No. 01-1437

In The 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; GENE WALKER, and MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE;

and

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

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

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

2. Under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, which provides without qualification that if a state "enact[s] or seek[s] to administer" a voting change, the change is precleared "if [it] has been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days," may the Attorney General extend the statutory sixty day period on the ground that the voting change has been enjoined by a federal court for independent reasons?

3. 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), such that the mere assumption of jurisdiction (independent of any remedial order) must be precleared by the Attorney General or the federal district court for the District of Columbia under Section 5?

4. Is a state statute requiring at-large congressional elections when the number of representatives is diminished and the "election . . . occur[s] . . . before the districts shall have changed to conform to the new apportionment," violated by a state court's decision to change the districts *before the election occurred* such that the decision is a voting change that must be precleared under Section 5 independent of the plan itself?

5. May the Attorney General extend the statutory sixty day review period by requesting additional information from the covered state if the information sought is unnecessary to the Section 5 evaluation?

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The February 26, 2002 final judgment of the District Court is unpublished and is reproduced in the appendix to the Jurisdictional Statement (J.S. App. 1a). The opinions and orders of the District Court are published and reproduced in the appendix to the Jurisdictional Statement as follows: February 26, 2002, 189 F.Supp.2d 548 (S.D. Miss. 2002), 4a; February 19, 2002, 189 F.Supp.2d 529, 25a; February 4, 2002, 189 F.Supp.2d 512, 62a; January 15, 2002, 189 F.Supp.2d 503, 90a; December 5, 2001, 189 F.Supp.2d 501, 107a. The December 13, 2001 order of the Supreme Court of Mississippi is unpublished and reproduced at J.S. App.110a. The opinions and orders of the Chancery Court of Hinds County, Mississippi are unpublished and reproduced in the appendix to the Jurisdictional Statement 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.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1253. The District Court's judgment was entered on February 26, 2002. A notice of appeal was filed the same day. J.S. App. 239a. The Jurisdictional Statement was filed and the appeal was docketed on March 28, 2002. This Court noted probable jurisdiction on June 10, 2002.

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

Overview

With the 2000 census, Mississippi lost a seat in Congress, its delegation in the next House of Representatives reduced from five to four. When the legislature failed to enact a new redistricting plan, the Mississippi courts addressed the problem in a lawsuit filed in the Chancery Court of Hinds County. Acting pursuant to a Mississippi Supreme Court order issued in the case, the Chancery Court adopted a plan after a five day trial. The plan was submitted for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, over sixty days prior to the candidate qualifying deadline. On the fiftieth day, the United States Department of Justice (DOJ) propounded a request for more information regarding not the plan itself, but the Mississippi Supreme Court ruling confirming the Chancery Court's jurisdiction. Despite the Mississippi Attorney General's prompt response, providing the new information five days later, the DOJ contended that the sixty day clock began anew and declined to make a decision prior to the qualifying deadline.

Armed with this refusal, a three-judge panel of the United States District Court for the Southern District of Mississippi, acting in a separate lawsuit, enjoined implementation of the state court plan on the ground that it had not been precleared and designed its own plan for the congressional elections. In addition, the federal court held that Article I, § 4 of the United States Constitution, which provides that the manner of holding congressional elections "shall be prescribed in each State by the Legislature thereof," prohibits courts in states like Mississippi from involvement in congressional redistricting cases pursuant to their general equitable jurisdiction. State courts may hear such cases, said the District Court, only if the legislature has passed a statute specifically authorizing them to do so. Subsequently, the DOJ cited this constitutional ruling of the District Court to justify a further delay in the Section 5 review process, saying that it will not grant or deny preclearance unless and until the constitutional injunction is lifted on appeal by this Court.

This appeal from the three-judge District Court decision raises the questions of whether Art. I, § 4 prohibits state courts from adjudicating congressional redistricting cases as part of their general equitable jurisdiction, and whether the Mississippi state court plan has been precleared given that (to quote Section 5) "the Attorney General has not interposed an objection within sixty days" of either the original submission or the response providing the additional information that the DOJ requested.

The State Court Case and the Preclearance Submission

This case grows out of the Mississippi legislature's failure, in a November, 2001 special session, to agree on a new redistricting plan in the wake of the loss of a seat. 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). In October, shortly before the special session, a lawsuit was filed by the appellants here, Beatrice Branch, et al., who are black and white voters from around the state, in the Chancery Court of Hinds County, which is the county encompassing the state capitol in Jackson. Concerned that the legislature might deadlock, the plaintiffs asked the Court to adopt a lawful plan if the legislature defaulted. The state defendants (the Governor, Secretary of State, and Attorney General, who collectively comprise the State Board of Election Commissioners) 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. J.S. App. 183a, 187a.[1] The matter was reviewed by the Supreme Court of Mississippi on a pretrial petition challenging, among other things, the Chancery Court's jurisdiction. By a 7-1 vote, 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), J.S. 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. In weighing the competing merits of the plans, the Court heard evidence from nineteen witnesses and compiled a record containing 58 exhibits. The state defendants did not propose plans, present evidence, or offer argument. On December 21, the Court adopted what was

