Supreme Court of the United States

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

Appellants,

v.

JOHN ROBERT SMITH; SHIRLEY HALL; and GENE WALKER,

and

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,

Appellees.

On Appeal from the United States District Court for the Southern District of Mississippi

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does Article I, § 4 of the United States Constitution deprive state courts of general jurisdiction of all power in congressional redistricting cases in the many states where no state statute explicitly speaks of such power?

2. If a state court, in the course of adhering to developments in the law, assumes jurisdiction and hears a type of voting rights case it has never heard before, does it thereby "enact or seek to administer [a] voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force and effect on November 1, 1964" (to quote Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c), such that the mere assumption of jurisdiction (independent of any remedial order) must be precleared by the United States Attorney General or the federal district court for the District of Columbia under Section 5?

3. Under Section 5, when a redistricting plan adopted by state authorities has (to quote Section 5) "been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission," may a federal district court nevertheless prevent enforcement and extend the statutory sixty day review period on the basis of the Attorney General's request for additional information if the information sought is unnecessary and irrelevant to the Section 5 retrogression evaluation?

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JURISDICTIONAL STATEMENT

Appellants Beatrice Branch, et al., ask this Court to note probable jurisdiction and reverse the decision of the three-judge court of the United States District Court for the Southern District of Mississippi enjoining implementation of the congressional redistricting plan adopted by the state courts of Mississippi in the wake of the legislature's failure to enact a plan.

OPINIONS BELOW

The opinions and orders of the District Court are reproduced in the appendix as follows: February 26, 2002 (final judgment), 1a; February 26, 2002 (opinion), 4a; February 19, 2002, 25a; February 4, 2002, 62a; January 15, 2002, 90a; December 5, 2001, 107a. The December 13, 2001 order of the Supreme Court of Mississippi is reproduced at 110a. The opinions and orders of the Chancery Court of Hinds County, Mississippi are reproduced as follows: December 31, 2001 (judgment), 113a; December 31, 2001 (order), 115a; December 21, 2001, 117a; December 13, 2001, 161a; December 13, 2001, 164a; December 13, 2001, 166a; December 7, 2001, 168a; December 7, 2001, 171a; December 7, 2001, 175a; December 6, 2001, 178a; December 3, 2001, 180a; December 3, 2001, 183a; November 19, 2001, 187a. None of the opinions and orders are reported.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1253.

STATUTES AND CONSTITUTIONAL PROVISIONS

Article I, § 4 of the United States Constitution provides in part:

> The Times, Places and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as

to the Places of Chusing Senators.

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, provides in part:

> Whenever a State or political subdivision subject to [this section] shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . such qualification, prerequisite, standard, practice, or procedure may be enforced . . . if [it] has been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . .

STATEMENT OF THE CASE

With the 2000 census, Mississippi lost a seat in Congress, its delegation in the next House of Representatives reduced from five to four. In a November special session, the Mississippi legislature could not agree on a new redistricting plan. This was the first time in several decades that the legislature had not adopted a congressional plan after the decennial census. *See*, FRANK R. PARKER, BLACK VOTES COUNT 42 (mentioning 1932, 1952, and 1962 plans); *Jordan v. Winter*, 541 F. Supp. 1135, 1138, 1142 (N.D. Miss. 1982), *rev'd*, 461 U.S. 921 (1983) (mentioning 1972 and 1981 plans). A lawsuit was filed by the appellants here, Beatrice Branch, et al., in the Chancery Court of Hinds County, Mississippi, asking the Court to adopt a plan if the legislature failed to do so. The state defendants (the Governor, Secretary of State, and Attorney General, who collectively comprise the State Board of Election Commissioners) initially moved to dismiss the case, as did several other voters (the Mauldin state court intervenors) who intervened and opposed the plaintiffs. The motions to dismiss

were denied. App. 183a, 187a.[1] The matter was reviewed by the Supreme Court of Mississippi on an interlocutory pretrial petition challenging, among other things, the Chancery Court's jurisdiction. In an order joined by all of the nine Justices except one who dissented without opinion and one who did not participate, the Court held that "the Hinds County Chancery Court has jurisdiction of this matter" and 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." *In Re Mauldin*, No. 2001-M-01891 (Miss. Dec. 13, 2001), App.110a-112a.

The Chancery Court then heard the case during a five-day trial spanning December 14-19. Eleven different plans were submitted into evidence, some by the Branch plaintiffs and others by the Mauldin intervenors. The state defendants did not propose plans, present evidence, or offer argument. On December 21, the Court adopted what was known as Branch Plan 2A. App. 117a .[2]

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[1] The entire state court record, as well as the Section 5 preclearance submission and subsequent Department of Justice letters, have been made a part of the present federal court record.

[2] As the Chancery Court explained, the plan contained a zero deviation and no one contended it violated the substantive standards of either Section 2 or Section 5 of the Voting Rights Act. While in the pre-existing plan, one of five districts was majority black, one of four is majority black in the state court plan. Under the existing five-district plan, the majority-black District 2 had a 61.1% black voting age population (BVAP) under 2000 census data. Under the state court's four-district configuration, which necessarily requires larger districts, District 2 has a 59.02% BVAP, thus retaining a strong BVAP majority. Also, the Chancery Court stated that, among other considerations, it adopted the plan that best provided parity and a competitive district between the supporters of the two incumbents who were thrown together by the loss of a seat. App. 117a-135a.

The state court plan was submitted by the Mississippi Attorney General to the United States Attorney General for Section 5 review on December 26, well over sixty days prior to the March 1, 2002 candidate qualifying deadline and over five months prior to the June 4 primary election. App. 221a. In an abundance of caution, approval also was requested of the State Supreme Court's December 13 order in *In re Mauldin*, *id.* 227a-228a , but with the usual caveat that the submission of something does not mean the State concedes it is covered by Section 5. *Id.* 225a. On the same day of the submission, December 26, the Deputy Chief of the Voting Section, Civil Rights Division, United States Department of Justice (DOJ), acknowledged receipt in writing and stated the submission "will commence the sixty (60) day time period for administrative review under Section 5 of the Voting Rights Act." *Id.* 220a. The Mississippi Attorney General's submission requested a decision by January 31, 2002 in light of the March 1 qualifying deadline. *Id.* 221-222a, 225a.

