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.,	§	
	§	Three Judge Court
Defendants.	§	
	§	

PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTIONS TO INTERVENE OF HAMMETT, BARRON AND SANDERS

COME NOW LIONEL GUSTAFSON, MARTHA HOSEY, BILLY RAY DUKES, JR., THOMAS M. BROWN, BOB CLEMONS, GILBERT DOUGLAS, DAVID HAMMONDS, ELAINE LITTLE, WILLIAM D. MEIERS, LOWELL MOORE, PAT MOORE, GEORGE OLDROYD, LOUIS PEARSON, RICK RENSHAW, JOE SANDERS, RAY STYLES, JASON UPTON, KEITH WARD, and BILL R. WOOD, all Plaintiffs in the above-styled action ("Plaintiffs"), and, for their Brief in Opposition to the Motions to Intervene of Seth Hammett and of Lowell Barron and Henry ("Hank") Sanders (collectively, "Motions to Intervene"), show this Court as follows:

I. STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

Plaintiffs are Alabama voters who have raised three constitutional challenges to the continued use of the state Senate and House of Representatives redistricting plans ("state legislative plans"). Specifically, Plaintiffs contend that the state legislative plans:

1. violate Art. IV, § 2 and the Equal Protection Clause of the Fourteenth Amendment in that they deny Plaintiffs the guarantee of one person, one vote;

2. violate Art. IV, § 2 and the Equal Protection Clause of the Fourteenth Amendment in that they constitute illegal partisan gerrymanders; and

3. constitute a denial of their First Amendment rights of freedom of speech and association.

(Complaint, ¶¶ 123-131, 134, 143).[1] While Movants Lowell Barron and Hank Sanders ("Movants Barron and Sanders," respectively) assert that Plaintiffs' action involves racial claims, it simply does not. Plaintiffs do not assert any claim based on racial discrimination, whether as a vote dilution claim under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, a racial gerrymandering claim under *Shaw v. Hunt*, 517 U.S. 899 (1996) or on any other basis.

Plaintiffs request specific relief: that this Court declare the state legislative plans unconstitutional, enjoin further use of those plans, and, if necessary, implement interim plans. (Complaint, Prayers for Relief, pp. 47-48). If the Court declares the state legislative plans unconstitutional, the Defendants – Alabama's 67 probate judges, who serve as the local election officials for their respective counties, and the Alabama Secretary of State, who is the state's chief election official – are the only state officials who would or could be enjoined from holding further elections under the plans.

Movants Barron and Sanders and Movant Seth Hammett ("Movant Hammett"), described in their Motions as leaders of the Democratic Party in the Alabama Legislature , have moved to intervene in this case. Their purpose is clear: the Movants seek to enter the case to represent the

[1] All references to the Plaintiffs' Complaint are to the Plaintiff's First Amended Complaint for Declaratory, Injunctive and Other Relief, unless otherwise noted. Doc. 9.

interests of the Democratic Party, an entity which does not have standing in this case and should not be allowed to come into the case and make it a political, rather than a constitutional, fight. Movants, however, attempt to cast their interest as that of representing all of Alabama's citizens; Movants Barron and Sanders also inconsistently claim that they are seeking intervention to protect the interests of some citizens – those who vote for Democratic candidates.

Movant Hammett claims that in moving to intervene in his official capacity as Speaker of the House, he does so "on behalf of the citizens of Alabama and their elected representatives he represents." Hammett Motion, p. 1. He asserts that his participation as a defendant is necessary to protect the "constitutional, democratic or institutional interests of the House of Representatives, its members and the citizens of Alabama who elected them."

Likewise, Movants Barron and Sanders maintain that they are entitled to intervene in their official capacities as the President Pro Tem and a member of the Senate, respectively, because they were elected to uphold and defend the Alabama Constitution and the state's laws. Barron Brief, p. 2-3. They reason that because the constitutionality of a law has been challenged, they are entitled to intervene "to protect the interests of the citizens of the state whose elected officials negotiated and duly passed the legislative districts being challenged." Barron Brief, p. 2. However, Movants Barron and Sanders concede that the Defendants are already obligated to represent all Alabama citizens, Barron Brief, p. 5, and Movant Hammettt admits that the Defendants in the case have "a responsibility to defend the laws of Alabama." Hammett Motion, p.2.

