

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

ALABAMA LEGISLATIVE BLACK)
CAUCUS, *et al.*,)
)
Plaintiffs,)
)
v.)
)
THE STATE OF ALABAMA, *et al.*,)
)
Defendants.)

CASE NO. 2:12-CV-691
(Three-Judge Court)

ALABAMA DEMOCRATIC)
CONFERENCE, *et al.*,)
)
Plaintiffs,)
)
v.)
)
THE STATE OF ALABAMA, *et al.*,)
)
Defendants.)

CASE NO. 2:12-CV-1081
(Three-Judge Court)

**CONDITIONAL MOTION TO CERTIFY QUESTIONS
TO THE SUPREME COURT OF ALABAMA**

To the extent that the Court believes resolution of this case requires an authoritative interpretation of state law, the State of Alabama, Governor Bentley, Secretary of State Merrill, Sen. Dial, Sen. McClendon, and Rep. Davis respectfully move this court to certify to the Supreme Court of Alabama questions concerning what force the county-splitting restrictions in the Alabama Constitution retain, if any, in light of the federal Constitution’s demand “that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.” *Reynolds v. Sims*, 377 U.S. 533, 577 (1964).

1. The ALBC Plaintiffs have repeatedly focused on county-splitting during the course of this litigation, *see e.g.* Doc. 1 at ¶¶ 2-4, 32-39, 46-51, 54, 57; Doc. 256 at 7, 12, 15, 72, and the ADC Plaintiffs have now joined in, Doc. 258 at 19, 33. Plaintiffs do not deny that some county splits are “necessary” to comply with the constitutional one-person one-vote standard, but there is currently no way of distinguishing a “necessary” county split from one that is unnecessary.

2. The Supreme Court of Alabama has recognized that the county-splitting prohibition for the Senate—“No county shall be divided between two districts,” Ala. Const. Art. IX, § 200¹—must yield to federal law, though the extent to which it must do so is uncertain. *See Rice v. English*, 835 So.2d 157, 164 (Ala. 2002) (“While the Rice plaintiffs rely on § 200, they concede, as they must, that, notwithstanding the clear prohibition of § 200, disregard of county lines is necessary to accommodate enforcement of the United States Constitution.”).

3. There is no similar county-splitting prohibition for the Alabama House. Instead, the Constitution provides for House members to be apportioned to the counties, rather than for the creation of House Districts. Ala. Const. Art. IX, § 198 (“The members of the house of

¹ In its entirety, Ala. Const. Art. IX, § 200 provides:

It shall be the duty of the legislature at its first session after taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of senators, and to divide the state into as many senatorial districts as there are senators, which districts shall be as nearly equal to each other in the number of inhabitants as may be, and each shall be entitled to one senator, and no more; and such districts, when formed, shall not be changed until the next apportioning session of the legislature, after the next decennial census of the United States shall have been taken; provided, that counties created after the next preceding apportioning session of the legislature may be attached to senatorial districts. *No county shall be divided between two districts*, and no district shall be made up of two or more counties not contiguous to each other.

Ala. Const. Art. IX, § 200 (emphasis added).

representatives shall be apportioned by the legislature among the several counties of the state” and “each new county shall be entitled to one representative”²; Ala. Const. Art. IX, § 199 (“apportion them among the several counties of the state” and “each county shall be entitled to at least one representative”)³; *see also* Ala. Const. Art. IV, § 50 (“The legislature shall consist of not more than thirty-five senators, and not more than one hundred and five members of the house of representatives, to be apportioned *among the several districts and counties*, as prescribed in this Constitution; provided that in addition to the above number of representatives, *each new county hereafter created shall be entitled to one representative.*”) (emphasis added).

4. These same constitutional provisions also emphasize apportionment by population. Ala. Const. Art. IX, § 200 (“which districts shall be as nearly equal to each other in

² In its entirety, Section 198 provides:

The house of representatives shall consist of not more than one hundred and five members, unless new counties shall be created, in which event *each new county shall be entitled to one representative*. The members of the house of representatives *shall be apportioned* by the legislature *among the several counties of the state*, according to the number of inhabitants in them, respectively, as ascertained by the decennial census of the United States, which apportionment, when made, shall not be subject to alteration until the next session of the legislature after the next decennial census of the United States shall have been taken.

Ala. Const. Art. IX, § 198 (emphasis added).

³ In its entirety, Section 199 provides:

It shall be the duty of the legislature at its first session after the taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of representatives and *apportion them among the several counties of the state*, according to the number of inhabitants in them, respectively; provided, that *each county shall be entitled to at least one representative*.

Ala. Const. Art. IX, § 199 (emphasis added).

the number of inhabitants as may be”); Ala. Const. Art. IX, § 198 (“shall be apportioned by the legislature among the several counties of the state, according to the number of inhabitants in them, respectively”); Ala. Const. Art. IX, § 199 (“apportion them among the several counties of the state, according to the number of inhabitants in them, respectively”).

5. And an entirely separate provision provides that “*Representation in the legislature shall be based upon population*, and such basis of representation shall not be changed by constitutional amendments.” Ala. Const. Art. XVIII, § 284 (emphasis added).

6. As the United States Supreme Court has recognized, “Although general provisions of the Alabama Constitution provide that the apportionment of seats in both houses of the Alabama Legislature should be on a population basis, other more detailed provisions clearly make compliance with both sets of requirements impossible.” *Reynolds v. Sims*, 377 U.S. 533, 584 (1964).