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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.

known as Branch Plan 2A. J.S. App. 117a .[2]

Consistent with the holding in *Hathorn v. Lovorn*, 457 U.S. 255 (1982), that state court-ordered voting changes are subject to Section 5's preclearance requirement, the state court plan was submitted by the Mississippi Attorney General to the United States Attorney General for Section 5 preclearance 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. J.S. App. 221a. In an abundance of caution, the submission also listed the State Supreme Court's December 13 order in *In Re Mauldin*, *id.* 227a-228a , with the caveat that the inclusion of any item in the submission is not a concession that the item must be precleared under Section 5. *Id.* 225a. The Mississippi Attorney General's submission requested a decision by January 31, 2002 in light of the March 1 qualifying deadline. *Id.* 221a-222a, 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.

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[2] As the Chancery Court explained, the plan contained a zero deviation. No one contended that it diluted minority voting strength in violation of Section 2 of the Voting Rights Act or that it was retrogressive in violation of Section 5. 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. J.S. App. 117a-135a.

In the meantime, no one asked the Mississippi Supreme Court to stay the Chancery Court plan. The state defendants did not appeal the decision. The Mauldin state court intervenors and the Mississippi Republican Executive Committee (MREC) did.[3] But while claiming to be aggrieved by the state court plan, they did not notice their appeal until January 25, 2002, J.S. 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. They made no request for expedited appellate review. Instead, the MREC and another group of individuals, represented by some of the same lawyers representing the Mauldin state court intervenors, turned to federal court for relief.

The Federal Court Case and the Preclearance Review

The present federal court case had been filed in early November of 2001 by John Robert Smith, et al (the Smith federal plaintiffs) 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 MREC aligned itself with the federal plaintiffs. The Branch state court plaintiffs (who are appellants here) were permitted to intervene in the federal case and advocate deference to the state court

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[3] The MREC was not a named defendant in the state court case. At one point, it and the Mississippi Democratic Executive Committee (MDEC) were joined as necessary parties at the request of the state defendants. J.S. App.178a. However, the Chancery Court later reconsidered and vacated the ruling, nevertheless making it clear that either or both of the executive committees remained free to intervene voluntarily. *Id.* 161a-163a, 171a. Neither did so. However, the MREC has joined the state court appeal on the ground that it had, at one time, been joined as a party in the state court case.

plan.

Shortly after the state court plan was adopted and submitted for preclearance, the federal court announced that it would interject itself into the process and draw its own plan. Suggesting it believed that timely preclearance should not and would not be granted, the Court said in a January 15, 2002 order: "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 . . . ." J.S. 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 went on to say 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. Weighing into a substantive Section 5 matter beyond its purview, the Court said with respect to the state supreme court's December 13 ruling: "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. As if providing a blueprint for delay to the Department of Justice, the District 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. The Court said it would set the case for trial. *Id.* 105a.

Trial commenced in federal court on January 28, 2002 and concluded on January 29. The Smith federal court plaintiffs and the MREC submitted a number of proposed plans.[4] 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 plan. J.S. 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. While the state court plan was chosen in part because of undisputed evidence that it provided parity and a roughly competitive district between the supporters of the two incumbents, J.S. App. 130a-131a, the federal court made no such effort. Instead, where the state court plan created a district that slightly favored the Republican candidate, the federal court

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[4] The same attorneys who represented the Mauldin state court intervenors were among those representing the Smith federal plaintiffs.

district gave that candidate a much stronger advantage.[5] 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 J.S. App. 64a-65a, the state plan at J.S. 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. J.S. App. 191a. The letter explained that "the Department is not formally seeking additional information regarding the redistricting plan." *Id.* 195a. Instead, the Department did what the District Court suggested it do: 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

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[5] In the state court plan, 47% of the population of the combined district came from old District 3, represented by the Republican, and 44% from old District 4, represented by the Democrat. In the federal plan, 60% came from the old 3rd and 39% from the old 4th. In the precincts in the combined district in the state court plan, Republican candidates won 50% of the vote in the 1999 gubernatorial election, 54% in the 2000 U.S. House elections, and 59% in the 2000 presidential election. In the precincts in the combined federal court district, Republican candidates won 57% of the vote in the 1999 gubernatorial election, 58% in the 2000 U.S. House elections, and 65% in the 2000 presidential election. *See* Intervenor's Objections and Comments Regarding the Proposed Federal Court Plan, filed in the District Court Feb. 8, 2002, pp. 8-9; J.S. App. 130a-131a (December 21, 2001 Chancery Court opinion).

. . . 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. J.S. 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. J.S. 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 . . . .

J.S. 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." J.S. 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.

Although the DOJ pledged on February 14 "to expedite our review to the extent possible," J.S. App. 196a, nothing more was heard from its officials. 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. J.S. 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 the present appeal. J.S. 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. The candidate qualifying deadline expired the same day.