In the meantime, the present case was filed asking the United States District Court for the Southern District of Mississippi to order at-large congressional elections in Mississippi, or alternatively to design the plan itself. Named as defendants were the same state officials named in the state court case, as well as the Mississippi Republican and Democratic executive committees. The Branch state court plaintiffs (who are appellants here) were permitted to intervene and advocate deference to the state court plan.

On January 15, 2002, the federal court issued an order stating: "it now appears uncertain whether the State authorities can have a redistricting plan in place by March 1, 2002," and "it is necessary to assert our jurisdiction and to . . . begin to draft a plan for reapportioning Mississippi's congressional districts . . . ." App. 91a. In that order, the federal court concluded not only that the state court plan was a voting change requiring

preclearance, but that the Mississippi Supreme Court's December 13 decision affirming the Chancery Court's jurisdiction also required preclearance. Although never suggesting that the redistricting plan itself was retrogressive, the federal court stated that it had "serious doubts" as to whether the plan and the December 13 decision would be precleared prior to the March 1 qualifying deadline. *Id.* 98a. With respect to the December 13 decision, the federal court said: "it is not at all clear that this change is not retrogressive with respect to minority voting rights, in the sense that redistricting decisions will depend on the individual views of an individual judge, elected by a small percentage of the State's voters." *Id.* 100a. The federal court added:

> [I]t appears to us that, at the very least, the Attorney General of the United States will consider these implications very carefully, and might perhaps request more information from State authorities to clarify what is embodied in the change and the consequences thereof.

Id. 100a. In light of its doubts about preclearance, the federal court said it would set the case for trial.

In the state case, the state defendants did not appeal the Chancery Court decision. However, the Mauldin state court intervenors and the Mississippi Republican Executive Committee (MREC) did.[3] But while claiming to be aggrieved

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[3] The MREC was named a defendant in the present federal case. As a practical matter, it has aligned itself with the Smith federal plaintiffs. The basis for the MREC's standing in the state court proceedings is unclear. Neither the MREC nor the Mississippi Democratic Executive Committee (MDEC) was named as a defendant and neither sought to intervene in the state case, although they could have done so at any point. On December 6, at the request of the state defendants, the Chancery Court ordered the MREC and MDEC joined as necessary parties. App.178a. However, on December 7, the Court reconsidered and vacated the ruling, nevertheless making it clear

by the state court plan, they did not notice their appeal until January 25, 2002, App. 241a, twenty-five days after the Chancery Court's December 31 final judgment, *Id.* 113a, and thirty-five days after its December 21order adopting the plan. *Id.* 117a. None of the state court appellants sought a stay of the Chancery Court plan in the Mississippi Supreme Court or any form of expedited appellate review.

Instead, the MREC and the Smith federal court plaintiffs urged the federal court to displace the state court plan and design its own.[4] Trial commenced in federal court on January 28 and concluded on January 29. The Smith federal court plaintiffs and the MREC submitted a number of proposed plans. The Branch federal court intervenors (who are appellants here and plaintiffs in the state court) continued to urge the federal court to defer to the state court plan. As in the state court, the state defendants did not participate in the federal court trial or offer plans. Neither did the defendant Mississippi Democratic Executive Committee (MDEC). No party in the federal case asserted that the particular lines in the state court plan violated the Fourteenth Amendment, the Voting Rights Act, or any other provision of federal law. Although not challenging the lines themselves, the Smith plaintiffs and the MREC contended that the state courts have no power to adopt a plan in light of Article I, § 4 of the federal constitution.

On February 4, 2002, the Federal District Court announced its own redistricting configuration, stating that its plan would be implemented "absent timely preclearance" of the state court

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that either or both of the executive committees remained free to intervene voluntarily. *Id.* 161a-163a, 171a. Neither did so. It is unclear why the MREC joined in the eventual state court direct appeal.

[4] The attorneys for the Mauldin state court intervenors are among those representing the Smith federal court plaintiffs.

plan. App. 62a. The federal plan was significantly different from the state court's. The federal court made no pretense of adhering to the policies reflected in the state court configuration, particularly in District 3, which in both plans combined the two junior incumbents, one Republican and one Democrat, but which was drawn very differently in the two plans. However, with respect to the majority black district, District 2, the federal plan contained a 59.2% BVAP majority, essentially the same percentage as the 59.0% figure in the state court plan, although the exact geographical composition of the district was different. (The federal plan is described at app. 64a-65a, the state plan at app. 134a-135a).

On February 14, fifty days after the submission of the state court plan, the Chief of the Voting Section of the Civil Rights Division of the DOJ faxed a letter to the Mississippi Attorney General. App. 191a. The letter explained that "the Department is not formally seeking additional information regarding the redistricting plan." *Id.* 195a. Instead, it propounded three pages of questions that it said related to the state supreme court's December 13 ruling, adding that it believed the "basis for the . . . decision is unclear." The Department asked for (among other things) the "state's view of the legal basis for the Mississippi Supreme Court's decision to vest a Chancery Court with jurisdiction to create and implement a statewide redistricting plan;" "detailed information about the nature and structure of state Chancery Courts, e.g., the number . . . of judges, how [they] are selected, . . . the demographic breakdown of the districts from which such judges are selected; . . . the limits imposed on Chancery Court jurisdiction;" a description of "any safeguards in place to ensure that a particular Chancery Court judge who creates and imposes a state-wide redistricting plan has him/herself been selected in a manner reflecting the political influence of the State's minority populations;" a description of "any existing legal procedure that would prevent

a potential litigant from 'forum shopping';" an "explanat[ion of] any laws and/or court rules . . . impacting the selection of venue for state Chancery Courts," and an "explana[tion of] whether Chancery Court decisions are appealable, by right, by any party to the suit." *Id.* 193a-195a. Additionally, the letter asked: "Please explain the state's view of the relationship between this change in procedure [the December 13 ruling] and Miss. Code Annot. 23-15-1039." *Id.* 193a-194a. (§ 1039 provides that if the number of congressional representatives is decreased and the next election is held "before the districts shall have changed to conform to the new apportionment," representatives shall be chosen at-large). According to the letter, "*[the] sixty-day review period will begin when we receive the information specified above*, but we will make all efforts to expedite our review to the extent possible." *Id.* 196a (emphasis added). In addition, the letter stated:

