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-MHT-WHP (3-judge court)
v.	*	
THE STATE OF ALABAMA; BETH CHAPMAN, in her official capacity as Alabama Secretary of State,	*	
Defendants.	*	
DEMETRIUS NEWTON et al.,	*	
Plaintiffs,	*	
v.	*	Civil Action No. 2:12-cv-1081-WKW-MHT-WHP
THE STATE OF ALABAMA et al.,	*	
Defendants.	*	

ALBC PLAINTIFFS' REPLY BRIEF IN SUPPORT OF SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs Alabama Legislative Black Caucus et al., through undersigned counsel, reply as follows to defendants' response, Doc. 76, to the ALBC plaintiffs second motion for partial summary judgment, Docs. 66 and 68-1.

Defendants do not dispute any of the facts set out in plaintiffs' motion.[1] They do dispute plaintiffs' allegation that the arbitrary ± 1% restriction of population deviation and incumbency protection cannot justify the many unnecessary splits of county boundaries. So issue is joined on the following questions of law:

1. Does the statutory inclusion in the constituency that elects a county's local legislative delegation of more non-residents than is necessary to satisfy statewide equal population among legislative districts violate the Fourteenth Amendment rights of the county's residents?

2. Can either the arbitrary ± 1% deviation rule or partisan or incumbent interests justify diluting the votes of the county's residents in the election of the county's local legislative delegation?

[1] Defendants' response contends there are "[g]eneral issues of material fact that preclude the entry of summary judgment...." Doc. 76 at 16. But they identify no particular disputed facts and simply argue that different conclusions should be drawn from the facts set out in plaintiffs' motion. E.g., "The ALBC Plaintiffs make far too much of the public meetings." Id.

A. The Dilution of County Residents' Votes In the Election of Their Local Legislative Delegation Violates the Equal Protection Clause, Not State Law.

Count III of the ALBC plaintiffs' amended complaint, Doc. 60, alleges a violation of federal constitutional law, not state law. Allowing non-residents to vote for members of an Alabama county's local legislative delegation violates the Equal Protection Clause of the Fourteenth Amendment, unless the non-residents' inclusion in the county delegation's electorate is required to comply with the Fourteenth Amendment mandate of substantial equal population among legislative districts statewide. This is the first court to be presented this precise question, but it follows logically and ineluctably from the principles underlying the most recent developments in federal law dealing with local legislative delegations.

The Count III Equal Protection claim does not depend on the whole-county provisions of the Alabama Constitution. Even if §§ 50, 198, 199, and 200 of the Alabama Constitution did not exist, the unnecessary statutory inclusion of non-residents in the constituency that elects the county's local legislative delegation would violate the Fourteenth Amendment, because in Alabama the local delegations are **gatekeepers** for all local acts affecting their respective counties. The affidavits of the Clerk of the House and the Secretary of the Senate affirm that "[l]ocal legislation **originates** with the members of a local delegation, who **must**

approve that legislation before it goes to one of the four Local Legislation Committees in the Senate," Doc. 76-1 at 2, or "to the House floor," Doc. 76-2 at 2 (emphasis added). Once the local bill reaches the floor "it is often uncontested as a matter of local courtesy." Docs. 76-1 at 3, 76-2 at 2. So, even if the entire Legislature is responsible for passing a local act, and even if local courtesy has been violated only on rare occasions ("objections to local legislation are uncommon," Doc. 76 at 13), the local delegation has "ultimate responsibility" for getting the bill through the starting gate.

In Alabama, the statutory assignment of legislators to counties makes "county legislative delegations constitute elected governmental bodies to which the constitutionally mandated 'one person, one vote' requirement applies...." *Vander Linden v. Hodges*, 193 F.3d 268, 270 (4th Cir. 1999). While the ultimate authority of the entire Legislature over local acts saves the **internal** system of local delegation gate-keeping and local courtesy from violating equal protection, **statutes** that empower local legislative delegations to perform important county governmental functions must comply with the Fourteenth Amendment. *DeJulio v. Georgia*, 127 F.Supp.2d 1274, 1296-97 (N.D. Ga. 2001), aff'd 290 F.3d 1291 (11th Cir.), cert. denied, 537 U.S. 948 (2002).

The statutes challenged in this action, Acts 2012-602 and 2012-603, do not

specify the governmental powers that county legislative delegations may exercise, but they designate the voters who will have the power to elect members of those county delegations. The entire Legislature may retain the power to approve local acts, but once the redistricting statutes have passed, the voters who will elect members of the county delegations are codified for the next decade. Defendants assert that plaintiffs to date have not identified the statutes that assign Alabama legislators to their county delegations. Doc. 76 at 15 n.3. The statutes that do so are Acts 2012-602 and 2012-603. Local delegations are composed of those members of the House and Senate "whose districts include all or part of a county." Docs. 76-1 at 2-3, 76-2 at 2.