No decision has since been made regarding preclearance. The only further communication from the DOJ came in a letter to the Mississippi Attorney General dated April 1, 2002. In that letter, the Chief of the Voting Section of the Civil Rights Division acknowledged that the additional information was received on February 19-20. However, the letter stated that, in light of the District Court's Article I, § 4 holding, "it would be inappropriate for the Attorney General to make a determination concerning [the] submission now." The letter said: "Where voting changes submitted by the State have been enjoined by a federal court, they are not presently capable of administration, and are not ripe for review by the Attorney General." The letters added that "[i]f the injunction against implementation of these changes is lifted, . . . the Attorney General will again consider these changes for preclearance." Joint Appendix (J.A.) 29.

The renewed sixty-day period, which began on February 20, expired at 5:00 PM on April 22, the Monday after the sixtieth day. On April 23, the Branch intervenors (appellants here) filed in the District Court a motion to declare that the state court plan is now precleared under Section 5, pointing out that the statute provides for preclearance "if . . . the Attorney General has not interposed an objection within sixty days after . . . submission" of the voting change. J.A. 29. While the District Court had earlier rejected the appellants' claim that the plan was precleared by passage of the first sixty day period, the April 23rd motion asserted that the plan unquestionably was

precleared after the second sixty days. The motion contended that the District Court's Article I, § 4 holding does not postpone the statutory period, particularly since Section 5 triggers the period whenever a state "enact[s] or seek[s] to administer" a voting change and submits it for preclearance. The District Court denied the motion without explanation in a one-sentence order. J.A. 37.

This Court noted probable jurisdiction of this appeal on June 10, 2002. It also noted probable jurisdiction that day of a conditional cross-appeal filed by the MREC and the Smith federal plaintiffs contending that the District Court should have imposed at-large congressional elections rather than a districting plan.[6]

SUMMARY OF ARGUMENT

In *Growe v. Emison*, 507 U.S. 25, 33 (1993), 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." In conformity with that principle, the state courts of Mississippi confronted the problem, previously unseen in that state in the years after *Baker v. Carr*, 369 U.S. 186 (1962), of a total

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[6] Just as in the District Court trial, the state defendants have played no role in the appeal to this Court. The MDEC has filed a letter with the Clerk of this Court saying it supports the position of the appellants. The MREC and the Smith federal plaintiffs are the only appellees opposing this appeal. Unless otherwise stated, any references in this brief to the "appellees" are to the MREC and the Smith federal plaintiffs.

The appeal filed in the Supreme Court of Mississippi by the MREC and the Mauldin state court intervenors is in the midst of briefing. No matter how that appeal is resolved, the Art. I, § 4 issue will remain alive. The Federal District Court's Art. I, § 4 injunction 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 vacated on appeal.

legislative failure to redraw congressional districts after a census. The Chancery Court adopted a plan that 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 displaced the plan with an unprecedented interpretation of Article I, § 4 and an unwarranted extension of the statutory sixty-day deadline provided by Section 5, thus allowing the Department of Justice to delay a preclearance decision past the March 1 qualifying deadline so that the federal court plan could be used in the current year's election. The Department continues to ignore the statutory deadline by postponing the second sixty day period and declining to make a decision on preclearance unless and until this Court reverses the District Court's constitutional holding.

1. Article I, § 4 does not deprive state courts of the authority to hear congressional redistricting cases pursuant to their general equitable jurisdiction.

A. If the District Court decision is affirmed, *Growe* will be overruled and the courts of most states will be unable to play any role in congressional redistricting. Minnesota, the state at issue in *Growe*, is like most other states. It has no specific jurisdictional statute regarding congressional redistricting and its courts handle such cases pursuant to their general equitable jurisdiction. The District Court's holding, if affirmed, would take this authority away from Minnesota and the vast majority of the other states. Nothing in Art. I, § 4 requires such a stark alteration of the federal-state landscape in situations where courts are called upon to enforce the law in matters of congressional redistricting

B. Although the legislatures possess authority under Art. I, § 4, to prescribe the "Manner of Holding Elections for . . . Representatives," the Mississippi state courts did not take this authority from the legislature. Instead, the legislature failed to

adopt a new plan even though one clearly was required by both state and federal law. While the Mississippi courts filled the breach by adopting a plan, the legislature remains free to assert its will and prescribe its own plan, which will supersede that of the courts.

C. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), this Court confirmed that Art. I, § 4 does not prevent courts from enforcing federal law in matters of congressional redistricting. Since federal courts are not the exclusive guardians of the federal law, it is clear that state courts also may enforce federal law in such cases.

D. The appellees' primary argument seems to be that even if state courts can enforce federal law in congressional redistricting cases, the state court complaint here cited no federal law provisions. But this ignores the fact that state courts are required to enforce federal law even when a complaint raises only state law claims, and that state courts always are required to enforce federal law and cure federal violations when designing a congressional redistricting plan in the wake of a post-census legislative default. Nothing about the word "Legislature" in Art. I, § 4 suggests that a state court is precluded from implementing a new congressional districting plan and curing a clear violation of both federal and state law simply because the complaint raises only state law claims.

