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

Appellees.

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

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Where the law of a state covered by § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, has previously provided that its courts may not entertain challenges to the manner of election of Members of the United States House of Representatives, must an order by its Supreme Court authorizing a trial court to impose a redistricting plan be reviewed and approved under § 5; and, if so, may the plan imposed by the trial court be reviewed under § 5 before the Supreme Court order granting jurisdiction has been approved?

2. Does Article I, § 4 of the United States Constitution permit a state court, in adjudicating a claim brought only under state law, to order its own congressional redistricting plan into effect when that State's Legislature has directed by statute that election of Representatives be conducted at large?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

MISCELLANEOUS

MOTION TO AFFIRM

Pursuant to this Court's Rule 18.6, John Robert Smith, Shirley Hall, and Gene Walker, who were plaintiffs before the United States District Court for the Southern District of Mississippi, and the Mississippi Republican Executive Committee, one of the defendants, move to affirm the judgment of that Court. The District Court ruled that a congressional redistricting plan prepared by appellants, who were plaintiffs in a separate action before the Chancery Court of the First Judicial District of Hinds County, Mississippi, could not be enforced consistent with § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. As a separate ground for its judgment, the District Court ruled that the Chancery Court's imposition of a congressional redistricting plan was barred by Art. I, § 4 of the United States Constitution, which confers upon legislatures the power to regulate elections to the House of Representatives. If either the statutory or the constitutional ruling is correct, the judgment of the District Court must be affirmed. Both rulings are correct.

JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1253.

REGULATIONS

In addition to the statutes and constitutional provisions identified in the Jurisdictional Statement, the following regulations adopted by the Attorney General of the United States are implicated in this appeal.

28 C.F.R. § 51.15 provides in pertinent part:

> (a) With respect to legislation (1) that enables or permits the State or its political subunits to institute a voting change or (2) that requires or enables the State or its political sub-

units to institute a voting change upon some future event or if they satisfy certain criteria, the failure of the Attorney General to interpose an objection does not exempt from the preclearance requirement the implementation of the particular voting change that is enabled, permitted, or required, unless that implementation is explicitly included and described in the submission of such parent legislation.

(b) For example, such legislation includes –

(1) Legislation authorizing counties, cities, school districts, or agencies or officials of the State to institute any of the changes described in § 51.13.

28 C.F.R. § 51.22 provides in pertinent part:

The Attorney General will not consider on the merits:

. . .

(b) Any proposed change which has a direct bearing on another change affecting voting which has not received section 5 preclearance.

28 C.F.R. § 51.35 provides in pertinent part:

The Attorney General will make no response on the merits with respect to an inappropriate submission but will notify the submitting authority of the inappropriateness of the submission. Such notification will be made as promptly as possible and no later than the 60th day following receipt and will include an explanation of the inappropriateness of the submission. Inappropriate submissions include . . . premature submissions (see §§ 51.22, 51.61(b)). . . .

STATEMENT OF THE CASE

Appellants' Statement of the Case is substantially correct. As might be expected, however, in a dispute litigated simultaneously in multiple courts, a few clarifications are necessary.

Appellants were plaintiffs in the Chancery Court and intervened as defendants in the District Court. Process was served in both cases in November of 2001, although the Chancery Court complaint was filed a few weeks earlier. Neither the complaint nor the amended complaint in Chancery Court raised any claim under federal law. The very first sentence of each pleading declared, "This action for injunctive relief is brought to insure compliance with Mississippi law . . . . " Mtn. App. 1.

Appellants sued only the three elected state officers, all Democrats, who are members of the State Board of Election Commissioners. Although the executive committees of the political parties are responsible for enforcement of the statutes governing nominations to Congress by primary or petition, appellants sought to litigate their claim in their absence. At the request of Attorney General Mike Moore, one of the defendants, the Chancery Court ordered the executive committees added as defendants, and a summons was served on the Mississippi Republican Executive Committee. Although the Chancery Court later vacated its order, the Committee appeared, moved to dismiss, and moved to vacate the order revoking its joinder in the action. Although the Committee did not file a separate motion to intervene, four voters intervened as defendants. Having been served with process, the Committee joined the intervening defendants in their appeal to the Supreme Court of Mississippi.[1]

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[1] Appellants complain that neither the Committee nor the intervening defendants asked the Supreme Court of Mississippi to stay the judgment of the Chancery Court. J.S. 6. No such motion would have been appropriate, because that judgment is automatically stayed pending compliance with § 5 of the Voting Rights Act. Appellants, who are appellees in the appeal to the Supreme Court of Mississippi, have never asked that Court to expedite its consideration of the appeal.

The congressional redistricting plan imposed by the Chancery Court's judgment, which appellants repeatedly describe as the state court plan, was devised and submitted into evidence by appellants themselves. App. 121a. The Chancery Court's opinion and order of December 21, 2001, describes it as "Branch Plaintiffs' Plan 2A Zero Deviation." App. 134a. Refusing to permit enforcement of appellants' plan, the District Court described it as "having been drafted by the Intervenors (plaintiffs in Chancery Court), not by the Chancery Court, and not by the Mississippi Legislature." App. 31a-32a.

Appellants' contention that "[n]o party in the federal case asserted that the particular lines in the state court plan violated . . . the Voting Rights Act," J.S. 6, is an exercise in semantics. Plaintiffs alleged and the District Court agreed that all lines in appellants' plan violated the Voting Rights Act because they had never been approved under § 5. Moreover, plaintiffs contended that the Chancery Court's decision to impose any system of districts violated the Voting Rights Act because of its inconsistency with Miss. Code Ann. § 23-15-1039 (Rev. 2001), which had been approved by the Attorney General of the United States pursuant to § 5 and which required Representatives to be elected at large. No change in Mississippi law challenged by plaintiffs in the District Court has yet been approved under § 5.

Plaintiffs asked the District Court to order the elections of Representatives at large under 2 U.S.C. § 2a(c)(5), which, like § 23-15-1039, requires at-large elections when the size of the delegation has been reduced but no redistricting has been completed. The District Court did not explain its failure to enforce these identical state and federal statutes. Because plaintiffs are satisfied with the remedy imposed by the District Court's judgment, they ask this Court to affirm that judgment. However, should

the Court choose to set this appeal for argument, plaintiffs ask this Court to review the District Court's failure to order at-large elections, as set forth in their separate Jurisdictional Statement on their conditional cross-appeal, as permitted by this Court's Rule 18.4.

ARGUMENT

I. BECAUSE NO MISSISSIPPI CONGRESSIONAL DISTRICTING PLAN HAS BECOME LAW, THE DISTRICT COURT PROPERLY IMPOSED A PLAN.

Appellants offer no criticism of the redistricting plan adopted by the District Court. They make no contention that the District Court ignored constitutional requirements or the remedial principles announced by this Court's precedents. Rather, they claim only that there was no wrong to remedy, because a new redistricting plan for Mississippi had already taken effect. They assert that their plan was properly submitted by General Moore after its approval by the Chancery Court and that, because of deficiencies in the letter of February 14, 2002, from the Chief of the Voting Rights Section of the Department of Justice, "the state court plan has been precleared." J.S. 21. Because, as will be seen, appellants' plan has not been precleared, the District Court's judgment imposing its own plan must be affirmed.[2]

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[2] The statutory issue is addressed first because of its sufficiency to support the judgment. Ordinarily, if an appeal may be resolved on statutory grounds, this Court will not reach any constitutional questions. *See, e.g., Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 343-44 (1999), citing *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

A. The District Court properly ruled that all three submitted changes required approval under § 5 of the Voting Rights Act.

General Moore's letter of December 26, 2001, to the Department of Justice submitted three changes for preclearance under § 5 of the Voting Rights Act: (1) appellants' redistricting plan, as embodied in the Chancery Court's order of December 21, 2001; (2) the reassignment of jurisdiction over redistricting to the Chancery Court by the Supreme Court's order of December 13, 2001, in *In re Mauldin* No. 2001-M-01981 (Miss. Dec. 13, 2001), App. 110a; and (3) the judicial imposition of a redistricting plan to the extent that it departed from the at-large requirement of Miss. Code Ann. § 23-15-1039. App. 227a-229a. Appellants admit that their redistricting plan required preclearance under § 5, but they deny that the other two submissions needed preclearance. In fact, all three changes are subject to § 5. Because *In re Mauldin* had not been precleared, the Department of Justice and the District Court properly concluded that consideration of appellants' redistricting plan itself was premature.

1. The order in *In re Mauldin* is enabling legislation under 28 C.F.R. § 51.15(b)(1).

The indispensable key to appellants' statutory argument is that the Supreme Court's order in *In re Mauldin* is not a voting change which requires approval under § 5 of the Voting Rights Act. Both the District Court and the Department of Justice found to the contrary. The District Court stated that *In re Mauldin* "clearly appears to be a change in Mississippi's election procedures that must be precleared by federal authorities." App. 97a. *See also* App. 33a. The letter to General Moore from the Chief of the Department's Voting Section described the order "that granted the Chancery Court of Hinds County jurisdiction to adopt and direct the implementation of a congressional

redistricting plan" as a "change in voting procedure." App. 193a. Appellants bewail at some length the supposedly dire consequences of that finding, but they offer no analysis of the statute or its implementing regulations which would undermine the conclusion reached by the District Court and the Department.

The broad reach of § 5 is well known. This Court has repeatedly stated that "Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." *Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969). The Attorney General has confirmed this broad scope in the regulations implementing the statute:

> Any change affecting voting, even though it appears to be minor or indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the section 5 preclearance requirement.

28 C.F.R. § 51.12. The regulations explicitly list redistricting decisions as being among those requiring preclearance. 28 C.F.R. § 51.13(e).

Deciding who shall have authority to make redistricting decisions may be one step removed from the redistricting itself, but it still falls within the scope of § 5. The regulations describe "enabling legislation" to include any provision "that enables or permits the State or its political subunits to institute a voting change." 28 C.F.R. § 51.15(a). Specific examples of such enabling legislation include:

> (1) Legislation authorizing counties, cities, school districts, or agencies or officials of the State to institute any of the changes described in § 51.13.

28 C.F.R. § 51.15(b)(1). *In re Mauldin* falls squarely within this definition.[3] The judges of Mississippi's Chancery Courts are "officials of the State," and *In re Mauldin* authorizes them "to institute [one] of the changes described in § 51.13," the preparation and imposition of redistricting plans. This Court has expressly approved the authority of the Attorney General to promulgate regulations implementing § 5, *Georgia v. United States*, 411 U.S. 526, 536 (1973), and it has traditionally given great deference to his application of the Act. Because this Court could agree with the Attorney General that a city's annexation of a vacant lot requires approval under § 5, *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987), it should have no difficulty in agreeing here with the District Court and the Justice Department that the reassignment of redistricting authority to the Chancery Court constitutes a change affecting voting.

Pursuant to its regulations, the Department of Justice has consistently acknowledged that a transfer of redistricting authority is subject to § 5. In a document available for public review on the Internet, the Department continues to declare:

> Some transfers of authority between government officials . . . clearly have a direct relationship to voting–if they concern authority over voting procedures, such as a change in who has authority to adopt a redistricting plan, conduct voter registration, or select polling place officials. *See, e.g., Foreman v. Dallas County*, 521 U.S. 979 (1997).

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[3] Although judicial orders would not generally be characterized as "legislation," all parties agree that voting changes are subject to § 5 even when ordered by courts, rather than by legislative authorities. *Hathorn v. Lovorn*, 457 U.S. 255 (1982).

Department of Justice, *About Section 5 of the Voting Rights Act*, "Section 5 Requirements," <http://www.usdoj.gov/crt/voting/sec_5/types.htm>. Although *Foreman* did not involve redistricting, it illustrates the importance of federal review of a change in decisonmakers. By using "party-affiliation formulas of one sort or another," Dallas County had changed its procedures for selecting election judges, "who supervised voting at the polls on election days." 521 U.S. at 980. Obviously, each election judge exercises a substantial amount of discretion in making decisions on election days; § 5 requires federal review of the procedures for selecting those judges so as to minimize the likelihood that they will exercise their discretion in a discriminatory fashion. So, too, state officials exercise a tremendous amount of discretion in adopting redistricting plans; it is equally important for federal officials to consider whether individual judges are more likely than the Mississippi Legislature to exercise that discretion in a discriminatory fashion.

The principle embodied in 28 C.F.R. § 51.15(b)(1) is fully consistent with this Court's decision in *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992). There, this Court held, "Changes which affect only the distribution of power among officials are not subject to § 5 because such changes have no direct relation to, or impact on, voting." *Id.*, at 506. The Court, however, continued:

> To be sure, reasonable minds may differ as to whether some particular changes in the law of a covered jurisdiction should be classified as changes in rules governing voting. . . . When the Attorney General makes a reasonable argument that a contested change should be classified as a change in a rule governing voting, we can defer to that judgment.

Id., at 509. As indicated from his public pronouncements and from the February 14 letter to General Moore, the

Attorney General continues to believe that a reassignment of redistricting authority "should be classified as a change in a rule governing voting." *Id.* While not binding, his judgment is one to which this Court may reasonably defer, as it did in *Foreman*.[4] *See also United States v. Louisiana*, 952 F.Supp. 1151, 1165-68 (W.D. La.) (*Presley* does not foreclose Attorney General's determination that a city court is a subunit of a city under 28 C.F.R. § 51.13(e)), *aff'd mem.*, 521 U.S. 1101 (1997).

Deference to the Attorney General's judgment is unlikely to have the broad effects predicted by appellants. Many state courts have litigated voting rights claims of various descriptions over the last four decades, but most such claims have arisen under federal law, not state law. State courts derive their authority and duty to litigate federal claims, not from legislative enactment or judicial decision, but from Article VI of the Constitution. Appellants here did not assert a federal claim; they took pains to clarify that their complaint before the Chancery Court asserted only claims arising under state law. The reassignment of authority to make redistricting determinations applying state law alone constitutes enabling

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[4] The dissent in *Presley* identified several transfers of authority which had been found subject to § 5, including "a transfer of voter registration duties from the county clerk to the county tax assessor." *Id.*, at 512 n.3 (Stevens, J., dissenting), quoting Brief for United States as *Amicus Curiae* 16 n.6. Likewise, in *County Council of Sumter County v. United States*, 555 F.Supp. 694 (D.D.C. 1983), the Attorney General had approved a South Carolina statute transferring the bulk of local decisionmaking authority, including the authority to select a form of government and to establish election districts, from the state to the county. The three-judge court unanimously agreed that "the shift of power from the Governor and the General Assembly to the new County Council" constituted a change affecting voting. *Id.*, at 702. This Court's opinion in *Presley* did not repudiate either of these precedents.

legislation under 28 C.F.R. § 51.15 just as much as the reassignment of authority to register voters or to supervise the polls. Here, neither the District Court nor the Department of Justice decided that a state court must obtain preclearance under § 5 before adjudicating a federal claim. The much narrower principle actually established by this case will control only claims in state court arising under state law.

