UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

JOHN ROBERT SMITH,
SHIRLEY HALL, and
GENE WALKER PLAINTIFFS

VS. Civil Action No. 3:01-cv-855-HTW-DCB-EGJ

MICHAEL WATSON[1], Secretary of State of Mississippi; LYNN FITCH[2], Attorney General for the State of Mississippi; TATE REEVES[3], Governor of the State of Mississippi; MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE DEFENDANTS

and

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

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[1] Michael Watson is the successor in offi e to Delbert Hosemann who was a party in his offici l capacity. Michael Watson is automatically substituted for Hosemann pursuant to Fed. R. Civ. P. 25(d).

[2] Lynn Fitch is the successor in office to Jim Hood who was a party in his offi ial capacity. Lynn Fitch is automatically substituted for Hood pursuant to Fed. R. Civ. P. 25(d).

[3] Tate Reeves is the successor in offi e to Haley Barbour who was a partyd in his offi ial capacity. Tate Reeves is automatically substituted for Barbour pursuant to Fed. R. Civ. P. 25(d).

CONSOLIDATED WITH

KELVIN BUCK, THOMAS PLUNKETT, JEANETTE SELF, CHRISTOPHER TAYLOR, JAMES CROWELL, CLARENCE MAGEE, and HOLLIS WATKINS, on behalf of themselves and all others similarly situated	PLAINTIFFS
VS.	CIVIL ACTION NO. 3-11-cv-717-HTW-LRA
TATE REEVES, in his official capacity as Governor of the State of Mississippi, LYNN FITCH in her officia capacity as Attorney General of the State of Mississippi, and MICHAEL WATSON, in his official capacity as Secretary of State of the State of Mississippi, as members of the State Board of Election Commissioners; THE MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE; THE MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE; and ELIJAH WILLIAMS, in his official capacity as Chairman of the Tunica County, Mississippi Board of Election Commissioners, on behalf of himself and all others similarly situated	DEFENDANTS

NOTICE OF APPEAL

(Filed Sep. 22, 2022)

COME NOW the plaintiffs in Civil Action No. 3:11-cv-717, Kelvin Buck, Thomas Plunkett, Jeanette Self, Christopher Taylor, James Crowell, Clarence Magee, and Hollis Watkins ("the Buck plaintiffs"), and, pursuant to 28 U. S. C. §§ 1253, 2101(b), and 2284 and U. S. Sup. Ct. R. 18 and 29, appeal to the United States Supreme Court from the (final) Memorandum Opinion and Order entered by the three-judge district court for the Southern District of Mississippi on July 25, 2022, [Doc. No. 206], the Memorandum Opinion and Order entered by the three-judge district court on July 25, 2022, [Doc. No. 205], and the Memorandum Opinion and Order entered by the three judge district court on May 23, 2022. [Doc. No. 192], granting the defendants' Rule 60(b)(5) motion to vacate, in its entirety, the final judgment entered on December 30, 2011 implementing the congressional redistricting plan and denying the Buck plaintiffs' motion to amend the final judgment entered on December 30, 2011 instead of vacating it in its entirety.

This the 22nd day of September, 2022.

Respectfully submitted,

KELVIN BUCK, THOMAS PLUNKETT,
JEANETTE SELF, CHRISTOPHER TAYLOR,
JAMES CROWELL, CLARENCE MAGEE, and
HOLLIS WATKINS, PLAINTIFFS

/s/ Carroll Rhodes

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JOHN ROBERT SMITH, SHIRLEY HALL, and GENE WALKER	PLAINTIFFS
VS.	Civil Action No. 3:01-cv-855-HTW-DCB
DELBERT HOSEMANN, Secretary of State of Mississippi; JIM HOOD, Attorney General for the State of Mississippi; HALEY BARBOUR, Governor of the State of Mississippi; MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE	DEFENDANTS
and	
BEATRICE BRANCH, RIMS BARBER, L. C. DORSEY, DAVID RULE, JAMES WOODWARD, JOSEPH P. HUDSON, and ROBERT NORVEL	INTERVENORS

CONSOLIDATED WITH

KELVIN BUCK, ET AL.	PLAINTIFFS
VS.	CIVIL ACTION NO. 3-11-cv-717-HTW-LRA
HALEY BARBOUR, ET AL.	DEFENDANTS

MEMORANDUM OPINION AND ORDER

(Filed May 23, 2022)

The Mississippi Republican Executive Committee ("MREC") has moved pursuant to Rule 60(b)(5) for this court to vacate its final judgment, entered on December 30, 2011, in this congressional redistricting case. That judgment amended this court's February 26, 2002 redistricting final judgment. The December 30, 2011 final judgment ordered that defendants implement the congressional redistricting plan adopted by this court in its December 19, 2011 order "for conducting congressional primary and general elections for the State of Mississippi in 2012" and for "all succeeding congressional primary and general elections for the State of Mississippi thereafter, until such time as 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." To date, every congressional primary and general election in the State of Mississippi since December 30, 2011 has occurred under the court-drawn plan.

In 2020, the Decennial Census rendered the four districts in the court-drawn plan malapportioned. On January 24, 2022, Mississippi Governor Tate Reeves signed into law a new four-district congressional redistricting statute for the State of Mississippi, House Bill 384 ("H.B. 384"). The MREC now requests that this court vacate its 2011 final judgment because the 2011 court-drawn plan is now malapportioned and H.B. 384 satisfies this court's instruction for the State of

Mississippi to produce a constitutional congressional redistricting plan.

I

A

The facts and procedural history of this case are set out in our previous orders and opinions. *See Smith v. Clark*, 189 F. Supp. 2d 503 (S.D. Miss. Jan. 15, 2002); *Smith v. Clark*, 189 F. Supp. 2d 529 (S.D. Miss. Feb. 19, 2002); *Smith v. Clark*, 189 F. Supp. 2d 548 (S.D. Miss. Feb. 26, 2002); *Smith v. Hosemann*, 852 F. Supp. 2d 757 (S.D. Miss. Dec. 30, 2011). To resolve the issues presently before us, we set forth further background facts.

On February 26, 2002, this court entered its first reapportionment judgment in this case. The February 26, 2002 final judgment, which drew the congressional districts, was based on, *inter alia*, "the failure of the timely preclearance under § 5 of the Voting Rights Act of the Hinds County Chancery Court's plan."[1] *Smith*, 189 F. Supp. 2d at 559, *aff'd sub. nom. Branch v. Smith*, 538 U.S. 254, 265 (2003) ("[W]e affirm the injunction on the basis of the District Court's principal stated ground that the state-court plan had not been precleared."). As a result, this court enjoined defendants from "implementing the congressional redistricting plan adopted by the Chancery Court for the First Judicial District of Hinds County, Mississippi." *Smith*,

[1] The initial redistricting plan that was challenged in this case in 2001 was adopted by the Hinds County Chancery Court. *Smith*, 189 F. Supp. 2d at 506.

189 F. Supp. 2d at 559. The court further ordered that defendants "implement the congressional redistricting plan adopted by this court in its order of February 4, 2002, for conducting congressional primary and general elections for the State of Mississippi in 2002," and

> use the congressional redistricting plan adopted by this court in its order of February 4, 2002, in all succeeding congressional primary and general elections for the State of Mississippi thereafter, 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. After entry of this final judgment in 2002, every subsequent congressional primary and general election in the State of Mississippi until 2011 occurred under this four-district plan drawn by the court because the Mississippi Legislature failed to produce a precleared redistricting plan.

Then came the next Decennial Census of 2010. And once again, it became the duty of this court to draw the Mississippi congressional map. Consequently, on December 30, 2011, we entered our second final judgment amending our February 26, 2002 fina judgment. The 2011 final judgment provided as follows:

> For the reasons stated in this Court's Order of December 19, 2011 and Memorandum Opinion of December 30, 2011, this court's Final

> Judgment of February 26, 2002, is hereby amended.
>
> It is ordered that the defendants implement the congressional redistricting plan adopted by this court in its order of December 19, 2011, and attached to this Final Judgment, for conducting congressional primary and general elections for the State of Mississippi in 2012.
>
> It is further ordered that the defendants shall use the said congressional redistricting plan in all succeeding congressional primary and general elections for the State of Mississippi thereafter, until such time as 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.
>
> This court shall retain jurisdiction to implement, enforce, and amend this judgment as shall be necessary and just.

Smith v. Hosemann, No. 3:01-cv-855-HTW-DCB, ECF No. 128 (S.D. Miss. Dec. 30, 2011). After this court entered final judgment in 2011, every subsequent congressional primary and general election in the State of Mississippi has occurred under the four-district plan drawn by this court because Mississippi again failed to produce a precleared redistricting plan.

The federal government has now completed the 2020 Decennial Census. Although the results of the census do not change the State of Mississippi's number of congressional representatives, there is no dispute

among the parties that the four districts now stand malapportioned because of population shifts among the districts.

B

On January 24, 2022, for the first time since this court entered its 2002 final judgment, a new four-district congressional redistricting statute for the State of Mississippi, H.B. 384, was signed into law by the Governor of the State of Mississippi. The same day that H.B. 384 was signed into law, the MREC moved pursuant to Rule 60(b)(5) to vacate the 2011 final judgment.[2] The MREC's motion to vacate was joined by Governor

[2] Previously on November 8, 2021, Hester Jackson McCrary, Kelly Jacobs and Mississippi Early Voting Initiative, a Mississippi non-profit ("Proposed Intervenors"), moved to intervene in this action. The Proposed Intervenors seek intervention to request that this court modify its 2011 final judgment

> to clarify: 1) That the Final Judgment Order only addressed the conduct of congressional elections to meet the requirements of federal law; 2) That the Judgment did not change the five congressional Districts for any purpose beyond the conduct of federal elections; specifically, the Order did not abolish the fi e districts existing on February 26, 2002, or on December 30, 2011; 3) That the Judgment did not void any provision of Mississippi Constitution Section 273.

Proposed Intervenors explicitly state that they "do not seek to overturn any election results or to modify in any way the Court's congressional redistricting plan that it ordered the defendants in its Final Judgment to implement." Governor Tate Reeves, Attorney General Lynn Fitch, Secretary of State Michael Watson, and the MREC opposed the motion to intervene. As set forth in a separate order, the motion to intervene is denied as moot.

Tate Reeves,[3] Attorney General Lynn Fitch,[4] Secretary of State Michael Watson,[5] and plaintiffs John Robert Smith and Gene Walker (plaintiff Shirley Hall is now deceased). On February 1, 2022, plaintiffs Kelvin Buck, Thomas Plunkett, Jeanette Self, Christopher Taylor, James Crowell, Clarence Magee, and Hollis Watkins, on behalf of themselves and all others similarly situated ("the Buck Plaintiffs"), filed their opposition to the MREC's motion to vacate.

On February 2, 2022, and again on April 8, 2022, this court conducted a status conference with the parties. At the status conferences, the parties presented their respective positions regarding MREC's motion to vacate the 2011 injunction and other procedural and jurisdictional issues. The court directed the parties to file supplemental briefing addressing the motion to vacate our 2011 injunction.

C

On February 14, 2022, the MREC filed a supplemental brief in support of its motion to vacate. Governor Reeves, Attorney General Fitch, Secretary of State

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[3] Pursuant to Rule 25(d), Governor Tate Reeves is substituted for former Governor Haley Barbour. *See* FED. R. CIV. P. 25(d).

[4] Pursuant to Rule 25(d), Attorney General Lynn Fitch is substituted for former Attorney General Jim Hood. *See* FED. R. CIV. P. 25(d).

[5] Pursuant to Rule 25(d), Secretary of State Michael Watson is substituted for former Secretary of State Delbert Hosemann. *See* FED. R. CIV. P. 25(d).