> With respect to the actual congressional redistricting plan submitted by the state, we have concerns about the Department reviewing it while the plan . . . is pending final approval by the Mississippi Supreme Court on direct appeal. In that regard, please see the attached letter to the Chief Justice of that Court, sent this date.

Id. 195a.

The last reference was to an unusual letter sent that same day from the Assistant Attorney General, Civil Rights Division, to the Chief Justice of the Supreme Court of Mississippi. App. 197a. The letter referred to the state court plan that had been submitted for preclearance and stated: "[T]hat plan, *pursuant to an order of your honorable Court*, was originally drafted by the Chancery Court of . . . Hinds County after trial and is now pending before your Court on direct appeal." *Id.* (emphasis added). The letter then stated: "I write to request respectfully that the Mississippi Supreme Court consider expediting its

review of the appeal before it to the extent possible." *Id.* 198a. This request was made even though the United States government is not a party to the state court case, and even though the appellants in that case have not sought from the Mississippi Supreme Court either expedited review or a stay of the Chancery Court plan.

On February 19, the Attorney General of Mississippi submitted a comprehensive response to the Department's February 14 request for more information. App. 200a.

Also on February 19, the Federal District Court issued an opinion stating:

> [I]f the Chancery Court plan has not been precleared before the close of business on Monday, February 25, 2002, the congressional redistricting plan attached to our order of February 4, 2002, shall operate as the plan for congressional districts for the State of Mississippi for the 2002 congressional elections . . . .

App. 61a.

In that opinion, the federal court held that no deference was required because "as of this date, no part of the [state court] plan . . . has been approved by the Attorney General," and because the state court plan, "having been drafted by the Intervenors (plaintiffs in Chancery Court), not by the Chancery Court, and not by the Mississippi Legislature," is "no expression, certainly no clear expression, of state policy on congressional redistricting to which we must defer." App. 31a-32a. The federal court agreed with the DOJ that its request for information started the sixty day review period anew. *Id.* 26a n.1, 33a-34a n.3. The Court also indicated that even if preclearance is granted, it might enjoin the state court plan and implement its own because of the "serious constitutional issue" of whether Article I, § 4 of the United States Constitution prevents the Mississippi courts from adopting congressional

redistricting plans even when the legislature defaults. *Id.* 60a n.7.

In the meantime, nothing more was heard from the DOJ. Monday, February 25, was the first weekday following the sixtieth day after the state court plan had been submitted. It passed uneventfully. On the morning of February 26, the Federal District Court enjoined implementation of the state court plan. App.1a. This was based not only on the absence of preclearance, but also "for the reason that [the plan] violates Article I, Section 4 of the United States Constitution." *Id.* 5a. According to the District Court, a state court cannot adopt a remedial congressional redistricting plan, even where the legislature defaults, unless "some act of the legislature" provides that the state court may do so. *Id.* 7a. The general grant of equitable authority to the courts under state law is not enough, said the District Court. *Id.* 20a. It thus concluded: "[I]rrespective of whether the chancery court plan is precleared, [it] cannot be implemented by the State of Mississippi because . . . the adoption of it . . . violates Article I, Section 4." *Id.* 22a. The Court's injunction required that its own plan be used in the 2002 congressional elections and "all succeeding congressional . . . elections . . . until the State of Mississippi produces a constitutional congressional redistricting plan that is precleared in accordance with the procedures in Section 5 of the Voting Rights Act of 1965." *Id.* 2a.

Shortly thereafter on the same day, February 26, the appellants noticed their appeal. App. 239a. The prior week, on February 20, they had lodged with this Court an application for stay and injunction pending appeal that formally was filed after the District Court's February 26 injunction. Later that same day, February 26, Justice Scalia denied the application. It was resubmitted to Justice Souter, who referred it to the full Court,

which denied it on March 1, 2002. This appeal follows.[5]

THE QUESTIONS ARE SUBSTANTIAL

In *Growe v. Emison*, this Court unanimously held that both legislative and congressional redistricting are governed by the longstanding principle that "state courts have a significant role in redistricting." 507 U.S. 25, 33 (1993). In conformity with that principle, the state courts of Mississippi confronted the problem, unprecedented in that state in the years after *Baker v. Carr*, 369 U.S. 186 (1962), of a total legislative failure to redraw congressional districts after a census. The Chancery Court adopted a plan and it was submitted for preclearance over sixty days prior to the qualifying deadline. None of the parties sought a stay from the Mississippi Supreme Court. Instead, the Federal District Court stepped in and displaced the plan with an unprecedented interpretation of Art. I, § 4 that undermines *Growe v. Emison* and, if affirmed, will leave congressional redistricting disputes almost entirely to the federal courts.

