No. 19-60133

In the United States Court of Appeals for the Fifth Circuit

JOSEPH THOMAS; VERNON AYERS; MELVIN LAWSON,
Plaintiffs-Appellees,

v.

PHIL BRYANT, GOVERNOR OF THE STATE OF MISSISSIPPI, ALL IN THE OFFICIAL CAPACITIES OF THEIR OWN OFFICES AND IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE STATE BOARD OF ELECTION COMMISSIONERS; DELBERT HOSEMANN, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI, ALL IN THE OFFICIAL CAPACITIES OF THEIR OWN OFFICES AND IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE STATE BOARD OF ELECTION COMMISSIONERS,
Defendants-Appellants.

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

BRIEF FOR THE STATES OF TEXAS AND LOUISIANA AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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Supplemental Certificate of Interested Persons

No. 19-60133

Joseph Thomas; Vernon Ayers; Melvin Lawson,
Plaintiffs-Appellees,

v.

Phil Bryant, Governor of the State of Mississippi, all in the official capacities of their own offices and in their official capacities as members of the State Board of Election Commissioners; Delbert Hosemann, Secretary of State of the State of Mississippi, all in the official capacities of their own offices and in their official capacities as members of the State Board of Election Commissioners,
Defendants-Appellants.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Identity and Interest of Amici Curiae

Amici curiae are the States of Texas and Louisiana. The amici States are responsible, through their respective legislatures and election officials, for the administration of congressional and state legislative elections and for the apportionment of electoral districts in a manner consistent with state and federal law, including the Voting Rights Act (VRA). Because States and their officials have the primary duty to apportion congressional and state legislative districts, the amici States have a strong interest in the proper interpretation of the VRA. And because federal court orders modifying election practices impose a heavy cost on States, state officials, and voters, the amici States have an equally strong interest in the enforcement of equitable limits on claims challenging state election laws.

The amici States submit this amicus brief supporting reversal of the district court's judgment because the plaintiffs' claims are barred by laches and because equitable principles governing challenges to state election laws should have foreclosed injunctive relief in any event. The amici States are authorized to file this brief by Fed. R. App. P. 29(a)(2). Counsel for amici authored this brief in whole. No party or any party's counsel authored any part of this brief, and no person or entity, other than the amici States, made a monetary contribution for the preparation and submission of this brief.

Summary of the Argument

The equitable doctrine of laches, incorporated by the Federal Rules of Civil Procedure as an affirmative defense, precludes equitable relief when a plaintiff's

inexcusable delay causes prejudice to the defendant. Laches is particularly appropriate for claims challenging state apportionment schemes because a plaintiff's delay in challenging electoral districts creates a high risk of prejudice to States, state officials, candidates, and voters. Laches accounts for the individual circumstances in each case, including the plaintiff's objective notice of his claim, the reasons for delay in filing suit, and the cost of equitable intervention.

In this case, the claims fail at every step of the laches inquiry. The record reflects that Thomas had actual knowledge of his claim in 2012, when he wrote a letter to the Department of Justice (DOJ) objecting that the plan violated sections 2 and 5 of the VRA. The facts underlying Thomas's objection were also available to his co-plaintiffs through ordinary diligence. Yet the plaintiffs did not sue when the DOJ precleared Mississippi's Senate redistricting plan the in 2012, nor did they sue in 2013 or 2014. The plan was first used in 2015, when Thomas ran in Senate District 22 (SD 22) but lost the election. Yet the plaintiffs still did not sue. Instead, they allowed another three years to pass before filing suit in 2018.

Thomas has failed to offer a plausible excuse for his six-year delay, and his co-plaintiffs have offered no excuse at all. The district court concluded that Thomas's delay was excusable, and it concluded that his co-plaintiffs did not delay at all. The district court abused its discretion because its holding reflects a mistaken view of the law and clear factual errors.

The plaintiffs' unexcused delay has prejudiced Mississippi. Their untimely suit predictably led to a compressed trial schedule, which gave the defendants inadequate time to mount a defense. Because the trial was scheduled during the candidate-

qualifying period, the district court's liability finding came after the election process had started, giving the legislature inadequate time to craft a new districting plan. Mississippi has also suffered prejudice from the district court's decision to redraw district boundaries before the 2019 elections because Mississippi will have to redraw its senate districts again to account for the 2020 census. These are all recognized examples of prejudice under the laches doctrine. The district court's finding that the plaintiffs' unexcused delay did not prejudice the State was an abuse of discretion.