The Eleventh Circuit in *DeJulio* distinguished the Fourth Circuit's holding in *Vander Linden* by pointing out that statutes enacted by the South Carolina Legislature locked in certain powers exercised by their local legislative delegations, while all powers of the local delegations in Georgia's Assembly were exercised through informal, non-binding local courtesy procedures, which were merely "internal management tools," 127 F.Supp.2d at 1300, "a form of political compromise," id. at 1298-99. But neither *Vander Linden* nor *DeJulio* addressed the question presented in the instant case: whether **statutes** that assign legislators to counties they will represent must respect the equal voting rights of county

residents.

Statutes that assign legislators to county delegations impact the equal protection rights of county residents much more than do statutes that assign particular governmental powers to those delegations. As the district court in *DeJulio* wrote, "we as citizens probably should fear the consequences that might result if legislators from localities not affected by a particular local bill refused to consider the views of those legislators whose constituents are affected." 127 F.Supp.2d at 1300. For example, the 155,279 non-residents whose registered voters help elect Jefferson County's House delegation, Doc. 68-1 at 23, added to the 428,101 non-residents whose registered voters help elect Jefferson County's Senate delegation, id. at 25, almost equal the entire 658,466 population of Jefferson County. Doc. 60-5 at 2. This was one important factor in the failure of Jefferson County's legislative delegation to re-enact its occupational tax, a county delegation impasse that contributed to the county's bankruptcy. Doc. 35 at 12; Doc. 60-4 at 3.

The Fourteenth Amendment issue in amended Count III has not been squarely addressed in the caselaw to date. But, as the three-judge court in Georgia intimated recently, the conclusion plaintiffs assert here is unavoidable. *Larios v. Cox*, 314 F.Supp.2d 1357, 1370 (N.D. Ga. 2004) (3-judge court) ("having a district intrude across county (or municipality) lines gives a legislator whose district

predominately lies outside that county (or municipality) a vote on issues that may well not directly affect the majority of the legislator's constituents"). A statute authorizing non-residents to vote for county commissioners obviously would be unconstitutional. Under Alabama's state constitutional system, which has been designed to restrict home rule, the county's local legislative delegation has more power over local government policies than do the county commissioners. So there is even more injury to the equal voting rights of county residents when statutes unnecessarily permit non-residents to vote for members of the county's legislative delegation.

B. The State's Defenses of Guaranteeing Safe Black Districts, a ± 1% Deviation Cap, and Incumbency Protection Cannot Justify Violating County Residents' Voting Rights.

The State defendants do not contend that a partisan interest in preserving statewide Republican control of the Legislature can justify the excessive and indiscriminate splits of county boundaries in Acts 2012-602 and 2012-603.[2] Nor

[2] The State's response to plaintiffs' second motion for partial summary judgment says the 2012 Senate plan splits 33 counties and the 2012 House plan splits 50 counties. Doc. 76 at 4-5. That may be true, but some of those county splits were necessary to comply with the one-person, one-vote rule. Plaintiffs' statement of facts counts 49 of Alabama's 67 counties that have been split **more than is necessary** based on their populations, including 44 unnecessary county splits in the House plan and 31 unnecessary splits in the Senate plan. Doc. 68-1 at 6. Defendants do not dispute plaintiffs' count of **unnecessary** county splits. Incidentally, defendants' exhibit showing county splits, Doc. 76-7, is based on

do they present evidence that contradicts the public statements of Republican leaders cited by plaintiffs admitting that this was a primary goal of the House and Senate redistricting plans. E.g., Doc. 66-2. The explanations they do advance fail as a matter of law to justify the violation of county residents' federally protected equal voting rights. According to the State's response and the affidavits of the co-chairs of the Legislative Reapportionment Committee (LRC), "the State put compliance with the Voting Rights Act and population equality ahead of preserving county lines...." Doc. 76 at 11; Docs. 76-4 and 76-5.