In addition, the Department of Justice subverted the role of the state courts by declining to provide a preclearance decision within the sixty day statutory review period even though the state court plan was properly and timely submitted. Instead, on the fiftieth day, the Department requested unnecessary and irrelevant information about matters that are not voting changes subject to Section 5 review. The District Court incorrectly ruled that this extended the statutory review period for an additional sixty days after the state Attorney General's response. Armed with this extension, the DOJ deliberately allowed the original sixty days and the qualifying deadline to pass without a decision. Even though Section 5's language provides that a plan

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[5] No further word from the DOJ has arrived as of March 26, 2002 despite the Department's February 14 pledge "to expedite our review to the extent possible."

is precleared if it "has been submitted . . . to the Attorney General and [he or she] has not interposed an objection within sixty days," the District Court held the plan had not been precleared and enjoined it on this ground as well.

Given that the District Court's rulings dramatically undermine the proper role of state courts in redistricting cases and interpret Section 5 in a manner distinctly contrary to the statutory language, this Court should note probable jurisdiction and resolve the significant constitutional and statutory questions that arise here.

I. THE DISTRICT COURT'S DECISION, IF AFFIRMED, WOULD OVERRULE *GROWE V. EMISON* AND PRECLUDE THE COURTS OF MOST STATES FROM PLAYING ANY ROLE IN CONGRESSIONAL REDISTRICTING, EVEN WHEN LEGISLATURES DEFAULT.

In *Growe v. Emison,* which involved both legislative and congressional apportionment, this Court said: "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." 507 U.S. at 33, *quoting, Scott v. Germano,* 381 U.S. 407, 409 (1965). Moreover, "federal judges [must] 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,* 507 U.S. at 33.

Despite the unanimous holding in *Growe* applying this principle to congressional redistricting, the District Court here held that, in light of Article I, § 4, the courts of Mississippi and all other states are powerless to adopt a congressional plan in the wake of a legislative default unless an "enactment of the . . . legislature grants to the . . . court the power to redistrict . . . for congressional elections." App. 7a. State law provisions giving

the courts general jurisdiction to enforce the law through equitable relief are insufficient, said the District Court. *Id.* 20a.

By holding that the state court plan violates Article I, § 4, the District Court concluded either that this Court was heedless of that provision when it unanimously decided *Growe* as it did or that it silently hinged its decision on two particular Minnesota statutes that never were mentioned in the opinion. The District Court distinguished *Growe* on the grounds that "Article I, Section 4 was not raised in *Growe* . . . and . . . there was some, albeit tenuous, legislative authority for the Minnesota Supreme Court's action in *Growe*." App. 18a. That "legislative authority" involved two Minnesota statutes dealing not with the role of state courts in redistricting, but with the authority of the Chief Justice of the state to "assign any judge of any court to serve . . . in a judicial district not that judge's own," and "to direct any judge . . . to hold court in any county or district where need therefor exists." App. 16a n.8, *quoting*, Minn. Stat. §§ 2.724 and 480.16. The statutes are general in their scope and do not refer to any particular type of case, redistricting or otherwise. They were never mentioned in *Growe*, but instead in a Minnesota Supreme Court opinion eight years later discussing the Chief Justice's authority to appoint a special redistricting panel of three judges to hear the case (which is also what happened in the state court case that formed the backdrop of *Growe*). App. 16a, *citing, Cotlow v. Growe*, 622 N.W.2d 561, 562 (Minn. 2001). The District Court here never explained how these statutes would meet its requirement of an "enactment of the . . . legislature grant[ing] the . . . court the power to redistrict . . . for congressional elections."[6]

Clearly, if the District Court's decision is affirmed, *Growe*

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[6] Mississippi has a similar statute allowing the Chief Justice to assign judges throughout the state. Miss Code Ann. § 9-1-105(2), (6).

v. Emison will be overruled. Minnesota itself does not satisfy the District Court's Art. I, § 4 formula. Moreover, Minnesota is not alone in containing no state statute or constitutional provision that speaks specifically of state court jurisdiction in congressional redistricting cases. Very few states have them. Yet state courts, particularly in the wake of *Growe*, understandably assume this jurisdiction exists. In the present redistricting cycle, courts of a number of states stepped in when legislatures defaulted and assumed jurisdiction in congressional redistricting cases without citing any state statutes that speak to it. *See, e.g., Perry v. Del Rio*, 2001 WL 1285081 (Tex. Oct. 19, 2001); *Beauprez v. Avalos*, 2002 WL 386713 (Colo. Mar 13, 2002) (affirming adoption of plan); *Cotlow v. Growe*, 622 N.W.2d at 563-64; *Zachman v. Kiffmeyer*, No. C0-01-160 (Minn. Special Redist. Panel, Mar. 19, 2002) (adopting plan); *Jepsen v. Vigil-Giron*, No. D0101-CV-2002-02177 (Dist. Ct. of Santa Fe Cty., N.M., Jan. 2, 2002) (adopting plan); *Perrin v. Kitzhaber*, No. 0107-07021 (Cir. Ct. of Multnomah Cty., Oregon, Oct. 19, 2001) (adopting plan).

Thus, affirmance of the District Court's decision not only will overrule *Growe*, but will leave courts of the vast majority of the states devoid of any authority to hear congressional redistricting cases and adopt congressional redistricting plans, even when legislatures fail to act. The field will be left almost entirely to the federal courts.

The District Court here never considered this. In addition, the District Court never confronted or even acknowledged the fact that the Mississippi courts did not deprive the legislature of any of its power. Art. I, § 4 provides that "[t]he Times, Places and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof." But the Mississippi legislature chose not to prescribe the shape of the districts. Someone had to do it. Nothing in Art. I, § 4 forbids the state courts from enforcing the

law and adopting a plan so that elections can go forward during this difficult situation.

Having lost no power, of course, the legislature remains free to assert its will, prescribe the shape of the districts and supersede the state court plan. The Supreme Court of Mississippi's December 13 order specifically held that any chancery court plan "will remain in effect, *subject to* any congressional redistricting plan which may be timely adopted by the legislature." App. 111a (emphasis added).

