**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-WC |
| v. | ) | (Three-judge court) |
| THE STATE OF ALABAMA, et al., | ) | |
| Defendants. | ) | |

**CONSOLIDATED MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND FOR PRELIMINARY INJUNCTION**

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 Consolidated Memorandum in support of their Motion for Judgment on the Pleadings (No. 29) and in opposition to Plaintiffs' Motion for Partial Summary Judgment and for Preliminary Injunction (Nos. 7 and 8). For the reasons stated in the State Defendants' Motion and this Memorandum, this Court should deny the

Plaintiffs' Motions and enter judgment in favor of the State Defendants and against the Plaintiffs.

## FACTUAL BACKGROUND

### I. Historical Background

This case does not occur in a vacuum, but rather against the backdrop of Alabama's recent history of redistricting. The State Defendants will highlight portions of that history, which is described in part in *Kelley v. Bennett*, 96 F. Supp. 2d 1301 (M.D. Ala.) (three-judge court), *vacated per curiam sub nom. Sinkfield v. Kelley*, 531 U.S. 28, 121 S. Ct. 446 (2000), beginning with the 1990 round of redistricting.

As the district court noted in *Kelley v. Bennett*, the Alabama Legislature deadlocked over competing Senate and House redistricting plans in 1993. The House passed plans, including a Senate plan known as the Reed-Buskey plan, but those plans did not make it out of committee in the Senate. The plans that passed the Senate likewise died in the House. A group of African-American voters responded to the deadlock by filing a lawsuit styled *Sinkfield v. Camp* in the Circuit Court of Montgomery County contending that the State's failure to redistrict violated the Equal Protection Clause of the Fourteenth Amendment to the

Constitution of the United States. In 1993, at the direction of then-Alabama Attorney General Jimmy Evans, the Alabama Secretary of State agreed to settle the case by adopting the Reed-Buskey plans that had passed the Alabama House of Representatives. *Kelley*, 96 F. Supp. 2d at 1309.

In 1997, a number of white voters challenged the constitutionality of the 1993 plans in federal court in what became *Kelley v. Bennett*.[1] The plaintiffs (the *Kelley* Plaintiffs) contended that the plans were the product of unconstitutional racial gerrymandering, drawing support from the U.S. Supreme Court's decision in *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993), and its progeny. After a six-day trial and post-trial briefing, a three-judge federal district court split 2–1 in holding that four Senate districts (SDs 21, 25, 29, and 30) and three House districts (HDs 63, 75, and 86) were unconstitutionally drawn. The court also found that a number of municipalities, including Montgomery, Dothan, Fort Deposit, Evergreen, Abbeville, Grove Hill, Thomasville, Monroeville, and Linden were split along racial lines. *See Kelley v. Bennett*, 96 F. Supp. 2d at 1311 ("In many of the divided towns, such as Fort Deposit, Evergreen, Abbeville, and Grove Hill, the

[1] John and Camilla Rice challenged the 1993 consent judgment in state court, which rejected their argument. *Rice v. Sinkfield*, 732 So. 2d 993 (1998).

racial composition of populations on either side of the district line differs dramatically.") & 1313. On appeal, the U.S. Supreme Court vacated the decision, holding that the plaintiffs lacked standing. *Sinkfield v. Kelley*, 531 U.S. 28, 121 S. Ct. 446 (2000) (*per curiam*).

After the State received the results of the 2000 Census, the State enacted legislative redistricting plans, which were precleared. Litigation challenging those 2001 plans followed in both state and federal court. The federal court lawsuit included a racial gerrymandering claim (which was unsuccessful), but the splitting of municipalities like Fort Deposit and Evergreen on racial grounds did not become an issue in that case.

In the state court case, John Rice and two other plaintiffs (the *Rice* Plaintiffs), challenged the Senate plan alleging that it violated the one-person, one-vote provision in Art. IX, § 200 of the Alabama Constitution. The Circuit Court of Montgomery County entered summary judgment against the *Rice* Plaintiffs, and the Alabama Supreme Court affirmed. *Rice v. English*, 835 So. 2d 157 (Ala. 2002).

In addition, a three-judge court sitting in Mobile took up a different lawsuit challenging the constitutionality of the House and Senate plans. Those plaintiffs

claimed that the plans violated federal one-person, one-vote standards and that they "unconstitutionally implemented a goal of racial maximization." *Montiel v. Davis*, 215 F. Supp. 2d 1279, 1282 (S.D. Ala. 2002). The plaintiffs (the *Montiel* Plaintiffs) alleged that the plans showed a "systematic overpopulation of white-majority districts and underpopulation of black majority districts." *Id*., at 1286. Significantly, the 2001 plans were drawn with an overall population deviation of 10%, or ±5%. *Id*., at 1282–83. Again, the State prevailed, with the district court holding that the plaintiffs had failed to back up their claims.

Subsequently, however, Republican plaintiffs in Georgia successfully challenged the constitutionality of the Georgia legislative redistricting plans on the ground that they violated one-person, one-vote principles in a way that could not be explained by legitimate, consistently applied state policies. Significantly, those Georgia legislative plans were drawn with an overall population deviation approaching 10% like those in Alabama. While that litigation occurred in Georgia, its theory subsequently made its way to Alabama.

In *Larios v. Cox*, a three-judge federal district court sitting in the Northern District of Georgia held that the legislative plans, which had an overall population deviation of 9.98%, "arbitrarily and discriminatorily dilute[d] and debase[d] the

weight of certain citizens' votes by intentionally and systematically underpopulating districts in rural south Georgia and inner-city Atlanta, correspondingly overpopulating the districts in suburban districts surrounding Atlanta, and by underpopulating the districts held by incumbent Democrats." 300 F. Supp. 2d 1320, 1322 (N.D. Ga.) (three-judge court), *aff'd mem.*, 542 U.S. 947, 124 S. Ct. 2806 (2004).

In its decision, the district court rejected the state's attempt to invoke the overall population deviation of less than 10% as a "safe harbor." It stated, "[T]he very fact that the Supreme Court has described the ten percent rule in terms of 'prima facie constitutionality' unmistakably indicates that 10% is not a safe harbor." *Id*. at 1340–41. It went to question the continued validity of the 10% criterion, observing that, with technological development, plans with perfect equality of population can be drawn. Then, the court suggested:

> [The] use of a 10% population deviation as a safe harbor may well violate the fundamental one person, one vote command of *Reynolds v. Sims*], requiring that states 'make an honest and good faith effort to construct districts . . . as nearly equal of population as practicable "and deviate only where "divergences … are based on legitimate considerations incident to the effectuation of a rational state policy." 77 U.S. at 577, 579, 84 S. Ct. at 1390, 1391. The use of a 10% safe harbor may also conflict with the *Roman* [*v. Sincock*] Court's observation that "the constitutionally permissible grounds of

> discretion in deviating from apportionment according to population" cannot be stated in a uniform mathematical formula, as it assumes that 10% is such a mathematical formula. 377 U.S. at 710, 84 S. Ct. at 1458.

*Id*. at 1341.

The U.S. Supreme Court summarily affirmed, with a concurrence by Justice Stevens, joined by Justice Breyer, and a dissent by Justice Scalia. For his part, Justice Stevens noted the district court's finding of "deliberate and systematic" and "intentional" partisan activity that "systematically" favored Democrats and disfavored Republicans. In the light of those findings, he explained that the Court had "properly rejected" Georgia's attempt to invoke a 10% safe harbor. *Cox v. Larios*, 542 U.S. at 949, 124 S. Ct. at 2806 (Stevens, J., concurring). In his dissent, Justice Scalia objected to the Court's summary affirmance, stating that he would have set the case for argument. He also observed that, while the drafters of the Georgia plans "believed" they could take shelter in the 10% safe harbor and drew plans that met that standard, the court below had disagreed. *Id*. at 951, 124 S. Ct. at 2809 (Scalia, J., dissenting). He closed with a warning: "Ferreting out political motivations in minute population deviations seems to me more likely to encourage

politically motivated litigation than to vindicate political rights." *Id*. at 952, 124 S. Ct. at 2810.

