

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

ALABAMA LEGISLATIVE BLACK CAUCUS, et al.,)	
)	
Plaintiffs,)	
)	Civil Action No.
v.)	2:12-cv-691-WKW-WC
)	
THE STATE OF ALABAMA, et al.,)	
)	
Defendants.)	

**REPLY TO RESPONSE
IN OPPOSITION TO MOTION TO DISMISS OR STAY**

Pursuant to this Court’s Order of September 4, 2012 (No. 16), the State of Alabama and Beth Chapman, in her official capacity as Secretary of State of Alabama, defendants in this action (the “State Defendants”), submit this Reply to Plaintiffs’ Response in opposition to their Motion to Dismiss or, in the Alternative, Motion to Stay (No. 15). For the reasons stated in the State Defendants’ Motion and this Reply, this Court should dismiss the Plaintiffs’ claims without prejudice or stay this action pending action on the State’s preclearance submissions and judicial complaint.

For their Reply, the State Defendants state:

1. At the outset, the State Defendants reiterate that they expect USDOJ to respond to the administrative submissions, the judicial preclearance complaint, or both on or before October 9, 2012, which is less than a month away. Given the State’s expenditure of substantial effort and resources in the attempt to obtain preclearance, the equities hardly favor the Plaintiffs. This

Court should not lightly take them up on their invitation to accelerate the litigation of their one-person, one-vote claims.¹

2. As the State Defendants explain below, this lawsuit, at its core, represents an attempt to induce this Court to tell State officials to follow State law. The Eleventh Amendment prohibits private parties from using the federal courts for that purpose. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104 S. Ct. 900 (1984); *Alexander v. Chattahoochee Valley Community College*, 325 F. Supp. 2d 1274, 1295 (M.D. Ala. 2004)(State law claims dismissed without prejudice).

3. The Plaintiffs' legal argument lacks merit. In the first place, it gives inappropriately short shrift to *Conner v. Waller*, 421 U.S. 656 (1975). There, the Court held that a three-judge federal district court in Mississippi erred in, among other things, "deciding the constitutional challenges to the Acts based on claims of racial discrimination." *Id.* In other words, that three-judge federal district court jumped the gun in addressing the merits of the constitutional challenge to an unprecleared law.

4. *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (three-judge court), further supports the State Defendants' Motion. There, a three-judge federal district court found that, among other things, the 2002 Georgia State Senate plan, which had been precleared, violated one-person, one-vote principles. The court, however, did not consider the claims against the 2001 Georgia State Senate plan, noting that the preclearance litigation relating to that plan was

¹ As the State Defendants understand the Plaintiffs' position, they do not object to this Court's staying its consideration of their Counts II and III. *See* No. 15 at 4-5, ¶ 6 ("[I]t would be appropriate for this Court to withhold judgment on plaintiffs' Count II claims of racial discrimination pending the outcome of Section 5 proceedings.").

not complete. The court explained, “[B]ecause it is unclear whether the 2001 Senate Plan will ultimately be precleared and reinstated, the trial in this action considered only the 2002 Senate Plan now in effect See generally *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101, 118 S. Ct. 1003, 1016, 140 L. Ed. 2d 210 (1998)(noting the Supreme Court’s long-standing disapproval of advisory opinions); *Hall v. Beals*, 396 U.S. 45, 48, 90 S. Ct. 200, 201-02, 24 L. Ed. 2d 214 (1969)(same).
Id., at 1325.

5. Moreover, the Plaintiffs’ treatment of the Texas litigation overlooks an important distinction between that litigation and the circumstances in which Alabama now finds itself. With respect to Texas, the State was engaged in an attempt to obtain judicial preclearance of several redistricting plans which it hoped to use in upcoming elections. The old plans could not be used because they were malapportioned, so another three-judge court in Texas was tasked with drawing remedial plans. In contrast, the next legislative elections in Alabama are not until 2014. If the 2012 plans have not been precleared by the time they are needed, there may be a need to draw remedial plans , but that time has not come.

6. The Plaintiffs’ attempt to accelerate the resolution of what they call their one-person, one-vote claims also rests on an unsound legal and procedural foundation. Contrary to Plaintiffs’ characterization, only the Senate plan can be involved in that claim. Further, the resolution of that claim necessarily and inextricably requires the resolution of an unsettled question of state law.

7. Article IX, § 200 of the 1901 Alabama Constitution, calls for the districts in the Alabama Senate to be “as nearly equal to each other in the number of inhabitants as may be ...,” and states “[n]o county shall be divided between districts” In contrast, Sections 198 and 199 of the 1901 Constitution do not address the splitting of counties and speak to the population of the House districts only implicitly. In pertinent part, § 198 states only “that each county shall be entitled to at least one representative.” Accordingly, the only “whole county” provision in the Alabama Constitution that Plaintiffs’ one-person, one-vote claim might implicate relates to the Alabama Senate.

8. How the population and county provisions of § 200 should be reconciled is an unsettled question of state law. In *Rice v. English*, 835 So. 2d 157 (2002), the Alabama Supreme Court rejected the contention that State Senate plan drawn by the Alabama Legislature did not satisfy the mandate that the population of those districts be “as nearly equal to each other in the number of inhabitants as may be.” The Court also held that the claim that the Legislature violated the county-splitting provision of § 200 in drawing that plan could not be raised for the first time on appeal. In his dissenting opinion, Associate Justice See of the Alabama Supreme Court explained that he would have:

“grant[ed] oral argument solely on the question of the effect of *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), on the obligation the Alabama Constitution, Art. IX, § 200, places on the Legislature to create districts “as nearly equal in the number of inhabitants to each other as may be.” The question whether the Legislature fulfilled its obligation to preserve county lines—indeed, whether in light of *Reynolds v. Sims* it any longer has such an obligation—is expressly not before us on appeal; yet, it is not clear to me how this Court can construe the “as nearly equal” obligation except in light of the county-preservation obligation.

Id., 835 So. 2d at 174 (See, J., dissenting).

Accordingly, some or all of the questions that Plaintiffs seek to resolve through accelerated consideration involve unsettled questions of state law.

9. As to such unsettled questions of state law, two courses of action are appropriate. First, abstention by this Court may well be warranted. *See Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643 (1941). The Court has explained that Pullman abstention is justified “when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided. By abstaining in such cases, the federal courts will avoid both unnecessary adjudication of federal questions and ‘needless friction with state policies’” *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236, 104 S. Ct 2321 (1984) (quoting *Pullman*, 312 U.S. at 500). Second, this Court can vindicate the interests guarded by the Pullman abstention doctrine by certifying the unsettled questions of state law that are embedded in the Plaintiffs’ constitutional claims to the Supreme Court of Alabama. *See Ala. Const.*, (Recomp.) art. VI, § 140(b)(3); Ala. R. App. P. 18.

10. Finally, as the State Defendants have previously observed, the plans that have been challenged cannot be enforced unless and until they are precleared. Thus, preclearance is not only the prerequisite to an actual injury, it is the key to this Court’s jurisdiction as well. If the plans are not precleared, this lawsuit would be purely hypothetical, and any ruling by this Court would be purely advisory. Even if, as Plaintiffs suggest, any objection relates to one or more particular districts, the whole plan will still be hung up until any objections are resolved.

Accordingly, for the reasons stated in the State Defendants’ Motion and this Reply, this Court should dismiss this case without prejudice or stay this case pending completion of the preclearance process.

Date September 11, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 11, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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