

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

ALABAMA LEGISLATIVE BLACK *
CAUCUS; BOBBY SINGLETON; *
ALABAMA ASSOCIATION OF BLACK *
COUNTY OFFICIALS; FRED *
ARMSTEAD, GEORGE BOWMAN, *
RHONDEL RHONE, ALBERT F. *
TURNER, JR., and JILES WILLIAMS, JR., *
individually and on behalf of others *
similarly situated, *

Plaintiffs,

v.

THE STATE OF ALABAMA; BETH *
CHAPMAN, in her official capacity as *
Alabama Secretary of State, *

Defendants.

DEMETRIUS NEWTON et al.,

Plaintiffs,

v.

THE STATE OF ALABAMA et al.,

Defendants.

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* Civil Action No.
* 2:12-CV-691-WKW-MHT-WHP
* (3-judge court)
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* Civil Action No.
* 2:12-cv-1081-WKW-MHT-WHP
* (3-judge court)
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**ALBC PLAINTIFFS’ SUPPLEMENTAL BRIEF RESPONDING TO
ORDER REGARDING RIPENESS AND STANDING ISSUES**

Plaintiffs Alabama Legislative Black Caucus et al., through undersigned counsel, respond as follows to this Court's order entered June 28, 2013, Doc. 130, inviting the parties to file supplemental letter briefs addressing certain issues of ripeness and standing set out in said order. The order asks these questions:

[1] Does the local delegations system exist subject to the confines of Section 48.01 of the Article IV of the Alabama Constitution, which, by its express terms, discusses matters like the "appointment of standing committees" and the selection of the "president pro tempore," but does not mention local delegations, which all parties seem to agree are nevertheless a component of the Legislature? See Ala. Const. Art. IV, § 48.01.

[2] And if the local delegations system is subject to this organizational requirement, would we be within our constitutional authority to deem the local delegations system to exist in the next Legislature before the organizational session?

[3] Would it be constitutionally sufficient for us to determine that the system is at least more likely than not to exist in that Legislature?

Doc. 130 at 4-5. The short answer to question [1] is no. The short answer to question [2] is yes, this Court does have constitutional authority to deem the local legislative "system" to exist before the next organizational session and indefinitely. The short answer to question [3], therefore, is yes.

A. The Rules and Committee Structures of the House and Senate Have No Power Either To Require or To Prohibit the Gatekeeping and Local Courtesy Customs of Alabama's Informal Local Legislative Delegation System.

It is an elementary principle that no member of the Alabama Legislature can

be compelled to introduce or not to introduce a bill or to vote yes or no or to withhold his or her vote on any bill that comes before the Legislature. No one would suggest otherwise, and this principle of a legislator's freedom and autonomy is reflected in the Alabama Constitution. E.g., Ala. Const., Art. IV, § 55 (“Any member of either house shall have liberty to dissent from or protest against any act or resolution which he may think injurious to the public, or to an individual, and have the reason for his dissent entered on the journal.”); Ala. Const., Art. IV, § 56 (“Members of the legislature shall, in all cases, except treason, felony, violation of their oath of office, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house shall not be questioned in any other place.”).

The current rules of the House and Senate do not require local bills to be introduced solely by members of a county's local delegation and do not require other members to vote for local bills approved by a county's local delegation, because there is no power to mandate or control by rule such conduct by legislators. As the affidavits of the clerks of the House and Senate plainly state, it is only as matters of “courtesy” and “custom” that local bills must originate with and be approved by local delegations, and that other members usually do not

contest local bills approved by local delegations, Docs. 76-1 and 76-2. A “member is free to oppose local legislation on the floor whether that Senator [House member] is a member of the local delegation or not.” Doc. 76-1 at 3; Doc. 76-2 at 2. These local delegation customs are deeply rooted, not only in the living memory of the affiant clerks, but in the proceedings of the 1901 Alabama Constitutional Convention. Doc. 88 at 3 (“In the words of a delegate to the Alabama Constitutional Convention of 1901, the lawmaker was a ‘czar’ who had ‘dictatorial powers about every matter of legislation that affects his county.’”) (citation omitted.) Indeed, these customs likely go back to the Alabama’s beginning, since every Alabama constitution since 1819 has apportioned seats in both houses of the Legislature by counties. Doc. 32, Appendix A.

No House or Senate rule or committee structure or assignments adopted in the 2015 organizational session of the Legislature can compel an end to – or even any change in – the local delegation customs the parties now agree are in place. Neither the President Pro Tem of the Senate, the Speaker of the House, nor any standing committee can tell legislators what local bills they may introduce or not introduce, how to vote or not to vote. No standing committee dealing with local legislation can tell legislators not to vote for local bills approved by members of a

county delegation. Change in these informal customs can only be brought about by the common consent of all members of the Legislature, and that is highly unlikely to happen. After two centuries of practice, it is hard to imagine what possibly could replace the local delegation customs. The answer to the question in Judge Thompson's concurring opinion, Doc. 131, is that local delegations do not cease to exist and need not be recreated during the Legislature's organizational session. The formal rules and standing committees of the Legislature have no power over and have no impact on the local delegation system that has operated informally in Alabama since time immemorial.

B. This Court Ought Not Attempt To Interfere With the Local Delegation Customs.

Any change in the local delegation customs would not be desirable and might be unlawful. As this Court's order notes, plaintiffs have repeatedly stated they do not contend that the local delegation customs themselves, either the gatekeeper custom or the local courtesy custom, are unconstitutional. To the contrary, given the absence of home rule powers for counties in the Alabama Constitution, eliminating the ability of legislators to control local laws affecting the county they represent would further dilute the ability of county residents to govern themselves and would subject them to tighter control by central state government in Montgomery.

“This general 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.’” *Knight v. Alabama*, 458 F.Supp.2d 1273, 1284-85 (N.D. Ala. 2004), aff’d 476 F.3d 1219 (11th Cir.), cert. denied, 127 S.Ct. 3014 (2007) (citation omitted). Doing away with the local delegation customs, even if that were possible, would impair “the way blacks are gaining true political power in Alabama....” Doc. 88 at 3 (quoting Advisory Commission on Intergovernmental Relations, MEASURING LOCAL DISCRETIONARY AUTHORITY (Washington, DC, November 1981) at page 31).

All county residents and local elected officials have an abiding interest in preserving and even strengthening the local delegation customs. That is obvious from the repeated pleas of citizens and officials at the hearings held around the state by the Legislative Reapportionment Committee, urging the Legislature to avoid dividing their counties unnecessarily among House and Senate districts and to limit the number of members in their county delegations. In general, the informal local delegation “system” is good democratic policy. As the district court in Georgia said: “A legislative rule or practice that requires or encourages

consensus on the part of representatives and senators of those citizens most affected by a local bill before the full legislature votes on the bill is not unconstitutional. As a matter of fact, 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.” *DeJulio v. Georgia*, 127 F.Supp.2d 1274, 1300 (N.D. Ga. 2001), aff’d 290 F.3d 1291 (11th Cir.), cert. denied, 537 U.S. 948 (2002).

C. The Issues Presented By the ALBC Plaintiffs’ Equal Protection Facial Challenge To the House and Senate Plans Are Ripe For Review.

The facts defining the Alabama Legislature’s informal local delegation system are concretely set forth in ¶¶ 4-11 and 16-25 of defendants’ amended brief supporting their motion for partial summary judgment, Doc. 98. Even if the House and Senate rules approved in the 2015 organizational session modified or eliminated the assignment of local bills to standing committees, that would have no effect on the local delegations’ customary gatekeeping function or on the informal courtesy other legislators usually extend to the local bills approved by county delegations.