Watson, and plaintiffs Smith and Walker all joined the MREC's supplemental brief in support of the motion to vacate. On February 24, 2022, the Buck Plaintiffs filed a supplemental brief in opposition to the motion to vacate. The Buck Plaintiffs' opposition was joined by defendant Mississippi Democratic Executive Committee ("MDEC"). On February 28, 2022, the MREC filed a reply in support of their motion to vacate. Additionally, the NAACP Legal Defense and Educational Fund, Inc., the Mississippi State Conference of the NAACP, One Voice, and Black Voters Matter Capacity Building Institute, as *amici curiae*, filed a brief in opposition to the MREC's motion to vacate.[6]

As a result of the status conferences and subsequent briefin , the positions of the parties have been defined In its filing , the MREC argues that "this Court should vacate the current final judgment, declare that the new statutory plan satisfies all state and federal statutes and constitutional requirements, and

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[6] Governor Reeves and Attorney General Fitch, joined by the MREC and Secretary Watson, oppose the motion for leave for fi e a brief as *amici curiae*. The *amici* fi ed a reply in support of their motion on March 1, 2022. The filing of amicus briefs is governed by Federal Rule of Appellate Procedure 29. Fed. R. App. P. 29. As the Fifth Circuit has recently explained, courts would be "well advised to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted." *Lefebure v. D'Aquilla*, 15 F.4th 670, 676 (5th Cir. 2021). We conclude that the *amici's* brief in this case complies with Rule 29 and would assist the court in resolving the issues before it. *See id.* at 673 ("Courts enjoy broad discretion to grant or deny leave to amici under Rule 29."). Accordingly, the motion for leave to file a brief as *amici curiae* is granted.

permit it to go into effect," because (1) "the State has satisfied the conditions set out in the final judgment" by adopting a constitutional congressional redistricting plan that satisfies all federal constitutional and statutory requirements and (2) "the 2020 census demonstrates that the districts specified in the fi al judgement have become malapportioned over time." The MREC also states that the court has jurisdiction to resolve all the issues before it that relate to its motion to vacate the 2011 final judgment.

The Buck Plaintiffs argue in their briefs that this court should deny the motion to vacate and instead amend the 2011 fina judgment by:

> (1) enjoining congressional elections under the 2011 malapportioned plan; and, either (2) implement the Mississippi State Conference of the National Association for the Advancement of Colored People's ("NAACP's") congressional redistricting plan as an interim plan until the state complies with the Court's 2011 injunction; or (3) make the least changes to the 2011 plan in order to have a properly apportioned constitutional plan that also complies with the Voting Rights Act of 1965.

Specificall , the Buck Plaintiffs argue that H.B. 384 has not been precleared, and is also an impermissible racial gerrymander in violation of Section 2 of the Voting Rights Act of 1965 ("VRA"), so the defendants have not satisfied this court's 2011 final judgment. Additionally, the Buck Plaintiffs assert that there "has not been a significant change in the law concerning the legality

of Section 5 of the VRA since the 2011 injunction was issued," which would justify vacating the 2011 fina judgment. The Buck Plaintiffs, however, agree with the MREC that the congressional districts set forth in the 2011 Final Judgment are now malapportioned and that this court has jurisdiction to consider the issues raised by the MREC's motion to vacate.

The NAACP Legal Defense and Educational Fund, Inc., the Mississippi State Conference of the NAACP, One Voice, and Black Voters Matter Capacity Building Institute argue in their *amicus* brief that H.B. 384 is "likely a racial gerrymander." The *amici* contend that H.B. 384 violates the Equal Protection Clause of the Fourteenth Amendment because the Mississippi Legislature subordinated traditional redistricting principles to pack District 2 with an unnecessarily high percentage of Black voting age population ("BVAP"), which deprives the remaining congressional districts of Black population, which in turn diminishes the influence of Black voters in other districts. The NAACP *amici* argue that the Legislature, when drafting its plan, began with a specific BVAP target in mind for District 2 and proceeded to hit that target; in doing so, however, the Legislature failed to conduct an analysis to determine whether its BVAP target was necessary to provide Black voters in District 2 with an opportunity to elect candidates of their choice. According to the argument, the Mississippi Legislature failed to support its racial BVAP target with an analysis to show that its consideration of race in District 2 was narrowly tailored. The *amici* request that the court

permit discovery, order an evidentiary hearing, and toll the candidate filing deadline.[7]

II

As previously discussed, the MREC, joined by Governor Reeves, Secretary Watson, Attorney General Fitch, and plaintiffs Smith and Walker have moved under Rule 60(b)(5) to vacate the final judgment entered on December 30, 2011, which, *inter alia*, implemented the current four-district plan. The Buck Plaintiffs and the MDEC oppose the motion to vacate. So, we now turn to consider the MREC motion under Rule 60(b)(5).[8]

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[7] The candidate filing deadline was March 1, 2022. No party fi ed a motion to extend the deadline.

[8] We find it unnecessary, however, to address the MREC's argument that H.B. 384 satisfies this court's 2011 final judgment because we conclude, within the meaning of Rule 60(b)(5), that it is inequitable to apply the 2011 final judgment prospectively. *See Horne v. Flores*, 557 U.S. 433, 454 (2009) ("Use of the disjunctive 'or' [in Rule 60(b)(5)] makes it clear that each of the provision's three grounds for relief is independently sufficient and therefore that relief may be warranted even if petitioners have not 'satisfied' the original order."). We have pretermitted the merits of the new map because it is unnecessary to even address this issue and there is some discretionary question whether this panel should exercise its jurisdiction to draft a new map when we can resolve the Rule 60(b)(5) question without deciding the merits of Mississippi's new plan. To be sure, it is usually the better part of discretion not to decide a question when it is unnecessary to do so. *See generally Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring) ("[I]f it is not necessary to decide more, it is necessary not to decide more."); *PDK Lab'ys Inc. v. U.S. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J.,

Federal Rule of Civil Procedure 60(b)(5) permits a court to relieve a party from a final judgment or order if, among other things, "applying [the judgment or order] prospectively is no longer equitable." FED. R. CIV. P. 60(b)(5); *Horne v. Flores*, 557 U.S. 433, 447 (2009). The Rule "provides a means by which a party can ask a court to modify or vacate a judgment or order if 'a significant change either in factual conditions or in law' renders continued enforcement 'detrimental to the public interest.'" *Horne*, 557 U.S. at 447 (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992)); *United States v. Texas*, 601 F.3d 354, 373 (5th Cir. 2010) (discussing the requirement of a "significan change in factual conditions or the law" for Rule 60(b)(5) relief); *Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr., Inc.*, 413 F.3d 897, 903 (8th Cir. 2005) ("When prospective relief is at issue, a change in decisional law provides sufficient justification for Rule 60(b)(5) relief.").

Rule 60(b)(5) serves a particularly important function in institutional reform litigation because "injunctions issued in such cases often remain in force for many years, and the passage of time frequently brings about changed circumstances—changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy

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concurring) ("[T]he cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more."). That principle seems particularly applicable here when the relief that the plaintiffs seek is readily available to them in a separate action brought under § 2 of the Voting Rights Act.

insights—that warrant reexamination of the original judgment." *Horne*, 557 U.S. at 447-48. In the context of institutional reform litigation, the Supreme Court has instructed that lower courts "must take a 'flexible approach' to Rule 60(b)(5)" and seek "to ensure that 'responsibility for discharging the State's obligations is returned promptly to the State and its officials' when the circumstances warrant." *Id.* at 450 (quoting *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 442 (2004)).

To obtain relief under Rule 60(b)(5) when applying the final judgment prospectively is no longer equitable, "[t]he party seeking relief bears the burden of establishing that changed circumstances warrant relief." *Horne*, 557 U.S. at 447; *Texas*, 601 F.3d at 373 ("The party seeking to modify an injunction bears the burden."). Thus, as the party seeking relief, the MREC must show that changed circumstances warrant relief from the 2011 fina judgment. Before we turn to whether the MREC has shown that change circumstances warrant relief, we must first determine the jurisdictional fit under Rule 60(b)(5), notwithstanding that all the parties agree that this court has jurisdiction over the issues presented by the MREC's motion to vacate. *E.E.O.C. v. Agro Distribution, LLC*, 555 F.3d 462, 467 (5th Cir. 2009) ("Although neither party raises the issue of subject matter jurisdiction, this court must consider jurisdiction *sua sponte*."); *Hosemann*, 852 F. Supp. 2d at 762 (considering the court's jurisdiction under Rule 60(b)(5) despite no party challenging the court's jurisdiction).

III

As this court has previously stated, "Rule 60(b)(5) applies only to judgments that have prospective effect as contrasted with those that offer a present remedy for a past wrong." *Hosemann*, 852 F. Supp. 2d at 762 (quoting *Cook v. Birmingham News*, 618 F.2d 1149, 1152 (5th Cir. 1980)). As the Fifth Circuit explained, judgments operate "prospectively" within the meaning of Rule 60(b)(5) if they "involve the supervision of changing conduct or conditions." *Cook*, 618 F.2d at 1152; *see also Griffin v. Sec'y, Fla. Dep't of Corr.*, 787 F.3d 1086, 1091 (11th Cir. 2015) (adopting the defini tion of "prospective" used by the Fifth Circuit in *Cook*). Thus, we must question whether the 2011 final judgment has prospective application. It does.[9]

First, it *orders* defendants to perform a future act, *i.e.*, to use the court-drawn congressional redistricting map in all succeeding elections. *See Cook*, 618 F.2d at 1152; *Hosemann*, 852 F. Supp. 2d at 762. Thus, the 2011 final judgment is executory by its terms.

Second, the 2011 final judgment requires this court to supervise changing conditions between the parties. The conditions underlying the final judgment, that is, the populations and the racial makeup of the districts, are not nearly so permanent as to be

[9] This court previously concluded in its December 30, 2011 decision that the final judgment entered on February 26, 2002 had prospective application. *See Hosemann*, 852 F. Supp. 2d at 762. The 2011 fin l judgment mirrors the language of the 2002 final judgment.

substantially impervious to change. It is a geographical fact that populations of this state shift over time, and as a result, the court has been required to supervise the final judgment on the basis of such changed conditions. *See Hosemann*, 852 F. Supp. 2d at 763.

Third, the court's express retention of "jurisdiction to implement, enforce, and amend [the] order as shall be necessary and just" supports the conclusion of the prospective nature of the 2011 final judgment. This express retention demonstrates that the court intended to continue to supervise the parties' compliance with the order and any changed conditions that could make the defendants' compliance with the final judgment problematic. *See Cook*, 618 F.2d at 1153 ("One further indication that the decree should not be regarded as a continuing injunction is that the court . . . did not state that it reserved power to modify the decree or that it retained jurisdiction over the case. It would have been natural for the decree to have contained such a provision if it had been intended that the court supervise the parties' compliance." (citation omitted)); *Hosemann*, 852 F. Supp. 2d at 763 (same).

Accordingly, we have the jurisdictional and procedural authority to interpret our 2011 final judgment under the third clause of Rule 60(b)(5) because the 2011 fina judgment has prospective application. *See* FED. R. CIV. P. 60(b)(5) (permitting relief from final judgment if "applying [the final judgment] prospectively is no longer equitable").

IV

Because we have decided that the final judgment has prospective application, we now turn to the question of whether the MREC has shown that changed circumstances warrant relief from the court's 2011 fi al judgment under Rule 60(b)(5).

First, there is no dispute among the parties that the 2011 congressional map drawn by this court is now unconstitutional; that is, its districts are malapportioned because the population has shifted over the past ten years. Indeed, the 2020 Decennial Census shows that all four districts from the 2011 court-drawn congressional map are now malapportioned. Thus, continuing to use the 2011 court-drawn congressional map would violate the constitutional right of Mississippians to the one-person, one-vote principle protected by the Equal Protection Clause. *See Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (requiring congressional districts to be drawn with equal populations); *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016) (discussing the development of the one-person, one-vote principle). Changed factual conditions therefore warrant relief under Rule 60(b)(5) since Mississippians would be denied an established constitutional right affecting their vote.

