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

ALABAMA LEGISLATIVE BLACK CAUCUS, et al.,	)	
Plaintiffs,	)	
vs.	)	Case No.
	)	2:12-cv-691WKW-MHT-WHP
THE STATE OF ALABAMA, et al.,	)	
Defendants.	)	
DEMETRIUS NEWTON, et al.,	)	
Plaintiffs,	)	
vs.	)	
	)	Case No.
	)	2:12-cv-1081WKW-MHT-WHP
THE STATE OF ALABAMA, et al.,	)	
Defendants.	)	

RESPONSE IN OPPOSITION TO
SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

The State of Alabama and Beth Chapman, in her official capacity as Secretary of State of Alabama, Defendants in the ALBC Lawsuit (the "ALBC Defendants"), submit this Response in opposition to the ALBC Plaintiffs' Second Motion for Partial Summary Judgment (Nos. 66 and 68-1). For the reasons stated below, this Court should deny the Plaintiffs' Motion.

INTRODUCTION

In No. 53, this Court held that the use of an overall population deviation of ± 1% in the drafting of the 2012 legislative redistricting plans does not violate constitutional one-person, one-vote standards. No. 53 at 6, 7, and 9. Indeed, it stated, "[A] deviation of less than two percent in population equality … easily establishes a presumption that the new districts satisfy the guarantee of one-person, one-vote." *Id*., at 7. This Court also concluded that the ALBC Plaintiffs' claim that the plans split too many counties raised an issue of state law that it lacks the jurisdiction to consider. *Id*.

With respect to the ALBC Plaintiffs' claim of partisan gerrymandering, this Court gave them another opportunity to plead that claim. The present motion relates to that claim, and, as counsel for the ALBC Plaintiffs warned at the hearing on December 12, 2012, the original partisan gerrymandering claim had a great deal of the county-splitting/one-person, one-vote claim in it. The new partisan gerrymandering claim shows that counsel's warning was prescient because the new claim is a revived and repackaged version of the old one-person, one-vote claim.

The ALBC Plaintiffs renew their attack on the overall population deviation of ± 1% and the splitting of counties. Now, splitting counties is said to violate the one-person, one-vote interests that county residents have in their local

delegations and to have been done unnecessarily. The ALBC Plaintiffs assert that "it is not possible to minimize the number of members in each county's local legislative delegation when all population deviations are limited to ±1%." No. 66, at 10. They also contend:

> Acts 2012-602 and 2012-603 violate the Equal Protection Clause (1) because they deny the fundamental rights of county residents to an equal and undiluted vote for the legislators who control the laws governing their local governments, and (2) because they are "crazy quilts" that construct House and Senate districts with no rational basis.

No. 68-1 at 38, ¶ 39.

FACTUAL BACKGROUND

With this Response, the ALBC State Defendants include affidavits from D. Patrick Harris, Secretary of the Alabama Senate, and Jeff Woodard, Clerk of the Alabama House of Representatives, that describe the procedures in the Alabama Senate and House of Representatives, respectively, for handling local legislation. Exhibits M-1 and M-2, respectively. Those affidavits show that local legislation is ultimately the product of the Alabama Legislature, not the local delegations in each house.

The ALBC State Defendants also include Affidavits from Bonnie Shanholtzer, Supervisor of the Alabama Legislative Reapportionment Office, Senator Gerald Dial, and Representative Jim McClendon that address, among other

things, the degree of county splitting in the 2012 Alabama legislative redistricting plans and the process for drawing those plans. Exhibits M-3, M-4, and M-5, respectively. These affidavits show that compliance with the Voting Rights Act and maintaining the overall population deviation of ±1% were the foremost considerations behind the drafting of the plans.

The Harris and Woodard Affidavits show that the Alabama Legislature, not the local delegations, is responsible for the passage of local legislation. While much local legislation can proceed to the floor of the House without going through committee, it must go through one of the four Local Legislation Committees in the Senate. Moreover, without regard to how the local delegations are selected or the voting procedures they employ, any member of either House can object to proposed local legislation. In that event, the proposed local legislation must garner a majority from those voting on the floor.

The Shanholtzer Affidavit shows that counties have been split in the 1993, 2001, and 2012 legislative redistricting plans. In the Senate plans, the number of split counties was 32 in the 1993 plan and 31 in the 2001 plan; in both of those plans, the overall population deviation was ±5%. In the 2012 Senate plan, for which the overall population deviation is ±1%, only 33 counties were split.

