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

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

RESPONSE IN OPPOSITION TO MOTION
FOR CERTIFICATION OF A CLASS ACTION

The State of Alabama and Beth Chapman, in her official capacity as Secretary of State of Alabama, defendants in the ALBC Lawsuit (the "ALBC State Defendants"), submit this Response in opposition to the ALBC Plaintiffs' Motion for Certification of a Class Action (No. 69). For the reasons stated below, this Court should deny the Plaintiffs' Motion.

INTRODUCTION

In their Motion, the ALBC Plaintiffs seek certification of the following plaintiff classes: "(1) of residents of Alabama counties whose boundaries have been unnecessarily split among more House and/or Senate districts than are necessary to satisfy the Fourteenth Amendment requirement of substantial population equality and the Voting Rights Act; (2) of all African-American voters of Alabama; and (3) of all Alabama voters who support and wish to elect black and white Democratic members of the Legislature." No. 69 at 2.

ARGUMENT

The ALBC State Defendants believe that the ALBC Plaintiffs' motion seeking the certification of three plaintiff classes should be denied for three reasons. First, the Newton Plaintiffs' lawsuit bars the certification of a Rule 23(b)(2) class. Second, the ALBC Plaintiffs' claims are not suitable for treatment as a Rule 23(b)(2) class action because they call for individualized consideration of districts and county lines. Third, the ALBC Plaintiffs cannot meet the commonality, typicality, and adequacy requirements of Federal Rule of Civil Procedure 23(a).

Before making those arguments, the ALBC State Defendants note that the Amended Complaint includes claims of vote dilution and isolation and partisan

gerrymandering. Without conceding that those district-specific are suitable for treatment as Rule 23(b)(2) class claims, the ALBC State Defendants note that the vote dilution claims can only be made as to the black-majority districts, and there are a limited number of them. There are 8 black-majority districts in the Senate plan and 28 in the House plan, so a statewide claim is impossible. If a statewide claim is impossible, certifying a plaintiff class of all African-American voters of Alabama would be improper and overreaching.

1. The Newton Plaintiffs' lawsuit bars the certification of a Rule 23(b)(2) class.

The Newton Plaintiffs' lawsuit bars the certification of a Rule 23(b)(2) plaintiff class because it is a de facto opt-out that demonstrates a lack of the cohesiveness required to sustain a Rule 23(b)(2) class.

A. A right to opt out of a Rule 23(b)(2) class is generally unavailable.

Federal Rule of Civil Procedure 23(b)(2) allows for the certification of a plaintiff class that meets the requirements of Rule 23(a) and, as to which,

> the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that the final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole ….

Id. Rule 23(b)(2) class actions are generally viewed as "mandatory" class actions. *See Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2558 (2011). A leading treatise explains

that Rule 23(b)(2) class actions "are often thought of as more organic cases in which the class's interests are so cohesive that opting out would be a non sequitur." 2 Newberg on Class Actions, 5th ed., § 4-1 at 8 ("Newberg"). The cohesion of a Rule 23(b)(2) class is reflected in the "indivisible nature of the declaratory or injunctive remedy…—the notion that the conduct is such that it can be enjoined or declared unlawful *only* as to *all* of the class members or as to none of them." *Wal-Mart v. Dukes*, 131 S. Ct. at 2557 (emphasis added)(quoting Richard Nagareda, Class Certification in the Age of Aggregate Proof, 84 N. Y. U. L. Rev. 97, 132 (2009)).

In the paradigmatic Rule 23(b)(2) class action, opt-out is a "non sequitur." Newberg, § 4.1 at 8. "[I]n a school desegregation case like *Brown v. Board of Education*, the plaintiffs' success would likely lead to the integration of the public schools; it is not clear how any member of the plaintiff class could 'opt out' of such an action." *Id*., at 8-9. The ALBC Plaintiffs' case is like *Brown* in that respect: if successful, new legislative redistricting plans would be the result, and it is unclear how the Newton Plaintiffs would not share in that relief. Instead, the Rule (b)(2) class binds everyone.

