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

ALABAMA LEGISLATIVE BLACK CAUCUS, et al.	)	
Plaintiffs	)	
v.	)	**2:12-CV-00691-WKW-MHT-WHP**
	)	**(Three Judge Court)**
THE STATE OF ALABAMA, et al.	)	
Defendants	)	
DEMETRIUS NEWTON, et al.	)	
Plaintiffs	)	
vs.	)	**2:12-CV-01081-WKW-MHT-WHP**
	)	**(Three Judge Court)**
STATE OF ALABAMA, et al.	)	
Defendants	)	

NEWTON PLAINTIFFS' RESPONSE TO DEFENDANTS' JOINT NOTICE OF OBJECTIONS OR, IN THE ALTERNATIVE, MOTION *IN LIMINE*

The Newton Plaintiffs respectfully respond to Defendants' objections to evidence offered by the Newton Plaintiffs. As Defendants concede, "motions in limine are not favored in non-jury proceedings." Doc. 167 at 2. The Court is well situated to weigh the value of each proffered fact. Here, each challenged item of evidence to be offered by the Newton Plaintiffs is relevant to a legal element of a claim under Section 2 of the Voting Rights Act, 42 U.S.C §1973, *Thornburgh v. Gingles*, 478 U.S. 30, 50 (1986), or the 14th and 15th Amendments, *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), and each item is admissible as evidence.

Evidence of Past Discrimination by Defendants

Defendants object to evidence of discriminatory acts that are "remote in time." Alabama's history of racial discrimination is particularly relevant to the Court's consideration of the issues of this case: a violation of Section 2, *Gingles*, 478 U.S. at 50, and a violation of the Constitution. *Arlington Heights*, 429 U.S. at 267.[1]

The objection is vague, undefined and overbroad. Defendants do not specify at which point incidents become remote in time, nor do they specify which policies and events they believe constituted abuses or which of those affected voting rights. They cite simply the 1901 Alabama Constitution and the events of the 1960s.

The Newton Plaintiffs' citations to the 1901 Alabama Constitution involve those provisions, notably Sections 198, 199 and 200, that continue to govern the redistricting process and that are good law where they do not conflict with federal law. The events of the 1960s, of course, have been litigated extensively and the Court can take judicial notice of the record of racial discrimination in voting in the 1960s as well as the 1970s, 1980s, 1990s, 2000s, and up to the present day. At the same time, however, the past is not dead. Many Alabama citizens, for example, who attended racially segregated schools before, during and after the 1960s continue to bear the effects of discrimination, and the events of the 1960s continue to affect in many ways. The events of the 1960s and the reaction to the passage of civil rights legislation initiated a political realignment in Alabama

[1] Defendants' reliance on a phrase in *Shelby County v Holder*, __ U.S. __, 133 S.Ct. 2612, 2617 (2013), does nothing to change the legal standards of *Gingles* and *Arlington Heights*. *Shelby County* holds only that the Section 4 formula based on long-banned voter tests and decades old voter registration and turnout rates no longer fit the Section 5 remedy. The Court did not absolve Alabama of past discrimination or overrule the settled law of *Gingles* or *Arlington Heights*.

that affects the state today. The past also is directly relevant to the issues of this case as it demonstrates a seamless web of racial discrimination.

Defendants' Recent Acts of Racial Discrimination

Defendants also wish to prevent the Court from considering acts and expressions of racial animus of more recent vintage. They urge the Court to exclude judicial findings of the racist expressions and open and accepted expressions of legislators' intent to discourage minority participation and influence in elections by leading members of the same Legislature that adopted these plans.

Apparently, Defendants do not wish to be tarred with the same brush as Sen. Beason and those who sat silent during their racial comments, acquiesced in the undermining of minority political participation, and condoned his continuing enjoyment of a position of power and leadership in the Legislature. This is understandable, but Defendants cite no authority for their proposition.[2] The comments were, in fact, made and the belittling discussion of minority citizens and the open antagonism to their exercise of the franchise certainly has a tendency to make "a fact more or less probable than it would be without the evidence." FED.R.EVID. 401. Defendants cannot un-ring that bell. The facts are relevant to both the Section 2 and constitutional inquiries under *Gingles*, 478 U.S. at 50, and *Arlington Heights*, 429 U.S. at 266-268.

Defendants similarly object to use of a letter from the Alabama NAACP to Defendant Secretary of State Beth Chapman concerning the failure of state public assistance agencies to provide

[2] Defendants contend that since they mooted the case by curing the violations found by the Court in *Central Alabama Fair Housing v. Magee*, 835 F. Supp.2d 1165 (M.D. Ala. 2011), that it prevents this Court from considering the factual findings of the *Magee* Court. However, they do not suggest that the factual findings were clearly erroneous, nor that the transcripts and records from which they were drawn are in any way inaccurate.

voter registration services as required by the National Voter Registration Act. The Defendants did not produce this letter in their initial disclosures or otherwise in discovery. The letter was written on behalf of the Alabama State Conference of the NAACP. Newton Plaintiffs identified Alabama NAACP President Bernard Simelton in their initial disclosures and have listed him as a witness. Mr. Simelton will testify as to the facts and circumstances of the State's violation of the National Voter Registration Act, among other things. The letter itself documents the date on which the State of Alabama officially was placed on notice of the NVRA violations.

