

No. 13-395

IN THE
Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, et al.,
Appellants,

v.

STATE OF ALABAMA, et al.,
Appellees.

On Appeal from the United States District Court for
the Middle District of Alabama

**BRIEF OPPOSING THE JOINT MOTION TO
DISMISS OR AFFIRM**

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BRIEF OPPOSING THE JOINT MOTION TO DISMISS OR AFFIRM

The central constitutional question presented by this appeal is whether Alabama has violated the equal protection clause of the Fourteenth Amendment by adopting an apportionment that produces large and unnecessary population deviations with respect to local legislative delegations that for more than a century have exercised county-level legislative power. The upshot of the apportionment challenged here is that the members of local legislative delegations represent vastly different numbers of constituents and that, in an arbitrarily selected number of counties, nonresidents are able to exercise significant influence over county-level legislation, thereby diluting the voting power of county residents.

Contrary to the State's arguments in its Motion to Dismiss or Affirm, this Court has jurisdiction to decide an important question of constitutional law: whether Alabama can justify the population disparities within local delegations – which clearly would violate the equal protection clause if it had adopted them for stand-alone county legislatures, *see Avery v. Midland County*, 390 U.S. 474, 485-86 (1968) – on the grounds that it was seeking a degree of population equality with respect to state legislative districts beyond that required by this Court as a matter of federal constitutional law. That issue is ripe for decision and appellants have standing to raise it. Moreover, that issue warrants full briefing and plenary consideration by this Court.

1. This Court has jurisdiction over this appeal. Congress has authorized appeals to this Court “from

an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action” required to be heard by a three-judge district court. 28 U.S.C. § 1253. As a challenge to a statewide legislative apportionment, this case required a three-judge court. 28 U.S.C. § 2284. Appellants expressly moved the three-judge court to “[e]nter a preliminary and permanent injunction” against the challenged plan on the grounds that the structure of the local legislative delegations could not be justified. Doc. 68-1 at 42; *see also* Doc. 107 (moving for reconsideration of the denial of the motion for a permanent injunction); Doc. 108 (separate motion for entry of a permanent injunction). The three-judge court squarely denied appellants’ “motion for entry of a permanent injunction.” J.S. App. 2; *id.* at 62. Thus, all of the elements of Section 1253 are satisfied.

Appellees seek to avoid the plain language of Section 1253 by invoking this Court’s decision in *Goldstein v. Cox*, 396 U.S. 471 (1970). That reliance is misplaced. *Goldstein* stands only for the unremarkable proposition that when a litigant has not expressly sought preliminary injunctive relief and when a three-judge court therefore has not entered an order denying that relief, the prerequisites of Section 1253 have not been satisfied and there can be no interlocutory appeal.

Goldstein involved a challenge to a provision of New York State’s surrogacy law. The plaintiffs’ complaint had sought both “temporary and permanent injunctive relief against further operation of the statute.” *Id.* at 473. When they moved for summary judgment, the plaintiffs simply “requested

‘the relief demanded in the complaint,’” *id.* at 474, but they “filed no separate application for a preliminary injunction.” *Id.* at 479. The three-judge court “denied summary judgment, but did not dismiss the action.” *Id.* at 474. Indeed, it did not resolve plaintiffs’ challenge. *See id.* at 479. Presumably, then, it contemplated further proceedings with respect to that claim. Under those circumstances, this Court held that it lacked jurisdiction because the district court had “decided no question of preliminary injunctive relief,” *id.* at 476, the precondition for exercising appellate jurisdiction over an interlocutory appeal.

The present case differs along all those dimensions. Here, appellants did specifically move for both preliminary and permanent injunctive relief. Here, the three-judge court expressly denied those motions. J.S. App. 2, 62. And here, the three-judge court reached, and decided, the merits of appellants’ constitutional claim. *Id.* at 37-62.

This Court’s decision in *MTM, Inc. v. Baxley*, 420 U.S. 799 (1975), confirms that when a three-judge federal court denies interlocutory or permanent injunctive relief, this Court has jurisdiction “where such order rests upon resolution of the merits of the constitutional claim presented below.” *Id.* at 804. Given the final resolution of appellants’ constitutional claims,¹ the State has provided no reason to ignore the plain language of Section 1253.