As a result, Rule 23 provides "no opportunity for (b1)(or (b)(2) class members to opt out, and does not even oblige the District Court to afford them

notice of the action." *Wal-Mart v. Dukes*, 131 S, Ct. at 2558; see also Newberg, § 4.26 at 98 (Members of a Rule 23(b)(2) class "generally cannot opt out."); *id*., § 4.33 at 119 ("typically" no opt out in Rule 23(b)(2) class actions). Instead of being protected at the class certification stage, the members of the Rule 23(b)(2) class have a voice when it comes to settlement. *Id*., § 4.26 at 98-9 ("'[V]oice' replaces 'exit' as the operable means of class member involvement."). Newberg explains:

> [A] court overseeing a (b)(2) class action is not required to provide notice and opt out rights with regard to the certification decision, but it may do so, and it is required to provide notice of a settlement and request for attorney's fees and to provide class members with the opportunity to be heard as to the terms of the settlement or fee request before entering final judgment.

Id., § 4.36 at 146-47.

To the extent that courts might have the discretion to provide the members of a Rule 23(b)(2) class action with a chance to opt out, "few courts accept the invitation." *Id*., § 4.1 at 8. And, when they do accept that invitation, different cases are involved.

In this regard, the former Fifth Circuit has observed that the theory behind limiting opt out rights in Rule 23(b)(2) class actions has "broken down with the advent of the 'hybrid' Rule 23(b)(2) class action in which individual monetary relief for class members, typically back pay, is sought in addition to classwide injunctive or declaratory relief." *Penson v. Terminal Transport Co*., 634 F. 2d 989,

993 (5th Cir. 1981).[1] Thus, "although a member of a class certified under Rule 23(b)(2) has no absolute right to opt out of the class, a district court may mandate such a right pursuant to its discretionary power under Rule 23."

The Fifth Circuit explained that notice of the opt-out right is required for classes certified pursuant to Rule 23(b)(3) "because it was presumed that, where personal monetary relief is being sought, the individual class members may have a strong interest in pursuing their own litigation." *Id.*, at 993. Less notice is required for Rule 23(b)(2) classes "because there is purportedly a greater degree of cohesiveness or unity in the class than in 23(b)(3) actions, which minimizes the need for notice and a right to opt out of the class." *Id.*, at 993-94 (internal quotation omitted). In a hybrid 23(b)(2)/(b)(3) class action, a district court might "require that an opt-out right and notice thereof be given should it believe that such a right is desirable to protect the interests of the absent class members." *Id.*, at 994.

In the same way, the D. C. Circuit has endorsed the notion that "the language of Rule 23 is sufficiently flexible to afford district courts discretion to grant opt-out rights in (b)(1) and (b)(2) class actions." *Eubanks v. Billington*, 110

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[1] Decisions of a Unit B panel of the former Fifth Circuit, like *Penson*, are binding precedent in the Eleventh Circuit. *Stein v. Reynolds Securities, Inc*. 667 F. 2d 33, 34 (11th Cir. 1982).

F. 3d 87, 94 (D.C. Cir. 1997). *Eubanks* involved a race discrimination class action in which money damages were sought in addition to declaratory and injunctive relief. The court explained, "Although, as a general matter, courts should not permit opt-outs where doing so would undermine the policies behind (b)(1) or (b)(2) certification, where both injunctive and monetary relief are sought, the need to protect the rights of individual class members may necessitate procedural protections beyond those ordinarily provided under (b)(1) and (b)(2)." *Id*., at 94-95.

The ALBC Plaintiffs' case is not a 'hybrid' case. It seeks only declaratory and injunctive relief. Accordingly, there is no reason to allow the Newton Plaintiffs or any other class member to opt-out of the proposed plaintiff classes.

B. The Newton Plaintiffs' lawsuit operates as a de facto opt out from a proposed Rule 23(b)(2) class action that reflects a lack of cohesion.

In the paradigmatic (b)(2) class action, the cohesion of the plaintiff class makes it possible to enter overarching injunctive or declaratory relief. That cohesion keeps the case from "devolv[ing] into consideration of myriad individual issues…." Newberg, § 4.34 at 122. As explained below, the ALBC Plaintiffs' contention that county lines have been unnecessarily split calls for an independent

look at every one of the split counties and, thereby, promises consideration of individual issues.

Cohesion is lacking in another way as well. The Newton Plaintiffs' lawsuit, which was filed the day after the hearing on the ALBC State Defendants Motion for Judgment on the Pleadings, indicates that the Newton Plaintiffs do not want to be part of the ALBC Plaintiffs' plaintiff classes. Rather, they want to pursue their own claims with their own lawyers. That desire shows that it would be a stretch to certify otherwise mandatory (b)(2) plaintiff classes.