Second, the Supreme Court's *Shelby County* decision represents a significan change in the law that also warrants relief from the terms of the injunction. Prior to *Shelby County*, the State of Mississippi had been subject to preclearance under § 5 of the VRA from 1965 until 2013. *Thompson v. Att'y Gen. of Miss.*, 129

F. Supp. 3d 430, 435 (S.D. Miss. 2015) (three-judge panel). A review of the history of the cases illustrates how Mississippi's compliance with § 5 preclearance was a firmly rooted principle of law. *E.g.*, *Allen v. State Bd. of Elections*, 393 U.S. 544, 548 n.3 (1969) ("Both States involved in these cases [Mississippi and Virginia] have been determined to be covered by the Act."); *Connor v. Waller*, 421 U.S. 656, 656 (1975) (per curiam) (applying § 5 of the Voting Rights Act to new Mississippi statutes); *Hathorn v. Lovorn*, 457 U.S. 255, 265 (1982) ("Respondents do not dispute that the change in election procedures ordered by the Mississippi courts is subject to preclearance under § 5 [of the Voting Rights Act.]"); *Young v. Fordice*, 520 U.S. 273, 275 (1997) ("The question before us is whether § 5 of the Voting Rights Act . . . requires preclearance of certain changes that Mississippi made in its voter registration procedures. . . ."). Indeed, in this case, this court's original 2002 final judgment was based on "the failure of the timely preclearance under § 5 of the Voting Rights Act of the Hinds County Chancery Court's plan." *Smith*, 189 F. Supp. 2d at 559. Furthermore, the Supreme Court affirmed this basis for the 2002 fina judgment. *Branch*, 538 U.S. at 265 ("[W]e affirm the injunction on the basis of the District Court's principal stated ground that the state-court plan had not been precleared."). In 2011, we amended our 2002 final judgment because the districts were malapportioned in the light of the 2010 Decennial Census and because the State of Mississippi failed to produce a congressional redistricting plan that had been precleared under § 5. *See Hosemann*, 852 F. Supp. 2d at 760-61.

Two years after this Court's 2011 final judgment, the Supreme Court issued *Shelby County*, which declared that the coverage formula set forth in § 4(b) of the VRA was unconstitutional. *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013). As a result, Mississippi is no longer covered by § 5's preclearance requirement because there is no longer a coverage formula under § 4(b) of the VRA. *See id.* at 556-57; *see also Thompson*, 129 F. Supp. 3d at 435 ("The result of *Shelby County* is that § 5 cannot be enforced at all, and especially not by an injunction. In essence, Mississippi and the other covered jurisdictions were granted a reprieve. They no longer have to seek preclearance for voting changes."). The *Shelby County* decision is plainly a significant change in the law that nullified the requirements of our 2011 final judgment. *See Thompson*, 129 F. Supp. 3d at 435; *Voketz v. Decatur, Ala.*, 904 F.3d 902, 908 (11th Cir. 2018) ("Section 5's preclearance requirements no longer apply because, without § 4(b)'s coverage formula, there are no covered jurisdictions for § 5 to apply to."); *Shelby Cnty.*, 570 U.S. at 587 (Ginsburg, J., dissenting) ("The Court stops any application of § 5 by holding that § 4(b)'s coverage formula is unconstitutional."). This conclusion is further supported by the Supreme Court's instruction for lower courts to take a "flexible approach to Rule 60(b)(5)" and seek "to ensure that responsibility for discharging the State's obligations is returned promptly to the State and its offici ls

when the circumstances warrant." *Horne*, 557 U.S. at 450 (quotation marks omitted).[10]

In sum, as noted above, there have been signifi cant changes in both the factual conditions and the law since this court entered the fi al judgment at issue, and thus movants have borne their burden to show a significant change in circumstances that warrants relief under Rule 60(b)(5). Accordingly, we hold that it is inequitable under Rule 60(b)(5) for our 2011 final

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[10] Nevertheless, the Buck Plaintiffs argue that "[t]here has not been a signifi ant change in the law concerning the legality of Section 5 of the VRA since the 2011 injunction was issued" because *Shelby County* did not declare § 5 unconstitutional. The Buck Plaintiffs are correct that the Supreme Court did not hold that § 5 of the VRA was unconstitutional. *Shelby Cnty.*, 570 U.S. at 557 ("We issue no holding on § 5 itself, only on the coverage formula."). But, even though § 5 itself has survived, its applicability has not. Following *Shelby County*, no jurisdiction formerly covered by § 4(b), including Mississippi, is currently subject to the requirements of preclearance under § 5 of the VRA. *See Thompson*, 129 F. Supp. 3d at 435; *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 229 (4th Cir. 2014) (fin ing that "North Carolina began pursuing sweeping voting reform" on June 26, 2013, the day after *Shelby County* was handed down); *Davis v. Abbott*, 781 F.3d 207, 212 (5th Cir. 2015) ("The day after *Shelby County* came down, on June 26, 2013, then-Governor Rick Perry signed the bill repealing the 2011 plan, adopting the new Senate plan . . . , and making the plan immediately effective."). As we have earlier noted, the reason this court originally enjoined the defendants in 2002 was because the State of Mississippi was a covered jurisdiction under § 4(b) and the Hinds County Chancery Court's plan was not precleared under § 5 of the VRA. *Smith*, 189 F. Supp. 2d at 559. Now that the State of Mississippi is no longer a covered jurisdiction under § 4(b) and is therefore no longer subject to § 5 preclearance, the basis for this court's injunction no longer exists.

judgment to continue to be applied prospectively and to require the State of Mississippi to continue using the 2011 congressional map drawn by this court.[11]

V

We sum up: the defendants under the 2011 fina judgment have asked us to vacate that injunction. The statute that controls whether the defendants are entitled to such relief is Federal Rule of Civil Procedure 60(b)(5), which provides that a court may relieve a party from a final judgment if "applying it prospectively is no longer equitable." We have held that the 2011 fina judgment is inequitable in two respects: First, malapportionment denies the constitutional rights of Mississippians; and second, the law upon which the injunction is based is no longer applicable. Additionally, we have considered, but not decided, the Buck Plaintiffs' allegations that H.B. 384 violates § 2 of the VRA and the Equal Protection Clause because it

[11] We note, parenthetically, that H.B. 384 safely preserves the majority-minority balance in District 2 and therefore ensures that the minority citizens will have an opportunity to elect the candidate of their choice in that district. Moreover, H.B. 384 achieves substantial population equality and is thus not malapportioned. Finally, the Buck Plaintiffs have preserved their right to seek the relief they request since they may proceed in another case challenging the constitutionality of H.B. 384, or H.B. 384's compliance with § 2 of the Voting Rights Act. The analysis and requirements of such a § 2 claim seem to be in flu as evidenced by several recent Supreme Court decisions. *See*, *e.g.*, *Merrill v. Milligan*, 595 U.S. ___, 142 S. Ct. 879 (2022) (Kavanaugh, J. concurring); *Wisc. Legislature v. Wisc. Elections Comm'n*, 595 U.S. ___, 142 S. Ct. 1245 (2022) (per curiam).

is unnecessary to our decision to vacate the 2011 final judgment under Rule 60(b)(5). Our decision does not impair their right to file a complaint in a new suit raising identical issues seeking the same relief. At the same time, our decision imposes no legal bar to prevent the congressional elections from proceeding in accordance with the map adopted by the State of Mississippi. Furthermore, no party has moved the court to stay the election. And, indeed, *Purcell* suggests that the processes of these congressional elections are too far advanced for the federal courts to interfere.[12] We thus vacate the 2011 final judgment without prejudice to the Buck Plaintiffs' rights to seek the same relief under the procedures of the Voting Rights Act. 52 U.S.C. § 10301, *et seq.* Finally, we hold that there is no barrier under the 2011 final judgment to the implementation of Mississippi's redistricting plan, H.B. 384.

Accordingly, The Mississippi Republican Executive Committee's Motion to Vacate Injunction and for Other Relief is GRANTED IN PART AND DENIED IN PART, that is, the court's 2011 Final Judgment dated December 30, 2011 is VACATED IN ITS ENTIRETY, but we decline to address the legality or constitutionality of H.B. 384 in this motion seeking relief from an

[12] The policy considerations that underlie the *Purcell* doctrine—avoiding disruption, confusion, and unanticipated and unfair consequences—counsel against any late judicial tinkering with state election laws. *See Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006) (per curiam); *Merrill*, 142 S. Ct. 879, 881-82 (Kavanaugh, J. concurring).

injunction under Federal Rule of Civil Procedure 60(b)(5).

SO ORDERED, this 23rd day of May, 2022.

E. GRADY JOLLY
UNITED STATES CIRCUIT JUDGE

DAVID C. BRAMLETTE
UNITED STATES DISTRICT JUDGE

DAVID C. BRAMLETTE, *District Judge*, specially concurring:

Given the undeniable and significant changes in facts and law that have occurred since the court issued its final judgment and injunction in 2011, I concur with today's majority opinion and agree that it is time to vacate our prior judgment and injunction. That is not to say that certain issues raised in our colleague's thoughtful and thorough dissent do not merit further consideration and reflection The dissent identifies the core question before our panel as whether the Mississippi legislature proceeded arbitrarily when it focused on a Black voting age population that mirrored this panel's 2011 plan. Our dissenting colleague encourages us to determine immediately whether the Mississippi legislature violated the Voting Rights Act by assigning "a preordained racial target for [Congressional District] 2" and by failing to conduct a proper analysis of voting patterns and other criteria as identified in recent Supreme Court cases.

I wholeheartedly agree that the people of Mississippi deserve a redistricting plan that is constitutionally valid, and I also agree that our three-judge panel has the authority to critique House Bill 384 ("H.B. 384") and make adjustments that are constitutionally required, if there should be any. However, in keeping with the Supreme Court's well-established principle of deference to the legislature in redistricting matters, it is this judge's view that our panel should exercise deference at this time and permit the legislature to revisit H.B. 384's redistricting plan in the 2023 legislative session. *See*, *e.g.*, *Perry v. Perez*, 565 U.S. 388, 392-96 (2012) (Supreme Court vacated district court's interim maps finding that the district court failed to afford sufficien deference to the legislature and noted that "[r]edistricting is 'primarily the duty and responsibility of the State.' ") (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)); *accord Abbott v. Perez*, 138 S. Ct. 2305, 2315-16 (2018).

All panel members agree that "the lateness of the hour" dictates that the elections scheduled for 2022 should proceed according to the map adopted by H.B. 384. *See Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006). Because of the timing of this case, the legislature will have ample opportunity, if it so chooses, to take a second look at its redistricting plan in the light of emerging Supreme Court guidance, which was not available when the legislature drew the congressional districts in H.B. 384. It is this judge's view, therefore, that the citizens of Mississippi will be better served by giving

their elected representatives the chance to revisit these issues in the upcoming 2023 legislative session.

HENRY T. WINGATE, *District Judge*, dissenting:

The majority has concluded that this court's 2011 Final Judgment must be vacated in its entirety. Sadly, the majority also has declined to address the constitutionality or legality of the new four-district congressional redistricting statute, House Bill 384 ("H.B. 384"). Should we adopt the majority view, however, we would be shirking our judicial duties.

Currently, this three-judge panel has the jurisdictional authority to decide the merits of Mississippi's new statute under Section 2 of the Voting Rights Act ("VRA").[1] Moreover, we have the concurrence of all the parties. Representatives from the Mississippi Republican Executive Committee ("MREC"), Mississippi Secretary of State, Mississippi Attorney General, Mississippi Governor, the original Plaintiffs, the Buck Plaintiffs, and the *amici curiae*[2] have all asked this panel to determine whether the State of Mississippi has produced a congressional redistricting plan that satisfies all state and federal constitutional

[1] Section 2 of the Act prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a).

[2] The NAACP Legal Defense and Educational, Inc.; the Mississippi State Conference of the NAACP; One Voice; and Black Voters Matter Capacity Building Institute.

requirements, that is, whether H.B. 384 fulfills the mandated conditions of this court's 2011 Final Judgment. That Final Judgment ordered that defendants implement the congressional redistricting plan adopted by this court in its December 19, 2011 order "for conducting primary and general elections for . . . all succeeding congressional primary and general elections for the State of Mississippi thereafter, until such time as the State of Mississippi produces a constitutional congressional redistricting plan that is precleared in accordance with the procedures of Section 5 of the Voting Rights Act of 1965."[3] Since December 30, 2011, every congressional primary and general election in Mississippi has occurred under the court's plan.