After the Supreme Court ruled in *Larios*, in 2005, other plaintiffs, represented by the same lawyer who represented the *Rice*, *Kelley*, and *Montiel* plaintiffs filed a lawsuit styled *Gustafson v. Johns* in federal court in Mobile. The plaintiffs (the *Gustafson* Plaintiffs) contended that the Alabama legislative redistricting plans violated constitutional one-person, one-vote principles and were the product of unconstitutional political gerrymandering. They piggybacked on the decisions in *Larios*, without citing them in the Complaint, alleging that the drafters of the Alabama plans "systematically" packed the Republican districts and "systematically and intentionally created state legislative districts with very substantial disparities in population, voting age population, citizens of voting age, registered voters and individuals actually casting votes, thereby giving differing voting power to different parts of the state." Exhibit A (*Gustafson* Complaint) at 38 ¶ 116. That distribution of voters was alleged to be an "attempt[]" by the Democratic-controlled Alabama Legislature and then-Governor Siegelman" to "prevent the majority of Alabama voters from electing a legislature of their choice for this decade and beyond." *Id*. at 38 ¶ 115.

A three-judge federal district court sitting in the Southern District of Alabama held that the claims were barred by *res judicata*. *Gustafson v. Johns*, 434 F. Supp. 2d 1246 (S.D. Ala. 2006) (three-judge court). Again, while the court did not reach the merits of the allegations of partisan gerrymandering, the claims were made. And, as the district court noted, Republican interests in Alabama were the driving force behind the lawsuit. *See id.* at 1251–54.

Finally, while the Republican Party in Georgia took control of the state legislature as a result of the *Larios* lawsuit, the Republican Party in Alabama relied on the ballot box and some changes in party affiliation to take control of both houses of the Alabama Legislature in 2010.

## II. The 2010 Round of Redistricting

In early 2011, after it received the results of the 2010 Census, the Alabama Legislature took up redistricting for its congressional delegation and the State Board of Education ("SBOE"). It took those plans up first because all of the congressional seats and several of the SBOE seats were up for election in 2012, and new districting plans were needed for those elections. In contrast, the legislative seats are not up until 2014, so the Legislature did not take that task up until May 2012.

Before taking up any of the redistricting, in May 2011, the Legislature's Permanent Joint Legislative Committee on Reapportionment promulgated Guidelines that would guide its work.[2] In pertinent part, those Guidelines declare that legislative and SBOE districts would be drawn so that they would have "substantial equality of population among the various districts." *See* Exhibit B (2011 Guidelines) at 2, § II.2.2. The Guidelines go on to define "substantial equality" as follows:

> a. Any redistricting plan considered by the Reapportionment Committee will comply with all the relevant case law regarding the one person, one vote principle of the equal protection clause of the 14th Amendment of the United States Constitution including but not limited to the cases of *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff'd sub nom Cox v. Larios*, 542 U.S. 947 (2004), and *White v. Regester*, 412 U.S. 755 (1973). When presenting plans to the Reapportionment Committee, proponents should justify deviations from the ideal district population either as a result of the limitations of census geography, or as a result of a consistently applied rational state policy.
>
> b. In keeping with subpart a. above, a high priority of every legislative and State Board of Education redistricting plan must be minimizing population deviations among districts. In order to assure compliance with the most recent case law in this area and to eliminate the possibility of an invidious discriminatory effect caused by

[2] The Guidelines were adopted at a meeting of the Reapportionment Committee on May 4, 2011. *See* Exhibit F-4 (Reapportionment Committee meeting minutes).

> population deviations in a final legislative or State Board of Education redistricting plan, in every redistricting plan submitted to the Reapportionment Committee, individual district populations should not exceed a 2% range of overall population deviation. The Reapportionment Committee will not approve a redistricting plan that does not comply with this requirement.

*Id*.

The Guidelines also make compliance with the Voting Rights Act mandatory. Exhibit B, at 2, § III; see also *id*., at 2, § IV.2.

With respect to the Constitution of Alabama, the Guidelines state that certain "redistricting policies contained in the Alabama Constitution shall be observed to the extent that they do not violate or conflict with requirements prescribed by the Constitution and laws of the United States." *Id*., at 3 § IV.6. The Guidelines state:

> The following redistricting policies contained in the Alabama Constitution shall be observed to the extent that they do not violate or conflict with requirements prescribed by the Constitution and laws of the United States:
>
> > a. Each House and Senate district should be composed of as few counties as possible.
> >
> > b. Every part of every district shall be contiguous with every other part of the district. Contiguity by water is allowed, but point-to-point contiguity and long-lasso contiguity is not.

c. Every district should be compact.

*Id*.

The United States Department of Justice precleared the State's congressional and State Board of Education plans administratively. In its submission letter for the State Board of Education plan, the State noted that the Legislature tightened the allowable overall population deviation from 10% (*i.e.*, ±5%) to an overall allowable population deviation of 2% (*i.e.*, ±1%). *See* Exhibit C-1 (SBOE preclearance submission letter) at 2. The Attorney General of the United States did not object to that change. *See* Exhibit D.[3]

The Alabama Legislature took up legislative redistricting in a Special Session that began after the end of the 2012 Regular Session. In preparation for that effort, during 2011, the Joint Reapportionment Committee conducted 22 public hearings at various locations around the State.

The first of those public hearings took place in Fort Payne, AL, on October 3, 2011. Senator Gerald Dial, one of the co-chairs of the Reapportionment

[3] The State again noted the change in the allowable overall population deviation in the submission letters for the State House of Representatives and Senate plans. *See* Exhibits C-2 and C-3 (Preclearance submission letters). Again, both of those plans were precleared. *See* No. 26-1.

Committee, and Dorman Walker, counsel for the Committee, explained that the districts in the area would have to change, with Senator Dial noting the change in the allowable population deviation. Senator Dial also noted the number of voters that the districts would have to gain or lose. Representative Jim McClendon, the other Committee co-chair, pointed to the existing plans and explained, "No plans have been drawn. We do not have a proposed plan for you to work from. And that's your job, is to tell us what you want in those plans." Walker identified the criteria that would be employed in drawing the new plans. Then, the attendees were offered a chance to speak. *See* Exhibit E-1 (hearing transcript).

The other public hearings, with the exception of the May 17, 2012 hearing in Montgomery, followed the same general pattern. *See* Exhibits E-2 through E-29. Before the last public hearing, the Reapportionment Committee met at 9:30 a.m. and adopted the McClendon House plan by a vote of 16–3 and the Dial Senate plan by a voice vote. Exhibit F-2. Later that morning, at the public hearing, Senator Dial and Representative McClendon produced the McClendon House Plan 2 and Dial Senate Plan 2 plans, which were then before the Reapportionment Committee. None of the attendees who spoke liked those plans; this included a number of members of the Legislature. *See* Exhibit E-30. At a 1:00 p.m. meeting which

followed the public hearing, the Committee adopted the McClendon House Plan 2 by a 13–5 vote and the Dial Senate Plan 2 by a 12–5 vote. *See* Exhibit F-3.

With respect to the actual drafting of the plans, the Legislature logically started with the existing plans, which were enacted and precleared in 2001. Both of those plans were drafted with an overall population deviation of just under 10%. In the years between the 2000 and 2010 Censuses, the State's population grew and its distribution changed, making the existing districts unconstitutionally malapportioned. Accordingly, the Legislature had to bring the districts within the allowable range of population deviation.

Before doing so, however, it was only logical for the Legislature to address the black-majority districts. Those districts are protected from retrogression by Section 5 of the Voting Rights Act, and, by obtaining preclearance for these plans, the State has shown that, at the least, its reading of its Section 5 obligations was not unreasonable. *Cf. Shaw v. Hunt*, 517 U.S. 899, 911, 116 S. Ct. 1894, 1903 (1996) (leaving open the question whether compliance with Section 5 of the Voting Rights Act is a compelling state interest because State's action was not required by a "correct reading of §5"). Indeed, it would have been "irresponsible" for the State not to attempt to comply with Section 5. *Cf. Bush v. Vera*, 517 U.S.

952, 991, 116 S. Ct. 1941, 1969 (1996) (O'Connor, J., concurring). So, the State could rationally have started by putting black-majority districts that met the standard for allowable population deviation in place.

In each of the past two cycles, the Legislature's first task has been to maintain the strength of the black-majority districts in Alabama. The black-majority districts generally, and particularly those in Jefferson County and in the Black Belt portions of the State like SD 18, 19, 20, 23, and 24 (*see* Table S2, below) and HD 53, 54, 55, 56, 57, 58, 59, 60, 67, 68, 69, 70, 71, and 72 (*see* Table H2, below), were substantially underpopulated. The Legislature had to bring them within the allowable population deviation without weakening the voting strength of the African-Americans in those districts.

Once the black-majority districts were taken care of, the Legislature could work around them and fill in the rest of the map. The remaining districts would first have to be brought within the allowable population deviation. Then, taking into account the desires of the incumbents, the lines of the new districts could be drawn. In that line drawing, county lines were inevitably split.