E. This Court's decisions in *Davis v. Hildebrant*, 241 U.S. 565 (1916), and *Smiley v. Holm*, 285 U.S. 355 (1932), confirm that Art. I, § 4 does *not* "render[] inapplicable the conditions which attach to the making of state laws." *Smiley*, 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.

2. Because, in the words of Section 5, "the Attorney General has not interposed an objection within sixty days" of

either the original submission of the state court plan or the response providing the additional information requested by the DOJ, the plan is precleared by operation of the statute.

A. At the very latest, the Attorney General was required to object to the plan within sixty days after the additional information was submitted if he believed the plan to discriminate in violation of Section 5's substantive standards. The federal court's constitutional injunction does not make any difference. The sixty day period is triggered by Section 5 whenever a state "enact[s] or seek[s] to administer" a voting change and "submit[s] [it] . . . to the Attorney General." Even under the DOJ theory that the submission of the plan was not complete until the additional information was provided on February 19, the sixty days started anew then. Although the subsequent constitutional injunction might prohibit state officials from implementing the plan, its presence does not alter the fact that the state has "enact[ed] or seek[s] to administer" the plan. The language of Section 5 does not allow the Attorney General unilaterally to postpone the sixty day period because of a constitutional injunction.

B. Since the Department sought no additional information regarding the state court plan itself, there was no basis to postpone the initial sixty day period. The decision of the Mississippi Supreme Court in *In Re Mauldin* authorizing the Chancery Court to adopt a plan is not itself a voting change that requires preclearance. Similarly, the state courts' decision to implement a districting plan prior to the election is not a change from the Mississippi statute requiring at-large elections only in those situations where the districts cannot be drawn prior to the election. Moreover, even if these are voting changes, the additional information requested by the DOJ was unnecessary and irrelevant to the Section 5 evaluation. The Attorney General can postpone the sixty day period only if the initial information provided is so insufficient that the plan cannot be deemed to have been "submitted" under Section 5. Clearly that

was not the case here.

I. ARTICLE I, § 4 DOES NOT DEPRIVE STATE COURTS OF POWER TO HEAR CONGRESSIONAL REDISTRICTING CASES IN THE EXERCISE OF THEIR GENERAL EQUITABLE JURISDICTION.

A. 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." J.S. 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*." J.S. 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." J.S. 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 Minnesota 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*). J.S. 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. " J.S. App. 7a.[7]

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[7] Indeed, Mississippi has a similar statute allowing the Chief Justice to assign judges throughout the state. Miss Code Ann. § 9-1-105(2), (6). Stretching to justify its reasoning and read the case law consistently with its unprecedented decision, the District Court explained two California state court congressional redistricting cases in the following manner: "In both cases, the California Supreme Court acted under its original mandate jurisdiction, as granted to the court in the state constitution, which of course provides a source of law for the state. *See* Cal. Const. Art. VI, § 10." J.S. App. 14a, n.7. But Cal. Const. Art. VI, § 10 has nothing to do with redistricting. Instead, it addresses only the original jurisdiction of the various levels of courts in California. As with the Minnesota statutes, the District Court cited this California provision in support of its ruling without acknowledging that the provision says nothing about what the District Court called "the power to redistrict . . . for congressional elections." J.S. App. 7a.

Clearly, if the District Court's decision is affirmed, *Growe 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.[8] Yet state courts, particularly in the wake of *Growe*, quite properly exercise jurisdiction over such cases.

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. Alexander v. Taylor*, 2002 WL 1370034 (Okla. June 25, 2002) (affirming adoption of plan and specifically rejecting the reasoning of the District Court in the present case); *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002) (affirming adoption of plan); *Perry v. Del Rio*, 67 S.W.3d 85 (Tex. 2001); *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).

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. As explained in the remainder of this section, nothing about Art. I, § 4 requires this dramatic

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[8] We are aware of only six: Conn. Const. Art. 3, § 6; Me. Rev. Stat. Ann. tit. 21-A, § 1206; Mass. Gen. Laws Ann. ch. 56, § 59; Mich. Comp. Laws Ann. § 3.71; N.J. Const. Art. 2, § 2, P7; Wash. Const. Art. 2, § 43.

alteration of the relationship between state and federal courts in matters of congressional redistricting.

B. The Action of the State Courts in this Case Did Not in Any Way Deprive the Legislature of its Power to Prescribe the Manner of Electing Members of Congress.

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 in 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." J.S. 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 just 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).

C. If, as this Court Has Held, Art. I, § 4 Does Not Prevent Federal Courts from Enforcing Federal Law in Congressional Redistricting Cases, Surely it Does Not Preclude State Courts from Doing the Same.