However, in addition to claiming an interest in protecting the rights of all Alabama voters and state legislators, Movants Barron and Sanders appear to make the inconsistent claim that they should be allowed to intervene in their "official" capacities as leaders of the Alabama

Democratic Party[2] to represent the political interests of those members of the legislature and of the public who share Movants' political views. Barron Brief, p. 5. Movants Barron and Sanders also seek intervention in their individual capacities, apparently for the purpose of protecting their personal political interests and the ostensible purpose of protecting the interests of African American voters with regard to racial claims, which do not exist in this case. Barron Brief, p. 5.

Movants' interest in intervention is clear; they want to protect the political interests of the Democratic Party by preserving the state legislative plans. While Defendants do not have a political interest in upholding the plans, that fact is irrelevant to this case; their mission is the same that Movants allege to advance – to have the Court uphold the state legislative plans. Except for the politically-based arguments, which are irrelevant to these Plaintiffs' constitutional claims, and the racially-based allegations, which attempt to create racial claims when none are asserted, Movants' proposed responsive pleadings state the same defenses and arguments that Defendants have. However, the Defendants and their attorney, the Alabama Attorney General, have the official responsibility for defending the plans. Ala. Code §36-15-21 (1975). The duty to represent the State of Alabama and its interest in having its laws upheld belongs solely to the Attorney General, as a matter of state law. Ala. Code §36-15-21. No other attorney may "represent the State of Alabama, or any agency, department or instrumentality of the state in litigation in any court or tribunal unless the attorney has been appointed s a deputy attorney general or assistant attorney general." Ala. Code 36-15-1.1. Thus, Movants have no right to intervene in their official capacities to represent Alabama's citizens, and their attorneys are

[2] Movants Barron and Sanders seek intervention in their capacities as head of the Senate Democratic Caucus (Barron) and as a member of the Legislative Black Caucus and the Senate Black Caucus (Sanders).

prohibited from doing so under state law, unless their representation is approved by the Attorney General and the Governor.

Plaintiffs cannot obtain any of the relief they seek against Movants Barron and Sanders or against Movant Seth Hammett. Furthermore, as discussed below, while Movants appear to seek intervention in their official capacities for the purposes of defending their actions in passing the state legislative plans and upholding those plans, they are not the proper parties to do so. Neither are Movants Barron and Sanders, who seek to intervene individually to protect those interests, entitled to do so, as their interests as citizens are already represented by the Attorney General.

Additionally, Movants are not proper defendants, either as officials or individuals, because Plaintiffs could not have sued any of the Movants for their actions in passing state legislative plans, *see Scott v. Taylor*, 405 F.3d 1251 (11th Cir. 2005). Nonetheless, Movants seek to intervene as defendants in this case. All Movants seek to intervene in this case in their official capacities, allegedly to defend the plans at issue and thereby protect the interests of all the citizens of Alabama and all the members of the Legislature in seeing the same done.

In summary, Movants have no right to intervene under Federal Rule of Civil Procedure ("F.R.C.P.") 24(a). Neither Movants nor their attorneys are proper defendants in this case or are authorized to defend this case on behalf of the State of Alabama. The relief sought by Plaintiffs can only be afforded through the Defendants.[3] The pleadings make clear that Defendants and the Alabama Attorney General have assumed their responsibility for defending the case and are executing it. Defendants have filed an Answer, along with a motion for judgment on the

[3] However, in their Complaint, Plaintiffs seek attorneys' fees and costs under 42 U.S.C. §1988. If Movants intervene and Plaintiffs are ultimately successful on their claims, Movants, as Defendants, would share in that liability.

pleadings and to dismiss for failure to state a claim. Answer of Defendants, Doc. 81; Motion for Judgment on the Pleadings and Brief, Docs. 84, 85). While Plaintiffs oppose Defendants' motions for judgment on the pleadings and to dismiss, Defendants' motion and their Answer leave no question that Defendants are defending the case.