In 2013, the United States Supreme Court held that it is unconstitutional to use the coverage formula in Section 4(b) of the VRA to determine which jurisdictions are subject to the preclearance requirement of Section 5. *Shelby Cnty. v. Holder*, 570 U.S. 529, 529 (2013). Even though Section 5 itself is still constitutional following the *Shelby County* ruling, no jurisdiction formerly covered by Section 4(b), including

[3] Under Section 5 of the VRA, any change with respect to voting in a covered jurisdiction—or any political subunit within it—cannot legally be enforced unless and until the jurisdiction first obtains the requisite determination by the United States District Court for the District of Columbia or makes a submission to the Attorney General. 42 U.S.C. § 1973(c)(a). Such approval is known as "preclearance." Section 4(b) of the VRA provides the "coverage formula" defi ing the covered jurisdictions, States or political subdivisions, subject to such preclearance.

Mississippi, is currently subject to the requirements of preclearance under Section 5.

The 2020 Census data showed population shifts, which have called for redrawing of Mississippi's current congressional districts. Although the results of the Census do not change Mississippi's number of congressional representatives, all parties agree that the State's four congressional districts now stand malapportioned because of these population shifts among the districts.

On January 24, 2022, Mississippi Governor Tate Reeves signed into law a new four-district congressional redistricting statute for the State of Mississippi, H.B. 384. The MREC contends that H.B. 384 satisfies this court's previous instruction for the State of Mississippi to produce a constitutional congressional redistricting plan. In drawing the new map, however, the Mississippi legislature packed thousands of Black Mississippians into District 2 ("CD 2"), already a majority Black district which historically had elected a Black-preferred candidate by generous margins.[4] Relevant to this point, the Mississippi Vice-Chair of the Redistricting Committee defended the packed CD 2 on the Senate floo , admitting the Legislature's predominant racial motive. He explained, more specifica ly, that the State could have made CD 2 more compact,[5] but the

[4] In the last decade, Congressman Bennie Thompson won each election in CD 2 by at least two-thirds of the vote.

[5] Compactness refers to the principle that the constituents residing within an electoral district should live as near to one another as possible.

"numbers just didn't work"—because it would have "decrease[d] [the district's Black Voting Age Population]" below the State's racial target of at least 61.36%.[6] Apparently, the Mississippi Legislature reached this figure of 61.36% because the Redistricting Committee sought to keep the number "as close as it was" to the Black Voting Age Population ("BVAP") assigned to CD 2 in this court's 2011 Plan.

Under the State's newly-drawn map, the percentage of BVAP in CD 2 is 62.15%, about 0.79% more than the Legislature's stated target. The Buck Plaintiffs argue that this percentage is unnecessarily high and diminishes Black voting strength elsewhere in the State, thus making H.B. 384 an unconstitutional plan.

The Mississippi Legislature's Plan added four counties to CD 2, as follows:

County	**Black Voting Age Population (BVAP)**
Adams	55.36%
Franklin	33.19%
Wilkinson	66.86%
Amite	37.77%

As illustrated above, the majority of the voting age population added to CD 2 was Black—with a 50.35% total BVAP. Three of the four newly-added counties

[6] Mississippi Legislature, MS Senate Floor – 12 JAN 2022, 10 AM, YouTube (Jan. 12, 2022), https://www.youtube.com/watch?app=desktop&v=FdtZfyWf5bo&feature=youtu.be (at 38:00).

have a BVAP equal to, or higher than, Mississippi's state-wide BVAP of approximately 37%. One of those counties—Wilkinson—features one of the highest Black voting populations of any county not already included in CD 2.

None of the parties disputes that the Voting Rights Act requires a majority-Black district in Mississippi. The question before this panel, then, is not whether a majority-Black district is required; rather, the question is whether the VRA required Mississippi to draw such a district with a BVAP of 62.15% with the Legislature having aimed for a BVAP of at least 61.36%.

The Equal Protection Clause[7] of the United States Constitution forbids the predominant use of race in the redistricting process, unless that use is narrowly-tailored to achieve a compelling state interest. Examples of "compelling state interest" include compliance with Section 2 of the VRA, as well as remedying past racial discrimination.[8] Absent narrow-tailoring to satisfy a compelling interest, a state cannot arbitrarily set a racial target for a voting district and then subordinate race-neutral criteria to ensure that particular

[7] The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Its central mandate is racial neutrality in governmental decision-making. *See*, *e.g.*, *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 191-192 (1964); *see also Brown v. Board of Education*, 347 U.S. 483 (1954).

[8] *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

target is reached. *Cooper v. Harris*, 581 U.S. ___, 137 S. Ct. 1455, 1463 (2017). Neither the State of Mississippi nor the Republican Party presents any evidence to suggest that, prior to the enactment of H.B. 384, the Mississippi Legislature had considered the VRA's requirements before assigning its stated racial target. Further, these parties failed to present any evidence that the Legislature conducted any analysis, whatsoever, of racial voting patterns, or other election data to determine the population level of Blacks needed to avoid voter dilution of Blacks in other districts. Mississippi's plan, therefore, may fail to pass constitutional muster.

This court should analyze whether Mississippi adopted a racially gerrymandered plan by assigning a preordained racial target for CD 2 and, possibly, ignoring other redistricting criteria to ensure that target was reached without narrowly-tailoring its use of race to achieve a compelling interest. These traditional redistricting principles include: (1) meeting one-person-one-vote requirements; (2) creating reasonably shaped, compact and contiguous districts; (3) respecting communities of interest; (4) preserving political subdivision boundaries; and (5) avoiding dilution of minority voting strength.

In a recent case, *Wisconsin Legislature v. Wisconsin Elections Commission*, 595 U.S. ___, 142 S. Ct. 1245 (2022) (per curiam), the United States Supreme Court reiterated its holding from *Cooper v. Harris* that "if race is the predominant factor motivating the placement of voters in or out of a particular district, the

State bears the burden of showing that the design of that district withstands strict scrutiny." *Id.* at 1248. To satisfy strict scrutiny, a State must "prove that its race-based sorting of voters" is narrowly-tailored to comply with the VRA. *Cooper*, 137 S. Ct. at 1464. If "a State invokes § 2 [of the VRA] to justify race-based districting, 'it must show (to meet the "narrow-tailoring" requirement) that it had "a strong basis in evidence" for concluding that the statute required its action.'" *Wisc. Legislature*, 142 S. Ct. at 1249. The Supreme Court then held that the Wisconsin Governor had failed to provide any evidence or analysis supporting his claim that the VRA required seven majority Black districts created by the Wisconsin Legislature and, thus, the Governor's plan failed the strict scrutiny test under *Cooper. Id.* at 1249-50,.

Importantly, the Supreme Court held that the Wisconsin Supreme Court had erred in applying *Cooper* because it had concluded that the VRA *might* support race-based districting, not that the VRA actually *required* it. Mississippi, accordingly, may only adopt a racially gerrymandered plan if, at the time of imposition, the State had judged it necessary under the VRA.

This panel has a duty to consider proposed possible alternatives for Mississippi, which may comply with the strictures of non-racial redistricting principles, while maintaining CD 2 as a majority-Black district that would satisfy the requirements of the VRA. The *amici* propose two such alternative plans, attached hereto as Exhibit A and Exhibit B.

In Plan 1, the BVAP of CD 2 is 54.32%. In Plan 2, the BVAP of CD 2 is 54.58%. Dr. Baodong Liu, the *amici's* expert, concluded that in the presence of racial bloc voting,[9] Black-preferred candidates in statewide elections would win by a substantial majority of the votes in CD 2 under both proposed plans. Further, say the *amici*, by "unpacking" CD 2, both proposed plans increase the BVAP in congressional district 3 ("CD 3"), allowing Black voters in that district to have greater impact, including influenc , in upcoming elections. Under Mississippi's 2022 Plan, the BVAP of CD 3 is 33.57%. Plan 1 proposed by the *amici* assigns CD 3 a BVAP of 41.90% and Plan 2 shows the BVAP of CD 3 as 42.12%.

When drafting the State's Congressional Plan following the 2000 Census, this court considered the following criteria, in addition to the requirements of federal law: (1) compactness and contiguity; (2) respect for county and municipal boundaries; (3) preservation of historical and regional interests; (4) placement of the major research universities and military bases, respectively, in separate districts; (5) placement of at least one major growth area in each district, and avoidance of placement of several major growth areas in the same district, so as to minimize population deviation among the districts as Mississippi's population changes; (6) inclusion of as much as possible of

[9] Racial bloc voting describes a cohesive electorate in which white voters favor and vote for white candidates and their propositions, and minority voters vote for their candidates and propositions.

southwest Mississippi from former District 4, and east central Mississippi from former District 3, in the new District 3; (7) protection of incumbent residences; and (8) consideration of the distances of travel within each district. *Smith v. Clark*, 189 F. Supp. 2d 529, 541 (S.D. Miss. 2002) (three-judge court), *aff'd sub nom. Branch v. Smith*, 538 U.S. 254 (2003).

The *amici* include a report from their analyst, Mr. William Cooper.[10] According to Mr. Cooper, both illustrative plans better adhere to this court's criteria than the State's plan. Using the Reock score,[11] supposedly one of the most common measures of compactness, CD 2, in both of *amici's* illustrative plans, scores higher than the State's plan on compactness.

The *amici's* illustrative plans also avoid extending CD 2 down the entire length of the State, instead

[10] William S. Cooper is a private consultant, currently serving as a redistricting and demographics expert for the *amici*. Mr. Cooper has a B.A. in Economics from Davidson College in Davidson, North Carolina. Since 1986, Mr. Cooper has allegedly "prepared proposed redistricting maps of approximately 750 jurisdictions for Section 2 litigation, Section 5 comment letters, and for use in other efforts to promote compliance with the Voting Rights Act of 1965." [Docket No. 169-1].

[11] "The Reock test is an area-based measure that compares each district to a circle, which is considered to be the most compact shape possible. For each district, the Reock test computes the ratio of the area of the district to the area of the minimum enclosing circle for the district. The measure is always between 0 and 1, with 1 being the most compact. The Reock test computes one number for each district and the minimum, maximum, mean and standard deviation for the plan." Maptitude For Redistricting software documentation (authored by the Caliper Corporation). [Docket No. 169-1, n.3].

expanding CD 2 to the east to include Madison County (a high-growth area) and part of Rankin County. Both *amici* plans split fewer counties, three in both Plan 1 and 2, contra four in the State's plan. The *amici's* plans also split fewer precincts-zero in Plan 1 and three in Plan 2-than the State's plan which splits five precincts. Both plans keep the City of Jackson, the State's Capitol, wholly within CD 2, contra the State's plan, which splits the State's Capitol into two separate congressional districts.

Importantly, the *amici* propose that by unpacking CD 2, both illustrative plans increase the BVAP in CD 3. The invalidation of a plan where race predominates "will require that many [B]lack voters formerly subjected to race-based inclusion in the invalidated districts will be assigned to surrounding non-challenged districts" resulting in an increase "in the BVAP of adjacent non-challenged districts." *Bethune-Hill v. Va. State Bd. of Elections*, 368 F. Supp. 3d 872, 879 (E.D. Va. 2019); *see also Covington v. North Carolina*, 283 F. Supp. 3d 410, 455-56 (M.D.N.C.) (three-judge court) (ordering a 13%-point decrease of the BVAP in a challenged district, which increased the BVAP in an adjacent district from 11% to 40%), *aff'd in relevant part* 138 S. Ct. 2548, 2554 (2018); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 565 (E.D. Va. 2016) (three-judge court) (ordering that the BVAP in a challenged district be lowered to 45% and increasing the BVAP in a neighboring district from 30% to 41%).

These alternative maps show that CD 2 can be drawn with a BVAP below the State's preordained

target that provides Black voters with the ability to elect a candidate of their choice and also complies with traditional redistricting principles. Drawing such a district, if feasible, would have the effect of avoiding BVAP reduction in surrounding districts such that Black voters would have the ability to impact elections in districts outside of CD 2.

The conclusions reached by the majority simply lift this court's injunction mandating use of this court's four-district plan, and reserves the Section 2 question for another day, possibly with another panel, should the Buck plaintiffs choose to pursue their Section 2 claims.

The people of Mississippi, however, deserve a ruling—a swift ruling—that we, this three-judge panel, have the capacity to provide. We are fully cognizant of this litigation's long juridical history and are best-suited to make this determination. As stated *supra*, all parties agree that this three-judge panel should address the Section 2 issue and determine whether H.B. 384 passes constitutional muster.

