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-MHT-WHP (3-judge court)
v.	*	
THE STATE OF ALABAMA; BETH CHAPMAN, in her official capacity as Alabama Secretary of State,	*	
Defendants.	*	
DEMETRIUS NEWTON et al.,	*	
Plaintiffs,	*	
v.	*	Civil Action No. 2:12-cv-1081-WKW-MHT-WHP
THE STATE OF ALABAMA et al.,	*	
Defendants.	*	

ALBC PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT OF PLAINTIFFS' MOTIONS TO RECONSIDER SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT AND FOR A PERMANENT INJUNCTION

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Plaintiffs Alabama Legislative Black Caucus et al. (hereafter collectively "ALBC plaintiffs"), through undersigned counsel, submit the following argument and authorities in response to defendants' motion for partial summary judgment, Doc. 95, and to support ALBC plaintiffs' motion for reconsideration of this Court's memorandum opinion and order, Doc. 101, denying ALBC plaintiffs' second motion for partial summary judgment, Doc. 68-1, and ALBC plaintiffs' motion for entry of a permanent injunction. ALBC plaintiffs incorporate herein by reference their previous responses and briefs, Docs. 8, 15, 23, 32, 35, 67, and 77.

Here is the constitutional rule alleged in ALBC plaintiffs' amended complaint: When a state enacts House and Senate plans that in the same districts determine the electorates for both the state legislature and for local legislative delegations, which exercise general governing authority over counties, the state can deviate from the principle of one-person, one-vote for the local delegations only to the extent that such deviations are necessary to comply with one-person, one-vote and the Voting Rights Act for the legislature as a whole.

I. GROUNDS FOR RECONSIDERING THE ORDER DENYING PLAINTIFFS' SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT.

This Court denied ALBC plaintiffs' second motion for partial summary judgment (1) because it concluded that ALBC plaintiffs had failed to state a viable

claim for partisan gerrymandering, "exacerbated by the internal inconsistencies of [their] amended complaint," Doc. 101 at 14, (2) because they failed adequately to distinguish *DeJulio v. Georgia*, 127 F.Supp.2d 1274 (N.D. Ga. 2001), aff'd 290 F.3d 1291 (11th Cir.), cert. denied, 537 U.S. 948 (2002), and (3) because there are disputed material facts regarding the drafters' reasons or motives for drawing the House and Senate districts. Doc. 101 at 11-19. Judge Thompson concurred separately, saying that "ALBC plaintiffs have yet to make clear their claim (which, to be candid, seems to be evolving)," Doc. 102 at 11, and because he thought evidence needed to be developed about "just how substantive and critical [local legislative delegations'] role is in practice in Alabama." Id. at 9-10.

ALBC plaintiffs' second motion for partial summary judgment should be reconsidered, and a permanent injunction should be entered without further delay for the following reasons:

a. Amended Count III alleges that, on their face, Acts 2012-602 and 2012-603 violate county residents' rights under the Equal Protection Clause to a full, equal, and undiluted vote for the members of their county delegations, regardless of the drafters' partisan motives.

b. ALBC plaintiffs are entitled to judgment as a matter of law based solely on the following undisputed facts asserted by the defendants themselves:

(1) Local legislation can originate, i.e., get through the starting gate, only with the approval of the House or Senate county delegation. Doc. 98 at ¶¶ 4, 16.

(2) Local county delegations are composed of those Representatives or Senators "whose districts include all or part of a county." Doc. 98 at ¶¶ 5, 17.

(3) In the Senate, local legislation approved by the county delegation goes to the Senate floor after it is approved by one of four standing local legislation committees. Doc. 98 at ¶¶ 6,7. In the House, if a local delegation has approved local legislation, it goes to the House floor for debate. Id. at ¶ 19.

(4) As a matter of custom, not pursuant to written Rules,[1] on the House and Senate floors "local legislation is often uncontested as a matter of local courtesy." Doc. 98 at ¶¶ 8, 21.