Exhibit M-3. That suggests that the use of an overall population deviation of ±1% had minimal effect on the Senate plan.

With respect to the House plans, 36 counties were split in the 1993 plan and 39 in the 2001 plan. As with the 1993 and 2001 Senate plans, the overall population deviation in the 1994 and 2001 House plans was ±5%. The number of split counties in the 2012 House plan, 50, is greater, but that 2012 plan uses a much tighter overall population deviation which allows for a significantly smaller effective range in population between districts. Exhibit M-3.[1]

In that regard, public records show that, while the effective population range of the House districts was 4,206, the effective population range was only about 900 in the 2012 plan. *See* No. 30-42 at 5 and No. 30-36, respectively. This tighter range suggests that something had to give in putting the plan together, just as a different value did in putting the 2001 House plan together. That 2001 plan

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[1] The 2001 House plan split Lauderdale, Colbert, Limestone, Morgan, Winston, Cullman, Madison, Blount, Walker, Tuscaloosa, Jackson, DeKalb, Marshall, Etowah, St. Clair, Coosa, Elmore, Calhoun, Talladega, Shelby, Jefferson, Bibb, Baldwin, Conecuh, Escambia, Monroe, Choctaw, Clarke, Dallas, Marengo, Autauga, Montgomery, Chambers, Lee, Russell, Bullock, Houston, Dale, and Mobile counties. *See* No. 30-42 at 21-30.

The 2012 House plan splits each of those counties except Dallas and Bullock. In addition, it splits Lawrence, Lamar, Franklin, Clay, Cleburne, Chilton, Pickens, Washington, Greene, Sumter, Perry, and Tallapoosa counties. *See* Exhibit M-7.

tolerated a greater degree of vote dilution in exchange for keeping some more counties intact.

The Affidavits of Senator Dial and Representative McClendon show that both undertook to treat their colleagues fairly. Senator Dial states that he spoke with each of the other members of the Senate, and Representative McClendon states that most, but not all of his fellow House members took him up on his offer to speak with each of them. Both also tried not to pit incumbents against each other and took steps to fix any error that was found.

With respect to the plans, both viewed the reduction in the overall population deviation from ± 5% to ±1% as "a reasonable attempt to comply with the general constitutional mandate that districts be as nearly equal in population to each other, without the need for absolute equality." Exhibit M-4, ¶ 6, lines 21-23; Exhibit M-5, ¶ 6, lines 4-6. Both also started with the black-majority districts and tried to ensure that the new districts "essentially guaranteed that the African-American community could elect the candidate of its choice in that district." Exhibit M-4, ¶ 9, lines 15-16; Exhibit M-5, ¶ 9, lines 9-10. Because all of the black-majority districts in both houses were underpopulated, the plans had to add population that was both contiguous to the old district lines and demographically

like the population of the previous district. Exhibit M-4, ¶ 9, lines 12-15; Exhibit M-5, ¶ 9, lines 18-21.

Senator Dial and Representative McClendon also considered the requests of their colleagues to change the plans. Senator Dial states that he inadvertently put two incumbents into one district but was able to correct that problem. Exhibit M-4, ¶ 8, lines 1-4. In addition, he states that he planned to make an accommodation for Senator Tammy Irons, but was unable to do so because another Democrat, Senator Marc Keahey, filibustered the bill on the floor and blocked the opportunity to amend. *Id*., ¶ 13. Representative McClendon also had to fix a drafting error that put two members outside the districts drawn for them. Exhibit M-5, ¶ 17. Finally, he describes several proposed accommodations, nearly all of which he could make. *Id*., ¶ 16.

Finally, the ALBC State Defendants submit a recent op-ed written by Representative Craig Ford, House Minority Leader in Alabama (D-Gadsden). He wrote:

> There are several reasons why Democrats are not only alive, but in a good position to take back several seats we have lost.
>
> * * *
>
> First, the 2010 and 2012 elections are not a good indicator of what is going to happen in 2014.

> In 2010, Republicans out worked Democrats. That year was also a wave election that benefitted Republicans across the country. But looking at how Democrats performed in local elections last year, it seems that wave has ended.

Exhibit M-6.

