IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LIONEL GUSTAFSON, et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	**Civil Action**
	)	**NO: 05-352**
ADRIAN JOHNS, et al.,	)	
	)	
Defendants,	)	

BRIEF OF SENATORS LOWELL BARRON AND HENRY ("HANK") SANDERS IN SUPPORT OF THEIR MOTION TO INTERVENE

Senators Lowell Barron and Hank Sanders (collectively "movants"), through undersigned counsel, submit the following arguments and authorities in support of their motion to intervene.

I. INTERVENTION OF RIGHT

Movants assert a right to intervene under Rule 24(a), Fed. R. Civ. P., because they claim interests relating to the redistricting transactions which are the subject of this action, because they and the citizens of Alabama they are elected to represent are so situated that the disposition of this action may as a practical matter impair or impede their ability to protect those interests, and because they are not adequately represented by existing parties. The complaint alleges that the Alabama Senate redistricting plan duly enacted by the Legislature violates certain rights Plaintiffs claim under the Constitution of the United States. The named defendants are the Alabama Secretary of State and the probate judges of Alabama, all in their official capacities only.

Plaintiffs allege claims based only on Article IV, Sec. 2 and the First and Fourteenth Amendments of the United States Constitution. Plaintiffs' constitutional claims actually are

vehicles for advancing the political agenda of certain Republicans who oppose on partisan and racial grounds the Senate plan adopted by the Legislature and signed by the Governor and which has received preclearance under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The Senate plan, Act 2001-727, passed with the support of a unified Democratic caucus, which held a majority of 27 to 11 in the Alabama Senate, and with the support of a minority of Republican members of the Senate. These Republican opponents of the plan produced through the constitutionally established legislative process aim at invalidating the legislatively enacted plan and obtaining a judicially drafted redistricting plan over which these Republicans hope to exert greater influence than they could wield through the democratic process.

Movants seeking intervention are State Senators who also are the President Pro Tem of the Alabama Senate and a member of the Legislative Black Caucus and the Senate Black Caucus. The position of President Pro Tem of the Alabama Senate is established by Section 51 of the Alabama Constitution and the person filling the position has always been elected by the Senate from the party having the most members elected to the Senate. As President Pro Tem of the Alabama Senate, Senator Barron is the leader of the Senate Democratic Caucus. The Legislative Black Caucus and the Senate Black Caucus are subunits of the Democratic Caucus. Senator Sanders is a member of the Legislative Black Caucus and of the Senate Black Caucus. Movants ask to intervene as defendants, individually and in their official capacities, for the purpose of defending the redistricting plan they successfully negotiated through the legislative process, and thereby to defend the democratic process in which they participated and its results. The Movants have taken an oath to uphold and defend the Constitution and laws of the State of Alabama. They have a duty to protect the political interests of all of Alabama citizens who

support the constitutionally mandated democratic process which produced the legislative districts at issue in this lawsuit.

The Movants also have a duty to protect the political interests of Alabama Democrats and of African-American voters in Alabama, who overwhelmingly support Democrats.

Movants assert that they represent the real defendant parties in interest in this action and that their interests are directly opposed to the partisan, racially discriminatory and anti-democratic interests of Plaintiffs. Movants further assert that the existing defendants, all sued in their official capacities as officers of the State of Alabama, some of whom were elected as Democrats and some as Republicans, are bound by their constitutional oaths to represent all citizens of Alabama, so that, notwithstanding their partisan affiliations, they are unable fully, aggressively and adequately to respond to the partisan agenda of plaintiffs and to advance the arguments of fact and law movants would assert in order to protect their aforesaid political interests.

