

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

ALABAMA LEGISLATIVE BLACK CAUCUS, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 2:12-cv-691
	)	WKW-MHT-WHP
THE STATE OF ALABAMA, et al.,	)	
	)	
Defendants.	)	
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	)	
DEMETRIUS NEWTON, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 2:12-cv-1081
	)	WKW-MHT-WHP
THE STATE OF ALABAMA, et al.,	)	
	)	
Defendants.	)	

**AMENDED MEMORANDUM IN SUPPORT OF  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

In support of their Motion for Partial Summary Judgment with respect to the ALBC Plaintiffs’ restated partisan gerrymandering claim, the State of Alabama and Beth Chapman, in her official capacity as Secretary of State of Alabama, defendants in this action (the “ALBC State Defendants”), submit this Memorandum. For the reasons stated in the Motion and this Memorandum, this Court should enter summary judgment in favor of the ALBC State Defendants and against the ALBC Plaintiffs on that claim or dismiss it.

## INTRODUCTION

As the ALBC State Defendants suggested in their Motion for Time Extension (No. 71), between the ALBC Plaintiffs' Motion for Partial Summary Judgment (No. 66) and the ALBC State Defendants' Response (No. 76), there was a substantial likelihood that some or all of the ALBC Plaintiffs' claims could be resolved on dispositive cross-motions. With this Court's denial of the ALBC Plaintiffs' Motion for Partial Summary Judgment (No. 89), the ALBC State Defendants have followed up on that suggestion by moving for partial summary judgment in their favor on the ALBC Plaintiffs' restated partisan gerrymandering claim.

At the outset, the ALBC State Defendants note that three members of the Alabama Legislative Black Caucus (Senators Vivian Davis Figures and Rodger Smitherman and Newton Plaintiff Demetrius Newton) and others, represented by one of the ALBC Plaintiffs' counsel in this case, filed an amicus brief in the Supreme Court's partisan gerrymandering case of *Vieth v. Jubelirer*, 541 U.S. 267, 124 S. Ct. 1769 (2004). *See* Exhibit N-1. In that brief, they argued, "Heeding [the Supreme] Court's holding in *Easley v. Cromartie*, 532 U.S. 234[, 121 S. Ct. 1452] (2001), that the purposeful aggregation of African-American voters is justified when it is done primarily for partisan political purposes, the Democratic leadership

pursued a biracial strategy aimed at safeguarding its governing majorities in both houses of the Legislature.” Exhibit N-1 at 3. In other words, the 2001 Alabama legislative redistricting plans were an example of “benign” partisan gerrymandering. It cannot be the case that partisan gerrymandering which the ALBC Plaintiffs contend favored them is a good thing while allegedly “bad” partisan gerrymandering that the ALBC Plaintiffs assert disfavors them is illegal. Something more should be required for a justiciable legal standard, and this Court should be wary of what it gets from the ALBC Plaintiffs given the political opportunism displayed in the amicus brief.

The ALBC State Defendants reiterate that the ALBC Plaintiffs were permitted to replead their partisan gerrymandering claim because its previous iteration failed to identify a justiciable standard. *See* No. 53 at 16. The restated claim’s invocation of “necessity” is no improvement. As counsel for the ALBC Plaintiffs acknowledged at the on-the-record scheduling conference on March 8, 2013, coming up with a standard for evaluating whether a county split was necessary was difficult at best. Once again, the ALBC Plaintiffs have failed to identify a justiciable standard for this Court to use.<sup>1</sup>

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<sup>1</sup> The *Vieth* amicus brief suggests that this failure should be no surprise. In its conclusion, the *amici* assert that the top-side *Vieth* parties have failed to show that

In that regard, this Court should consider what a remedial injunction might say. As the ALBC State Defendants have pointed out more than once, counties will have to be split in order to comply with one-person, one-vote standards no matter whether the standard is  $\pm 1\%$ ,  $\pm 5\%$ , or something else. A directive to adopt a new plan without splitting too many counties or any counties unnecessarily would not provide sufficient guidance to the Legislature without a way to identify too many or a definition of necessity.

### **FACTS**

The ALBC State Defendants incorporate the Affidavits of D. Patrick Harris and Jeff Woodard (Nos. 76-1 and 76-2, respectively), which were filed in conjunction with their Response to the ALBC Plaintiffs' Motion, into this Memorandum. In addition, they will include two news articles which illustrate the way in which three Democratic members of the Alabama House of Representatives have addressed local legislation in the current session.

More specifically, that evidence shows:

1. D. Patrick Harris (Harris) has served as Secretary of the Alabama State Senate since December 2010. No. 76-1, at 1, ¶ 2.

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there are any “justiciable standards for adjudicating claims of strictly partisan gerrymandering.” Exhibit N-1 at 30.

2. Before becoming Secretary of the Alabama State Senate, Harris served as Assistant Secretary of the Senate for 20 years. No. 76-1, at 1, ¶ 2.

3. In the course of his duties as Secretary of the Senate and Assistant Secretary of the Senate, Harris has been called on to interpret and apply the Senate Rules, including those that relate to local legislation. No. 76-1, at 2, ¶ 3.

4. Local legislation in the Alabama Senate originates with the members of a local delegation, which must approve that legislation before it goes to one of the Senate's four Local Legislation Committees. No. 76-1, at 2, ¶ 4.

5. Local delegations in the Alabama Senate are composed of those Senators whose districts include all or part of a county. No. 76-1, at 2, ¶ 4.

6. In some counties, local legislation can move forward with a majority vote in the local delegation; in other counties, unanimity is required. No. 76-1, at 2, ¶ 4.

7. In the Senate, local legislation that has been approved by a local delegation goes to the appropriate standing Local Legislation Committee. No. 76-1, at 2, ¶ 5.

6. Alabama Senate Rule 48(21) provides for the establishment of four standing Local Legislation Committees, organized by the size of locality with one of the four for Madison County. No. 76-1, at 2, ¶ 5.

7. Local legislation that has been approved by the applicable Local Legislation Committee goes to the Senate floor. No. 76-1, at 2, ¶ 6.

8. On the Senate floor, local legislation is often uncontested as a matter of local courtesy. No. 76-1, at 2, ¶ 6.

9. Nothing in the Senate's Rules provides for local courtesy, so, to the extent it is observed, that is done as a matter of custom. No. 76-1, at 2, ¶ 6.

10. Any Senate member is free to oppose local legislation on the floor of the Senate, whether that Senator is a member of the local delegation or not. No. 76-1, at 2, ¶ 7.

11. If a Senator opposes local legislation on the Senate floor, that piece of proposed local legislation must be approved by a majority of the Senate to pass. No. 76-1, at 2, ¶ 7.

12. Jeff Woodard became Clerk of the Alabama House of Representatives in 2012. No. 76-2, at 1, ¶ 2.

13. Before becoming Clerk of the Alabama House of Representatives, Woodard served as Assistant Clerk for two years, as Chief of Staff for House Speaker Seth Hammett for 12 years, and as the confidential assistant to House Speaker Jimmy Clark for 8 years. No. 76-2, at 1-2, ¶ 2.

14. Woodard has more than 20 years' experience working with the House Rules, including those related to local legislation. No. 76-2, at 2, ¶ 3.

15. Woodard gained this experience through his service as Clerk of the Alabama House of Representatives, Assistant Clerk, Chief of Staff to Speaker Hammett, and confidential assistant to Speaker Clark. No. 76-2, at 2, ¶ 3.

16. Local legislation in the Alabama House of Representatives originates with the members of a local delegation, which must approve that legislation before it goes to the house floor. No. 76-2, at 2, ¶ 4.

17. Local delegations in the Alabama House of Representatives consist of those house members whose districts include all or part of a county. No. 76-2, at 2, ¶ 4.

18. In some counties, local legislation can move forward on a majority vote from the local delegation; in others, unanimity within the local delegation is required. No 76-2, at 2, ¶ 4.

19. If a local delegation in the house has approved local legislation, it goes to the House floor for debate. No. 76-2, at 2, ¶ 5.

20. Alabama House Rule 23 states, "Any local bill may be contested by one or more member(s) filing a written statement of contest with the Clerk." No. 76-2, at 2, ¶ 6.

21. When local legislation comes to the House floor, it is often uncontested as a matter of local courtesy. No. 76-2, at 2, ¶ 6.

22. Nothing in the House Rules requires members to observe local courtesy, so, to the extent it is observed, that is done as a matter of custom. No. 76-2, at 2, ¶ 6.

23. A House member is free to oppose local legislation on the house floor whether that House member is a member of the local delegation or not. No. 76-2, at 2, ¶ 7.

24. If a House member opposes local legislation on the house floor, that local bill must be approved by a majority of the House members voting to pass. No. 76-2, at 2, ¶ 7.

25. Local legislation is not officially enacted until it passes both houses of the Alabama Legislature and has been signed by the Governor. No. 76-1, at 2, ¶ 8; No. 76-2, at 3, ¶ 8.

26. The local delegations in the Alabama Legislature do not have plenary authority to enact local legislation. No. 76-1, at 2, ¶¶ 8, 9; No. 76-2, at 3, ¶¶ 8, 9.

27. On March 19, 2013, Mike Cason, a reporter, wrote that Representative Johnny Mack Morrow (D-Red Bay) said that he would file written notice of his

intent to contest all local legislation in the Alabama House of Representatives. No. 96-2, at 1.

28. Cason reported that Morrow filed his written notice in response to the House's failure to override the Governor's veto of local legislation for Franklin County, which Morrow represents. No. 96-2, at 1.

29. Cason reported that Morrow said, "If Franklin County's local courtesy can't be honored, then no other county's local courtesy can be honored. No 96-2, at 1.

30. Cason reported that Mike Hubbard, Speaker of the Alabama House of Representatives, said that any House member has the right to contest local legislation. No. 96-2, at 1.

31. Cason reported that Craig Ford, Minority Leader on the Alabama House of Representatives previously filed written notice of his intent to contest all local legislation in the Alabama House of Representatives. No. 96-2, at 1.

32. Cason wrote that Ford filed his notice "as part of the Democrats' plan to slow legislation in response to the Feb. 28 passage of the Alabama Accountability Act." No. 96-2, at 1.

33. On April 3, 2013, George Talbot reported that Joseph Mitchell (D-Mobile) has filed written contests against two pieces of proposed local legislation for Mobile County. No. 97-2, at 1.

## **ARGUMENT**

### **A. The Applicable Standard**

Federal Rule of Civil Procedure 56(a) provides that summary judgment should be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” The ALBC State Defendants submit that *DeJulio v. Georgia*, 290 F. 3d 1291 (11<sup>th</sup> Cir. 2002), is controlling both as to the law and as to the materiality of the facts.

#### **1. This Court should dismiss the ALBC Plaintiffs’ partisan gerrymandering claim.**

In their Response (No. 76) to the ALBC Plaintiffs’ Motion for partial summary judgment, the ALBC State Defendants argued that the restated partisan gerrymandering claim should be dismissed for two reasons: (1) insofar as it rests on the contention that counties were unnecessarily split, that claim raises a question of state law that is not within the scope of this Court’s jurisdiction, and (2) the restated claim is barred by the law of the case. If this Court agrees with either or both of those arguments, it should dismiss the ALBC Plaintiffs’ partisan gerrymandering claim.

As this Court has held, “To the extent that the complaint filed by the Black Caucus alleges that state officials violated state law, we lack jurisdiction to consider it.” No. 53 at 7 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117, 104 S. Ct. 900, 917 (1984)). The application of that legal rule mandated the dismissal of the ALBC Plaintiffs’ claim that the 2012 Alabama legislative redistricting plans split too many counties.

As the ALBC State Defendants have noted, the ALBC Plaintiffs’ “restated” partisan gerrymandering claim is “so closely related to the earlier county-splitting claim as to be another question of state law.” No. 76 at 9. The restated claim calls for an inquiry into county-splitting just like the earlier claim did. That inquiry would consider whether too many counties were split unnecessarily, while the earlier claim would consider whether too many counties were split. The difference between the earlier dismissed claim and the restated claim is insubstantial, so the restated claim should be dismissed without prejudice so the claim can be litigated in state court if the ALBC Plaintiffs so choose.

Alternatively, given that this Court has already concluded that the county-splitting claim is outside its jurisdiction and that the use of an overall population deviation of  $\pm 1\%$  does not violate federal one-person, one-vote standards, the ALBC Plaintiffs’ attempt to relitigate these issues is barred by the law of the case.

The ALBC Plaintiffs have not given this Court a reason to reconsider the wisdom of its previous rulings, so the restated claim should be dismissed with prejudice.

**2. In the alternative, the ALBC State Defendants are entitled to summary judgment in their favor on the ALBC Plaintiffs' restated partisan gerrymandering claim.**

In their Response to the ALBC Plaintiffs' Motion for Partial Summary Judgment, the ALBC State Defendants presented, among other things, the Affidavits of D. Patrick Harris and Jeff Woodard, Nos. 76-1 and 76-2, respectively. Those Affidavits show that local legislation is the product of the Legislature, not the local delegations. When viewed in the context of *DeJulio v. Georgia*, 290 F. 3d 1291 (11<sup>th</sup> Cir. 2002), there is no violation of the one-person, one-vote interests of the ALBC Plaintiffs.

The Affidavits of Harris and Woodard show that the local delegations control, at most, only one of the several steps required to enact local legislation in Alabama. Certainly, those local delegations exercise nothing like plenary authority. Rather, in the Alabama House of Representatives, some local delegations can move local legislation to the floor, but any member can force a vote on it and can vote against it. No. 76-2, ¶¶ 5-7. In the Alabama Senate, local legislation must go through one of the four Local Legislation Committees to get to the floor, where any member is free to oppose it. No. 76-1, ¶¶ 4, 5. Both houses

often observe local courtesy, but nothing in the rules of either house requires them to do so. And, as with all other legislation, local legislation does not become law unless passed by both houses and signed by the Governor.

The al.com article attached as Exhibit N-2 illustrates the operation of local courtesy in the Alabama House of Representatives. It reports that two House members have found reasons to require that all local legislation be voted on. That article shows that the local delegations do not exercise plenary authority over local legislation in the Alabama House of Representatives.

In *DeJulio*, the Eleventh Circuit affirmed the rejection of a one-person, one-vote, local-delegation challenge to the structure of the Georgia Legislature. The ALBC Plaintiffs have stated that the Georgia practice upheld in *DeJulio* is “virtually the same [as] Alabama’s.” No. 66, at 3. If that is the case, *DeJulio*, which is binding authority, compels the rejection of their claim as a matter of law.

Accordingly, if this Court does not dismiss the ALBC Plaintiffs’ restated partisan gerrymandering claim, it should enter summary judgment in favor of the ALBC State Defendants and against the ALBC Plaintiffs on that claim.

## CONCLUSION

For the reasons stated above, this Court should dismiss the ALBC Plaintiffs' restated partisan gerrymandering claim or, if it does not, enter summary judgment in favor of the ALBC State Defendants and against the ALBC Plaintiffs on that claim.

Respectfully submitted,

Dated April 4, 2013

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