ARGUMENT

The ALBC Plaintiffs are not entitled to summary judgment for several reasons. First, the contention that counties were split unnecessarily is, at its core, an issue of state law just like the claim that too many counties were split. This Court lacks jurisdiction to consider it. Second, to a substantial extent, this Court has already rejected these claims. Third, the ALBC Plaintiffs are not entitled to judgment as a matter of law, and genuine issues of material fact preclude the entry of summary judgment.

1. The Eleventh Amendment bars consideration of the restated county splitting claim.

The ALBC Plaintiffs' claim that the 2012 legislative redistricting plans split counties unnecessarily, just like the prior claim that the plans split too many counties, is just another attempt to induce this federal court to tell State officials to follow State law. As this Court has held, the Eleventh Amendment prohibits private parties from using the federal courts for that purpose. *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).

The contention that counties were split unnecessarily raises another question of state law. This Court has recognized that any limitation on the number of split counties arises from state law. That state law is, as the ALBC State Defendants have explained, unsettled. It is no more this Court's job to tell the State to split fewer counties unnecessarily than it is to tell the State to split fewer of them. Indeed, the earlier contention that too many counties were split includes the suggestion that those counties were split unnecessarily, and both contentions call for a similar explanation in response. A county that is not one of "too many" was, implicitly at least, "necessarily" split. In short, the restated claim is so closely linked to the earlier county-splitting claim as to be another question of state law.

This Court should deny the motion for partial summary judgment and dismiss the restated partisan gerrymandering claim.

2. The law of the case bars all or most of the restated partisan gerrymandering claim.

"As most commonly defined, the [law of the case] doctrine provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391 (1983). This Court has already rejected an

attack on the use of the ±1% overall population deviation, and it has declined to consider the argument that the 2012 legislative redistricting plans split too many counties. Likewise, it has not been persuaded by the ALBC Plaintiffs' invocation of *Larios v. Cox*, 314 F. Supp. 2d 1357 (N.D. Ga. 2004)(three-judge court) and *Sims v. Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965)(three-judge court). The ALBC Plaintiffs give this Court no reason to reconsider the wisdom of its prior rulings.

Moreover, the problem that led to the amendment of the partisan gerrymandering claim is the ALBC Plaintiffs' failure "to identify a justiciable standard for the adjudication of a claim of political gerrymandering." No. 53 at 16. The restated claim suffers from the same problem. The necessity standard is no standard at all. Without looking at each county that is split, there is no way to tell whether any were split unnecessarily. Furthermore, the integrity of county lines is not something that the United States Constitution protects. Once again, the ALBC Plaintiffs have failed to identify a justiciable standard to guide inquiry into claims of political gerrymandering.

In that regard, some counties must be split. As the ALBC State Defendants have previously noted, "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." No. 30 at 32 (quoting *Bartlett v. Strickland*, 556 U.S. 1, 7, 129 S. Ct. 1231, 1239 (2009)). To the extent that the State put compliance with the Voting Rights Act and population equality ahead of preserving county lines, it vindicated legitimate federal and state interests before protecting other state interests. The Affidavits of Senator Dial and Representative McClendon show that the 2012 Alabama legislative plans do precisely that. *See* Exhibits M-4 and M-5.

This Court should deny the ALBC Plaintiffs' motion because it is barred by the law of the case and should dismiss the partisan gerrymandering claim for that reason. To the extent the partisan gerrymandering claim is not completely barred, this Court should recognize that the ALBC Plaintiffs start from the bottom of a big hole that they have failed to climb out of. The ALBC Plaintiffs must explain how redistricting plans that do not violate constitutional one-person, one-vote standards as a whole can violate those interests in a different way. In addition, they should be required to anchor the preservation of county lines in something other than the Alabama Constitution. If this Court decides that the ALBC Plaintiffs have failed to distinguish their restated claim from the one-person, one-vote claim that this Court has already dismissed, it should deny the ALBC Plaintiffs' motion and dismiss the partisan gerrymandering claim.

3. The ALBC Plaintiffs are not entitled to summary judgment as a matter of law.

The only new part of the ALBC Plaintiffs' legal argument is the contention that the unnecessary splitting of counties violates the one-person, one-vote rights of some county residents. That argument lacks merit.

The ALBC Plaintiffs claim that the Equal Protection Clause has been violated by both the splitting of counties and by an allegedly "crazy quilt" plans. Without admitting the premise, the State Defendants believe that, unless a "crazy quilt" plan was drawn for an invidious reason, it does not violate the United States Constitution. Neither does the splitting of counties, which, if they are protected at all, they are protected by state law.

