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

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| ALABAMA LEGISLATIVE BLACK CAUCUS, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| v. | ) | Case No. 2:12-cv-691 |
| | ) | WKW-MHT-WHP |
| THE STATE OF ALABAMA, et al., | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |
| DEMETRIUS NEWTON, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| v. | ) | Case No. 2:12-cv-1081 |
| | ) | WKW-MHT-WHP |
| THE STATE OF ALABAMA, et al., | ) | |
| | ) | |
| Defendants. | ) | |

**REPLY TO ALBC PLAINTIFFS'**
**RESPONSE TO ALBC STATE DEFENDANTS'**
**MOTION FOR PARTIAL SUMMARY JUDGMENT AND**
**RESPONSE IN OPPOSITION TO ALBC PLAINTFFS' MOTION FOR**
**RECONSIDERATION AND MOTION FOR PERMANENT INJUNCTION**

The State of Alabama, and Beth Chapman, in her official capacity as Secretary of State of Alabama, defendants in this action (the "ALBC State Defendants), submit this Reply to the ALBC Plaintiffs' Response to the ALBC State Defendants' Motion for Partial Summary Judgment (No. 106). This Reply will also serve as the ALBC State Defendants' Response to the ALBC Plaintiffs'

Motion for Reconsideration (No. 107) and their Motion for Permanent Injunction (No. 108). For the reasons stated in the ALBC Defendants' Motion and supporting Memorandum and this Reply, this Court should (1) grant the ALBC State Defendants' Motion for Partial Summary Judgment, and (2) deny the ALBC Plaintiffs' Motion for Reconsideration, thereby mooting their Motion for Permanent Injunction.

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## Introduction

From the very beginning of this case, several things have been clear. First, the ALBC Plaintiffs have problems with the overall population deviation of ±1% that was used in creating the 2012 Alabama legislative redistricting plans. They have, likewise, sought to revive counties as building blocks for legislative districting plans. Finally, they have been unable to set out a justiciable claim of partisan gerrymandering. The ALBC Plaintiffs' present filing shows that nothing has changed in this regard.

The ALBC Plaintiffs' continuing dissatisfaction with the first two of those elements of the legislative plans faces the same substantial hurdles that this Court identified back in December 2012. The overall population deviation of ±1% does not violate constitutional one-person, one-vote standards, and complaints about county splitting are state-law based claims that do not belong in federal court. See No. 53. And, because the latest iteration of the partisan gerrymandering claim shares that continuing dissatisfaction, it faces the same hurdles.

As first stated, the partisan gerrymandering claim was based on the First Amendment. The ALBC Plaintiffs alleged:

> Acts 2012-602 and 2012-603 are partisan gerrymanders that unnecessarily minimize population deviations and violate the whole-county provisions of the Alabama Constitution for the

> purpose and with the effect of impairing the ability of Alabama citizens, based on the content of their political speech and political associations, to elect members of the Legislature who share their political views.

No. 1 at 2, ¶ 4. They asserted that the 2012 Alabama legislative redistricting plans "violate the rights of free speech and political association of plaintiffs… guaranteed by the First Amendment to the Constitution of the United States.…" *Id*., at 22, ¶ 58.

In its first ruling on the viability of the ALBC Plaintiffs' claims, this Court noted, "In its Complaint, the Black Caucus alleged that this claim was based on the First Amendment, but in briefs and at the hearing on these motions, the Black Caucus contended that this claim is based on the Equal Protection Clause of the Fourteenth Amendment." No. 53 at 15. It allowed the ALBC Plaintiffs to amend their Complaint "to allege more facts and constitutional grounds to support [their] claim of political gerrymandering and to identify a judicial standard by which we can adjudicate the claim." *Id*., at 15-16.

In the Amended Complaint that followed, the ALBC Plaintiffs restated their partisan gerrymandering claim. They alleged:

> Acts 2012-602 and 2012-603 are partisan gerrymanders that unnecessarily minimize population deviations and violate the whole-county provisions of the Alabama Constitution for the purpose and with the effect of diluting the votes of county residents without any compelling state justification or

> rational basis, in violation of the Fourteenth Amendment, and with the purpose and with the effect of impairing the ability of Alabama citizens, based on the content of their political speech and political associations, to elect members of the Legislature who share their political views.