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. And while the District Court here held that Art. I, § 4 forbids court action unless a statute tells courts in specific terms that they can adjudicate congressional redistricting cases, *Wesberry* imposed no such a requirement. It relied on no such Congressional act and, indeed, none existed at the time.[9]

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 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 was enacted, there were no lower federal courts. The task of judicial enforcement fell to the state courts. Any claim brought to enforce federal law in congressional elections would necessarily have been heard in state court. *See,* U.S. Const. art. III, § 1 (allowing but not requiring Congress to establish lower federal courts); Judiciary Act of 1789, 1 Stat. 73 (creating lower federal courts, but not conferring civil jurisdiction to hear federal questions); Judiciary Act of 1875, 18 Stat. 470 (conferring, for the first time, civil federal question jurisdiction on the lower federal courts). Clearly, Art. I, § 4 was not designed to preclude state courts from enforcing federal law in this arena.

The appellees do not seem to contest this point. Instead, they sidestep it by contending that the state court complaint here mentioned no provisions of federal law. They offer no explanation as to why this is relevant. Certainly, the District

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[9] 28 U.S.C. § 2284(a), which mandates a three-judge court when a federal case is filed challenging the constitutionality "of congressional districts," did not contain the language about congressional districts until 1976. 90 Stat. 1119. Prior to that time, the statute required three-judge courts whenever the constitutionality of a state statute was questioned, and there was no language in the statute about congressional redistricting. 74 Stat. 201; 62 Stat. 968.

Court's robust reading of Art. I, § 4 did not rest on this distinction. Indeed, perhaps recognizing the unsettling scope of the District Court's reasoning, the appellees did not try to defend it in responding to the Jurisdictional Statement. Instead, in their Motion to Affirm, they conceded that "[s]tate courts are obliged by the Supremacy Clause of Art. VI to enforce federal law. . . ." Mot. Aff. 18. *See also, id.* 22 ("federal claims may be litigated notwithstanding Art. I, § 4"). Had a federal claim been specifically included in the state court complaint, they imply, the District Court would have been wrong to enjoin the state court plan on constitutional grounds. But here, they say, there was no such claim. *Id.* As explained in the next subsection of this brief, however, the jurisdiction of the state courts does not turn on the presence or absence of a specific federal claim in the complaint.

D. The State Courts Are Not Deprived of Jurisdiction in Congressional Redistricting Cases Simply Because the State Court Complaint Does Not Specifically Mention Provisions of Federal Law.

In contending that the present case is different because federal claims were not specified in the complaint, the appellees ignore the fact that, to quote again their language from page 18 of the Motion to Affirm, "[s]tate courts are obliged by the Supremacy Clause of Art. VI to enforce federal law" even in cases where only state law claims are in the complaint. In *Hathorn v. Lovorn*, 457 U.S. 255, 258, 269-70 (1982), where the complaint raised only state law causes of action, this Court specifically held that the state courts have "the duty" to enforce federal law.

Any congressional redistricting plan adopted by a state court must, of necessity, comply with federal law, including the equal population requirement of Art. I, § 2, the specification of a particular number of representatives pursuant to the apportionment required by Art. I, § 2, the use of districts to

elect representatives pursuant to 2 U.S.C. § 2c, the equal protection clause of the Fourteenth Amendment, and the Voting Rights Act. Although the state court complaint here mentioned no specific provision of federal law, it asked the court "to insure enforcement of the laws" by adopting a plan in the wake of a legislative default. In this situation, as in most instances when state courts are called upon to adjudicate these matters, the pre-existing plan — designed prior to the last census — did not comply with either state or federal law. In Mississippi, it complied with neither the equal population requirement of Art. I, § 2 of the federal constitution nor what the Mississippi Supreme Court has described as "the one person, one vote standard . . . under Miss. Const. Art. 3, § 14." *Adams County Election Commission v. Sanders*, 586 So. 2d 829, 831 (Miss. 1991). Similarly, it did not comply with the new apportionment inasmuch as the state lost a seat, going from five to four. Thus, whether or not federal law claims were raised in the complaint, the state courts of Mississippi, in adopting a plan, were required to comply with federal law and cure a pre-existing federal law violation.

Elsewhere, the appellees have recognized that federal law was intrinsic to the state court case. In their brief to the Mississippi Supreme Court as part of their appeal there, the appellees quote the state court complaint and say:

> Plaintiffs' prayer that the Chancery Court should "issue an injunction adopting and directing the implementation of a congressional redistricting plan," C.P. 6, R.E. 10, necessarily implicates Article I, § 2 of the Constitution, which provides, "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."

Brief of [State Court] Appellants, *Mauldin v. Branch*, No.

2002-CA-00146 (Miss.), pp. 38-39.[10]

If, as the appellees seem to acknowledge, the Supremacy Clause of Art. VI gives state courts the power and the duty to enforce federal law and cure federal violations in a congressional redistricting case where federal claims are raised in the complaint, surely those courts also may enforce state law and cure state law violations in such a case (as long as state law does not run afoul of federal law). If state courts can cure both federal and state law violations when federal claims are raised in the complaint, it follows that they also can do so when only state law claims are raised in the complaint. Nothing about the word "Legislature" in Art. I, § 4 suggests that a state court is precluded from implementing a new congressional districting plan and curing a clear violation of both federal and state law simply because the complaint only raises state law claims.