Courts have made clear that persons like the movants who seek to protect partisan and African-American political interests in the districting process are entitled to intervene of right, even when the public officials named as defendants share their ultimate litigation objectives. *E.g.*, *Clark v. Putnam County*, 168 F.3d 458 (11th Cir. 1999) (black voters had right to intervene in action filed by white voters under *Shaw v. Reno*, 509 U.S. 630 (1993)); *Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1478 (11th Cir. 1993) (white voters had right to intervene in vote dilution challenge to at-large elections brought by African Americans and Hispanics, because "intervenors sought to advance their own interests in achieving the greatest possible participation in the political process," and the defendant county commissioners must "balance a range of

interests likely to diverge from those of the intervenors.").

> We point out that we are not alone in this conclusion. As the proposed interveners observe, voters have been permitted to intervene in a large number--if not all--of the actions involving a *Shaw v. Reno* claim. *See, e.g., Cannon v. Durham County Bd. of Elections*, 959 F.Supp. 289 (E.D.N.C.), *aff'd on other grounds*, 129 F.3d 116 (4th Cir.1997); *Scott v. United States Dep't of Justice*, 920 F.Supp. 1248, 1250 (M.D.Fla.1996), *aff'd on other grounds sub nom. Lawyer v. Department of Justice*, 521 U.S. 567, 117 S.Ct. 2186, 138 L.Ed.2d 669 (1997); *Vera v. Richards*, 861 F.Supp. 1304, 1310 (S.D.Tex.1994), *aff'd on other grounds sub nom. Bush v. Vera*, 517 U.S. 952, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996); *Shaw v. Hunt*, 861 F.Supp. 408, 420 (E.D.N.C.1994), *rev'd on other grounds*, 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996).

Clark v. Putnam County, 168 F.3d at 462.

Intervention has been granted both to elected officials and to individual citizens. *E.g., Johnson v. Mortham*, 915 F.Supp. 1529, 1536, 1538 (N.D. Fla. 1995) ("Registered voters have standing, and a sufficiently substantial interest to intervene, in an action challenging the voting district in which the voters are registered.," and member of Congress representing the challenged district also has right to intervene) (*citing Meek v. Metropolitan Dade County*; *League of United Latin Am. Citizens, Council No. 4434 v. Clements* ("LULAC II "), 999 F.2d 831, 845 (5th Cir.1993) (en banc) (judges had standing as voters in county to intervene in action challenging judicial elections in that county), *cert. denied*, 510 U.S. 1071 (1994)); *PAC for Middle America v. Illinois State Bd. of Elections*, 1995 WL 571893 (N.D. Ill. 1995) (granting intervention of right to member of Congress who represents district being challenged and granting permissive intervention to black registered voters); *Vera v. Richards*, 861 F.Supp. at 1310 ("the court granted the motion to intervene of six African-American registered voters represented by the NAACP Legal Defense and Educational Fund, Inc."); *Baker v. Regional High School Dist. No. 5*, 432 F.Supp. 535, 537 (D. Conn. 1977) (voters and selectmen of municipality with smaller

population had right to intervene in one-person, one-vote action brought by voters in more populous municipality).

In the instant action, the plaintiffs' claims are aimed at the entire Alabama Senate redistricting plan, not just at one or two Senate districts. Movants are leaders directly elected, first by voters in their districts and second by their fellow members of the Legislature, to represent the political interests of Democrats and African-American voters throughout the State. Both Democrats and African Americans, the vast majority of whom support Democratic candidates, have a variety of often divergent political interests, which they seek to reconcile and to advance through the political process as members of the Democratic Party and supporters of several predominately black political organizations active in Alabama. It is movants' responsibility to express and to advocate the positions which favor the political interests of most Democrats, including most African Americans.

Where the plaintiffs and movants for intervention represent opposing political interests of the citizenry, official defendants elected to represent all the citizens cannot adequately represent both sides in redistricting litigation. *Clark v. Putnam County*, 168 F.3d at 461 ("[A]fter all, both the plaintiffs and the proposed defendant-interveners are Putnam County citizens. The commissioners cannot adequately represent the proposed defendants while simultaneously representing the plaintiffs' interests."). The fact that the original defendants and the defendant intervenors are on the same side provides only a weak presumption of adequate representation that is easily overcome. "The 'requirement of the Rule is satisfied if the applicant shows that representation of his interest "may be" inadequate; and the burden of making that showing should be treated as minimal.'" I*d. (quoting Trbovich v. United Mine Workers*, 404 U.S. 528,

538 n. 10 (1972)). "Any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action." *Meek v. Metropolitan Dade County*, 985 F.2d at 1478 (quoting *FSLIC v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir.1993).

II. PERMISSIVE INTERVENTION

Movants also satisfy the requirements of Rule 24(b) for permissive intervention. Their defenses have questions of law and fact in common with those of the named defendants, their motion is timely, and granting intervention will not unduly delay or prejudice the rights of the original parties. *E.g.*, *Scott v. United States Dep't of Justice*, 920 F.Supp. at 1250 ("The court permitted intervention by (1) the Florida Senate; (2) Senator James T. Hargrett, Jr., the incumbent representative of District 21; (3) Moease Smith and others, some of whom are residents and some of whom are non-residents of District 21 but all of whom are African-American or Hispanic individuals with an interest in District 21; and (4) Sandra B. Mortham, Florida's Secretary of State, whose constitutional and statutory responsibility includes the superintendence of Florida's elections"); *Bossier Parish School Bd. v. Reno*, 157 F.R.D. 133 (D. D.C. 1994) (permissive intervention granted to group of African Americans in Section 5 preclearance action); *Shaw v. Hunt*, 861 F.Supp. at 420 ("After the state defendants filed their answer, we permitted twenty-two persons registered to vote in North Carolina, both African-American and white, to intervene as defendants in support of the Plan (the defendant-intervenors). We also permitted eleven persons registered to vote as Republicans in North Carolina--including Art Pope, who had been the lead plaintiff in the earlier political gerrymandering challenge to the Plan--to intervene as plaintiffs"); *League of Women Voters v.*

Board of Comm'rs of Haverford Township, 1986 WL 3868 (E.D. Pa. 1986) (granting permissive intervention to voters contesting the political motives of redistricting plans proposed by plaintiffs).

CONCLUSION

The motion to intervene of Senators Barron and Sanders should be granted.

Respectfully submitted,

s/Shannon L. Holliday
Robert D. Segall (SEG003)
Shannon L. Holliday (HOL088)
COPELAND, FRANCO, SCREWS & GILL, P.A.
444 South Perry Street (36104)
P.O. Box 347
Montgomery, AL 36101-0347
Telephone: 334-834-1180
Fax:: 334-834-3172
Email: holliday@copelandfranco.com

Larry T. Menefee
407 S. McDonough Street
Montgomery, AL 36104
Telephone: 334-265-6002
Fax:: 334-832-9476
Bar No.: ASB-0745-F35L
Email: lmenfee@knology.net

Attorneys for Defendant Interventors Lowell Barron and Hand Sanders, in their official capacity as Senators

CERTIFICATE OF SERVICE

I certify that on this 15th day of July, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following attorneys:

- **Charles Brinsfield Campbell**
  ccampbell@ago.state.al.us condef@ago.state.al.us
- **Anne Ware Lewis**
  awl@sbllaw.net
- **Mark Montiel**
  mgmontielpc@aol.com joimontiel@aol.com
- **John J. Park, Jr**
  jpark@ago.state.al.us condef@ago.state.al.us
- **Frank B. Strickland**
  FBS@sbllaw.net

and a copy of the foregoing was delivered by facsimile, email, and/or first class mail to the following:

James U. Blacksher
710 Title Building
300 North Richard Arrington, Jr., Blvd.
Birmingham, AL 35203-3352

Edward Still
2122 11th Avenue South
Suite 201
Birmingham, AL 35205

s/Shannon L. Holliday
Of Counsel