No. 60 at 2, ¶ 4. They claimed:

> "Acts 2012-602 and 2012-603 violate the Equal Protection Clause (1) because they deny the fundamental rights of county residents to an equal and undiluted vote for the legislators who control the laws governing their local governments, and (2) because they are 'crazy quilts' that construct House and Senate districts with no rational basis."

No. 60 at 26-27, ¶ 63. The ALBC Plaintiffs concluded by alleging that the 2012 Alabama legislative redistricting plans "have the purpose and effect of minimizing the opportunities of black and white voters who support the Democratic party to elect the candidates of their choice" in violation of the right to "equal protection under the Fourteenth Amendment and to freedom of speech and association under the First Amendment." No. 60 at 55, ¶ 84.

When they sought summary judgment on that claim, however, this Court had problems with it. Two members of this Court wrote, "[T]he Black Caucus has again failed to provide a standard by which we can evaluate a claim of partisan gerrymandering." No. 101 at 12. They explained that it was incorrect to apply the standards applicable to racial gerrymandering claims to claims of partisan

gerrymandering. They also concluded that it made no difference whether the ALBC Plaintiffs attacked the legislative districting plan or the internal legislative rules for local legislation, the result was the same. *Id*., at 15-16. Finally, they questioned how the restated claim was linked to the allegation of partisan gerrymandering. *Id*., at 16-17.

The third member of this Court noted that the record did not allow him to say one way or the other how substantive the alleged gate-keeper role of the local delegations is in practice. No. 102 at 9-10. He explained that the silence of the record "as well as the reason the ALBC Plaintiffs have yet to make clear their claim (which, to be candid, seems to be evolving)" justified the denial of their motion. *Id*., at 11.

Now, the ALBC Plaintiffs seek partial summary judgment on yet another iteration of their partisan gerrymandering claim. As re-restated, it is a one-person, one-vote claim that hardly mentions partisan motives other than to assert that they are insufficient to justify the plans. In addition, while the ALBC Plaintiffs don't mention the First Amendment portion of their claim, any such argument lacks merit. See No. 30 at 49-53.

In this Reply, the ALBC State Defendants respond to the latest iteration of the partisan gerrymandering claim and show that it should be rejected.

**Factual Response**

In this portion of their Reply, the ALBC State Defendants will set forth the basis for their disagreement with certain material factual assertions made by the ALBC Plaintiffs.

1. The ALBC Plaintiffs state that the news articles filed by the ALBC State Defendants (Nos. 96-2 and 98-1) "serve only [sic] to show how extraordinary it is for the informal rule of local legislative courtesy to be violated after the starting gate has been crossed." No. 106 at 4. This statement is incorrect for two reasons:

a. The news articles illustrate that any House member can force a vote on local legislation as well as why a member might do that. Representative Ford is said to have done so for partisan political reasons, and Representative Morrow is said to be upset with the lack of support he received in an attempt to override a veto of local legislation. See No. 86-2. For his part, Representative Mitchell does not appear to have offered any explanation. See No. 98-1.

b. The gubernatorial veto reinforces the ALBC State Defendants' point that nothing the local delegations do is plenary. Any legislator can require a vote, the House or Senate can reject the bill, and the Governor can veto it.

2. The ALBC Plaintiffs err in their treatment of Senate Rule 81. They assert that it represents a gloss on the customary nature of local courtesy, an exception to the unwritten practice. See No. 106 at 3 and fn. 1. Rather:

a. If a Senator opposes local legislation on the Senate floor, that piece of proposed local legislation must be approved by *a majority of the Senate* to pass. No. 76-1 at 2, ¶ 7 (emphasis added).

b. A majority in the 35-member Senate is 18.

c. In order to pass the Senate, a piece of proposed local legislation must receive no fewer than 18 votes on the Senate floor.

d. In pertinent part, Senate Rule 81 states, "[M]embers are requested to vote for local bills that relate to political subdivisions they do not represent in order for these local bills to receive the constitutional majority needed to become law."

e. Senate Rule 81 encourages members of the Senate to vote on pieces of proposed local legislation without regard to whether it affects a county they represent.

f. If a House member opposes proposed local legislation on the house floor, that local bill must be approved by *a majority of the House members voting* to pass. No. 76-2 at 2, ¶ 7 (emphasis added).

g. Because only the House members voting count, a Rule like Senate Rule 81 is not needed in the House.