Nonetheless, the ALBC Plaintiffs now claim that the splitting of counties affects the passage of local legislation, which is then linked to a violation of one-person, one-vote principles. That violation cannot be a global one because, as this Court has held, the use of an overall population deviation of ±1% does not violate federal constitutional standards. The link to local legislation is also flawed.

In the first place, the cases cited by the ALBC Plaintiffs start with *Hadley v. Junior College Dist.*, 397 U.S. 50, 90 S. Ct. 791 (1970), and its statement of one-person, one-vote principles:

> [W]henever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter be given an equal opportunity to participate in that election, and when members of an elected body are selected from separate districts, each district must be established on a basis that will ensure, as far as practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.

Id., 397 U.S. at 56, 90 S. Ct. at 795. By any measure, the 2012 Alabama legislative districts meet this standard. The districts are constitutionally apportioned, so each voter gets an equal opportunity to participate. In addition, each voter votes for one Senator and one member of the House of Representatives, so there is the requisite proportionality.

It is not clear how *Hadley's* formulation of one-person, one-vote principles leads to the way in which legislative bodies handle their legislative duties.

In *DeJulio v. Georgia*, 290 F. 3d 1291 (11th Cir. 2002), the Eleventh Circuit affirmed the rejection of a one-person, one-vote challenge to the way in which the Georgia Legislature considered local legislation. It held, "[T]he [Georgia] General Assembly, which has indisputably been apportioned in accordance with the 'one person, one vote' requirement, engages in the governmental function of lawmaking, not the local delegations." *Id*., at 1296. The court noted that Georgia "does not codify or require the discretionary deference to local courtesy when either the House or Senate addresses legislation." *Id*. Moreover, even if

objections to local legislation are uncommon, this does not give the local delegations "plenary authority" over local legislation. *Id*. Instead, local legislation must be approved by both houses of the Georgia General Assembly and signed by the Governor to become law.

The ALBC Plaintiffs characterize the Georgia practice as "virtually the same [as] Alabama's." *See* No. 66 at 3. As the Affidavits of Patrick Harris and Jeff Woodard show, the ALBC Plaintiffs are correct in that characterization. *See* Exhibits M-1 and M-2.

Those Affidavits show that the local delegations in the Alabama Legislature do not exercise "plenary authority" over local legislation. Local courtesy is not codified. Rather, in both houses, any member can force a vote on proposed local legislation. Alabama House Rule 23 states, "Any local bill may be contested by one or more member(s) by filing a written statement of contest with the Clerk."[2] In the Senate, one of the Local Legislation Committees must be on board for local legislation to get to the floor. Local legislation must also be approved on the floor of each house before it is sent to the Governor. Just as in Georgia, local legislation is the product of the Legislature, not the local delegations. And, as noted above,

[2] Available at www.legislature.state.al.us/house/houserules/houserules1_40.html.

the Legislature has been apportioned in accordance with federal constitutional standards.

DeJulio compels the rejection of the ALBC Plaintiffs' claim. Even if Alabama legislators are assigned to local delegations by statute, as the ALBC Plaintiffs claim, see No. 66 at 4,[3] the bottom line remains the same. Local legislation remains the product of the Alabama Legislature. Moreover, using one-person, one-vote principles to realign the local delegations in the Alabama Legislature in the intrusive way that the Fourth Circuit did in *Linden v. Hodges*, 193 F. 3d 268 (4th Cir. 1999), doesn't change that. Cf. *id*., at 281 (Niemeyer, J., dissenting)("Th[e majority's] heavy-handed intrusion into the heart of state government represents an unwarranted extension of federal judicial power, justified only by generalities and irrelevant history but certainly not by the U.S. Constitution.").

Accordingly, the ALBC Plaintiffs are not entitled to judgment as a matter of law. This Court should deny their motion for partial summary judgment for that reason.

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[3] The ALBC Plaintiffs write, "In Alabama, legislators are assigned to local legislative delegations **by statute**, not by internal rules of the Legislature." No. 66 at 4 (emphasis in original). They do not, however, cite any such statute, and this Court should not permit them to cite such a statute or to argue from one or more of them in their Reply.

4. General issues of material fact preclude the entry of summary judgment in favor of the ALBC Plaintiffs.

The ALBC Plaintiffs' showing is factually insufficient to justify the entry of summary judgment. Alternatively, the ALBC State Defendants' showing is sufficient to demonstrate the existence of genuine issues of material fact that preclude the entry of summary judgment.