7. Accordingly, the Alabama Constitution inherently recognizes a role for population equality in redistricting, and maybe even a preeminent one given Section 284, but simultaneously demands that county lines be respected. Fifty years ago, the Supreme Court of the United States added to that mix the Equal Protection Clause’s one-person one-vote requirement. Taken together, it may be that the county-splitting provisions are null and void. Or, it may be that the county-splitting provisions should be honored to the maximum extent possible while fully complying with the Equal Protection Clause. Or, it may be that some other interpretation is the correct one.

8. Only the Supreme Court of Alabama can authoritatively interpret the state’s Constitution. *Riley v. Kennedy*, 553 U.S. 406, 425 (2008) (“A State’s highest court is

unquestionably ‘the ultimate exposito[r] of state law.’”) (alteration by the Court; *quoting Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)).

9. Similarly, it is the role of the state courts to provide “a limiting construction” of the Alabama Constitution’s county splitting requirements. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008); *see also Gooding v. Wilson*, 405 U.S. 518, 520 (1972) (“Only the Georgia courts can supply the requisite construction, since of course ‘we lack jurisdiction authoritatively to construe state legislation.’”) (*quoting U.S. v. Thirty-seven (37) Photographs*, 402 U.S. 363, 369 (1971)); *cf. Baggett v. Bullitt*, 377 U.S. 360, 375 (1964) (“[T]his Court ordinarily accepts the construction given a state statute in the local courts and also presumes that the statute will be construed in such a way as to avoid the constitutional question presented . . .”).

10. By contrast, this Court cannot authoritatively interpret the Alabama Constitution. As now-Chief Judge Carnes has colorfully explained, “when we [the federal courts] write to a state law issue, we write in faint and disappearing ink.” *McMahan v. Toto*, 311 F.3d 1077, 1079 (11th Cir. 2002) (internal citation and quotation marks omitted).

11. And, of course, this Court has recognized that it lacks the authority to adjudicate any claims that the state Defendants have violated state law. Doc. 53 at 7 (*citing Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984)).

12. Rule 18 of the Alabama Rules of Appellate Procedure provides a mechanism for this Court to ask the Supreme Court of Alabama for an interpretation of state law. In part, it states:

When it shall appear to a court of the United States that there are involved in any proceeding before it questions or propositions of law of this State which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this State, such federal court may certify

such questions or propositions of law of this State to the Supreme Court of Alabama for instructions concerning such questions or propositions of state law, which certified question the Supreme Court of this State, by written opinion, may answer.

Ala. R. App. P. 18(a).

13. The question of the force of the Alabama Constitution's county-splitting provisions need not be resolved to rule in the defendants' favor in this case. All parties acknowledge that some counties must be split. Here, the number of county splits in the 2012 plans is not substantially greater than the splits in the prior plans,⁴ and the splits were not done for the purpose of dividing voters by race but were required by the need to comply with the tighter population deviation and/or for other lawful purposes. In Defendants' view, how to balance competing districting criteria is a matter that should be left to the Legislature. *See Connor v. Finch*, 431 U.S. 407, 414-15 (1977) ("[A] state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality. The federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name.").

14. Nonetheless, given the Plaintiffs' consistent refrain, this Court might determine that it needs to better understand the requirements of the Alabama Constitution to judge whether the Legislature deviated from established redistricting principles in passing the 2012 Acts, insofar as that determination might influence a decision on the federal racial gerrymandering issue. (Of course, to the extent that the remaining force, if any, of the county splitting provisions is an unsettled question of Alabama law, that itself may undermine any argument that failure to

⁴ In 1993, the Legislature split 36 counties in the House and 32 in the Senate; in 2001, the Legislature split 39 counties in the House and 31 in the Senate; and in 2012, the Legislature split 50 counties in the House and 33 in the Senate.

comply with a latter-issued authoritative pronouncement on the matter is indicative of anything, and the defendants reserve the right to so argue.)

15. If the Court concludes that an authoritative interpretation of State law is needed, these are the types of questions it may wish to certify to the Supreme Court of Alabama:

- a. Does the command in Section 200 of the Alabama Constitution that “No county shall be divided between two districts” retain any force in redistricting the Alabama Senate in light of the federal Constitution’s demand “that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable,” *Reynolds v. Sims*, 377 U.S. 533, 577 (1964)?
- b. If the county-splitting restriction in Section 200 of the Alabama Constitution retains force, does the Legislature have discretion to balance the county-splitting prohibition against the command that the population of the resulting districts be “as nearly equal to each other in the number of inhabitants as may be” and the discretion to select an overall population deviation to accomplish that result?
- c. Does the requirement in Sections 198 and 199 of the Alabama Constitution that members of the House of Representative be assigned to counties, rather than districts, retain any force in light of the federal Constitution’s demand “that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable,” *Reynolds v. Sims*, 377 U.S. 533, 577 (1964)?
- d. If the requirements pertaining to counties in Section 198 and 199 of the Alabama Constitution retain force, what discretion does the Legislature have to select an

overall deviation to bring the population of the districts to relative equality within federal constitutional one-person, one-vote standards?

16. If this Court certifies questions to the Supreme Court of Alabama, the parties to this litigation will have the opportunity, and responsibility, to brief the issues to that court. Ala. R. App. P. 18(g).

For the foregoing reasons, if the Court believes that resolution of the racial gerrymandering claims in this case require an answer to that unsettled question of Alabama law, the defendants respectfully move the Court to certify to the Supreme Court of Alabama questions concerning the force the county-splitting restrictions in the Alabama Constitution retain given the Equal Protection Clause's one-person one-vote requirements,.

Respectfully submitted,

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I hereby certify that, on July 24, 2015, 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 counsel of record:

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