IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

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| LANDIS SEXTON AND CUBIE RAE HAYES, | ) | |
| Plaintiffs, | ) | CASE NO. CV-2012-503 |
| vs. | ) | |
| ROBERT BENTLEY, et al., | ) | |
| Defendants. | ) | |

**MOTION TO DISMISS**

Defendants Mike Hubbard, Speaker of Alabama House of Representatives, in his official capacity; Del Marsh, President pro-tempore of the Alabama Senate, in his official capacity; Jim McClendon, House Chairman of Joint Committee on Reapportionment, in his official capacity; and Gerald Dial, Senate Chairman of Joint Committee on Reapportionment, in his official capacity, move this Court to dismiss the complaint pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the *Alabama Rules of Civil Procedure* on the grounds that that (1) the plaintiffs fail to state a claim upon which relief can be granted, (2) the Court lacks subject matter jurisdiction, and (3) the plaintiffs lack standing.

In support of this motion, the Defendants state the following:

1. On May 17, 2012, the plaintiffs filed their complaint and motion for temporary restraining order seeking to (a) enjoin the Alabama legislature from convening for a special session called by the Governor for the purpose of conducting the reapportionment and redistricting apportionment process of the Alabama legislature pursuant to *Alabama Const. Art. IX, Sec.* 198,[1] *Sec.* 199,[2] and *Sec.* 200;[3] (b) declare that any reapportionment or redistricting plan

[1] Section 198 of the *Constitution* provides as follows:

adopted during the special session be declared unconstitutional; and (c) have this Court, instead of the Alabama legislature, assess and then order a reapportionment and redistricting plan. The complaint, however, does not challenge the constitutionality of the current legislative apportionment and districting plan or allege that current plan is mal-apportioned, discriminatory, or otherwise impermissibly drawn.

2. In support of their claims, the plaintiffs argue that conducting the reapportionment and redistricting process during the special session and any plan adopted in that special session would be unconstitutional because *Alabama Const. Art. IX, Sec.* 198, *Sec.* 199, and *Sec.* 200 allegedly provide that reapportionment or redistricting of the legislature can only be done in the first regular session after the taking of the last decennial census of the United States, which

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> The house of representatives shall consist of not more than one hundred and five members, unless new counties shall be created, in which event each new county shall be entitled to one representative. The members of the house of representatives shall be apportioned by the legislature among the several counties of the state, according to the number of inhabitants in them, respectively, as ascertained by the decennial census of the United States, which apportionment, when made, shall not be subject to alteration until the next session of the legislature after the next decennial census of the United States shall have been taken.

[2] Section 199 of the *Constitution* provides as follows:

> It shall be the duty of the legislature at its first session after the taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of representatives and apportion them among the several counties of the state, according to the number of inhabitants in them, respectively; provided, that each county shall be entitled to at least one representative.

[3] Section 200 of the *Constitution* provides as follows:

> It shall be the duty of the legislature at its first session after taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of senators, and to divide the state into as many senatorial districts as there are senators, which districts shall be as nearly equal to each other in the number of inhabitants as may be, and each shall be entitled to one senator, and no more; and such districts, when formed, shall not be changed until the next apportioning session of the legislature, after the next decennial census of the United States shall have been taken; provided, that counties created after the next preceding apportioning session of the legislature may be attached to senatorial districts. No county shall be divided between two districts, and no district shall be made up of two or more counties not contiguous to each other.

occurred in 2010, and the Alabama legislature failed to reapportion or redistrict during the first regular session following the 2010 federal census.

**FAILURE TO STATE A CLAIM**

3. Even assuming *arguendo* that the Court has jurisdiction to hear this action (which is addressed below), the complaint should be dismissed for failure to state a claim because the plaintiffs' claims lack any legal basis given the Alabama Supreme Court's opinion in *Opinion of Justices No. 117*, 47 So. 2d 714 (1950) (a copy is attached hereto as Exhibit A). In that case, the Supreme Court, in answering a question from the Alabama legislature, held that the Alabama legislature may conduct the reapportionment and redistricting process and adopt a plan as provided in *Alabama Const. Art. IX, Sec.* 198, *Sec.* 199, and *Sec.* 200 in a special session called by the Governor for such purposes and such actions are not limited to the first regular session following the last decennial federal census. *Opinion of Justices No. 117,* 47 So. 2d at 716.

4. In *Opinion of Justices No. 117*, the Supreme Court, in addressing the legislature's duty to reapportion and redistrict under *Alabama Const. Art. IX, Sec.* 198, *Sec.* 199, and *Sec.* 200, explained that "the duty is a continuing one and, if it is not discharged at or within the time prescribed, **the duty rests upon succeeding general assemblies**." *Id.* at 716 (emphasis added). In other words, if the duty is not discharged at or within the time specified, the duty remains with the legislature, and does not fall with the courts.

