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

ALABAMA LEGISLATIVE BLACK CAUCUS, et al.,	)	
Plaintiffs,	)	
	)	Civil Action No. 2:12-cv-691-WKW-MHT-WHP
v.	)	(Three-judge court)
THE STATE OF ALABAMA, et al.,	)	
Defendants.	)	

REPLY TO PLAINTIFFS' RESPONSE TO
MOTION FOR JUDGMENT ON THE PLEADINGS

The State of Alabama and Beth Chapman, in her official capacity as Secretary of State of Alabama, defendants in this action (the State Defendants) submit this Reply to the Plaintiffs' Response (No. 35) to their Motion for Judgment on the Pleadings (No. 29). For the reasons stated in the State Defendants' Motion, its supporting Memorandum (No. 30), including the Exhibits attached thereto, and this Reply, this Court should (1) deny the Plaintiffs' Motion for Partial Summary Judgment, and (2) enter judgment on the pleadings in favor of the State Defendants and against the Plaintiffs.

I. Introduction

At the outset, the State Defendants wish to emphasize two points. First, the while the preclearance of these plans may not be dispositive, the fact of preclearance speaks to the claims in this lawsuit. Second, the Plaintiffs' invocation of intentional discrimination as a lever for discovery, even if notionally legitimate, threatens to set a dangerous precedent.

As with the three-judge court's decision in *Montiel v. Davis*, 215 F. Supp. 2d 1279 (S.D. Ala. 2002), which the State Defendants cited in their Memorandum (No. 30), the preclearance of the 2012 House of Representatives and Senate plans shows that the Plaintiffs must shoulder a heavy burden. USDOJ's action shows that, in its judgment, the plans were not adopted with the purpose and did not have the effect of retrogressing. In addition, because of the changes made to Section 5 in the 2006 Act, it shows that, in USDOJ's judgment, the plans were not adopted with any other discriminatory purpose and do not have the effect of diminishing the ability to elect or the right to vote on the basis of any other discriminatory purpose. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246, 120 Stat.577, § 5 (2006).

The State Defendants agree that the fact of preclearance is not dispositive of the claims in this case. *Cf. Morris v. Gressette*, 432 U.S. 491, 97 S. Ct. 2411 (1977) (The Attorney General's decision to preclear a change administratively is not judicially reviewable, but administrative preclearance does not bar a subsequent, traditional constitutional challenge); *see also* 28 C.F. R. § 51.41(b)(2012)("[T]he failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change.").[1] USDOJ knew about this case, but its Section 2 allegations were, in the State Defendants' judgment and properly viewed, outside the scope of its Section 5 review.[2] Nonetheless, it suggests that the Plaintiffs' claims should be viewed with skepticism, if not rejected, to the extent that they seek to revisit USDOJ's preclearance determinations.

Second, as the Defendants noted in their Memorandum, the controlling standard in the one-person, one-vote cases is the one laid out in *Montiel v. Davis*. As the three-judge court in that case noted, when the population deviation is less

[1] In the State Defendants' judgment, the potentially preclusive effect of preclearance has been made logically greater by the expansion of the scope of Section 5 review in the 2006 Act.

[2] As the Plaintiffs know, before USDOJ reached its decision to preclear these plans, it interviewed a number of State legislators including Joe Hubbard (HD 77), Charles Newton (HD 90), Tammy Irons (SD 1), and Billy Beasley (SD 28), each of whom Plaintiffs point to in their Section 2 claim. See No. 35 at 7.

than 10%, "the state is entitled to a presumption that the apportionment plan was the result of an 'honest and good faith effort to construct districts …of as nearly equal population as is practicable.'" *Montiel v. Davis*, 215 F. Supp. 2d at 1286 (quoting *Daly v. Hunt*, 93 F. 3d 1212, 1220 (4th Cir. 1996), itself quoting *Reynolds v. Sims*, 377 U.S. 533, 577, 84 S. Ct. 1362, 1390 (1964))(emphasis deleted). In order to overcome this presumption, those challenging a lawfully enacted redistricting plan (which in the case of *Montiel v. Davis* had been precleared) must show: (1) the population deviation results "solely from the promotion of an unconstitutional or irrational state policy"; (2) that unconstitutional or irrational policy is the "actual reason" for the population deviation; and (3) the deviation is "not caused by the promotion of legitimate state policies." *Id*. (emphasis deleted). Here, the State Defendants have advanced legitimate state policies (compliance with Section 5 of the Voting Rights Act, minimizing population deviations and the attendant potential for vote dilution, and giving all incumbents a chance to win in their new districts). Accordingly, the Plaintiffs must shoulder a heavy burden.

That burden is logically greater given that the 2012 plans have a smaller overall population deviation (2%) than the 2001 plans did (10%). The desire to reduce the population deviations among districts cannot be characterized as either

unconstitutional or irrational, and the drafters' having promoted that policy in these plans likewise shows that the Plaintiffs cannot meet the *Montiel v. Davis* standard.

One effect of the "safe harbor" and the relatedly high showing required of plaintiffs challenging redistricting plans is to deny them the opportunity of intrusive discovery directed at the drafters of those plans. In the 2001 round, when the Plaintiffs and their allies had the upper hand in the legislature and drafted the plans and were represented by some of the same attorneys, they successfully blocked discovery from the drafters of their plans.[3] To deny the State Defendants the benefit of the "safe harbor" in this case would be, at best, unusual.

Indeed, if allegations of intentional discrimination are a lever that moves the world, there is no longer any safe harbor for any jurisdiction, no matter what population deviation it chooses. This Court should require a much greater showing from Plaintiffs before allowing them to proceed with discovery.

[3] To the best of counsel's recollection, the *Montiel* Plaintiffs did not get the benefit of a Rule 26(f) conference between the parties, a Rule 16 conference, or discovery from the State, and the *Gustafson* Plaintiffs received only a Rule 26(f) conference and related disclosures. *Cf.* No. 35 at 15.

II. The Plaintiffs' federal one-person, one-vote claims should be dismissed, and, if any state law questions remain, they should be dismissed or certified to the Supreme Court of Alabama.

In their Preliminary Injunction Reply (No. 32) and their Response, the Plaintiffs contend that they are entitled to preliminary injunctive relief with respect to their one-person, one-vote claim because: (1) their claim is based on federal law; and (2) federal law has resolved the question of the degree to which the state constitutional limits on splitting counties survive the preemptive effect of federal law, so (3) this Court should require the State Defendants to explain the splitting of counties. These contentions lack merit, so, at the very least, the Plaintiffs request for preliminary injunctive relief should be denied because there is no substantial likelihood that they will prevail as a matter of law on their one-person, one-vote claims.

Taking the Plaintiffs' insistence that their one-person, one-vote claims are federal at face value, those claims lack legal merit. On its face, the use of a deviation of ±1% in a redistricting plan does not violate federal constitutional standards. Further, when a one-person, one-vote claim has been linked with another claim, as it was in cases like *Montiel v. Davis*, *Larios v. Cox*, and *Gustafson v. Johns*, it was directly linked to a protected category, like race or partisan affiliation. In contrast, the Plaintiffs' one-person, one-vote claim is

directly linked to the splitting of counties, which are not part of a federally protected class. *See Sims v. Amos*, 336 F. Supp. 924, 937 (M.D. Ala. 1972) (three-judge court) ("There is no federal constitutional requirement that a plan of state reapportionment maintain the integrity of political subdivisions ...."). Accordingly, the State Defendants, not the Plaintiffs, are entitled to judgment in their favor on the Plaintiffs' federal one-person, one-vote claims.

Given that there is no federal constitutional requirement that the integrity of county lines be maintained, such a claim is necessarily one of state law. In that regard, the Plaintiffs begin with §§ 198, 199, and 200 of the Alabama Constitution, as they must, and read them to require that fewer counties be split. For this Court to follow the Plaintiffs' direction would be to run afoul of *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1964). Accordingly, to the extent that a state law claim is lurking in the Plaintiffs' one-person, one-vote claim, that state law claim should be dismissed.

In the alternative, and before undertaking to consider the merits of any state law claim, this Court should give the Supreme Court of Alabama the chance to define the contours of the intersection between federal one-person, one-vote law and state law. In *Rice v. English*, 835 So. 2d 157 (Ala. 2002), the court acknowledged the general proposition that federal one-person, one-vote standards

trump state law limitations on the splitting of counties when there is an "unavoidable conflict" between them. *Id*., at 160 (quoting *Sims v. Amos*, 336 F. Supp. at 939, n. 20 (itself quoting *Reynolds v. Sims*, 377 U.S. at 584, 84 S. Ct. at 1393.)). Beyond that recognition of the general principle, however, the contours of state law remain unsettled.

Neither the Plaintiffs nor this Court can say that the 2012 plans, which use a tighter population tolerance than the 2001 plans did, split too many counties. We don't know, for example, whether the 2001 Senate plan, which used an allowable population deviation of ± 5% and split 30 counties, split too many; the Alabama Supreme Court didn't answer that question in *Rice v. English*. And, to the extent that the 2012 Senate plan splits 33 counties with a smaller overall population deviation, the Plaintiffs implicitly ask this Court to draw a bright, shiny constitutional line between 30 and 33, something that the federal courts have been loath to do. *Cf. Holder v. Hall*, 512 U.S. 874, 114 S. Ct. 2451 (1994)(declining to consider a challenge to the size of an elected body under § 2 because there is no principled reason to support choosing a benchmark size as the basis for comparison); *Libertarian Party of Florida v. Florida*, 710 F. 2d 790, 793 (11th Cir. 1983)("[A]ny percentage or numerical requirement is necessarily arbitrary ….")(internal quotation omitted). In fact, the Alabama Supreme Court hasn't laid

out the rules of the road for the intersection of federal and state law since *Reynolds v. Sims*.[4]

More specifically, nobody other than the Supreme Court of Alabama can conclusively say what population standards apply to the House and Senate plans, whether too many counties have been split, or what standards should govern the enactment of future legislative redistricting plans. Those standards might take one of any number of forms, including one in which:

(1) The allowable overall population deviation should be different in the House and the Senate plans, such that the House plan should preserve county boundaries while keeping the overall deviation less than 10% so as to stay within federal constitutional standards, while the Senate plan balances the need to make the population of the districts "as nearly equal as may be" with need not to split counties; or

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[4] The Plaintiffs' reliance on the *Opinion of the Justices*, 263 Ala. 158, 81 So. 2d 881 (1950), is misplaced because that opinion precedes the Supreme Court's 1964 decision in *Reynolds v. Sims*. The question for the Senate plan and for the House plan, if Plaintiffs are correct about its being subject to a constitutional restriction on county splitting, is the one posed by then-Associate Justice See in his dissent in *Rice v. English*, i.e., "whether the Legislature fulfilled its obligation to preserve county lines–indeed, whether in light of *Reynolds v. Sims* it any longer has such an obligation…." 835 So. 2d at 174 (See, J., dissenting). Even if the answer is that the Legislature still has such an obligation, the precise contours of that obligation remain undefined, and, if definition is required, such definition should come from the Supreme Court of Alabama.

(2) The allowable population deviation for the House and Senate plans can constitutionally be the same, as they have been in recent years, with some limitation on the splitting of counties to be identified; or

(3) The splitting of counties in the House and Senate plans can constitutionally be addressed as it is in the Reapportionment Committee Guidelines, *i.e.*, subordinated to relative population equality and observed as part of the overall preservation of communities of interest; or

(4) Some other standard altogether.

In the absence of any such guidance, before undertaking to review the state-law aspects of the Plaintiffs' one-person, one-vote claim, this Court should certify the state law aspects of the Plaintiffs' one-person, one-vote claim to the Supreme Court of Alabama.