ARGUMENT

I. Laches is a Deeply Rooted Defense that Limits Delayed Claims for Equitable Remedies.

The doctrine of laches is "based on the maxim, '*vigilantibus non dormientibus aequitas subvenit*,' meaning 'equity aids the vigilant, not those who sleep on their rights.'" *West Bend Mut. Ins. Co. v. Procaccio Painting & Drywall Co.*, 794 F.3d 666, 678 (7th Cir. 2015) (quoting *Ikelionwu v. United States*, 150 F.3d 233, 237 (2d Cir. 1998)); *see Lupton v. Janney*, 38 U.S. (13 Pet.) 381, 386 (1839) (Story, J.) (noting that "Courts of equity are never active in lending their aid to stale and neglected claims"). Laches developed as an equitable counterpart to the Statute of James I of 1623, the predecessor of statutes of limitations in courts of law. The statute did not apply in courts of equity; instead, "the full range of equity's responses to the passage of time" governed and evolved into the doctrine of laches. Samuel Bray, *A Little Bit of Laches Goes a Long Way: Notes on* Petrella v. Metro-Goldwyn-Mayer, Inc., 67 Vand. L. Rev. En Banc 1, 5 (2014).

Just as the statute of limitations barred legal relief, laches barred equitable relief, ensuring that stale claims were equally unwelcome in courts of law and courts of equity. *See Envt'l Def. Fund, Inc. v. Alexander*, 614 F.2d 474, 478 (5th Cir. 1980) (noting the development of laches to "prevent the assertion of stale claims" and ensure fairness across separate systems of law and equity). A chancellor of equity will not be "call[ed] forth . . . into activity" if "the party has slept upon his rights" and acquiesced "for a great length of time," rather than exercise "reasonable diligence"—"[L]aches and neglect are always discountenanced." *Bowman v. Wathen*, 42 U.S. (1 How.) 189, 193 (1843) (quoting *Smith v. Clay*, 3 Brown, Ch. 639 (1767) (Camden, Ch.)). "Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive and does nothing." *Ibid.*

The Federal Rules of Civil Procedure changed the form, but not the substance, of equitable claims and remedies. Merging separate rules for actions in law, equity, and admiralty, the Federal Rules provided for "one form of action—the civil action." Fed. R. Civ. P. 2. The Federal Rules thereby incorporated equitable principles into American courts of law. *See* 4 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1004 (4th ed.) (describing the creation and adoption of the Federal Rules); *see also* Samuel Bray, *The Supreme Court and the New Equity*, 68 Vand. L. Rev. 997, 1017–18 (2015) (explaining that "the Rules were understood as not changing the requirements for equitable relief").

The Federal Rules expressly incorporate the defense of laches in Rule 8, which requires parties to "affirmatively state any avoidance or affirmative defense,

including . . . laches." Fed. R. Civ. P. 8(c)(1).[1] In its modern form, laches operates as a defense to equitable remedies, rather than a separate approach to the passage of time based on the absence of a statute of limitations. Bray, *supra*, at 6; *see also Envt'l Def. Fund*, 614 F.2d. at 480 (holding laches can apply to private law claims, constitutional claims, and claims based on separation of powers).

Laches is a necessary limit on equitable relief for at least three reasons. First, equitable remedies risk becoming a poor fit for the injury as circumstances change—injunctions can be more or less onerous depending on timing; constructive trusts can only be applied to a defined corpus, which can disappear; and accounting for profits becomes more challenging as time passes. Second, equitable relief is particularly susceptible to opportunism—for instance, when a plaintiff chooses to wait and see whether an asset increases in value before suing. Bray, *supra*, at 6; *Petrella*, 572 U.S. at 678 & n.14. Finally, equitable remedies tend to impose greater costs on the parties and the judicial system. Bray, *supra*, at 6. The parties must comply with the equitable remedy, and courts must oversee that compliance. These characteristics require the courts to enforce limits on equitable remedies—as relevant here, laches.

The Fifth Circuit has established that "three independent criteria must be met before laches can be invoked to bar litigation. The defendant must show: (1) a delay

[1] The district court was wrong to suggest that laches might not apply here. This Court and the Supreme Court have recognized that laches is available whenever an equitable remedy is sought. *See Envt'l Def. Fund*, 614 F.2d at 478 ("One basic principle has, however, been consistently followed: equitable remedies are not available if granting the remedy would be inequitable to the defendant because of the plaintiff's long delay."); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 678 (2014).

in asserting a right or claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted." *Envt'l Def. Fund*, 614 F.2d at 478 (quotation marks omitted); *see also Save Our Wetlands, Inc. v. U.S. Army Corps of Eng'rs*, 549 F.2d 1021, 1026 (5th Cir. 1977). The propriety of applying laches depends on the circumstances of each case. *Envt'l Def. Fund*, 614 F.2d at 478.

II. Laches Bars Equitable Relief for Inexcusably and Prejudicially Delayed Voting Rights Act Claims.

Courts routinely, "logically, and fairly" apply the doctrine of laches to bar equitable relief for delayed VRA claims. *Lopez v. Hale Cty.*, 797 F. Supp. 547, 550 (N.D. Tex. 1992), *aff'd*, 506 U.S. 1042 (1993) (per curiam); *see also, e.g.*, *Sanders v. Dooly Cty.*, 245 F.3d 1289, 1290–91 (11th Cir. 2001) (per curiam); *White v. Daniel*, 909 F.2d 99, 103 & n.6 (4th Cir. 1990). As one court explained, "redistricting challenges are subject to the doctrine of laches because of the ten-year expiration date of electoral districts," corresponding to the States' use of federal census data to reapportion every ten years. *Chestnut v. Merrill*, 377 F. Supp. 3d 1308, 1314 (N.D. Ala. 2019); *see Reynolds v. Sims*, 377 U.S. 533, 584 (1964) ("[I]f reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect."). Laches is particularly suited to claims under the VRA because the equitable relief requested—a change to state election law by a federal court decree or by remedial legislation passed in the shadow of liability—imposes a heavy cost on the States and the judiciary.

A. A VRA claim is delayed when a plaintiff has objective notice of a voting practice but waits to sue based on ignorance of the law, the desire for more evidence, or no reason at all.

The time period relevant to a laches defense begins when the plaintiff has objective notice of the facts giving rise to the claim. Courts consider what the plaintiff "knew or should have known"; that is, facts the plaintiff "had notice of," and facts the plaintiff "could have found out" with due diligence. *Armco, Inc. v. Armco Burglar Alarm Co., Inc.*, 693 F.2d 1155, 1162 (5th Cir. 1982); *see also White*, 909 F.2d at 102. The relevant facts in a challenge to an apportionment plan include when the plan was finalized, when the plan was precleared by the DOJ, and when the plan was first used. *See Sanders*, 245 F.3d at 1290 (affirming application of laches to bar claims brought "six years after the first use of the plan"); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887, 909 (D. Ariz. 2005) (applying laches to claims brought two years after the plan was finalized and one year after DOJ preclearance).

Similarly, "laches does not depend on subjective awareness of the *legal* basis on which a claim can be made." *Envt'l Def. Fund*, 614 F.2d at 479 (emphasis added); *see also Fouts v. Harris*, 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999) (concluding that delay was not excused by asserting that plaintiffs "did not know they had a cause of action until 1995" upon a court-ordered redistricting of another district in the same plan), *aff'd sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000) (per curiam). Courts have indicated that significant changes in substantive law can excuse delay. *See Dickinson v. Ind. State Election Bd.*, 933 F.2d 497, 502 (7th Cir. 1991) (indicating that the 1982 amendment of the VRA could be grounds to excuse delay); *Kelley v. Bennett*, 96

F. Supp. 2d 1301, 1305 (M.D. Ala. 2000), *vacated on other grounds sub nom. Sinkfield v. Kelley*, 531 U.S. 28 (2000) (per curiam) (concluding that "[r]eason did not demand" that plaintiffs assemble their action in "a mostly unsettled area of law" shortly after issuance of a Supreme Court opinion that "many jurists perceived to be a major departure from older districting law"). But a plaintiff who chooses to pursue one avenue of relief, only to later discover the need for a backup legal position, does not demonstrate excusable delay. *See Ariz. Minority Coal. for Fair Redistricting*, 366 F. Supp. 2d at 909 n.20 (concluding that laches barred a VRA claim by plaintiffs who initially "assert[ed] that they had no need to bring a VRA claim" because "it was clear" that they would succeed on state constitutional grounds).