So the impact the local delegation customs have on the way the districts in Acts 2012-602 and 2012-603 violate the one-person, one-vote rights of county residents is not “[a] hypothetical threat.” *United Public Workers of America v.*

Mitchell, 330 U.S. 75, 89-90 (1947). Plaintiffs' Equal Protection claim meets the fitness test for ripeness, because the facts about the operation of the local delegation customs are final and definite and do not "depend[] upon facts that may not yet be sufficiently developed." *Harrell v. The Florida Bar*, 608 F.3d 1241, 1258 (2010) (quoting *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 535 (1st Cir. 1995)). They do not rest on contingent events that may never occur. *Texas v. United States*, 523 U.S. 296, 300 (1998). To the contrary, it is this Court's suggestion that the leadership of the Legislature could somehow do away with the local delegation customs, which have been observed for generations, that rests on events that are not just hypothetical and contingent but unrealistic. Even if the Legislature adopted a rule that required local bills to be introduced by members from other counties or that forbade deference to the wishes of the county's representatives, there would be no way to enforce such a rule, and no way to tell if Senators and House members obeyed the rule.

Moreover, this Court's order asks the wrong questions about what hardships the parties would suffer if plaintiffs' Equal Protection claims are not addressed promptly. The ALBC plaintiffs do not bring these claims on behalf of themselves as candidates for the Legislature or for their county commissions, but for themselves as voters and as certified representatives of the class of county residents

whose votes are diluted by the hash Acts 2012-602 and 2012-603 have made of their county boundaries and local delegations.

If the June 2014 primary elections are allowed to proceed under the challenged plans, the hardship suffered by residents of counties unnecessarily divided among House and Senate districts will be the denial of “one of the most fundamental rights of our citizens: the right to vote,” *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009), in this case the constitutional right to an equal and undiluted vote for the members of their county delegations. There is no more serious hardship than that. And the longer this Court waits to address plaintiffs’ Equal Protection claims and vindicate their equal voting rights, the more likely there will be insufficient time for the Legislature, even in special session, to enact new redistricting plans that comply with the Constitution of the United States (and the Constitution of Alabama). The ALBC plaintiffs’ Equal Protection claims are not only ripe for review, they require this Court’s urgent attention.

D. The ALBC Plaintiffs Have Standing To Bring Their Equal Protection Claims.

The concerns expressed in this Court’s order about plaintiffs’ standing, as noted above, appear to turn on two misconceptions: (1) that plaintiffs’ real beef is with the informal system of local delegations, and (2) the further misconception that anything done in the next organizational session of the Legislature can prohibit

members of the House and Senate from continuing their customs of deference and courtesy to local delegations. Given the restrictions that the white supremacist 1901 Alabama Constitution has placed on county home rule, the continuance of a fairly apportioned and informally observed local delegation system may be the best hope of self-governance for county residents. The legislative malfunction, plaintiffs allege, is not the local delegation custom – which constitutes good legislative practice, but the redistricting plans that deny county residents an equal vote for the members of their county delegations.

When the ALBC plaintiffs’ Equal Protection claims are viewed correctly, their Article III standing is evident. Their injury-in-fact, the dilution of county residents’ votes, is fully materialized in Acts 2012-602 and 2012-603. The system of customary deference to local delegations has long been in place, was never “adopted” by rules of the Legislature or by the creation of standing committees, and cannot be amended by whatever rules are adopted in the next organizational session. Plaintiffs’ injury is directly traceable to the county-busting districts that allow nonresidents to elect members of their county delegations. The violation of plaintiffs’ one-person, one-vote rights would be redressed by the requested injunction, which would prohibit enforcement of the challenged statutes and position this Court to order its own House and Senate plans in effect if the

Legislature failed timely to enact new plans that split counties between districts only where necessary to satisfy substantial statewide equality of district populations.

Conclusion.

The ALBC plaintiffs' facial Equal Protection challenge to Acts 2012-602 and 2012-603 is ripe for review by this Court, and plaintiffs have Article III standing to prosecute these claims.

Respectfully submitted this 9th day of July, 2013.

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CERTIFICATE OF SERVICE

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