This case is unlike *Bush v. Gore*, 531 U.S. 110 (2000), where three justices of this Court concluded in concurrence that the Florida Supreme Court's ruling infringed upon the legislature's decision regarding the standards for choosing presidential electors, thus transgressing Article II, § 1's command that each state appoint its electors "in such Manner as the Legislature thereof may direct." *Id.* at 111 (Rehnquist, C.J., concurring). Contrary to that situation, no one here contended that the pre-existing legislative scheme — in this case, the prior congressional districting plan — could be utilized. It had too many districts and obviously violated what the Mississippi Supreme Court has described as "the one person, one vote standard under the 14th Amendment of the United States Constitution as well as under Miss. Const. Art. 3, § 14." *Adams County Election Commission v. Sanders*, 586 So. 2d 829, 831 (Miss. 1991). Moreover, as previously mentioned, the legislative will here was not thwarted. The legislature retains the prerogative of superseding the state court's decision by enacting its own plan. This is not a case where the state courts cast aside "the clearly expressed intent of the legislature." *Bush v. Gore*, 531 U.S. at 120 (Rehnquist, C.J., concurring).

This Court already has held that the reference in Art. I, §4 to the power of "Congress . . . at any time [to] make or alter such Regulations" for the manner of electing congressional

representatives does not preclude courts from adjudicating congressional redistricting cases and enforcing the law. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court discussed Justice Frankfurter's opinion in *Colegrove v. Green*, 328 U.S. 549 (1946), and said:

> Mr. Justice Frankfurter's Colegrove opinion contended that Art. I, 4, of the Constitution had given Congress "exclusive authority" to protect the right of citizens to vote for Congressmen, but we made it clear in Baker that nothing in the language of that article gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in *Marbury v. Madison*, 1 Cranch 137, in 1803. Cf. *Gibbons v. Ogden*, 9 Wheat. 1.

376 U.S. at 6-7 (footnotes omitted).

Surely, if the reference in Art. I, § 4 to the power of Congress does not immunize congressional redistricting from judicial enforcement of the law, neither does the reference to legislatures. While the *Wesberry* opinion was referring to the enforcement of the federal constitution, federal courts are not the exclusive guardians of that constitution. State courts also are obligated and entrusted to enforce it. *See, Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340-44 (1816). When the Constitution and Art. I, § 4 was drafted, there were no lower federal courts. The task of judicial enforcement of the constitution was borne by the state courts. That being the case, Art. I, § 4 cannot be said to divest state courts of jurisdiction to enforce the law in matters of congressional redistricting and thereby leave the task

exclusively to federal courts.[7]

In canvassing the precedents, the District Court here found only three cases interpreting the relevant clause of Article I, § 4: *Davis v. Hildebrant*, 241 U.S. 565 (1916) (nullification of the legislature's congressional redistricting plan by application of a state constitutional provision allowing the people to disapprove any law through popular referendum does not violate Article I, § 4); *Smiley v. Holm*, 285 U.S. 355 (1932) (governor's veto of legislature's congressional redistricting plan does not violate Article I, § 4); and *Grills v. Branigin*, 284 F. Supp. 176, 178 (S.D. Ind.), *aff'd*, 391 U.S. 364 (1968) (Article I, § 4 does not permit a state board of elections to draw a congressional redistricting plan to displace that of the legislature). According to the District Court, "these three cases . . . have made clear that the reference to 'Legislature' in Article I, Section 4 is to the law-making body and *processes of the state*." App. 13a (emphasis added).

This, however, supports the exercise of state court authority rather than contradicts it. In most states, including

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[7] Although the state court complaint mentioned no specific provision of federal law, it asked the court "to insure enforcement of the laws" by adopting a plan if the legislature defaulted. Of course, the state courts were required to enforce both federal and state law. *See, Hathorn v. Lovorn*, 457 U.S. 255, 258, 269-70 (1982) (in a case where state court complaint raised only state law claim, this Court held that state courts have "the duty" to enforce federal law). If Art. 1, § 4 does not preclude state courts from enforcing federal law in this arena, nothing about it precludes them also from enforcing state law (so long as state law does not conflict with federal law). And with respect to Art. I, § 4, nothing suggests that the power to enforce the law is contingent upon whether the complaint specifically mentions federal law or not. As this Court pointed out when requiring in *Growe* that federal courts defer to state courts in these matters: "*Germano* . . . does not require that the federal and state-court complaints be identical; it instead *focuses on the nature of the relief being requested*: reapportionment of election districts." 507 U.S. at 35 (emphasis added), *citing, Scott v. Germano*.

Mississippi, the "processes of the state"authorize the courts to enforce the law through equitable remedies. Just as this Court held in *Davis* that the application of the state constitutional authority of the people of Ohio to nullify a legislative enactment did not countermand Art. I, § 4 when congressional redistricting was at issue, the application of the state constitutional and statutory authority of Mississippi's chancery courts over all matters in equity, Miss. Const. Art. 6, § 159, Miss. Code Ann. § 9-5-81, does not violate Art. I, § 4 in such a situation. And just as this Court held in *Smiley* that the gubernatorial veto generally applicable to legislative enactments can be exercised with respect to congressional redistricting without violating Art. I, § 4, so the equitable authority of courts to enforce the law as a general matter can be exercised with respect to congressional redistricting without transgressing that provision. In *Smiley*, this Court said that Art. I, § 4 does *not* "render[] inapplicable the conditions which attach to the making of state laws" such as, in that instance, the gubernatorial veto. 285 U.S. at 365. In Mississippi, as in most states, the "conditions which attach to the making of state laws" include the power of the courts to take the necessary steps to enforce the laws through equitable relief when, as here, the legislature leaves a gap.[8]

If anything, the situations in *Davis* and *Smiley* are more of an affront to Art. I, § 4 than what happened here. In those cases, a non-legislative entity nullified the legislature's congressional plan. Here, the state courts acted only when the legislature specifically declined to act. Surely, if Art. I, § 4 was

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[8] In *Grills*, when holding that the state election board could not draw congressional plans, the court said that the board does not "possess the legislative power . . . nor . . . judicial power under the Indiana constitution," 284 F. Supp. at 180. This reference to judicial power implies that the state courts can exercise equitable authority and draw such plans without violating Art. I, § 4.

not transgressed there, it was not violated here.