The State Defendants recognize that, in § 202 of the 1901 Alabama Constitution, the organizational plan for the House of Representatives is based on whole counties, with a rough adjustment for population differences between the counties. That fact goes only so far, however. First and foremost, it has been overturned, at least in part, by *Reynolds v. Sims*. Indeed, in *Sims v. Amos*, the court rejected proposed multi-member redistricting plans for the Alabama House of Representatives that preserved county boundaries because, among other reasons,

the population deviations were too great. The court identified the "controlling constitutional principles," explaining that "in *Reynolds* the Court announced that equal representation must be the 'overriding objective' and cannot be 'submerged' in an effort to preserve county lines." *Sims v. Amos*, 336 F. Supp. at 935.

Moreover, in his dissent in *Rice v. English*, then-Chief Justice Moore dismissed the Senate districting plan incorporated in § 203 of the 1901 Alabama Constitution as "irrelevant." *Rice v. English*, 832 So. 2d 157, 169 (Ala. 2002) (Moore, C.J., dissenting). He explained that the § 203 plan was to be in place only until the 1910 Census, when the § 200 standard ("as nearly equal as may be" in population and no county splitting) would take over. He also observed that, in fact, the § 200 standard did not take over because the State did not redistrict until after the Supreme Court found that the Alabama Senate plan unconstitutionally violated one-person, one-vote standards in *Reynolds v. Sims*.

Then-Chief Justice Moore was on his own in that dissent, but neither the majority nor then-Associate Justice See, who also dissented, took issue with that view. Likewise, the claims in *Rice v. English* involved the state Senate, not the House. Even so, the Plaintiffs make the same argument based on § 202 that then-Chief Justice Moore rejected.

In short, the Plaintiffs' arguments to the contrary notwithstanding, this Court should (1) enter judgment in favor of the State Defendants on the Plaintiffs' federal one-person, one-vote claims; (2) dismiss any state law one-person, one-vote claims without prejudice or certify the controlling questions to the Supreme Court of Alabama; and (3) deny the Plaintiffs' Motion for Partial Summary Judgment and for Preliminary Injunction.

III. The Plaintiffs' Claims of Vote Dilution and Racial Isolation Lack Merit.

The Plaintiffs contend that, because their Section 2 claims are directed at allegedly intentional discrimination, the State Defendants are not entitled to judgment on the pleadings in their favor. The Plaintiffs point to statements in the press and in court opinions, to the plans' treatment of Jefferson County, and their treatment of several districts, which the Plaintiffs call crossover districts. These contentions lack merit for several reasons.

A. The Statements

With respect to the statements on which Plaintiffs rely, the State Defendants note that none of the statements come from Senator Gerald Dial, who headed up the effort in the Senate, and only one, which is misconstrued, from Representative Jim McClendon, who headed up the effort in the House of Representatives. In addition, the State Defendants note:

(1) The statement attributed to the Republican Senate President Pro Tem, *see* No. 35 at Exhibit A, is nothing more than puffing;

(2) Plaintiffs write, "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 black-majority districts. Exhibit A at 5." *See* No. 35 at 6. That statement does not appear in Exhibit A. In pertinent part, that Exhibit quotes McClendon as saying, "We certainly cannot be accused on retrogression, (and) we've increased the number of minority districts." In fact, the House plan increased the number of black-majority districts, from 27 to 28. In any event, the statement does not support the weight the Plaintiffs put on it.

(3) The Plaintiffs' reliance on the opinion in *United States v. McGregor*, 824 F. Supp. 2d 1339, 1347 (M.D. Ala. 2011), No. 35 at 14-15, is irrelevant. That case doesn't involve redistricting, and Scott Beason is not a drafter of the Senate plan. The opinion does not relate to either Senator Dial or Representative McClendon.

B. Jefferson County

The Plaintiffs' argument based on Jefferson County is based in part on the previous balance of power and in part on the use of a population deviation of ± 5%. Implicitly, they see a static universe in the Jefferson County area. In addition, their argument overlooks the degree to which the black-majority districts were

underpopulated in the 2001 plans. SD 18, 19, and 20 were underpopulated by -2.577%, -4.142%, and -4.072%, respectively, in the 2001 Senate plan, and were underpopulated by -17.64%, 20.06%, and -21.37%, respectively, when the 2010 Census data were loaded into the 2001 map. *See* No. 30 at 16-17, Tables S2001 and S2. Similarly, a number of the black-majority House districts (HD 53, 54, 55, 57, 58, 59 and 60) were underpopulated in the 2001 House plan and when the 2010 Census data were loaded into the 2001 plan. See No. 30 at 18-21, Tables H1 and H2. Rather than being static, the population distribution in Jefferson County and the surrounding area, in both absolute and racial terms, is dynamic.

As for Mary Sue McClurkin, who represents HD 43, that district included portions of Jefferson County in the 2001 plan, which the Democrats drew. Further, her opposition to an occupational tax is not based on race, but, rather, on the perceived interests of her constituents.

C. The Specific Districts

With respect to the Plaintiffs' complaints about specific districts, the State Defendants note:

(1) HD 73, in Montgomery County, was, and is, a neighbor to two underpopulated black-majority districts, HD 77 and 78. When the 2010 Census data were loaded into the 2001 plan for those districts, HD 77 was -23.12% and

HD 78 was -32.16%. *See* No. 30 at 20, Table H2. In order to maintain the relative strength of the minority population in those districts, minority population had to be moved from HD 73.

Of the districts cited, only HD 73 had an African-American population greater than 40%. The State Defendants note that, in *Bartlett v. Strickland*, the crossover district that North Carolina contended it had to create in order to comply with Section 2 was only 39.36% in voting-age population. *Id*., 556 U.S. at 3, 129 S. Ct at 1239. The Supreme Court rejected that contention. Thus, the Plaintiffs contend that the Constitution and Section 2 require the preservation of districts that neither would require the State to create.[5]

(2) HD 90, in south-central Alabama, strains the meaning of "diminish" in that the minority population declined from 35.8% to 34.9%. That change is *de minimis*.

(3) In the 2001 plan, SD 11 consisted of Talladega and Coosa counties, as well as portions of Calhoun and Elmore counties. *See* Exhibit J at 10. When the 2010 Census data were loaded into the 2001 Senate plan, SD 11 was

[5] In the oral argument at the Supreme Court on *Bartlett v. Strickland*, Justice Breyer suggested, "[T]here's a kind of natural stopping place. When I worked out the numbers, it seemed that the natural [minimum] stopping place [for a crossover district] fell around 42-43 percent." Transcript in 07-689-2, at 36, available at http://www.scotusblog.com/case-files/cases/bartlett-v-strickland/. That view did not garner majority support.

underpopulated by 11,453 people, or -8.39%. *See* Exhibit H-4. In order to gain that population, SD 11 was moved to the north and west to gain population from two growing counties, Shelby and St. Clair.[6]

(4) SD 22, in southwest Alabama, borders on two substantially underpopulated black-majority districts, SD 23 and 24, just like HD 77 did. When the 2010 Census data were loaded into the 2001 districts, SD 23 was -18.03%, and SD 24 was -12.98%. *See* No. 30 at 15, Table S2. In order to maintain the relative strength of the minority population in SD 23 and 24, minority population had to be drawn from SD 22. As it was, the total minority population in SD 23 is 64.84% and the total minority population in SD 24 is 63.22%. *See* No. 30 at 17, Table S2.

(5) The Plaintiffs' complaints about Tammy Irons (SD 1) miss the point. Irons' district is in the northwest corner of Alabama. To its south is SD 6, which was substantially underpopulated when the process began; it needed to gain 19,519

[6] This change had the collateral effect of unbundling the ungainly former SD 30, which included Butler, Crenshaw, and Pike counties as well as portions of Lowndes and Autauga counties. *See* Exhibit J at 1, and 12-13. In *Kelley v. Bennett*, 96 F. Supp. 2d, 1301 (M.D. Ala.), *vacated per curiam sub nom. Sinkfield v. Kelley*, 531 U.S. 28, 121 S. Ct. 446 (2000), the three-judge court called the 1993 version of SD 30's shape "bizarre" and explained that, in order to link Autauga County with Butler and Crenshaw counties, the plan's Democratic drafter "opted for a land bridge" that had "a racial twist" in that the land bridge swept up the white portions of majority-black Lowndes County. *Id*., at 1317. The three-judge court found that version of SD 30 unconstitutional as the product of racial gerrymandering. The Democratic drafters of the 2001 Senate plan preserved the land bridge, but mitigated its racial tinge.

people to reach the ideal population and was -14.29% of the ideal. *See* Exhibit H-4. To SD 1's east is SD 2, which was overpopulated by 42,494, or 31.12%. *Id*. The drafters of the Senate plan did not act irrationally, much less than in an intentionally race-based way, by moving SD 6 north into SD 1 to gain population and moving SD1 into SD 2 to absorb the excess population.

Thus, when examined critically, the Plaintiffs' evidentiary support for their claims of racial gerrymandering is no more compelling than that of the *Montiel* Plaintiffs. Their claim should be treated the same way and dismissed.

IV. The Plaintiffs' Claims of Partisan Gerrymandering Should Be Dismissed.

For their response to the State Defendants' contention that their partisan gerrymandering claims lack merit, the Plaintiffs seek to generate a standard for evaluating such claims from Justice Kennedy's concurring opinion in *Vieth v. Jubelirer* and contend that they satisfy those standards. These arguments lack merit.

As the State Defendants noted in their Memorandum, Justice Kennedy's views lack support from the other members of the Court. Thus, his assertion that "there is no doubt" that Fourteenth Amendment standards govern review of partisan gerrymandering claims and his suggestion that the First Amendment "may be the more relevant constitutional provision in future cases" do not establish a

justiciable standard for these cases. *See Vieth v. Jubelirer*, 541 U.S. 261, 314 (2004) (Kennedy, J., concurring in the judgment).

Even if they did, however, the Plaintiffs' contention that they can satisfy them fails. To the extent that they point to allegedly unconstitutional county splitting, they are bootstrapping in their one-person, one-vote claim, which is valid only if that claim has merit. As the State Defendants have shown, though, the Plaintiffs' attempt to combine one-person, one-vote with a county-splitting claim is without legal merit. *See* No. 30 at 32-37 and 6-7, above. And, their attempt to move incumbent protection to the top of the list overlooks the need to comply with Section 5 and with the applicable population standard, both of which the State Defendants advanced as reasons that support the drafters' non-discriminatory intent.

As for HD 16, and Daniel Boman, the State Defendants note that this is the only specific example of partisan gerrymandering alleged, and that allegation is more one of personal retaliation than of systematic gerrymandering. More to the point, when the 2010 Census data were loaded into the 2001 plan, HD 16 was underpopulated by 4,528 people, or -9.95%. To the extent it needed to gain population, that population was more likely to come from Tuscaloosa or Jefferson County than from the thinly populated counties of northwest Alabama.

Conclusion

For the forgoing reasons, as well as those set forth in No. 30, this Court should: (1) deny the Plaintiffs' Motion for Partial Summary Judgment and for Preliminary Injunction; (2) enter judgment in favor of the State Defendants and against the Plaintiffs on (a) the Plaintiffs' one-person, one-vote claim to the extent that it is based on federal law; and (b) on Plaintiffs claims of vote dilution and racial isolation; and their claims of partisan gerrymandering; and (3) to the extent that the Plaintiffs' one-person, one-vote claim and county splitting claim is based on state law, dismiss that claim or certify the controlling questions of state law to the Supreme Court of Alabama.

Respectfully submitted,

Date November 26, 2012

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CERTIFICATE OF SERVICE

I hereby certify that, on November 26, 2012, I electronically filed the foregoing 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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