(1) *The Legislature's stated policy of drawing districts that guarantee the ability of African Americans to elect candidates of their choice is not required by the Voting Rights Act and may violate the Fourteenth Amendment.*

The State openly declares that the drafters of Acts 2012-602 and 2012-603 "started with the black-majority districts and tried to ensure that the new districts 'essentially **guaranteed** that the African-American community could elect the candidate of its choice in that district.'" Doc. 76 at 6 (quoting Doc. 76-4 at 4 and Doc. 76-5 at 3) (emphasis added). In an earlier brief the State also said it "needed to maintain the relative strength in the minority population in each of those districts

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McClendon House Plan 2. Act 2012-602 enacted McClendon House Plan 3, but we do not believe this error makes any material difference in the number of county splits.

in order to comply with Section 5. And, that is what it did." Doc. 30 at 39. But, as plaintiffs showed in their reply to defendants' motion for judgment on the pleadings, neither Section 2 nor Section 5 of the Voting Rights Act, 42 U.S.C. §§ 1973 and 1973c, requires maintaining the high percentages of black voting age populations that frequently appear when new census data are applied to the old, usually under-populated majority-black districts. Nor does the Voting Rights Act require **guaranteeing** black voters the ability to elect the candidates of their choice. Doc. 32 at 13-14 (citing *Texas v. United States*, 831 F.Supp.2d 244, 260 (D. D.C. 2011) (3-judge court)).

In fact, the State's admission that it began the House and Senate plans by drawing districts that maximized the black majorities at levels that guaranteed blacks' ability to elect may violate the Fourteenth Amendment under the *Shaw v. Reno*, 509 U.S. 630 (1993), line of cases.

> The Court has specified that those who claim that a legislature has improperly used race as a criterion, in order, for example, to create a majority-minority district, must show at a minimum that the "legislature subordinated traditional race-neutral districting principles ... to racial considerations." [*Miller v. Johnson*, 515 U.S. 900,] 916 [(1995)] (majority opinion). Race must not simply have been "*a* motivation for the drawing of a majority-minority district," *Bush v. Vera*, 517 U.S. 952, 959 (1996) (O'CONNOR, J., principal opinion) (emphasis in original), but "the '*predominant* factor' motivating the legislature's districting decision," [*Hunt v.] Cromartie*, [526 U.S. 541,] 547 [(1999)] (quoting *Miller, supra*, at 916) (emphasis added) [(internal quotation marks omitted)]. Plaintiffs must show that a

> facially neutral law "is unexplainable on grounds other than race." *Cromartie, supra*, at 546 (quoting *Shaw I*, 509 U.S., at 644, in turn quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)).

Easley v. Cromartie, 532 U.S. 234, 241-42 (2001).

The House and Senate plans the Alabama Legislature drew after the 2000 census survived a *Shaw* challenge by demonstrating that partisan politics, not race, was the predominant purpose for their majority-black districts.

> Plaintiffs have proffered no evidence to refute the abundant evidence submitted by the defendants and defendant-intervenors which establishes that black voters and Democratic voters in Alabama are highly correlated; that the Legislature utilized recent election returns to ascertain actual voter behavior; and that Acts 2001-727 and 2001-729 were the product of the Democratic Legislators' partisan political objective to design Senate and House plans that would preserve their respective Democratic majorities.

Montiel v. Davis, 215 F.Supp.2d 1279, 1283 (S.D. Ala. 2002) (3-judge court) (footnote omitted). The defendants in the instant case do not contend – indeed, they deny – that the majority-black districts in Acts 2012-602 and 2012-603 were packed for the partisan political purpose of preserving their Republican majorities. Even if they advanced such a partisan explanation, it could not justify violating the equal voting rights of county residents.

(2) *The Legislature's arbitrary restriction of population deviations to ± 1% cannot justify violating the federal constitutional voting rights of county residents.*

Defendants wrongly contend that this Court has already decided the question presented by amended Count III, whether it is constitutionally permissible to dilute the ability of county residents to select their own county legislative delegations by imposing a narrower statewide population deviation restriction than is required by the precedents of the Supreme Court and this Court. What this Court held in dismissing Count I of the ALBC complaint for lack of subject-matter jurisdiction addressed a different question regarding the Legislature's ± 1% restriction:

> The complaint [in Count I] filed by the Black Caucus alleges that, because the Legislature chose to maintain population deviations at below two percent, "[the districts] violate the one-person, one-vote requirement of the Equal Protection Clause by restricting allowable population deviations more than is practicable to comply with the whole-county provisions in the Alabama Constitution and by failing to comply with those whole-county provisions to the extent practicable." See Ala. Const. Art. IX, §§ 198–200. In other words, the complaint filed by the Black Caucus alleges that the new districts have too little deviation in population equality in violation of the state constitution. Nothing in these allegations suggests that the new districts violate the guarantee of one-person, one-vote under the Fourteenth Amendment.
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> The odd complaint of the Black Caucus that the new districts are too equal in population fails to address a concern of the Fourteenth Amendment.

