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

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

JOINT BRIEF OF SENATOR GERALD DIAL, REPRESENTATIVE JIM McCLENDON, AND THE ALBC STATE DEFENDANTS

Pursuant to this Court's Order of June 28, 2013 (No. 130) and the concurring opinion of Judge Thompson of July 1, 2013 (No. 131), the State of Alabama and Beth Chapman, in her official capacity as Secretary of State of Alabama, defendants in this action (the "ALBC State Defendants") and Senator Gerald Dial and Representative Jim McClendon, defendants-intervenors, jointly submit this letter brief.

The ALBC Plaintiffs' Equal Protection claim has been a moving target throughout the litigation, but Defendants understand it to be as this Court has

characterized it: Plaintiffs allege that the Legislature failed to observe the one-person, one-vote requirement at the county delegation level by splitting too many counties, the result of which is that some members of some local delegations will be elected in part by voters of another county.

Never mind that the ALBC Plaintiffs (a number of whom are legislators) agree that some counties must be split in order to comply with one-person, one-vote standards; they object to the "unnecessary" splitting of counties. Likewise, never mind that legislators represent voters, not counties, and that the Eleventh Circuit has held that the one-person, one-vote requirement did not apply to a county delegation system in Georgia that is indistinguishable from Alabama's. *DeJulio v. Georgia*, 290 F.3d 1291 (11th Cir. 2002). The questions for the moment are whether the claim is ripe (it is not) and whether the ALBC Plaintiffs have standing to bring it (they do not). Among other reasons, Plaintiffs lack standing and their claim is not ripe because local delegations cease to exist with the end of each quadrennial session. Like other standing committees, local delegations are recreated with each new quadrennium, *if* the Legislature chooses to use them.

1. Ripeness

The ALBC Plaintiffs' Equal Protection claims are not ripe because their alleged injury turns on contingent future events that may not occur. There will be one more regular session under the current districting plan in 2014, and then that Legislature's standing committees and local delegations cease to exist. The new Legislature that comes to the organizational session in January 2015 will not only

include new faces but also will adopt new rules that may or may not be the same as the old rules. The injury that the ALBC Plaintiffs predict will not materialize before January 2015, if it occurs at all.

This level of contingency is fatal to Plaintiffs' claim. In *Mulhall v. Unite Here Local 355*, 618 F. 3d 1279, 1291 (11th Cir. 2010), the Eleventh Circuit Court of Appeals observed, "[I]t is generally true that the existence of contingencies raises fitness concerns that militate in favor of postponing review." (internal quotation and amendments omitted) It explained that it is the "*likelihood*" that a contingency will materialize, not just its existence, that "determine[s] whether a future contingency creates fitness (and ultimately ripeness) concerns." *Id.* (emphasis in original).

Here, the contingencies are undeniable and unavoidable. Inevitably, there will be legislative elections in 2014; an organizational session in January 2015; and new rules, the content of which cannot be known at this time. Jeff Woodard (Clerk of the House) and D. Patrick Harris (Clerk of the Senate) testified that the House and Senate adopt their committee rules at the organizational session that follows each election. The current rules were adopted in January 2011 and will remain in effect until the 2014 elections. The rules that will govern the operations of the House and Senate in the 2015-2018 quadrennium will be established in January 2015. Ex. S-1, p. 20, line 3 through p. 21, line 1; Ex. S-2, p. 19, line 9 through p. 20, line 5.

Woodard testified that local delegations in the House "are formed in every organizational session by the [S]peaker of the House and adopted by the House when they adopt the rules." Ex. S-1, p. 10, line 23 through p. 11, line 3. Presently, local delegations are created when there are at least five House members who represent a county; new local delegations have been created after previous rounds of redistricting. Ex. S-1, p. 10 lines 10-19; p. 11 lines 13-21.

In the House, local legislation requires a majority vote from a local delegation. Ex. S-1, p. 22 lines 14-20. For counties without a local delegation (those with fewer than five representatives), "a local bill has to be signed out by all of the members who represent that county," and the committee chair must concur. Ex. S-1, p. 23 lines 5-16.