Census Data

Defendants also object to certain census data. Defendants aver that the ACS data published by the Bureau of the Census "are not census data" and cannot be used as a remedy if one is found warranted. Neither proposition is accurate. *See, e.g.*, *Benavidez v. City of Irving*, 638 F.Supp.2d 709 (N.D. TX. 2009).

The specific data at issue is Exhibit NPX 327 (identified by Defendants as NPX 45) (see also Doc. 137-3), the 2011 population of the State of Alabama by race and ethnicity as reported by the ACS, or American Community Survey. The American Community Survey is a rolling Census Bureau survey of detailed population characteristics that has replaced the "long form" Census Bureau sample of population characteristics. The Census Bureau publishes a wide range of ACS data that it considers sufficiently reliable to be useful to decision-makers. Exhibit NPX 327 provides the most recent population data published by the Census Bureau for the State of Alabama. Defendants aver that the ACS data is unreliable but offer no facts supporting that proposition or any reason to believe that it is not more accurate than the 2010 census as a reflection of the current total population of Alabama. The plain fact is that demographic characteristics of a given area can be very fluid: in

House District 73, the white percentage dropped some 25 percentage points between 2000 and 2010 and became a minority-majority district that elected the choice of minority voters in 2010. *See LULAC v. Perry*, 548 U.S. 399, 429 (2006). Indeed, Defendants themselves offer evidence of the relevance of speculative projected population shifts as relevant to a Voting Rights Act determination. See Common Exhibit C37, p.2.

In terms of the use of ACS data *vis-à-vis* remedy, the Newton Plaintiffs are not quite at the remedy stage, but here advise the Court that, upon a finding of liability, the Newton Plaintiffs' position will be that the Court should allow the Legislature a reasonable opportunity to draw new non-discriminatory districts within the framework of the violations found by the Court. *Connor v. Finch*, 431 U.S. 407, 414-415 (1976). The Newton Plaintiffs have not suggested that such remedial plans should apportion on the basis of the 2011 ACS data: the Court should not. "States operate under the legal fiction that their plans are constitutionally apportioned throughout the decade." *LULAC v. Perry*, 548 U.S. at 421 (2006). While the ACS data may have imperfections when very small units are involved that militate against its use in drawing redistricting plans, the statewide ACS report offered by the Newton Plaintiffs is useful in making "a fact more or less probable than it would be without the evidence." FED.R.EVID. 401.[3]

Newspaper Articles

Defendants also object to "a number of newspaper articles" but fail to specify any particular newspaper article. Defendants admonish that "[t]he Court should consider all of those articles with

[3] The Newton Plaintiffs do not agree that the Legislature or the Court should turn a blind eye to significant post-2010 shifts in the racial composition of the population within actual or potential districts.

care, assigning them the weight to which they are entitled." We have confidence that the Court will do so.

Illustrative Plans

Defendants also raise a question concerning differences between the Newton Plaintiffs' illustrative remedies for Montgomery and Madison Counties. We note first that these plans are not offered as remedial plans. Consideration of remedial plans will be timely once the Court identifies the scope of the violations in the State's plans and gives the Alabama Legislature a reasonable opportunity, considering the time available before the 2014 elections to address those violations in revised House and Senate plans.

Rather, the plans in question simply demonstrate "the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994); accord *Perry*, 548 U.S. at 429. They illustrate that a remedy for the Section 2 violations in the counties involved is possible: that compact and contiguous districts can be drawn in which minorities will form a majority of the voting age population. *Bartlett v. Strickland*, 556 U.S. 1 (2009). The ultimate end of the first *Gingles* precondition is to prove that a solution is possible, not necessarily to present the ultimate solution to the problem. *Gingles*, 478 U.S. at 50 n.17.

Defendants note that there are "discrepancies" between the data associated with different versions of the illustrative plans and demand an explanation. The explanation for the statistical differences in the different plans is that there are different versions of the plans and that the boundaries of the districts in the different versions are not identical. The data cited by Defendants

are associated with initial versions of the plans that were later corrected and provided to Defendants through supplemental disclosures.

CONCLUSION

In all, Defendants take an unrealistically narrow, crabbed view of what constitutes the "totality of circumstances" relevant to a Section 2 inquiry under *Gingles* and an even more restrictive view of the objective criteria set forth in *Arlington Heights*. While this reluctance to acknowledge and explain Defendants' racially discriminatory actions is understandable in a very human sense, it is unsupported by the law, and should be rejected by the Court.

RESPECTFULLY SUBMITTED, this 5th day of August, 2013.

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