Furthermore, Movants should not be permitted to intervene under F.R.C.P. 24(b), in either their official or individual capacities, because their interest in upholding the plans is the very interest being represented by Defendants and the State Attorney General, the only party authorized to represent that interest unless the Attorney General and Governor authorize otherwise. Additionally, allowing intervention of Movants will cause delay in the case and unduly prejudice Plaintiffs' rights to have new plans in place for the 2006 elections if the Court declares the plans unconstitutional. As demonstrated by their pleadings filed with their Motions to Intervene, Movants intend to expand the case unnecessarily by arguing claims that do not exist such as the racial discrimination claim they imagine. Moreover, with their Motions to Intervene, Movants all filed Motions to Dismiss, largely duplicative of Defendants' motions for judgment on the pleadings and to dismiss. If Movants are allowed to intervene, then those motions will occupy months of time. However, if no intervention is allowed, Plaintiffs and Defendants may proceed with discovery and the litigation of this case.

Movants, of course, welcome and intend the delay their intervention would cause. Every delay means the possibilities that (1) the case might not be decided in time for the 2006 elections, and (2) even if the case were decided and the plans declared unconstitutional, the delay caused by Movants' participation in the case might make it impossible to draw new plans before the 2006 elections. Plaintiffs would be forced to suffer under the unconstitutional state legislative

plans for another election and another four years. The delay caused by Movants' tactics once parties will thus unduly prejudice Plaintiffs.

Movants want to intervene in this case to push their political agenda and to delay resolution. The Court should not allow them to do so at Plaintiffs' expense. They are not proper defendants and have no interest that is not already adequately represented. Movants' desire to promote their political interests is not sufficient reason to allow them to delay the case and expand it to the detriment of Plaintiffs. Thus, Movants should not be allowed to intervene in any capacity.

II. ARGUMENT AND CITATION OF AUTHORITIES

None of the Movants have shown a right to intervene in their official capacities under F.R.C.P. 24 (a), nor have Movants Barron and Sanders shown a right to intervene in their individual capacities. In addition, none of the Movants has demonstrated that he should be granted permissive intervention under F.R.C.P. 24(b), either in his official capacity or, as requested by Movants Barron and Sanders, individually.

A. Movants Have Not Shown Entitlement to Intervene Under Either FRCP 24 (a)(1) or (2), and Therefore, Their Motion to Intervene As a Matter of Right Must Be Denied

Federal Rule of Civil Procedure 24(a) provides that if a timely application is filed, intervention shall be allowed only if (1) a federal statute confers an unconditional right to intervene or (2) the movant can meet the following three requirements: (a) an interest relating to the property or transaction which is the subject of the action, (b) his or her ability to protect that interest may be impaired or impeded by the disposition of the action and (c) inadequate representation by the existing parties. F.R.C.P. 24(a)(1), (2). While Plaintiffs do not dispute that Movants' Motions are timely, Movants have not met the remaining requirements for intervention under F.R.C.P. 24(a).

1. Movants do not have an unconditional statutory right to intervene under F.R.C.P. 24(a)(1)

Under F.R.C.P. 24(a)(1), a motion to intervene must be granted if a federal statute provides an unconditional right to intervene in the litigation. Movants do not argue that any statute provides them the unconditional right to intervene, and no such statute exists. Furthermore, the federal statutes under which this case is brought do not provide Movants a right to intervene. *See* 42 U.S.C. §§ 1983, 1988; 28 U.S.C. §§2201, 2202 and 2284. Therefore, Movants have no right to intervene under F.R.C.P. 24(a)(1), either in their official or individual capacities.

2. Movants do not have a right to intervene under F.R.C.P. 24(a)(2)

As discussed above, in order to be entitled to intervene as a matter of right under F.R.C.P. 24(a)(2), Movants must show a that they have an interest related to the case, that their ability to protect that interest may be adversely affected by the disposition of the case and that the existing parties are not providing adequate representation. Movants have not made and cannot make those showings, and therefore, should not be allowed to intervene as a matter of right, whether officially or individually.

a. Movants do not state or have a direct, substantial, legally protectable interest warranting intervention.