Moreover, as the State Defendants have noted (see No. 62), two sets of lawyers purport to represent the individual Newton Plaintiffs. Those individual Newton Plaintiffs are members of putative classes 2 and 3 (Newton, Stallworth, and Pettway) or putative class 3 (Weaver and Toussaint). The ALBC Plaintiffs' lawyers or the Newton Plaintiffs' lawyers, but not both of them, can represent these individual Newton Plaintiffs, and that issue must be resolved before the case can move forward.

This Court should resolve the inherent tension between the ALBC Plaintiffs' pursuit of class certification and the Newton Plaintiffs' lawsuit by denying the motion for class certification under Rule 23(b)(2). The State Defendants believe that the Newton Plaintiffs have the right to bring the lawsuit they have brought

through the counsel they have chosen. Denying the motion for class certification will clear the way for the Newton Plaintiffs to proceed.

2. The ALBC Plaintiffs' claims are not suitable for Rule 23(b)(2) class treatment.

A. However denominated, the ALBC Plaintiffs' county-splitting claim is unsuitable for class treatment.

In their Complaint, the ALBC Plaintiffs argued, among other things, that the 2012 legislative redistricting plans violated constitutional one-person, one-vote standards and split too many counties in violation of provisions of the Alabama Constitution and that they were the victims of partisan gerrymandering. This Court rejected the one-person, one-vote, county-splitting claim, holding that the use of an overall population deviation of ±1% does not violate the ALBC Plaintiffs' one-person, one-vote rights and that it lacks jurisdiction to consider whether the 2012 Alabama legislative redistricting plans split too many counties. *See* No. 53. This Court also gave the ALBC Plaintiffs an opportunity to replead their partisan gerrymandering claim. *Id*.

In that repled claim, the ALBC Plaintiffs did as their counsel warned at the December 12, 2012 hearing and relied heavily on the contentions that counties have been split unnecessarily and that such unnecessary splitting of county lines violates the one-person, one-vote rights of county residents. *See* Nos. 66 and 68-1.

So framed, it is unclear how the restated partisan gerrymandering claim survives the rejection of the original county-splitting claim.

Whether the restated partisan gerrymandering claim survives or not, it is not suitable for class treatment. No general rule can be devised to identify those counties that have been unnecessarily split. Rather, a county-by-county factual inquiry will be required, with the results for each county being good for that county alone. That inquiry is inconsistent with the indivisibility needed for a (b)(2) injunctive or declaratory remedy.

Accordingly, this Court should deny the motion to certify one or more Rule 23(b)(2) plaintiff classes as to the partisan gerrymandering claim.

B. Class treatment is not suitable for the ALBC Plaintiffs' claims of racially-based vote dilution and isolation.

Class treatment is not appropriate for the ALBC Plaintiffs' claims of vote dilution and isolation because those claims are inherently district specific. Only a black-majority district can be said to be packed, and the 2012 House and Senate plans contain a limited number of such districts. A putative class member who does not live in one of those allegedly packed districts lacks standing to complain about it because any injury is only a general one.

Class treatment is also unsuitable for the residents of the black-majority districts. While the ALBC State Defendants believe that those districts are not

packed as a matter of law and that there are problems with devising a remedy, see No. 30, they also believe that each district requires individualized treatment. What may be packing in one district is not necessarily packing in another. In the same way, the amount of unpacking that must be done will differ from district to district. Cf. *Texas v. United States*, 831 F. Supp. 2d 244, 263 (D.D.C. 2011)(three-judge court)("[W]hen there is no supermajority in a district, a Section 5 analysis must go beyond mere population data to include factors such as minority voter registration, minority voter turnout, election history, and minority/majority voting behavior." (footnote omitted)). Thus, the kind of unitary adjudication of the racially-based vote dilution and isolation claims of the ALBC Plaintiffs is impossible.

Given the impossibility of unitary adjudication of the ALBC Plaintiffs' vote dilution and isolation claim, this Court should deny the motion for class certification as to that claim.

3. The ALBC Plaintiffs cannot satisfy all of the requirements for certifying a class action set forth in Federal Rule of Civil Procedure 23(a).

For the ALBC Plaintiff classes to be certified, they must not only fit themselves into one the class actions allowed by Rule 23(b), they must also satisfy the requirements for the certification of any class *vel non* set out in Rule 23(a). *See Turner v. Beneficial Corp.*, 242 F. 3d 1023, 1025 (11th Cir. 2001)(en banc). In the

judgment of the ALBC State Defendants, the ALBC Plaintiffs cannot satisfy the commonality, typicality, and adequacy prerequisites for class certification.

With respect to commonality and typicality, the ALBC State Defendants note that, in order to pursue claims of racial and partisan gerrymandering, the plaintiffs should be required to show that they were placed in their districts for invidious racial or partisan reasons. Without such a showing, they would be "asserting only a generalized grievance against governmental conduct of which he or she does not approve." *United States v. Hays*, 515 U.S. 737, 745, 115 S. Ct 2431, 2436 (1995). This limitation on standing should not be swept aside through the certification of plaintiff classes and should not be satisfied by the presence or organizational plaintiffs who live everywhere and nowhere.

Commonality looks at the characteristics of the group as a whole and examines whether a claim is susceptible to class-wide proof. As noted above, neither of the ALBC Plaintiffs claims are suitable for (b)(2) class treatment because they require line-by-line or district-by-district fact-finding. A witness as to either claim has standing to testify only as to his or her district, not anyone else's. *See Sinkfield v. Kelley*, 531 U.S. 28, 121 S. Ct. 446 (2000); *United States v. Hays*. A class representative cannot provide testimony sufficient to support class-wide proof, so commonality is lacking.

Typicality is also lacking because no plaintiff's testimony can be typical. Rather, that testimony is county-specific, district-specific, or both. And, that testimony will not be good for any other potential class member.

With respect to the adequacy of class representation, the ALBC State Defendants note:

(1) The Newton Plaintiffs' lawsuit demonstrates, at the very least, that there is significant internal disagreement within the proposed plaintiff classes. The Newton Plaintiffs filed their lawsuit on December 13, 2012, the day after this Court heard oral argument on the ALBC State Defendants' Motion for Judgment on the Pleadings. The Newton Plaintiffs obviously knew of the ALBC Plaintiffs' action and chose to file their own with their own lawyers. They also make different claims.

Different organizational interests are involved in each case too. The Alabama Legislative Black Caucus and the Alabama Association of Black County Officials, both ALBC Plaintiffs, are each unincorporated groups of elected officials. For its part, the Newton Plaintiff Alabama Democratic Conference alleges that: (1) it is a statewide body with members in "almost every county of Alabama," (2) its purpose is "to endorse candidates for public office who will be responsive to the needs of the blacks, other minorities and poor people in the State

of Alabama'" and (3) its purpose is to "protect the voting rights of racial minorities in the State of Alabama." Newton No. 1 at 2, ¶ 3. Clearly, there is geographic and racial overlap, but different strategies.

With this much internal disagreement within the community of black voters and the community of Democratic Party supporters, there is good reason to question the adequacy of representation.

(2) Proposed class counsel have their own problems. In the first place, they chose not to pursue the paradigmatic Section 2 claim of district-specific racial gerrymandering that the Newton Plaintiffs are pursuing. Before they are appointed class counsel, ALBC counsel should explain their strategic thinking.

(3) In addition, they should demonstrate that they have adequate resources. Even as they assert that they have the necessary resources, they complain:

> Plaintiffs will be prejudiced if they are required to conduct discovery, retain expert witnesses, and present evidence on Counts II and III in plenary trial proceedings, when they are entitled at this time to summary judgment on Count III of their amended complaint. Plaintiffs do not have access to the financial and investigatory resources that the State Defendants possess.

No 68-1, at 3, ¶ 4. The State Defendants note that the ALBC Plaintiffs picked this fight, so their complaints about its alleged one-sidedness must be viewed in context. Before counsel for the ALBC Plaintiffs become class counsel, they should show that they have the resources necessary to carry out their obligations.

Accordingly, this Court should deny the motion for class certification because the ALBC Plaintiffs cannot satisfy all of the requirements of Rule 23(a).

CONCLUSION

For the reasons stated above, this Court should deny the ALBC Plaintiffs' Motion for Certification of a Class Action.

Date March 5, 2013

Respectfully submitted,
LUTHER STRANGE
Attorney General of Alabama
By:

/s/John J. Park, Jr.
Deputy Attorney General
Alabama State Bar ID ASB-xxxx-P62J
E-mail: jjp@sbllaw.net

Strickland Brockington Lewis LLP
Midtown Proscenium Suite 2200
1170 Peachtree Street NE
Atlanta, GA 30309
Telephone: 678.347.2200
Facsimile: 678.347.2210

/s/ James W. Davis
Assistant Attorney General
Alabama State Bar ID ASB-xxxx-I58J
E-mail: jimdavis@ago.state.al.us

/s/ Misty S. Fairbanks Messick
Assistant Attorney General
Alabama State Bar ID ASB-xxxx-T71F
E-mail: mmessick@ago.state.al.us

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