Because *In re Mauldin* falls within the plain language of 28 C.F.R. § 51.15(b)(1), and because appellants have shown no reason to disregard the determination of the District Court and the Department of Justice, this Court should conclude that preclearance of the decision of the Supreme Court of Mississippi is required under § 5.

2. The Chancery Court's unexplained disregard of the at-large election requirement of Miss. Code Ann. § 23-15-1039 is a voting change.

The Mississippi Legislature, in a provision readopted most recently in 1986, 1986 Miss. Gen. Laws ch. 495 § 308, has provided a rule for conducting elections whenever it fails to adopt a redistricting plan after a change in the size of the delegation. The applicable language provides that, "if the number of representatives shall be diminished, then the whole number shall be chosen by the electors of the state at large." Miss. Code Ann. § 23-15-1039. In ordering its own redistricting plan into place, the Chancery Court simply ignored this statute. It did not find the at-large mandate to be unconstitutional or inapplicable; it simply failed to address it at all.

The District Court, by contrast, held that the Chancery Court's disregard of § 23-15-1039 constituted a change from prior Mississippi law. The Court unequivocally stated that "the Chancery Court's judgment adopting a congressional redistricting plan is a change . . . from

the at-large plan set forth in Miss. Code Ann. § 23-15-1039 for circumstances such as the present ones." App. 98a. In its letter to General Moore of February 14, the Department of Justice made no such explicit finding, but its questions implicitly recognized that a change had been made. With regard to the reassignment of redistricting power to the Chancery Courts, the letter requested, "Please explain the State's view of the relationship between this change in voting procedure and Miss. Code Annot. 23-15-1039." App. 193a-194a.

Appellants' contention that the District Court and the Justice Department misunderstood the statute is purest sophistry. Noting the statute's application to elections held "before the districts shall have been changed to conform to the new apportionment," appellants contend that the districts changed "[o]nce the state court adopted a plan," J.S. 26, thus removing the precondition for the application of the statute. Of course, changes in Mississippi districts "are not now and will not be effective as laws until and unless cleared pursuant to § 5." *Connor v. Waller*, 421 U.S. 656 (1975). Had the Chancery Court accepted appellants' construction of § 23-15-1039, it would have instructed state officials to conduct at-large elections until such time as a redistricting plan had been properly approved.

The District Court construed § 23-15-1039 according to its plain meaning and found that the enforcement of appellants' plan would constitute a change from that meaning. Appellants offer no good reason for this Court to reject the District Court's common-sense reading of the statute. For this Court to accept appellants' fanciful construction of the statute would violate its ordinary procedures. "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be

unreasonable." *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 224 n.10 (1985), quoting *Propper v. Clark*, 337 U.S. 472, 486-87 (1949), and citing cases. *Accord, Stenberg v. Carhart*, 530 U.S. 914, 940 (2000). Although the District Court's judgment has not had the benefit of review by the Court of Appeals, it is noteworthy that all three judges accepted this reading of Mississippi law.

Finally, it beggars belief to suppose that the Mississippi Legislature intended § 23-15-1039 to apply only when a court had failed to redistrict the state. The statute in its present form goes back at least as far as the first code following the adoption of Mississippi's present Constitution of 1890. 1892 Miss. Code § 3690. At that time there was no precedent whatsoever for the drawing of congressional districts by a court. Mississippi's rejection of such a practice was confirmed in *Brumfield v. Brock*, 169 Miss. 784, 142 So. 745 (1932), which remained good law until *In re Mauldin*. Thus, the historical record squarely precludes appellants' reading of the statute.

For these reasons, the District Court properly concluded that enforcement of appellants' redistricting plan would constitute a change from the law prescribed by § 23-15-1039.

B. The District Court properly agreed with the Department of Justice that consideration of appellants' congressional redistricting plan was inappropriate under 28 C.F.R. § 51.35.

The Attorney General is obliged under § 5 of the Voting Rights Act to consider changes in election law properly submitted by state authorities. All parties recognize that the Attorney General's power to prescribe reasonable regulations to govern that process was confirmed by this Court in *Georgia v. United States, supra*. Appellants nevertheless contend that the application of those regulations by the Department of Justice in this case was so

arbitrary and unnecessary that their congressional redistricting plan became effective 60 days after General Moore submitted it. Appellants are wrong.

The regulations quite reasonably describe the sorts of changes which may be submitted for consideration, as well as the time of proper submission. In 28 C.F.R. § 51.35, the regulations provide for the disposition of improper submissions. The Department's letter of February 14 invoked this provision in refusing to consider appellants' redistricting plan:

> Because the December 13, 2001 Order of the Mississippi Supreme Court (In re Mauldin No. 2001-M-01891), and the December 21 & 31, 2001 Orders of the Chancery Court which adopted a redistricting plan, are directly related, it would be inappropriate for the Attorney General to make a determination concerning the congressional redistricting plan adopted by the Chancery Court. See 28 C.F.R. 51.22(b); 51.35.

App. 192a. The former provision mentioned in the letter concerns premature submissions, which it defines to include "[a]ny proposed change which has a direct bearing on another change affecting voting which has not received section 5 preclearance." 28 C.F.R. § 51.22(b). In other words, because the Chancery Court's authority to impose a redistricting plan had not yet received preclearance under § 5, it was premature for the state to submit for consideration appellants' plan which the Chancery Court had adopted.

There is nothing arbitrary or improper about the Department's application of its regulations in this case. The District Court approved the Department's finding that it could not "make a determination considering the Chancery Court plan until it receives the requested information and makes a decision on whether to approve the assignment of jurisdiction to the Chancery Court." App.

33a n.3. Until the Attorney General approves the Chancery Court's assumption of jurisdiction, the Chancery Court's approval of appellants' plan carries no more weight than the approval by appellants themselves.

In attacking the Department's February 14 request for information regarding the effect of *In re Mauldin*, appellants fail to carry the heavy burden of showing that the Department has engaged in "unwarranted administrative conduct," as described in *Georgia v. United States*, 411 U.S. at 541 n.13. Indeed, they do nothing more than restate their earlier objections that *In re Mauldin* should not be considered a change in the first place. If reassignment of electoral authority among state officials can ever be subject to § 5, as *Foreman* holds, then it can hardly be frivolous for the Department to investigate the possible consequences of that reassignment.

Appellants' argument is based upon their misreading of *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000). That case does not hold that all submissions must be approved where no retrogression, actual or intended, is shown; the holding is limited to "§ 5 in its application to vote-dilution claims." *Id.*, at 328. Retrogression is the touchstone for evaluating appellants' redistricting plan, but it is not the sole consideration in reviewing the reassignment of redistricting authority effected by *In re Mauldin*.