A. The ALBC Plaintiffs' Case.

The ALBC Plaintiffs rely on a selective reading of the transcripts of some of the public hearings and other materials.

The ALBC Plaintiffs make far too much of the public meetings. As the transcripts show, with one exception, those meetings took place before the new legislative plans were drawn. Senator Dial, Representative McClendon, and Dorman Walker, the hearing officer, explained that districts needed to gain or lose population and identified the considerations that would guide that process. Those who spoke offered suggestions about their corner of the State, which Senator Dial and Representative McClendon had to reconcile with the suggestions that came from the other 20 meetings that took place before the plans were drawn. Looking at all of the transcripts, rather than selected ones, leaves the impression that it is impossible to accommodate everyone's wishes within the established legal and population parameters.

The ALBC Plaintiffs' reliance on excerpts from House Speaker Mike Hubbard's book (No. 66-1) is misplaced. There is nothing malign in a political party's planning to take over a legislative house, which is all that the excerpts describe. That's what political parties do; they try to gain control so that they can implement their agenda.

Indeed, Craig Ford's op-ed of February 13, 2013 shows that the Democrats are not immune from the desire to improve their position in state government; Ford predicts that "2014 will be a better year for Democrats" and that they are "in good position to take back several seats we have lost." Exhibit M-6. Finally, there's Dr. Joe Reed, whose 1993 plans were drawn to "maximize" the number of black-majority districts and to help Democrats. *See Kelley v. Thompson*, 97 F. Supp. 2d 1301 (M.D. Ala. 2000)(three-judge court). In short, the ALBC Plaintiffs' reliance on excerpts from Speaker Hubbard's book is much ado about something that is commonplace.

Finally, the ALBC Plaintiffs' reliance on newspaper articles is insufficient to support their burden. ALBC Plaintiffs' Exhibit QQ (No. 66-2) includes statements from representatives of both parties, but the ALBC Plaintiffs highlight only those of the Republicans. As with the Hubbard book excerpts, both parties are busy doing what political parties do.

B. The ALBC State Defendants' Showing

The Affidavits of Senator Dial and Representative McClendon show that the 2012 plans are the product of a good faith effort to treat their colleagues fairly as they sought to comply with the Voting Rights Act, stay within the allowable overall population deviation, and otherwise trying to preserve communities of interest.

The Affidavit of Bonnie Shanholtzer shows that the ALBC Plaintiffs' attempt to link the number of split counties in the Senate plan (which is the starting point for any contention that one or more counties has been unnecessarily split) to the use of the overall population deviation of ±1% is incorrect. The 1993 and 2001 Senate plans, which were drafted by Democrats using an overall population deviation of ±5%, split almost the same number of counties as the 2012 plan; The 1993 plan split 32, and the 2001 plan split 31, while the 2012 plan split 33. If the use of ±1% had any effect on the Senate plan, that effect was minimal.

To the extent that more counties were split in the House plan, Representative McClendon's Affidavit shows that he focused on trying to comply with the Voting Rights Act and staying within the allowable population deviation. If that meant that more counties were split than in the 2001 House plan, Representative McClendon traded off a reduction in the level of vote dilution for more split

counties. His Affidavit puts his statements in ALBC Plaintiffs' Exhibit QQ (No. 66-3) in context. Only the ALBC Plaintiffs could, once again, claim that tightening the allowable population deviation violates constitutional one-person, one-vote standards.

The ALBC State Defendants have shown that the process of putting the 2012 Alabama legislative plans together involved trade-offs. It is the job of the political branches to make those trade-offs, and that's what they do best. This Court should give the drafters of the 2012 Alabama legislative plans a substantial amount of deference. *See generally Gustafson v. Johns*, 434 F. Supp. 2d 1246 (S.D. Ala. 2006)(three-judge court); *Montiel v. Davis*, 215 F. Supp. 2d 1279 (S.D. Ala. 2002)(three-judge court). The alternative is finely-grained political work, for which the courts are not institutionally well suited.

This Court should deny the ALBC Plaintiffs' Motion because genuine issues of material fact cannot be resolved in their favor.

CONCLUSION

For the reasons stated above, this Court should deny the ALBC Plaintiffs' Second Motion for Partial Summary Judgment.

Date February 28, 2013

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