Movants neither state nor have an interest sufficient to support intervention as of right. In order to meet this first prong of F.R.C.P. 24(a)(2), Movants must show "a direct, substantial, and legally protectable interest in the litigation." *Johnson v. Mortham*, 915 F.Supp. 1529, 1537 (N.D. Fla. 1995), citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) (citations omitted). "The Supreme Court has held that an interest under Rule 24(a)(2) means a 'significantly

protectable interest'. . . ."*Chiles*, 865 F.2d at 1212, *quoting Donaldson v. United States*, 400 U.S. 517, 531, 91 S.Ct. 534 (1971).

To demonstrate such an interest, a movant must show, at a minimum, a "direct, substantial, legally protectable interest in the proceedings." *United States v. Perry County Bd. of Ed.*, 567 F.2d 277, 279 (5th Cir. 1978); *Army Corps of Engineers*, 302 F.3d at 1249; *see also Donaldson v. United States*, 400 U.S. 517, 531 (1971). In determining whether a movant "possesses the requisite interest for intervention purposes, [courts] look to the subject matter of the litigation." *Georgia v. United States Army Corps of Engineers*, 302 F.3d 1242, 1251 (11th Cir. 2002). In reviewing that subject matter however, this Circuit has "adopted a somewhat narrow reading of the term 'interest,'" as intended by the drafters of the Rule. *Perry County Bd. of Ed.*, 567 F.2d at 279 *citing* Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), *81 Harv. L. Rev. 356, 405 (1967)*.

Despite Movants' allegations regarding their perception of the Plaintiffs' "agenda," the subject matter of this case is simply the constitutionality of the state legislative plans and the continued use of those plans. Movants have no legal interest in defending that subject matter. That interest belongs to Defendants, who are protecting it through their counsel, the Attorney General.

Movants, however, argue that they have a legally protectable interest in "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." Barron Motion, ¶4. *See also* Hammett Motion, p. 2 (Hammett seeks intervention to represent the "constitutional, democratic or institutional interests of the House of Representatives, its members and the citizens of Alabama who elected them.") They claim that interest is one they must protect for Alabama

voters. Additionally, Movants Barron and Sanders also allege an interest based on their belief that they have a legal interest in defending the state legislative plans as representatives of Alabama Democrats (officials and voters), the Senate Democratic Caucus, the Legislative Black Caucus (a "subunit of the Democratic Caucus"), the Senate Black Caucus and all African American voters. Barron Motion, ¶4; Barron Brief, p.2. For the reasons discussed below, Movants Barron and Sanders have no legal interest in defending the state legislative plans. That fact does not change whether they are attempting to represent all or some of Alabama's voters or elected officials. Movants simply do not have that duty and therefore have no right based on such a duty.

As for the assertion of Movants Barron and Sanders that they have an interest in protecting the political interests of Democrat voters and legislators, Movants cite no authority for that contention nor does one exist. Likewise, Movants Barron and Sanders offer no support for their contention that they have an interest in protecting the interests of African American voters, "who overwhelmingly support Democrats," Barron Brief, p. 3. That allegation is just another way of seeking to intervene for political purposes.

Plaintiffs must note that that with regard to Movants Barron and Sanders' claim that they have a legal interest in defending the rights of African American voters, Movants incorrectly represent the issue before this Court. The cases cited by Movants in support of their contention all involved claims based on race. This case, however, does not involve racial discrimination, racial gerrymandering or racial claims of any sort. The case is a constitutional challenge, not based on any racial claims. The interests of African American voters interests in this suit are the same as <u>all</u> voters within the State of Alabama, and these interests are being fully and adequately represented by the Attorney General. Race has not been put in issue by Plaintiffs in the present

litigation, and Movants should not be allowed to insert race as a means to create some sort of legal interest on their part.

None of the interests voiced by Movants provides the narrow interest required under F.R.C.P. 24(a) (2). Members of the Legislature, whether leadership or rank and file, do not have a legally protectable interest in defending the legislation they passed, or responsibility for its implementation. As for defending the legislation, Movants are not responsible for defending nor are they the proper parties to defend the legislation they passed. First, even if Plaintiffs had named Movants as defendants, Movants would have been entitled to be dismissed. *Scott v. Taylor*, 405 F.3d 1251 (11th Cir. 2005). Second, the duty to defend the legislation passed by the Legislature belongs solely to the Attorney General. Ala. Code §§36-15-1.1 and 36-15-21.