As noted above, reassignments of electoral authority are important because election officials exercise discretion. Appellants are certainly correct that retrogression can be forestalled by § 5 review of the redistricting plan itself. However, in any redistricting process, there are many potential plans which do not constitute retrogression. The selection among those plans is an exercise of discretion, and that discretion can be exercised in a discriminatory fashion. Where redistricting authority is reassigned, § 5 review is necessary to assure that the

reassignment does not make discrimination more likely in the exercise of that discretion. All of the Department's questions in its February 14 letter are plainly directed toward that end.

Finally, even if this Court were to accept appellants' contention that the February 14 letter was insufficient to toll the running of the 60-day period, the only effect would be the approval of *In re Mauldin*. The time for consideration of appellants' redistricting plan itself was not tolled; it never started. The Department's declaration, approved by the District Court, was that the submission of the plan was premature under § 51.22(b) until *In re Mauldin* had been approved. If appellants are correct that *In re Mauldin* has now been approved by operation of law, then the consideration of their redistricting plan may begin. The District Court was plainly correct in concluding, App. 33a-34a & n.3, that the plan had not gone into effect.

Because no congressional redistricting plan for Mississippi had gone into effect, the District Court had no choice but to impose its own plan. Because appellants have not identified any defect in the District Court's plan,[5] its judgment must be affirmed.

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[5] In their Jurisdictional Statement on their conditional cross-appeal, plaintiffs and the Committee have argued that the District Court erred by failing to impose the at-large election required by 2 U.S.C. § 2a(c)(5). Should this Court grant the motion to affirm, there will be no need to address the issue raised by the conditional cross-appeal.

II. ARTICLE I, SECTION 4 OF THE CONSTITUTION DELEGATES POWER OVER CONGRESSIONAL ELECTIONS TO A STATE'S LEGISLATIVE AUTHORITIES, NOT ITS JUDICIAL AUTHORITIES.

Even if appellants were correct that their redistricting plan has been precleared under § 5, it would remain unenforceable because of its adoption by the Chancery Court. Article I, § 4 of the Constitution of the United States declares in pertinent 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 . . . .

The District Court properly found that the Mississippi Legislature had not authorized the Chancery Court to devise new congressional districts, and it therefore properly enjoined the enforcement of the Chancery Court's judgment. App. 7a.

A. The Framers intended power to be exercised by legislative authorities subject to federal control, not control by other state authorities.

The constitutional delegation of power to make redistricting decisions seems quite clear on its face. In *Federalist No. 59*, Alexander Hamilton explained the necessity and propriety of legislative regulation of congressional elections:

> [I]t will therefore not be denied, that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded, that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature,

> or wholly in the State legislatures, or primarily in the latter and ultimately in the former. The last mode has, with reason, been preferred by the convention.

It would have astounded the Framers to suppose that the state courts should have "a discretionary power over elections" to Congress, such as that exercised by the Chancery Court here.

The Framers delegated this authority not to the states, to be exercised as the states might choose, but quite specifically to state legislatures. Other provisions of the Constitution show that the Framers knew how to specify the state authorities to exercise particular powers. Besides authority over elections to Congress, seven other powers were given to the state legislatures: to appoint Senators (Art. I, § 3); to consent to land purchases by Congress (Art. I, § 8); to provide the manner for appointing presidential electors (Art. II, § 1); to consent to subdivision of a state (Art. IV, § 3); to seek national help during a domestic disturbance (Art. IV, § 4); to apply for a constitutional convention (Art. V); and to ratify amendments if Congress chooses that method (Art. V). Two of these – the power to fill Senatorial vacancies in Art. I, § 3 and to seek emergency national help in Art. IV, § 4 – explicitly provide for state *executive* gap filling. No discretionary power whatsoever is delegated to the state courts. State courts are obliged by the Supremacy Clause of Art. VI to enforce federal law, but appellants asserted no federal claim in their complaint in Chancery Court.

The Framers were quite conscious that state legislatures might be unable or unwilling to discharge the powers delegated to them by the Constitution. Hamilton in *Federalist No. 59* expressed particular concern that they might fail to provide for elections to Congress:

> Nothing can be more evident, than that an exclusive power of regulating elections for the

> national government, in the hands of the State legislatures, would leave the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs.

Although the Framers could have assigned the power to cure legislative defaults to other state authorities, as they had in Art. I, § 3 and Art. IV, § 4, they chose instead to place that responsibility in federal hands. Charles Cotesworth Pinckney explained to the South Carolina Legislature that this decision stemmed from the fear that local political disputes would cripple the national interest:

> [I]t is absolutely necessary that Congress should have this superintending power; lest, by intrigues of a ruling faction in the state, the members of the House of Representatives should not really represent the people of the state, and lest the same faction, through partial state views, should altogether refuse to send representatives to the general government.

4 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* 303 (2d ed. 1888).

The few judicial decisions to consider Art. I, § 4 have construed the term "legislature" broadly enough to include all of a state's legislative authorities, but not so broadly as to include the state courts. In *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), this Court gave effect to a referendum conducted pursuant to Ohio law to invalidate a redistricting plan passed by its Legislature. This Court held that Art. I, § 4 did not preclude Congress from providing by statute that redistricting should be accomplished in the manner provided by state law. *Id.*, at 569-70. The Supreme Court of Ohio had construed its law to the effect that "the provisions as to referendum were a

part of the legislative power of the state," *id.*, at 567,[6] thus complying with the controlling congressional statute.

In *Smiley v. Holm*, 285 U.S. 355 (1932), plaintiffs argued that the Constitution precluded the Governor of Minnesota from vetoing a redistricting plan adopted by that state's Legislature. This Court carefully examined history to determine that the Framers would have regarded the veto as a legitimate part of the legislative process to which the Constitution had delegated authority:

> At the time of the adoption of the Federal Constitution, it appears that only two states had provided for a veto upon the passage of legislative bills; Massachusetts, through the Governor, and New York, through a council of revision. But the restriction which existed in the case of these states was well known. That the state Legislature might be subject to such a limitation, either then or thereafter imposed as the several states might think wise, was no more incongruous with the grant of legislative authority to regulate congressional elections than the fact that the Congress in making its regulations under the same provision would be subject to the veto power of the President, as provided in article 1, § 7.

Id., at 368-69.

Davis and *Smiley* stand at most for the proposition that the electorate, exercising the referendum power, and the governor, exercising the veto power, may be considered to be among the state legislative authorities to whom

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[6] Mississippi, by contrast, provides that "[t]he legislative power of the state shall be vested in a legislature." Miss. Const. Art. 4, § 33 (1890). As the District Court observed, App. 11a n.6, the courts are explicitly forbidden to exercise legislative power by Art. 1, § 2.

redistricting power was delegated by Art. I, § 4. However, by no means do those cases support the proposition that, when the Legislature fails to act, other state officials may exercise the "discretionary power over elections" to which Hamilton referred. In both *Davis* and *Smiley* the Legislature had actually adopted a plan, but other state legislative authorities prevented it from becoming law. The result in both cases was the continued enforcement of the existing districting plan, not the adoption of a new and different plan by other state authorities.

