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

ALABAMA LEGISLATIVE BLACK CAUCUS, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	)	CASE NO. 2:12-CV-691 (Three-Judge Court)
DEMETRIUS NEWTON, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	)	CASE NO. 2:12-CV-1081 (Three-Judge Court)

ORDER

At the last hearing the Court conducted on pending motions, the Black Caucus plaintiffs announced for the first time that count three of their complaint encompassed two claims: an as-applied challenge for partisan gerrymandering in violation of the First Amendment and a facial challenge to the districts based on the Equal Protection Clause of the Fourteenth Amendment. The former challenge is that the Acts violate the First Amendment because the legislature allegedly acted

with partisan motives when it approved the new districts that dilute the votes of county voters for their local delegations. The latter challenge is that the Acts violate the Equal Protection Clause because the districts are apportioned to satisfy the requirement of one person, one vote for the legislature as a whole, but not for the local delegations.

Based on this clarification of the Black Caucus plaintiffs' position, the Court has concerns that the claim under the Equal Protection Clause may not be justiciable for two reasons. First, the claim under the Equal Protection Clause may not be ripe for review. See United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 89–90, 67 S. Ct. 556, 564 (1947). Second, the Black Caucus plaintiffs may not meet "the irreducible constitutional minimum of standing." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 2136 (1992).

1. Is the Claim Under the Equal Protection Clause Ripe for Review?

The Court is concerned that the claim under the Equal Protection Clause in count three of the complaint of the Black Caucus plaintiffs is not yet ripe for judicial review. "The ripeness doctrine is one of the several 'strands of justiciability doctrine . . . that go to the heart of the Article III case or controversy requirement.'" Mulhall v. UNITE HERE Local 355, 618 F.3d 1279, 1291 (11th Cir. 2010) (quoting Harrell v. Fla. Bar, 608 F.3d 1241, 1246 (11th Cir. 2010)). "Article III of the United States Constitution limits the jurisdiction of the federal

courts to cases and controversies of sufficient concreteness to evidence a ripeness for review." Digital Properties, Inc. v. City of Plantation, 121 F.3d 586, 589 (11th Cir. 1997); see also United Pub. Workers, 330 U.S. at 89–90, 67 S. Ct. at 564 ("The power of courts . . . to pass upon the constitutionality of acts . . . arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough.").

"To determine whether a claim is ripe, we assess both the fitness of the issues for judicial decision and the hardship to the parties of withholding judicial review." Harrell, 608 F.3d at 1258. "The fitness prong is typically concerned with questions of 'finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed.'" Id. (quoting Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 535 (1st Cir. 1995)). "The hardship prong asks about the costs to the complaining party of delaying review until conditions for deciding the controversy are ideal." Id.

The Court is concerned that the issues presented in the claim under the Equal Protection Clause may not be fit for review. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Texas v. United States, 523 U.S. 296, 300, 118 S. Ct. 1257, 1259 (1998) (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580–81, 105 S. Ct. 3325, 3333 (1985)). Under the Constitution of Alabama, a

newly elected Legislature must convene on the second Tuesday in the January immediately following the general election to organize the Legislature for the next four years. Ala. Const. Art. IV, § 48.01; see also Rules of the Senate of Alabama, Alabama State Senate, available at http://www.legislature.state.al.us/senate /senaterules/senaterulesindex.html (last visited June 11, 2013) (explaining that the rules adopted by the Legislature elected in 2010 govern only the 2011–2014 legislative quadrennium). As we understand the rules of the Alabama Legislature, no committees or local delegations exist until that organizational session. See Patrick Harris & McDowell Lee, Alabama's Legislative Process, Ala. S. Doc. No. 3 (2011), available at http://www.legislature.state.al.us/misc/legislativeprocess /legislativeprocess_ml.html. And although the parties appear to agree that the local delegations system has been adopted by every Alabama Legislature for decades, no Alabama law appears to require its existence. To the contrary, Alabama law appears to require that, every quadrennium, the Alabama Legislature adopt new rules, and those rules establish a new committee structure. Does the local delegations system exist subject to the confines of Section 48.01 of the Article IV of the Alabama Constitution, which, by its express terms, discusses matters like the "appointment of standing committees" and the selection of the "president pro tempore," but does not mention local delegations, which all parties seem to agree are nevertheless a component of the Legislature? See Ala. Const. Art. IV, § 48.01.