Similarly, Harris explained that the Senate standing committees from one quadrennium do not continue into the next quadrennium. Ex. S-2, p. 21 lines 2-4. The Senate has four local legislation committees: one for each of Jefferson, Mobile, and Madison Counties, and a fourth covering all remaining counties. Ex. S-2, p. 8 lines 8-21. The Jefferson, Mobile, and Madison committees are composed of the Senate members who represent a portion of those counties. Ex. S-2, p. 9 lines 6-10. In contrast, the Committee on Assignments designates the members of the fourth local legislation committee, and those members may come from any county. Ex. S-2, p. 9 lines 10-14; p. 10 lines 3-17.

Significantly, the Senate local legislation committees operate under their own rules, which the committees themselves adopt. Ex. S-2, p. 10 line 18 through

p. 19 line 3. For a local legislation committee like the one for Jefferson County, the chairman "establishes the rules on how those bills are reported out, whether or not all the members have to sign it out or a majority has to sign it out." Ex. S-2, p. 11 lines 4-11.

We cannot know at this time if the Legislature that convenes in January 2015 will operate in the same manner. Indeed, the changes made to the organizational rules of one house may change radically as they did in 1999, after Steve Windom, a Republican, was elected Lieutenant Governor. In the 1995 organizational session, the Senate adopted rules that, among other things, allowed the president of the Senate to name the committee chairs and members and to appoint the Senate Floor Leader, who would serve "solely" at the President's "pleasure." See Journal of the Senate, Organizational Session of 1995, vol. 1 at 14, Rules 47(a) and (b), attached as Exhibit S-3. In the 1999 organizational session, the Democratic-controlled Senate changed Rule 47, empowering the Democratic President Pro Tempore to appoint the Senate Floor Leader and creating a Committee on Assignments to select the Chairs, Vice-Chairs, and members of committees. Journal of the Senate, Organizational Session of 1999, vol. 1, at 4, Rule 47 (attached as Exhibit S-4). In effect, the Democratic majority in the Senate stripped the Republican Lieutenant Governor of powers that his predecessor had exercised. A new legislature could make similarly broad changes to its rules, including those regarding local legislation.

2. Standing

As Plaintiffs describe their new Equal Protection claim, they contend that the Legislature failed to achieve "one-man-one-vote" at the county delegation level by paying too much attention to the same doctrine at the state level. Plaintiffs contend that the Constitution requires less equality in one area (the legislature as a whole) so that more equality can be achieved in another (within the local delegations). Their "injury" comes, allegedly, from the fact that some members of some county delegations will be partially elected by voters in adjacent counties.

Yet the ALBC Plaintiffs do not challenge the county delegation rules. (No. 60, ¶ 59). Nor do they claim that the injury comes from the mere fact that some members of local delegations are elected by residents of more than one county. (*Id.*). It is not the fact that multi-county districts exist, but the fact that more of them exist than if the Legislature had been content to allow greater variation in population among districts. It is only the marginal *increase* in the number of multi-county legislators that allegedly causes harm.

a. The ALBC Plaintiffs lack standing to proceed in their legislative capacities.

The ALBC Plaintiffs lack standing to proceed in their legislative capacities for two reasons. First, they have suffered only an institutional injury, if any, not a personal one. Second, the injury that they claim to have suffered is neither actual nor imminent.

The United States Supreme Court has held that members of Congress, each of whom voted against the adoption of a piece of legislation, lacked standing to challenge the constitutionality of that law insofar as it affected their powers as legislators. *Raines v. Byrd*, 521 U.S. 811, 117 S. Ct. 2312 (1997). The Court explained that the member-plaintiffs had not been "singled out for specially unfavorable treatment as opposed to other members of their respective bodies." 521 U.S. at 821, 117 S. Ct. at 2318. Instead, the injury was an institutional one that affected only their political power. The Court explained:

> If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power.

521 U.S. at 821, 117 S. Ct. at 2318. Accordingly, the member-plaintiffs lacked a "personal stake" in the dispute. 521 U.S. at 829, 117 S. Ct. at 2322.

In the same way, the ALBC legislative plaintiffs have no personal stake in the number of counties they represent. In the 2014 elections, which will be held under the new district lines, one or more of them may not be returned to the Legislature. Whoever represents those districts in 2015 will have to operate under the rules that the Legislature adopts, just like every other member. In the absence of such a personal stake in the outcome, the Black Caucus Plaintiffs lack standing.

In addition, the injury that they claim is neither actual nor imminent. In *McConnell v. FEC*, 540 U.S. 93, 124 S. Ct. 619 (2003), *overruled on other grounds*, *Citizens United v. F.E.C.*, 558 U.S. 310, 130 S.Ct. 876 (2009), the Court

held that the McConnell Plaintiffs, including Senator Mitch McConnell, lacked standing to challenge the constitutionality of § 305 of the Bipartisan Campaign Reform Act of 2002. That section made the lowest unit charges of broadcasting time unavailable until 45 days before a primary election or 60 days before a general election. McConnell's claim that he planned to run advertisements criticizing his future opponents was insufficient to establish standing because he was not up again until 2009. As a result, any injury to him was "too remote temporally to satisfy Article III standing." 540 U.S. at 226, 107 S. Ct. at 637-38.

The ALBC Plaintiffs will not have to wait for six years, but their injury is still too remote to establish standing. They will not know what the new local delegation rules will be until after another legislative session under the existing rules, an election, and an organizational session. That will be settled 18 months from now, but it is not settled today.

b. Injury-in-fact

To establish Article III standing, Plaintiffs must show that they have suffered a real, concrete, particularized injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130 (1992). (Other elements of standing will be discussed below.) Plaintiffs have not suffered such an injury, for two reasons: (1) The county delegations do not yet exist for the next Legislature, and it cannot be said with certainty that they will exist or that they will take the same form they have taken in the past; and (2) any alleged injury would not be visited on the office-holder Plaintiffs, but would instead be suffered, if at all, by voters.

First of all, Plaintiffs have no standing for the same reason that their claim is not ripe: We do not know if County delegations will matter in the next Legislature, whether they will exist, or what form they will take. We do not even know if any of the ALBC Plaintiffs (or any other current legislator) will be re-elected in 2014. Any legislative rule that will govern local legislation in the next Legislature does not yet exist. Whether an injury will ever occur is uncertain and conjectural, insufficient to support standing. *See Elend v. Basham*, 471 F.3d 1199, 1205 (11th Cir. 2006) ("If an action for prospective relief is not ripe because the factual predicate for the injury has not fully materialized, then it generally will not contain a concrete injury requisite for standing."); *Dermer v. Miami-Dade County*, 599 F.3d 1217, 1221 (11th Cir. 2010) ("When a plaintiff lacks standing for prospective relief because the injury in fact requirement is not satisfied, the claim is usually not ripe."); *Little v. Strange*, 796 F.Supp.2d 1314, 1331-32 (M.D. Ala. 2011) (three-judge court) (finding plaintiffs lacked standing when the challenged statute was not enforced and future enforcement was uncertain).

Second, if an injury ever occurs, it will not be to these Plaintiffs, who sue as legislators and commissioners. The hypothetical injury would be to *voters*. Defendants do not concede that a voter would have Article III standing to raise the present claim; the point is that if anyone has been injured, it is not these Plaintiffs.

Plaintiffs appear to acknowledge that the alleged injury is to voters, not to themselves. They allege "[t]he dilution of the voting strength of *residents of a county* by the inclusion in their local legislative delegation of members whose

constituencies unnecessarily include resident of another county." (No. 60, ¶62(a)) (emphasis added). But "a party generally may assert only his or her own rights and cannot raise the claims of third parties not before the court." *Granite State Outdoor Advertising, Inc. v. City of Clearwater, Fla.*, 351 F.3d 1112, 1116 (11th Cir. 2003). There is an exception to this rule in First Amendment overbreadth cases, *id.*, which this is not. And there is a "prudential standing" exception where a party can assert the rights of others if the party has also suffered an injury, and if there is a hindrance to the third party asserting his or her own rights. *Young Apartments, Inc. v. Town of Jupiter, FL*, 529 F.3d 1027, 1042 (11th Cir. 2008). Here, though, the ALBC Plaintiffs have not suffered a personal injury, and there is no obstacle to a voter asserting his or her own rights.

Even if the ALBC plaintiffs alleged a personal injury, there is no such conceivable injury deriving from county-splitting that would satisfy the standing requirement. It would not be tied to any specific piece of legislation, and cannot be, because the non-existent 2015 Legislature has not considered any local legislation. *See Raines v. Byrd*, 521 U.S. at 824 (finding a lack of standing by legislators challenging a line-item veto bill in part because "they have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated."). And it is not sufficient to for an elected official to claim that his or her vote has become less effective. *Id.* at 825-26. Moreover, their so-called injury would not stay with them if they left

office, but would pass on to a successor: An injury sufficient to grant standing must be personal, not official. *Id.* at 830 (1997) (Souter, J., concurring).

If there is an actual (or even potential) Equal Protection injury here at all, it was not (and would not be) suffered by the ALBC Plaintiffs.

c. Traceability

For an injury to support standing, "there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560, 112 S.Ct at 2136. Here, any alleged injury would arise not from the redistricting plan, but from the county delegation system, which is not challenged in this suit.

Plaintiffs have not challenged the potential rules of the next Legislature governing local legislation; they have in fact expressly disavowed such a claim. (No. 60, ¶59). But it is from those rules that their alleged harm arises. No matter how many counties are split, county-splitting has exactly zero impact on local legislation until, or unless, the future Legislature adopts such rules. The injury, then, is traceable not to the new district lines, but to internal Legislative procedure.

This bears further discussion, but because the analysis of traceability in this case collapses somewhat with redressability, we will expand the discussion below.

d. Redressability

Finally, for Plaintiffs to establish standing, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561, 112 S.Ct. at 2136. Here, the new redistricting plan Plaintiffs seek would not cure their alleged injury, for much the same reason that the injury is not traceable to Defendants' conduct. This is because Plaintiffs' real grief is with the local delegation system, not the plan.

It is true, in a sense, that county-splitting is related to the alleged injury. But it is also true that a new plan would not eliminate county splitting. It would not result in local delegations untainted by voters of neighboring counties. It may somewhat *reduce* the number of multi-county legislators, but it would not eliminate them. Thus, it does not eliminate the injury. If it causes an injury for a member of a local delegation to be partially elected by voters outside the county, that injury exists whether there are five such members or one.

Only a different system for local legislation would cure the alleged injury. It therefore is not traceable to the plan, nor could it be redressed by a new plan. And, as this Court pointed out, Secretary of State Beth Chapman is the only official that the ALBC Plaintiffs have named as a defendant.[1] She is not empowered to change the Legislature's internal operating procedure.

[1] The Newton Plaintiffs have also named Governor Bentley, in his official capacity, as a defendant, but he too lacks the power to change the Legislature's internal operating procedures. Moreover, neither Senator Dial nor Representative McClendon can change those procedures on his own.

3. Conclusion

Plaintiffs would impose upon Legislatures a requirement to find a Constitutional "sweet spot." In Plaintiffs' view, Legislatures must observe one-person, one-vote to the least possible extent and allow the maximum permissible population deviation, whatever that is. Their standard is vague and unworkable, it is unsupported in the law, it is bad policy, and it is inseparable from a quintessential state-law question of what force remains in state constitutional provisions addressing county-splitting. The flaw in their claim most relevant to this brief, though, is that the claim is inseparable from internal Legislative operating procedures related to local legislation, the rules for which do not, and may never, exist for the next Legislature. Consequently, Plaintiffs lack standing, their claim is not ripe, and this Court lacks jurisdiction to consider the Equal Protection claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 9, 2013, 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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