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

ALABAMA LEGISLATIVE BLACK CAUCUS; BOBBY SINGLETON; ALABAMA ASSOCIATION OF BLACK COUNTY OFFICIALS; FRED ARMSTEAD, GEORGE BOWMAN, RHONDEL RHONE, ALBERT F. TURNER, JR., and JILES WILLIAMS, JR., individually and on behalf of others similarly situated,	*	
Plaintiffs,	*	Civil Action No. 2:12-CV-691-WKW-MHT-WHP (3-judge court)
v.	*	
THE STATE OF ALABAMA; BETH CHAPMAN, in her official capacity as Alabama Secretary of State,	*	
Defendants.	*	
DEMETRIUS NEWTON et al.,	*	
Plaintiffs,	*	
v.	*	Civil Action No. 2:12-cv-1081-WKW-MHT-WHP
THE STATE OF ALABAMA et al.,	*	
Defendants.	*	

ALBC PLAINTIFFS' BRIEF IN SUPPORT OF SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs Alabama Legislative Black Caucus et al., through undersigned counsel, submit the following argument and authorities in support of their second motion for partial summary judgment, this time with respect to amended Count III, filed contemporaneously herewith. The Republican super-majority's pursuit of a statewide strategy of maximizing the number of seats in the House and Senate most likely to elect Republicans has resulted in redistricting plans that violate one-person, one-vote equal protection rights of county voters.

A. Adding More Non-Residents To a County's Local Legislative Delegation Than Are Required for Statewide Substantial Equal Population Violates the One-Person, One-Vote Rights of the County's Voters.

The Fourth Circuit held in *Vander Linden v. Hodges*, 193 F.3d 268 (4th Cir. 1999), that "county legislative delegations constitute elected governmental bodies to which the constitutionally mandated 'one person, one vote' requirement applies...." 193 F.3d at 270. The court based its holding on *Hadley v. Junior College Dist. of Metro. Kansas City*, 397 U.S. 50 (1970), and *Board of Estimate v. Morris*, 489 U.S. 688 (1989). *Hadley* held that

> whenever 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 must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.

397 U.S. at 56 (emphasis added). Since in South Carolina local legislative delegations were both popularly elected and performed governmental functions, the *Vander Linden* court held that the whole system of enacting local laws had to be reformed to comply with the Equal Protection Clause. It did not matter that legislators became members of the local legislative delegations by virtue of offices to which they already were elected in accordance with the one-person, one-vote rule. 193 F.3d at 274 (citing *Morris*, 489 U.S. at 694).

Subsequently, the Eleventh Circuit addressed a claim by Fulton County voters that the Georgia Assembly's system of deferring to local legislative delegations when enacting local laws also violated the one-person, one-vote rights of county residents. *DeJulio v. Georgia*, 127 F.Supp.2d 1274 (N.D. Ga. 2001), aff'd 290 F.3d 1291 (11th Cir.), cert. denied, 537 U.S. 948 (2002). The district court and Eleventh Circuit rejected this attack on the entire local legislation system, which is virtually the same Alabama's, on the grounds that the informal local courtesy rule and system for passing local laws were simply internal procedures by which the Assembly organized itself and conducted its business, and that local laws still had to be passed by the whole legislature. 127 F.Supp. 2d at 1300; 290 F.3d at 1296. The district court distinguished *Vander Linden* by pointing out that important governmental functions were formally assigned local

legislative delegations in South Carolina by statute. 127 F.Supp.2d at 1296-97.

Neither *DeJulio* nor *Vanden Linden* addressed claims that the way legislators are assigned to be members of local legislative delegations violated the voting rights of county residents; they were attacks on the **systems** under which local delegations operated once their members were selected. *DeJulio*, 127 F.Supp.2d at 1287; *Vanden Linden*, 193 F.3d at 272. In Alabama, legislators are assigned to local legislative delegations **by statute**, not by internal rules of the Legislature. The question presented in the instant case is whether statutorily assigning more legislators to local delegations than are necessary to comply with statewide equal population requirements violates the equal protection rights of county residents. In other words, in light of the gate-keeping power local legislative delegations have over local laws that control important functions of county government in Alabama, does splitting county boundaries violate the one-person, one-vote rights of county residents, absent a compelling federal or state reason for doing so?

The answer is yes. As the three-judge district court in *Larios* explained,

avoiding county splits is also important because

> [e]ach county, municipality, or other jurisdiction has a local delegation and any legislator whose district encompasses territory within a specific city or county is a member of the local delegation for that entity.
>
> The local delegations make recommendations to

> the House and Senate standing committees, which then recommend local legislation to the entire body. A local bill must receive the requisite majority from the local delegation to be reported favorably out of the standing committees with a "do pass" recommendation.
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> *DeJulio*, 290 F.3d at 1293 (footnote omitted). Furthermore, "[i]f local legislation has received the requisite number of signatures of representatives or senators whose districts lie partially or wholly within the locality which the legislation affects, it is ordinarily passed on an uncontested basis as a matter of local courtesy." Id. at 1293-94. Thus, having a district intrude across county (or municipality) lines gives a legislator whose district predominately lies outside that county (or municipality) a vote on issues that may well not directly affect the majority of the legislator's constituents.