It is unnecessary for the Court to receive further evidence on the substantive or practical effects of the dilution of county residents' votes for their local delegations. It is undisputed that Alabama's constitutional system denies counties

[1] But see Senate RULE 81: "The Senate encourages 'Local Courtesy' when voting on local bills and members are requested to vote for local bills that relate to political subdivisions that they do not represent in order for these local bills to receive the constitutional majority needed to become law." http://www.legislature.state.al.us/senate/senaterules/senaterules5.html.

home rule, imposing one of the strictest applications of Dillon's Rule in the United States, and that county local legislative delegations in Alabama exercise *de facto* control over their counties' taxes and even routine functions of county government.[2] Defendants admit that local laws cannot get through the starting gate without the approval of the county's local delegation. Doc. 96 at 4. And the recent news articles filed by defendants serve only to show how extraordinary it is for the informal rule of local legislative courtesy to be violated after the starting gate has been crossed. Docs. 96-2 and 98-1. See also plaintiffs' supplemental authorities, Doc. 88. Based on the ALBC plans in HB 16 and SB 5, there can be no dispute that at least half of the county splits in Acts 2012-602 and 2012-603 are unnecessary to comply with the one-person, one-vote requirement. As was the

[2] The constitutional restriction of county home rule has been the subject of ongoing debate in Alabama for over a century. E.g., see Will Parker, *Still Afraid of "Negro Domination?": Why County Home Rule Limitations in the Alabama Constitution of 1901 are Unconstitutional*, 57 ALA. L. REV. 545 (2005); PARCA, Local Self-Government in the Constitution of Alabama of 1901, http://parca.samford.edu/alconstitution/Constitutional%20provisions%20on%20local%20government.pdf; Albert P. Brewer, *Home Rule*, in ENCYCLOPEDIA OF ALABAMA, http://www.encyclopediaofalabama.org/face/Article.jsp?id=h-1153; Bring it back Home Alabama, Alabama Citizens for Constitutional Reform, http://www.bringitbackhome.org/. The Legislature's Constitutional Revision Commission currently has under review many proposals for modifying the Alabama Constitution to provide some home rule for counties. See Article IV – Local Government Issues, Staff Draft of Proposals for Text Revisions, http://ali.state.al.us/documents/ArticleIVlocalgovtdec14.pdf.

case in *DeJulio*, 127 F.Supp.2d at 1283, judgment as a matter of law is appropriate on the parties' cross-motions for summary judgment.

c. A permanent injunction should be entered now, before this case has proceeded through discovery to trial in August and to entry of a final judgment on all Counts of the parties' complaints, so that there will be time for constitutionally acceptable plans to be enacted and for orderly conduct of the June 2014 primary and November 2014 general elections for the Alabama House and Senate.

II. THE THEORY OF THE EQUAL PROTECTION CLAIM IN AMENDED COUNT III.

This Court's opinions denying plaintiffs' second motion for partial summary judgment properly noted that plaintiffs must clarify their theory that the unnecessary inclusion of nonresidents in the Alabama House and Senate districts that elect a county's local legislative delegation violates the Equal Protection Clause. Doc. 101 at 16; Doc. 102 at 9-13 and n.5. As plaintiffs have emphasized, "[t]he Fourteenth Amendment issue in amended Count III has not been squarely addressed in the caselaw to date." Doc. 77 at 6.

Plaintiffs' Count III claim addresses the tension in the Supreme Court's one-person, one-vote jurisprudence between the requirement of substantially equal population among all House and Senate districts statewide and the rights of county

residents to a full, equal, and undiluted vote for the members of their county legislative delegations.[3] This is a question of first impression. Here is how ALBC plaintiffs contend that question should be answered:

1. The equal protection rights of residents of any county are violated whenever **any** nonresidents are allowed to vote for the county's local delegation -- unless the inclusion of those nonresidents is necessary to comply with statewide equal population requirements.