Because the District Court's decision so dramatically conflicts with this Court's decision in *Growe*, contravenes the understanding that most state courts have of their authority in the wake of *Growe*, leaves (if affirmed) most state courts without any authority in matters of congressional redistricting, and appears inconsistent with the decisions in *Davis* and *Smiley*, this Court should note probable jurisdiction.[9]

II. CONTRARY TO THE HOLDING OF THE DISTRICT COURT, THE STATE COURT PLAN WAS PRECLEARED WHEN THE ATTORNEY GENERAL DID NOT OBJECT TO IT WITHIN SIXTY DAYS OF ITS SUBMISSION.

Section 5 provides that when any covered state "enact[s] or seek[s] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," it may obtain the requisite federal preclearance "if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . ."

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[9] This appeal raises issues relating not only to Art. I, § 4, but also to Section 5 of the Voting Rights Act. Of course, the validity of the state court's plan depends on whether it ultimately is precleared under Section 5. The plan also is the subject of an appeal in the Supreme Court of Mississippi. But no matter how the preclearance process and the state court appeal are resolved, the Art. I, § 4 issue will remain alive. The federal injunction premised upon Art. I, § 4 prevents the state courts from implementing *any* plan, whether it is the existing state court plan or some alternative that those courts adopt in the future if the existing plan is not precleared or is vacated on appeal.

The December 26, 2001 preclearance submission listed three separate items for possible preclearance: (1) the December 21, 2001 Chancery Court order substantively adopting a new congressional redistricting plan, (2) the December 13 Mississippi Supreme Court ruling in *In Re Mauldin* that the chancery court had jurisdiction to hear the case and adopt a plan, and (3) the December 21 Chancery Court order "to the extent that it constitutes a departure from Miss. Code Ann. Section 23-15-1039." App. 227a-229a.[10]

The February 14 Department of Justice letter did not seek more information regarding the first change. "[T]he Department is not formally seeking additional information regarding the redistricting plan." App. 195a. Most of the questions relate to the second item. One question purportedly relates to the third, which involves Miss. Code Ann. § 23-15-1039, a statute providing that if the number of congressional representatives is decreased and the next election is held "before the districts shall have changed to conform to the new apportionment," representatives shall be chosen at-large. Although acknowledging that the DOJ "has not sought additional information regarding the redistricting plan," the District Court nevertheless extended the sixty day statutory review period because, it said, the latter two items involve a "newly asserted change in redistricting authority" that, if not

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[10] After listing the first item submitted, which was the Chancery Court's "substantive[] adopt[ion of] a new congressional redistricting plan," the Mississippi Attorney General's office submitted the other two by listing "the following additional matters which *may* constitute a covered change . . . ." App. 227a (emphasis added). The submission also expressly reserved all objections as to whether the submission, "or any parts thereof," are subject to Section 5's preclearance requirements. *Id.* 225a. Also, contrary to the suggestion of the District Court, app. 97a-98a, the appellants did not conceded that anything other than the first of the three items listed above is a voting change subject to Section 5.

precleared, "render[] the plan itself a legal nullity under the Voting Rights Act." *Id.* 33a-34a n.3.

In the remainder of this document, we contend (a) the December 13 state supreme court ruling is not a voting change, (b) the December 13 Supreme Court order and December 21 Chancery Court order do not conflict with § 23-15-1039 and therefore do not alter the provisions or operation of that statute in a way that constitutes a voting change, and (c) even if one or both of the foregoing are voting changes, the information requested by DOJ on February 14 is unnecessary and irrelevant to the § 5 retrogression evaluation. If we are correct about points (a) and (b), the additional information requested does not relate to any voting changes, and the voting change that did occur — the redrawing of the lines — was precleared when the sixtieth day expired on February 25 without objection. If we are correct about point (c), it raises the question left open in *Georgia v. United States*, 411 U.S. 526 (1973) — whether a request for additional information that is "unnecessary or irrelevant to § 5 evaluation of the submitted reapportionment plan," *id.* at 540, extends the review period beyond the statutory sixty days. If the period was not extended, the state court plan has been precleared.

A. The December 13 Order of the Mississippi Supreme Court in *In Re Mauldin* Is Not a Voting Change.

The December 13 Mississippi Supreme Court's order in *In re Maudlin* confirming the Chancery Court's jurisdiction does not involve (to quote Section 5) the "enact[ment] or . . . administ[ration] [of] any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964."

All agree that the new districting plan adopted by the state courts must be precleared. This Court said as much in *Hathorn v. Lovorn*, 457 U.S. 255, 269-70 (1982), when it held — in

reviewing a Mississippi chancery court order implementing a new election scheme — that state courts must enforce Section 5 and insure preclearance of any voting changes they mandate. But the Court never suggested that preclearance also was required of the decision by the state courts to exercise jurisdiction in the first place.

