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-WC
v.	*	(3-judge court)
THE STATE OF ALABAMA; BETH CHAPMAN, in her official capacity as Alabama Secretary of State,	*	
Defendants.	*	

PLAINTIFFS' REPLY BRIEF SUPPORTING MOTION FOR PARTIAL SUMMARY JUDGMENT AND FOR PRELIMINARY AND PERMANENT INJUNCTION

Plaintiffs Alabama Legislative Black Caucus et al., through undersigned counsel, respectfully submit this reply to defendants brief, Doc. 30, in opposition to plaintiffs' motion, Doc. 7, for partial summary judgment with respect to Count I of their complaint, Doc. 1 and Doc. 3-1. Pursuant to this Court's order of October

10, 2012, Doc. 27, this reply brief addresses only defendants' response to plaintiffs' motion for partial summary judgment and for preliminary and permanent injunctions. By this Court's order entered October 30, 2012, Doc. 31, a response to defendants' motion for judgment on the pleadings, Doc. 29, is not due until November 14.

This reply to defendants' opposition to plaintiffs' motion for partial summary judgment will show that there is no doubt that Alabama's Constitution prohibits dividing counties in either House or Senate districts, that plaintiffs' motion presents a question of federal law that has long been settled, and that the enacted House and Senate redistricting plans violate federal law by failing to minimize splitting county boundaries except to the extent necessary to comply with the Fourteenth Amendment requirement of equal population and with the Voting Rights Act. This reply supplements the authorities and arguments set out in plaintiffs' brief supporting partial summary judgment, Doc. 8, plaintiffs' opposition to defendants' motion to dismiss or stay, Doc. 15, and plaintiffs' surreply to defendants' motion to dismiss or stay, Doc. 23.

THE ALABAMA CONSTITUTION PROHIBITS SPLITTING COUNTIES IN BOTH HOUSE AND SENATE DISTRICTS.

The plain language of §§ 198 and 199 of the 1901 Constitution of Alabama

requires 105 House districts to be apportioned among the 67 counties, without splitting any county or combining two or more counties in one district.

> The house of representatives shall consist of not more than one hundred and five members, unless new counties shall be created, in which event each new county shall be entitled to one representative. The members of the house of representatives shall be apportioned by the legislature among the several counties of the state, according to the number of inhabitants in them, respectively, as ascertained by the decennial census of the United States, which apportionment, when made, shall not be subject to alteration until the next session of the legislature after the next decennial census of the United States shall have been taken.

Ala. Const. § 198.

> It shall be the duty of the legislature at its first session after the taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of representatives and apportion them among the several counties of the state, according to the number of inhabitants in them, respectively; provided, that each county shall be entitled to at least one representative.

Ala. Const. § 199. What this means is made clear in the 1901 Constitution itself:

> **Initial apportionment of house of representatives.**
> Until the legislature shall make an apportionment of representatives among the several counties, as provided in the preceding section, the counties of Autauga, Baldwin, Bibb, Blount, Cherokee, Chilton, Choctaw, Clay, Cleburne, Coffee, Colbert, Conecuh, Coosa, Covington, Crenshaw, Cullman, Dale, DeKalb, Escambia, Fayette, Franklin, Geneva, Greene, Lamar, Lawrence, Limestone, Macon, Marion, Marshall, Monroe, Pickens, Randolph, St. Clair, Shelby, Washington, and Winston, shall each have one representative; the counties of Barbour, Bullock, Butler, Calhoun, Chambers, Clarke, Elmore, Etowah, Hale, Henry, Jackson, Lauderdale, Lee, Lowndes,

> Madison, Marengo, Morgan, Perry, Pike, Russell, Sumter, Talladega, Tallapoosa, Tuscaloosa, Walker, and Wilcox, shall each have two representatives; the counties of Dallas and Mobile shall each have three representatives; the county of Montgomery shall have four representatives; and the county of Jefferson shall have seven representatives.

Ala. Const. § 202.

The § 202 apportionment of House seats among the counties remained unchanged until 1962. *Sims v. Frink*, 208 F.Supp. 431, 436-37, 441 (M.D. Ala. 1962) (3-judge court), aff'd sub nom. *Reynolds v. Sims*, 377 U.S. 533 (1964). No counties were split until this Court ordered single-member districts to be used for the first time in the 1974 House and Senate elections. *Sims v. Amos*, 336 F. Supp. 924 (M.D. Ala.), aff'd, 409 U.S. 942 (1972). The same "whole county"[1] apportionment of House seats has been in every Alabama Constitution since the state was founded in 1819. See Appendix A.

It cannot be disputed that no county was split among House districts in Alabama from 1819 to 1974. The defendants are plainly wrong when they argue that "the degree to which the Alabama Constitution addresses the splitting of counties in House plans is an unsettled question of state law...." Doc. 30 at 31 n.11. The constitutional provisions governing apportionment of House districts

[1] *Sims v. Baggett*, 247 F.Supp. 96, 103 (M.D. Ala. 1965) (3-judge court) (quoting Resolution of the Alabama Legislature, August 13, 1965).

have not explicitly referred to splitting counties because there have always been more House districts than there are counties to which they are apportioned, and each county is entitled to one representative.

In contrast, there have always been more counties than Senate seats. So the whole-county language for Senate districts prohibits dividing counties:

> It shall be the duty of the legislature at its first session after taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of senators, and to divide the state into as many senatorial districts as there are senators, which districts shall be as nearly equal to each other in the number of inhabitants as may be, and each shall be entitled to one senator, and no more; and such districts, when formed, shall not be changed until the next apportioning session of the legislature, after the next decennial census of the United States shall have been taken; provided, that counties created after the next preceding apportioning session of the legislature may be attached to senatorial districts. No county shall be divided between two districts, and no district shall be made up of two or more counties not contiguous to each other.

Ala. Const. § 200. The initial apportionment of Senate seats is set out in § 203 of the 1901 Constitution, and it remained unchanged until 1962. *Sims v. Frink*, 208 F.Supp. at 442. The same whole-county apportionment of Senate seats has been in every Alabama Constitution since the state was founded in 1819. See Appendix A.

Maps of the whole-county districts from which members of the Alabama House and Senate were elected from 1819 to 1962 can be viewed on the web site of the Alabama Archives.

http://www.archives.alabama.gov/legislat/ala_maps/getstart.html. Maps of the House and Senate districts ordered by this Court in *Sims v. Baggett*, 247 F.Supp. 96, 103 (M.D. Ala. 1965) (3-judge court), are in Appendix B to this brief.[2]

THE EXTENT TO WHICH THE FOURTEENTH AMENDMENT AND THE VOTING RIGHTS ACT PREVENT ENFORCEMENT OF THE STATE'S CONSTITUTIONAL WHOLE-COUNTY PROVISIONS IS A SETTLED QUESTION OF FEDERAL LAW.

There is no question about the meaning of the whole-county provisions in the Alabama Constitution, nor is there any doubt that §§ 198-200 are mandatory constraints on the Alabama Legislature, which the Legislature may not lawfully modify or ignore. E.g., *Opinion of the Justices*, 263 Ala. 158, 81 So.2d 881 (1950) (cited in *Sims v. Frink*, 208 F.Supp. at 434). Under the Supremacy Clause of the U.S. Constitution, only the requirements of the Equal Protection Clause of the Fourteenth Amendment and the Voting Rights Act can lawfully prevent the full

[2] These maps are part of Plaintiffs' Exhibit 167 admitted in evidence in *Lynch v. Alabama*, CA No. CV-08-S-0450-NE (N.D. Ala.). PX 167 was taken from the archives of the Alabama Farm Bureau Federation maintained by Auburn University. Note that the House plan apportions two seats to Macon, Bullock, and Barbour Counties. This was the majority-black district that in 1970 elected Fred Gray and Thomas Reed as the first two African-American members of the Alabama Legislature since Reconstruction. But the first election under this apportionment plan was held in 1966 and resulted in a federal lawsuit filed by Mr. Gray alleging that white election officials stole the election. Judge Pittman ordered the election officials to implement a long list of reforms, but he declined to order a new election. *Gray v. Main*, 309 F.Supp. 207 (M.D. Ala. 1968).

enforcement of those state constitutional mandates. The extent to which the Constitution and laws of the United States require modification of §§ 198-200 of the Alabama Constitution is a question of federal law, not state law. State courts, of course, may enforce federal law. But this Court has already ruled on how the state constitutional whole-county provisions must be reconciled with these federal constitutional and statutory requirements. See plaintiffs' surreply to defendants' motion to dismiss or stay, Doc. 23, at 2-5 (citing *Sims v. Baggett*, 247 F. Supp. 96, 100-01 (1965) (3-judge court); *Sims v. Amos*, 336 F. Supp. 924 (M.D. Ala.) (3-judge court), aff'd, 409 U.S. 942 (1972); *Burton v. Hobbie*, 561 F.Supp. 1029, 1031 (1983) (3-judge court)).

The defendants wrongly contend that this is a question of state law, and that the Alabama Legislature "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." Doc. 30 at 33. Of course, the Alabama Legislature has no authority to repeal or disregard §§ 198-200 of the Alabama Constitution. E.g., *Grantham v. Denke*, 359 So.2d 785, 787 (Ala. 1978) ("The constitution of this state is the supreme law and limits the power of the legislature); accord, *Ellis v. West ex rel. West*, 971 So.2d 20, 22 (Ala. 2007) ("'The

authority to declare public policy is reserved to the Legislature, subject to limits imposed by the Constitution.") (citations omitted). As a matter of federal law, the whole-county restrictions on the power of the Legislature to redraw its House and Senate districts "remain[] operative" and may be disregarded only where their application "brings about an unavoidable conflict" with federal law. *Sims v. Baggett*, 247 F.Supp. At 100-01; accord, *Sims v. Amos*, 336 F. Supp. 924, 939 (M.D. Ala.) (3-judge court), aff'd, 409 U.S. 942 (1972) ("[b]oundary lines are sacrificed only where **absolutely necessary** to satisfy the constitutional requirement of one man one vote." (bold emphasis added)).

The defendants' brief acknowledges the Legislature understood that this question is settled:

> 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.

Doc. 30 at 11 (quoting the May 2011 Reapportionment Committee Guidelines, Doc. 30-4 at 3). But defendants contend that the Legislature "does not, however, have to follow those federal court decisions." Doc. 30 at 33. This remarkable contention is flatly wrong. Only federal law authorizes the Legislature to split

even a single county between House and Senate districts, and the Supremacy Clause requires all branches of state government to comply with this Court's determination of the extent to which the Equal Protection Clause and the Voting Rights Act can justify deviation from the whole-county mandates of the Alabama Constitution.

Defendants' reliance in this case on *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), stands on their heads the "principles of federalism that inform Eleventh Amendment doctrine." 465 U.S. at 100 (quoting *Hutto v. Finney*, 437 U.S. 678, 691 (1978)). *Pennhurst* held that a federal court injunction entered solely on the basis of a claim that state officials were "failing to carry out their duties under State statutes" was barred by the Eleventh Amendment. 465 U.S. at 109. Specifically, the Court held "that suit may not be predicated on violations of state statutes that command purely discretionary duties . . .[which] gave petitioners broad discretion in operating Pennhurst. . . ." Id. at 110. The Court remanded the case for consideration of "to what extent, if any, the judgment may be sustained" based on "the Eighth and Fourteenth Amendments and § 504 of the Rehabilitation Act of 1973." Id. at 125.

In the instant action, the defendants aren't complaining that this Court's prior whole-county rulings constitute federal interference **solely** with state

officials' **discretionary** interpretation of how to carry out their duties under a state **statute**. To the contrary, they are contending that these federal court decisions enforcing **federal** constitutional and statutory law have relieved them of any duty to comply with state **constitutional** mandates that **prohibit** the exercise of legislative discretion to divide counties among House and Senate districts. Defendants' position seeks to establish a principle of **reverse** federalism, asking this Court to hold that a federal court has the authority to enforce federal law in a way that effectively repeals the state constitutional provisions that have limited the Legislature's power for nearly two centuries. It is the defendants, not the plaintiffs, who are asking this Court to violate the State of Alabama's sovereignty and the Eleventh Amendment.

THE DEFENDANTS' ALLEGED REASONS FOR DISREGARDING COUNTY BOUNDARIES CANNOT BE JUSTIFIED AS UNAVOIDABLE CONFLICTS WITH FEDERAL LAW.

Defendants advance three federal law reasons they contend justify the number of splits of county boundaries in the House and Senate plans that is so excessive it amounts to total disregard of the state constitutional whole-county provisions:

First, while acknowledging the Supreme Court rule that ± 5% deviations constitute prima facie compliance with population equality under the Equal

Protection Clause, defendants contend that "nothing stops the Legislature from using a tighter overall population deviation." Doc. 30 at 34. This argument essentially asserts that the Legislature is free to ignore the prior holdings of this Court that state constitutional restrictions on its power to gerrymander must be complied with unless a conflict with federal law is unavoidable. The greater leeway the Supreme Court has afforded states when redrawing their legislative districts has been provided precisely to protect the legitimate state interest in preserving political subdivisions. *Sims v. Baggett*, 247 F.Supp. at 100 (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)). Defendants may not justify the hash that Acts 2012-602 and 2012-603 make of county boundaries by contending that the federal constitutional rule of population equality has provided it a free hand to violate §§ 198-200 of the Alabama Constitution.[3]

Second, they contend that the federal court decision in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), aff'd, 542 U.S. 947 (2004), justifies the

[3] Defendants argue: "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." Doc. 30 at 35. It is true that much smaller population deviations are required in Congressional redistricting plans. But a month ago the Supreme Court reaffirmed the principle that protecting county boundaries can justify more than *de minimus* deviations even in Congressional plans. *Tennant v. Jefferson County Comm'n*, 81 USLW 3136 (Sept. 25, 2012) at *4.

Legislature's arbitrary rule rejecting any proposed House and Senate plans that contain more that a ± 1% deviation. Doc. 30 at 36-37. But ± 1% is no more a safe harbor than is ± 5%, and it cannot insulate the Legislature from claims that its plans are arbitrary and discriminatory. 300 F. Supp. 2d at 1340-41. Defendants do not – and cannot – contend that the ± 1% restriction is necessary to prevent an **unavoidable** conflict with federal constitutional law. To the contrary, it violates federal constitutional principles. As we stated in the complaint, the restriction of permissible deviations to ± 1% in Acts 2012-602 and 2012-603 is an arbitrary and discriminatory manipulation of population deviations that "violate[s] the fundamental one person, one vote command of *Reynolds*, requiring that states 'make an honest and good faith effort to construct districts ... as nearly of equal population as practicable' and deviate from this principle only where 'divergences ... are based on legitimate considerations incident to the effectuation of a rational state policy.'" *Larios*, 300 F. Supp. 2d at 1341 (quoting 377 U.S. at 577).

Third, defendants contend that additional county splits were made necessary because "[t]he State also needed to maintain the relative strength in the minority population in each of those [majority-black] districts in order to comply with Section 5." Doc. 30 at 39. This is incorrect. Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, only requires that, with respect to existing majority-black

districts, the state avoid retrogression in the number of districts in which members of the protected minority have the ability to elect candidates of their choice.

> Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or [membership in a language minority group], to elect their preferred candidates of choice denies or abridges the right to vote....

42 U.S.C. § 1973c(b).

"[A] simple voting-age population analysis cannot accurately measure minorities' ability to elect," nor can "examining only the number of majority-minority districts." *Texas v. United States*, 831 F.Supp.2d 244, 260 (D. D.C. 2011) (3-judge court). Section 5 does not require maintaining the high percentages of black voting age populations that frequently appear when the new census data are applied to the old, usually under-populated majority-black districts. Nor does § 5 require guaranteeing the ability to elect, as defendants suggest, by drawing districts with 65% black voting-age majorities. Doc. 30 at 40.[4]

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[4] Indeed, only 8 of the 27 House districts and 2 of the 8 Senate districts in the Legislature's plans have black voting-age majorities above 65%. Doc. 30-6 at 5, Doc. 30-7 at 4. The State even created a 28th House district with a 50.08% **total** black population majority, although HD 85, at 47.863%, does not have a black voting-age majority. Doc. 30-6 at 5. Plaintiffs agree that HD 85 likely will perform as a black "ability-to-elect" district, and it demonstrates that the Legislature realized that maintaining the very high percentages in the majority-black districts is not essential to maintaining black voters' ability to elect a

> Determining where and how the ability to elect is present is a careful inquiry. This Court finds that the simple voting-age population statistics used by Texas are insufficient, and we cannot be confident that Texas has properly identified existing ability districts in its benchmark or future ability districts under the proposed Plans. Therefore, this Court can neither count the former nor compare them to the latter. There are no easy shortcuts in this inquiry.

Texas v. United States, 831 F.Supp.2d at 262. The three-judge district court's opinion in *Texas v. United States*, the first decision to examine the substantive requirements of § 5 as amended and extended by Congress in 2006, goes on to "outline the types of factors that are relevant for this analysis." Id.

> Although the Supreme Court has never outlined all factors relevant to this inquiry, it has emphasized that retrogression analysis "is often complex in practice to determine." *Georgia v. Ashcroft*, 539 U.S. [461,] 480 [(2003)]. We conclude that the type of factors relevant to this complex inquiry may include the number of registered minority voters in redrawn districts; population shifts between or among redrawn districts that diminish or enhance the ability of a significant, organized group of minority voters to elect their candidate of choice; an assessment of voter turnout in a proposed district; to the extent discernible, consideration of future election patterns with respect to a minority preferred candidate; and new ability districts that would offset any lost ability district.

Texas v. United States, 831 F.Supp.2d at 264-65.

The defendants suggest that (unnecessarily) maintaining the high black percentages in the existing majority-black districts "presented some challenges"

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candidate of their choice.

that justified splitting more county boundaries. Doc. 30 at 40. But the plans sponsored by members of the Alabama Legislative Black Caucus, HB 16 and SB 5, demonstrated how the number of county splits can be drastically reduced while still maintaining 27 House districts and 8 Senate districts with black voting-age majorities. Doc. 3-1, Exhs. F-J. On their faces, the plans enacted in Acts 2012-602 and 2012-603 cannot be justified on grounds that an unavoidable conflict with the Voting Rights Act requires splitting so many counties that 49 of Alabama's 67 counties will have one or more members of their local legislative delegations than are necessary based on their populations.

CONCLUSION

The facial challenge to Acts 2012-602 and 2012-603 presented by plaintiffs' motion for partial summary judgment should be decided before addressing the remaining counts in the complaint and the defendants' defenses to them. If the Legislature's enacted plans violate the one-person, one-vote rule by ignoring the whole-county restrictions in the Alabama Constitution, this Court must order the Legislature to draft new plans that split county boundaries only where conflicts with the one-person, one-vote rule and the Voting Rights Act are unavoidable. Whether plaintiffs will have grounds for challenging new, whole-county statutory plans is uncertain. This Court would be required to order in effect its own plans

only if the Legislature failed to act.

The plaintiff African-American legislators and county commissioners recognize that the Republican majorities will enact House and Senate redistricting plans that attempt to maximize their partisan interests. As racial and partisan minorities, plaintiffs believe that the whole-county restrictions in the Alabama Constitution may offer their best and last hope of protecting their constituents from extreme partisan gerrymandering. And preserving county boundaries will provide local county officials heightened influence with their local legislative delegations, influence that may ameliorate to some extent state constitutional restrictions on home rule. The crazy-quilt districts on display in Acts 2012-602 and 2012-603 show the chaotic direction in which unrestrained gerrymandering is headed. By granting the injunction plaintiffs request, this Court could restore now and for the future the modicum of order and fairness that were the objectives of its whole-county rulings when federal courts first entered the political thicket of redistricting.

Respectfully submitted this 2nd day of November, 2012.

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CERTIFICATE OF SERVICE

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