3. The ALBC Plaintiffs assert that the local delegations "exercise *de facto* control over their counties' taxes and even routine functions of county government." No. 106 at 8. This assertion is erroneous because the powers of the local delegations and their members are limited:

a. In *McInnish v. Riley*, 925 So. 2d 174 (Ala. 2005), the Supreme Court of Alabama held that an Alabama statute that authorized a permanent joint legislative committee to award community services grants funded from otherwise appropriated funds violated the separation of powers because those actions involved the execution of the laws. As the court said, "The legislature cannot … execute the laws it enacts." *Id*., at 188.

b. Section 11-3-11(a), Code of Alabama (2008), states that "[t]he county commission[s] shall have authority" to take specified actions.

c. The authority granted in § 11-3-11(a) includes the power to levy taxes, budget for and expend revenues, acquire, hold, and manage property, hire and fire personnel.

d. Neither the members of the local delegations in their official capacity nor the local delegations can exercise the powers given to or exercised by the county commissions.

e. Neither the members of the local delegations in their official capacities nor the local delegations play any role in the day-to-day management of county government.

## Argument

### 1. The ALBC Plaintiffs' Motion for Reconsideration should be denied because it seeks to require state officials to follow state law.

The ALBC Plaintiffs' partisan gerrymandering claim is inextricably intertwined with the previously dismissed claim that too many county lines were split. They once again point to *Sims v. Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965) (three-judge court), as support for the notion that the whole county provisions in the Alabama Constitution "must give way only when its application brings about an *unavoidable conflict* with the Constitution of the United States." No. 106 at 14 (quoting *Sims v. Baggett*, 96 F. Supp. at 103 and adding emphasis as shown). They also argue that *Reynolds v. Sims*, 377 U.S. 533 (1964):

> did not address the question whether the equal protection rights of county residents would be violated if the Legislature, instead of *following the whole-county provisions in the Alabama Constitution* except when 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.

No. 106 at 14-15 (emphasis added).[1]

This Court has already told the ALBC Plaintiffs that it lacks jurisdiction to tell state officials to follow state law. No. 53 at 7-10. This Court also told the ALBC Plaintiffs that their reading of *Sims v. Baggett* is wrong: The *Sims* court "did not order the State Defendants against their will, nor could it have, to comply with those [whole-county] provisions of the state constitution." *Id*., at 8. And, two members of this Court have reminded the ALBC Plaintiffs that, "to the extent"

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[1] To the extent that the ALBC Plaintiffs' claim of entitlement to relief depends on the contention that the 2012 legislative plans are legally flawed because they have "smaller statewide population deviations than the Supreme Court requires," they incorrectly apply their preferred overall deviation of ±5% as both a ceiling and a floor.

To the extent their claim depends on the contention that the plans have "higher majority-black percentages than the Voting Act requires" (No. 106 at 14), the ALBC Plaintiffs have failed to address, much less carry, their burden. The contention that the majority-black districts in the 2012 plans are "packed" is contested as a matter of fact. It is also legally contested. See *Texas v. United States*, 831 F. Supp. 2d 244, 263 & n. 22 (D.D.C. 2011) (three-judge court) ("A district with a minority voting majority of sixty-five percent (or more) essentially guarantees that, despite changes in voter turnout, registration, and other factors that affect participation at the polls, a cohesive minority group will be able to elect the candidate of its choice.").

These factors alone call for the denial of the ALBC Plaintiffs' Motion for Reconsideration.

they had "simply repackaged [their] claim that the districts violate the whole-county provisions of the Alabama Constitution as a partisan gerrymandering claim," that repackaged claim was outside this Court's jurisdiction. No. 101 at 17.

This Court should deny the Motion for Reconsideration because the present iteration of the ALBC Plaintiffs' so-called one-person, one-vote claim is just another repackaging of the previously dismissed whole-county claim. All such whole-county claims, no matter how they are packaged, belong in state court.

**2. The ALBC Plaintiffs have failed to identify a justiciable standard by which this Court can adjudicate their partisan gerrymandering claim.**

In their Response, the ALBC Plaintiffs assert that the "constitutional rule" set forth in their Amended Complaint goes as follows:

> When a state enacts House and Senate plans that in the same districts determine the electorates for both the state legislatures 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 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.