2. The plans challenged here violate the Equal Protection Clause in all three ways identified by Judge Thompson, Doc. 102 at 11-13 n.5.

a. It violates the Equal Protection Clause when a legislative district unnecessarily allows nonresidents to dominate residents of a county, or even have disproportionate electoral influence, in a district that elects a member of a county's local delegation. Judge Thompson pointed to HD 43, which contains only 224 Jefferson County residents, or 0.49% of the total district population, with the rest residing in Shelby County. Doc. 102 at 6-7; Doc. 60-11. Even more egregious is

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[3] Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105, 154-55 (1992) ("Reapportionment cases premised on this one-person, one-vote principle recognize that in drawing legislative districts, there is an inherent tension between adhering to political subdivision boundaries and minimizing population variances among districts.") (footnote omitted).

HD 61, which contains only 12 residents of Greene County (0.03%). Doc. 60-11. But altogether there are 11 instances of House districts containing residents of a county who constitute less than 5% of the district population, and 27 instances where they constitute 10% or less of the district population. Doc. 60-11. In the Senate plan, there are 14 similar instances below 5% and 29 similar instances below 10%. Doc. 60-12. There are many more instances of potential nonresident domination where residents constitute less than 25% of district population. Docs. 60-11, 60-12. "Thus, having a district intrude across county (or municipality) lines gives a legislator whose district predominately lies outside that county (or municipality) a vote on issues that may well not directly affect the majority of the legislator's constituents." *Larios v. Cox*, 314 F.Supp.2d 1357, 1370 (N.D. Ga. 2004) (3-judge court).[4]

b. Related to the concern of nonresident domination is the multiplication of counties that a House or Senate member unnecessarily represents.

[4] "If legislative delegations are akin to local governing bodies," as one commentator said, "then each legislative reapportionment is also a reapportionment of the delegation." Binny Miller, supra, 102 YALE L.J. at 152. This is especially damaging to county residents' rights when "a district line [extends] across a county boundary to take in a small piece of an adjoining county. ... By becoming a member of the county's legislative delegation, that district's legislator can influence the deliberations of that body and can propose or block legislation sponsored by other delegation members." Id.

For example, there are five House districts in which Dekalb County residents constitute less than 20% of total district population. Doc. 60-11. Members of Dekalb County's local House delegation also represent seven outside counties: Jackson, Marshall, Blount, Cherokee, Calhoun, Cleburne, and Etowah Counties. Exhibit A, Doc. 60-1. The independence and voting strength of residents of Dekalb County are severely diluted when members of their local delegation, as a practical matter, must also take account of the interests of the entire populations of those other seven counties.

c. The voting strength of county residents whose House or Senate district lies entirely within the county is diluted when compared with the voting strength of residents of the same county whose districts extend out of the county. For example, the voting strength of residents of HD 24, the only House district lying entirely within Dekalb County, is diluted in comparison with the other residents of Dekalb County, and especially in comparison with all the nonresidents included in districts containing parts of Dekalb County. This kind of dilution of county residents' voting strength exists in most of the districts in Acts 2012-602 and 2012-603.

III. DISTINGUISHING *DeJULIO*.

This Court's majority stated: "The Black Caucus has offered us no

explanation for its argument that the district maps are somehow unconstitutional because they elect legislators who participate in a process that the Eleventh Circuit has previously explained does not violate the principle of one person, one vote." Doc. 101 at 16. The short explanation is that the question presented in amended Count III of the instant action was neither addressed nor decided by *DeJulio*. Both *DeJulio* and *Vander Linden v. Hodges*, 193 F.3d 268 (4th Cir. 1999), addressed the constitutionality of internal legislative procedures through which local delegations operated. Amended Count III addresses the constitutionality of the statutory boundaries that define who the members of each local delegation will be. This is a question of first impression. The longer explanation requires examining the principles underlying the *DeJulio* decision.