Likewise, Movants have no legal interest in the implementation of the laws they pass. Movants have no right to see that there is compliance with the laws for which they voted. *Chiles v. Thornburgh*, 865 F.2d. 1197, 1205. In addition, Movants are not the proper parties from whom Plaintiffs should seek injunctive relief, as they have no role in the implementation of the state legislative plans, or, as sought by Plaintiffs here, the power and duty not to enforce the plans if they are declared unconstitutional. *Scott*, 405 F.3d at 1256-1257. That power and duty belongs solely to the Defendants. Ala. Code § 17-1-8.

Finally, to have the requisite legal interest to intervene as a matter of right, a movant "must be at least a real party in interest in the transaction which is the subject of the proceeding." *Athens Lumber Co., Inc. v. Federal Election Comm'n*, 690 F.2d 1364, 1366 (11th Cir. 1982). Movants are not real parties in interest to this litigation, and thus, their claim of interest fails on that ground as well.

1. Movants have no legally protectable interest in defending the legislation they passed

Movants are not properly defendants in this case as they have legislative immunity protecting them from being sued on their actions as legislators. In *Scott v. Taylor*, 405 F.3d 1251 (11th Cir. 2005), decided earlier this year, the Eleventh Circuit specifically rejected the argument that parties who passed a redistricting plan were properly defendants in a case challenging the plan. In *Scott*, the incumbent, DeKalb County Commissioner Jackie Scott, lost her seat in the election following redistricting. *Scott*, 405 F.3d at 1253. Scott filed suit challenging the plan and, as here, sought to have it declared invalid, enjoin its use and have new plans drawn. Her suit named as defendants those four state officials she deemed responsible for passage of the plan: the Speaker of the Georgia House of Representatives, the Lieutenant governor, the Chairs of the DeKalb County House and Senate delegations. She also named as a defendant the DeKalb County Board of Elections.

The four state officials moved to dismiss Scott's claim against them because legislative immunity prevented them from being sued for their official acts, i.e., passage of the plan at issue. The Eleventh Circuit agreed, concluding that the state officials should be dismissed from the suit because they had legislative immunity. Citing the U.S. Supreme Court's decision in *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980), the Court held that "[t]he square holding of *Consumers Union* applies with full force here; these state legislator defendants enjoy legislative immunity protecting them from a suit challenging their actions taken in their official legislative capacities and seeking declaratory and injunctive relief." *Scott v. Taylor*, 405 F.3d at 1254.

Under *Scott*, Movants are protected from being defendants in their official capacities and should not be allowed to intervene in that capacity. Because Plaintiffs certainly could not have sued Movants in their individual capacity for their legislative acts, the same reasoning applies to deny Movants Barron and Sanders' request for the right to intervene individually.

Furthermore, the Alabama Attorney General is charged with defending the attack on the constitutionality of the state legislative plans, not Movants (as either officials or individuals) or their attorneys. Under Alabama law, that right and duty belongs solely to the Attorney General:

> All litigation concerning the interest of the state, or any department of the state, shall be under the direction and control of the Attorney General. The employment of an assistant attorney general, other than an assistant attorney general employed in the office of the Attorney General, for the purpose of representing the state or any department thereof shall be by the Attorney General with the approval of the Governor.

Ala. Code §36-15-21 (1975). If the Attorney General does not delegate that representation, no other attorney may represent "the State of Alabama, or any agency, department, or instrumentality of the state in any litigation in any court or tribunal . . . "Ala. Code §36-15-1 (1975). In this case, there has been no such delegation.

Simply stated, Movants do not have a legal interest in defending the passage of the state legislative plans. As shown below, they also fail to demonstrate and do not have a legal interest in enforcing legislation they pass, including the state legislative plans.