And if the local delegations system is subject to this organizational requirement, would we be within our constitutional authority to deem the local delegations system to exist in the next Legislature before the organizational session? Would it be constitutionally sufficient for us to determine that the system is at least more likely than not to exist in that Legislature?

The allegation of the Black Caucus plaintiffs that the redistricting Acts violate the Equal Protection Clause is tied to the way in which the districts would interact with a local delegation system, but, if it is the case that no local delegations system has been adopted for the Legislature that would be elected in 2014 in accordance with the new district maps and that we cannot predict whether the Legislature elected in 2014 will adopt a system of local delegations or how that system, if adopted, will be structured, the Court is concerned that the claim under the Equal Protection Clause in count three would rest on contingent future events and would not be sufficiently concrete and definite to be fit for judicial review. See Texas, 523 U.S. at 300, 118 S. Ct. at 1259–60. We invite the parties to address whether the claim would be sufficiently fit for review if the Black Caucus plaintiffs can establish either that the local delegation system will not require future action of the Alabama Legislature or that its adoption is likely to occur based on the history of its use in Alabama. See Hulteen v. AT&T Corp., 498 F.3d 1001, 1004 n.1 (9th Cir. 2007), rev'd on other grounds by AT&T Corp. v. Hulteen, 556 U.S. 701, 129

S. Ct. 1962 (2009); cf. Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents, 633 F.3d 1297, 1309–10 (11th Cir. 2011).

And the Court wonders what hardship will be suffered by the parties if it withholds consideration of the claim. If the problem with the new legislative districts is tied to the later adoption of the local delegation system, it is not clear how the Black Caucus plaintiffs will be harmed by the use of the districts before that system is adopted. Questions to address include: Would the Black Caucus plaintiffs be able to establish sufficient hardship based on the inability of candidates to campaign effectively unless they know who their constituencies will be, which might be affected by a ruling that local delegations were unconstitutional? If so, how would that hardship be any different from the hardship suffered by any candidate who does not yet know who will serve as the next presiding officers of the Legislature or the members of its various committees? Or would the Black Caucus plaintiffs be able to establish sufficient hardship based on the need for candidates to know what sorts of powers they will have in the next Alabama Legislature and in local delegations, if adopted, to allow them to craft their campaign messages? And again, how would that hardship be any different from the hardship suffered by any candidate regarding other matters to be decided in an organizational session?

2. Do The Black Caucus Plaintiffs Have Standing to Bring this Claim?

The Court is also concerned that the Black Caucus plaintiffs may lack standing to bring this claim. "The standing inquiry focuses on whether the plaintiff is the proper party to bring this suit, although that inquiry 'often turns on the nature and source of the claim asserted.'" Raines v. Byrd, 521 U.S. 811, 818, 117 S. Ct. 2312, 2317 (1997) (quoting Warth v. Seldin, 422 U.S. 490, 500, 95 S. Ct. 2197, 2206 (1975)) (internal citation omitted). Standing, like ripeness, is a necessary ingredient of a case or controversy under Article III. Id.

To have standing under Article III, a plaintiff must establish three elements. "First, the plaintiff must have suffered an injury in fact–an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560, 112 S. Ct. at 2136 (internal quotation marks omitted). "Second, there must be a causal connection between the injury and the conduct complained of–the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." Id. at 560–61, 112 S. Ct. at 2136 (internal quotation marks and alterations omitted). "Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Id. at 561, 112 S. Ct. at 2136 (internal quotation marks

omitted). The Court is concerned that the Black Caucus plaintiffs may not meet any of these elements.

For the same reasons that the claim under the Equal Protection Clause may not be ripe for review, the Black Caucus plaintiffs may not be able to establish the existence of an injury-in-fact. See Elend v. Basham, 471 F.3d 1199, 1205 (11th Cir. 2006) ("If an action for prospective relief is not ripe because the factual predicate for the injury has not fully materialized, then it generally will not contain a concrete injury requisite for standing.") The Black Caucus plaintiffs argue that the implementation of the redistricting Acts during the 2014 election will violate their rights under the Equal Protection Clause because nonresidents will be allowed to vote for a representative of another county's local delegation. But it may be the case, as discussed above, that no system of local delegation has been adopted for the Legislature that will be elected in 2014, that we cannot know the nature of any local delegations system that may be adopted, and that the injury alleged by the Black Caucus plaintiffs is dependent entirely on the independent action of a future Alabama Legislature. Without proof that a new system of local delegation will be used in the next Legislature, we wonder how the Black Caucus plaintiffs have established the existence of an injury that is "actual or imminent."

The Black Caucus plaintiffs also may not be able to satisfy the second element of standing because the allegedly unconstitutional interaction between the

redistricting Acts and the local delegations may not be fairly traceable to the implementation of the redistricting Acts. The Black Caucus plaintiffs argue that the redistricting Acts violate the Equal Protection Clause when they provide for the election of legislators who in turn represent unequal numbers of county voters in the local delegations, but the redistricting Acts do not by themselves create or otherwise provide for the local delegations. As discussed above, it may be that only the next Alabama Legislature can create the system of local delegations for the members of that Legislature. If the constitutional injury alleged by the Black Caucus plaintiffs under the Equal Protection Clause can arise only if the next Alabama Legislature adopts a system of local delegations at its organizational session, it is not clear how that injury is "fairly traceable" to the State defendants' enforcement of the redistricting Acts.

The Black Caucus plaintiffs also may not be able to establish the third element of standing because it is not clear that an injunction to prevent the use of the redistricting Acts would remedy the injury caused by the adoption of a local delegation system at a future organizational session of a Legislature elected in accordance with different district maps. The only remedy sought by the Black Caucus plaintiffs is an injunction to prevent the use of the new district maps. Indeed, the Black Caucus plaintiffs concede in their complaint that they "do not allege that the rule of local courtesy and other constitutional, statutory, and internal

legislative rules and procedures governing passage of local laws violate the Equal Protection Clause." At oral argument, when asked if the remedy for the claim under the Equal Protection Clause would be to "enjoin the state from using local legislative delegations and leave the redistricting acts totally in place," the Black Caucus plaintiffs disclaimed any interest in such an injunction and argued that it "would fly squarely in the face of DeJulio." And because the only official who is a named defendant in this action is Beth Chapman, in her official capacity as Secretary of State, we wonder whether we have the power to enjoin a future Legislature from adopting a system of local delegations in its organizational session.

If the claim under the Equal Protection Clause of count three is nonjusticiable, the correct procedural posture may have been the one in DeJulio v. Georgia, 290 F.3d 1291 (11th Cir. 2002). The Black Caucus plaintiffs could have sued state officials to challenge the current system of local delegations. See id. at 1292–93. And, if the next Legislature were to adopt a system of local delegations, the Black Caucus plaintiffs could then challenge that system and seek to enjoin its use. But that challenge would be brought before a single-judge district court, with review in the Eleventh Circuit, not before a three-judge district court. See 28 U.S.C. § 2284.

3. Conclusion

We **ORDER** the parties to file simultaneous supplemental letter briefs by Tuesday, July 9, 2013, to address whether this claim under the Equal Protection Clause is ripe for review and whether the Black Caucus plaintiffs have standing to bring it. We invite both parties to submit any material evidence along with their letter briefs to help us resolve these questions.

DONE this 28th day of June, 2013.

/s/ William H. Pryor Jr.
UNITED STATES CIRCUIT JUDGE
PRESIDING

/s/ W. Keith Watkins
CHIEF UNITED STATES DISTRICT JUDGE

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE