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-WC
v.	*	(3-judge court)
THE STATE OF ALABAMA; BETH CHAPMAN, in her official capacity as Alabama Secretary of State,	*	
Defendants.	*	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiffs Alabama Legislative Black Caucus et al., through undersigned counsel, pursuant to this Court's order entered October 30, 2012, Doc. 31, submit the following response in opposition to defendants' motion for judgment on the pleadings, Doc. 29, and supporting brief, Doc. 30.

TABLE OF CONTENTS

This response will discuss the claims presented in Counts I, II, and III of the complaint against Acts 2012-602 and 2012-603, which this Court need address only if it denies or defers ruling on plaintiffs' motion for partial summary judgment. A ruling granting plaintiffs' motion for partial summary judgment, Doc. 7, would render moot defendants' motion for judgment on the pleadings. Plaintiffs' requested injunction would require the Legislature to enact new House and Senate redistricting plans that demonstrate a good-faith effort to preserve county boundaries except where doing so would result in an unavoidable conflict with the Fourteenth Amendment or the Voting Rights Act.

Defendants have moved for judgment on the pleadings pursuant to Rule 12(c), Fed.R.Civ.P. Rule 12(d) provides:

> If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

The complaint in this action is supported by numerous exhibits describing and analyzing the House and Senate plans passed by the Legislature and whole-county plans introduced by black legislators. Plaintiffs have already filed a motion for partial summary judgment based on these matters outside the pleadings. Defendants' motion for judgment on the pleadings now has added dozens of

documents outside the pleadings. Thus the standard for assessing defendants' motion for judgment on the pleadings is the same as the summary judgment standard.

> Judgment on the pleadings is appropriate when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. All facts alleged in the complaint must be accepted as true and viewed in the light most favorable to the nonmoving party.

Scott v. Taylor, 405 F.3d 1251, 1253 (11th Cir. 2005) (citing *Cannon v. City of West Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001)).

I. PLAINTIFFS, NOT DEFENDANTS, ARE ENTITLED TO SUMMARY JUDGMENT ON COUNT I OF THE COMPLAINT.

With respect to Count I of the complaint, the Court is effectively presented with cross-motions for summary judgment. Plaintiffs' motion for partial summary judgment shows that the House and Senate plans in Acts 2012-602 and 2012-603 are facially unconstitutional because they unnecessarily divide counties in violation of the one-person, one-vote rulings of this Court and the Supreme Court. Defendants' motion for judgment on the pleadings contends that the Alabama Legislature is not required to comply with this Court's prior rulings that the whole-county requirements in the Alabama Constitution remain in force except where a conflict with federal law is unavoidable. As a matter of federal law, the defendants are wrong. See the authorities and arguments set out in plaintiffs' brief supporting

partial summary judgment, Doc. 8, plaintiffs' opposition to defendants' motion to dismiss or stay, Doc. 15, plaintiffs' surreply to defendants' motion to dismiss or stay, Doc. 23, and plaintiffs' reply brief supporting their motion for partial summary judgment, Doc. 32.

Defendants understandably make no attempt to argue that the county splits in Acts 2012-602 and 2012-603 are necessary to avoid conflicts with the Equal Protection Clause or the Voting Rights Act. They say the Legislature was not "acting irrationally" when it refused to consider any redistricting plans that had population deviations greater than ± 1%, because the drafters were trying "to head off a *Larios*-based challenge to their work." Doc. 30 at 37 (citing *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), aff'd, 542 U.S. 947 (2004)). That is a mistaken view of the law, as plaintiffs show in their reply brief, Doc. 32 at 11-12. Nor, as defendants erroneously contend, Doc. 30 at 37-40, does Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, require the Legislature to maintain or to maximize the strength of the majority-black districts. See plaintiffs' reply brief, Doc. 32 at 12-15.

In any event, while the Legislature's ± 1% rule and its attempt to pack majority-black districts certainly exacerbated the problem, defendants don't contend they can justify the huge number of county splits in both the House and

Senate plans. Defendants cite three reasons why "county lines were inevitably split": maximizing the majority-black districts, complying with the Legislature's arbitrary ± 1% population deviation rule, and "taking into account the desires of the incumbents." Doc. 30 at 15. None of these reasons is a requirement of federal constitutional or statutory law, and none makes unavoidable the plans' disregard of the whole-county restrictions in the Alabama Constitution.

II. THE HOUSE AND SENATE PLANS VIOLATE § 2 OF THE VOTING RIGHTS ACT AND THE FOURTEENTH AND FIFTEENTH AMENDMENTS.

Defendants argue that the complaint does not state a claim for relief under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, because of the Supreme Court's decision in *Bartlett v. Strickland*, 556 U.S. 1 (2009). But *Bartlett v. Strickland*'s holding "that § 2 does not require the creation of influence districts," 556 U.S. at 23, was limited to application of the results prong of § 2. "Our holding does not apply to cases in which there is intentional discrimination against a racial minority." Id. at 20; accord, *Broward Citizens for Fair Districts v. Broward County*, 2012 WL 1110053 (S.D. Fla., April 3, 2012) at *4-*6 ("because the Amended Complaint contains numerous allegations of intentional misconduct on the part of Broward County, including an allegation that one commissioner ordered that District 7 be 'bleached,' *Strickland*'s holding would not apply").

In *Johnson v. DeSoto County Bd. of Comm'rs*, 204 F.3d 1335 (11th Cir. 2000), relied on by defendants, Doc. 30 at 43, the court said: "In the absence of Supreme Court direction, therefore, we question, as a legal proposition, whether vote dilution can be established under the Constitution when the pertinent record has not proved vote dilution under the more permissive section 2." Id. at 1344-45. *Bartlett v. Strickland* has provided that direction, and intentional diminution of African Americans' ability to participate in the political process and elect candidates of their choice, even in crossover districts, is actionable under both § 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.

A. The intentional destruction of existing and potential crossover districts.

There is both direct and circumstantial evidence that the drafters of Acts 2012-602 and 2012-603 intended to segregate African Americans in the majority-black House and Senate districts. The Republican Senate President Pro Tem said publicly that the Senate plan was designed to produce "as many as 27 Republicans in the 35-member Senate. . . ." Exhibit A at 1. That would leave only the 8 majority-black Senate seats as Democrats. The House co-chair of the Reapportionment Committee said in the press (and defendants now assert) that both plans were designed to maximize the number of black voters in majority-black districts. Exhibit A at 5. The plans enacted by the Legislature show how the

drafters utilized the Reapportionment Committee's arbitrary ± 1% deviation restriction and the disregard of county boundaries to effectuate their scheme of diminishing the ability of black voters and their elected representatives to form effective coalitions with white Democrats.

In Act 2012-602, two performing[1] crossover House districts had their black voting-age populations reduced:

HD 73: Joe Hubbard (D), 48.5% BVAP to 10.5% BVAP

HD 90: Charles O. Newton (D), 35.8% to 34.9% BVAP

See Exhibit B. In Act 2012-603, two performing crossover Senate districts had their black voting-age populations slashed:

SD 11: Jerry Fielding (D), 34.2% BVAP to 15.3% BVAP

SD 22, Marc Keahey (D), 28.5% BVAP to 21.8% BVAP.

See Exhibit C. In addition to Senators Fielding and Keahey, the other three white Democrats in the Senate are Tammy Irons (SD 1), Roger Bedford (SD 6), and Billy Beasley (SD 28). The Act 2012-603 plan drastically modified the adjoining districts of Senators Irons and Bedford, replacing the core black Lauderdale County precincts in Senator Irons' district with black precincts in Madison County

[1] A "performing" minority district is one that has already demonstrated the ability of members of the protected minority group to elect candidates of its choice. E.g., *Texas v. United States*, 2012 WL 3671924 (D. D.C., Aug. 28, 2012) at *35.

to avoid creating a potential crossover Senate district in Hunstville.[2] The drafters had to split three counties, Lauderdale, Limestone, and Madison, to excise the threatening black precincts in Huntsville. See Doc. 3-1, Exhibit C.

B. Intentional black vote dilution in the Jefferson County Local Legislative Delegation.

In Alabama, the dilution of black voting strength in counties' local legislative delegations matters a lot. That's because Alabama's county governments lack most of the rudimentary powers of home rule, especially the power to tax. Each local legislative delegation exercises almost total control over most important county government functions. Because the Legislature has long observed an unwritten "local courtesy" rule, local bills supported by a county's legislative delegation routinely are passed without opposition. See Exhibit I.

Jefferson County has the largest local legislative delegation in the state. In the Jefferson County delegation, local bills are voted out of committee by majority

---

[2] Note that Senate District 7 in the SB 5 plan was 40.1% BVAP. See Doc. 3-1, Exhibits H and I. "In majority-minority districts, a minority group composes a numerical, working majority of the voting-age population. Under present doctrine, § 2 can require the creation of these districts." *Bartlett v. Strickland*, 556 U.S. at 13 (citation omitted). " Like an influence district, a crossover district is one in which minority voters make up less than a majority of the voting-age population. But in a crossover district, the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." Id. (citation omitted).

vote within the delegation. Exhibit I. By packing the Jefferson County Local Delegation with 6 more members than are required by the county's population, all of whom represent majority-white constituencies outside Jefferson County, white legislators will continue being able to block local revenue bills, whose defeat has helped drive Jefferson County into bankruptcy and threatens to close Cooper Green Mercy Hospital for the poor. See Exhibit D.

In Acts 2012-602 and 2012-603 Jefferson County has 6 more members of its local legislative delegation than are warranted by its population, 3 in the House and 3 in the Senate. See Doc. 3-1, Exhibit E. All six of the extra districts are majority white. Thus the total membership of the Jefferson County Legislative Delegation remains at 26, but one of the current majority-black House districts, HD 53, has been taken out of Jefferson County and moved to Madison County. So, where currently the 18 Jefferson County House districts are evenly divided, 9 majority-white and 9 majority-black, under Act 2012-602 there will be 10 majority-white House districts and only 8 majority-black House districts. The Act 2012-603 plan retains 3 majority-black and 5 majority-white Senate districts.

The lack of home rule for counties in Alabama is rooted in racial discrimination. "[G]eneral hostility to home rule in the 1901 Constitution, as well as the 1875 Constitution, was motivated at least in part by race: 'white control of

the state government ... is an important fall-back provision for guaranteeing the maintenance of white supremacy in majority black counties. And so it's important not to have too much power in the hands of the counties, or to make sure that the power ... that is at the local level is in safe, that is, Democratic [now Republican] and white hands.'" *Knight v. Alabama*, 458 F.Supp.2d 1273, 184-85 (N.D. Ala. 2004), aff'd 476 F.3d 1219 (11th Cir.), cert. denied, 127 S.Ct. 3014 (2007) (citation omitted).

Under Act 2012-602, the eight majority-black House districts will be HD 52 and 54-60, all but one of which (HD 58) have been packed to the same or higher % BVAP as in the current plan. See Exhibit B. All eight majority-black House districts lie entirely within Jefferson County. See Exhibit E. The ten majority-white House districts will be HD 14, 15, 16, 43, 44, 45, 46, 47, 48, and 51. See Exhibit E. As one example of how the Reapportionment Committee's ± 1% deviation rule facilitated gerrymandering, the part of HD 43 that lies in Jefferson County contains only 224 people, 213 white and 8 black, and is so small it is not visible on maps of the scale in these exhibits. As another example of how the Legislature's disregard of Alabama's whole-county constitutional restriction facilitated gerrymandering, only 4 of the 10 majority-white House districts lie entirely within Jefferson County, HD 44, 46, 47, and 51.

Under Act 2012-603, the 3 majority-black Senate districts will be 18, 19, and 20, all lying entirely within Jefferson County. See Doc. 3-1, Exhibits C and D, and Exhibit F to this response. All 5 majority-white Senate districts cross the Jefferson County boundaries into adjoining counties.

Had the Legislature complied with the whole-county provisions of the Alabama Constitution, 14 or 15 House districts could have been drawn entirely within Jefferson County, with no district extending beyond the Jefferson County boundaries, as demonstrated by the HB 16 plan. See Doc. 3-1, Exhibits F and G and Exhibit G to this response. All 9 of the current majority-black House districts could have been maintained. Similarly, as demonstrated by the SB 5 plan, Doc. 3-1, Exhibits H and I and Exhibit H to this response, 5 or 6 Senate districts could be drawn, 4 of which could be contained entirely within Jefferson County, while maintaining the current 3 majority-black Senate districts.

Thus, under Acts 2012-602 and 2012-603, the Jefferson County Local Legislative Delegation will have 26 members elected from 11 majority-black and 15 majority-white House and Senate districts. In the Jefferson County Local Legislation Committee, each member of the delegation has an equal vote. See Exhibit I. All 11 members from majority-black districts will represent only residents of Jefferson County. But 11 of the 15 members elected from majority-

white districts will also represent residents in at least one other county. This allows residents of other counties to block action in the Jefferson County delegation, as one white Republican explained in the press:

> Rep. Mary Sue McClurkin, R-Indian Springs Village, who represents parts of Shelby County, said legislators who represents counties near Jefferson will not support an occupational tax. "When you add up those people that represent counties surrounding Jefferson, that's a lot of folks," McClurkin said. "They don't want their constituents to have to pay an occupational tax for Jefferson County. . . . People just don't want to have another income tax and that's what an occupational tax is."

Exhibit D at 3.

Together Acts 2012-602 and 603 demonstrate a racially discriminatory purpose to dilute severely black voting strength within the Jefferson County delegation. By arbitrarily imposing a ± 1% maximum deviation rule, and by totally ignoring the whole-county provisions in the Alabama Constitution, the Legislature purposefully created a majority-white Jefferson County House Delegation by eliminating the current black-white balance of 9-9 House members.

Black voting strength in Jefferson County is further diluted by the inclusion in the Jefferson County delegation of 11 members elected by majority-white constituencies residing outside of Jefferson County. Had Jefferson County's integrity been respected, as required by the state constitution, the size of the Jefferson County delegation could have been reduced from 26 to either 20 or 21,

while still maintaining substantial population equality and avoiding retrogression of the current number of majority-black districts, 9 in the House and 3 in the Senate.

C. Plaintiffs' claims of intentional racial discrimination must be assessed by the evidentiary standards of *Arlington Heights*.

Plaintiffs' claims that the drafters of Acts 2012-602 and 2012-603 designed the House and Senate plans purposefully to pack black voters in the majority-black districts, eliminate as many crossover districts as possible, isolate legislators elected by black voters, dilute the voting strength of black voters and their elected representatives in the Jefferson County Local Legislative Delegation, and minimize the influence of black county officials over local legislation must be evaluated by the evidentiary standards set out in *Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252 (1977), whether the claims are made under the Voting Rights Act or the Fourteenth and Fifteenth Amendments. *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 488-89 (1997); accord, e.g., *South Carolina v. United States*, 2012 WL 4814094 (D. D.C., Oct. 10, 2012) (3-judge court) at *12; *Brown v. Detzner*, 2012 WL 4356839 (M.D. Fla., Sept. 24, 2012) at *6; *Texas v. Holder*, 2012 WL 3743676 (D. D.C., Aug. 30, 2012) (3-judge court) at *6; *Texas v. United States*, 2012 WL 3671924 (D. D.C., Aug. 28, 2012) (3-judge court) at *13; *Florida v. United States*, 2012 WL 3538298 (D. D.C., Aug. 16, 2012) (3-

judge court) at *38; *Perez v. Texas*, 2012 WL 4094933 (W.D. Tex., Sept. 7, 2012) (3-judge court) at *5.

> The "important starting point" for assessing discriminatory intent under *Arlington Heights* is "the impact of the official action whether it 'bears more heavily on one race than another.' " 429 U.S., at 266, (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)). In a § 5 case, "impact" might include a plan's retrogressive effect and, for the reasons discussed above, its dilutive impact. Other considerations relevant to the purpose inquiry include, among other things, "the historical background of the [jurisdiction's] decision"; "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; and "[t]he legislative or administrative history, especially ... [any] contemporary statements by members of the decisionmaking body." 429 U.S., at 268, 97 S.Ct., at 565.

Reno v. Bossier Parish School Bd., 520 U.S. at 489.

In a recent decision, this Court made findings of fact that Republican legislators have been pursuing a policy of controlling the Alabama Legislature by suppressing black voting strength and isolating their elected representatives. *United States v. McGregor*, 824 F.Supp.2d 1339, 1345-48 (M.D. Ala. 2011). "The intersection of political strategy and purposeful racial prejudice is nothing new. Alabama has a lengthy and infamous history of racial discrimination in voting." Id. at 1346 (citations omitted). These findings concluded:

> In light of this history, the court cannot disregard clear evidence of political manipulation motivated by racism.
>
> To some extent, "[t]hings have changed in the South." *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193

> (2009). Certain things, however, remain stubbornly the same. In an era when the "degree of racially polarized voting in the South is increasing, not decreasing," Alabama remains vulnerable to politicians setting an agenda that exploits racial differences. H.R.Rep. No. 109–478, at 34 (2006) (internal quotation marks omitted). The Beason and Lewis recordings represent compelling evidence that **political exclusion through racism** remains a real and enduring problem in this State. Today, while racist sentiments may have been relegated to private discourse rather than on the floor of the state legislature, see *Busbee v. Smith*, 549 F.Supp. 494, 500 (D.D.C.1982) (Edwards, J.) (labeling a state lawmaker a "racist" for using racial slurs to refer to majority-minority districts), it is still clear that such sentiments remain regrettably entrenched in the high echelons of state government.

Id. at 1347 (footnote omitted) (bold emphasis added).

There is already direct and circumstantial evidence in the record of this action that meets all of the *Arlington Heights* standards for proving intentional racial discrimination. There certainly is enough evidence to defeat defendants' motion for judgment on the pleadings. At the very least, summary judgment on Count II should not be considered until after discovery has ended. At this point, there has been no Rule 26(f) conference by the parties or exchange of initial disclosures. Nor has this Court scheduled a Rule 16 conference.

III. IN COUNT III, THE ARBITRARY AND DISCRIMINATORY FACTORS EVIDENT IN THESE REDISTRICTING PLANS COMBINE TO ESTABLISH A CLAIM FOR JUDICIAL RELIEF UNDER FAMILIAR STANDARDS OF EITHER THE FIRST OR FOURTEENTH AMENDMENT.

Of course, Justice Kennedy's concurring opinion in *Vieth v. Jubelirer*, 541 U.S. 267, 306-17 (2004), is not binding precedent on this Court. But his was the swing vote for the judgment against the claims of partisan gerrymandering in that case, between the plurality who believed partisan gerrymandering claims are nonjusticiable and the dissenters who proposed various judicial standards according to which they believed plaintiffs had proved a violation of the Equal Protection Clause. As the swing voter, Justice Kennedy encouraged lower courts to continue searching for judicially manageable standards for identifying unconstitutional burdens imposed on partisan groups in redistricting cases. "If workable standards do emerge to measure these burdens, however, courts should be prepared to order relief. With these observations, I join the judgment of the Court." 541 U.S. at 317.

Justice Kennedy agreed "there is no doubt" that Fourteenth Amendment standards govern claims of partisan gerrymandering. Id. at 314. But, he wrote,

> [t]he First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, **their voting history**, their association with a political party, or their expression of political views.

Id. (citation omitted) (bold emphasis added). He used a hypothetical example to

illustrate why some partisan gerrymanders should be unconstitutional under either the First or Fourteenth Amendment:

> If a State passed an enactment that declared "All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, **though still in accord with one-person, one-vote principles**," we would surely conclude the Constitution had been violated. If that is so, we should admit the possibility remains that **a legislature might attempt to reach the same result without that express directive**. This possibility suggests that in another case a standard might emerge that suitably demonstrates how an apportionment's de facto incorporation of partisan classifications burdens rights of fair and effective representation (and so establishes the classification is **unrelated to the aims of apportionment and thus is used in an impermissible fashion**).

Id. at 312 (bold emphases added). The judicial inquiry Justice Kennedy is calling for would rely on "well developed and familiar" standards, such as the Equal Protection standard enunciated in *Baker v. Carr*, 369 U.S. 186, 226 (1962), that condemns redistricting schemes that "reflec[t] no policy, but simply arbitrary and capricious action," or some other standard that left the court with "the sense that legislative restraint was abandoned." 541 U.S. at 316.

In the instant case, defendants appear to concede that, after packing the majority-black districts, the Alabama Legislature utilized its arbitrary ± 1% restriction solely to accommodate "the desires of the incumbents." Doc. 30 at 15. But there is abundant evidence that the only incumbents whose desires were fulfilled were Republican legislators, not the white and black Democratic

legislators who publicly denounced both the House and Senate plans. See Exhibits A, D, and I. These justifications closely track the policies that were held in *Larios* to violate one-person, one-vote principles, "because the policies the population window was used to promote in this case were not 'free from any taint of arbitrariness or discrimination.'" 300 F.Supp.2d at 1341 (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)). While the Georgia Legislature manipulated population deviations at the broad end of the Supreme Court's ± 5% rule, the deviations restricted to the narrow end of the rule in Alabama's House and Senate districts "were not driven by any traditional redistricting criteria such as compactness, contiguity, and preserving county lines." 300 F.Supp.2d at 1342. Rather, as in Georgia, they were driven primarily by incumbent protection. Id. The *Larios* court rejected the Georgia Legislature's attempt to justify protecting incumbents in regional terms:

> **This argument misses the point of permitting deviations in order to "maintain[ ] the integrity of political subdivision lines**." An interest in preserving discrete local political boundaries was deemed rational precisely because it recognized both **the function that smaller governmental units (such as counties) serve in state politics** and the long-standing tradition of some states to divide political power equally among their various subdivisions.

Id. at 1345-46 (quoting *Mahan v. Howell*, 410 U.S. 315, 329 (1973)) (other citations omitted) (bold emphases added). *Larios* quotes *Reynolds*: "In many

States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines **to deter the possibilities of gerrymandering**." 300 F.Supp.2d at 1346 (quoting *Reynolds v. Sims*, 377 U.S. 533, 580-81 (1964)) (bold emphasis added). Of course, the Alabama policy of preserving the integrity of county boundaries *Reynolds* was referring to is embedded in the state constitution.

The *Larios* court said:

> We need not resolve the issue of whether or when partisan advantage alone may justify deviations in population, because here the redistricting plans are plainly unlawful. In the state legislative plans at issue in this case, **partisan interests are bound up inextricably** with the interests of regionalism and **incumbent protection. It is simply not possible to draw out and isolate the political goals in these plans from the plainly unlawful objective of regional protection or from the inconsistently applied objective of incumbent protection**.

300 F.Supp.2d at 1352 (bold emphasis added). A claim of partisan gerrymandering viewed in this perspective is almost indistinguishable from the search for judicially manageable First/Fourteenth Amendment standards Justice Kennedy is calling for. Similarly, *Bartlett v. Strickland*, viewed in the light of Justice Kennedy's concurring opinion in *Vieth*, signals a growing jurisprudential movement toward corralling partisan gerrymandering by more strictly enforcing

familiar, long established good-districting principles. These principles have particular force where they are embedded in a state constitution, as *Bartlett* indicates.