On April 8, 2022, this court heard oral arguments from the parties, during which time the parties expressed their positions. The Mississippi Republican Party Executive Committee's attorney, Michael Wallace, stated as follows:

> Judge Wingate: Mr. Wallace . . . tell me whether you feel this court should go beyond just looking at the injunctive life and address

> Section 2, as it might apply here, or the constitutionality of the House Bill 384 . . .
>
> Attorney Michael Wallace: The answer is that I think you can and I think you should, although I certainly understand the concerns expressed by Judge Jolly. . . . Here, it is necessary for some court to decide whether H.B. 384 is unconstitutional. The Buck plaintiffs have told you they're not going away. They've told you that if they have to file another lawsuit, they will. So that decision is going to have to be made. It is necessary, and the question in my mind is whether it is better for this court to make the decision than for some other court to make the decision. And the short version is, you know more about redistricting in Mississippi than anybody else. And the Legislature said it was trying to follow your guidance, and nobody is better situated than this court to understand whether the [Legislature] did that, and whether that was a constitutionally permissible thing to do.

[Hearing Tr., Status Hearing, 4/8/22, 5:18-25, 6: 8-19].[12]

The undersigned agrees with Mr. Wallace's statements. By adopting the majority view, we would simply be punting this constitutional issue, that is, the crux of this whole lawsuit, to another, less experienced panel.

The majority approach unfortunately is reminiscent of Mississippi's sordid discriminatory past of

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[12] *See also* Hearing Tr., 4/8/22, 8: 14-18; 27:22-25; 28:1; and 43:7-12.

allowing overpopulation of one district to the detriment of Black voters elsewhere in the State. The advocates of the instant approach deny any racial animus; however, such relegation of minority voters to a single district within the State takes away the State's Black population's voting power as a whole. This statement is supported by a review of the BVAP of CD 3 under H.B. 384 (33.37%) versus the BVAP proposed by the *amici's* alternative plans (41.90% in Plan 1 and 42.12% in Plan 2).

A "crossover district" is one in which "minority voters make up less than a majority of the voting-age population, but the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Bartlett v. Strickland*, 556 U.S. 1 (2009) (Per Justice Kennedy with the Chief Justice and one Justice joining and two Justices concurring in the judgment.). CD 3, in this writer's view, may constitute such a "crossover district." The four counties added to CD 2 under Mississippi's new redistricting plan were previously assigned to CD 3. The majority of the voting age population added to CD 2 was Black. One of the four newly-added counties, Wilkinson, had a BVAP of 66.86%. Another, Adams County, had a BVAP of 55.36%. These figures are significant enough to warrant an analysis of H.B. 384's possible unconstitutional ramification . CD 2 has an established voting pattern of electing Black-preferred candidates by substantial margins; therefore, Mississippi is less likely to be

justified in adding voters to CD 2 on the basis of race. Diluting the BVAP of CD 3; however, is far more likely to have a negative impact on District 3's Black population to elect their preferred candidate. This court has an obligation to veto any weakening of the opportunity of Mississippi's minority voters to elect a representative of their choice.

Unaddressed, and seemingly ignored, by the majority opinion's theoretical construct which advances a "let's-wait-and-see" approach for some indefinite time-period is the very real practical effects of their approach. Mississippi has one Black Congressman, Bennie Thompson, who was elected back in 1993, following the vacation of that same office by Mike Espy, Mississippi's first Black Congressman since Reconstruction.[13] Espy was elected in 1986, beating incumbent Webb Franklin, a White Republican, who unwittingly had supported President Ronald Reagan's veto of a farm bill Blacks and Whites of the Mississippi Delta desperately needed.

Blacks voted overwhelmingly for Espy, but angered White farmers "voted with their rumps" and stayed home on election day in large part because of the demise of the farm bill. Although upset with Franklin, many White voters still could not stomach the idea of voting for Espy, a Black candidate. The

[13] The Reconstruction era was a period in American history following the American Civil War; it lasted from 1865 to 1877 and marked a time during which the United States grappled with the challenges of reintegrating into the Union the states that had seceded and determining the legal status of African Americans.

margin provided by those "stay at home Whites" provided the vote difference which secured Espy's election. After that historic break through, Espy prevailed in three more two-year elections, when his support was truly bipartisan. When Congressman Espy gave up his congressional seat for an appointment to President William Jefferson Clinton's Cabinet (also a first for Mississippi), Bennie Thompson then won the House seat. By then, the BVAP in that District, Mississippi CD 2, was approximately 58%.

Although Blacks have cheered the successive elections of Mike Espy and Bennie Thompson to the United States House of Representatives from the same piece of Mississippi, the somber truth is that since 1881,[14] Mississippi has not elected even one African American state-wide offi e holder—not a United States Senator (2); Governor; Lieutenant Governor; Attorney General; Secretary of State; Treasurer; Auditor; Agriculture Commissioner; nor Insurance Commissioner. The Census over the years has recognized Mississippi as having a state-wide Black percentage of about 38% to 39%, which nation-wide bestows

[14] Blanche Kelso Bruce was the second African American to serve in the United States Senate from 1875-1881. He was the first elected African American to serve a full term. Prior to Bruce's tenure, Hiram Rhodes Revels was elected by the Mississippi Legislature to the United States Senate to represent Mississippi in 1870 and 1871. Revels was the first African American to serve in either house of the U.S. Congress. Alexander K. Davis, elected in 1874, was Mississippi's first and only Black Lieutenant Governor. Davis was impeached in 1875 as part of Mississippi's plan to return the State government to White Democrats.

bragging rights upon Mississippi for having the second highest population of African Americans (the District of Columbia boasts the highest population of Black Americans with 48%). Yet, Black would-be state-wide office holders have been unable to gain membership into this exclusive club. Any historian knows that for scandalous scores and scores of years, Black Mississippians were locked out of the election process.

Mississippi has made many improvements in race relations, but the majority's mindset here is reminiscent of yesterday's resistance to progress. The majority's opinion has a special message for Blacks in Mississippi: we feel your pain, but you will have to wait for a constitutional cure. Meanwhile, even if H.B. 384 is unconstitutional, because the bulk of you have been herded into the Second District, with no real chance to utilize your numbers in the Third District to elect a candidate of your choice—either by splitting the White vote or partnering with friendly White groups—you must nonetheless tolerate this fl wed political design for the unforeseeable future.

For the foregoing reasons, I am in favor of modifying the current injunction to allow presently scheduled elections to go forward, in view of the lateness of the hour, while addressing immediately the prerequisites for reaching a decision on the Section 2 interrogatory.

I reach the above conclusion because H.B. 384 *may be* constitutionally fl wed, while our injunction-preserved scheme is *certainly* constitutionally fl wed. The citizens of Mississippi should not have to be faced with

these unsavory consequences—forced to endure under either an unconstitutional enactment or a possibly unconstitutional enactment—when we can begin the analysis now and, if necessary, the curative process.

EXHIBIT A

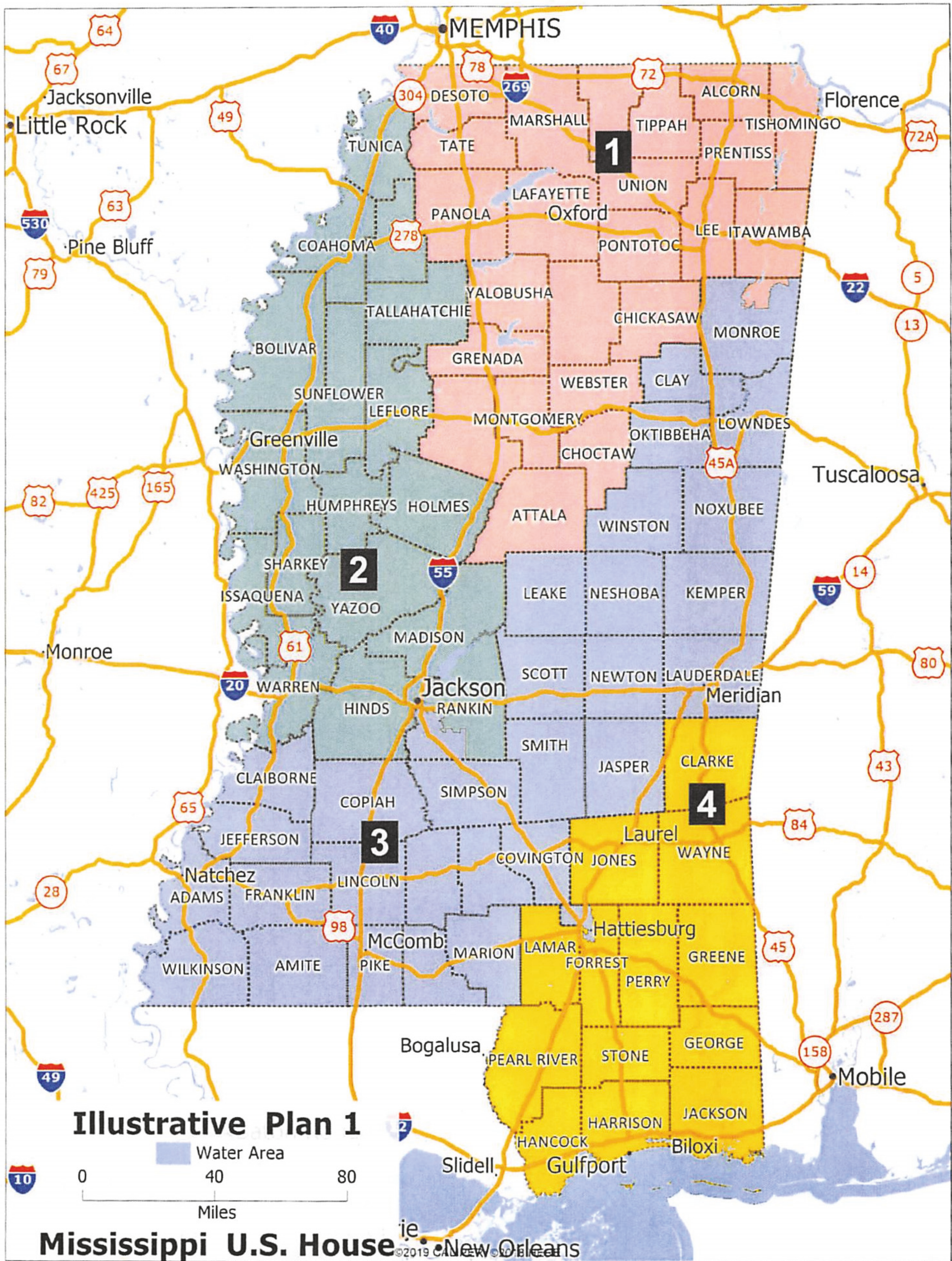

EXHIBIT A-1

Illustrative Plan 1—2020 Census

District	Population	Deviation	18+ Pop	% 18+ AP Black	% 18+ NH White
1	740319	-1	569508	26.69%	67.40%
2	740320	0	569020	54.32%	41.15%
3	740322	2	571940	41.90%	53.15%
4	740318	-2	567131	21.57%	69.38%