2. Movants have no legally protectable interest in defending the implementation of the legislation they passed

Movants argue that they have an interest in seeing that the laws in which they enacted are enforced and carried out by the State of Alabama. They do not.

In *Chiles v. Thornburgh*, 865 F.2d. 1197 (11th Cir. 1989), the Eleventh Circuit examined and rejected the same argument made by Movants here. In *Chiles*, United States Senator Lawton Chiles "basically argu[ed] that as a Senator he has a right to see that the laws, which he voted for, are complied with.

Explaining why Senator Chiles had no such right, the *Chiles* court analyzed the legal interest required for intervention in the context of the interest required to establish standing. Although standing is not a requirement for intervention, the court concluded an examination of the interest required for standing would be helpful in defining the interest necessary for intervention as a matter of right. *Chiles*, 865 F.2d at 1212-13 ("The standing cases…are relevant to help define the type of interest that an intervenor must assert.") *citing Howard v. McLucas*, 782 F.2d 956 (11th Cir. 1986) and *Athens Lumber Co., Inc. v. Federal Election Commission*, 690 F.2d 1364 (11th Cir. 1982). The court noted that that "the instances in which a legislator has standing are limited." *Chiles*, 865 F.2d at 1206. Although the court found that "under the modern test for standing a legislator's loss of effectiveness in voting constitutes injury in fact," *Chiles*, 865 F.2d at 1205, that claim of injury was insufficient to create the necessary legal interest: "[S]uch a claim of injury, however, is nothing more than a 'generalized grievance [] about the conduct of the government'." *Chiles*, 865 F.2d at 1205 *quoting Flast v. Cohen*, 392 U.S. 83, 106 (1968) (emphasis added). The *Chiles* court concluded that such a generalized grievance as stated by Senator Chiles (and Movants here) was insufficient to create the required interest because the "Supreme Court has repeatedly made clear that an injury to the 'right possessed by every citizen, to require that the government be administered according to law' is insufficient to support a claim of standing." *Chiles*, 865 F.2d at 1205-1206 *quoting Valley Forge*

Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 483 (1982).

Under *Chiles*, Movants do not have a legal interest in seeing that the laws they pass are carried out by the government because that interest is a generalized one, shared by all citizens. This generalized interest does not rise to the level of the narrowly-interpreted "legal interest" sufficient for intervention. *See e.g., Chiles*, 865 F.2d at 1207. Thus, Movants are not entitled to intervene in their official or individual capacities.

Additionally, Movants cannot claim an interest related to the enforcement or implementation of the legislation they pass because specific individuals other than Movants are exclusively charged with that power and duty. Under Alabama law, Defendants are the sole officials charged with administering Alabama's elections, including implementation and enforcement of the state legislative plans. Ala. Code § 17-1-8. In *Scott*, the Eleventh Circuit made the point succinctly, concluding that the legislative officials seeking dismissal have "no role at all with respect to enforcement or implementation of the challenged voting districts." *Scott*, 405 F.3d at 1254, fn. 3 (emphasis added). As for Scott's complaint that dismissing the state officials would leave her no recourse for the alleged discrimination, the Eleventh Circuit disagreed, noting that she could continue her suit against the Board of Elections: "Indeed, the Board of Elections is the only defendant in this case which has any role with respect to the relief sought by [plaintiff], i.e., prospective relief seeking to enjoin the enforcement of the challenged voting district and a declaration of its legality. As noted above, the legislator defendants have no role in the enforcement or implementation of the voting district." *Scott*, 405 F.3d at 1256-57

(citations omitted). Clearly, Defendants are the only individuals capable of enforcement and implementation and the only proper defendants to this case.[4]

3. Movants do not have a sufficient legal interest because they are not real parties in interest to this litigation

"In determining sufficiency of interest [necessary for intervention as of right], 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." *Purcell v. Bankatlantic Financial Corp.*, 85 F.3d 1508, 1512 (11th Cir. 1996) *citing Worlds v. Department of Health and Rehabilitative Serv.*, 929 F.2d 591 (11th Cir. 1991) (per curiam). Contrary to Movants' argument that they "represent the real parties in interest," Barron Brief, p.3, neither Movants nor those they claim to represent are real party defendants in interest to this litigation.