The House and Senate redistricting plans in Acts 2012-602 and 2012-603 arbitrarily and discriminatorily use the pretext of more strictly enforcing federal equal population and voting rights law to carry out an unrestrained partisan agenda. In this action, the Alabama Legislature claims (1) that federal law has liberated it from having to obey the anti-gerrymandering, county-integrity restrictions in its own constitution, (2) that the federal court decision in *Larios* requires it to impose the narrowest population deviation restriction, (3) that the Voting Rights Act requires it to maximize majority-black districts, and (4) that, thereafter, it is free to cut and slash wherever it wishes to accommodate the desires of the incumbent partisan majority. The result is a "crazy quilt" as obvious as the one Justice Clark would have declared unconstitutional under the rational basis standard of the Equal Protection Clause in *Baker v. Carr*, 369 U.S. 186, 254 (1962) (Clark, J., concurring).

One of the more extreme crazy-quilt examples of patent partisan gerrymandering is new House District 16, which the incumbent white Democrat claims was drawn to punish him for switching from the Republican Party. Exhibit

J. Rep. Daniel Boman was elected from a district that included all of Lamar and Fayette Counties and a part of Tuscaloosa County. See http://www.legislature.state.al.us/house/housemaps2001/house_districts_2001.pdf. Act 2012-602 raggedly splits Lamar County (Boman resides in Sulligent), takes all of Fayette County, then snakes through northern Tuscaloosa County all the way into north Jefferson County. Doc. 3-1, Exhibit A. This particular partisan gerrymander has the additional partisan and racial purpose of diluting the voting power of the majority-black districts in the Jefferson County Local Legislative Delegation.

> McClendon [House Republican co-chair of the Reapportionment Committee] said the 18-member Jefferson County House delegation, which in the past has been split evenly along party-lines, is expected to become majority Republican in the next legislative election. "Jefferson County is less likely to have a 9-9 tie vote on important issues in the future," McClendon said. However, Boman questioned the fairness of someone from so far outside Jefferson County having a voice in Jefferson County politics. "I think it's a crying shame that a guy from Sulligent, Alabama -- which is 25 miles from the Mississippi line -- could be a part of the Jefferson County delegation. I think that hurts everybody," Boman said.

Exhibit J at 2. Whether measured by the First Amendment standard, which protects persons from official punitive action based on their political association, or by the Fourteenth Amendment standards, which require reconciling population equality with state constitutional restrictions against dividing counties, and which

prohibit purposeful racial discrimination, Acts 2012-602 and 2012-603 are unconstitutional partisan gerrymanders.

CONCLUSION

Defendants' motion for judgment on the pleadings should be denied.

Alternatively, this Court should defer ruling on defendants' motion for judgment on the pleadings pending its ruling on plaintiffs' motion for partial summary judgment, which could render moot defendants' motion.

Alternatively, pursuant to Rule 56(d), Fed.R.Civ.P., undersigned counsel declares that facts essential to the presentation of plaintiffs' case cannot be obtained without the opportunity to conduct discovery, especially regarding the discriminatory intent of the drafters of Acts 2012-602 and 2012-603, and plaintiffs move that a ruling on defendants' motion be deferred pending the completion of discovery.

Respectfully submitted this 14th day of November, 2012.

Edward Still
Bar No. ASB-4786-I 47W
130 Wildwood Parkway
STE 108 PMB 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 November 14, 2012, I served the foregoing on the following electronically by means of the Court's CM/ECF system:

Misty S. Fairbanks Messick
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Post Office Box 300152
Montgomery, Alabama 36130-0152
email: mmessick@ago.state.al.us

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

James W. Davis (ASB-4063-I58J)
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Post Office Box 300152
Montgomery, Alabama 36130-0152

email: jimdavis@ago.state.al.us.

s/ James U. Blacksher

Attorney for plaintiffs