More specifically, in the 2001 Senate plan, which was drawn by the Democrats using an overall population deviation of 9.73%, the drafters split 30

counties.[4] *See* Exhibit J (2001 Senate package). The drafters of the 2001 Senate plan also underpopulated all but two of the black-majority districts:[5]

**Table S2001**

| Senate District Number | 2001 Total Population | 2001 Ideal Population | Absolute Deviation | Relative Deviation (%) |
|---|---|---|---|---|
| 18 | 123,786 | 127,060 | –3,274 | –2.577 |
| 19 | 121,797 | 127,060 | –5,263 | –4.142 |
| 20 | 121,886 | 127,060 | –5,174 | –4.072 |
| 23 | 120,985 | 127,060 | –6,075 | –4.781 |
| 24 | 121,009 | 127,060 | –6,051 | –4.762 |
| 26 | 129,339 | 127,060 | +2,279 | +1.794 |
| 28 | 126,913 | 127,060 | – 147 | –0.116 |
| 33 | 127,288 | 127,060 | + 228 | +0.179 |

The demographics of the minority districts in the Senate plans for 1993, 2001, and 2012 are presented in the table[6] below:

[4] The 2001 Senate plan split Colbert, Limestone, Madison, Lawrence, Winston, Jefferson, Tuscaloosa, Blount, Cherokee, Calhoun, Elmore, St. Clair, Lee, Bibb, Shelby, Hale, Baldwin, Choctaw, Clarke, Conecuh, Mobile, Monroe, Autauga, Marengo, Perry, Montgomery, Russell, Dale, Houston, and Lowndes Counties. *See* Exhibit J, at Assigned Districts Splits.

[5] The data in this table are drawn from Exhibit J at 2-3, Plan Statistics.

[6] The data in this table are drawn from Exhibits H-2, H-4, J, and L.

**Table S2**

| Senate District Number | Act 2012–603 Total Black Pop. (%) | Overpop.(+) or Underpop.(–) of 2001 District Using 2010 Census Data (%) | 2001 Senate Total Black Pop. (%) | Overpop.(+) or Underpop.(–) of 1993 District Using 2000 Census Data (%) | 1993 Senate Total Black Pop. (%) |
|---|---|---|---|---|---|
| 18 | 59.10 | –17.64 | 66.685 | –21.674 | 65.89 |
| 19 | 65.31 | –20.06 | 66.227 | –17.947 | 63.00 |
| 20 | 63.15 | –21.37 | 65.697 | –25.275 | 64.28 |
| 23 | 64.84 | –18.03 | 62.305 | –14.716 | 63.46 |
| 24 | 63.22 | –12.98 | 62.409 | –17.553 | 65.36 |
| 26 | 75.13 | –11.64 | 71.507 | –16.942 | 70.34 |
| 28 | 59.83 | – 3.80 | 56.458 | – 3.233 | 61.09 |
| 33 | 71.64 | –18.05 | 62.451 | –18.153 | 65.34 |

The 2012 Senate plan, which was drawn using an overall population deviation of 1.99%, splits 33 counties.[7] *See* Exhibit H-3.

[7] The 2012 Senate plan splits Limestone, Madison, Lawrence, Winston, Jefferson, Tuscaloosa, Blount, Cherokee, Elmore, St. Clair, Lee, Shelby, Hale, Baldwin, Choctaw, Clarke, Conecuh, Mobile, Monroe, Marengo, Montgomery, Russell, Dale **,** and Houston Counties, each of which was split in the 2001 plan. It also splits Lauderdale, Washington, Pickens, Marion, Lauderdale, DeKalb, Chilton, Clay, and Tallapoosa Counties. *See* Exhibit H-3 for 2012 and Exhibit J at 9-13 for 2001.

The 2012 plan does not split 6 counties which were split in the 2001 plan, Colbert, Calhoun, Bibb, Autauga, Lowndes, and Perry Counties.

Similarly, in the 2001 House plan, which was also drawn by the Democrats using an overall population deviation of 9.93%, most of the black-majority districts were underpopulated:[8]

**Table H1**

| House District Number | 2001 Total Population | 2001 Ideal Population | Absolute Deviation | Relative Deviation (%) |
|---|---|---|---|---|
| 19 | 42,416 | 42,353 | + 63 | +0.149 |
| 32 | 41,906 | 42,353 | – 447 | –1.055 |
| 52 | 42,091 | 42,353 | – 262 | –0.619 |
| 53 | 40,728 | 42,353 | –1,625 | –3.837 |
| 54 | 40,399 | 42,353 | –1,954 | –4.614 |
| 55 | 40,347 | 42,353 | –2,006 | –4.736 |
| 56 | 42,362 | 42,353 | + 9 | +0.021 |
| 57 | 40,296 | 42,353 | –2,057 | –4.857 |
| 58 | 40,834 | 42,353 | –1,519 | –3.587 |
| 59 | 40,241 | 42,353 | –2,112 | –4.987 |
| 60 | 41,482 | 42,353 | – 871 | –2.057 |
| 67 | 40,448 | 42,353 | –1,905 | –4.498 |
| 68 | 40,551 | 42,353 | –1,802 | –4.255 |

[8] The data in this table are drawn from Exhibit I.

| House District Number | 2001 Total Population | 2001 Ideal Population | Absolute Deviation | Relative Deviation (%) |
|---|---|---|---|---|
| 69 | 40,450 | 42,353 | –1,903 | –4.493 |
| 70 | 42,318 | 42,353 | – 35 | –0.083 |
| 71 | 40,305 | 42,353 | –2,048 | –4.836 |
| 72 | 42,077 | 42,353 | – 276 | –0.652 |
| 76 | 41,082 | 42,353 | –1,271 | –3.001 |
| 77 | 40,969 | 42,353 | –1,384 | –3.268 |
| 78 | 40,428 | 42,353 | –1,925 | –4.545 |
| 82 | 44,053 | 42,353 | +1,700 | +4.014 |
| 83 | 40,270 | 42,353 | –2,083 | –4.918 |
| 84 | 41,436 | 42,353 | – 917 | –2.165 |
| 85 | 41,711 | 42,353 | – 642 | –1.516 |
| 98 | 42,504 | 42,353 | + 151 | +0.357 |
| 99 | 42,412 | 42,353 | + 59 | +0.139 |
| 103 | 42,142 | 42,353 | – 211 | –0.498 |

The demographics of the minority districts in the House plans for 1993, 2001, and 2012 are presented in the table below:[9]

**Table H2**

| House District Number | Act 2012-602 Total Black Pop. (%) | Overpop.(+) or Underpop.(–) of 2001 District Using 2010 Census Data (%) | 2001 House Total Black Pop. (%) | Overpop.(+) or Underpop.(–) of 1993 District Using 2000 Census Data (%) | 1993 House Total Black Pop. (%) |
|---|---|---|---|---|---|
| 19 | 61.25 | – 6.90 | 66.039 | –22.256 | 66.27 |
| 32 | 60.05 | –14.76 | 59.598 | –15.567 | 63.93 |
| 52 | 60.13 | – 5.19 | 65.848 | –17.538 | 67.72 |
| 53 | 55.83 | –22.28 | 64.445 | –22.938 | 66.01 |
| 54 | 57.73 | –23.32 | 63.276 | –24.544 | 63.95 |
| 55 | 73.55 | –21.86 | 67.772 | –15.744 | 61.57 |
| 56 | 62.14 | – 9.79 | 62.665 | –19.706 | 63.52 |
| 57 | 68.47 | –20.48 | 62.967 | –18.282 | 63.90 |
| 58 | 75.68 | –17.75 | 63.518 | –22.688 | 62.75 |
| 59 | 72.96 | –27.86 | 63.241 | –27.091 | 63.86 |
| 60 | 67.68 | –19.37 | 64.348 | –26.038 | 66.22 |
| 67 | 69.15 | –16.79 | 63.447 | –22.357 | 63.50 |
| 68 | 64.31 | –20.40 | 62.211 | –13.524 | 63.58 |
| 69 | 64.21 | –17.46 | 65.308 | – 8.264 | 63.29 |
| 70 | 62.03 | –13.77 | 62.827 | –26.999 | 64.60 |
| 71 | 70.18 | –16.32 | 64.191 | –16.200 | 66.16 |
| 72 | 62.02 | –13.42 | 60.748 | – 9.338 | 65.36 |
| 76 | 73.79 | – 1.38 | 73.309 | – 8.505 | 66.69 |
| 77 | 67.04 | –23.12 | 69.677 | –24.289 | 71.93 |
| 78 | 70.00 | –32.16 | 72.697 | –18.029 | 72.37 |

[9] The data in this table are drawn from Exhibits G-2, G-3, I, and K.

| House District Number | Act 2012-602 Total Black Pop. (%) | Overpop.(+) or Underpop.(–) of 2001 District Using 2010 Census Data (%) | 2001 House Total Black Pop. (%) | Overpop.(+) or Underpop.(–) of 1993 District Using 2000 Census Data (%) | 1993 House Total Black Pop. (%) |
|---|---|---|---|---|---|
| 82 | 62.14 | – 4.68 | 62.663 | – 8.663 | 79.73 |
| 83 | 57.52 | – 9.85 | 61.214 | + 1.558 | 64.52 |
| 84 | 52.35 | – 9.24 | 53.260 | – 2.592 | 37.81 |
| 85 | 50.08 | – 6.79 | 47.863 | –25.002 | 51.13 |
| 98 | 60.02 | –16.89 | 64.448 | –21.972 | 65.72 |
| 99 | 65.61 | –12.59 | 65.250 | –18.214 | 65.09 |
| 103 | 65.06 | –10.79 | 63.049 | –19.000 | 65.58 |

## APPLICABLE LEGAL STANDARDS

### I. The Standards Applicable to the State Defendants' Motion for Judgment on the Pleadings

In order to obtain judgment on the pleadings, the State Defendants must show that they are entitled to judgment as a matter of law. Review of a motion for judgment on the pleadings proceeds much like review of a motion to dismiss. As the Eleventh Circuit has stated, "Whether the court examined [the complaint] under Rule 12(b)(6) or Rule 12(c), the question was the same: whether [the complaint] stated a claim for relief." *Strategic Income Fund, L.L.C. v. Spear, Leeds & Kellogg Corp.*, 305 F. 3d 1293, 1295 n. 8 (11th Cir. 2002).

The United States Supreme Court has held that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007)). That said, one of the "working principles" that should guide review of a motion to dismiss is the "tenet that a court must accept as true all of the allegations contained a complaint is inapplicable to legal conclusions." *Id*. at 678–79, 129 S. Ct. at 1950; *see also Am. Dental Ass'n v. Cigna Corp*., 605 F. 3d 1283, 1290 (11th Cir. 2010) ("The [Supreme] Court suggested that courts considering motions to dismiss adopt a two-pronged approach … : 1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."). In this case, this Court can begin by ignoring paragraphs 40 through 50 of the Complaint, which are nothing more than legal argument, as well as other legal arguments or conclusory assertions embedded in factual allegations.

This Court should also consider the public record in evaluating these motions. In *Horsley v. Feldt*, 304 F. 3d 1125, 1131 (11th Cir. 2002), the Eleventh

Circuit Court of Appeals held that the "incorporation by reference" doctrine applies to motions as well as to pleadings and to motions made pursuant to Rule 12(c) as well as those made pursuant to Rule 12(b)(6). *Id*. at 1134–35. It pointed to the Ninth Circuit's decision in *In re Silicon Graphics Inc*. *Securities Litigation*, 198 F. 3d 970 (9th Cir. 1999), in which that court said, "[T]he incorporation by reference . . . doctrine permits a district court to consider documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the plaintiff's pleading." 198 F. 3d at 986 (internal quotations and alteration omitted). As the Eleventh Circuit put it, "[A] document attached to a motion to dismiss may be considered by the court without converting the motion into one for summary judgment only if the attached document is: (1) central to the plaintiff's claim; and (2) undisputed." *Horsley*, 304 F. 3d at 1134.

Notwithstanding the Eleventh Circuit's use of the word "only" in *Horsley*, the nature of this redistricting case makes it appropriate to consider other documents that are part of the public record. *See, e.g.*, *Commercial Money Ctr*., *Inc. v. Ill. Union Ins*. *Co*., 508 F. 3d 327, 336 (6th Cir. 2007) (amicus brief filed by an insurance organization in another case to "incorporate the arguments articulated

in an analogous situation"); *Faibisch v. Univ. of Minn.*, 304 F. 3d 797 (8th Cir. 2002) (EEOC charge).

Measured against these standards, this Court should consider the following categories of documents which have been included as Exhibits to this Memorandum:

Documents that relate to the demographics of the 2012 legislative redistricting plans (Exhibits G and H) because they are matters of public record that are both central to the Plaintiffs' claims and not subject to reasonable dispute as to their authenticity. See *Horsley*.

The Reapportionment Committee's Guidelines (Exhibit B) because they are public records which are both central to the Plaintiffs' claims and not subject to reasonable doubt as to their authenticity. *Id*.

Documents that relate to the demographics of the 2001 and 1993 plans (Exhibits I, J, K, and L) because they are matters of public record which are necessary to provide context and are not subject to reasonable dispute.

Documents that relate to the public hearings and meetings of the Reapportionment Committee (Exhibits E-1 through E-30, and F-1 through F-4) because they are matters of public record which were included as Exhibits to the

State's administrative submission of the Senate redistricting plan. They are offered not for the truth of the matter asserted, but, rather, to show what was said.

The Complaint in *Gustafson v. Johns* (Exhibit A) because it is a matter of public record. This document is not offered for the truth of the matters asserted but, rather, to show what was said.

The administrative preclearance letters for the State Board of Education, State House of Representatives, and Senate redistricting plans (Exhibit C-1 through C-3) because it they are matters of public record offered to show that a change was drawn to the attention of the Attorney General of the United States and the preclearance letter for the State Board of Education redistricting plan (Exhibit D) because it is likewise a matter of public record offered to show that no objection was made to that or any other change identified in the letter.

## II. The Standards Applicable to the Plaintiffs' Motions

The Plaintiffs seek both partial summary judgment and injunctive relief, and different legal standards apply to those motions. Each motion, though, requires a legal showing. For their summary judgment motion, the Plaintiffs must show not only that there are no genuine issues of material fact, but also that they are "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). One seeking a

preliminary injunction must similarly show, among other things, that there is a substantial likelihood of success on the merits. *See, e.g.*, *ACLU v. Miami-Dade County*, 557 F. 3d 1177, 1198 (11th Cir. 2009) ("The most common failure [in carrying the movant's burden of persuasion] is not showing a substantial likelihood of success on the merits."). Accordingly, each prong of the Plaintiffs' Motions has a legal element.

More specifically, "A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishes the burden of persuasion as to the four requisites." *ACLU*, 557 F. 3d at 1198. This Court may not grant injunctive relief unless the Plaintiffs show that they: (1) have a substantial likelihood of success on the merits; (2) will suffer irreparable injury in the absence of an injunction; (3) the balance of equities is in their favor; and (4) an injunction is in the public interest. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20, 129 S. Ct. 365 (2008); *Siegel v. LePore*, 234 F. 3d 1163, 1176 (11th Cir. 2000) (*en banc*). In *Winter*, the Court reinforced the independent nature of the four elements, explaining, "[E]ven if the Plaintiffs have shown irreparable injury from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors. A

proper consideration of these factors alone requires denial of the requested injunctive relief." *Id*., 555 U.S. at 23, 129 S. Ct. at 376; *see also ACLU*, 557 F. 3d at 1198 ("Failure to show any of the four factors is fatal . . . .").

Significantly, the Plaintiffs seek relief, including an injunction, that would alter the status quo. The status quo is two legislative redistricting plans that have been enacted and are now enforceable, having been precleared. *See* No. 26-1. The Plaintiffs do not simply want to block the State from using those plans, they also want new plans either from the Legislature or from this Court.

Ordinarily, "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 1834 (1981). In this case, because the next legislative elections will not be held until 2014, there is a substantial likelihood that this lawsuit can be concluded before the qualifying period opens. In other words, the need to preserve the status quo is not substantial; the status quo can take care of itself. Given the affirmative aspects of Plaintiffs' claims for relief, their injunctive claims should be viewed as seeking mandatory, not prohibitive, relief.

