

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,

v.

THE STATE OF ALABAMA; JOHN H. *
MERRILL in his official capacity as *
Alabama Secretary of State, *

Defendants. *

ALABAMA DEMOCRATIC *
CONFERENCE et al., *

Plaintiffs, *

v. *

THE STATE OF ALABAMA et al., *

Defendants. *

* Civil Action No.
* 2:12-CV-691-WKW-MHT-WHP
* (3-judge court)

* Civil Action No.
* 2:12-cv-1081-WKW-MHT-WHP
* (3-judge court)

**ALBC PLAINTIFFS' FOURTH NOTICE
OF INTERVENING CASE LAW**

Plaintiffs Alabama Legislative Black Caucus et al., through undersigned counsel, give notice of the intervening decision in *Harris v. Arizona Independent Redistricting Com’n*, ___ U.S. ___, 2016 WL 1574579 (April 20, 2016). In particular, we call attention to this passage in the Court’s unanimous opinion:

It is appellants’ inability to show that the present plan’s **deviations and boundary shapes** result from the predominance of similarly illegitimate factors that makes *Cox*[*v. Larios*, 542 U.S. 947 (2004)] inapposite here. Even assuming, **without deciding**, that **partisanship** is an illegitimate redistricting factor, appellants have not carried their burden.

2016 WL 1574579 at *8 (bold emphases added).

Three years ago, this Court noted that, in light of Justice Kennedy’s controlling concurrence for a divided Supreme Court in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), “the Black Caucus cannot seriously contend that we should apply the racial gerrymandering standard to a partisan gerrymandering claim....” *ALBC v. Alabama*, 2013 WL 1397139 at *5 (M.D. Ala., April 5, 2013), appeal dismissed for want of jurisdiction, 134 S.Ct. 694 (2013) (quoting *Vieth*, 541 U.S. at 307 (“Race is an impermissible classification. Politics is quite a different matter. A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied

in an invidious manner or in a way unrelated to any legitimate legislative objective.”)).

Justice Kennedy in *Harris* now has joined a unanimous opinion that says the Court has not yet decided whether partisanship itself is a legitimate districting factor or objective. Thus, manipulating permissible population deviations or district shapes in ways that classify voters based on their previous political preferences, or based on their likely political preferences in the future, in a manner that subordinates the traditional districting principles of compactness, contiguity, and the integrity of political subdivisions may violate the First and Fourteenth Amendments.

Plaintiffs have contended that the Legislature adopted a 2% maximum population deviation restriction to facilitate both racial and political gerrymandering. But, under the Supreme Court’s mandate in these remand proceedings, the 2% maximum population restriction is a “background” consideration, and the only issue currently before this Court is “how equal population objectives [were] met.” *ALBC v. Alabama*, 135 S.Ct. 1257, 1270 (2015). Any potential partisan gerrymandering issue will be presented **only** if this Court concludes, as the State defendants have sometimes argued, that the shapes of some majority-black districts are explained more by partisanship than by race.

Such a finding would be contrary to the testimony of the drafters that race, not politics, was all they considered. But if, nonetheless, this Court adopted the State's politics-over-race contention, the question whether partisanship is a legitimate districting factor would be presented.

However, restricting permissible population deviations to levels much smaller than 10% in future plans, including remedial plans in this action, might be unconstitutional if it is intentionally designed to require moving more voters in or out of districts for political purposes, and if the Supreme Court subsequently holds that partisanship is an illegitimate redistricting objective.

Finally, with respect to strict scrutiny, contrary to the State's assertion in its notice of supplemental authority, Doc. 305 at 2, the drafters never sought to determine what black percentage would create an ability-to-elect district. Instead, as the Supreme Court held, they adopted mechanical racial targets based solely on the black percentages in the 2001 districts using 2010 census data. 135 S.Ct. at 1273 ("The record makes clear that both the District Court and the legislature relied heavily upon a mechanically numerical view as to what counts as forbidden retrogression.") (citation omitted). *Harris v. Arizona Independent Redistricting Com'n* provides no basis for modifying the Supreme Court's mandate in this action, and this Court's duty is to strike down each of the majority-black districts

in which traditional districting principles were subordinated to the drafters' attempt to reach or exceed their racial targets.

Respectfully submitted this 27th day of April, 2016.

Edward Still
Bar No. ASB-4786-I 47W
429 Green Springs Hwy
STE 161-304
Birmingham, AL 35209
205-320-2882
fax 205-320-2882
E-mail: still@votelaw.com

s/ James U. Blacksher
Bar No. ASB-2381-S82J
P.O. Box 636
Birmingham AL 35201
205-591-7238
Fax: 866-845-4395
E-mail: jblacksher@ns.sympatico.ca

U.W. Clemon
Bar No. ASB-0095-076U
WHITE ARNOLD & DOWD P.C.
2025 Third Avenue North, Suite 500
Birmingham, AL 35203
Phone: (205)-323-1888
Fax: (205)-323-8907
E-mail: uwclemon@waadlaw.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2016, I served the foregoing on the following electronically by means of the Court's CM/ECF system:

Andrew L. Brasher
Megan A. Kirkpatrick
Misty S. Fairbanks Messick
James W. Davis (ASB-4063-I58J)
William G. Parker, Jr.
OFFICE OF THE ATTORNEY
GENERAL
501 Washington Avenue
Post Office Box 300152
Montgomery, Alabama 36130-0152
email: mmessick@ago.state.al.us
email: jimdavis@ago.state.al.us
email: abrasher@ago.state.al.us
email: mkirkpatrick@ago.state.al.us

David B. Byrne, Jr.
OFFICE OF THE GOVERNOR
Alabama State Capitol
600 Dexter Avenue, Suite NB-05
Montgomery, AL 36130
(334) 242-7120 P
(334) 242-2335 F
david.byrne@governor.alabama.gov
pam.chesnutt@governor.alabama.gov

Joe M. Reed, Esq.
Joe M. Reed & Associates, LLC
524 South Union Street
Montgomery, AL 36104-4626
email: joe@joereedlaw.com

John J. Park, Jr.
Deputy Attorney General
Strickland Brockington Lewis LLP
Midtown Proscenium Suite 2200
1170 Peachtree Street NE
Atlanta, GA 30309
email: jjp@sblaw.net.

Walter S. Turner, Esq.
Post Office Box 6142
Montgomery, AL 36106-0142
email: wsthayer@juno.com

John K. Tanner, Esq.
3743 Military Road NW.
Washington, DC 20015
email: john.k.tanner@gmail.com

William F. Patty, Esq.
The Gardner Firm, P.C.
P.O. Box 991
Montgomery, AL 36101-0991
email: bpatty@thegardnerfirm.com

Richard H. Pildes
40 Washington Square South
New York, NY 10012-1005
email: pildesr@juris.law.nyu.edu

Dorman Walker
dwalker@balch.com
Louis M. Calligas
lcalligas@balch.com
Post Office Box 78
Montgomery, AL 36101-0078

James H. Anderson
Joel T. Caldwell
Copeland, Franco, Screws & Gill,
P.A.
P.O. Box 347
Montgomery, AL 36101-0347
Telephone: (334) 834-1180
Email: caldwell@copelandfranco.com
anderson@copelandfranco.com

Algert S. Agricola
60 Commerce Street, Suite 1400
Montgomery, AL 36104
(334) 834-5290 P
(334) 834-5297 F
aagricola@rdafirm.com
aandrews@rdafirm.com

s/ James U. Blacksher

Attorney for ALBC plaintiffs