Larios v. Cox, 314 F.Supp.2d 1357, 1370 (N.D. Ga. 2004) (3-judge court). The *Larios* court was explaining why it directed its special master to avoid splitting counties for a court-ordered redistricting plan. But there is no principled basis for holding that preserving county boundaries is only a discretionary good-districting guideline that the Legislature is not constitutionally bound to follow. Indeed, it's a matter of common sense.[1] Applying the equal protection principles of *Hadley*,

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[1] Rep. Jim McClendon, Co-Chair of the Legislative Reapportionment Committee, is a physician, not a lawyer. But he had no difficulty making this common-sense point in a public hearing:

> REPRESENTATIVE McCLENDON: Thank you, Mr. Walker. I am now speaking as a representative of St. Clair County and not a member of this board. But I wanted to get this -- just as Senator Dial did, I want to get this on the record on behalf of my home county. Right now we have six legislators from St. Clair County. Five of them do not live in St. Clair County. Five of them have a majority of their

Morris, *Vander Linden*, and *DeJulio*, county voters are protected by the Equal Protection Clause from state statutes that unnecessarily give persons residing outside their county the ability to select members of its local legislative delegation.

B. A Partisan Strategy of Maximizing Republican Majorities in the Legislature Was the Driving Force Behind the Massive Splitting of County Boundaries in Acts 2012-602 and 2012-603.

Republican leaders in the Legislature have openly proclaimed that their primary objective in redrawing the House and Senate districts was to preserve the seats of incumbent Republicans and to defeat the remaining white Democrats. In his 2012 book, *Storming the State House*, Speaker of the House Mike Hubbard said that in the 2010 campaign his primary goal as Republican leader in the House was "flipping the legislature" and "dislod[ing] entrenched Democratic incumbents...." Exhibit PP at 208, 128. The tactics he successfully employed prepared the way for the Republican redistricting plans in 2012.

> voters in some other counties. That affects accountability. For your representatives, your legislators, your law makers, it's a reverse situation from the way we normally think. Fewer is better than more. The more you have in a district, the harder it is for them to agree among themselves down in Montgomery. The way our constitution is written, many local issues must be dealt with in Montgomery. In St. Clair County, any one of those six legislators, whether they live in the county or not, can veto any local legislation. I just -**that is not right**.

Doc. 30-26 at 7 (emphasis added)

> I commissioned an **in-depth study of voting patterns in various districts represented by white Democratic legislators across the state**. We looked at past results in presidential elections, gubernatorial contests, and other statewide offices and **pinpointed the areas that cast the most Republican ballots** yet continued to send Democratic lawmakers to Montgomery.

Id. at 116 (emphases added). "Another important item gleaned . . . from our 2006 experience was the need to prioritize and carefully target districts." Id. at 168.

> To begin ranking districts and determining which districts to target, the party hired consultant Scott Stone to conduct an **infinitely more indepth analysis** than the one produced four years earlier. . . . Stone developed a formula based on historical **election results**, district **demographics**, and numerous other factors and ranked each House and Senate district. The most **vulnerable Democrats** were obvious, but his report was extremely helpful in developing the second- and third-tier targets that we would eventually fund. Stone's study also included the **population centers** of each district so **we knew where to focus our recruitment efforts to increase the potential for votes**.

Id. at 168-69 (emphases added). According to Speaker Hubbard, "A key element of Campaign 2010 was building a centrally based approach to achieving a lofty and historic goal." Id. at 280.

That statewide, centrally based approach, based on election returns and demographics,[2] was employed in the 2012 redistricting process to maximize the Republican majorities in the House and Senate.

Republicans' goal is to keep supermajority.

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[2] "Demographics" in Alabama means only one thing: race or ethnicity.

> Republicans were equally encouraged by local victories in traditionally Democratic counties in 2012, and think they could serve as springboards to expanding their legislative control in 2014.
>
> "Obviously, **we want to do all we can do to maintain the supermajority**," Alabama Republican Party chairman Bill Armistead said. "I think we're in good shape to do that. The Democratic Party doesn't offer good alternatives."
>
> The heats for the 2014 race have already begun. Democratic officials plan to launch a program today called Grass Roots Alabama, aimed at bringing a host of small donors into the state party through a website, email and social media. The party has been working for the past year identifying potential candidates, according to Ford.
>
> Those candidates will face a formidable election map. A redistricting plan drawn up and approved by Republicans last spring **moved large numbers of minority voters into districts that were already majority-minority**.