A different scenario would be presented if the legislature had adopted a plan that complied with federal law, and the state court cast aside the plan on the sole ground that it violated state law. Whether that would make a difference for purposes of Art. I, § 4 need not be resolved since that did not happen here.[11] Instead, the Mississippi legislature failed to adopt a new plan even though one was required by both federal and state law. The action of the Mississippi courts in curing the resulting

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[10] A copy of this state supreme court brief will be lodged with the Clerk of this Court.

[11] The cases discussed later in this brief, *Davis v. Hildebrant*, 241 U.S. 565 (1916),and *Smiley v. Holm*, 285 U.S. 355 (1932), suggest that Art. I, § 4 would not prevent the state courts from acting in such a situation. *See also, Preisler v. Hearnes,* 362 S.W. 2d 552, 555 (Mo. 1962) (implying a general equitable power to strike down congressional districts that do not comply with state constitutional requirements); *Brown v. Saunders*, 166 S.E. 105 (Va. 1932) (nullifying a congressional apportionment on state constitutional grounds).

federal and state law violations did not violate Art. I, § 4.[12]

E. Contrary to the District Court's Analysis, this Court's Precedents Actually Support the Exercise of State Court Jurisdiction and Demonstrate That Article I, § 4 Does Not Preclude It.

In canvassing the precedents, the District Court here found only three cases interpreting the relevant clause of Article I, § 4, two from this Court and one from a three-judge federal district court: *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*." J.S. App. 13a (emphasis added).

This supports the exercise of state court authority rather than contradicts it. In most states, including Mississippi, the "processes of the state"authorize the courts to enforce the law through equitable remedies. Just as this Court held in *Davis*

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[12] This comports with the suggestion in *Growe* that the precise nature of the claims in the complaint does not matter. In ordering federal courts to defer to state courts in these matters, this Court in *Growe* said: "*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.*

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 in that arena without transgressing that provision. Indeed, 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.[13]

If anything, the situations in *Davis* and *Smiley* would be more likely to contravene 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 declined to act. Surely, if Art. I, § 4 was not transgressed there, it was not violated here.

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[13] In *Grills*, when holding that the state election board could not draw congressional plans, the federal district 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.

II. THE STATUTORY SIXTY DAY DEADLINE PRESCRIBED BY SECTION 5 HAS PASSED TWICE WITHOUT AN OBJECTION BY THE ATTORNEY GENERAL, AND BY VIRTUE OF EITHER OR BOTH OF THOSE PASSAGES, THE STATE COURT PLAN HAS BEEN PRECLEARED.

As noted later in this brief, we contend the state court plan was precleared by operation of the statute as of February 26, 2002 at the conclusion of the first sixty days. But the District Court chose to hold otherwise. This Court declined to enter a stay and the federal court plan is being used for the 2002 elections. The question now before the Court is whether the state court plan is precleared as of the present time so that it can be used in future elections. At the very latest, the Attorney General had until 5:00 PM on April 22, the first Monday after the sixtieth day after the February 19-20 submission of the additional information, to object if he believed the state court plan to discriminate in violation of Section 5's substantive standards. If we are correct about that, there is no need to resolve our separate assertion that the Attorney General actually had only sixty days from the original submission to object. Either way, the plan has been precleared.

A. Although the Federal Court Enjoined the Plan on Constitutional as Well as Section 5 Grounds, the Constitutional Injunction Did Not Change the Fact That the State Had "Enact[ed] or [Sought] to Administer" the Plan, and Thus the Attorney General Had No Right to Extend the Second Sixty Day Statutory Period.

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 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 . . . ." The State of Mississippi, whose courts have ordered implementation of the state court plan, clearly has "enact[ed] or seek[s] to administer"that plan. This is reflected in the Mississippi Supreme Court's December 13, 2001 ruling and the December 21 opinion and order of the Chancery Court of Hinds County. The Federal District Court's constitutional injunction does not change this fact.

Although the April 1 Department of Justice letter stated that the plan is not "presently capable of administration" because of the District Court's constitutional injunction, Section 5 does not require that the plan be "capable of administration." It simply requires that the state authorities "enact or seek to administer" the plan. Once the plan is submitted, the statutory sixty day review period begins. Nothing in the statute allows the Attorney General to postpone the sixty day period simply because a federal court enjoins the plan on federal constitutional grounds.

Not only is there nothing in the statutory language to support this subversion of the sixty day requirement, but the DOJ has adopted no regulation authorizing it. Instead, the Department has trotted out this unsupported justification as a means of continuing to delay the preclearance process and preventing implementation of the state court plan for as long as possible without saying whether it satisfies Section 5's substantive requirements. This is particularly unfortunate given that the plan, which contains a 59% BVAP district, clearly is not retrogressive and does not violate Section 5. *See* n. 2 of this brief; J.S. App. 45a (federal court opinion stating that the 59.2% BVAP federal district is not retrogressive).

In *Morris v. Gressette*, 432 U.S. 491 (1977), this Court

explained that under Section 5, a covered jurisdiction may preclear a voting change by obtaining a declaratory judgment from the Federal District Court for the District of Columbia or, alternatively, "may submit [the] change . . . to the Attorney General and subsequently may enforce the change if 'the Attorney General has not interposed an objection within sixty days after such submission.'" *Id.* at 502. Under this alternative method, said the Court, "compliance with § 5 is measured solely by the absence, *for whatever reason*, of a timely objection on the part of the Attorney General." *Id* (emphasis added). The Court added:

> We think it clear that Congress intended to provide covered jurisdictions with an expeditious alternative to declaratory judgment actions. The congressional intent is plain: The extraordinary remedy of postponing the implementation of validly enacted state legislation was to come to an end when the Attorney General failed to interpose a timely objection based on a complete submission. Although there was to be no bar to subsequent constitutional challenges to the implemented legislation, there also was to be "no dragging out" of the extraordinary federal remedy beyond the period specified in the statute.

Id. at 504. Also, the Court pointed out that "the Attorney General's failure to object is not conclusive with respect to the constitutionality of the submitted state legislation." *Id.* at 505.

Thus, this Court recognized that federal courts might enjoin voting changes on constitutional grounds independent of any Section 5 review. At the same time, the Court said review by the Attorney General must provide an "expeditious" means of preclearance and may not be "'dragg[ed] out' . . . beyond the period specified in the statute." This strongly corroborates what is clear from the statutory language: a constitutional injunction does not postpone the statutory sixty day review

period.

The need for a prompt decision on a Section 5 submission, independent of any constitutional injunction, is illustrated by the fact that "States must often redistrict in the most exigent circumstances." *Growe v. Emison*, 507 U.S. 25, 35 (1993). If a federal court enjoins a redistricting plan on constitutional grounds, the injunction is subject to being vacated on appeal, perhaps through emergency review. However, if the Attorney General can postpone the sixty day period when an injunction is entered, the covered jurisdiction will be unable to implement the plan promptly even if the injunction is vacated. The jurisdiction will be required to await renewal and completion of the interrupted Section 5 review process. The language of Section 5 does not allow for this sort of delay.

Of course, if the Attorney General is unable — as we contend — to postpone the sixty day period, there is the possibility that the completion of the Section 5 review process will have been in vain if the constitutional injunction is not lifted on appeal. But had Congress believed this a serious problem, it could have written the statute to stop the sixty day period when an independent injunction was issued. It did not do so, and the statutory terms of Section 5 do not allow for extension of the review period on this basis. The state court plan has been precleared by operation of the statute.

B. Because the Department of Justice Never Sought Additional Information Regarding the State Court Plan Itself, There Was No Basis to Postpone the First Sixty Day Period.

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." J.S. App. 227a-229a.[14]

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." J.S. App. 195a. Most of the questions related to the second item. One question purportedly related 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 precleared, "render[] the plan itself a legal nullity under the Voting Rights Act." *Id.* 33a-34a n.3.

In the remainder of this brief, 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

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[14] 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 . . . ." J.S. 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, J.S. App. 97a-98a, the appellants did not concede that anything other than the first of the three items listed above is a voting change subject to Section 5.

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, as we contend, this sort of unnecessary information does not extend the statutory period, the state court plan has been precleared.

1. **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."

In *Hathorn v. Lovorn*, 457 U.S. 255, 269-70 (1982), while reviewing a Mississippi chancery court order implementing a new election scheme, this Court held 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, J.S. 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). 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 required of the mere decision to exercise jurisdiction.

If that sort of decision is a voting change, a number of post-1964 ventures by state courts into the arena of voting rights in covered jurisdictions have 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. After these developments, of course, 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 trigger date for Section 5 (which is November 1, 1964 in a number of states). 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.[15]

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

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[15] 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.

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 litigation, which often involves 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 this sort of 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-*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.

2. 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. J.S. App. 193a-194a.[16] The District Court also intimated that

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[16] 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." J.S. App. 193a-194a.

the December 13 order constituted a voting change from the formula contained in Miss. Code Ann. § 23-15-1039. J.S. App. 96a-98a. 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 have changed to conform to the new apportionment." In all other situations, Mississippi law requires that the state's members of the United States House of Representatives 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). The Mississippi Supreme Court's resolution of the interlocutory petition in *In Re Mauldin* confirms this

reading as a matter of Mississippi law. There, the MREC and the Mauldin state court intervenors contended that § 1039 required at-large elections if the legislature defaulted, and thereby precluded the Chancery Court from adopting a plan. Petition for Writ of Prohibition, *In Re Mauldin*, No. 2000-M-01891 (Miss.), pp. 7-8, 11. We responded with the same argument we make here. *Id.*, Response in Opposition to Petition for Writ of Prohibition, pp. 10-11.[17] The state supreme court rejected the MREC/Mauldin contention, holding that "[a]ny 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." J.S. App. 111a.