In contending the December 13 decision constitutes a voting change, the District Court, App. 96a-97a, cited a 1932 Mississippi Supreme Court decision declining to adjudicate a congressional redistricting claim and saying, "courts of equity deal alone with civil and property rights and not with political rights." *Brumfield v. Brock*, 142 So. 745, 746 (Miss. 1932).[11] That case, like *Barnes v. Barnett*, 129 So. 2d 638, 641 (Miss. 1961), arose at a time when the "almost universal rule [was] that the apportionment . . . of congressional districts is a political question and not a judicial one." *Barnes*, 129 So. 2d at 641. As the Court said in *Barnes*, "the leading case so holding is *Colegrove v. Green*, 1946, 328 U.S. 549." 129 So. 2d at 641. But subsequent to *Barnes*, this Court overruled *Colegrove v. Green* in the landmark decision of *Baker v. Carr*, 369 U.S. 186 (1962). Afterwards, state courts in Mississippi, like courts throughout the land, began hearing redistricting cases involving all types of elected bodies. *See, e.g., Hathorn v. Lovorn*; *Carter v. Luke*, 399 So. 2d 1356 (Miss. 1981); *Brooks v. Hobbie*, 631 So. 2d 883, 885-86 (Ala. 1993) (overruling pre-*Baker* Alabama precedent and stating: "In light of *Baker v. Carr* and its progeny, it is not longer legitimate for a court to decline to enforce the right of every citizen to [an equal] vote"). But no one suggested that preclearance was

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[11] The District Court also intimated that the December 13 order constituted a voting change from the formula contained in Miss. Code Ann. § 23-15-1039. App. 96a-98a. The next section of this document explains that this is not a voting change.

required of the mere decision to exercise jurisdiction.

Indeed, if that sort of decision is a voting change, an entire legion of post-1964 ventures by state courts into the arena of voting rights in covered jurisdictions has violated Section 5. And the violations are ongoing. For example, prior to *Reynolds v. Sims*, 377 U.S. 533 (1964), the Fourteenth Amendment was widely considered not to require population equality among state legislative and local governmental districts and few, if any, state courts required it. And prior to 1965, the Voting Rights Act did not exist. Of course, after these developments, state courts began to uphold the one-person, one-vote rule and the Voting Rights Act in a variety of contexts. We are aware of no courts, however, that believed they had to obtain preclearance of the threshold decisions to hear the cases (as opposed to the actual changes ordered at the conclusion of the cases) and are aware of none that have done so.

But under the theory of the District Court here, preclearance was required before any of those state courts could apply these new principles of law and exercise jurisdiction over any type of claim they had not adjudicated prior to the November 1, 1964, which is the trigger date for Section 5. According to that theory, if a trial court exercises jurisdiction post-1964 in a one-person, one-vote case involving a county commission, in a situation where it has never done so before, it first must obtain preclearance of that exercise — independent of obtaining preclearance for any new election plan it adopts. Once the case goes on appeal, the state supreme court must obtain preclearance of any decision affirming the trial court's jurisdiction if it previously has not done so in an identical or at least similar situation. Apparently, the entire process must be repeated the next time a case arises in a slightly different context — say, city council elections rather than county commission elections. Indeed, under the District Court's holding, the preclearance path must be traversed anew every

time the state courts, acting in conformity with developments in the jurisprudence of voting rights, hear a case in a new context.[12]

Of course, as a general matter, voting changes may not be implemented until precleared. *Clark v. Roemer*, 500 U.S. 646, 652 (1991). If the assumption of jurisdiction in a new context is a voting change, a state court may believe it is required to submit the change to the DOJ, wait sixty days, wait another sixty days if the DOJ chooses to delay and ask the type of questions it asked here, and obtain DOJ approval before it even holds hearings or goes forward in the case. That sort of delay, is problematic in any case, but particularly in voting rights cases, which often involve what this Court in *Growe* described as "exigent circumstances." 507 U.S. at 35. Surely, Section 5 does not mandate such a cumbersome process.

If it did, the landscape would be littered with violations. As mentioned before, few state courts have obtained such preclearance. Under the District Court's holding, any remedies those courts ordered are unlawful because, even though the changes encompassed by the remedies were precleared, the underlying assumptions of jurisdiction were not.

Like most courts in most states, chancery courts in Mississippi long have held equitable authority. They have applied that authority in voting cases after *Baker v. Carr* to a greater degree than before. While any particular remedial order in such a case that changes the method of voting must be precleared, the mere decision to assume jurisdiction in the post-

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[12] For example, under the District Court's theory, a state court, confronting for the first time a case involving what this Court in *Shaw v. Reno*, 509 U.S. 630, 652 (1993) described as the "analytically distinct" claim raised there, would be required to obtain preclearance of the assumption of jurisdiction in such a case.

Baker v. Carr context is not a voting change. The December 13 ruling of the Supreme Court of Mississippi is not subject to Section 5 and preclearance is not required.

B. The Use of Districts Rather Than At-Large Elections in the State Court Plan Does Not Deviate From Miss. Code Ann. § 23-15-1039 and Is Not a Voting Change.

In addition to the numerous questions regarding chancery courts in Mississippi, the February 14 DOJ letter contains one question regarding the relationship between the state court's exercise of jurisdiction and Miss. Code Ann. § 23-15-1039. App. 193a-194a.[13] But neither the state court plan nor the exercise of state court jurisdiction conflicts with § 1039. The statute reads:

> Should an election of representatives in Congress occur after the number of representatives to which the state is entitled shall be changed, in consequence of a new apportionment being made by Congress, and *before the districts shall have changed to conform to the new apportionment*, representatives shall be chosen as follows: . . . if the number of representatives shall be diminished, then the whole number shall be chosen by the electors of the state at large.

(Emphasis added).

The statute says nothing about who can or should adopt redistricting plans. Moreover, it does not require at-large elections whenever the state loses a seat in congress. Instead, it purports to require at-large voting only when the state loses a seat *and* the next election is actually held "before the districts

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[13] After referring to the December 13 order, the letter said: "Please explain the state's view of the relationship between this change in procedure and Miss. Code Annot. 23-15-1039." App. 193a-194a.

have changed to conform to the new apportionment." In all other situations, Mississippi law requires that members of congress be elected "by districts." Miss. Code Ann. § 23-15-1033. Historically, they have been elected by districts.

