proposed Plan D3	Part AP Blk in Federal Court Proposed Plan D4
1	607229	137143	131439 (95.84%)	4707 (3.43%)	997 (.73%)	0
2	517345	338790	18901 (5.58%)	318355 (93.97%)	1534 (.45%)	0
3	588915	190351	38265 (20.1%)	6549 (3.44%)	129181 (67.86%)	16356 (8.59%)
4	530679	250703	0	124491 (49.66)	106613 (42.53%)	19599 (7.82%)
5	600490	124721	0	0	0	124721 (100%)

6093

Exhibit 3

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 7th day of February, 2002.

Cristina Correia

Cristina Correia

CERTIFICATE OF SERVICE

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

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Herbert Lee, Jr.
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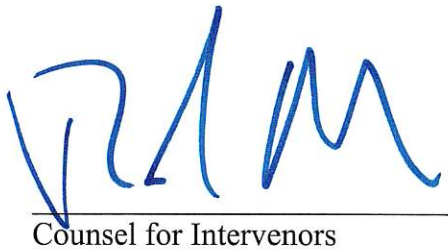
Jackson, MS 39209

This 8th day of February, 2002.



Counsel for Intervenors