EXHIBIT B

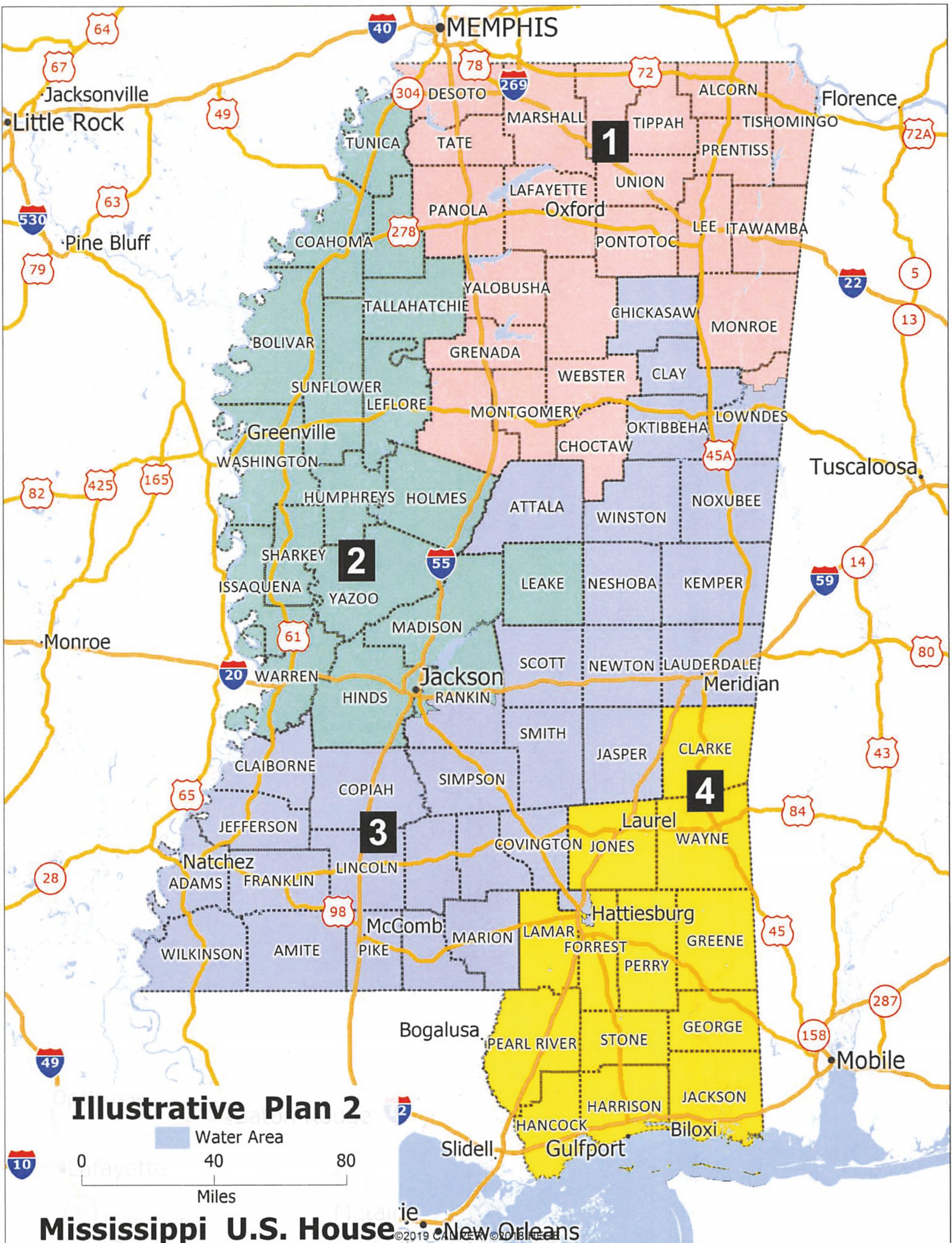

EXHIBIT B-1

Illustrative Plan 2—2020 Census

District	Population	Deviation	18+ Pop	% 18+ AP Black	% 18+ NH White
1	740320	0	569508	26.22%	67.85%
2	740316	-4	569020	54.58%	40.67%
3	740325	5	571940	42.12%	53.18%
4	740318	-2	567131	21.57%	69.38%

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

JOHN ROBERT SMITH, SHIRLEY HALL
and GENE WALKER PLAINTIFFS

VS. Civil Action No. 3:01-cv-855-HTW-DCB

DELBERT HOSEMANN, Secretary of
State of Mississippi; JIM HOOD,
Attorney General for the State of Mississippi;
HALEY BARBOUR, Governor of the State of
Mississippi; MISSISSIPPI REPUBLICAN
EXECUTIVE COMMITTEE; and
MISSISSIPPI DEMOCRATIC
EXECUTIVE COMMITTEE DEFENDANTS

and

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

CONSOLIDATED WITH

KELVIN BUCK, ET AL. PLAINTIFFS

VS. Civil Action No. 3:11-cv-717-HTW-LRA

HALEY BARBOUR, ET AL. DEFENDANTS

MEMORANDUM OPINION AND ORDER

(Filed Jul. 25, 2022)

We have now received briefing from all the parties regarding the Plaintiffs', Kelvin Bucks', Thomas

Plunkett's, Jeanette Self's, Christopher Taylor's, James Crowell's, Clarence Magee's, and Hollis Watkins', Motion to Amend the Memorandum Opinion and Order Entered by the Court on May 23, 2022 [DOC. NO. 192] (the "Buck Plaintiffs' Motion for Reconsideration"), and the Plaintiffs', Kelvin Bucks', Thomas Plunkett's, Jeanette Self's, Christopher Taylor's, James Crowell's, Clarence Magee's, and Hollis Watkins', Motion to Correct Findings of Fact and Make Additional Findings of Fact in the Memorandum Opinion and Order Entered by the Court on May 23, 2022 [DOC. NO. 192] (the "Buck Plaintiffs' Motion to Correct Findings of Fact and Make Additional Findings of Fact"). In short, it appears that the Buck Plaintiffs are attempting to relitigate the merits of H.B. 384, urging the Court to conclude that H.B. 384 is an unconstitutional racial gerrymander in violation of the Equal Protection Clause. The motions are DENIED.

First, the Republican Party is correct that the Court did not make any findings of fact in its opinion because there was no trial or contest on the merits. These issues were decided under Rule 60(b)(5), not under summary judgment or following a bench trial. Thus, it follows that there are no findings of fact to correct.[1] Thus, the Buck Plaintiffs' Motion to Correct

[1] With respect to the Buck Plaintiffs' assertion that the Court failed to acknowledge that they challenged H.B. 384 as a violation of the Equal Protection Clause of the Fourteenth Amendment, the Court directs the Buck Plaintiffs to that part of this Court's previous opinion where we clearly stated that we "considered, but [did] not decide[ ] the Buck Plaintiffs' allegations that H.B. 384 violates § 2 of the VRA and the Equal Protection Clause."

Findings of Fact and Make Additional Findings of Fact is denied.

Second, the Buck Plaintiffs' Motion for Reconsideration is denied because they ask the Court to address the merits of H.B. 384 and thus conclude that it violates the Equal Protection Clause and §2 of the VRA. The Buck Plaintiffs' argument is based on their incorrect interpretation of both Rule 60(b)(5) and *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367 (1992). That is, the Buck Plaintiffs argue that per *Rufo*, for the Court to vacate the injunction, the Republican Party must adequately bear its "heavy burden to convince the Court that they complied with the injunction."

Rule 60(b)(5), however, does not require that the enjoined party satisfy the injunction for the injunction to be vacated. FED. R. CIV. P. 60(b)(5) (permitting a court to relieve a party from a final judgment if "the judgment has been satisfied released, or discharged; it is based on an earlier judgment that has been reversed or vacated; *or* applying it prospectively is no longer equitable" (emphasis added)); *Horne v. Flores*, 557 U.S. 433, 454 (2009) ("Use of the disjunctive 'or' [in Rule 60(b)(5)] makes it clear that each of the provision's three grounds for relief is independently sufficient and therefore that relief may be warranted even if petitioners have not 'satisfied' the original order."). Thus, as we have said in our opinion, defendants need not satisfy the injunction in order for it to be vacated under Rule 60(b)(5) when prospective application has become inequitable, FED. R. CIV. P. 60(b)(5), malapportionment, and its consequences with respect to § 2 of the VRA as

well, being reasons that prospectively applying this Court's 2011 injunction would be inequitable.

To be sure, *Rufo* is inapplicable in this case. *Rufo* addressed a consent decree, and the arguments of the Buck Plaintiffs relate to changed conditions underlying a consent decree, which are not present in this case. *See Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383 (1992) (reviewing denial of a motion to modify a consent decree). The Buck Plaintiffs argument is that the parties to a consent decree cannot be relieved of their duty to perform under the decree by the occurrence of anticipated events; it follows, they say, that this Court was powerless to dissolve the injunction because the inequity of malapportionment was previously anticipated.

This principle is inapplicable in this case, however. A consent decree "embodies an agreement of the parties" and "is contractual in nature." *Rufo*, 502 U.S. at 378; *see also Frew v. Janek*, 820 F.3d 715, 721 (5th Cir. 2016) (describing consent decree as a "contract"). Typically, the terms of consent decrees are separately negotiated by the parties and later presented to the court for approval. *See United States v. City of New Orleans*, 947 F. Supp. 2d 601, 608-14 (E.D. La.) (discussing the process of consent decree negotiation by the parties and subsequent court approval), *aff'd*, 731 F.3d 434 (5th Cir. 2013). Thus, "[c]onsent decrees are construed according to general principles of contract interpretation." *Frew v. Janek*, 780 F.3d 320, 327-28 (5th Cir. 2015) (internal citation omitted).

The reapportionment in this case in 2011, however, was the result of an injunction issued by this Court that neither sought, required, nor acquired the consent of the parties. The parties did not negotiate the terms of the injunction and they did not present any agreement to this Court for approval. Indeed, it was an injunction. None of the parties to this Court's injunction had any contractual rights thereunder to withdraw, modify, or otherwise affect the injunction. In short, it was this Court's injunction that could only be changed, amended, or modifi d by this Court itself. Thus, the principles that may be applicable in consent decree cases are inapplicable here.

Finally, with respect to the Buck Plaintiffs' argument that "collateral estoppel could be used to preclude any future litigation concerning the constitutionality of H.B. 384," the Buck Plaintiffs are incorrect. "Collateral estoppel prevents litigation of an issue only when: '(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; and (3) the previous determination was necessary to the decision.'" *Bradberry v. Jefferson Cnty.*, 732 F.3d 540, 548 (5th Cir. 2013) (quoting *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290 (5th Cir. 2005)); *see also Rabo Agrifinance, Inc. v. Terra XXI, Ltd.*, 583 F.3d 348, 353 (5th Cir. 2009) ("To establish collateral estoppel under federal law, one must show: (1) that the issue at stake be identical to the one involved in the prior litigation; (2) that the issue has been actually litigated in the prior litigation; and (3) that the determination of the issue in the prior litigation has been a critical and necessary part of the

judgment in that earlier action."). Although the issue of the constitutionality and legality of H.B. 384 raised in this case would likely be identical to the issues raised in a future case challenging H.B. 384, there has been no "determination" by this Court on those issues. Indeed, this Court declined to address "the Buck Plaintiffs' allegations that H.B. 384 violates § 2 of the VRA and the Equal Protection Clause," and explicitly stated that those issues were "unnecessary to our decision to vacate the 2011 fina judgment under Rule 60(b)(5)." In short, collateral estoppel cannot bar a future challenge to the legality or constitutionality of H.B. 384.

We sum up: First, this Court did not make any findings of fact in its opinion and thus there are no findings of fact to correct; second, Rule 60(b)(5) does not require that the enjoined party satisfy the injunction for the injunction to be vacated; third, *Rufo* is inapplicable in this case because the 2011 reapportionment was not the result of a consent decree; and fourth, collateral estoppel cannot bar a future challenge to the legality or constitutionality of H.B. 384 because there has been no "determination" by this Court as to those issues. Accordingly, the Plaintiffs', Kelvin Bucks', Thomas Plunkett's, Jeanette Self's, Christopher Taylor's, James Crowell's, Clarence Magee's, and Hollis Watkins', Motion to Amend the Memorandum Opinion and Order Entered by the Court on May 23, 2022 [DOC. NO. 192] is DENIED, and the Plaintiffs', Kelvin Bucks', Thomas Plunkett's, Jeanette Self's, Christopher Taylor's, James Crowell's, Clarence Magee's, and Hollis Watkins', Motion to Correct Findings of Fact and

Make Additional Findings of Fact in the Memorandum Opinion and Order Entered by the Court on May 23, 2022 [DOC. NO. 192], is DENIED.

SO ORDERED, this 25th day of July, 2022.

E. GRADY JOLLY
UNITED STATES CIRCUIT JUDGE

DAVID C. BRAMLETTE
UNITED STATES DISTRICT JUDGE

Henry T. Wingate, *District Judge*, dissenting, in part:

I agree with the majority that the Buck Plaintiffs' *Motion to Correct Findings of Fact and Make Additional Findings of Fact* must be denied. The majority did not make any findings of fact in its previous Opinion. I further agree that because the majority declined to address the Buck Plaintiffs' allegations that House Bill 384 ("H.B. 384") violates § 2 of the Voting Rights Act ("VRA")[1] and the Equal Protection Clause of the Fourteenth Amendment[2], collateral estoppel cannot

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[1] Section 2 of the Voting Rights Act prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a)

[2] Section 1**.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process

bar a future challenge to the constitutionally or legality of H.B. 384. I must, however, reiterate my disapproval of the majority's selected course of (in)action.