¹ Nothing about the ongoing proceedings with respect to the remaining Voting Rights Act-based claims will undercut the

2. Contrary to the State’s argument, MDA 11-15, this appeal is ripe for resolution. The State does not deny that Alabama has an unbroken century-long use of local delegations to exercise county-level legislative power. *See* J.S. 4-6; J.S. App. 66-69. To be sure, it is always *possible* that some future legislative session will abandon that “unwritten law of county governance,” *id.* at 69, and adopt new formal rules, or even set in motion constitutional revision to provide home rule. But *those* possibilities, and not the continuance of the existing system, are the “contingent future events that may not occur as anticipated, or indeed may not occur at all.” MDA 12 (quoting J.S. App. 22). Neither the majority below nor the State before this Court has provided any basis to doubt the continued use of local delegations to perform the core task of county-level legislation, this time with delegations possessing significant and unjustifiable population deviations.

3. Contrary to the State’s argument, MDA 15-18, appellants have standing. To the extent that the State’s argument here does not simply repeat its unpersuasive ripeness argument, it rests on a fundamental misunderstanding of what redressability means.

The core of appellants’ constitutional claim is that Alabama, having chosen to place county-level legislative authority in state legislators whose districts contain county territory (through the

finality of the three-judge court’s rejection of appellants’ constitutional challenge. *See also infra* at 6-7.

mechanism of local legislative delegations), cannot *unnecessarily* disregard county lines when the consequence of that disregard is to create local delegations whose members represent vastly different numbers of county residents. Appellants acknowledge that compliance with one-person, one-vote at the state legislative level may require *some* splitting of counties and *some* inclusion of county nonresidents in *some* legislative districts. What they challenge is the wholesale disregard of county boundaries when compliance with federal requirements for one-person, one-vote *could* have been achieved without the splitting. Thus, the injury appellants suffer will be redressed if Alabama adopts a plan that reduces county splitting and inclusion of county nonresidents to rational levels necessary to comply with one-person, one-vote. Appellants need not show that the deviations will be eliminated altogether.

4. The question whether Alabama's system of dual-purpose legislators (performing both state and local governmental functions) satisfies the equal protection clause warrants plenary consideration by this Court. This Court has recognized that too rigid an insistence on population equality across districts can undercut important representational values. *See Tennant v. Jefferson Cnty. Comm'n*, 133 S. Ct. 3 (2012) (per curiam); *see also Cox v. Larios*, 542 U.S. 947 (2004) (per curiam) (Stevens & Breyer, JJ., concurring) (explaining how one-person, one-vote interacts with political considerations). In this case, in the guise of pursuing with a newfound fervor a stricter form of population equality, Alabama adopted an apportionment that exacerbates the tension this

Court long has recognized between one-person, one-vote and respect for county boundaries. *See* J.S. 6-7, 20-21.

The State acknowledges, as it must, that the apportionment at issue here effectively “giv[es] people who are affected by another jurisdiction’s laws a say in how that jurisdiction will be governed” by “occasionally extending the franchise to affected persons beyond a jurisdiction’s borders.” MDA 23. The State may well be correct that under some circumstances states can permit voting by nonresidents. But the question presented in this case is whether Alabama’s particular choice here – which gives such voting power to arbitrary blocks of county nonresidents like the 40,000-plus residents of Shelby County who live in House District 43 and thus participate in the Jefferson County local delegation (but not the other 160,000 or so Shelby County residents), *see* J.S. 10 – passes constitutional muster or is instead “a crazy quilt without rational basis” violative of the equal protection clause. *Baker v. Carr*, 369 U.S. 186, 254 (1962) (Clark, J., concurring). That this Court has not yet given full consideration to this question is a reason for plenary review, not for summary disposition.

5. This Court should not delay noting probable jurisdiction to await the ongoing Section 2 proceedings. A resolution by the three-judge district court of the still-pending race discrimination issues will not moot the one-person, one-vote issue presented in this appeal. If appellants prevail here, Alabama will have to reapportion its state legislature to restore the integrity of county boundaries to the extent practicable. Thus, even if appellants were to

prevail on the claims pending in the district court that some or all of the majority-black House and Senate districts have been unconstitutionally and illegally packed and that black voting strength has been diluted in some county legislative delegations, permissible remedies will depend on the outcome of this appeal. And redrawing the few districts that dilute black voting strength will leave unaddressed the one-person, one-vote rights of all county residents in the vast majority of other House and Senate districts.

The order on appeal here, which granted the State's motion for partial summary judgment, finally resolved the threshold one-person, one-vote claims. If this Court reverses that judgment, it will moot all remaining issues involving the 2012 legislative redistricting plans. Both the House and Senate plans will require substantial revision, including redrawing most if not all of the majority-black districts at issue in the pending proceedings. Indeed, the three-judge district court may well be withholding a decision on the race discrimination claims to await action in this Court.

With primary elections set for June 2014, this Court should note probable jurisdiction and set this case for argument this Term.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction.

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Respectfully submitted,

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