

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,

v.

THE STATE OF ALABAMA; BETH *
CHAPMAN, in her official capacity as *
Alabama Secretary of State, *

Defendants. *

DEMETRIUS NEWTON et al., *

Plaintiffs, *

v. *

THE STATE OF ALABAMA et al., *

Defendants. *

* Civil Action No.
* 2:12-CV-691-WKW-MHT-WHP
* (3-judge court)

* Civil Action No.
* 2:12-cv-1081-WKW-MHT-WHP

**ALBC PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION
TO MOTION FOR CERTIFICATION OF A CLASS ACTION**

Plaintiffs Alabama Legislative Black Caucus et al., through undersigned counsel, reply as follows to defendants' opposition, Doc. 78, to plaintiffs' motion for certification of a class action, Doc. 69.

Defendants' opposition is confusing. Plaintiffs filed their Rule 23(c)(1) motion solely to protect the interests of Alabama's citizens, all of whom will be affected by the House and Senate redistricting plans that this Court will approve for use in the 2014 primary and general elections. Redistricting lawsuits are the archetypical Rule 23(b)(2) class actions, because, regardless of the different claims that might be made on behalf of individual counties or citizens, black or white, Democrat or Republican, the judgment of this Court will approve only one House plan and one Senate plan. There will not be separate remedies for separate claims other citizens might raise.

The purpose of the motion is simply to alert this Court of its obligation under Rule 23(c)(1)(A), Fed.R.Civ.P.: "At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." Granting or denying plaintiffs' Rule 23 motion won't have a substantial impact on the way the ALBC plaintiffs prosecute this action. For example, briefing now is complete with respect to plaintiffs' second motion for partial summary judgment, Doc. 66, 68-1, and this Court should

schedule a hearing and decide the second summary judgment motion before it considers the class certification motion. A decision on class certification would be premature before this Court has decided whether there should be discovery proceedings and trial with respect to Acts 2012-602 and 2012-603, or whether, as plaintiffs contend, the Legislature should be required to redraw House and Senate plans so that they do not unnecessarily dilute the votes of county residents. If the Legislature enacts new plans, the ALBC plaintiffs may or may not decide to continue this civil action. Only when it is clear which plans are properly before the Court could members of the putative classes assess whether they support or oppose the ALBC plaintiffs' claims and whether they think the ALBC plaintiffs will adequately protect their interests.

So plaintiffs will limit this reply to pointing out that in the past this Court has certified class actions challenging reapportionment or redistricting of the Alabama House and Senate, has liberally permitted Alabama citizens opposing and supporting the original plaintiffs to intervene, or has consolidated their separate actions, as it has done in this case. *Sims v. Frink*, 208 F.Supp. 431, 432 (M.D. Ala. 1962) (3-judge court), *aff'd sub nom. Reynolds v. Sims*, 377 U.S. 533 (1964) ("Plaintiffs and the plaintiff-intervenors, as citizens of the United States and of the State of Alabama, and as taxpayers and duly qualified and registered voters in said

State and in the Counties of Jefferson and Mobile, jointly and severally bring this action in their own behalf and in behalf of all other voters in the State of Alabama who are similarly situated.”); *Sims v. Amos*, 336 F.Supp. 924 (M.D. Ala.) (3-judge court), aff’d, 409 U.S. 942 (1972) (numerous additional intervenors in the original *Sims* class action); *Burton v. Hobbie*, 543 F.Supp. 235 (M.D. Ala.) (3-judge court), aff’d 459 U.S. 961 (1972) (“Plaintiffs brought this class action on behalf of themselves and all other black citizens of the State of Alabama”); *Thompson v. Smith*, 52 F.Supp.2d 1364, 1366 (M.D. Ala. 1999) (“There are four groups involved in these cases. First, there are the Rice plaintiffs, two white persons who initiated the federal lawsuit. Second, there are the Thompson plaintiffs, a group of white persons whom the Rice plaintiffs later added to their complaint. Third, there are the state defendants one of whom was also a defendant in the state lawsuit. And, lastly, there are the Sinkfield parties, a group of African-Americans who were successful plaintiffs in the state lawsuit and were later named as defendants in this federal suit.”) (footnotes omitted); *Montiel v. Davis*, 215 F.Supp.2d 1279 (S.D. Ala. 2002) (3-judge court) (the white plaintiffs did not allege a class action, but legislators and the Governor were allowed to intervene as defendants). Even though no class was certified in *Montiel v. Davis*, a subsequent action filed by a different set of white plaintiffs was held to be barred by res judicata. *Gustafson v.*

Johns, 434 F.Supp.2d 1246 (S.D. Ala. 2006) (3-judge court). Thus *Gustafson* illustrates the fact that all Alabama citizens in the putative classes are likely to have their rights determined in the instant action whether the Court certifies the classes or not.

The State's novel arguments that the consolidation of the Newton plaintiffs' action with the ALBC plaintiffs' action constitutes a "de facto opt-out" of the putative Rule 23(b)(2) class, Doc. 78 at 3, and that the claims in this redistricting lawsuit are unsuitable for class treatment, *id.* at 9, are incoherent and inconsistent with the above case precedents. They fly in the face of this Court's duty to protect the class by orders that may include notice of "the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action...." Rule 23(d)((1)(B)(iii). The Newton plaintiffs are entitled to participate fully as parties in these consolidated actions, asserting their own claims through their own counsel. But a hearing to determine whether the ALBC plaintiffs and their counsel themselves would be adequate representatives of the classes they seek to represent should be held only after this Court rules on the pending second motion for partial summary judgment.

WHEREFORE, plaintiffs pray that the Court will postpone consideration of

the ALBC plaintiffs' motion for certification of classes, Doc. 69, pending its ruling on plaintiffs' second motion for partial summary judgment, Doc. 68-1.

Respectfully submitted this 6th day of March, 2013.

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CERTIFICATE OF SERVICE

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