"[W]here, as here, 'a preliminary injunction goes beyond the status quo and seeks to force one party to act, it becomes a mandatory or affirmative injunction and the burden placed on the moving party is increased.' For such mandatory injunctions, relief should be granted '*[o]nly in rare instances*.'" *Boyd v. Steckel*, 753 F. Supp. 2d 1163, 1169 (M.D. Ala. 2010) (internal citations and footnote omitted; emphasis by the court); *see also Martinez v. Mathews*, 544 F. 2d 1233, 1243 (5th Cir. 1976) ("Mandatory preliminary relief, which goes well beyond simply maintaining the status quo pendent lite, is particularly disfavored and should not be issued unless the facts and law clearly favor the moving party . . . .").[10]

## ARGUMENT

### I. The Plaintiffs' One-Person, One-Vote Claims Lack Merit as a Matter of Federal Law.

The Plaintiffs claim that the Legislature's decision to tighten the allowable population deviation from ±5% to ±1% violates constitutional one-person, one-vote standards. In so doing, they contend that, under the Alabama Constitution, the

[10] Decisions of the former Fifth Circuit rendered prior to the close of business on September 30, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F. 2d 1206, 1209 (11th Cir. 1981) (*en banc*).

preservation of county boundaries takes priority over relative population equality. This claim lacks merit for several reasons.

In the State Defendants' judgment, the Plaintiffs have dressed a state law claim in federal law garb. To the extent that this claim is, in whole or in part, one of state law, this Court lacks jurisdiction to consider it. To the extent, if any, that this one-person, one-vote claim is brought under federal law, this Court should dismiss it because it lacks merit as a matter of law.

**A. To the extent that the Plaintiffs' one-person, one-vote claim is founded on State law, the Eleventh Amendment bars this Court from considering it.**

At its core, this element of the lawsuit is little more than an effort to dress a state-law claim in federal clothes. Any argument about the propriety of splitting counties starts with the words of Article IX, §§ 198, 199, and 200 of the 1901 Alabama Constitution, but the Plaintiffs cite only decisions from the federal courts. *See, e.g.*, Nos. 9 and 23 (citing *Sims v. Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965) (three-judge court), *Sims v. Amos*, 336 F. Supp. 854 (M.D. Ala.), *aff'd mem.*, 409 U.S. 942 (1972), and *Burton v. Hobbie*, 561 F. Supp. 1029 (M.D. Ala. 1983)). Citing to decisions of federal courts, even ones that construe state law, does not make a claim one under federal law. Moreover, the Constitution of the United

States says nothing about the preservation of county boundaries; to the extent that the Supreme Court has addressed that issue in the context of redistricting, it has been done as part of the recognition of legitimate state interests, not as a matter of federal constitutional law. Cf. *Miller v. Johnson*, 515 U.S. 900, 916, 115 S. Ct. 2475, 2488 (1995) (quoting *Shaw v. Reno*, 509 U.S. 630, 647, 113 S. Ct. 2816, 2827 (1993)).

As such, the Plaintiff's one-person, one-vote claim represents an attempt to induce this federal court to tell State officials to follow State law. The Eleventh Amendment prohibits private parties from using the federal courts for that purpose. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104 S. Ct. 900 (1984); *Alexander v. Chattahoochee Valley Cmty. Coll.*, 325 F. Supp. 2d 1274, 1295 (M.D. Ala. 2004) (State law claims dismissed without prejudice).

Even if this Court had jurisdiction to hear this one-person, one-vote claim, the guiding principles to evaluate it must come from the Alabama Supreme Court, not the federal courts, As the Supreme Court has stated, the Alabama Supreme Court "is unquestionably 'the ultimate exposito[r] of state law.'" *Riley v. Kennedy*, 553 U.S. 406, 425, 128 S. Ct. 1970, 1985 (2008) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S. Ct. 1881, 1886 (1975) (alteration by the Court)); see also

*McMahan v. Toto*, 311 F. 3d 1077, 1079 (11th Cir. 2002) ("Recent events in this case illustrate that when we write to a state law issue, we write in faint and disappearing ink.") (internal quotation marks and citation omitted).

In this case, no state appellate court has decided (1) that Article IX, §§ 198 and 199 of the Alabama Constitution establish a constitutionally binding and enforceable limitation on the splitting of counties in the House districting plan;[11] (2) whether and to what extent the equal population requirements of the U.S. Constitution override the "no county splitting" provision in Article IX, § 200 of the

[11] By their terms, §§ 198 and 199 do not address the splitting of counties. Cf. *Rice v. English* (one-person, one-vote claim under Alabama Constitution limited to 2001 Senate plan). For that reason, and because the degree to which the Alabama Constitution addresses the splitting of counties in House plans is an unsettled question of state law, the State Defendants do not intend to address the splitting of counties in the House plan at this stage of the proceedings. They will, of course, address that issue if this Court deems it appropriate.

If, as the State Defendants contend, this means that no such constitutional limitation exists, the preservation of county boundaries becomes an element of preserving communities of interest. The Guidelines classify the preservation of communities of interest as a redistricting policy that is "embedded in the traditions, customs, and usages of the State of Alabama [which] shall be observed to the extent that [it] do[es] not violate or subordinate the foregoing policies prescribed by the Constitution and laws of the United States and of the State of Alabama." Ex B, at 3–4, § IV.7 and § IV.7.b. (identifying "county, municipal, or voting precinct boundaries" as a "similarit[y] of interest" which helps identify a community of interest). Such policies are subordinated to, among other things, the population equality standards established elsewhere in the Guidelines.

Alabama Constitution; and (3) assuming that the "no county splitting" provision in § 200 has not been completely overridden, how to reconcile that provision with the portion of § 200 which calls for the districts in the State Senate to be "as nearly equal to each other in the number of inhabitants as may be."

If the Alabama appellate courts have not addressed these issues, this Court should follow *Pennhurst* and dismiss this claim without prejudice because it cannot define state law and tell state officials to follow it. Alternatively, this Court should certify the issues of state law which have not been resolved by the Alabama appellate courts to the Supreme Court of Alabama.

**B. Assuming, without conceding, that the Plaintiffs' one-person, one-vote claim is brought under federal law, it should be dismissed.**

"It is common ground that state election-law requirements like [a] Whole County Provision may be superseded by federal law—for instance, the one-person, one-vote principle of the Equal Protection Clause of the United States Constitution." *Bartlett v. Strickland*, 556 U.S. 1, 7, 129 S. Ct. 1231, 1239 (2009). To date, federal courts have addressed the need for the whole county provision in § 200 of the Alabama Constitution of 1901 to yield to one-person, one-vote considerations, and, while the state courts accept that proposition, they have not

established the "rules of the road" which will govern that intersection of federal and state law.

In the absence of controlling state standards, the State Defendants believe that, in the first instance, it is the Legislature's job to accommodate the demands of federal constitutional and statutory law and state law. When it does, it is free to use the decisions of the federal courts as guidance and give those decisions, which relate to other plans and circumstances, the weight it believes appropriate just like the state courts would do. It does not, however, have to follow those federal court decisions. Cf. *McMahan v. Toto*, 311 F. 3d at 1097 (When federal courts address state law issues, they "write with faint and disappearing ink."). Instead, to the extent that the federal courts have interpreted state law, they have been trying to follow their reading of state law.

On its face, § 200 calls for the districts in the State Senate plan to be drawn so as to be "as nearly equal to each other in the number of inhabitants as may be" and states that "[n]o county shall be divided between two districts." Given that the county-splitting provision must yield to constitutional population standards, it is likewise the Legislature's job to reconcile both parts of § 200 so as to give meaning to each part. And, that task includes deciding, within constitutional

limits, how close "as nearly equal to each other in the number of inhabitants" will be.

The State Defendants agree that, in *Brown v. Thomson*, the United States Supreme Court observed, "Our decisions have established, as a general matter, that an apportionment plan has held that an apportionment plan with a maximum population deviation under 10% falls within th[e] category of minor deviations" that do not require a state justification. 462 U.S. 835, 842, 103 S. Ct. 2690, 2696 (1983). In the State Defendants' judgment, though, *Brown v. Thomson* establishes only a ceiling beyond which the State takes on the risk. The population deviation in the 2001 plans edged under 10%, but nothing stops the Legislature from using a tighter overall population deviation.[12]

Indeed, the State Defendants are hard pressed to understand how tightening the overall population deviation in the legislative plans and, thereby, making the districts more equal to each other in population than they might otherwise have been, runs afoul of constitutional one-person, one-vote standards. After all, in *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526 (1964), the Supreme Court held,

[12] The overall deviation in the 2001 State House of Representatives plan was 9.93%, and the overall deviation in the 2001 Senate plan was 9.73%. *See* Exhibits I and J.

"[C]onstrued in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the people of the States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id*. at 7–8, 84 S. Ct. at 530. Subsequently, the Court "reaffirm[ed] that [in the congressional redistricting context] there are no *de minimis* population deviations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2 without justification." *Karcher v. Daggett*, 462 U.S. 725, 734, 103 S. Ct. 2653, 2660 (1983).