A more recent case suggests that other state officials have no role to play when the Legislature has failed to adopt an enforceable congressional redistricting plan. In *Grills v. Branigin*, 284 F.Supp. 176 (S.D. Ind.), *aff'd mem.*, 391 U.S. 364 (1968), plaintiffs successfully sued members of the Election Board to enjoin enforcement of an unconstitutional districting scheme. When the Indiana Legislature failed to pass a new scheme, the defendants asked the Court to authorize the executive branch defendants to draw the plan. The Court refused: "Article I, Section 4, Clause 1 of the United States Constitution clearly does not authorize the defendants, as members of the Election Board of Indiana, to create congressional districts." 284 F.Supp. at 180.

To permit other state officials affirmatively to substitute their discretion for that of the Legislature in redistricting matters might realize Pinckney's fear that the "intrigues of a ruling faction in a state" could produce a congressional election which "should not really represent the people of the state." Here, the leaders of the Mississippi Legislature declined to reach a political compromise, but continued their intrigues in their testimony before the Chancery Court. A federal rule which permits other state officials to resolve political quarrels in place of the Legislature decreases the likelihood that the Legislature will discharge the duties delegated to it by Art. I, § 4,

and increases the likelihood that legislators may choose instead to seek political results from selected state judges.

This appeal does not present the question of whether a state court may impose a redistricting plan as a remedy for a violation of federal law, because appellants asserted no federal claim before the Chancery Court. Even if Art. I, § 4 permits a state court to impose a redistricting plan in resolving a federal claim, it remains important to exclude redistricting claims brought under state law. A federal claim brought in state court may be reviewed by this Court for errors of federal law; here, the Chancery Court's declaration that "fairness to the incumbents is a paramount consideration," App. 131a, would be promptly corrected. *See Wyche v. Madison Parish Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) ("Many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts."). By contrast, this Court would not be able to review an exercise of discretion under state law, except to assure compliance with minimal standards set by the federal Constitution and statutes. As they did in the District Court, *see* App. 30a-34a, appellants would defend all exercises of the Chancery Court's discretion as determinations of state policy to which this Court must defer.

This very practical consideration forecloses appellants' reliance on *Wesberry v. Sanders*, 376 U.S. 1 (1964). There, this Court held that the assignment of authority to Congress in Art. I, § 4 did not preclude the federal courts from enforcing the separate demands of Art. I, § 2 for equal representation. The Framers surely would have understood that any litigation to enforce Art. I, § 2 would be fully reviewable by this Court; even if Art. VI permits state courts to entertain such federal claims, this Court retains the final authority. Thus, the fact that federal claims may be litigated notwithstanding Art. I, § 4 does

not compel the conclusion that state claims, unreviewable in this Court, must be similarly permissible. Certainly, Framers like Pinckney, who feared "intrigues of a ruling faction in a state," would have been unwilling to surrender unreviewable authority to state judges.

The language, history, and prior application of Art. I, § 4 necessitate the conclusion that state courts may not impose congressional redistricting plans in adjudicating a claim brought under state law.

B. The District Court's ruling does not contravene *Growe v. Emison*.

Relying on *Growe v. Emison*, 507 U.S. 25 (1993), appellants contend that affirmance of the District Court's judgment would preclude most state courts from litigating congressional redistricting claims when legislatures fail to complete the redistricting process.[7] Whether state courts should have such power is certainly questionable, notwithstanding the result in *Growe*, because of the plain language of Art. I, § 4. However, no such dilemma is presented by the District Court's judgment, because it is consistent with the result in *Growe* for two separate reasons. First, the Minnesota court, unlike the Chancery Court here, adjudicated a federal claim as required by the Supremacy Clause of Art. VI; other state courts will remain free to do the same. Second, the Chancery Court

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[7] As the District Court found, App. 18a, the constitutional issue raised by plaintiffs and the Committee has not been foreclosed by *Growe*. The issue of whether a state court's resolution of a redistricting dispute is consistent with Art. I, § 4 was not raised or decided in that case. As the Court has recently said, "Constitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas v. Cobb*, 532 U.S. 162, 169 (2001). *Accord, Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). The issue facing this Court is therefore of one of first impression.

here acted in defiance of the legislative will as expressed in Miss. Code Ann. § 23-15-1039; the District Court's opinion left open the possibility that other legislatures might delegate redistricting authority to their courts.

1. The Minnesota court derived its power, not from Article I, section 4, but from its duty under Article VI to enforce Article I, section 2, but no federal claim was presented here to the Chancery Court.

The complaint filed by appellants in Chancery Court is certainly unusual and probably unique. Unlike most redistricting cases, it asserts no claim under federal law. Instead, ¶ 5 of the amended complaint invokes "the interests of the plaintiffs and all Mississippi voters in enforcement of Mississippi's election laws," as well as "their rights under Mississippi law to participate in a congressional election process conducted in a timely manner." Mtn. App. 3.

Appellants' assertion that "the state courts were required to enforce both federal and state law," J.S. 17 n.7, obscures the true record. The first time they mentioned a federal statute in the Chancery Court proceedings, appellants went out of their way to make clear that their claim arose only under state law, presumably to avoid the possibility of removal to federal court. In the process of arguing that enforcement of Mississippi's at-large statute would violate 2 U.S.C. § 2c, appellants added:

> As previously mentioned, our claim in this case is brought specifically under Mississippi law and seeks to enforce Mississippi law. In response, the intervenors have claimed that § 23-15-1039 requires at-large elections. We raise federal law at this juncture only to show that even if this at-large option were required by that statute, it is not a viable solution because it

> violates both federal law and the Mississippi Constitution.

Mtn. App. 8 n.3. It is simply beyond dispute that appellants sought relief from the Chancery Court only under Mississippi law, to the exclusion of federal law.

The Minnesota pleadings in *Growe* were entirely different:

> In January 1991, a group of Minnesota voters filed a state-court action against the Minnesota Secretary of State and other officials responsible for administering elections, claiming that the State's congressional and legislative districts were malapportioned, in violation of the Fourteenth Amendment of the Federal Constitution and Article 4, § 2, of the Minnesota Constitution.

507 U.S. at 27. It is certainly the case that the Supremacy Clause of Art. VI ordinarily obligates state courts to entertain claims for enforcement of federal law. For instance, this Court has held that state courts must hear claims arising under the Voting Rights Act. *Hathorn, supra,* 457 U.S. at 269-70. Neither *Growe* nor any other case directly considers the question of whether state courts may or must hear federal claims concerning congressional redistricting.[8]

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[8] Appellants contend that the District Court's judgment is inconsistent with that of numerous state courts which have entered congressional redistricting orders since the completion of the 2000 census. J.S. 14. Most of the opinions to which appellants refer indicate only that plaintiffs presented constitutional claims, without specifying whether they arose under state or federal law. *Beauprez v. Avalos,* 42 P.3d 642, 645 (Colo. 2002); *Zachman v. Kiffmeyer,* 629 N.W.2d 98 (Minn. 2001); *Perry v. Del Rio,* 67 S.W.3d 85, 87 (Tex. 2001). In Oregon, however, the trial court explicitly stated that "the plaintiffs challenge the constitutionality of the existing United States

Appellants suggest that *Growe* holds the precise nature of the claim to be irrelevant to a state court's authority to adjudicate congressional redistricting claims. However, when this Court in *Growe* stated that *Scott v. Germano*, 381 U.S. 407 (1965), "does not require that the federal and state-court complaints be identical," 507 U.S. at 35, it was addressing the obligation of a federal court to defer to state proceedings, not the jurisdiction of the state court. *Growe* held that the federal plaintiffs' assertion of a claim under the Voting Rights Act did not allow them to proceed to the exclusion of the federal constitutional claim being asserted in state court. This Court did not hold that a federal court would be required to abstain in favor of a state law attack on a congressional redistricting plan or that a state court could entertain such an attack consistent with Art. I, § 4.[9]

In short, because these appellants asserted only state law claims in Chancery Court, this appeal does not present the question of whether state courts can or must hear federal claims involving congressional redistricting.