No. 106 at 2.

This proposed rule fails to set forth a justiciable standard, just like the ALBC Plaintiffs' previous standards failed to do so. The sticking point is "necessary," whatever that means. The ALBC Plaintiffs recognize, as they must, that not every

county split is unnecessary. See No. 60 at 24, ¶ 59. Even so, they do not provide this Court with any guidance on how to distinguish necessary from unnecessary deviations from "the principle of one-person, one-vote for local delegations." They assert that "at least half of the county splits" in the legislative plans "are unnecessary to comply with the one-person, one-vote requirement," see No. 106 at 4, but they don't tell this Court how to identify which ones they are.

The proposed rule also fails because the local delegations do not exercise general governmental powers in the manner contemplated in *Hadley v. Junior College District of Metropolitan Kansas City, Mo*. 397 U.S. 50 (1970). In *DeJulio*, the court affirmed the district court's conclusion that the local delegations in the Georgia legislature do not engage in governmental functions. *DeJulio v. Georgia*, 290 F. 3d 1291, 1295 (11th Cir. 2002). Pointing to the features of the arrangement for dealing with local legislation in the Georgia legislature, which correspond to those in the Alabama Legislature, the court concluded, "[T]he General Assembly, which has undisputedly been apportioned in accordance with the 'one-person, one-vote' requirement, engages in the governmental function of lawmaking, not the local delegations." *Id*., at 1296.

The ALBC Plaintiffs' attempt to distinguish *DeJulio v. Georgia* fails. They claim that their restated claim is one of first impression, but, as articulated in No.

106 at 14-15 and set forth above, it turns on the contention that, among other things, the drafters of 2012 legislative districts subordinated the integrity of county boundaries in order to create districts with "smaller statewide population deviations than the Supreme Court requires." This Court has already said that claims about violations of the whole-county provisions in the Alabama Constitution belong in state court.

This Court has also rejected the contention that the use of an overall population deviation of ±1% violates constitutional one-person, one-vote standards. See No 53 at 5-7. The latest articulation of the ALBC Plaintiffs' partisan gerrymandering claim is just another attempt to revisit the validity of the ±1% overall deviation. Moreover, when they assert that the population deviation is "smaller … than the Supreme Court requires," they are *sub silentio* pushing for a larger overall deviation, like ±5%. Moving to an overall deviation of ±5% will simply substitute one form of vote dilution for another; the ALBC Plaintiffs would get the local delegations they like, and the rest of the State would have its votes diluted.[2]

[2] As with the *Vieth* amicus brief (No. 96-1) with its suggestion that some kinds of political gerrymandering are good, and other kinds are bad, the substitution of one kind of vote dilution for another suggests that the ALBC Plaintiffs see vote dilution the same way.

The ALBC Plaintiffs also complain that the *DeJulio* court got it wrong. They state, "*DeJulio's* conclusion that the 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." No. 106 at 11. But, this Court cannot revisit a decision of the Eleventh Circuit, so the ALBC Plaintiffs are bound with that conclusion.

The failure of the ALBC Plaintiffs to set forth a justiciable standard for this Court to apply suggests that the partisan gerrymandering claim should be dismissed for the failure to state a claim as to which relief may be granted. Alternatively, this Court should deny the Motion for Reconsideration.

**3. The ALBC Plaintiffs' invocation of "the equal protection law of nonresident voting" is without merit.**

The ALBC Plaintiffs invoke what they call "the equal protection law of nonresident voting," citing, among other things, *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978), and Eleventh Circuit decisions involving the interaction between county boards of education and municipalities within those counties. This argument fails for several reasons.

First, this argument rests on a misreading of *Holt Civic Club*. There, in a decision written by Chief Justice Rehnquist, the Court held that an Alabama statute that extended municipal police, sanitary and business-licensing power over those

residing within three miles of the municipality's limits without giving those who lived outside the municipal limits the right to vote in municipal elections did not violate the Equal Protection Clause. Chief Justice Rehnquist explained that it is one thing to deny the right to vote to "individuals who were physically resident within the geographic boundaries of the governmental entity concerned," but another to deny it to nonresidents. 439 U.S. at 68.