This means that plaintiffs cannot delay indefinitely for the purpose of investigating their claims and gathering additional evidence. The Fourth Circuit, for example, has held that obtaining more evidence of racially polarized voting from additional elections did not justify the plaintiffs' delay, absent an explanation that facts gathered earlier were "inadequate to support their claims." *White*, 909 F.2d at 103; *cf. Lopez v. Merced Cty.*, 473 F. Supp. 2d 1072, 1081 (E.D. Cal. 2007) ("Plaintiffs' assertion that Federal Rule of Civil Procedure 11 dictated the extra time needed for factual and legal investigation is a colorable contention of excuse for delay."). A plaintiff's delay will be evaluated in light of his superior knowledge or experience. *See Nader 2000 Primary Comm., Inc. v. Hechler*, 112 F. Supp. 2d 575, 579 & n.2 (S.D.W. Va. 2000); *cf. Chestnut*, 377 F. Supp. 3d at 1316; *Merced Cty.*, 473 F. Supp. 2d at 1077 (considering knowledge of counsel who was "highly informed and experienced in VRA litigation"); *see also Garza v. Cty. of L.A.*, 918 F.2d 763, 777 (9th Cir. 1990)

(declining to excuse delay by a candidate who knew about claims against the existing districting plan, knew the relief sought could affect the outcome of the election, and decided to run in the election).

In sum, an unreasonable, unexplained lapse of time between objective notice and filing the complaint demonstrates delay for purposes of laches. Although the burden to show laches is on the defendant, courts are understandably skeptical of claimants who make no effort to explain their delay. *See Chestnut*, 377 F. Supp. 3d at 1315–16 (recognizing that "a plaintiff's reasonable need to fully investigate its claims" can excuse delay but applying laches partly because the plaintiffs "provide[d] no demonstration of the steps taken to investigate the claim that would justify the delay"); *Merced Cty.*, 473 F. Supp. 2d at 1081 (denying injunctive relief partly for the "troubling" lack of explanation for commencing investigation in August 2006, when the alleged violations were decades old); *Vera v. Bush*, 980 F. Supp. 254, 257 (S.D. Tex. 1997) (concluding the absence of an explanation was "fatal" to the proposed amended complaint to add more plaintiffs).

B. The prejudice at stake in VRA claims includes invasion of an essential state responsibility, disruption of elections, and a constrained ability to mount a defense.

When a laches defense is raised in a challenge to a State's redistricting plan, the analysis of prejudice must account for principles of federalism, which counsel against federal court intervention. "Redistricting 'is primarily the duty and responsibility of the State,' and '[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions.'" *Abbott v. Perez*, 138 S. Ct. 2305, 2324

(2018) (quoting *Miller v. Johnson*, 515 U.S. 900, 915 (1995)). Courts determining the propriety of equitable remedies should always "endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." *Reynolds*, 377 U.S. at 585.

Federal courts routinely err on the side of caution when ordering any relief that interferes with state elections, *see infra* Part IV, and the same principle factors into the balance of equities for a laches defense. Courts have acknowledged the attendant difficulties of "serious disruption of election process," including the "extremely difficult, if not impossible" task of changing voting materials, and the "confusion that would attend such a last-minute change" and interfere with citizens' exercise of their voting rights. *Williams v. Rhodes*, 393 U.S. 23, 35 (1968). These disruptions affect States, voters, and candidates. *See Thomas v. Bryant*, 938 F.3d 134, 177 (5th Cir. 2019) (Willett, J., dissenting) ("Political candidates don't jumpstart campaigns at the drop of a hat."). The difficulties increase when plaintiffs challenge a districting plan late in the ten-year period following reapportionment because the underlying census data are out of date, and any remedial redistricting plan will soon be out of date when the new census data are released. *See Sanders*, 245 F.3d at 1291; *see also White*, 909 F.2d at 104 (same).

Regardless of the context, a court considering a laches defense must consider prejudice in the light of the plaintiff's delay. The Fourth Circuit, for instance, has instructed that the requisite showing of prejudice is inversely related to the strength

of the showing of inexcusable delay. *See White*, 909 F.2d at 102. "Clearly the greater the delay, the less the prejudice required to show laches, and vice versa." *Ibid.*

III. Laches Bars Equitable Relief in This Case.

This case demonstrates the need for a robust laches defense against late-in-the-decade challenges to state redistricting plans. The plaintiffs' objective knowledge of the claim—and one plaintiff's subjective knowledge—accrued in 2012, when Mississippi passed the challenged apportionment plan and the DOJ precleared it over the lead plaintiff's written objection. The plaintiffs nevertheless sat on their hands for nearly six years, filing their complaint only months before the first deadlines in the 2019 election. The plaintiffs (1) delayed their suit (2) without excuse (3) to the detriment of the defendants and the State of Mississippi. The district court abused its discretion when it held that their requests for injunctive and declaratory relief were not barred by laches.

A. Each plaintiff knew or should have known about his claim in 2012, and no plaintiff has offered a plausible excuse for his delay.

The record shows that Thomas had subjective knowledge of his claim in 2012, and it contains no reason to doubt that this knowledge was available to Thomas's co-plaintiffs through the exercise of due diligence. The district court's finding that Thomas's delay was excusable and that his co-plaintiffs were not guilty of delay in the first place, ROA.378, is contrary to law and clearly erroneous.

There is no basis to dispute that Thomas had subjective knowledge of his claim in 2012. Thomas testified that he followed the 2012 redistricting and formed an opinion on the plan before it was finalized: "Of the proposed plan I was aware and I

disagreed and I knew that it was a problem." ROA.796. When asked if he believed the plan "gave African-American voters a fair opportunity to elect candidates of choice," Thomas responded, "No, sir." ROA.796–97. He explained that the "numbers just [weren't] there to be electable" and that he "felt that we needed at least 62 percent." ROA.797.

That was enough for Thomas to act in 2012, at least to oppose preclearance. He testified that he began to pursue relief for these concerns by "contacting the Justice Department and . . . writing letters, calling and pleading with them not to approve the Mississippi plan," and "stat[ing] our opposition to it and all of that." ROA.797. One of the letters he references, dated August 20, 2012, asked DOJ "to look hard at the Mississippi Senate Redistricting plan." ROA.264. The letter contended that the plan violated sections 2 and 5 of the VRA. ROA.264. Thomas claimed that the plan "reduces blacks voting strength" because, under the old plan, "Yazoo City was in District 21 which had a 66.02%," and "the new State Plan reduces Yazoo City to a 50.77, which will not allow us to elect a black." ROA.264. The letter concluded by stating that the new "District 22 denies black voters," and that "the State Plan clearly reduces over 17 impact districts with 30[ ]to 40 % black population. These districts were doing well and had influences with numbers." ROA.264. Thomas testified that this was a "second request to the Department of Justice." ROA.811.

The district court's finding that Thomas's delay was "excusable," ROA.378, is wrong as a matter of law and clearly erroneous as a matter of fact. Thomas attempted to excuse his delay by arguing that "in 2012, he did not know that private parties could bring a § 2 suit," and that he did not learn otherwise until 2018. ROA.377. The

district court rejected this argument with good reason—not only because laches does not require "subjective awareness of the legal basis on which a claim can be made," ROA.377–78, but also because Thomas could have inquired about the availability of a private cause of action in 2012.

After rejecting Thomas's proffered excuse, the district court nevertheless excused Thomas's delay because he chose to run for election to SD 22 in 2015 despite his belief that the district violated section 2. ROA.378. According to the district court, "Thomas did not perceive a legal violation in 2012 and then sit on his laurels"; he "sought to remedy the problem through the political process." ROA.378. That statement is factually inaccurate. Thomas took no action between 2012 and 2015, and even if he had prevailed in the 2015 election, that would not have "remed[ied] the problem through the political process." ROA.378. But even if it were accurate, the district court's finding that "the time between 2012 and 2015 is excusable," ROA.378, cannot excuse Thomas's delay because it does not explain why he waited three more years after 2015 to bring his claim.