In *Vander Linden,* as the district court in *DeJulio* noted, the Fourth Circuit held that, because by **statute** "South Carolina's local legislative delegations performed local governmental functions either in lieu of or in concert with local governments, depending on the situation," the one-person, one-vote requirement applied to those local delegations in the same manner it would apply to any popularly elected local government. 127 F.Supp.2d at 1296. On remand, the district court ordered as a remedy that, to satisfy population equality within local delegations, each member of the delegation should have a whole or fraction of a

vote on local legislation weighted in proportion to the percentage of the member's constituency residing in the county. *Vander Linden v. Hodges*, C.A. No. 2-91-3635 (D. S.C. June 22, 2000).

The district court in *DeJulio* held there were "important relevant distinctions between the role of South Carolina's local legislative delegations and the role of Georgia's local legislative delegations." 127 F.Supp.2d at 1296. Statutes gave South Carolina's local legislative delegations direct control over local governments. "Indeed, most of these statutes explicitly provide that the local legislative delegation, not the entire General Assembly, is the final authority." Id. at 1296-97. "In contrast, no final governmental authority is granted to the Georgia General Assembly's local delegations. The Georgia Constitution explicitly provides that the General Assembly as a whole, not specific local delegations, is the legislative authority for Georgia's counties and municipalities." Id. at 1297.

Georgia's local delegations had no statutory power to act as *de facto* county governments. Consequently, the Equal Protection Clause did not require that the formal and informal internal procedures under which Georgia's local delegations acted on local laws comply with the one-person, one-vote rule. "[The Equal Protection Clause] does not require a properly apportioned legislative body to distribute power and influence so that every legislator is as powerful and

influential as every other member of the body." Id. at 1298. "Passage of legislation is the principal governmental function of the legislative branch," the district court held, id. at 1299, and to impose the one-person, one-vote requirement on the internal processes that facilitate "political compromise" id. at 1298, would make unconstitutional all legislative committees and offices, including the Speaker of the House. Id. at 1288, 1298. The Eleventh Circuit agreed. 290 F.3d at 1296.

So the holding of *DeJulio* is that the uncodified, non-binding procedures by which local delegations enact local laws are not subject to a one-legislator, one-vote rule. This case is different. Amended Count III applies the Equal Protection Clause to the **statutorily determined** weight of the votes cast by the constituencies of legislators. This is a fundamentally different claim than the claim made by the plaintiffs in *DeJulio*. The district court and Eleventh Circuit may have reached the right result in holding that the constitutional one-person, one-vote rule does not require the Georgia Assembly to change its internal voting procedures. But *DeJulio*'s conclusion that local delegations are not exercising general governmental functions, notwithstanding the gatekeeping and local courtesy customs that empower local delegations in Georgia, just as they do in Alabama, was erroneous. Local delegations in both Georgia and Alabama exercise real governmental lawmaking power over local legislation affecting the counties they

represent.

Before *Reynolds v. Sims*, 377 U.S. 533 (1964), for 145 years, from 1819 to 1964, not a single county boundary had been split by reapportionment of the Alabama Legislature.[5] The residents of every county in Alabama had a full and equal vote for the members of their local legislative delegations, who had *de facto* autonomy when it came to passing local laws. "In the words of a delegate to the Alabama Constitutional Convention of 1901, the lawmaker was a 'czar' who had 'dictatorial powers about every matter of legislation that affects his county.'" Doc. 88 at 3 (quoting Robert M. Ireland, *The Problem of Local, Private, and Special*

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[5] The best way to draw districts "may depend in good part on highly local and contextual factors, including the wishes of the polity in question and the particular customs and political conditions that prevail there." James A. Gardner, *How To Do Things With Boundaries: Redistricting and the Construction of Politics*, 11 ELECTION L.J. 399, 409 (2012). Gardner advocates "looking first at the kinds of choices that have actually been made in existing American jurisdictions." Id.