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.

3. 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 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:

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[17] Copies of these documents will be lodged with the Clerk of this Court..

> 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 was unwarranted and even frivolous. The delay in waiting until the fiftieth day to make the request was 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. For example, 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?" J.S. 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.[18] The DOJ focus should be on retrogression in the state court plan — of which there is none — and not any unfounded concerns it purports to have about the operation of the state court system.

Clearly, the state court plan itself was not retrogressive and it therefore gave the Attorney General no basis for a Section 5 objection. Of course, neither did the fact that the plan was adopted by an elected Mississippi state court judge, subject to review by the Supreme Court of Mississippi, allow for an objection. Had the Attorney General objected on that ground, similar objections would be required to all state court redistricting plans in Section 5 states where judges are elected.

Indeed, since refusing to issue a decision in Mississippi, the Attorney General has precleared a statewide legislative redistricting plan adopted by a single North Carolina trial judge. The preclearance of that plan demonstrates that the information sought in Mississippi was unnecessary, and proves that the Department was disingenuous in delaying a preclearance decision on that basis. In *Stephenson v. Bartlett*, 562 S.E.2d 377 (N.C. 2002), the North Carolina Supreme Court affirmed a trial court ruling that the legislative redistricting plan recently adopted by the North Carolina General Assembly violated the

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[18] 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. J.S. App. 208a-209a.

state's constitution, and then remanded the case for the trial court to adopt an interim plan for the 2002 legislative elections. This was the first time the North Carolina Supreme Court had authorized the courts to adopt a statewide redistricting plan. Prior to the Voting Rights Act, the Court had held that any question about the lawfulness of a legislative redistricting plan "is a political one, and there is nothing the courts can do about it" because "[t]hey do not cruise in nonjusticiable waters." *Leonard v. Maxwell*, 3 S.E.2d 316, 324 (N.C. 1939).

After this year's state supreme court decision in the *Stephenson* case, the North Carolina trial court on remand devised a new plan that was submitted to the Attorney General for preclearance. The submission was completed on June 28, 2002, and preclearance was granted 14 days later. None of the information sought about the Mississippi courts was submitted to the DOJ or requested by the DOJ in a more information letter.[19] If the DOJ really believed the first post-Act assumption of jurisdiction by a state's courts to be a voting change, and really believed this sort of information necessary to evaluate such a change, it would have sought the information in North Carolina that it did in Mississippi. The fact that it did not do so shows that the request in Mississippi was simply a ruse so that top officials in the Department could delay a preclearance decision. This allowed the federal court to displace the state court plan and implement one that those officials likely knew was more favorable to their political allies. *See* J.S. App. 198a (February 14 letter of the Assistant Attorney General for Civil Rights explaining that the federal court plan "will be imposed if the Department does not very soon complete its review of the State's submission.")

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[19] Details about the North Carolina submission are contained in the chart and the letter in the appendix to the brief *amicus curiae* being filed in support of the appellants in the present case.

Under Section 5, the Attorney General may not suspend or restart the statutory sixty-day 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" (to quote Section 5). 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 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. The Department's fiftieth day request for more information, along with the 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. 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.

Unfortunately, the District Court here contributed to the

problem by injecting itself into a substantive Section 5 question that was beyond its purview, gratuitously stating, "it is not at all clear that [the state supreme court's *In Re Mauldin* decision] is not retrogressive," and adding that, "at the very least, the Attorney General . . . might perhaps request more information. . . ." J.S. App. 100a. This contradicts a long line of cases holding that local federal courts should not indulge in such speculation about matters that "are relevant only to questions reserved by § 5 for consideration by the Attorney General . . . or the District Court for the District of Columbia." *Perkins v. Matthews*, 400 U.S. 379, 386 (1971).

The problem is particularly acute where, as here, the DOJ delay appears to be politically motivated. As indicated by the chart at the end of the brief *amicus curiae* submitted in support of the appellants, no other post-2000 congressional or legislative redistricting plan was subjected to the type of delays the DOJ imposed here. In each of the other states, preclearance of congressional plans was completed prior to the qualifying deadline. And, as just mentioned, the statewide plan drafted by a North Carolina judge was expedited in a manner dramatically different from what occurred in Mississippi. In such circumstances, political motives seem to be the only rational explanation for the difference in treatment. The sixty day review period provided by Congress helps to limit any inclination that political appointees in the DOJ might have to manipulate the Voting Rights Act for political purposes. When that period can be unilaterally expanded by the Attorney General, the potential for mischief increases significantly.

The alleged voting changes were "submitted" on December 26. No one has identified any information that is so necessary to the Section 5 evaluation that the purported changes cannot be said to have "been submitted." The North Carolina events confirm this. 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, the decision of the District Court should be reversed.

Respectfully Submitted,

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