No. 22-492

In The Supreme Court of the United States

KELVIN BUCK, et al.,

Appellants,

v.

MICHAEL WATSON, et al.,

Appellees.

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

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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ARGUMENT

The appellees' motion to dismiss the appeal for lack of jurisdiction should be denied because the Court has jurisdiction of the two orders issued by the three-judge District Court that have the "practical effect" of denying an injunction. Their motion to affirm should be denied as well because the December 30, 2011 permanent injunction prospectively, with minor adjustments to the 2011 court-drawn redistricting plan, is still equitable.

1. The motion to dismiss should be denied because the Court has jurisdiction of the two orders that have the "practical effect" of denying an injunction in this "civil action required by an Act of Congress to be heard and determined by a district court of three judges."

Appellees argue that the Court lacks jurisdiction of this appeal. They are wrong. This is a direct appeal from two orders issued by a three-judge District Court that have the "practical effect" of denying an injunction. The Supreme Court has jurisdiction of an appeal "from an order granting or denying . . . an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. §1253. Congressional redistricting cases are required to be heard and determined by a district court of three judges. *Shapiro v. McManus*, 577 U.S. 39 (2015); 28 U.S.C. §2284(a). Therefore, the three-judge District Court was required and properly constituted

in this case. *Shapiro v. McManus*, supra; 28 U.S.C. §2284(a).

Appellees argue that the appeal of the two orders issued by the three-judge District Court which modified the December 30, 2011 injunction by dissolving it should have been to the United States Court of Appeals for the Fifth Circuit instead of to this Court. However, the Fifth Circuit dismissed an appeal of two ancillary orders from a district court of three judges where an injunction was neither granted nor denied. *Weiser v. White*, 505 F.2d 912 (5th Cir. 1975), cert. denied, 421 U.S. 993 (1975). The Fifth Circuit held that it lacked jurisdiction because the Supreme Court had jurisdiction of the appeal. *Id*. Therefore, appellees' argument that the court with jurisdiction of this appeal is the Fifth Circuit is without merit. See *Weiser v. White*, supra.

This Court, in *Abbott v. Perez*,[1] held that it had jurisdiction of an appeal from orders issued by a three-judge District Court that did not expressly grant or deny a preliminary or permanent injunction. In fact, "the District Court did not call its orders 'injunctions. . . .'" *Abbott v. Perez*, 138 S. Ct. at 2319. A District Court declining to enter an order prohibiting certain conduct is practically equivalent to denying an injunction. *Id*., citing *Carson v. American Brands, Inc*., 450 U.S. 79 (1981).

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[1] 585 U.S. ___, 138 S. Ct. 2305 (2018).

In this case, the three-judge District Court entered a permanent injunction on December 30, 2011 ordering the State of Mississippi to use the court-drawn congressional redistricting plan for congressional elections "until such time as the State of Mississippi produces a constitutional congressional redistricting plan that [has been] precleared in accordance with the procedures in Section 5 of the Voting Rights Act of 1965." D. Ct. Dkt. 128 at 2. On January 24, 2022, appellees filed their Fed. R. Civ. P. 60(b)(5) motion to vacate the 2011 injunction in its entirety. D. Ct. Dkt. 143. On February 1, 2022, appellants filed their response opposing the motion to vacate and requested the District Court to modify the injunction by requiring appellees "to use the alternative redistricting plan submitted to the Mississippi Joint Congressional Redistricting and Legislative Reapportionment Committee ('the Joint Committee') on November 30, 2021 by the Mississippi State Conference of the NAACP ('the NAACP'),[footnote 6 omitted], or a plan adopted by the Court."[2] D. Ct. Dkt.

[2] Appellees argue that "[a]ppellants' plan included a black voting age population (62.11%) near H. B. 384's (63.74%) for District 2." Motion to Dismiss or Affirm at 6. Appellants' plan is the NAACP Plan in which race was not a predominant or dominant factor and it did not subordinate neutral redistricting principles to a consideration of race. The NAACP plan was drafted by Anthony "Tony" Fairfax. Mr. Fairfax submitted a declaration testifying as follows:

> 7. I have reviewed the redistricting criteria for the State of Mississippi Constitution and the criteria that were approved by the Joint Congressional Redistricting and Legislative Reapportionment Committee. This included the following criteria: 1) District should be as equal as practicable, 2) District

151 at 4-5 ¶ 11. Appellants requested the District Court to maintain the December 30, 2011 permanent injunction requiring the State of Mississippi to produce a constitutional congressional redistricting plan

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should be composed of contiguous territory, 3) The redistricting plan should comply with all applicable state and federal laws, including Section 2 of the Voting Rights Act of 1965, as amended, and the Mississippi and United States Constitutions and 4) the Committee should consider the neutral redistricting factors employed by the Court in *Smith v. Hosemann, 852 F.Supp.2d 757 (S.D. Miss. 2011).*

8. My analysis showed that the NAACP plan performed better than the H.B. 384 plan or the Current congressional district plan when comparing traditional redistricting criteria. The NAACP plan is more compact than the H.B. 384 plan or the Current congressional district plan in at least two of three compactness measures (Reock, Polsby-Popper, and Convex Hull). The NAACP plan also splits fewer counties than the H.B. 384 plan or the Current congressional district plan. The NAACP plan splits fewer Voting Tabulation Districts ('VTDs'), [footnote omitted], than the H.B. 384 plan or the Current congressional district plan.

