IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS; BOBBY SINGLETON; ALABAMA ASSOCIATION OF BLACK COUNTY OFFICIALS; FRED ARMSTEAD, GEORGE BOWMAN, RHONDEL RHONE, ALBERT F. TURNER, JR., and JILES WILLIAMS, JR., individually and on behalf of others similarly situated,	*	
Plaintiffs,	*	Civil Action No. 2:12-CV-691-WKW-WC
v.	*	(3-judge court requested)
THE STATE OF ALABAMA; BETH CHAPMAN, in her official capacity as Alabama Secretary of State,	*	
Defendants.	*	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY

Plaintiffs Alabama Legislative Black Caucus et al., through undersigned counsel, oppose defendants' motion to dismiss or, in the alternative, motion to stay, filed August 31, 2012, Doc. 14. As grounds for their opposition, plaintiffs would show as follows:

1. Defendants acknowledge that a three-judge district court should be

convened in this action. Indeed, the defendants' motion to dismiss or stay must be decided by a three-judge court, not by a single district judge. E.g., *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962) ("the applicable jurisdictional statute therefore made it impermissible for a single judge to decide the merits of the case, either by granting or by withholding relief"); *Nixon v. Richey*, 513 F.2d 430, 437 (D.C. Cir. 1975) ("in instances where a three-judge court is in order, the single judge must activate the three-judge machinery, and . . . any stay of three-judge proceedings which is proper may be granted only by the three judges"). Thus this opposition to defendants' motion is addressed to the three-judge court.

2. Common sense tells us that defendants' motion for this Court to stay its hand until the Section 5 preclearance process has been completed gets things backwards. The threshold question, presented by plaintiffs' motion for partial summary judgment, Doc. 7, and supporting brief, Doc. 8, is whether the House and Senate redistricting plans in Acts 2012-602 and 603 violate fundamental one-person, one-vote standards by arbitrarily restricting permissible population deviations to ± 1% and by not attempting to comply with the whole-county provisions of the Alabama Constitution. If this Court grants plaintiffs' motion for partial summary judgment and enters a preliminary and/or permanent injunction

requiring the Legislature to start over, it will moot the current preclearance proceedings under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and, at least for the time being, the racial and partisan discrimination claims in this action.

3. In contrast, the Section 5 outcome cannot moot the one-person, one-vote issues in Count I of the complaint in this action. In fact, if Acts 2012-602 and 603 are precleared, it will not moot any of plaintiffs' claims in this action. If either or both the House and Senate plans are denied preclerance, the objections will focus on specific districts that violate Section 5, *Perry v. Perez*, 132 S.Ct. 934 (2012), which, at most, could moot some but not all of the racial and partisan discrimination claims in Counts II and III. However, the Count I Fourteenth Amendment claims of plaintiffs and the class of all Alabama residents whose counties have been split unnecessarily and whose local legislative delegations have been expanded unnecessarily are statewide in nature and will not be affected by a Section 5 objection. Plaintiffs' Article III standing to assert their statewide Equal Protection claims against the House and Senate plans is not undermined by the potential unenforceability of a few districts under Section 5.

4. If in its next special or regular session the Legislature must amend one or both plans to remedy Section 5 objections, it will need to know as well whether it must remedy constitutional and/or statutory violations this Court may find. And, if

both the House and Senate plans are precleared, the Legislature still will need to know as soon as possible the judgment of this Court, so that it can enact and obtain preclearance of new plans that satisfy this Court's decree and can be implemented well in advance of the April 2014 qualifying deadline.

5. So the Section 5 issues and the claims in this action are not interdependent, and there is no basis for staying proceedings in this action until after the Section 5 review has been completed. In *Perry v. Perez*, 132 S.Ct. 934 (2012), the three-judge court in Texas did not stay trial proceedings to await the D.C. court's Section 5 review of Texas' Congressional, House and Senate plans. Rather, it "heard argument and held a trial with respect to the plaintiffs' claims, but withheld judgment pending resolution of the preclearance process in the D.C. court." 132 S.Ct. at 940 (citation omitted). It was appropriate that the Texas court withhold judgment as long as it could, because a Section 5 determination would impact the claims before it "that Texas' enacted plans discriminate against Latinos and African–Americans and dilute their voting strength...." Id.

6. In the instant case also, it would be appropriate for this Court to withhold judgment on plaintiffs' Count II claims of racial discrimination pending the

outcome of Section 5 proceedings.[1] But the contrary is true with respect to the Count I claims. The D.C. district court and the Department of Justice would benefit from a speedy ruling on plaintiffs' motion for partial summary judgment and preliminary or permanent injunction, because all Section 5 preclearance issues would be moot until after the Legislature has adopted plans that satisfy the one-person, one-vote, whole-county constitutional standards.

WHEREFORE, plaintiffs pray that this Court will promptly request the convening of a three-judge court and that the three-judge court will deny defendants' motion to dismiss or, in the alternative, to stay.

Plaintiffs further pray that the three-judge court will expedite proceedings

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[1] In *Connor v. Waller*, 421 U.S. 656 (1975), the case cited in defendants' motion, the Supreme Court reversed the three-judge district court's ruling that Mississippi's House and Senate plans need not be submitted for Section 5 preclearance and its ruling on the merits of claims of racial discrimination. Id. at 656. "This reversal [was], however, without prejudice to the authority of the District Court, if it should become appropriate, to entertain a proceeding to require the conduct of the 1975 elections pursuant to a court-ordered reapportionment plan that complies with this Court's decisions in *Mahan v. Howell*, 410 U.S. 315 (1973); *Connor v. Williams*, 404 U.S. 549 (1972); and *Chapman v. Meier*, 420 U.S. 1 (1975)." 421 U.S. at 656-57.

Similarly, in *Perry v. Perez*, the Supreme Court instructed the three-judge district court in Texas to adopt interim plans for the imminent 2012 elections that followed the district lines drawn by the legislature, except to the extent "they reflect aspects of the state plan that stand a reasonable probability of failing to gain § 5 preclearance." 132 S.Ct. at 942. There was no one-person, one-vote claim in the Texas case, and there is no basis for withholding judgment on Count I in the instant case.

leading to a determination of plaintiffs' motion for partial summary judgment and for a preliminary and/or permanent injunction.

Respectfully submitted this 4th day of September, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2012, I electronically served the foregoing on the following by means of the Court's CM/ECF system:

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