No. 01-1596

In the

Supreme Court of the United States

JOHN ROBERT SMITH; SHIRLEY HALL; GENE WALKER; and MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,

Cross-Appellants,

v.

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL; ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,

Cross-Appellees.

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

CONDITIONAL MOTION TO AFFIRM

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CONDITIONAL MOTION TO AFFIRM

In their conditional cross-appeal, the Mississippi Republican Executive Committee (MREC) and the federal court plaintiffs contend that while the Federal District Court properly enjoined the state court plan, it should have imposed at-large elections for Mississippi's members of Congress rather than devise a single-member district plan. This issue will be relevant only if this Court affirms the District Court's injunction against the state court plan in the course of resolving the main appeal (No. 01-1437). In the event that happens, the Branch intervenors, who are appellants in the main appeal and cross-appellees here, conditionally move to affirm the District Court's rejection of at-large elections.

Because this issue will be relevant only if the District Court's injunction against the state court plan is affirmed, this Court is free to delay a decision on the cross-appeal until the main appeal is resolved. If that injunction is reversed, the cross-appeal can then be dismissed as moot. If affirmed, this Court can then summarily affirm on the cross-appeal, as we suggest in this conditional motion, or note probable jurisdiction and schedule the matter for argument.

As an initial matter, it appears this issue has been waived. For example, in its February 4, 2002 order announcing a redistricting plan, the Federal District Court said: "The parties are directed to show cause by written objections [filed by February 9], why this court's redistricting plan . . . would not satisfy all state and federal statutory and constitutional requirements. . . Failure to object in accordance with this order will be deemed a waiver of all further objections to this plan." No. 01-1437, J.S. App. 62a-63a. In response, the federal court plaintiffs and the MREC filed comments saying the plan "satisfies all constitutional and statutory criteria." Appendix. They never objected there or elsewhere to the Court's failure to require at-large elections. (The plaintiffs did request at-large election relief in their complaint, but as just mentioned, did not

object in response to the February 4 order).

Turning to the merits, all members of the United States House of Representatives are elected by districts except in those states that elect only one representative. This conforms with 2 U.S.C. § 2c, adopted in 1967, which provides:

> 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 . . . .

(Emphasis added).

The position advocated by the cross-appellants would change that. They contend that federal law, specifically 2 U.S.C. § 2a(c)(5), requires courts to impose at-large elections if state legislatures do not produce a lawful congressional redistricting plan after the loss of a seat. Under their view, another subdivision of that statute, § 2a(c)(2), would require at-large elections for any new seats if the number of House members increased after the census and no plan were adopted by the legislature. Thus, if the cross-appellants are correct, congressional elections in a number of states where courts imposed redistricting plans after a loss or gain of seats will convert from districts to total or partial at-large balloting, including Mississippi, Texas, and Colorado. *See, Balderas v. Texas*, No. 6:01cv158 (E.D. Tex. Nov. 14, 2001); *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002).

Not only does federal law not require this, however; it prohibits it. As just mentioned, 2 U.S.C. § 2c, mandates that "Representatives shall be elected *only from Districts*" in states with more than one representative. (Emphasis added). This statute, adopted in 1967, supersedes the 1941 statute upon which the cross-appellants rely, 2 U.S.C. § 2a(c). As this 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). Although this language is dictum, it makes perfect sense. Most of the lower courts that have addressed the question appear to agree that the 1967 statute supersedes the one from 1941. *See, 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), *aff'd mem. 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.")

The cross-appellants cite only one case to the contrary, *Carstens v. Lamm*, 543 F. Supp. 68, 77-78 (D. Colo. 1982), and even it does not support their position. In *Carstens*, the Court held that § 2c did not repeal § 2a(c), but instead left the provisions of § 2a(c) in place for use "in the event that no constitutional redistricting plan exists on the eve of a congressional election, and there is not enough time for either the Legislature or the courts to develop an acceptable plan." *Id.* at 77-78. In the present case, of course, there was time for the courts to develop a plan and there was no need to resort to the drastic step of at-large elections.

The cross-appellants' only answer to this is that the

provisions of § 2c are to be enforced only by legislatures, not courts. This is true, they say, because in passing § 2c in 1967, Congress did not "give explicit directions to courts for resolving those controversies." Of course, courts enforce federal statutes all the time even though the words of the statutes do not explicitly mention courts. Most federal statutes that are binding upon states — such as Section 2 of the Voting Rights Act, 42 U.S.C. § 1973c — do not explicitly refer to courts. Yet courts enforce them when the states do not. Nothing about § 2c suggests that Congress in 1967 intended for the courts to ignore the statute when faced with the need to adopt a congressional redistricting plan. Indeed, if courts cannot enforce the provisions of § 2c, passed in 1967, it would follow that they also cannot enforce the provisions of the statute upon which cross-appellants rely — § 2a(c)(5), passed in 1941 — inasmuch as the language of the latter does not explicitly direct itself to courts.

Yet the cross-appellants contend that the phrase "by law" from § 2c is what demonstrates that Congress, when passing that provision in 1967, intended that it only be enforced by legislatures and not courts. But surely those words do not mean that courts — entrusted with implementing federal law when states fail to do so — should abstain with respect to this one particular statute. If Congress had intended in 1967 to preclude federal courts from enforcing this particular statute, it would have said so in words much more explicit than these. It did not.