The majority has chosen to abandon its obligation to reach the merits of this lawsuit, to permit this litigation to fester as a potentially gnawing sore on the face of Mississippi jurisprudence and politics, and as a potential cleaver for further racial divide in a state which, too long, has prided itself as being one of the architects of the Confederate States of America[3].

A simple benefit/cost analysis with thunderous impact underscores the logic of this dissent, which seeks here a decision on the merits of this litigation: a revelation of a fully-disclosed record of how exactly this challenged map was developed and drawn. Consider the following:

The Mississippi Joint Congressional Redistricting and Legislative Reapportionment Committee ("the Committee") was tasked with redrawing Mississippi's Congressional map following the 2020 Census. [See

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of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV

[3] Mississippi gave the Confederacy Jeff Davis, its first and only President; Mississippi was the second state to secede from the United States; Mississippi was one of the last three of the eleven states of the Confederacy to rejoin the United States; and Mississippi waited until 1995 to ratify the Thirteenth Amendment, which abolished slavery still existing in Delaware, Maryland, Missouri, Kentucky, and the District of Columbia, because the Emancipation Proclamation did not free slaves in these slaveholding states not at war with the United States.

Miss. Code Ann. § 5-3-121]. The Committee met three (3) times over the course of approximately six (6) months, during which times it performed the following tasks:

(1) elected the leadership of the Committee on June 30, 2021. This meeting lasted approximately 19 minutes and 22 seconds[4].

(2) adopted redistricting criteria on November 19, 2021 (10 minutes, 36 seconds)[5]; and

(3) proposed a Congressional redistricting plan on December 15, 2021 (17 minutes, 46 seconds)[6].

The Committee held nine (9) hearings across the state to solicit input from members of the public between August 5 and August 23, 2021. Mississippi Republican Executive Committee ("MREC") has stated that "sufficient census data was not made available to the states until September 16, 2021". [Docket no. 177, 11]. The public hearings, then, were held before U.S. Census data was released. Further, all of the hearings were held before the Committee had even put forth any

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[4] Mississippi Legislature, Senate - Redistricting Committee - Room 216, 30 June 2021, 3:30PM, YouTube (June 30, 2021), https://www.youtube.com/watch?v=i13Dj0xYp84&t=314s

[5] Mississippi Legislature, Legislative Redistricting Committee - Room 216, 19 November 2021 10:00 A.M., YouTube (Nov. 19, 2021). https://www.youtube.com/watch?v=PhQAS6o3jXM

[6] Mississippi Legislature, Congressional Redistricting Committee - Room 216, 15 December 2021 10:00 A.M., YouTube (Dec. 15, 2021), https://www.youtube.com/watch?v=-mDs-EzHZUg&t=942s

proposed plan on December 15, 2021; consequently, the public did not have an opportunity to provide any public comment about the Committee's proposed plan at these various hearings. The full Legislature took up the Committee's proposed map as soon as the legislative session began on January 4, 2022. Clearly, this truncated, historical record opens the doorway to a myriad of questions: when were the real decisions made, by whom, on what statistical evidence?

A House Floor Meeting took place on January 6, 2022. The Committee's proposed plan was approved 75-44.[7] The Mississippi House of Representatives is comprised of 122 members. Forty (40) House representatives are African American. All forty (40) African American Representatives voted against H.B. 384. They were joined by four (4) Caucasian Representatives.

A Senate Floor Meeting took place on January 12, 2022. The Mississippi Senate approved the congressional redistricting proposal 33-18[8]. The Mississippi State Senate is comprised of fifty-two (52) members, fourteen (14) of whom are African American. All fourteen (14) African American Senators, along with four

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[7] Mississippi Legislature, 2022 Regular Session, House Bill 384 (last updated on 6/14/22) http://billstatus.ls.state.ms.us/2022/pdf/votes/house/0030003.pdf

[8] Mississippi Legislature, 2022 Regular Session, House Bill 384 (last updated on 6/14/22) http://billstatus.ls.state.ms.us/2022/pdf/votes/senate/0090005.pdf

(4) Caucasian Senators, voted against passing H.B. 384.

Seemingly, every elected African American in Mississippi's House of Representatives voted against the plan. So, too, every elected African American Mississippi State Senator voted against the plan. Nevertheless, with blinders on, the majority here trumpets: send this contentious, political hot potato back to the Mississippi Legislature for that body to address and resolve questions which already may have been addressed and ignored. Meanwhile, overlooks the majority, under their scheme, the scheduled forthcoming election will proceed, and maybe others, before this matter is resolved, allowing each 2022 successful candidate to build on his/her incumbency.

On January 24, 2022, Governor Tate Reeves signed into law House Bill 384, a new four-district congressional redistricting statute for the State of Mississippi. The full redistricting process, then, seemingly was completed in less than six (6) months. Much of the Committee's work was done in private. Although members of the Committee made several statements about the "great deal of work" that went into the process of developing the Committee's map[9], this three-judge panel has before it no evidence which would provide insight into the Committee's deliberations. Importantly, this three-judge panel has before it no

[9] *See*, *e.g.*, Mississippi Legislature, *Congressional Redistricting Committee - Room 216, 15 December 2021 10:00 A.M.*, YouTube (Dec. 15, 2021), https://www.youtube.com/watch?v=-mDs-EzHZUg&t=942s (at 1:34).

evidence showing that the Committee analyzed whether its Black Voting Age Population (BVAP) target of 62.15% in Congressional District 2 was actually necessary.

Two decades ago, when this panel first revealed its proposed injunction, it asked the parties to address whether the plan would "satisfy all state and federal statutory constitutional requirements." *Smith v. Clark*, 189 F. Supp. 2d 529, 542 (S.D. Miss. 2002) (three-judge court), *aff'd sub nom. Branch v. Smith*, 538 U.S. 254 (2003). As the MREC stated in its Memorandum Brief in support of its motion to vacate, "[t]hat approach is equally important as this [three-judge panel] considers whether to permit the statute which the Legislature has now adopted to take effect in place of the current final judgment, which is now malapportioned." [Docket no. 144, p. 7].

The MREC further pointed out that "[o]ne of the maxims of equity, recognized in Mississippi, as throughout Anglo-American jurisdictions, is that "[e]quity delights to do complete justice and not by halves." V. Griffith Mississippi Chancery Practice § 36 at 38 (2d ed. 1950). The objective is that "when the matter is thus settled there will be no doors left open out of which it is probable that further suits or further contention will spring." *Id.*, at 39. The MREC stated that "this [three-judge panel] should now examine all constitutional and statutory issues so as to close those doors." [Docket no. 144, pp.7-8].

I agree. As do the Buck Plaintiffs, and before the majority took its hands-off stance, the MREC. Earlier in this dissent, I mentioned a benefit/cost analysis. The foregoing discussion unmistakably shows all the benefits of resolving the issue at hand on the merits. Commensurately, this discussion reveals no cost. Accordingly, for the foregoing reasons, I respectfully disagree with the majority, and submit this dissent to be read in conjunction with my earlier-voiced opposition.

USCS Const. Art. I, § 2, Cl 1

Cl 1. House of Representatives—
Composition—Electors.

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Amendment 14 (Equal Protection Clause)

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment 15

Sec. 1. [Right of citizens to vote—Race or color not to disqualify.] The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

Sec. 2. [Power to enforce amendment.] The Congress shall have power to enforce this article by appropriate legislation.

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28 USC § 1253

Direct appeals from decisions of three judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

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28 USC § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

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28 USC § 2101

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or

decree, appealed from, if interlocutory, and within sixty days if fin l.

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28 USC § 2284

§ 2284. Three judge court; when required; composition; procedure

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1) Upon the filin of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by

registered or certifi d mail to the Governor and attorney general of the State.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific findin , based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before fi nal judgment.

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52 USC § 10304

§ 10304. Alteration of voting qualifications procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [*52 USCS § 10303(a)*] based upon determinations

made under the first sentence of section 4(b) [52 USCS § 10303(b)] are in effect 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, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [52 USCS § 10303(a)] based upon determinations made under the second sentence of section 4(b) [52 USCS § 10303(b)] are in effect 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, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [52 USCS § 10303(a)] based upon determinations made under the third sentence of section 4(b) [52 USCS § 10303(b)] are in effect 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, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [52 USCS § 10303(f)(2)], and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification,

prerequisite, standard, practice, or procedure: *Provided*, That such qualificatio , prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualifica tion, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of *section 2284 of title 28 of the United States Code* and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [*52 USCS § 10303(f)(2)*], to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

USC Supreme Ct R 18

Rule 18. Appeal from a United States District Court

1. When a direct appeal from a decision of a United States district court is authorized by law, the appeal is commenced by filing a notice of appeal with the clerk of the district court within the time provided by law after entry of the judgment sought to be reviewed. The time to fil may not be extended. The notice of appeal shall specify the parties taking the appeal, designate the judgment, or part thereof, appealed from and the date of its entry, and specify the statute or statutes under which the appeal is taken. A copy of the notice of appeal shall be served on all parties to the proceeding as required by Rule 29, and proof of service shall be filed in the district court together with the notice of appeal.

2. All parties to the proceeding in the district court are deemed parties entitled to file documents in this Court, but a party having no interest in the outcome of

the appeal may so notify the Clerk of this Court and shall serve a copy of the notice on all other parties. Parties interested jointly, severally, or otherwise in the judgment may appeal separately, or any two or more may join in an appeal. When two or more judgments involving identical or closely related questions are sought to be reviewed on appeal from the same court, a notice of appeal for each judgment shall be filed with the clerk of the district court, but a single jurisdictional statement covering all the judgments suffice . Parties who file no document will not qualify for any relief from this Court.

3. No more than 60 days after filing the notice of appeal in the district court, the appellant shall file 40 copies of a jurisdictional statement and shall pay the Rule 38 docket fee, except that an appellant proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the jurisdictional statement. The jurisdictional statement shall follow, insofar as applicable, the form for a petition for a writ of certiorari prescribed by Rule 14, and shall be served as required by Rule 29. The case will then be placed on the docket. It is the appellant's duty to notify all appellees promptly, on a form supplied by the Clerk, of the date of filin , the date the case was placed on the docket, and the docket number of the case. The notice shall be served as required by Rule 29. The appendix shall include a copy

of the notice of appeal showing the date it was filed in the district court. For good cause, a Justice may extend the time to file a jurisdictional statement for a period not exceeding 60 days. An application to extend the time to file a jurisdictional statement shall set out the basis for jurisdiction in this Court; identify the judgment sought to be reviewed; include a copy of the opinion, any order respecting rehearing, and the notice of appeal; and set out specific reasons why an extension of time is justified. For the time and manner of presenting the application, see Rules 21, 22, and 30. An application to extend the time to file a jurisdictional statement is not favored.

4. No more than 30 days after a case has been placed on the docket, an appellee seeking to file a conditional cross-appeal (*i.e.*, a cross-appeal that otherwise would be untimely) shall fil , with proof of service as required by Rule 29, a jurisdictional statement that complies in all respects (including number of copies filed) with paragraph 3 of this Rule, except that material already reproduced in the appendix to the opening jurisdictional statement need not be reproduced again. A cross-appealing appellee shall pay the Rule 38 docket fee or submit a motion for leave to proceed *in forma pauperis*. The cover of the cross-appeal shall indicate clearly that it is a conditional cross-appeal. The cross-appeal then will be placed on the docket. It is the cross-appellant's duty to notify all cross-appellees promptly, on a form supplied by the Clerk, of the date of fili g, the date the cross-appeal was placed on the docket, and the docket number of the cross-appeal. The notice shall

be served as required by Rule 29. A cross-appeal may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached. The time to file a cross-appeal will not be extended.

