



arguments that go to the merits of the one-person, one-vote claims in Count I of the Complaint. These merits arguments properly should be considered only when this Court addresses plaintiffs' motion for partial summary judgment and for preliminary and permanent injunctions, Doc. 7. However, because defendants contend that the merits of Count I bear on their motion to dismiss or stay, plaintiffs would show that, contrary to defendants' assertion that Count I "requires resolution of an unsettled question of state law," Doc. 21-1 at 4, Count I relies on a mixed question of federal and state constitutional law that has been settled by decisions of this Court and has been in effect for over forty years.

1. Contrary to defendants' assertion that the only whole-county proviso in the Alabama Constitution is § 200, which governs the Senate districts, this Court held in *Sims v. Baggett*, 247 F. Supp. 96 (1965) (3-judge court), that §§ 198 and 199, which govern the House districts, also contain whole-county requirements.

[*Reynolds v. Sims*, 377 U.S. 533 (1964),] require[s] us to consider instances of unavoidable conflict between the Constitution of the United States and the Constitution of Alabama. One such instance, on which all of the parties are agreed, involves the concluding proviso of section 199 of the Constitution of Alabama which reads: '\* \* \* provided, that each county shall be entitled to at least one representative.' Five Justices of the Supreme Court of Alabama in an advisory opinion to the House of Representatives of Alabama, filed September 6, 1965, said:

'It follows that we must say, in all candor, that we believe that the quoted proviso in Section 199 has been

held to be violative of the equal protection clause of the Federal Constitution in the *Reynolds* case, and is therefore, not controlling as to any plan the Legislature might evolve in trying to meet the guidelines set out in the Federal Court decisions.’

In a separate opinion, Justice Coleman advised that the House Bill, which was later enacted, does violate section 199 of the Constitution of Alabama.

The quoted proviso, on its face, does not conflict with the Federal Constitution. We think that the Supreme Court’s opinion in *Reynolds v. Sims*, supra, **does not render that proviso wholly inoperative**. The quoted proviso in section 199 and its companion section 198 **are intended to insure that each of the counties as a political unit of the State have separate representation in the House**. It is apparent that the framers of the Constitution had at least **two purposes** in mind: First, to **prevent gerrymandering**, and, second, to **insure compact geographic districts with legislators attuned to local problems**. Intelligent and meritorious purposes are not enough to sustain application of this initially valid constitutional provision to counties whose population falls below the minimum required for valid reapportionment, or to counties of larger population whose joinder into a single district becomes necessary to reapportionment based on population. In those instances, the proviso as applied contravenes the Federal Constitution. **In instances where the proviso can be applied without bringing about a conflict with federal constitutional requirements, the proviso remains operative**.

...

[T]he protective effect of the concluding proviso of section 199 should be stayed only where the Federal Constitution requires. Enforcement of the concluding proviso of section 199 to the extent that it will not conflict with the Federal Constitution in no way violates ‘the intent with which it (that proviso) was promulgated’ nor does it cause a result ‘not contemplated’ by the framers of the Alabama Constitution. In fact **the limited application of section 199**

**continues to effectuate its purpose.**

It is only when application of the quoted proviso 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 [sic: 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.

247 F. Supp. at 100-01 (footnotes and citations omitted) (bold emphases added).

“Throughout the State’s history, insofar as we are advised, representation **in each House** has been divided according to county lines, and no county has been subdivided to create a legislative district.” *Id.* at 103 (bold emphasis added).

2. *Sims v. Baggett* also held that the whole-county proviso in § 200 of the Alabama Constitution, which governs the Senate, should be enforced to the extent it did not conflict with the one-person, one-vote rule. 247 F. Supp. at 102, 105.

3. Following the 1970 census, this Court reaffirmed its whole-county ruling in *Sims v. Amos*, 336 F. Supp. 924 (M.D. Ala.), *aff’d*, 409 U.S. 942 (1972), as discussed in plaintiffs’ partial summary judgment brief, Doc. 8 at 4-5 and Appendix A.

4. Following the 1980 census, this Court reviewed the House and Senate plans ultimately adopted by the Legislature by the same whole-county principle:

The Court carefully scrutinized those Acts and considered their validity with respect to the State and Federal Constitutional requirements that: (1) apportionment be on a population basis so that one man's vote is worth as much as another's; (2) **county lines be respected wherever possible**; and (3) apportionment not be for the purpose of racial discrimination.

*Burton v. Hobbie*, 561 F.Supp. 1029, 1031 (1983) (citing *Sims v. Baggett*, 247 F.Supp. at 105) (bold emphasis added).

5. Following the 1990 census, the state court approved a consent decree redrawing House and Senate districts that survived a challenge in this Court claiming that they contained unconstitutional racial gerrymanders under *Shaw v. Reno*, 509 U.S. 630 (1993). *Kelley v. Bennett*, 96 F. Supp.2d 1301 (M.D. Ala.) (3-judge court), rev'd sub nom. *Sinkfield v. Kelley*, 531 U.S. 28 (2000). No whole-county issues were presented in these cases.

6. Following the 2000 census, the Legislature enacted House and Senate plans that received preclearance under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and that survived one-person, one-vote and racial gerrymandering challenges in federal court. *Montiel v. Davis*, 215 F. Supp.2d 1279 (S.D. Ala. 2002) (3-judge court). The issue of county splits arose only in the context of the Montiel plaintiffs' racial gerrymandering claims:

[P]laintiffs appear to argue that a combination of allegations, namely “when the Alabama Legislature establishes a legislative plan that splits ‘numerous counties’ and ‘contains population variances of up to plus/minus five percent’,” obviates their burden of proof as set forth above and establishes a *per se* constitutional violation. The case relied upon by the plaintiffs, *Burton v. Hobbie*, 543 F.Supp. 235, 241–43 (M.D.Ala.1982)(J. JOHNSON, concurring), does not stand for such a proposition. In point of fact, the Court in *Burton* was forced by time constraints to choose an interim plan from a number of plans, including the plan adopted by the Alabama Legislature to which numerous objections related to racial gerrymandering and large retrogressions in black voting strength had been raised by the Department of Justice, and discussed the splitting of county lines in that comparative context alone. See, *Burton*, 543 F.Supp. at 243–48 (J. THOMPSON, dissenting). Thus, unlike the case at bar, improper racial motivation was established to the necessary degree to obfuscate the presumption that the apportionment plan enacted by the Legislature was the result of an “honest and good faith effort to construct districts ... as nearly of equal population as is practicable.” *Reynolds*, 377 U.S. at 577. Judge Johnson did not even suggest there is a *per se* constitutional limitation on the number of counties the Legislature may split but, instead, merely concluded under the facts of that case that “the utter disregard of county boundaries obviously makes more credible plaintiffs’ claims that the legislature engaged in racial gerrymandering.”

215 F. Supp. at 1288 (citing *Burton v. Hobbie*, 543 F. Supp. 235, 241 (M.D. Ala. 1982) (3-judge court)) (footnote omitted).

7. As defendants note, the plans enacted by the Legislature after the 2000 census were also reviewed in state court, but the only claim the state court considered was whether § 200 of the Alabama Constitution requires the Legislature to draw districts with smaller population deviations than the 10% overall deviation

that constitutes substantial compliance with federal constitutional law. *Rice v. English*, 835 So.2d 157 (Ala. 2002). The Alabama Supreme Court affirmed the trial court's holding that the Legislature did not violate § 200 when it drew Senate districts "within plus or minus five percent of the ideal population of a senate district." 835 So.2d at 167.

8. The Alabama Supreme Court declined to consider the Rice plaintiffs' claim that by splitting 30 of Alabama's 67 counties the Legislature had violated the whole county proviso in § 200, because the issue was raised for the first time on appeal. 835 So.2d at 166-67. One dissenter would have granted oral argument on this question, which he acknowledged is a mixed question of federal and state law:

The question whether the Legislature fulfilled its obligation to preserve county lines-indeed, whether **in light of *Reynolds v. Sims*** it any longer has such an obligation-is expressly not before us on appeal; yet, it is not clear to me how this Court can construe the "as nearly equal" obligation except in light of the county-preservation obligation. **It may be that the Legislature should have tried harder not to divide counties and that a 10% deviation in the population of the districts would have been permissible had few counties been divided**; however, 30 of the 67 counties in the State were, in fact, divided. What effect should this fact have on our evaluation of the Legislature's performance of its constitutional obligation to create districts "as nearly equal ... as may be"?

835 So.2d at 174 (J. See dissenting) (bold emphases added).

9. The other dissenter in *Rice v. English* recognized that this mixed question of federal and state law had already been decided and was not, as defendants in the

instant action argue, a question of unsettled law.

The federal district court for the Middle District of Alabama ordered a relaxation of the “no-division” provision of Art. IX, § 200, regarding county boundaries, in *Sims v. Amos*, 336 F.Supp. 924, 939 (M.D. Ala. 1972), because the “one-person, one-vote” rule instituted by the United States Supreme Court has priority over the State requirement of maintaining political boundaries. However, in relaxing the standard, the court made it clear that “the requirements of equal protection necessitate, *in some instances*, that county lines give way in drawing legislative districts.” 336 F. Supp. at 939 n. 20 (emphasis added). Indeed, “[b]oundary lines are sacrificed *only where absolutely necessary* to satisfy the constitutional requirement of one man one vote.” 336 F. Supp. at 939 (emphasis added). **Consequently, the “no-division” provision of Art. IX, § 200, cannot be arbitrarily disregarded by the legislature.**

835 So.2d at 172 (C.J. Moore dissenting) (italicized emphases in original) (bold emphasis added). Chief Justice Moore then cited the decisions of this Court as “bear[ing] out the importance of the interplay between the percentage deviation in population provided under the scheme and the number of counties split by the scheme.” *Id.* at 273 (citing *Sims v. Amos* and *Burton v. Hobbie*).

10. Thus the continued vitality of the whole-county provisos in §§ 198-200 of the Alabama Constitution in the wake of *Reynolds v. Sims* is settled law. If in the future the Alabama Supreme Court were to dispute this mixed question of federal and state law and hold that the whole-county state constitutional provisos should be severed entirely from the Alabama Constitution, that holding itself would be a change in law respecting voting that could not be enforced absent § 5



preclearance. *Hathorne v. Lovorn*, 457 U.S. 255 (1982).

11. Given the holding of *Rice v. English* that the Alabama Constitution does not require stricter population deviations than  $\pm 5\%$ , defendants cannot contend that plaintiffs' claim in Count I against the Legislature's arbitrary imposition of a  $\pm 1\%$  deviation restriction on House and Senate redistricting plans presents a question of state law. As the dissenters in *Rice v. English* pointed out, narrowing the permissible range of population deviation makes it more difficult to comply with the whole-county proviso of § 200 of the Alabama Constitution. Any contention that the  $\pm 1\%$  restriction is justified by *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), aff'd sub nom *Cox v. Larios*, 542 U.S. 947 (2004), clearly presents a question of federal constitutional law.

WHEREFORE, plaintiffs pray that this Court will deny defendants' motion to dismiss or, in the alternative, to stay.

Plaintiffs further pray that the three-judge court will expedite proceedings leading to a determination of plaintiffs' motion for partial summary judgment and for a preliminary and/or permanent injunction.

Respectfully submitted this 13th day of September, 2012.

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