Once the state court adopted a plan, the "districts [had] changed to conform to the new apportionment," and there was no need for at-large elections under the terms of the statute. *See, Carstens v. Lamm*, 543 F. Supp. 68, 77-78 (D. Colo. 1982) (holding that the federal at-large statute, 2 U.S.C. § 2a(c)(5) — which parallels the Mississippi statute — "provides emergency statutory relief" to be utilized only when a seat is lost and neither the legislature nor a court can devise a plan in time for the election). Because the state court adopted a four-district plan here, thus "chang[ing] [the districts] to conform to the new apportionment,"its action in no way conflicts with § 1039. There is no voting change with respect to that statute.

C. The DOJ Letter Requested Information That Is Unnecessary to the Evaluation Under Section 5 and the Request Therefore Does Not Extend or Restart the Sixty Day Review Period Prescribed by the Statute.

Even if these matters were voting changes, the information requested on the fiftieth day was unnecessary to the Section 5 retrogression evaluation. In *Georgia v. United States*, the Attorney General requested additional information two weeks after the initial submission. This Court upheld the application in that case of the DOJ regulation restarting the 60 day calendar upon the receipt of the information. In so doing, the Court noted: "There is no serious claim in this case that the additional information requested was unnecessary or irrelevant to § 5 evaluation of the submitted reapportionment plan." 411 U.S. at 540. The Court also said:

> The appellants contend that to allow the Attorney General to promulgate this regulation is to open the way to

> frivolous and repeated delays by the Justice Department of laws of vital concern to the covered States. No such conduct by the Attorney General is presented here, and by upholding the basic validity of the regulation we most assuredly do not prejudge any case in which such unwarranted administrative conduct may be shown.

Id. at 541 n.13.

Here, the information sought is irrelevant and unnecessary. The request for it is unwarranted and even frivolous. The delay in waiting until the fiftieth day to make the request is inexcusable. Restarting the sixty day period under these circumstances contravenes the statutory language of Section 5.

Under this Court's decisions, retrogression or an intent to retrogress are the only proper grounds for a Section 5 objection. *See, Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000). The information sought in the February 14 letter does not relate to these factors. The letter posed a hypothetical: "may a Chancery Court judge, selected in a county that is 95% white . . . impose a redistricting plan binding the entire state?" App. 194a. But Section 5 does not prohibit state courts from exercising jurisdiction in redistricting cases simply because each of the trial court judges is elected by a small percentage of the state's voters or because some judges are elected from districts with particular racial demographics. If it did, this Court's unanimous decision in *Growe v. Emison* would be inapplicable in those many Section 5 states where trial judges are elected and where the courts began hearing redistricting cases after Section 5 became effective in the mid-1960s.

The simple fact that a particular official among a designated group of officials could potentially adopt a retrogressive plan does not mean that any allocation of redistricting authority to that category of officials is itself retrogressive. Although a state court judge could adopt a

retrogressive plan, and the state supreme court could affirm it, the state legislature could do the same thing. The retrogression can be cured, however, by preclearance review of the plan itself. Questions about venue, alleged forum shopping, and the racial demographics of the judicial election districts are unnecessary to the Section 5 evaluation.[14] The DOJ focus should be on retrogression, not any unfounded concerns it chooses to raise about the operation of the state court system.[15]

Congress specifically provided in Section 5 that a voting change is precleared, and "may be enforced" by a state, if it "has been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . ." There are no exceptions. Under the statute, the Attorney General may not suspend or restart the review period at will. The DOJ regulation, 28 C.F.R. § 2137, allowing that period to begin anew when more information is requested is a means of insuring that the review period does not commence when the information submitted is so inadequate that the voting change cannot be said to have "been submitted . . . to the Attorney General." But where the additional information is unnecessary and even irrelevant to the Section 5 evaluation, nothing about that information demonstrates that the change has not "been submitted." Thus, the sixty day calendar may be started anew only if the omission of necessary information precludes the Section 5 evaluation to such an extent

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[14] As stated in the Mississippi Attorney General's response to the February 14 letter, the districts for electing chancery judges in Mississippi were precleared previously by the United States Attorney General, who was provided with their racial demographics at that time. App. 208a-209a.

[15] Moreover, this is not a transfer of the congressional redistricting power from one governmental entity (the legislature) to another (the courts). It instead involves the exercise of the equitable authority of the courts to adopt a plan when the legislature declines to exercise its authority.

that the voting change truly has not "been submitted" for review.

If it were otherwise, the Department of Justice could do as it has done here and seek unnecessary information about state court procedures when those courts adopt plans, or unnecessary information about legislative procedures when legislatures adopt them, and thereby delay preclearance in a situation where time is of the essence. The present case is a perfect example. Because of the Department's fiftieth day request for more information, it extended the statutory sixty-day review period a total of fifty-five days additional days (which includes the five days it took the Mississippi Attorney General to respond). This delay, along with the Department's unjustified failure to provide a prompt decision once the new information was received, prevented the enforcement of the plan adopted by the state authorities. That gave the federal court grounds, even apart from its questionable Article I, § 4 holding, to substitute its own plan for that of the state courts in the 2002 congressional election.[16] The delay is inexcusable, particularly in light of what this Court has described as "the reality that States must often redistrict in the most exigent circumstances . . . during the brief interval between completion of the decennial federal census and the primary season for the general elections in the next even-numbered year." *Growe v. Emison*, 507 U.S. at 35.

Congress provided a sixty day review period. The alleged voting changes were "submitted" on December 26. No one has identified any information that is so necessary to Section 5 evaluation that the purported changes cannot be said to have

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[16] Top DOJ officials knew this would be the impact of its delay. As the Assistant Attorney General for Civil Rights explained in his letter to the Chief Justice of Mississippi: "a wholly separate plan has been drafted by a federal court, which will be imposed if the Department does not very soon complete its review of the State's submission." App. 198a.

"been submitted." The District Court erred in extending the review period beyond the statutory sixty days. Given that no objection was interposed within sixty days of the submission of the state court redistricting plan, the plan has been precleared under Section 5.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, this Court should note probable jurisdiction and reverse the decision of the District Court.

Respectfully Submitted,

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