Finally, even if the cross-appellants were otherwise correct, the imposition of at-large elections in Mississippi would lead to a dilution of black voting strength in violation of Section 2 of the Voting Rights Act as well as retrogression in violation of Section 5 of the Act, 42 U.S.C. § 1973c. *See, Jordan v. Winter*, 604 F.Supp. 807 (N.D. Miss. 1984) (three-judge court), *aff'd mem.*, 469 U.S. 1002 (1984) (electing all members of Congress

in Mississippi from majority-white districts violates Section 2). According to the cross-appellants, the Voting Rights Act does not apply to acts of Congress. However, under the cross-appellants' theory, at-large elections are the consequence of the failure of the Mississippi legislature to adopt a redistricting plan. Thus, that failure by the state, and the resulting implementation of at-large elections, would be subject to scrutiny under the Voting Rights Act.

For all of these reasons, the conditional cross-petition should be dismissed as moot. Alternatively, in the event the District Court's injunction against the state court plan is affirmed, the refusal to impose at-large elections also should be affirmed.

Respectfully Submitted,

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

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

V.

CIVIL ACTION NO. 3:01CV855WS

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

(Filed Feb. 8, 2002)

COMMENTS OF THE PLAINTIFFS AND MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE

COME NOW plaintiffs and defendant Mississippi Republican Executive Committee and respond as follows to the request for comments set forth in this Court's order of February 4, 2002:

1. Plaintiffs and the Mississippi Republican Executive Committee have no objection to the plan devised by the Court. It satisfies all constitutional and statutory criteria and can be defended on neutral redistricting principles. Although plaintiffs and the Mississippi Republican Executive Committee offered several plans which also

meet those criteria, the plan adopted by the Court is entirely satisfactory.

2. However, plaintiffs and the Mississippi Republican Executive Committee do have one comment on this Court's analysis of its plan. The Eighth factor taken into consideration by the Court was its effort "to includ[e] as much of the currently existing districts 3 and 4 in the new combined District 3 as possible." Analysis at 4. Although many of the witnesses advocated such an objective, the Court's analysis does not give an explanation of its legal significance. Such an explanation would be useful in the event that the plan should be challenged on appeal.

3. Plaintiffs and the Mississippi Republican Executive Committee do not agree with the analysis given by the Chancery Court in support of its decision to combine old Districts 3 and 4 that "fairness to the incumbents is a paramount consideration." Opinion of December 21, 2001, at 14. Whatever consideration this Court may have given to that factor was properly secondary. In *Balderas v. Texas*, No. 6:01CV158 (E.D. Tex. Nov. 14, 2001), the Court considered political issues only after the plan had been completed to see whether it "was avoidably detrimental to Members of Congress of either party holding unique, major leadership posts," and whether the plan was "likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state." Slip op. at 8-9. Accord, *Good v. Austin*, 800 F.Supp. 557, 566-67 (E.&W.D. Mich. 1992). To the extent that this Court considered the effect of the combination of old Districts 3 and 4 on the two incumbents simply as a check

upon its plan, that practice is fully consistent with federal precedent.[1]

4. The combination of old Districts 3 and 4 can also be justified neutrally as a product of population changes. For instance, where Texas gained congressional seats, the *Balderas* Court accepted the suggestion of Dr. John Alford that "the most natural and neutral locator is to place [new seats] where the population growth that produced the new additional districts has occurred." Slip op. at 6. By the same logic, where Mississippi has lost a seat, it would seem most logical to combine the two old districts with the least population. Senator Kirksey did so by combining portions of old District 4 into old District 2. Because that course raises at least potential problems under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, this Court's decision to combine the two smallest unprotected districts makes good sense.

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[1] *Hastert v. State Board of Elections*, 777 F.Supp. 634 (N.D.Ill. 1991), upon which the Branch Intervenors have previously relied, does not authorize the use of politics as a guiding principle. There, incumbent Democratic Members of the Illinois congressional delegation claimed that the Republican plan would "result in a politically unfair distribution of congressional seats between Democrats and Republicans", *id.*, at 656, in the manner forbidden by *Davis v. Bandemer*, 478 U.S. 109 (1986). The District Court rejected that claim, finding that the plan was "likely to yield the distribution of seats across party lines that mirrors the statewide partisan makeup of the voting citizenry." *Id.*, at 659. No party has raised a *Davis v. Bandemer* challenge to any of the plans considered by this Court.

5. This Court's order does not explain what it might consider to be "the timely preclearance of the redistricting plan adopted by the State Chancery Court." In the event that preclearance is not received before the qualifying date of March 1, 2002, there may be no need for this Court to address other issues presented by the complaint. Nevertheless, plaintiffs and the Mississippi Republican Executive Committee do not waive their contentions, and expressly assert them in the alternative, that the adoption of a congressional redistricting plan by a state court acting under state law violates Article I, § 4 of the Constitution, and that the implementation of the Supreme Court's assignment of redistricting authority to the Chancery Court without obtaining approval under § 5 should result in the invalidation of the results of that trial even if approval is subsequently obtained. Moreover, as previously stated in response to questions from the court, potential candidates need time to evaluate the new district lines and to make their decisions. For that reason, this Court's plan should take effect for the 2002 election if the Chancery Court plan has not been approved by February 15, 2002.

WHEREFORE, PREMISES CONSIDERED, plaintiffs and the Mississippi Republican Executive Committee pray that this Court will consider these comments offered pursuant to this Court's order of February 4, 2002.

Respectfully submitted,

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App. 6

MISSISSIPPI REPUBLICAN
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