Gardner finds the lesson of history to be emphatically clear. "As early as 1790, state constitutions began to require that election districts consist of contiguous territory and to prohibit the division of counties or towns in the creation of such districts, thus preserving a form of 'intactness' in territorial representation." Id. at 610 (footnote omitted). Throughout the nation states have favored building legislative districts with counties, because their residents "are widely thought to share a common local economy and economic life," id. at 410-11, and because "residency in a county creates what might be called an administrative community of interest among the inhabitants in virtue of their common experience of the county's administration of governmental programs. Counties have historically occupied a significant place in the structure of state government." Id. at 411 (footnotes and internal quotation marks omitted).

Legislation in the Nineteenth-Century United States, 46 AM. J. LEGAL HIST. 271, 274 (2004) (footnote omitted)). But when it came to passage of general laws, the residents of underpopulated counties had votes that weighed more than did the votes of residents of overpopulated counties. The *Reynolds* Court did not order the Legislature to alter its internal procedures for enacting local laws, for example, by giving the House and Senate members representing underpopulated counties fewer votes than legislators representing overpopulated counties. Instead, it ordered that the number of persons residing in each legislator's district be substantially equal. That made it impossible to avoid splitting the boundaries of at least some counties, denying the residents of split counties independent control over their local delegations, even though local delegations continued to exercise *de facto* control over local legislation.

The *Reynolds* Court recognized that its one-person, one-vote statewide requirement would endanger county voters' control over the local laws affecting only their county. "However, permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population." 377 U.S. at 580-81. The Court ordered the district court to respect the system for enacting local laws reflected in the state constitution. 377 U.S. at 584.

On remand from *Reynolds*, the three-judge district court quoted "a resolution ... unanimously adopted by the Legislature of Alabama on August 13, 1965," that said "it is considered highly desirable that the area from which individual members of the legislature are to be elected should not be less than **whole county units...."** *Sims v. Baggett*, 247 F.Supp. 96, 103 (M.D. Ala. 1965) (3-judge court) (bold emphasis added). The district court concluded "that the Constitution of Alabama, construed as a whole and **in the light of its application throughout the State's history**, requires that representation in each House be divided according to county lines and that no county be subdivided to create a legislative district." Id. (bold emphasis added). The whole-county provision, the district court held "must give way only when its application brings about an **unavoidable conflict** with the Constitution of the United States." Id. (bold emphasis added).

However, *Reynolds* did not address the question whether the equal protection rights of county residents would be violated if the Legislature, instead of complying with the whole-county provisions in the Alabama Constitution except where they created an unavoidable conflict with the U.S. Constitution, ignored county boundaries, or subordinated the integrity of county boundaries to (1) smaller statewide population deviations than the Supreme Court requires, (2) higher majority-black percentages than the Voting Rights Act requires, (3) partisan

interests, and (4) incumbency interests. Nor has the Supreme Court addressed this question in subsequent cases. Neither was that question addressed in *DeJulio*. "Plaintiffs are not arguing that the votes they cast for their particular state representatives and senators have been diluted as compared to those votes that other voters elsewhere in the state cast for their elected legislators." 127 F.Supp.2d at 1287. Amended Count III in the instant action does present this question of first impression, and that is why *DeJulio* does not control the answer. Instead, this Court should look for guidance to those Supreme Court precedents that bear most closely on the issue presented here.

IV. THE EQUAL PROTECTION LAW OF NONRESIDENT VOTING.

Judicial decisions examining the inclusion of nonresidents in a local electoral jurisdiction show that such inclusion can violate the Fourteenth Amendment when it dilutes the voting rights of resident citizens. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978), held that nonresidents of a city who are within the city's police jurisdiction do not have a right under the Equal Protection Clause to vote in city elections. "No decision of this Court has extended the 'one man, one vote' principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions." 439 U.S. at 68-69 (citations omitted). Even though residents of Holt were subject

to "the indirect extraterritorial effects of many purely internal municipal actions[,] . . . no one would suggest that nonresidents likely to be affected by this sort of municipal action have a constitutional right to participate in the political processes bringing it about." Id. at 69. Here, amended Count III presents the converse question: whether, without violating the equal protection rights of county residents, the state may **statutorily allow** nonresidents to vote for the county's local legislative delegation, when doing so is not necessary to satisfy statewide population equality.