5. After a notice of appeal has been fil d in the district court, but before the case is placed on this Court's docket, the parties may dismiss the appeal by stipulation filed in the district court, or the district court may dismiss the appeal on the appellant's motion, with notice to all parties. If a notice of appeal has been fil d, but the case has not been placed on this Court's docket within the time prescribed for docketing, the district court may dismiss the appeal on the appellee's motion, with notice to all parties, and may make any just order with respect to costs. If the district court has denied the appellee's motion to dismiss the appeal, the appellee may move this Court to docket and dismiss the appeal by filing an original and 10 copies of a motion presented in conformity with Rules 21 and 33.2. The motion shall be accompanied by proof of service as required by Rule 29, and by a certificate from the clerk of the district court, certifying that a notice of appeal was filed and that the appellee's motion to dismiss was denied. The appellant may not thereafter file a jurisdictional statement without special leave of the Court, and the Court may allow costs against the appellant.

6. Within 30 days after the case is placed on this Court's docket, the appellee may file a motion to dismiss, to affirm or in the alternative to affirm or dismiss. Forty copies of the motion shall be filed except

that an appellee proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the motion to dismiss, to affirm or in the alternative to affirm or dismiss. The motion shall follow, insofar as applicable, the form for a brief in opposition prescribed by Rule 15, and shall comply in all respects with Rule 21.

7. The Clerk will distribute the jurisdictional statement to the Court for its consideration upon receiving an express waiver of the right to file a motion to dismiss or to affirm or, if no waiver or motion is filed upon the expiration of the time allowed for filin . If a motion to dismiss or to affirm is timely filed the Clerk will distribute the jurisdictional statement, motion, and any brief opposing the motion to the Court for its consideration no less than 14 days after the motion is filed unless the appellant expressly waives the 14-day waiting period.

8. Any appellant may file a brief opposing a motion to dismiss or to affirm but distribution and consideration by the Court under paragraph 7 of this Rule will not be deferred pending its receipt. Forty copies shall be filed except that an appellant proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The brief shall be served as required by Rule 29.

9. If a cross-appeal has been docketed, distribution of both jurisdictional statements will be deferred until the cross-appeal is due for distribution under this Rule.

10. Any party may file a supplemental brief at any time while a jurisdictional statement is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filin . A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form for a brief in opposition prescribed by Rule 15. Forty copies shall be filed except that a party proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The supplemental brief shall be served as required by Rule 29.

11. The clerk of the district court shall retain possession of the record until notified by the Clerk of this Court to certify and transmit it. See Rule 12.7.

12. After considering the documents distributed under this Rule, the Court may dispose summarily of the appeal on the merits, note probable jurisdiction, or postpone consideration of jurisdiction until a hearing of the case on the merits. If not disposed of summarily, the case stands for briefing and oral argument on the merits. If consideration of jurisdiction is postponed, counsel, at the outset of their briefs and at oral argument, shall address the question of jurisdiction. If the record has not previously been filed in this Court, the

Clerk of this Court will request the clerk of the court in possession of the record to certify and transmit it.

13. If the Clerk determines that a jurisdictional statement submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the defici ncy. If a corrected jurisdictional statement is submitted in accordance with Rule 29.2 no more than 60 days after the date of the Clerk's letter it will be deemed timely.

USC Fed Rules Civ Pro R 60

Rule 60. Relief from a Judgment or Order

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

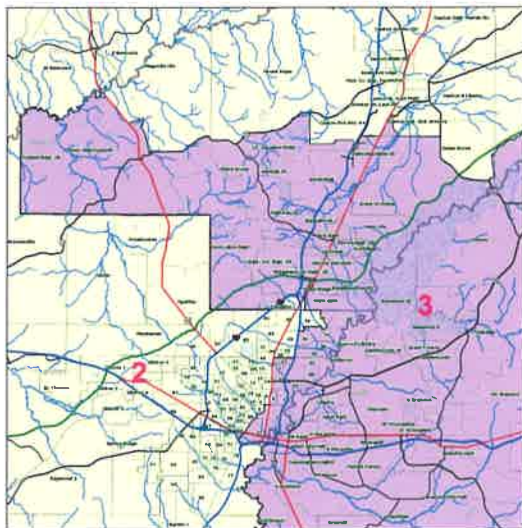
(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

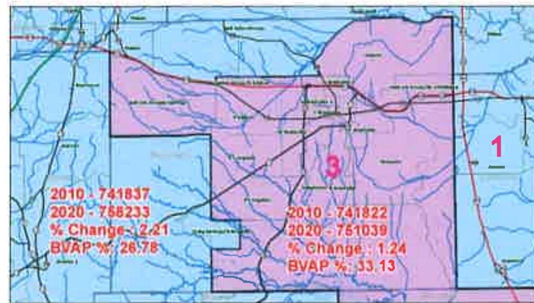
(5) the judgment has been satisfied released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

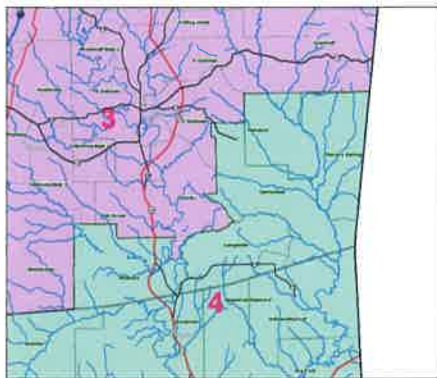
2011 MAP



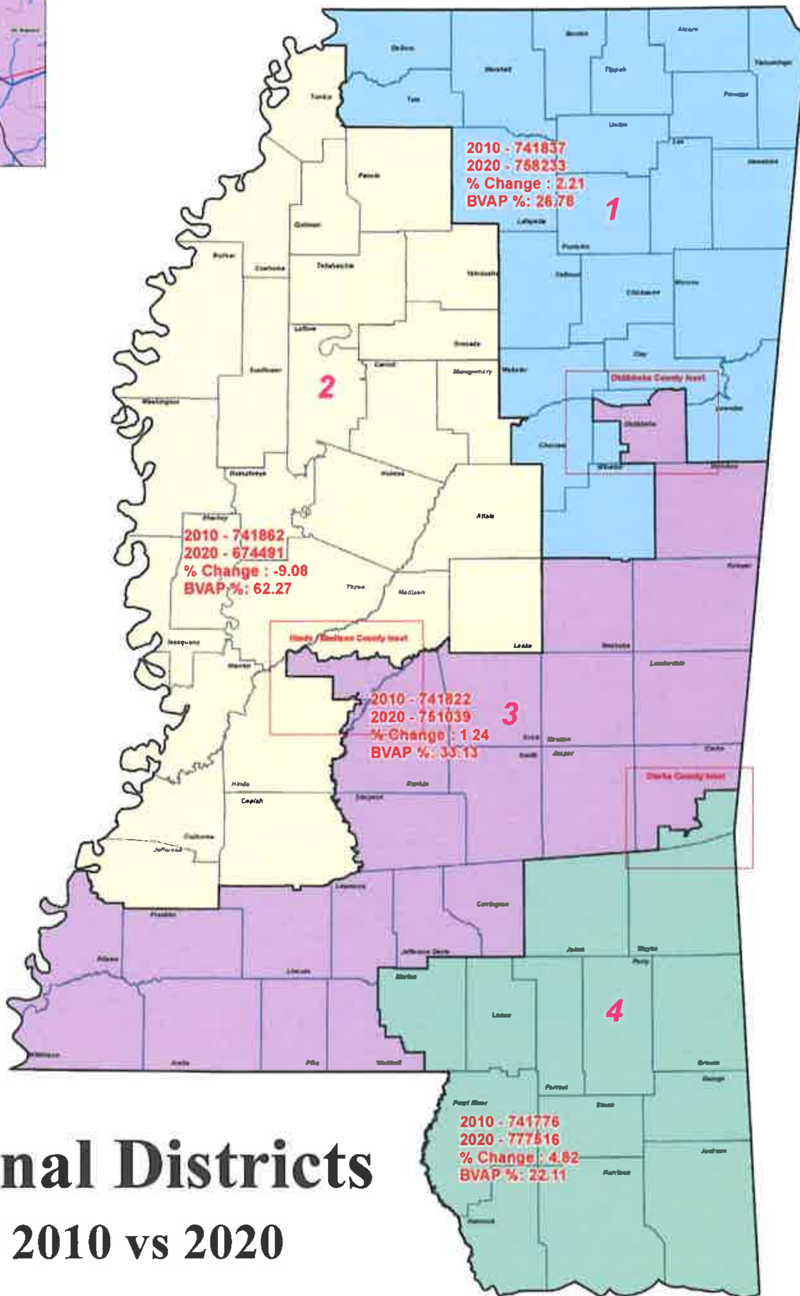
Hinds / Madison County Inset



Oktibbeha County Inset



Clarke County Inset



U.S. Congressional Districts

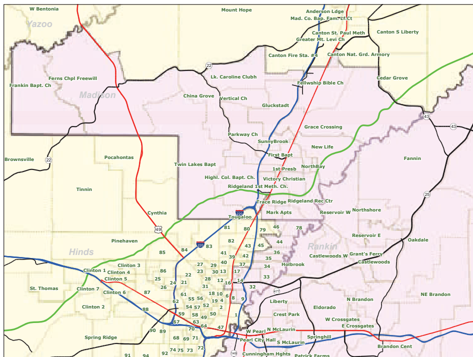
Population Change - 2010 vs 2020

Map prepared by MARIS - 8/13/2021

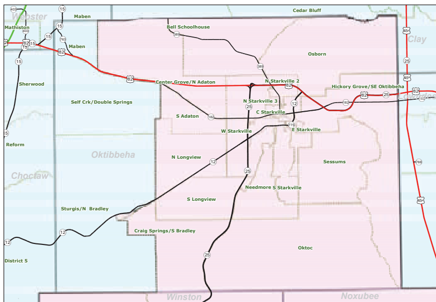
Election Districts were compiled on a whole block basis by Legislative staff. Base data (roads, cities, and counties) were compiled from 2020 U.S. Census Bureau TIGER Files. Although the information contained on this map is believed to be accurate, the Board of Trustees, State Institutions of Higher Learning/MARIS, the Standing Joint Committee on Reapportionment make no warranties as to the completeness, accuracy, reliability or suitability of the data for any use, or for any conclusions derived from this map.

U.S. Congressional Districts

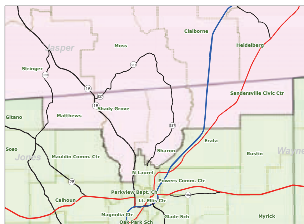
Proposed by the Committee - December 15, 2021



Hinds / Madison County Inset



Oktibbeha County Inset



Jones County Inset

DeSoto
Marshall
Benton
Tippah
Alcorn
Tishomingo
Tate
Tunica
Prentiss
Union
Lee
Itawamba
Panola
Quitman
Lafayette
1
Pontotoc
Bolivar
Coahoma
Tallahatchie
Yalobusha
Calhoun
Chickasaw
Monroe
Leflore
Grenada
Clay
Sunflower
Carroll
Montgomery
Webster
Washington
2
Oktibbeha
Lowndes
Choctaw
Humphreys
Holmes
Winston
Noxubee
Oktibbeha County Inset
Sharkey
Attala
Kemper
Yazoo
Madison
Issaquena
Leake
Neshoba
Warren
Lauderdale
3
Hinds / Madison County Inset
Scott
Newton
Smith
Jasper
Clarke
Hinds
Rankin
Copiah
Simpson
Claiborne
Jefferson
Lawrence
Covington
Jones County Inset
Franklin
Jones
Wayne
Jefferson Davis
Perry
Adams
Lincoln
Marion
Lamar
Wilkinson
Amite
Pike
Walthall
4
Greene
Forrest
George
Pearl River
Stone
Jackson
Harrison
Hancock

N

District Demographics

District	Population	Ideal Value	Deviation	BVAP
1	740,319	740,320	-1	26.32 %
2	740,319	740,320	-1	61.05 %
3	740,320	740,320	0	31.79 %
4	740,321	740,320	1	21.71 %

Election Districts were compiled on a whole block basis by Legislative staff. Base data (roads, cities, and counties) were compiled from 2020 U.S. Census Bureau TIGER Files. Although the information contained on this map is believed to be accurate, the Board of Trustees, State Institutions of Higher Learning/MARIS, the Standing Joint Committee on Reapportionment make no warranties as to the completeness, accuracy, reliability or suitability of the data for any use, or for any conclusions derived from this map.

Map prepared by MARIS - 12/15/2021

0 15 30 60 Miles