The district court also erred as a matter of law in finding that Thomas's co-plaintiffs' could not be charged with delay. According to the district court, the laches defense "quickly fails as to plaintiffs Ayers and Lawson" because "[t]here is no evidence that either had any indication of a problem with District 22's boundaries and slept on his rights." ROA.377; *see also* ROA.478 (stating, in denying the defendants' motion to stay, that "the laches argument can (at best) knock out one of the three plaintiffs"). But this implies that the plaintiffs could not be charged with delay unless they had actual, subjective knowledge of the facts underlying their claims. That is

not the case. This Court has consistently held, to the contrary, that the relevant question for a laches defense is whether a reasonable plaintiff *should have known* of the alleged violations. *Armco, Inc.*, 693 F.2d at 1161–62; *see also Envt'l. Def. Fund*, 614 F.2d at 479 ("[L]aches does not depend on subjective awareness of the legal basis on which a claim can be made."). And plaintiffs with constructive notice of their claims cannot excuse their delay by joining plaintiffs who allegedly needed additional time to investigate. *See Chestnut*, 377 F. Supp. 3d at 1316 (holding that the presence of a plaintiff who did not move to Alabama until 2016 could not excuse delay by plaintiffs who were on notice of their claims since 2011). The district court lost sight of this distinction and, as a result, imposed a heightened burden on the defendants to prove laches.

Underscoring its improper insistence on subjective knowledge, the district court commented that "there is no basis to conclude that DOJ preclearance vests voters with the knowledge of a claim sufficient to hold them accountable via laches." ROA.377. The district court was mistaken. Plaintiffs are charged with knowledge of facts discoverable in the exercise of due diligence. Those facts include the promulgation of a redistricting plan and its implementation in an election. *See, e.g.*, *Sanders*, 245 F.3d at 1290 (affirming grant of summary judgment on laches grounds where the plaintiffs filed a racial-gerrymandering claim in 1998, "over six years after the first use of the plan and five years after *Shaw v. Reno*[, 509 U.S. 630 (1993),] issued"); *Chestnut*, 377 F. Supp. 3d at 1314–18 (holding that the plaintiffs' claims first became available when the state redistricted). Here, the record shows that Ayers voted in 2015 and that Lawson voted in 2007, 2011, and 2015. ROA.132. Even if they could

not be charged with knowledge of the relevant facts in 2012—and they could—they could certainly be charged with such knowledge no later than 2015. Neither plaintiff has offered any explanation for his delay in filing suit. The district court erred as a matter of law when it relieved them of that burden.

B. Plaintiffs' unexcused delay prejudiced the State of Mississippi both in defending its districting plan and complying with the district court's injunction.

The plaintiffs' unexplained six-year delay has worked to the detriment of the State of Mississippi, Mississippi election officials, and Mississippi voters. By filing their complaint just over five months before the candidate-qualifying period opened, the plaintiffs created unnecessary pressure to try their case on an expedited basis before the 2019 election cycle began. Predictably, this restricted the defendants' ability to conduct discovery and prepare a defense, and it created an obvious risk that a finding of liability would disrupt the election process—either through a hastily enacted legislative remedy or through a hastily implemented judicial remedy leaving inadequate time for appellate review. Both remedies issued here. First, the district court adopted the plaintiffs' remedial plan, then—after a stay from this Court—the Legislature quickly adopted its own substitute. Both the process and the outcome clearly prejudiced the defendants and the State of Mississippi.

The disruption caused by redistricting, even with months to go before the election itself and even limited to a handful of districts, causes confusion and disruption for election officials, voters, and candidates. Injunctive relief is particularly prejudicial late in the ten-year reapportionment cycle because (1) the census data are older

and less reliable by that time, and (2) the costs of redistricting are imposed twice in a short period of time if the State must adjust to a court-ordered change only to reapportion again when new census data are released. *See Sanders*, 245 F.3d at 1290–91; *accord White*, 909 F.2d at 104; *see also Dickinson*, 933 F.2d at 502 (finding injunctive relief "inappropriate" partly because "legislative reapportionment is imminent"); *Vera v. Bush*, 980 F. Supp. 251, 253 (S.D. Tex. 1997) (expressing "reticence to act on increasingly outdated census data" from 1990). Because the plaintiffs waited to file their lawsuit until 2018, the district court's grant of equitable relief will cause Mississippi to make two changes to its state Senate plan in quick succession.