Doc. 53 at 5-6. Amended Count III presents not the question whether the ± 1% restriction violates either state law or the **statewide** equal protection rights of Alabama voters, but whether the State can justify diluting the equal voting rights of **county** residents by narrowing permissible population deviations more than federal

law requires. The answer is no, and the State does not respond to plaintiffs' authorities which show that diluting county residents' ability to elect their county legislative delegations cannot be justified by making the populations in every House and Senate district more nearly equal than they need to be. Doc. 67 at 9-11.

Instead, defendants attempt to justify the many unnecessary county splits in Acts 2012-602 and 2012-603 by noting that the 2001 House and Senate plans had almost as many splits. Doc. 76 at 18. But the 2001 plans were never examined by a state or federal court for compliance with the equal protection standard in Count III of the ALBC's amended complaint, and we doubt those plans could have survived such a challenge. Protecting Democratic majorities in 2001 would have been no more a justification for diluting county residents' voting rights than is protecting Republican majorities in 2012. The House and Senate plans sponsored by the ALBC in HB 16 and SB 5 provide incontrovertible evidence that the partisan interests of incumbent legislators likely subordinated the voting rights of county residents in 2001 just as they have done in 2012.

The State erroneously contends that it can choose to ignore the constitutional leeway federal law gives it to protect the equal voting rights of county residents and restrict allowable population deviations statewide as near absolute zero as it wants to do. Senator Dial, Co-Chair of the LRC, says: "We also tried to preserve

communities of interest, which sometimes includes county lines, but that was subject to compliance with the Voting Rights Act and with the ±1 % population deviation. I reminded members that we're State Senators, not county or district Senators." Doc. 76-4 at 4-5. Well, in the Alabama Legislature, members of the House and Senate represent **both** their counties and the state as a whole. So when substantial equality is presumptively satisfied by ± 5% deviations, and when even much higher deviations are permitted to protect county integrity, *Brown v. Thomson*, 462 U.S. 835, 842 (1983), overall population deviations like the 165% in Jefferson County's Senate delegation (428,101 + 658,466 / 658,466) violate the Equal Protection Clause. See page 6 *supra*.

(3) *The interests of incumbents cannot justify violating the federal constitutional voting rights of county residents*.

The State and the LRC co-chairs say that protecting the interests of incumbent legislators explains how many of the House and Senate districts were drawn. Doc. 76 at 6; Doc. 76-4 at 5 ("I tried to treat each of them fairly and to give them a district that they could run in."); Doc. 76-5 at 6 ("In putting the House plan together, I offered each member an opportunity to tell me what he or she wanted."). The State does not dispute Co-Chair McClendon's statement in the press that "[l]egislators those whose re-election is most affected by moving district lines will likely rate their political survival ahead of county lines." Doc. 66-3 at 2.

Just as the protection of incumbents cannot justify more than minor **statewide** population deviations, *Larios v. Cox*, 300 F. Supp. 2d 1320, 1347-49 (N.D. Ga. 2004), aff'd sub nom *Cox v. Larios*, 542 U.S. 947 (2004), so incumbent interests cannot justify the wholesale violation of **county** residents' equal voting rights. And, "[i]n general, the lower courts have similarly listed only the prevention of contests between incumbents, rather than some broader notion of incumbency protection, as a legitimate state goal supporting population deviations." 300 F.Supp.2d at 1348 (citations omitted).

Further, here, as was the case in *Larios*, "the policy of protecting incumbents was not applied in a consistent and neutral way." 300 F.Supp.2d at 1347. Only Democratic incumbents were pitted against each other. As a result of HD 53 being moved from Birmingham to Huntsville, Doc. 76-5 at 4, Democratic Representatives Newton and Givhan both were placed in HD 60. Doc. 60-27. As a result of HD 73 being moved from Montgomery to Shelby County, Representatives John Knight and Joe Hubbard both were placed in HD 77. Doc. 60-37.

Conclusion

Partisan gerrymandering is a fact of life, and there may be nothing wrong with it so long as it operates within overarching state and federal districting rules

and respects the equal voting rights of residents at both the statewide and county levels. Acts 2012-602 and 2012-603 flagrantly and openly subordinate these legitimate state and federal interests to the personal and partisan interests of incumbent legislators. They violate the Equal Protection Clause. Plaintiffs' second motion for partial summary judgment should be granted.

Respectfully submitted this 4th day of March, 2013.

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CERTIFICATE OF SERVICE

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