That question directs us to the early one-person, one-vote cases dealing with local election systems that allowed nonresidents to vote and/or that excluded some residents from voting. In *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), the Court confronted a California statute that established a water district in which "[t]he franchise is extended to landowners, whether they reside in the district or out of it...." 410 U.S. at 730. The appellants "[did] not challenge the enfranchisement of nonresident landowners," id., but the Court held that the test for determining when the one-person, one-vote principle constitutionally prohibits the exclusion of non-landowning resident voters is whether the statutorily created district is a "unit[] of local government[] exercising general governmental power, as that term was defined in *Avery v. Midland County*,

390 U.S. 474 (1968)." 410 U.S. at 727. *Avery* had held "that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population." 390 U.S. at 485-86.

General governmental powers include any "important governmental functions," and the only exception "might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds*, supra, might not be required...." *Salyer Land Co.*, 410 U.S. at 727-78 (quoting *Hadley v. Junior College Dist.*, 397 U.S. 50, 56 (1970)). *Ball v. James*, 451 U.S. 355 (1981), held that an Arizona agricultural improvement and power district "simply does not exercise the sort of governmental powers that invoke the strict demands of *Reynolds*," because it "cannot impose ad valorem property taxes or sales taxes" or "enact any laws governing the conduct of citizens. . . ." 451 U.S. at 366 (footnote omitted). Applying these principles, the dilution of county citizens' right to vote for their local delegations in Acts 2012-602 and 2012-603 violates the Equal Protection Clause. Local legislative delegations in Alabama are the gatekeepers for local laws affecting only their counties, and,

except on rare occasions, they have customary ultimate authority over those local laws. These circumstances lead further to an examination of constitutional precedents dealing with overlapping subdivisions within a larger electoral jurisdiction.

V. THE EQUAL PROTECTION LAW OF OVERLAPPING ELECTORAL SUBDIVISIONS.

Eleventh Circuit cases holding unconstitutional Alabama statutes allowing residents of separate municipal school districts to vote for members of the county school board support the conclusion that the House and Senate districts challenged here violate the Equal Protection Clause. The Eleventh Circuit (including the former Fifth Circuit) has considered this question in four cases, holding that the state's statutory inclusion of city voters in county school board elections was constitutional in two instances and unconstitutional in the other two instances. "The test established by these cases is whether the city residents have a substantial interest in the operation of the county school system." *Sutton v. Escambia County Bd. of Education*, 809 F.2d 770, 771 (11th Cir. 1987). The other three cases were *Hogencamp v. Lee County Board of Education*, 722 F.2d 720 (11th Cir.1984); *Phillips v. Andress*, 634 F.2d 947 (5th Cir. Unit B 1981); and *Creel v. Freeman*, 531 F.2d 286 (5th Cir.1976), cert. denied, 429 U.S. 1066 (1977).

Applying these constitutional precedents to local legislative delegations, it is

immediately apparent that one county's residents have no substantial interest in the governance of another county or in the enactment of another county's local laws. The only overlapping interest lies in the election of a state legislator. By the *Sutton* standard, the inclusion of nonresidents in the electorate for a county's local delegation clearly would be irrational and unconstitutional but for the necessity of satisfying the statewide requirement of substantial population equality among House and Senate districts.

The Fourteenth Amendment standard applied in all four county school board cases was a rationality test. "The test for whether the statute is irrational as applied to the particular county is whether the city residents have a substantial interest in the operation of the county school system. If the city residents do not have a substantial interest, then the state **must exclude** the city residents from voting." *Sutton*, 809 F.2d at 772 (citations omitted) (bold emphasis added). But, because the fundamental right to vote was at stake, the strict scrutiny test was also suggested. "To exclude [city residents] from elections in the county in which they reside requires a compelling state interest." 809 F.2d at 774 (citing *Kramer v. Union Free School District*, 395 U.S. 621 (1969)). In *Sutton*, the Eleventh Circuit concluded there was "a strong relationship between the two school systems," making it unnecessary to reconcile the two standards. 809 F.2d at 775.

However, the Sixth Circuit disagreed with the Eleventh Circuit's assertion that a state would have to demonstrate a compelling state interest to exclude city residents from county school board elections. *Duncan v. Coffee County*, 69 F.3d 88, 96 (6th Cir. 1995). The Sixth Circuit concluded "that the benchmark for determining whether the inclusion of 'out-of-district' voters in another district's elections unconstitutionally dilutes the votes of in-district residents is whether the decision is irrational[, and it] is not irrational if . . . those voters have **a substantial interest** in the Rural Coffee County School District election." 69 F.3d at 94 (bold emphasis added) (rejecting the Fourth Circuit's compelling state interest standard in *Locklear v. North Carolina State Bd. of Elections*, 514 F.2d 1152 (4th Cir.1975)).

The facts the Eleventh Circuit found to establish the substantial interest making it constitutional to include city residents in the election of their county boards of education included the inability of city residents to dominate the county board elections, the absence of county board members residing in the city, and the sharing of school properties, programs, students, and revenues between the city and county school systems. *Sutton*, 809 F.2d at 772, 773-74 (citations omitted). The converse facts the Eleventh Circuit concluded not to establish a substantial interest between school systems included few student crossovers, domination of county

board elections by larger city populations, minimal revenue support of county schools by city residents, and separate physical facilities and programs. Id. at 772-73 (citations omitted). The Sixth Circuit concurred, concluding that these factors were "critical to determining whether there is a substantial interest." *Duncan v. Coffee County*, 69 F.3d at 96; accord, *Board of County Comm'rs of Shelby County v. Burson*, 121 F.3d 244, 248-49 (6th Cir. 1997) (holding that Tennessee's inclusion of residents of more populous Memphis in the election of the Shelby County school board was irrational and unconstitutional). Since, by definition, county governments are independent of each other, may only be elected by residents of their own counties, and seldom share administrative functions, nonresidents cannot have a substantial interest in electing county legislative delegations absent a compelling federal constitutional or statutory reason.

The extraterritorial impact of one county's local laws, for example, a sales tax, which must be paid by residents and nonresidents alike, is not a constitutionally sufficient justification for allowing nonresidents to vote for that county's local delegation. *Holt Civic Club,* 439 U.S. at 69. Statutes that unnecessarily include nonresidents in the constituency that elects a county's local delegation are not rationally related to a legitimate state objective; much less can they be justified by a compelling state interest. Obviously, residents of one county

cannot be excluded from voting when their state legislator also represents residents of another county. As one commentator says, "the one-person, one-vote rule makes inevitable a certain amount of community disruption--but . . . this disruption can and should be minimized by intelligent district drawing." Nicholas Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1435 (2012).

CONCLUSION

The principles that determine when it is unconstitutional for a state to allow nonresidents to vote for governing authorities in a local jurisdiction, even in a subdivision of a larger, overlapping jurisdiction, compel the conclusion that Count III of ALBC plaintiffs' amended complaint states an equal protection claim upon which relief can be granted. The undisputed facts show that the House and Senate plans in Acts 2012-602 and 2012-603 violate the rights of county residents to an equal, undiluted vote for members of their local legislative delegations. Defendants' motion for partial summary judgment should be denied. After reconsideration, ALBC plaintiffs' second motion for partial summary judgment should be granted, and ALBC plaintiffs' motion for a permanent injunction should be granted.

Respectfully submitted this 17th day of April, 2013.

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