Viewed in this light, the ALBC Plaintiffs' argument is misguided. The operative "governmental entity concerned" is the State of Alabama, not the county delegations in the legislature. Even though the State's actions may affect those who live in neighboring states, residents of Georgia, Florida, Mississippi, and Tennessee have no right to vote for Alabama legislators. Residents of Alabama have the right to vote for the legislators in whose districts they reside.

That vote is for a legislator to represent a district, not for a member of a local delegation. The local delegations are simply the product of the rules of each house of the Alabama legislature. Nothing requires the legislature to recognize local delegations or to follow the current scheme for handling local legislation that is contained in the House and Senate Rules. That current scheme may be an efficient way of working, but the legislature can abolish or change it if it so chooses by

changing the rules. Nothing in law requires the creation of local delegations, and nothing in law stops the House from going to a committee system like the Senate.

The ALBC Plaintiffs' reliance on Eleventh Circuit decisions is misplaced for the same reasons. Those decisions, including *Sutton v. Escambia County*, 809 F. 2d 770 (11th Cir. 1987), involve Alabama statutes permitting the residents of municipalities with their own school systems to vote for the members of the county boards of education in the counties in which the municipalities were located. Again, the county is more like the Alabama legislature than the local delegations.

Like the Civic Club's argument, the ALBC Plaintiffs' claim also "proves too much," 439 U.S. at 69, because the Alabama legislature is full features that allow "nonresidents" to vote on, and potentially kill, proposed local legislation. The Senate committees likely consider proposed local legislation for counties other than those in which the committee members reside. Both Houses have to vote on local legislation whether it concerns the counties a member represents or not. Indeed, a majority of the Senate must approve all pieces of local legislation, and a majority of the Senate cannot live in the county at issue. See No. 76-1 at 2, ¶ 7. The Governor has the power to veto proposed legislation, and he answers to no county. If the ALBC Plaintiffs are right, there is something wrong with these institutional arrangements of Alabama's government.

Finally, the ALBC Plaintiffs fail to address the implications of their argument for local legislation that affects municipalities. Plenty of amendments to the Alabama Constitution that apply to specific municipalities, including Amendment No. 6 (school tax for the City of Selma), Amendment Nos. 316 and 477 (dealing with a port authority for the City of Jackson), Amendment No. 465 (dealing with the membership of the City of Tuskegee's Utility Board), Amendment 514 (dealing with an arts center for the City of Huntsville), and Amendment Nos. 550 and 591 (permitting bingo games in the City of Jasper and the town of White Hall, respectively). If the ALBC Plaintiffs' one-person, one-vote argument is correct, this Court will have to look at the representation of municipalities within county delegations. That shows that the ALBC Plaintiffs' claim is simply a bridge too far.

Accordingly, this Court should deny the ALBC Plaintiffs' Motion for Reconsideration.

**4. This Court should grant the ALBC State Defendants' Motion for Partial Summary Judgment.**

Two members of this Court have explained that *DeJulio v. Georgia* "establishes that, when local legislation must be passed by the entire legislature and signed by the Governor, an informal rule of local courtesy … does not violate the one person, one vote requirement of the Fourteenth Amendment because the

government functions are performed by the Legislature as a whole." No. 101 at 16. The ALBC State Defendants relied on that reading of *DeJulio* in their Motion. They also submitted affidavits demonstrating that the ALBC Plaintiffs correctly acknowledged that the Georgia practice upheld in *DeJulio* is "virtually the same [as] Alabama's." See No. 66 at 3. If that is the case, the ALBC State Defendants' Motion for Partial Summary Judgment should be granted.

**Conclusion**

For the reasons stated above and in the ALBC State Defendants' Memorandum in support of their Motion for Partial Summary Judgment, this Court should grant that Motion. In addition, it should deny the ALBC Plaintiffs' Motion for Reconsideration and declare the Motion for Permanent Injunction to be moot.

Respectfully submitted,

Dated April 25, 2013

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**CERTIFICATE OF SERVICE**

I hereby certify that, on April 25, 2013, I electronically filed the foregoing REPLY TO ALBC PLAINTIFFS' RESPONSE TO ALBC STATE DEFENDANTS MOTION FOR PARTIAL SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO ALBC PLAINTFFS' MOTION FOR RECONSIDERATION AND MOTION FOR PERMANENT INJUNCTION 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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