The State Defendants recognize that different standards apply to congressional and state legislative redistricting. Nonetheless, on its face, an overall population deviation of 2% between districts makes the vote of one person more equal to that of another than an overall population deviation of 10%. If zero deviation plans are virtually required for congressional representation (and county lines are sacrificed to the demand for population equality), tightening the allowable population deviation in a legislative plan should not be seen to violate one-person, one-vote standards.

The State Defendants also disagree with the contention that the Legislature read *Larios v. Cox* incorrectly. The Plaintiffs' contention that the Legislature

misread *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.) (three-judge court), *aff'd mem.*, 542 U.S. 947, 124 S. Ct. 2806 (2004), is an exercise in missing the point. In *Larios*, the three-judge court "agree[d] that state legislative plans with population deviations of less than 10% may be challenged based on alleged violation of the one person, one vote principle" and rejected the contention that deviation of less than 10% represented a legal safe harbor. 300 F. Supp. 2d at 1340–41. The district court's decision in *Larios* represents a successful one-person, one-vote grounded attack on plans with an overall deviation under 10%, and the Supreme Court affirmed that judgment. The *Larios* Plaintiffs, thus, achieved what the *Rice* Plaintiffs, the *Kelley* Plaintiffs, and the *Montiel* Plaintiffs, and the *Gustafson* Plaintiffs had tried to do without success—get inside the 10% threshold and force the drafters of the plans to explain their decisions.

Put differently, the legal backdrop includes the *Rice*, *Kelley*, *Montiel*, and *Gustafson* cases, discussed above, not just *Larios*. Those other decisions might not have been cited in the Guidelines, but the redistricting process did not take place in a vacuum (and the Guidelines recognize that not all relevant case law was being cited). *See* Exhibit B, at 2, § II.2 ("Any redistricting plan considered by the Reapportionment Committee will comply with all relevant case law regarding the

one person, one vote principle of the equal protection clause of the 14th Amendment of the United States Constitution, including but not limited to . . . . "). The drafters of the 2012 plans would not have been acting irrationally if, along with complying with the Voting Rights Act, satisfying the population deviation standards, paying attention to the number of split counties, otherwise considering communities of interest, and keeping incumbents in their former districts, they tried to head off a *Larios*-based challenge to their work.

Accordingly, this Court should enter judgment in favor of the State Defendants and against the Plaintiffs on their one-person, one-vote claims to the extent that they are based on federal law and deny the Plaintiffs' motions.

## II. The Plaintiffs' Claims of Vote Dilution and Isolation Lack Merit.

### A. The Plaintiffs' claims of vote dilution and isolation lack merit as a matter of law.

The Plaintiffs contend that the Legislature "packed" African-American voters into 8 black-majority Senate districts and 28 black-majority House districts.[13]

[13] In paragraphs 52 and 53 of their Complaint, the Plaintiffs assert that there are 27 black-majority House districts. They are incorrect; there are 28 such House districts.

At the outset, the State Defendants note that the United States District Court for the District of Columbia recently concluded, "A district with a minority voting majority of sixty-five percent (or more) essentially guarantees that, despite changes in voter turnout, registration, and other factors that affect participation at the polls, a cohesive minority group will be able to elect its candidate of choice." *Texas v. United States*, 831 F. Supp. 2d 244, 263 & n.22 (D.D.C. 2011) (three-judge court). Measured against that standard, the majority-minority districts in the Senate and House of Representatives are not packed as a matter of law. *See* Tables S2, H2, above.

Moreover, the State Defendants note that the strength of a district's voting majority is, fundamentally, a matter of politics. The Democrats, including the members of the Alabama Black Legislative Caucus, controlled the redistricting process in 1993 and in 2001. Both times, they left the minority population above 60% in almost every district that was black-majority and displayed little, if any, interest in "unpacking" the now allegedly "packed" districts. It is unclear to the State Defendants how something the Democrats saw as tolerable, and perhaps even desirable, in 2001 became illegal, unconstitutional, or both in 2012.

In any event, the Legislature did not yank the numbers 8 and 28 out of thin air. There were 8 black-majority districts in the 2001 State Senate plan and 27 such districts in the 2001 State House of Representatives plan. The State had to preserve those districts in order to avoid violating Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The State also needed to maintain the relative strength in the minority population in each of those districts in order to comply with Section 5. And, that is what it did. *See* Tables S2 and H2, above.

In this regard, the State Defendants view compliance with Section 5 as not just rational but a compelling state interest.[14] It would make no sense to roll up black-majority districts unless one-person, one-vote considerations made it necessary. To do so would invite a preclearance objection, leaving the State with an unenforceable plan.

[14] In *Shaw v. Hunt*, the Court implicitly approved the invocation of a covered jurisdiction's reliance on compliance with Section 5 as a compelling state interest on its being based on "a correct reading of § 5." 517 U.S. at 911, 116 S. Ct. at 1903. Given the fact that the State's plans have been precleared, without USDOJ's having dictated any changes, the State's reading of Section 5 cannot be said to be incorrect. *Compare Miller v. Johnson*, 515 U.S. at 921-24, 115 S. Ct. at 2491-92 (declining to defer to State's compliance with legally erroneous reading of the law by USDOJ).

Preserving the number and strength of the black-majority districts presented some challenges. As shown in Tables S2 and H2 above, a number of the black-majority districts were substantially underpopulated. The State had to add population to those districts, and, in order to do that, the added population needed to be (1) contiguous, and (2) demographically aligned with the demographics of the existing district. In that regard, the District Court for the District of Columbia recently held, "A district with a minority voting majority of sixty-five percent (or more) essentially guarantees that, despite changes in turnout, voter registration and other factors that affect participation at the polls, a cohesive minority group will be able to elect its candidates of choice." *Texas v. United States*, 831 F. Supp. 2d at 263 & n.22; *cf. Voinovich v. Quilter*, 507 U.S. 146, 154, 113 S. Ct. 1149, 1156 (1993) ("Placing black voters in a district in which they constitute a sizable and therefore 'safe' majority ensures that they are able to elect their candidate of choice."). The State did not violate the Voting Rights Act, or the Constitution for that matter, by "guarantee[ing]" that the voters in the black-majority districts will be able to elect the candidates of their choice.

### B. The Plaintiffs' claims of vote dilution and isolation should be dismissed because there is no valid legal remedy for them.

Further, the logical remedy for the alleged violation is not a proper Section 2 remedy. In order to cure alleged "packing," the packed districts must be "cracked," which, as noted above, is something that the Democrats signally failed to do in 2001 when they drew the plans. But, the most that "cracking" can do is create influence or crossover districts, not black-majority districts.

In *Bartlett v. Strickland*, the Supreme Court held that Section 2 does not require the creation of crossover districts in which the minority population will constitute less than 50% of the total population.[15] The plurality further stated,

[15] The Plaintiffs' treatment of *Bartlett v. Strickland* is an example of overlawyering. They contend that the Supreme Court "enforced" the North Carolina Supreme Court's reading of the "no county splitting provision" in the North Carolina Constitution. No. 9 at 5. The Supreme Court's decision may have had that effect, but what the Court was considering was the contention that Section 2 of the Voting Rights Act trumped North Carolina law in a particular way. *Bartlett v. Strickland*, 556 U.S. at 6, 129 S. Ct. at 1238 ("This case requires us to interpret § 2 of the Voting Rights Act of 1965. . . ."); *see also id*., 556 U.S. at 7, 129 S. Ct. at 1239 ("Here the question is whether § 2 of the Voting Rights Act requires district lines to be drawn that otherwise would violate the Whole County provision" of the North Carolina Constitution,). The Court's answer was that Section 2 did no such thing (at least in cases not involving intentional discrimination). *Id*., 556 U.S. at 12-20, 129 S. Ct. at 1241-46). The Court did not endorse the North Carolina court's reading of the North Carolina Constitution, but took that reading as it came to it. And, what the North Carolina Supreme Court

"This Court has held that § 2 does not require the creation of influence districts." 556 U.S. at 13, 129 S. Ct. at 1242 (citing *League of United Latin American Citizens v. Perry*, 548 U.S. 349, 445, 126 S. Ct. 2594, 2625 (2006) (opinion of Kennedy, J.)). Instead, a minority group "must 'demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.' " *Id*. at 12, 129 S. Ct. at 1242 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50, 106 S. Ct. 2752, 2766 (1986)). The Plaintiffs nowhere contend that they can satisfy this requirement, and the State Defendants believe that no additional black-majority districts can be drawn in either plan. Indeed, the creation of a new black-majority district in Madison County, HD 53, demonstrates that, when the *Gingles* 1 threshold could be met, the State saw to it.