Exhibit QQ at 1 (emphases added).

State Republican Chairman Bill Armistead echoed Speaker Hubbard's focus on the remaining white Democrats. "Republicans, meanwhile, hope to build on successes in local races in 2012. Armistead said the party would target seats held by Democratic Sens. Roger Bedford, Marc Keahey and Tammy Irons, who are running in 2014 in significantly Republican districts." Id. at 2. "Armistead said he did not 'expect to lose a single seat in the House.'" Id.

This "infinitely more indepth" Republican statewide redistricting strategy almost completely ignored county boundaries. LRC Co-Chairman Jim McClendon made this clear when he addressed a meeting of the Greater Birmingham Young Republicans in September 2012:

> Rep. McClendon said, "Our Constitution creates House and Senate Districts independent of county lines." "**There is no requirement to respect county boundaries**." Federal court cases and guidelines are interested in population distribution not county lines. Redistricting considered county lines, but they are not paramount. **Legislators those whose re-election is most affected by moving district lines will likely rate their political survival ahead of county lines**. McClendon said that it is important to always remember that, "Redistricting is **a political process**."

Exhibit RR at 2 (emphases added). Dr. McClendon was misinformed about controlling federal law, but his statement shows clearly the county-splitting policy the LRC followed and the "paramount" importance it gave to the "political survival" of Republican incumbents.

Federal case law, of course, has not rendered county lines irrelevant in the redistricting process. To the contrary, this Court held:

> It is only when application of the [whole-county] proviso [in § 199 of the Alabama Constitution] brings about an unavoidable conflict that the Supremacy clause controls. There may be, and, indeed, as we shall later point out, there are instances in which the population of a county entitles it to at least one representative. Further, deference to the spirit of the quoted proviso would require that there be **as few** multi-county House districts **as is practicable**, and in instances where multi-county House districts are **unavoidable**, the counties to be joined should, **so far as practicable**, be those which would require **a minimum number** of representatives. The departure from application of the quoted proviso **should not extend further than is required** by application of the Federal Constitution.

Sims v. Baggett, 247 F. Supp. 96, 102 (1965) (3-judge court) (bold emphases

added). And *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), aff'd sub nom *Cox v. Larios*, 542 U.S. 947 (2004), acknowledged that, under controlling Supreme Court case law, ± 5% deviation is prima facie compliance with the constitutional requirement of population equality, which need not be justified by a state redrawing its legislative districts. 300 F. Supp. 2d at 1339-40 (citing *Connor v. Finch*, 431 U.S. 407, 418 (1977); *White v. Regester*, 412 U.S. 755, 764 (1973); *Brown v. Thomson*, 462 U.S. 835, 842 (1983)).

Larios held that the equal protection violation lay not in the size of the ± 5% deviation but in evidence that the deviations had been manipulated for the discriminatory purpose of underpopulating some regions of Georgia while overpopulating other regions, and that this geographic discrimination could not be justified either by party partisan considerations or by an interest in protecting incumbents. 300 F. Supp. 2d at 1322, 1342. *Ceteris paribus*, the equal protection rights of county residents to elect the members of their local legislative delegations without having their votes diluted by voters outside their county cannot be justified by partisan or incumbency interests.

It is not practicable to minimize the number of county splits and the number of members in each county's local legislative delegation when all population deviations are restricted to ± 1%. This arbitrary constraint is not "required by

application of the Federal Constitution." *Sims v. Baggett*, 247 F. Supp. at 102. HB 16 and SB 5, which were sponsored by members of the Alabama Legislative Black Caucus, contained House and Senate redistricting plans that illustrate how the Alabama constitutional whole-county requirements could have been more nearly complied with while still maintaining 27 majority-black voting-age population (VAP) House districts and 8 majority-black VAP Senate districts. See Exhibits F, G, H, and I, Docs. 60-6 through 60-9.

CONCLUSION

For the foregoing reasons, plaintiffs' second motion for partial summary judgment should be granted, declaratory and injunctive relief prohibiting enforcement of Acts 2012-602 and 2012-603 should be ordered, and this Court should retain jurisdiction of this action to afford the Alabama Legislature a reasonable opportunity to adopt and to obtain preclearance under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, of new redistricting plans for the House and Senate that comply with Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, and the First, Fourteenth, and Fifteenth Amendments to the Constitution of the United States.

Should the Alabama Legislature fail in timely manner to enact lawful, constitutional, and enforceable redistricting plans for the Alabama House and

Senate, the parties should be instructed to submit redistricting proposals that this Court would adopt in time for the orderly conduct of the primary and general elections for members of the Alabama House and Senate in 2014.

Respectfully submitted this 6th day of February, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2013, I served the foregoing on the following electronically by means of the Court's CM/ECF system: