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

LIONEL GUSTAFSON et al.,	)	
	)	
Plaintiffs,	)	
	)	
V.	)	CIVIL ACTION NO.
	)	1:05-cv-00352-CG-L
ADRIAN JOHNS, et al.,	)	
	)	
Defendants.	)	

HAMMETT REPLY TO RESPONSES OF PLAINTIFFS AND DEFENDANTS TO MOTIONS TO INTERVENE OF HOUSE AND SENATE LEADERS

Hon. Seth Hammett, through undersigned counsel, pursuant to this Court's order entered July 19, 2005, replies as follows to the responses of plaintiffs and defendants, filed August 5, 2005, to his motion to intervene and the motion to intervene of Senators Barron and Sanders.

The Legislative Leaders Have a Right To Intervene in Their Official Capacities.

Neither of the responses cites a single case where the Speaker of the House or the President Pro Tem of the Senate was not allowed to intervene in a

redistricting case or was dismissed, either individually or in his or her official capacity, as an improper party defendant. On the contrary, a cursory Westlaw search turns up over thirty reported redistricting or voting rights cases where the Speaker and/or the President Pro Tem were either named as original defendants or were allowed to intervene in their official capacities, in some cases represented by the State Attorney General[1] and in other cases by separate counsel.[2] This Court

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[1] *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (en banc) (state legislative districts); *James v. Tuck*, 77 Fed. App. 754 (5th Cir. 2003), *cert. denied*, 125 S.Ct. 46 (2004) (Congressional districts); *Emery v. Hunt*, 272 F.3d 1042 (8th Cir. 2001) (state legislative districts); *Shaw v. Hunt*, 154 F.3d 161 (4th Cir. 1998) (Congressional districts); *Cannon v. Durham County Bd. of Elections*, 129 F.3d 116 (4th Cir. 1997) (local government districts); *Simkins v Gressette*, 631 F.2d 287 (4th Cir. 1980) (state legislative districts); *Bone Shirt v. Hazeltine*, __ F.Supp.2d __, 2005 WL 1593036 (D. S.D., July 1, 2005) (state legislative districts); *Markham v. Fulton County Bd. of Registration & Elections*, __ F.Supp.2d __, 2002 WL 32587313 (N.D. Ga., May 29, 2002) (local government districts); *Vigil v. Lujan*, 191 F.Supp.2d 1273 (D. N.M. 2001) (state legislative districts); *Mayfield v. Texas*, 206 F.Supp.2d 820 (E.D. Tex. 2001) (Congressional districts); *Vera v. Bush*, 980 F.Supp. 251 (S.D. Tex. 1997) (Congressional districts); *Cannon v. North Carolina State Bd. of Education*, 917 F.Supp. 387 (E.D. N.C. 1996) (state board of education districts); *Rural West Tennessee African-American Affairs Council, Inc. v. McWherter*, 877 F.Supp. 1096 (W.D.Tenn.), *aff'd* 516 U.S. 801 (1995) (state legislative districts); *Gingles v Edmisten*, 590 F.Supp. 345 (E.D. N.C. 1984), *aff'd in part and rev'd in part, sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986) (state legislative districts); *Jordan v. Allain*, 619 F.Supp. 98 (N.D. Miss. 1985) (Congressional districts).

[2] *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (alleging partisan gerrymandering of Congressional districts); *Vander Linden v. Hodges*, 193 F.3d 268 (4th Cir. 1999) (local government districts); *Johnson v. Mortham*, 915 F.Supp. 1529 (N.D. Fla. 1995) (Congressional districts); *Burton v. Sheheen*, 793 F.Supp. 1329 (D. S.C. 1992), *vacated on other grnds sub nom. Statewide Reapportionment Advisory Committee v. Theodore*, 508 U.S. 969 (1993) (Congressional and state legislative districts); *Los Angeles Bar Assn. v. Eu*, 979 F.2d 697 (9th Cir. 1992) (number of judges); *Session v. Perry*, 298 F.Supp.2d 251 (E.D. Tex.), *vacated on other grnds, sub nom. Henderson v. Perry*, 125 S.Ct. 351 (2004) (Congressional districts) *Emery v. Hunt*, 236 F.Supp.2d 1033 (2002) (state legislative districts); *Cano v. Davis*, 211 F.Supp.2d 1208 (C.D. Calif. 2002), *aff'd*, 537 U.S. 1100 (2003) (state legislative districts); *Colleton County Council v. McConnell*, 201 F.Supp.2d 618 (D. S.C. 2002) (Congressional and state legislative districts); *Deem v. Manchin*, 188 F.Supp.2d 651 (N.D. W.Va.), *aff'd, sub nom. Unger v.*

granted the motion of the House Majority Leader and Chair of the Legislative Black Caucus to intervene in their official capacities in *Montiel v. Davis*. 01-447 Docs. 50, 55.

Hammett, Barron and Sanders Are Real Parties in Interest.

Movants are entitled to intervene of right under Rule 24(a)(2), Fed. R. Civ. P. "In determining sufficiency of interest, this circuit requires that the intervenor must be at least a real party in interest in the transaction which is the subject of the proceeding. This interest has also been described as a direct, substantial, legally protectable interest in the proceedings." *Worlds v. Department of Health and Rehabilitative Serv.*, 929 F.2d 591, 594 (11th Cir.1991) (per curiam) (footnotes, citations, and quotation marks omitted) (*quoted in Purcell v. BankAtlantic Financial Corp.*, 85 F.3d 1508, 1512 (11th Cir.), *cert. denied, sub nom. American Broadcasting Cos., Inc. v. BankAtlantic Fin. Corp.*, 519 U.S. 867 (1996)).

Manchin, 536 U.S. 935 (2002) (state legislative districts); *Arrington v. Elections Bd.*, 173 F.Supp.2d 856 (E.D. Wis. 2001) (Congressional districts, Speaker allowed to intervene); *Diaz v. Silver*, 978 F.Supp. 96 (E.D. N.Y.), *aff'd*, 522 U.S. 801 (1997) (Congressional districts); *United States v. Georgia*, 1996 WL 453543 (N.D.Ga. 1996) (state legislative districts); *Johnson v. Miller*, 922 F.Supp. 1552 (S.D. Ga. 1995), *aff'd, sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997) (Congressional districts); *Watkins v. Fordice*, 807 F.Supp. 406 (S.D. Miss. 1992) (state legislative districts, Speaker allowed to intervene); *De Grandy v. Wetherell*, 815 F.Supp. 1550 (N.D. Fla. 1992), *aff'd in part and rev'd in part, sub nom. Johnson v. De Grandy*, 512 U.S. 997 (1994) (state legislative districts); *Prosser v. Elections Bd.*, 793 F.Supp. 859 (W.D. Wis. 1992) (state legislative districts, Speaker allowed to intervene); *Stone v. Hechler*, 782 F.Supp. 1116 (N.D. W.Va. 1992) (Congressional districts).

LULAC v. Clements, 884 F.2d 185 (5th Cir. 1989), cited in Attorney General King's opposition to Hammett, Barron and Sanders being allowed to intervene in their official capacities, actually shows why these legislative leaders are real parties in interest entitled to intervene as of right. In *LULAC*, a Voting Rights Act challenge to districts used to elect state district judges, a county was denied the right to intervene on behalf of itself and on behalf of its three district judges. "Because it is a legislative action, judges play no part in creating or revising the election scheme and, therefore, fail to meet the 'real party in interest' test." 884 F.2d at 188 (footnote omitted). Rather, the Fifth Circuit noted, "the power to re-shape judicial districts is vested in three legislative bodies. . . . Lacking the power to re-draw district lines, Midland couldn't have caused the injury, nor is it in any position to effect a remedy." *Id*. at 187 (citations omitted). The Constitution of Alabama assigns to the Legislature the duty to redraw its own House and Senate districts, Ala. Const. §§ 199, 200 (1901), and the Speaker and President Pro Tem are elected under the state constitution to preside over the House and Senate. Ala. Const. § 48.01 (recomp. 2005). Thus they are real parties in interest in this attack on the legislatively enacted House and Senate districts, to whom this Court would have to defer for any remedy it determined to be necessary. *E.g.*, *Larios v. Cox*, 300 F.Supp.2d 1320, 1357 (N.D. Ga.), *aff'd*, 124 S.Ct. 2806 (2004) (*citing Wise v.*

Lipscomb, 437 U.S. 535, 539 (1978)).

Plaintiffs do not dispute the Legislature's direct, substantial and legally protectable interest in defending the redistricting plans it enacted in carrying out its constitutional duty. Rather, they contend that the Attorney General alone, representing the defendant election officials, is the only state officer with authority to protect the Legislature's interest in this action. They invoke Ala. Code § 35-15-1, which provides: "Any statute to the contrary notwithstanding, no attorney shall represent the State of Alabama, or any agency, department, or instrumentality of the state in any litigation in any court or tribunal unless the attorney has been appointed as a deputy attorney general or assistant attorney general."

As an initial matter, plaintiffs' state statutory argument essentially contends that in this federal court action the Legislative leaders lack standing to defend their own interests in this action. But in the Eleventh Circuit it is not necessary for applicants for intervention to demonstrate they have standing to protect their interests. *Purcell v. BankAtlantic, supra*, 85 F.3d at 1512 n.12 (*citing Chiles v. Thornburgh*, 865 1197, 1213 (11th Cir. 1989)). Indeed, there is substantial doubt that the plaintiffs themselves have standing to assert the Attorney General's alleged exclusive authority when the Attorney General himself has not done so.

In any event, plaintiffs' state law contention that only the Attorney General

can represent the Legislature and its leadership is simply wrong. To our knowledge, no Alabama court has ever held that the Alabama Legislature, the Speaker of the House and President Pro Tem of the Senate – or any other member of the Legislature – is an agency, department or instrumentality of the State within the meaning of § 35-15-1.[3] The Office of the Speaker is acknowledged by statute to "be separate and distinct from the Legislature, any state agency, entity, or official." Ala. Code § 29-4-60. The Speaker has express "authority to . . . contract for . . . services for use by the Office of the Speaker of the House of Representatives and pay for the . . . services from funds appropriated to the Office of the Speaker of the House of Representatives." *Id*. The Legislature's standing Contract Review Committee, Ala. Code § 29-2-40, has approved the contract the Speaker entered into with undersigned counsel to advise him on redistricting matters and to represent him in all courts. See Attachment A.

The Legislature, after all, is the author of the statute cited by plaintiffs and all other legislation governing the Attorney General's duties, and any attempt to give the Attorney General exclusive authority to speak for the Legislature in court arguably would violate the separation of powers provisions of the Alabama

[3] To the contrary, the Speaker and President Pro Tem have had separate counsel in the reported cases we have found. *Dobbs v. Siegelman*, 724 So.2d 1137 (Ala. 1998); *Ex parte James*, 713 So.2d 869, 876 (Ala. 1997) (Speaker allowed to realign as plaintiff); *Ex parte James*, 684 So.2d 1315 (Ala. 1996).

Constitution. Ala. Const. §§ 43 and 44. Interpreting statute law as giving the Attorney General exclusive authority to defend or to propose to this Court redistricting plans for the House and Senate and/or to agree to a consent decree establishing such new plans likely would violate the state constitutional proscription against delegating to the executive branch of state government a duty imposed on the legislative branch by the Alabama Constitution. *E.g., see Ex parte James*, 836 So.2d 813 (Ala. 2002) (state judiciary lacks power to reform school finance system assigned to legislative branch); *Mead v. Eagerton*, 50 So.2d 253 (Ala. 1951) (Legislature may not delegate to Governor power to declare on what date bill should become effective, without regard to any fixed standard).

But this Court need not address these sensitive state constitutional issues to decide whether the requirements of Rule 24(a)(2) are satisfied by the motions to intervene. It is enough that the Legislature and its leaders have clear, direct and legally protectable interests in defending the House and Senate districts in this action. Plaintiffs' reliance on *Scott v. Taylor*, 405 F.3d 1251 (11th Cir. 2005), as precedent to the contrary is misplaced. *Scott* simply holds that legislators are entitled to invoke legislative immunity when they are named as defendants in their official capacities in an action seeking to enjoin enforcement of a state statute redrawing county commission districts. Where, as in *Scott*, "the legislator

defendants have no role in the enforcement or implementation of the voting district," the claims against them cannot be construed as an *Ex parte Young*[4] suit against the state entity itself, in which personal immunities are not available. 405 F.3d at 1256-57.[5] But that does not prevent legislators from appearing in their official capacities and waiving legislative immunity, *id*. at 1255, which frequently has happened, *id*. at 1258 (Jordan, J., concurring).[6]

The concurring opinion in *Scott* does, however, suggest that the Gustafson plaintiffs lack Article III standing to assert any of their claims, not because they have sued state officials who cannot provide relief, but because their affidavits and pleadings do not "demonstrate injury in fact (i.e., a harm that is 'concrete and actual or imminent'), causation (i.e., a 'fairly trace[able] connection between the alleged injury ... and the alleged conduct of the defendant'), and redressability (i.e. a 'substantial likelihood that the requested relief will remedy the alleged injury')."

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[4] 209 U.S. 123 (1908).

[5] Actually, in the instant action seeking to enjoin enforcement of statutorily prescribed legislative districts, the presiding officers of the Alabama Legislature do have a role in the implementation of the election of members of the House and Senate. Ala. Const. § 51 (1901) ("Each house shall choose its own officers and shall judge of the election, returns, and qualifications of its members.").

[6] See all the cases cited in footnotes 1 and 2 above, including one of the cases cited by plaintiffs, *Johnson v. Mortham*, 915 F.Supp. 1529, 1531 (N.D. Fla. 1995), where the Speaker of the Florida House of Representatives was a named defendant represented by counsel for the House of Representatives.

405 F.3d at 1259 (*quoting Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771(2000)). Plaintiffs have shown no particularized injury to themselves personally; they have not alleged that the minor population deviations, which by themselves do not violate the Equal Protection Clause, have prevented them from electing the candidates of their choice or have prevented their representatives from having equal influence in the Legislature because of party affiliation. Nor have plaintiffs offered any alternative redistricting plan that would afford them (whatever) relief they seek consistent with the state's districting principles, the Voting Rights Act and the state and federal constitutions. Lack of standing provides a threshold ground for dismissal of this action.

The Legislature's Interests Are Not Adequately Represented By the Defendant Election Officials Represented By the Attorney General.

The presumption of adequate representation is a "weak" one, and the burden of Hammett, Barron and Sanders to demonstrate that the existing defendants do not adequately represent their interests is "minimal." *Stone v. First Union Corp.*, 371 F.3d 1305, 1311 (2004); *Georgia v. U.S. Army Corps of Engineers*, 302 F.3d 1242, 1255-56 (11th Cir. 2002) (*quoting Clark v. Putnam County*, 168 F.3d 458, 461 (11th Cir.1999)). The Attorney General has already conceded this point:

> In submitting their Motion and this Memorandum, Secretary of State Worley and the other State Election officials note that the legislative

> redistricting plans are the product of the Alabama Legislature. As a result, the members of the Legislature are likely to be the most knowledgeable persons when questions about line-drawing are asked. In contrast, these defendants do not know why the lines were drawn the way they were; they simply run elections using the lines that others have established. For those reasons, to the extent that one of [sic] more of the other parties to this action may assert that others act from partisan motives, these defendants do not join in such assertions.

Doc. 85 at 2. This is a forthright acknowledgment that the Alabama Constitution assigns the duty of redistricting to the Legislature so that the wide range of state, regional, local, and political factors involved in the task should be resolved by political compromise through the democratic process. Partisan politics plays a legitimate role in redistricting, as all members of the Supreme Court have acknowledged. *Vieth v. Jubelirer*, 541 U.S. 267, 299 (2004) (plurality opinion) ("We agree with much of Justice Breyer's dissenting opinion, which convincingly demonstrates that 'political considerations will likely play an important, and proper, role in the drawing of district boundaries.' *Post*, at 358. This places Justice Breyer, like the other dissenters, in the difficult position of drawing the line between good politics and bad politics."). The Alabama Legislature, not the Attorney General or the election officials, is charged with reconciling the competing political interests of the people and thus "drawing the line between good politics and bad politics." The Speaker has moved to intervene not to protect partisan Democratic interests *per se*, but to defend the interests of the Legislature

and its members, both Democrats and Republicans, most of whom supported enactment of the House and Senate plans and all of whom have a stake in upholding the products of the Legislature's majoritarian political process.

An immediate example of the named defendants' inability adequately to represent the Legislature's interests is the judgment in *Montiel v. Davis*, 215 F.Supp.2d 1279 (S.D. Ala. 2002) (3-judge court). As in the instant action, Montiel named as original defendants only the Secretary of State and probate judges, who appeared through the Attorney General. This Court granted the legislator-intervenors' motion for summary judgment, which alleged that Montiel's one-person, one-vote and racial gerrymander claims were proxies for an agenda of Republican Party officials to increase the number of safe Republican seats. 01-447 Doc. 84 at 6. Intervenors Guin and Hayden – not the Attorney General – asserted as an affirmative defense that, without subordinating other legitimate redistricting criteria, the minor population deviations and majority-black districts in the plans were the products not of a racial design but of an acknowledged purpose to preserve the seats of incumbents, including the Democratic majorities in both houses. *Id*. at 2, 8 (*citing Easley v. Cromartie*, 532 U.S. 234, 242 (2001) ("Caution is especially appropriate in this case, where the State has articulated a legitimate political explanation [of preserving the existing partisan cores of the districts] for

its districting decision, and the voting population is one in which race and political affiliation are highly correlated.").

In the instant action, which explicitly asserts claims on behalf of the Republican Party, the Gustafson plaintiffs essentially are alleging that the successful partisan-politics-not-race defense in *Montiel v. Davis* now provides new constitutional grounds for relief with respect to both their one-person, one-vote and partisan gerrymander claims. Obviously, these are claims that could have been raised in *Montiel v. Davis* but were not raised, either before or after judgment. Yet the Attorney General has already represented to this Court that he cannot speak to partisan motives, so he cannot aggressively represent the interests of the Legislature. If the House and Senate leaders are not allowed to intervene, there will be no party to this litigation showing the Republican sponsorship of both lawsuits that demonstrates privity between the Montiel and Gustafson plaintiffs and pointing to the partisan affirmative defense in *Montiel v. Davis* which demonstrates that Gustafson's claims involve the same cause of action.

The Attorney General's situation is aggravated by the motion to intervene of Governor Riley, who has submitted a proposed answer admitting the plaintiffs' allegations and conceding their entitlement to relief. Like Hammett, Barron and Sanders, the Governor has a right to intervene, but, if the legislative leaders are not

also allowed to intervene, the Attorney General may not be able to oppose the Governor. *See Graddick v. Newman*, 452 U.S. 928, 934 (1981) (In prison litigation, Alabama Attorney General may not intervene to oppose the Governor's position regarding the best interests of the people). The Attorney General may not be able to assert, for example, that the Governor is bound by principles of issue preclusion from taking a different position than that taken by his predecessor, Governor Siegelman, who intervened in *Montiel v. Davis* and successfully contended that the House and Senate plans are constitutional.

Governor Riley's motion to intervene also dramatizes the practical political reasons why Attorney General King cannot adequately represent the interests of the Legislature. The 2006 state primary elections are less than a year away, and candidates are already raising campaign contributions. Governor Riley and Attorney General King will have strong opposition in the Republican primary. See http://www.politics1.com/al.htm. Indeed, one the lawyers expected to oppose Attorney General King's bid for re-election is Mark Montiel, lead counsel for the Gustafson plaintiffs. It is understandable why in an election year Governor Riley would want to support the Republican Party in this action, and Attorney General King deserves credit for defending the Constitution and laws of Alabama notwithstanding the fact that the Republican Party is the real plaintiff in interest.

But there are obvious limits to his ability aggressively to defend against his party's explicitly partisan claims, as his brief supporting judgment on the pleadings plainly states.

The Legislative Leaders Should Be Permitted To Intervene Under Rule 24(b)(2).

Plaintiffs object to permissive intervention of Hammett, Barron and Sanders on contradictory grounds. On one hand, plaintiffs argue they will be delayed and prejudiced because the movants will litigate issues not raised by the Attorney General. Doc. 99 at 24-25. On the other hand, they contend that the legislative leaders will merely duplicate the pleadings and briefs of the existing defendants, "resulting in several additional answers, motions, and filings with this Court all briefing the same issues and facts." *Id*. at 26. These are not valid reasons for denying the motions to intervene.

It is true that Speaker Hammett would raise additional issues, including the defense of laches, contending that the Legislature's interest in remedying any constitutional infirmity this Court might find in the House and Senate plans has been prejudiced by plaintiffs' intentional delay in commencing this action. This entails questions of partisan motives the Attorney General has stated he will not get involved in and provides compelling grounds for this Court to grant permissive intervention. There is a strong public interest in protecting the people's right to

redistrict through their elected representatives, and this Court should receive and consider any evidence that its jurisdiction is being invoked merely as an instrument for manipulating the political process.

It is also true that movants' proposed motions to dismiss and supporting briefs make some of the same arguments the Attorney General has advanced on behalf of the defendant election officials. Speaker Hammett supports the defendants' motion for judgment on the pleadings, but he requests that the Court not rule on that motion until the motions to intervene are granted and intervenors have the opportunity to file and brief their responsive pleadings, including their motions to dismiss.

Conclusion

This Court should grant the pending motions to intervene. After providing the parties an opportunity to address the issues raised by the intervenors, it should also grant defendants' motion for judgment on the pleadings and defendant-intervenors' motions to dismiss.

Respectfully submitted this 19th day of August, 2005,

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	)	
Defendants,	)	

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 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:

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