5. In their complaint, the plaintiffs misstate the Supreme Court's holding in *Opinion of Justices No. 117. See Complaint*, ¶ 25 (citing *Opinion of Justices No. 117* for the argument that the duty to reapportion "may be carried out in a special session prior to the regular session specified by §§ 199-200"). In *Opinion of Justices No. 117*, the Supreme Court was asked whether the Alabama legislature could conduct the reapportionment and redistricting process and

adopt a plan in a special session based upon the 1950 federal census (which had been taken, but it had not been officially published and the results had not been officially proclaimed) or the prior 1940 federal census. *Id.* at 715, 717. The Supreme Court answered that "[i]f the 1950 federal census has been taken and ascertained within the meaning of §§ 198-200 of the Constitution of 1901, then, of course, apportionment should be based on that census; **if not, it may be based on the 1940 federal census**." *Id.* at 717 (emphasis added).[4]

6. By permitting reapportionment and redistricting in a special session in 1950 based on the 1940 federal census, the Supreme Court approved the practice of reapportionment and redistricting by the legislature in a special session **many years** (and many regular sessions) after the last prior federal census, and rejected the argument (which is being made by the plaintiffs here) that the legislature could only reapportion and redistrict in the first regular session after the last prior federal census. *See Id.* As the Supreme Court noted, "[t]he legislature by mere omission to perform its constitutional duty at a particular session cannot thereby prevent for another ten years the apportionment provided for by the Constitution." *Id.*

7. The Supreme Court's holding in *Opinion of Justices No. 117* stands for the proposition that the provisions of *Alabama Const. Art. IX, Sec.* 198, *Sec.* 199, and *Sec.* 200 specifying that the legislature is to conduct the reapportionment and redistricting process in the first session following the last decennial federal census is merely directory, and not mandatory. *See MCI Telecommunication, Inc. v. Alabama Public Service Commission*, 485 So.2d 700, 703 (Ala. 1986) ("As a general rule, public policy, for the convenience and necessity of government, has much to do in the finding that minor details of duties imposed upon a public body or public

[4] The Supreme Court added that, if the 1950 census was not finalized (*i.e.*, remained "tentative"), it could not be used. *Id.* at 717 ("As long as the enumerations which have been made in any of the counties in this state remain tentative, then we do not think that apportionment could be made on the basis of the 1950 federal census.").

official are directory and not mandatory.... It is a fundamental principle that the limitation of the time within which a public body is to act does not oust it of jurisdiction to act after the expiration of that time. In this principle the courts have generally concurred. The general rule being that where a public officer is required to perform an official act within a specified time it will be considered as directory only unless the nature of the act to be performed or the language used by the Legislature shows that the designation of the time was intended as a limitation of the power of the officer.") (quotations and internal citations omitted), *overruled on other grounds*, *Ex parte Andrews*, 520 So.2d 507 (Ala. 1987); *Mobile County Republican Executive Committee v. Mandeville*, 363 So. 2d 754, 757 (Ala. 1978) ("The distinction between a mandatory provision and one which is only directory is that when the provision of a statute is the essence of the thing to be done, it is mandatory. Under these circumstances, where the provision relates to form and manner, or where compliance is a matter of convenience, it is directory. .... In making this determination, it is legislative intent, rather than supposed words, art such as 'shall,' 'may' or 'must,' which ultimately controls.") (internal citations omitted).

8. Based on the foregoing, under the Supreme Court precedent set by *Opinion of the Justices No. 117*, the Court should dismiss the complaint for failure to state a claim upon which relief can be granted.

**LACK OF SUBJECT MATTER JURISDICTION**

9. The Court should dismiss this action because it lacks subject matter jurisdiction. The Court lacks the jurisdiction to enjoin the functions of the state legislature in convening for a special session called by the Governor because to do so would violate the separation of powers doctrine, *Alabama Const. Art. III, Sec. 43*. Furthermore, this action does not present a justiciable issue or controversy concerning redistricting or reapportionment as the legislature has not yet

adopted a redistricting and reapportionment plan based on the 2010 federal census, and the current apportionment and districting plan based on the 2000 census is not being challenged in this action.

10. Under the Alabama Constitution, the Governor has the power and authority to call a special session for stated purposes, *Alabama Const. Art. V, Sec. 122*,[5] and the Alabama legislature has the power and authority to address the redistricting and reapportionment of the representation in the Alabama legislature, *Alabama Const. Art. IX, Sec.* 198, *Sec.* 199, and *Sec.* 200. On the other hand, the state judiciary "shall never exercise the legislative and executive powers, or either of them." *Alabama Const. Art. III, Sec. 43.*

11. In support of this Court's jurisdiction, the plaintiffs cite *Brooks v. Hobbie*, 631 So. 2d 883 (Ala. 1993). In *Brooks*, the Supreme Court held that the Montgomery County Circuit Court (in a separate action, *Sinkfield v. Bennett*, CV-93-689) had the jurisdiction to entertain a challenge to "the **existing** state legislative district lines under both federal and state law" and later enter a "consent judgment adopting a plan for redistricting the state legislature for the 1994 legislative elections." *Brooks*, 631 So. 2d at 884 (emphasis added); *see also, e.g.*, *Rice v. English*, 835 So. 2d 157 (Ala. 2002) (holding that a state court had jurisdiction in a case involving "a state-law challenge to the new redistricting plan for Alabama senate districts" which had been proposed by an Act of the legislature, approved by the Governor and pre-cleared by the Attorney General of the United States).

12. The instant case, however, does not concern a constitutional challenge to an **existing** redistricting or reapportionment plan adopted by the Alabama legislature. Rather, the

[5] Section 122 of the *Constitution* provides: "The governor may, by proclamation, on extraordinary occasions, convene the legislature at the seat of government...; and he shall state specifically in such proclamation each matter concerning which the action of that body is deemed necessary."

plaintiffs are attempting to circumvent the legislative process by asking this Court to, in effect, stand in for the legislature and adopt a reapportionment and redistricting plan without first allowing the Alabama legislature to act. Moreover, in *Brooks*, at the time when the complaint was filed in *Sinkfield v. Bennett*, the legislature had no plans to conduct the reapportionment or redistricting process, elections were upcoming, and the parties agreed to the jurisdiction of the circuit court to resolve the matter. Here, the legislature is currently moving forward with the reapportionment and redistricting process, there are no upcoming elections affected by the current plan, and the parties do not consent to jurisdiction of the Court. Accordingly, *Brooks* is distinguishable and does not support the Court taking jurisdiction of this action.

13. Moreover, this case does not involve a situation where the plaintiff seeks to *compel* the state legislature to *comply* with its constitutional duty under *Art. IX*, §§ 199-200, because it has failed to redistrict or reapportion according to constitutional requisites in a timely fashion after having adequate opportunity to do so. *See Brooks*, 631 So. 2d at 888. In fact, the plaintiffs here seek to *enjoin* the legislature from *complying* with its continuing constitutional duty under its constitutional duty under *Art. IX*, §§ 199-200. *See Opinion of Justices No. 117*, 47 So. 2d at 716.

14. This case presents a situation where the Court should simply defer to the legislature and allow it to act, as that is the legally preferred resolution. "As the Constitution vests redistricting responsibilities foremost in the legislatures of the States and in Congress, a lawful, *legislatively* enacted plan should be preferable to one drawn by the courts." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 416 (2006) (emphasis added); *see also Gaffney v. Cummings*, 412 U.S. 735, 749 (1973) (The goal of "fair and effective representation" is not "furthered" when legislators are replaced by courts "which themselves must make the political

decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan.").

15. Accordingly, this Court lacks the jurisdiction to enjoin the Alabama legislature from conducting the reapportionment and redistricting apportionment process. Furthermore, this action does not present a justiciable controversy concerning an existing redistricting or reapportionment plan as addressed in *Brooks* and *Rice*, *supra.*

**LACK OF STANDING**

16. The plaintiffs lack standing to bring the claims asserted in the complaint.

17. "A party establishes standing to bring a [constitutional] challenge ... when it demonstrates the existence of (1) an actual, concrete and particularized 'injury in fact' -- 'an invasion of a legally protected interest'; (2) a 'causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be 'redressed by a favorable decision." *Ex parte King*, 50 So. 3d 1056. 1059-60 (Ala. 2010) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)) (internal quotations and citations omitted). The plaintiffs have failed to satisfy each of these elements.

18. It takes more than a general grievance to confer standing. As the United States Supreme Court has said, "We have consistently held that a plaintiff raising only a generally available grievance about government— claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U. S. at 560-561.

19. The Alabama Supreme Court has embraced the standing test adopted in *Lujan.* Because Plaintiffs have not shown that they are affected in any way that is unique to them – in

any way different than any other Alabamian is affected – they lack standing. "When a party without standing purports to commence an action, the trial court acquires no subject-matter jurisdiction." *State v. Property at 2018 Rainbow Drive*, 740 So. 2d 1025, 1028 (Ala. 1999). And without jurisdiction, Plaintiffs cannot show a likelihood of success on the merits.

20. Accordingly, the plaintiffs' claims should be dismissed because they lack standing.

Respectfully submitted this the 18th day of May, 2012.

*s/Dorman Walker*
One of the Attorneys for Defendants

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**CERTIFICATE OF SERVICE**

This is to certify that I have this day filed the above pleading using the AlaCourt system which will send a copy to the following:

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This the 18th day of May, 2012.

*s/Dorman Walker*
Of Counsel