9. The H.B. 384 plan performed substandard to the NAACP plan when comparing the neutral redistricting factors set forth in *Smith v. Hosemann, 852 F.Supp.2d 757 (S.D. Miss. 2011)* established by the Court. Specifically, the NAACP plan is superior to the H.B. 384 plan when evaluating the redistricting factors of compactness, county & municipal boundaries, and distance of travel within the district.

D. Ct. Dkt. 164 at 3-4, ¶¶ 7-9.

that had been precleared and make minor adjustments to the court-drawn redistricting plan so that it would not be malapportioned. The District Court's May 23, 2022 and July 25, 2022 orders essentially denied the December 30, 2011 injunction and appellants' request to amend the injunction instead of vacating it. The Court has jurisdiction of an appeal of orders that have the "practical effect" of denying an injunction issued by a properly constituted three-judge District Court *Abbott v. Perez*, supra; *Shapiro v. McManus*, supra; *Weiser v. White*, supra. Therefore, the Court has jurisdiction of this appeal.

2. Appellees' motion to affirm should be denied because applying the injunction prospectively, with minor adjustments to the 2011 court-drawn plan, is still equitable.

Appellees argue that the District Court did not abuse its discretion by vacating the December 30, 2011 injunction in its entirety because applying the injunction prospectively is inequitable. They assert it is inequitable because (1) the 2011 court-drawn plan is malapportioned; (2) they produced a constitutional redistricting plan; and (3) the State of Mississippi is no longer required to obtain preclearance after this Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013).[3] Contrary to the appellees' argument,

[3] Appellants argue that preclearance is required not because Mississippi is a jurisdiction covered by §§4(b) and 5 of the Voting Rights Act, 52 U.S.C. §§10303(b) and 10304, but because the December 30, 2011 injunction ordered the State to produce a

applying the December 30, 2011 injunction prospectively is still equitable because the State failed to produce a constitutional congressional redistricting plan. Instead of complying with the injunction and producing a constitutional redistricting plan, the State produced an unconstitutional racially gerrymandered redistricting plan. A legislative leader responsible for shepherding H. B. 384 through the Legislature admitted during debate on the Senate floor that race was a predominant factor in the way CD2 was drawn. App. 30-31. He also admitted that the plan subordinated traditional neutral redistricting criteria to the consideration of race. App. 30-31. "Although a legislature's compliance with 'traditional districting principles such as compactness, contiguity, and respect for political subdivisions' may well suffice to refute a claim of racial gerrymandering, *Shaw*, 509 U.S. at 647, appellants cannot make such a refutation where, as here, those factors were subordinated to racial objectives." *Miller v. Johnson*, 515 U.S. 900, 919 (1995), quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (*Shaw I*). The State of

precleared plan. A State seeking to vacate an injunction must show that it attempted to comply with the injunction or sought relief from the Court that imposed the injunction. See *Board of Educ. v. Dowell*, 498 U.S. 237, 249 (1991) (a defendant's "compliance with previous court orders is obviously relevant" in deciding whether to modify or dissolve an injunction); *Walker v. Birmingham*, 388 U.S. 307, 314 (1967) ("An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case.").

Mississippi subordinated traditional neutral districting principles to its racial target of maintaining a 61.36% BVAP congressional district – CD2. *Miller v. Johnson*, supra, at 919. "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') as assigned to CD2 in [the] court's 2011 Plan." App. 31. However, the Voting Rights Act "does not require maintaining the same minority population percentages in majority-minority districts as in the prior plan." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 276 (2015). The Voting Rights Act "is satisfied if minority voters retain the ability to elect their preferred candidates." *Ibid*. Therefore, by attempting to maintain the same BVAP percentage as in the 2011 plan, the State produced an unconstitutional racially gerrymandered districting plan. *Miller v. Johnson*, supra, at 919; *Ala. Legis. Black Caucus v. Alabama*, supra, at 276.

It is equitable, prospectively, for the District Court to keep its injunction in place requiring the State to produce a constitutional redistricting plan. One reason the State does not want the injunction to remain in effect is because the injunction implemented a court-drawn plan that is now malapportioned. However, that malapportionment could be cured by making minor adjustments to the court-drawn plan. It is an abuse of discretion to cure the malapportionment by vacating the injunction and allowing a racially gerrymandered plan to replace the malapportioned court-drawn plan.

"Of course, a modification must not create or perpetuate a constitutional violation." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 391 (1992).

CONCLUSION

The Court should note probable jurisdiction, reverse the District Court, and remand the case to the District Court to modify its 2011 injunction consistent with this Court's ruling.

Dated January 27, 2023

Respectfully submitted,

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