Aside from the changes to its electoral districts, Mississippi has shown that it was prejudiced by the compressed litigation schedule. The plaintiffs sued on July 9, 2018, then amended their complaint on July 25, 2018. ROA.20; ROA.65. On August 30, 2018, the plaintiffs filed a motion for an expedited schedule, citing the advantages of the court finding liability during the upcoming legislative session. ROA.114. Defendants opposed, citing the complexity of the factual and legal issues. ROA.158. On November 16, 2018, the district court granted the motion to expedite, setting a discovery deadline of January 18, 2019, and a trial date of February 6, 2019. ROA.201. Defendants claim that they received critical information from Plaintiffs' expert mere days before trial. Appellants' Br. 29; Reply 12. The defendants' ability to litigate effectively was compromised by a trial schedule that was rushed to accommodate the plaintiffs' late filing and the forthcoming election deadlines. *See Thomas*, 938 F.3d at 179–80 (Willett, J., dissenting) ("The plaintiffs hamstrung the State by creating a nigh-impossible timetable for effectively litigating. . . . This urgency stymied the

State's ability to fully litigate its own preferred, democratically enacted plan, which inherently prejudiced the State.").

Mississippi suffered further prejudice when the remedial phase was expedited to avoid further interference with election deadlines. *See Thomas v. Bryant*, 919 F.3d 298, 312 (5th Cir. 2019) ("[T]he district court went ahead and redrew the lines given concerns about the candidate qualifying deadline."). The district court issued an order finding that SD 22 violated the VRA on February 13, 2019, and an order explaining its reasoning on February 16, 2019, leaving just weeks before the close of the candidate-qualifying period on March 1, 2019, and little time for the legislature to redraw districts. ROA.355, 357. The district court then gave the defendants one day to report on the Mississippi Legislature's progress in redrawing SD 22. ROA.457. When the defendants reported that the Legislature intended to redraw the district if pending stay motions were denied, ROA.470, the district court immediately ordered into effect a redistricting plan drawn by the plaintiffs, ROA.473, extended the candidate-qualifying deadline, ROA.473, and entered final judgment, ROA.481. The Legislature enacted a remedial plan on March 27, 2019, but only after this Court granted a limited stay for that purpose. *See Thomas*, 919 F.3d at 316.

Mississippi suffered additional prejudice when its legislature was put to the choice of quickly redrawing senate districts or forfeiting its right to provide a remedy in the first instance. An expedited legislative redistricting process is inherently risky because it may be used against the State in future challenges to the affected districts. Among other risks, a short timeframe for redistricting is often cited as evidence of discriminatory purpose. In Texas's post-2011 redistricting litigation, for instance,

the district court found that the Legislature's enactment of a court-ordered remedial plan was "tainted" by intentional discrimination in part because it "pushed the redistricting bills through quickly in a special session" and failed to conduct "a true deliberative process." *Perez v. Abbott*, 274 F. Supp. 3d 624, 649 (W.D. Tex. 2017), *rev'd*, 138 S. Ct. 2305 (2018); *see generally Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) ("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role.").

More relevant to this case, a hastily adopted plan to remedy a vote-dilution claim may be subject to challenge as a racial gerrymander. That risk is acute where the violation and remedy are framed solely in terms of demographic benchmarks, and it exists even if the legislature's remedy has the court's imprimatur. *See Sanders*, 245 F.3d at 1290 (explaining that a plan challenged as a racial gerrymander had been "effectuated by consent decree"). Here, for instance, the legislature's remedy followed a court-ordered remedial plan, drawn by the plaintiffs, that was apparently based on a single criterion: increasing the black voting-age population to 62%. *See* ROA.740–41 (testimony by plaintiffs' expert that he "was asked to opine [whether] African-American voters would have a reasonable likelihood of electing their candidate of choice in District 22 if the black voting age population were increased to 62 percent"); *cf.* ROA.797 (testimony by Thomas that he "felt that we needed at least 62 percent").

The district court unwittingly highlighted the prejudice to the defendants when it denied their motion to stay pending appeal. It dismissed concerns about the approaching election on the ground that "[t]his is a basic § 2 case, . . . and the judiciary

is generally capable of resolving 'a run-of-the-mill case' filed 16 months before a general election." ROA.480. But the facts of this litigation belie that assurance, as the district court was unable to resolve the plaintiffs' challenge to a single district without interfering with election deadlines. By focusing on the time between the complaint and the election, the district court ignored the prejudice that resulted from holding a trial after the candidate-qualifying period opened, issuing an injunction to redraw the boundaries of SD 22 shortly before the candidate-qualifying period closed, and forcing the Legislature to attempt a remedy on short notice (and then only after securing a temporary stay from this Court). This litigation shows that conflicts with election deadlines and the prejudice inherent in a late-in-the-decade change to electoral districts are entirely predictable, even in a "basic," "run-of-the-mill" section 2 case. The district court's decision to overlook this prejudice ignored the law and clearly misinterpreted the facts.