The State Defendants note that, in addition to invoking Section 2 of the Voting Rights Act, the Plaintiffs cite the Fourteenth and Fifteenth Amendments as legal support for their vote dilution claim. Given that Section 2 goes farther than the Constitution, the argument is a non-starter. But, even if Section 2 and the Constitution were co-extensive, as they originally were seen to be, it is unclear

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says about the North Carolina Constitution may, but need not, be what the Alabama Supreme Court says about the Alabama Constitution.

how the Fourteenth or Fifteenth Amendment could serve as a valid basis for relief when Section 2 does not.

In *Johnson v. DeSoto County Board of Commissioners*, 204 F. 3d 1335 (11th Cir. 2000), the Eleventh Circuit "question[ed], as a legal proposition, whether vote dilution can be established under the Constitution where the pertinent record has not proved vote dilution under the more permissive section 2." *Id*. at 1344–45. It did so in the context of a challenge to an at-large election scheme, but the State Defendants believe that "question" to be well-founded generally.

"As the Supreme Court has stated, section 2 'make[s] clear that certain practices or procedures that result in the denial or abridgement of the right to vote are forbidden even though the absence of proof of discriminatory intent [in the adoption or maintenance of those practices or procedures] protects them from constitutional challenge' under the Fourteenth and Fifteenth Amendments." *Nipper v. Smith*, 39 F. 3d 1494, 1514 (11th Cir. 1994) (*en banc*) (citing *Chisom v. Roemer*, 501 U.S. 380, 383–84, 111 S. Ct. 2354, 2358 (1991)). In *Chisom*, the Supreme Court explained that Section 2 did not spark much debate in Congress when it was first considered "because it was viewed largely as a restatement of the Fifteenth Amendment." 501 U.S. at 392, 111 S. Ct. at 2362. Indeed, the Court

"recognized that the coverage [originally] provided by § 2 was *unquestionably coextensive* with the coverage provide by the Fifteenth Amendment; the provision simply elaborated upon the Fifteenth Amendment." *Id*. (Emphasis added) (citing *Mobile v. Bolden*, 446 U.S. 55, 60–61, 100 S. Ct. 1490, 1495–97 (1980)). As such, Section 2, like the Fifteenth Amendment, required proof of intentional discrimination. *See Bolden*, 446 U.S. at 62, 100 S. Ct. at 1497 ("Our decisions, moreover, have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose."). Likewise, proof of a violation of the Equal Protection Clause of the Fourteenth Amendment requires a showing of intentional discrimination. *Washington v. Davis*, 426 U.S. 229, 239, 96 S. Ct. 2040, 2047 (1976); *see also Bolden*, 446 U.S. at 66, 100 S. Ct. at 1499 ("[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment.").

Thus, when Congress amended the Voting Rights Act in 1982 in response to *Mobile v. Bolden* by adding a results test to Section 2, it went even farther than either the Fourteenth or Fifteenth Amendments. If the drawing of a crossover or influence district is not a proper remedy for Section 2, with its results test, then it

cannot be a proper remedy for an alleged Fourteenth or Fifteenth Amendment violation.

"[F]rom the inception of a section 2 case, the existence of a workable remedy . . . is critical to the success of a vote dilution claim. The absence of an available remedy is not only relevant at the remedial stage of the litigation, but also precludes, under the totality of the circumstances inquiry, a finding of liability." *Nipper*, 39 F. 3d at 1533. Neither Section 2 nor the Fourteenth and Fifteenth Amendments provides a basis for drawing crossover districts to remedy Plaintiff's claims of "packing." Absent a legal basis for relief and a feasible remedy, this claim should be dismissed.

For these reasons, this Court should enter judgment on the pleadings and as a matter of law in favor of the State Defendants and against the Plaintiffs on their claims of vote dilution and isolation and deny the Plaintiffs' Motions.

**B. The Plaintiffs' claims of vote dilution and isolation lack merit because the Complaint fails to plausibly suggest that Plaintiffs can overcome the presumption that the State acted in good faith.**

The State's House and Senate redistricting plans have been drawn with an overall population deviation of less than 10%. In *Daly v. Hunt*, the Fourth Circuit Court of Appeals explained that such a deviation is legally regarded as *de minimis*

and cannot be the sole basis for contending that a state redistricting plan is illegal. 93 F. 3d 1212, 1220 (4th Cir. 2000). Instead, the court explained, "[T]he state is entitled to a presumption that the apportionment plan was the result of 'an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Id*. (quoting *Reynolds v. Sims*, 377 U.S. 533, 577, 84 S. Ct. 1362, 1830 (1964)).

As the three-judge federal district court noted in *Montiel v. Davis*, in order to rebut this presumption, the Plaintiffs must show that the minor deviations in these plans "resulted *solely* from the promotion of an unconstitutional or irrational state policy." *Montiel v. Davis*, 215 F. Supp. 2d at 1286 (quoting and adding emphasis to *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1032 (D. Md. 1994)). The Plaintiffs must also show that "the asserted unconstitutional or irrational state policy is the actual *reason* for the deviation" and that the deviation "is *not* caused by promotion of legitimate state policies." *Id*. (again quoting and adding emphasis to *Marylanders*, 849 F. Supp. at 1032).

In *Montiel v. Davis*, the three-judge federal district court entered summary judgment against a group of white plaintiffs who contended that the 2001 Alabama legislative redistricting plans violated constitutional one-person, one-vote

standards and were the product of unconstitutional racial gerrymandering. The court applied the standard in *Daly v. Hunt* and held that the plaintiffs failed to overcome the presumption.

In this case, the Plaintiffs' pleading burden should be to make a plausible showing that they can overcome the presumption that the State Defendants acted in good faith.[16] This, they have not done. The gravamen of their Complaint is that the legislature split counties unnecessarily, and that the black-majority districts are "packed." The districts are not, however, "packed" as a matter of law. *See Texas v. United States*, 831 F. Supp. 2d at 263 & n. 22. Four of the five counties they point to in paragraph 23 of their Complaint as being unnecessarily split are majority white (DeKalb, Jefferson, Limestone, and Talladega), and two (DeKalb

[16] The State Defendants' invocation of the plausibility standard is sound for at least two reasons. First, in *Iqbal*, the Court held that the plausibility standard applies to "'all civil actions.'" 556 U.S. at 684, 129 S. Ct. at 1953 (quoting Fed. R. Civ. P. 1). Second, redistricting cases, like the antitrust case at the heart of *Twombly*, make substantial demands on the courts and the parties. This case requires the service of three federal judges, and, if discovery proceeds, will take up the time of elected and appointed state officials in order to produce a voluminous record. Before a party takes up the time of all of these federal and state officials, that party should present a plausible basis for proceeding with discovery. *See Twombly*, 550 U.S. at 557–60, 127 S. Ct. at 1966–67.

and Limestone) overwhelmingly so. *See* Exhibit H-3.[17] Finally, their promotion of the HB 16 and SB 5 plans as demonstrative (No. 1 at ¶ 39) is "unavailing." *Montiel v. Davis*, 215 F. Supp. 2d at 1288. If the "more equipopulous plan" at issue in *Montiel v. Davis* would not, standing alone, prove a one-person, one-vote violation, the alternative plans that split fewer counties do not, standing alone, prove that the Legislature split counties unnecessarily, much less that they did so with the intent to discriminate against minority voters.

For those reasons, this Court should enter judgment on the pleadings and as a matter of law in favor of the State Defendants and against the Plaintiffs on their claims of vote dilution and isolation and deny the Plaintiffs' Motions.

## III. The Plaintiffs' Partisan Gerrymandering Claims Lack Merit.

The Plaintiffs contend that the redistricting plans for the Alabama Senate and Alabama House of Representatives deprive them of their rights to free speech and political association in violation of the First Amendment to the U.S. Constitution. They further contend that these rights are enforceable against

[17] The State Defendants note that, of the five counties identified in paragraph 23, three (Jefferson, Limestone, and Marengo) were split in the 2001 Senate plan. *See above* at 12 fn. 4.

Secretary of State Chapman pursuant to 42 U.S.C. § 1983. The State Defendants disagree with this contention.

In *Davis v. Bandemer*, 478 U.S. 109, 106 S. Ct. 2797 (1986), a majority of the United States Supreme Court held that political gerrymandering claims are justiciable, but that majority could not agree on the standard to be applied. In the subsequent 18 years, Justice Scalia explained, the lower courts "considered numerous political gerrymandering claims," but, "[t]o think that this lower court jurisprudence has brought forth 'judicially discernible and manageable standards' would be fantasy. *Vieth v. Jubelirer*, 541 U.S. 267, 280–81, 124 S. Ct. 1769, 1777–78 (2004) (plurality opinion). In *Vieth*, as discussed in greater detail below, the Court found that itself, once again, unable to agree on a standard for adjudication political gerrymandering claims.

The State Defendants note that the Plaintiffs' reliance on the First Amendment appears to originate in Justice Kennedy's opinion concurring in the judgment in *Vieth*, 541 U.S at 306, 124 S. Ct. at 1782 (Kennedy, J., concurring in the judgment). The novel argument set in Justice Kennedy's opinion has no precedential value.

In *Vieth*, a plurality of the Court concluded that political gerrymandering claims are non-justiciable, while the dissenters thought the claims should be justiciable but could not agree on the standard. Justice Kennedy joined in the judgment of the Court rejecting the claims of the Vieth parties, who contended that Pennsylvania's congressional redistricting plan was the product of unconstitutional political gerrymandering. He did not do so, however, on the basis that the claims were non-justiciable, and declined to foreclose the possibility that workable standards for evaluating a political gerrymandering claim might someday emerge. Justice Kennedy explained, "That no such standard has emerged in this case should not be taken to prove that none will emerge in the future." *Id*. at 311, 124 S. Ct. at 1795 (Kennedy, J., concurring in the judgment).

He went on to suggest that, instead of the Equal Protection Clause, the First Amendment "might be the more relevant constitutional provision in future cases that allege unconstitutional gerrymandering." *Id*. at 314, 124 S. Ct. at 1797 (Kennedy, J., concurring in the judgment). In so doing, he declined to join either Justice Stevens or Justice Breyer, each of whom pointed to the Equal Protection Clause as a source of workable standards. *See id.* at 319, 334, 124 S. Ct. at 1800, 1809 (Stevens, J., dissenting); *id.* at 362, 124 S. Ct. at 1825 (Breyer, J., dissenting)

("[G]errymandering that leads to entrenchment amounts to an abuse that violates the Constitution's Equal Protection Clause."). Likewise, Justice Kennedy did not join Justice Souter, who, joined by Justice Ginsburg, proposed a test based on the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), summary judgment standard. Justice Souter's test would start with five parts, and a successful showing would then shift the burden to the defendant "to justify their decision by reference to objectives other than naked partisan advantage." *Id*., 541 U.S. at 352, 124 S. Ct. at 1891 (Souter, J., dissenting).

Accordingly, the First Amendment theory advanced by the Plaintiffs lacks support in the precedent.

In addition, that First Amendment theory fails as a matter of law. The Plaintiffs contend that the alleged partisan gerrymandering violates their First Amendment rights to free speech and political association. A three-judge federal district court sitting in the Northern District of California disposed of this claim in *Badham v. Eu*, 694 F. Supp. 664, 675 (N. D. Cal. 1988) (three-judge court), stating "Plaintiffs here are not prevented from fielding candidates or from voting for the

candidate of their choice. The First Amendment guarantees the right to participate in the political process; it does not guarantee political success." *Id*.[18]

In this case, nothing stops the Plaintiffs from engaging in unrestrained political speech or from joining whatever political group they want to. They may or may not persuade when they speak, and their political group may or may not win at the polls. And, even if they lose, "[A]n individual or group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests if those voters." *Davis v. Bandemer*, 478 U.S. 109, 132, 106 S. Ct. 2797, 2810 (1986); *cf. Badham v. Eu*, 694 F. Supp. at 675 n.9 ("Although *Bandemer* involved an equal protection challenge, the observation is equally applicable to a First Amendment claim. The Court in *Williams* [*v. Rhodes*, 393 U.S. 23, 30, 89 S.

[18] Section 2 of the Voting Rights Act, which targets practices that provide minority voters with "less opportunity than other members of the electorate . . . to elect representatives of their choice," 42 U.S.C. § 1973(b), goes no farther. Other members of the electorate need a majority (or a plurality, depending on the circumstance) of the votes in an election for the candidate of their choice to win.

Ct. 5, 10 (1968)] noted the overlapping nature of the right to association and the right to vote.").

For those reasons, this Court should enter judgment on the pleadings and as a matter of law in favor of the State Defendants and against the Plaintiffs with respect to the Plaintiffs' claims of partisan gerrymandering and deny the Plaintiffs' Motions.

## IV. Injunctive Relief Should Be Denied Because, in Addition to Plaintiffs Being Unlikely to Succeed on the Merits, the Balance of Equities Does Not Favor the Plaintiffs, and Injunctive Relief Would Not Be in the Public Interest.

The balance of equities does not favor the Plaintiffs in this case for several reasons.

First, the Plaintiffs seek judicial interference with and oversight of a process that is fundamentally legislative. In *Gaffney v. Cummings*, the Supreme Court expressed its discomfort with taking the process away from the Legislature and giving the reins to "federal courts which must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan." 412 U.S. 735, 749, 93 S. Ct. 2321, 2329 (1973). In this case, the official goals are

embodied in the plans that the State enacted and the United States Department of Justice precleared. Clearly, the Plaintiffs have different objectives in mind. Before this Court takes the process away from the State, it should remind itself that this lawsuit is a transparent attempt to overturn the results of the 2010 elections.

Second, the equities do not favor the Plaintiffs because they have unclean hands. In the 2001 Senate plan, with an overall deviation of 9.98%, the Democrats, including the ALBC members, split 30 counties. Either doing so was a necessity or they saw no need to comply with their present reading of § 200. Moreover, in opposing the attempt of the Rice Plaintiffs to assert a county-splitting claim in the Supreme Court of Alabama in *Rice v. English*, the State of Alabama was joined by lawyers for then-Governor Don Siegelman, a Democrat, and by lawyers for Democratic Senators Lowell Barron and Hank Sanders, also an ALBC member. *See* 835 So. 2d at 158.

In contrast, the 2012 Senate plan, which was drawn using a much tighter overall population deviation of 1.99%, splits 33 counties, just 3 more than the 2001 plan.[19] In the State Defendants' judgment, the difference between 30 and 33 is not

[19] The Plaintiffs' claim thus suggests that there is a bright, shiny, clearly-established constitutional line between the 30 counties the Democrats split in 2001

constitutionally significant. Finally, as Tables H2 and S2 show, the 2012 plans provide the minority members of the House and the Senate with seats that are, roughly, as safe as the seats the Democrats gave them in the 2001 and 1993 plans.

Accordingly, this Court should deny the Plaintiffs' Motion for Preliminary Injunction.

## CONCLUSION

This case illustrates the substantial tensions inherent in the application of the Voting Rights Act. If, as the Plaintiffs contend in their first claim, the Constitution requires the State to use an overall population deviation of close to 10% instead of a 2% deviation, then the Constitution simultaneously requires some vote dilution even as it bars other vote dilution. Implicitly, then, the Plaintiffs contend that some forms of vote dilution are better than others. Similarly, if the Constitution and Section 2 require the creation of crossover districts as a remedy for alleged packing and the related vote dilution, as the Plaintiffs appear to contend in their second, the Supreme Court's recent decision in *Bartlett v. Strickland* is a dead letter.

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and the 33 counties the new plan splits. If such a line exists, and where it is to be drawn, are for the Alabama courts to decide.

For the reasons stated in the State Defendants' Motion and this Memorandum, this Court should (1) deny the Plaintiffs' Motions for Partial Summary Judgment and for Preliminary Injunction, and (2) grant the State Defendants' Motion for Judgment on the Pleadings, entering judgment in favor of the State Defendants and against the Plaintiffs on all of their claims under federal law.

To the extent that the Plaintiffs seek to bring a county splitting claim based on state law, this Court should dismiss that claim pursuant to *Pennhurst*. In the event this Court concludes that dismissal is not compelled, because novel issues of state law have been presented, this Court should certify the following questions to the Supreme Court of Alabama:

(1) Do §§ 198 and 199 of Article IX of the Alabama Constitution establish a constitutionally binding and enforceable limitation on the splitting of counties in the House districting plan?

(2) Do the equal population requirements of the U.S. Constitution override, in whole or in part, the "no county splitting" provision in § 200 of Article IX of the Alabama Constitution?

(3) If the "no county splitting" provision in § 200 has not been completely overridden by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, how should that provision be reconciled with the portion of § 200 which calls for the districts in the State Senate to be "as nearly equal to each other in the number of inhabitants as may be."

Respectfully submitted,

Date October 26, 2012

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**CERTIFICATE OF SERVICE**

I hereby certify that, on October 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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