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congressional districts in Oregon under the Federal Constitution." *Perrin v. Kitzhaber*, No. 0107-07021, slip op. at 1 (Cir. Ct. of Multnomah Cty., Ore., Oct. 19, 2001). Likewise, in New Mexico the trial court ruled, "The current New Mexico congressional districts violate Art. I, § 2 of the Constitution of the United States." Order re: Amendment to the Court's Findings of Fact and Conclusions of Law Filed January 2, 2002, *Jepsen v. Virgil-Giron*, No. D0101-CV-2002-02177 (Dist. Ct. of Santa Fe Cty., N.M. 2002). So far as appears, appellants are the only litigants in the country who have chosen to rely only on state law in pressing their claims.

[9] *Germano*, of course, concerned only legislative redistricting. Thus, it cannot support a contention that state courts can or must adjudicate congressional redistricting claims.

Affirmance of the District Court's decision is not inconsistent with *Growe* or with the more recent state court cases upon which appellants rely.

2. Whether or not the Minnesota Legislature delegated redistricting power to its courts, the Chancery Court here disregarded the express dictate of the Mississippi Legislature that at-large elections be conducted.

In considering whether Art. I, § 4 leaves a role for state courts in congressional redistricting, the District Court considered whether Minnesota's Legislature may have created statutory authority for its courts to hear such cases. The Court noted that in *Cotlow v. Growe*, 622 N.W.2d 561 (Minn. 2001), the Supreme Court of Minnesota relied on two statutes giving its Chief Justice authority to make special assignments in special cases. App. 16a. Concluding that its interpretation of Art. I, § 4 was not precluded by this Court's precedents, the District Court remarked that "there was some, albeit tenuous, legislative authority for the Minnesota Supreme Court's action in *Growe*." App. 18a.

Whether or not the District Court was correct in suggesting that Minnesota's courts may have had legislative authority to proceed, there can be no disputing its conclusion that Mississippi has "no legislative act on which to base the chancery court's authority to act in congressional redistricting." App. 19a.[10] When the Mississippi Legislature fails to redistrict itself or the Circuit or Chancery Courts, Mississippi's Constitution assigns secondary authority respectively to a special commission and to the Supreme Court. Miss. Const. Art. 6, § 152; *id.*,

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[10] As previously noted, this Court will ordinarily accept the lower court's reading of state law. *Regents of University of Michigan, supra*, 474 U.S. at 224 n.10.

Art. 13, § 254. "There is no similar legislative grant for redistricting congressional districts." App. 19a.

It is certainly true, as appellants note, that Art. 6, § 159 of the Mississippi Constitution confers upon the Chancery Court "full jurisdiction in . . . [a]ll matters in equity." J.S. 18. It is equally true that judges who would have been acquainted with the Framers of that Constitution held 70 years ago that "courts of equity deal alone with civil and property rights and not with political rights." *Brumfield, supra*, 142 So. at 746. Neither the Framers nor the legislators who adopted the general jurisdictional statute, Miss. Code Ann. § 9-5-81 (Rev. 1991), intended to delegate redistricting authority to the Chancery Court. While the Supreme Court purported to confer that authority in *In re Mauldin*, the District Court properly observed that it "did not point to any legislative authority that authorized the chancery court to act." App. 21a.

In fact, the Legislature expressly considered its potential failure to agree on a redistricting plan, and it did not choose to delegate authority to the courts. Instead, it provided in Miss. Code Ann. § 23-15-1039 that, under the circumstances presented here, all Representatives should be elected at large. In approving appellants' redistricting plan, the Chancery Court completely ignored the statute the Legislature had adopted to regulate elections to Congress. It is certainly true, as appellants assert, that legislators retain the power to adopt a new plan, assuming that they can agree with each other and the Governor and can get the Attorney General to approve it under § 5. However, it is likewise true that the Legislature has already adopted a plan to govern this year's congressional elections, and it calls for those elections to be held at large. The Chancery Court simply chose to order state election officials to do something else.

Thus, the situation here resembles that decried by the three concurring Justices in *Bush v. Gore*, 531 U.S. 98 (2000). Just as Art. I, § 4 delegates to legislatures the power to prescribe rules for conducting elections to Congress, Art. II, § 1 grants them the authority to direct the manner of election of presidential electors.[11] Here, as in *Bush*, "the clearly expressed intent of the legislature must prevail." *Id.*, at 120 (Rehnquist, C.J., concurring). In imposing its own redistricting plan, the Chancery Court unconstitutionally disregarded that clear intent, as set forth in § 23-15-1039.[12]

The District Court specifically left open the possibility that a legislative delegation of congressional redistricting authority might pass constitutional muster. It noted that a delegation to a special commission had been held constitutional under Art. I, § 4 by the Supreme Court of New Jersey in *Brady v. New Jersey Redistricting Comm'n*, 131 N.J. 594, 622 A.2d 843 (1992). App. 22a-23a n.13. Thus, affirmance of the District Court's judgment will not resolve the question of whether other legislatures may delegate redistricting authority to their courts. It will merely establish that the Mississippi Legislature has never done so.

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[11] As the three dissenting Justices observed, "It is perfectly clear that the meaning of the words 'Manner' and 'Legislature' as used in Article II, § 1, parallels the usage in Article I, § 4 . . . ." *Id.*, at 123 n.1 (Stevens, J., dissenting).

[12] Whether § 23-15-1039 is unenforceable for some other reason is an issue which was not addressed by either the Chancery Court or the District Court. The question was preserved by plaintiffs and the Committee and is presented in their conditional cross-appeal. For purposes of resolving appellants' appeal, it is enough to note that § 23-15-1039, even if unenforceable, is inconsistent with any suggestion that the Legislature delegated redistricting authority to state courts.

Thus, the District Court's judgment is not inconsistent with *Growe*, nor does it inhibit the ability of state legislatures and courts to resolve their own redistricting disputes. That judgment should be affirmed.

CONCLUSION

For the reasons set forth herein, this Court should affirm the judgment of the District Court.

Respectfully submitted,

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IN THE CHANCERY COURT OF
HINDS COUNTY, MISSISSIPPI

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

vs. No. G-2001-1777 W/4

ERIC CLARK, Secretary of State of
Mississippi; MIKE MOORE, Attorney General
of Mississippi; RONNIE MUSGROVE, Governor
of Mississippi DEFENDANTS

AMENDED COMPLAINT

(Filed Oct. 17, 2001)

This action for injunctive relief is brought to insure compliance with Mississippi law regarding the timing of congressional elections in the State of Mississippi.

1. Plaintiffs Beatrice Brance and Rims Barber are residents and registered voters of Hinds County, Mississippi and the presently existing Fourth Congressional District. David Rule and Melvin Horton are residents and registered voters of Holmes County, Mississippi and the presently existing Second Congressional District. Plaintiff James Woodard is a resident and registered voter of Webster County, Mississippi and the presently existing First Congressional District. He also is an elected Supervisor in Webster County. Plaintiff Joseph P. Hudson is a resident and registered voter of Harrison County, Mississippi and the presently existing Fifth Congressional District. Plaintiff Robert Norvel is a resident and registered voter of Jackson County, Mississippi and the presently

existing Fifth Congressional District. He also is an elected supervisor in Jackson County. These plaintiffs have an interest in participating as voters in the regularly scheduled 2002 elections for members of Congress from the State of Mississippi. They also have an interest in insuring that the provisions of Mississippi law relating to the scheduling of those election are fully enforced.

2. Defendant Eric Clark is the Secretary of State of Mississippi. Defendant Mike Moore is the Attorney General of Mississippi. Defendant Ronnie Musgrove is the governor of Mississippi. Pursuant to § 23-15-211(1) of the Mississippi Code, the three of them constitute the State Board of Election Commissioners of the State of Mississippi. As occupants of the offices they hold, and as members of the State Board of Election Commissioners, they are responsible for the implementation and enforcement of Mississippi's election laws. They are sued in their official capacities as occupants of the offices they hold and as members of the State Board of Election Commissioners.

3. Mississippi law requires that the first step in decennial redistricting of congressional districts occur by December 3, 2001. Pursuant to § 5-3-123 and § 5-3-129 of the Mississippi Code, the Standing Joint Congressional Redistricting Committee of the Mississippi legislature must draw a congressional redistricting plan and present it to the legislature and governor no later than thirty days preceding the convening of the next regular session of the legislature after the publication of the results of the decennial census. The decennial census results were published in early 2001. The next regular session of the legislature convenes January 2, 2002. See Miss. Code

§ 5-1-7. Thus, the Committee's plan must be presented to the legislature and governor no later than thirty days prior to January 2, which is December 3, 2001.

4. Mississippi law requires that qualification of candidates running for Congress in the 2002 elections occur by March 1, 2002. See Miss. Code § 23-15-299. The new districting plan must be enacted well in advance of that time in order for the qualification to occur as scheduled.

5. As of the present time, the Joint Congressional Redistricting Committee has yet to adopt, recommend, or present a plan to the legislature and governor. The legislature has yet to adopt or implement a plan. Unless the legislature adopts a plan in time for it to be implemented in advance of the March 1 qualifying deadline, the interests of the plaintiffs and all Mississippi voters in enforcement of Mississippi's election laws will be compromised, and their rights under Mississippi law to participate in a congressional election process conducted in a timely manner will be violated.

6. This Court has jurisdiction of actions for injunctive relief of this type.

7. In the event the Committee fails to recommend, and the legislature fails to adopt, a congressional redistricting plan in a timely manner, it will be the duty of this Court to insure enforcement of the laws and to adopt and implement a congressional redistricting plan so that the plan can be in place in sufficient time for the candidate qualification and election process to go forward according to the schedule established by Mississippi law.

Accordingly, the plaintiffs request that this Court assume jurisdiction of this cause and further request that, in the event a congressional redistricting plan is not adopted by the legislature in a timely manner, this Court proceed to hold a hearing and issue an injunction adopting and directing the implementation of a congressional redistricting plan for the State of Mississippi that allows the candidate qualification and election process to go forward as required by Mississippi law. The plaintiffs also request any other relief to which they are entitled.

Respectfully submitted,

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IN THE CHANCERY COURT OF
THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

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

Plaintiffs,

vs. No. G-2001-1777 W/4

ERIC CLARK, Secretary of State of
Mississippi; MIKE MOORE, Attorney General
of Mississippi; RONNIE MUSGROVE, Governor
of Mississippi,

Defendants.

SUPPLEMENTAL RESPONSE OF THE PLAINTIFFS TO THE PENDING MOTIONS TO DISMISS

This supplemental response summarizes and adds to the two responses previously filed by the plaintiffs in opposition to (1) the supplemental motion to dismiss of the defendants (response filed November 26, 2001, and (2) the motion to dismiss of the intervenors (response filed November 28, 2001). Because the two motions make different arguments, we believe it useful to summarize our arguments to both motions in a single response and to elaborate upon at least one of those arguments.

I.

Both the defendants and the intervenors contend this Court has no subject mater jurisdiction. But the United

States Supreme Court has said that "state courts have a significant role in redistricting," *Growe v. Emison*, 507 U.S 25, 33 (1993), and also has 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." *Id., quoting, Scott v. Germano*, 381 U.S. 407, 409 (1965). The Mississippi Supreme Court has made it clear that chancery courts have jurisdiction in election law cases such as this one. *Carter v. Lake*, 399 So.2d 1356, 1357-1358 (Miss. 1981); *Adams County Election Commissions v. Sanders*, 586 So.2d 829, 380 (Miss. 1991). *See also, Hathorn v. Lovorn*, 457 U.S 255, 269-270 (1982).[1]

II.

The intervenors argue that the only remedy for this situation is an at-large statewide election for all members of Congress pursuant to Miss. Code § 23-15-1039. They contend, accordingly, that this Court has no jurisdiction. As we previously noted in our response to the intervenors' motion, their argument regarding this remedy in no way deprives this Court of jurisdiction. Moreover, this is not a viable remedy for a number of reasons.

In filing this case, we have asked this Court to enforce Mississippi law and implement an election plan that complies with Mississippi law. Mississippi law sets

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[1] These authorities are discussed in more detail at pages 2-9 of our response to the defendants' supplemental motion to dismiss.

out an election schedule that requires candidate qualification on March 1, 2002, primary elections on June 4, 2002, and the general election on November 5, 2002. Mississippi law also clearly contemplates and requires election of members of Congress by districts. *See*, Miss. Code § 23-15-1033 ("Representatives in the Congress of the United States shall be chosen *by districts* on the first Tuesday after the first Monday of November in the year 1986, and every two (2) years thereafter. . . . "); § 5-3-123 (members of the Standing Joint Congressional Redistricting Committee of the legislature shall draw a plan to redistrict no later than 30 days preceding the next regular session of the legislature and shall submit it to the Governor and the legislature).[2]

But the intervenors contend that the remedy for a legislative impasse resulting from a decrease in the number of seats is set out in Miss. Code § 23-15-1039. They argue that this statute requires at-large elections. However, the statute does not, in fact, require at-large elections. Instead, it mandates at-large balloting only if the election is actually held "before the districts have changed to conform to the new apportionment." The present case is being brought so that this Court can adopt

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[2] Although the legislature obviously can adopt a plan without a recommendation from the Committee, the state law giving the Committee the authority to draw such a plan clearly contemplates that districts will be used. Otherwise, there would be no need to draw a plan. And, as just mentioned, § 23-15-1033 specifically states that members of Congress "shall be chosen by districts." *See also, Adams County Election Commission v. Sanders*, 586 So.2d at 381 (referring to the one-person, one-vote principle of Art 3, § 14 of the Mississippi Constitution).

and implement a redistricting plan containing four congressional districts in time for the 2002 election schedule. Once that is done, the "districts [will] have changed to conform to the new apportionment," and there will be no need for at-large elections under the statute. Nothing in that statute remotely suggests that this Court, as a court of equity, does not have the authority to implement a districting plan in the wake of the legislative default that has occurred here. Thus, the statute does not require at-large elections in the situation that exists here, and it does not deprive this Court of jurisdiction.

Even if the statute did require at-large elections under the present circumstances, that remedy could not be imposed because it would be unlawful both as a matter of Mississippi constitutional law and federal law. First, at-large elections would specifically violate the federal statute requiring election of congressional representatives from districts.[3] 2 U.S.C. § 2c states:

> In each State entitled . . . to more than one Representative . . . there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected *only* from Districts so established . . . .

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[3] As previously mentioned, our claim in this case is brought specifically under Mississippi law and seeks to enforce Mississippi law. In response, the intervenors have claimed that § 23-15-1039 requires at-large elections. We raise federal law at this juncture only to show that even if this at-large option were required by that statute, it is not a viable solution because it violates both federal law and the Mississippi Constitution.

(Emphasis added).[4] Second at-large elections would dilute back voting strength by requiring that all members of Congress be elected from a majority-white electorate. This dilution would violate both Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the equal protection component of Article 3, Section 14 of the Mississippi Constitution. *See, Jordan v. Winter*, 604 F.Supp. 807 (N.D. Miss. 1984) (three-judge court), *summary aff'd*, 469 U.S. 1002 (1984) (requiring that a majority black congressional district be created in Mississippi).

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[4] In 1941, the Congress passed a statute that would have allowed the remedy of at-large elections where the state lost a seat and failed to redistrict. *See*, 2 U.S.C. § 2a(c)(5). But in 1967, Congress passed the statute just quoted in the text of this brief, 2 U.S.C. § 2c, which specifically mandates that "Representatives shall be elected *only from districts*." (Emphasis added). As the United States Supreme Court stated in *Whitcomb v. Chavis*, 403 U.S 124, 159 n. 39 (1971): "In 1941, Congress enacted a law that required that . . . if there is a decrease in the number of representatives and the number of districts in the State exceeds the number of representatives newly apportioned, all representatives shall be elected at large. . . . In 1967, Congress *reinstated the single-member district requirement*." (Emphasis added). *See also, Shayer v. Kirkpatrick*, 541 F.Supp. 922, 926-927 (W.D. Mo. 1982) (three-judge court) ("we conclude that the later statute, section 2c, repealed section 2a(c)(5) by implication," so that "the only appropriate remedy is a court-ordered apportionment" rather than at-large elections), *summarily affirmed sub. nom. Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982); *Assembly of California v. Deukmajian*, 639 P.2d 939, 954-955 (Cal. 1982) ("Congress intended 2c to supersede the provisions of section 2a, subdivision (c)" and "an at-large election . . . would contravene the congressional mandate set forth in section 2c.").

For all of these reasons, at-large elections are not a viable option, and Miss. Code § 23-15-1039 does not deprive this Court of jurisdiction.

III.

In the supplemental motion to dismiss, the Attorney General contends that the three defendants, the Governor, the Secretary of State, and the Attorney General, are not proper defendants. But in a line of Mississippi redistricting cases going back some 35 years, these three officials always have been the lead state defendants. *See, e.g., Connor v. Johnson*, 256 F.Supp. 962, 963-964 (S.D. Miss. 1966) (legislative and congressional redistricting); *Jordan v. Winter*, 541 F.Supp. 1135, 1137 (N.D. Miss. 1982) (congressional redistricting); *Martin v. Allain*, 658 F.Supp. 1183, 1186 (S.D. Miss. 1987) (judicial districts); *Watkins v. Mabus*, 771 F.Supp. 789, 792 (S.D. Miss. 1991) (legislative redistricting); *NAACP v. Fordice*, 252 F.3d 361, 364 (5th Cir. 2001) (public service and transportation commissioners).[5] Neither the courts nor the Mississippi Attorney

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[5] Some of these cases also have named legislative leaders as defendants, while others have not (and in one case the legislators voluntarily intervened). The absence of them as defendants in some of the cases suggests, of course, that they are not necessary parties. This is particularly true in light of the fact that the plaintiffs in the present case are not asking the Court to order the legislature to do anything. Instead, the plaintiffs are simply asking that the Court implement a lawful plan for the congressional elections in the event the legislature does not do so on its own. As indicated by the cases just cited, these three state officials – as occupants of their offices and as members of the State Board of Election Commissioners – are the proper defendants for that purpose. If the legislative leaders

General appear ever to have raised a question about whether these are the proper defendants. Moreover, in the parallel federal case that is presently pending and that relates to congressional redistricting, the Attorney General has not filed any motion to dismiss based on this ground, and has not suggested to the court that these are improper defendants.

Clearly, these are proper defendants to represent the interests of the State of Mississippi and to implement any new redistricting plan if the legislative impasse continues and this Court is required to order equitable relief. *See, Connor v. Finch*, 469 F.Supp. 693, 694 (S.D. Miss. 1979) (imposing new districting plan for legislative elections by issuing injunction solely against Governor, Secretary of State, and Attorney General). These three officials comprise the State Board of Election Commissioners. They all are responsible for upholding and enforcing Mississippi law, and the Secretary of State is the state's chief election officer. This is not a basis for dismissing this case.[6]

IV.

The intervenors contend that the Republican and Democratic executive committees are indispensable parties for the purpose of imposing the remedy. But the committees were not parties in at least some of statewide redistricting litigation that has occurred in Mississippi

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wish to participate, they are free to file a motion to intervene or motion for leave to participate *amicus curiae*.

[6] This is discussed more at pages 9-10 of our response to the defendants' supplemental motion to dismiss.

over the years and that has led to new redistricting plans – particularly the thirteen year battle over legislative districts that lasted from 1966-1979. *See, Connor v. Johnson*, 256 F.Supp. at 963-964; *Connor v. Finch*, 469 F.Supp. at 694. *See also, Grove v. Emison*, 507 U.S. at 27-28; *Emison v. Growe*, 782 F.Supp. 427 (D. Minn. 1992) (three-judge court) (political parties were not defendants in either the state or federal court congressional redistricting cases that led to the Supreme Court's decision in *Growe*, and no one suggested they were necessary parties for congressional redistricting litigation). Under the law, the political parties must hold primaries under whatever plan is adopted by the State or the appropriate court, and as long as the state defendants are included, the political parties need not be named as defendants. This is not a proper basis for a motion to dismiss.[7]

V.

As all parties agree, any plan adopted by this Court must be precleared under Section 5 of the Voting Rights Act. However, the intervenors argue that preclearance must be obtained before this Court even holds hearings. That is simply not correct, and the intervenors cite no case law mandating such a requirement. Indeed, all of the case law demonstrates the contrary. *See, Hathorn v. Lovorn*, 457 U.S. at 269-270 (United States Supreme Court holds that where a chancery court orders a new election plan implemented, the change must be precleared, but

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[7] This is discussed more at pages 2-3 of our response to the intervenors' motion to dismiss.

the Court never suggested that preclearance should have been obtained before the chancery court held hearings); *Adams County Election Commission v. Sanders*, 586 So.2d at 830 (same).[8] Redistricting litigation has proceeded in a number of state courts in other states that are covered by Section 5 of the Voting Rights Act, but no court has ever held that preclearance must be obtained before the state court holds hearings.

For all of these reasons, as well as those stated in our prior responses, the motions to dismiss should be denied.

Respectfully submitted,

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[8] This is discussed more fully at page 3 of our response to the intervenors' motion to dismiss

CERTIFICATE OF SERVICE

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

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