IV. The District Court's Grant of Equitable Relief Was Improper Even if Laches Did Not Bar the Plaintiffs' Claims.

Even if the timing of the plaintiffs' complaint somehow precluded a laches defense, which it does not, the timing of the trial and the district court's judgment created an independent barrier to relief under equitable principles governing challenges to state election laws. In *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam), the Supreme Court relied on "considerations specific to election cases" to caution against federal court interference with impending state elections. It explained that "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that

risk will increase." *Id.* at 4–5. To account for those risks, a court considering a request to enjoin state election laws before an impending election must consider potential conflicts with the timing of elections and appellate proceedings. *See ibid.*

The need for caution in granting equitable relief against state election laws persists even after a finding of liability. In *Purcell*, the Court emphasized that "the facts in these cases are hotly contested, and [n]o bright line separates permissible election-related regulation from unconstitutional infringements." *Id.* at 5. Thus, even after concluding that a redistricting plan is unlawful, a district court "must undertake an equitable weighing process to select a fitting remedy . . . taking account of what is necessary, what is fair, and what is workable." *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam) (quotation marks omitted). The "obvious considerations" in that weighing process "include the severity and nature of the particular constitutional violation, the extent of the likely disruption to the ordinary processes of governance . . . , and the need to act with proper judicial restraint when intruding on state sovereignty." *Id.* at 1626. These inherent limitations on equitable relief exist independently of the laches defense, but they reflect similar concerns. *See, e.g.*, *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) ("Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so.").

The prospect of interference with state elections often warrants postponement of relief, or denial of relief altogether, when the risk of disrupting an election is high or when the plaintiff has failed to act diligently. This Court, for instance, has declined to grant immediate relief on a section 2 discriminatory-effects claim even though

several months remained before the general election. *See Veasey v. Abbott*, 830 F.3d 216, 243 (5th Cir. 2016) (en banc) (instructing the district court in July 2016 to "take the requisite time to reevaluate the evidence" and fashion a remedy to apply after the November 2016 election); *see also Short v. Brown*, 893 F.3d 671, 680 (9th Cir. 2018) (concluding in June 2018 that no remedy was proper for the November 2018 election). And the Supreme Court has affirmed the denial of a preliminary injunction that was not requested until six years after the challenged map was adopted and three years after the suit was filed, concluding that the plaintiffs had not shown "reasonable diligence." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (per curiam).

In any case, relief should not be granted without a thorough analysis of the competing equitable considerations. *See Covington*, 137 S. Ct. at 1625 (vacating the district court's remedial order "for the simple reason that the district court failed to meaningfully weigh any equitable considerations"). Here, the district court addressed the impact of an injunction "in only the most cursory fashion," *see id.* at 1626, finding no prejudice to the State because the injunction affected a small number of districts and was requested sixteen months before the general election. ROA.379. Similarly, in refusing to stay its order, the district court found the balance of harms to be "in equipoise" and gave controlling weight to "the importance of voting and the years that have elapsed without the electoral opportunity intended by § 2." ROA.479. That reasoning discounts the magnitude of harm to the State and the thousands of voters affected by changing boundaries in SD 22. It also places a thumb on the scale in favor of the three individual plaintiffs, whose concerns with the 2012 apportionment were not sufficient to prompt a challenge until halfway

through 2018. *Cf.* ROA.479 (relying on purported harm to "the plaintiffs *and other African-Americans* in District 22 [who] were unable to vote their candidate of choice into office *in the 2003, 2007, 2011, and 2015* election cycles" (emphases added)).

The district court's reasoning flouts the Supreme Court's "demand for careful case-specific analysis," *Covington*, 137 S. Ct. at 1626, because it would justify relief in any vote-dilution case, regardless of interference with election deadlines, as long as the plaintiffs managed to file before the eve of an election. *Cf. ibid.* (holding that the district court's reasoning was inadequate because it would justify relief "in *every* racial-gerrymandering case"). Even if it were correct to reject the defendants' laches defense, the district court should have given appropriate weight to the State's injury and the plaintiffs' lack of diligence at the remedial phase and denied injunctive relief.

Conclusion

The Court should reverse and render judgment that the plaintiffs' claims are barred by laches, or, in the alternative, reverse in part and render judgment that the plaintiffs are not entitled to equitable relief.

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On October 30, 2019, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,314 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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