Real parties in interest are defined as those "persons entitled under the substantive law to enforce the right sued upon." Black's Law Dictionary 470 (New Pocket Edition 1996). For the reasons discussed above, neither Movants nor the citizens or political party members they seek to represent are proper parties to enforce the validity and continued implementation of the legislation that is the state legislative plans. The parties statutorily charged with exclusive authority to do so are Defendants and their attorney, the Alabama Attorney General.

In summary, Movants fail to meet the first part of the test of F.R.C.P. 24(a) (2). Therefore, their motion for intervention as a matter of right must be denied, both with respect to intervention in their official and individual capacities.

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[4] As discussed above, the Attorney General is the only authorized legal representative of the State or any agency, department or instrumentality of the State in all litigation involving the State. Ala. Code §§ 36-15-21, 36-15-1 (1975).

b. Having failed to demonstrate a legal interest, Movants have not established that the disposition of this litigation will impair or impede their ability to protect that interest

For the reasons set forth above, Movants do not have a legal interest in this case. Because of that fact, Movants cannot meet the requirement of the second prong of F.R.C.P. 24(a)(2) – that their ability to protect that the disposition of this litigation may adversely affect their ability to protect that interest.

Even assuming *arguendo* that Movants did have a legal interest in preserving the status quo with respect to the state legislative plans, that interest is being adequately represented by the Defendants and the Attorney General. Therefore, Movants cannot show that the disposition of this litigation impairs or impedes their ability to protect that interest.

c. Assuming *arguendo* that Movants have a legal interest in this litigation, that interest is adequately represented by Defendants and the Alabama Attorney General

Movants do not have a legal interest in this action and therefore are not entitled to representation of such an interest. In making their argument that the Defendants and the Attorney General do not adequately represent their interests, the Movants' clear reference is to their political interest, which is not a legal interest entitling them to intervention. However, to the extent that the Movants have a legal interest in seeing the state legislative plans upheld (which they do not), that interest is identical to Defendants' interest and is being adequately represented by the Attorney General.

Even assuming that Movants could get past the statutory requirement that the interests of the State are represented by the Attorney General in all litigation, which they cannot, Movants

have not demonstrated and cannot demonstrate inadequate representation of their legal interest by Defendants and Defendants' attorneys. Initially, the Court should consider that there is a presumption that the Attorney General provides adequate representation in this case; unless Movants can overcome that presumption, they have no right to intervene. Second, it is a matter of fact in this case that the Attorney General is providing that representation. Defendants have made clear their intent to defend the state legislative plans. Movants can hardly claim that Defendants' defense efforts are inadequate.

In proving inadequate representation, Movants must first overcome the "presumption of adequate representation where an existing party seeks the same objective as the interveners." *Stone v. First Union Corp.*, 371 F.3d 1035, 1311 (11th Cir. 2004) *citing Clark v. Putnam*, 168 F.3d 458 (11th Cir. 1999). *See also Federal Savings and Loan Insurance Corp. v. Falls Chase Special Taxing District*, 983 F.2d 211, 215 (11th Cir. 1993) *quoting United States v. United States Steel Corp.*, 548 F.2d 1232, 1236 (5th Cir. 1977). In the instant action, Movants are state officials who contend that they should be allowed to intervene to defend the plans. That is the same objective possessed by Defendants and the Attorney General. Thus, the presumption of adequate representation applies.

Next, Movants must rebut the presumption that representation of the State's interests by Defendants and the Attorney General is adequate. "[N]otwithstanding the liberalizing 1966 amendment of Rule 24(a) the burden of establishing inadequate representation . . . remains on the proposed intervenor. Furthermore, a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interest of the absentee." *United States v. Baldwin County Board of Education*, 544 F.Supp. 367, 370 (M.D. Ga. 1982) *citing 7A C. Wright & A. Miller, Federal Practice and Procedure §1909 at*

528-29 (1972) and *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689 (1961). *See also*, *Commonwealth of Pa. v. Rizzo*, 530 F.2d 501, 505 (3rd Cir. 1976).

In an effort to overcome that presumption, Movants allege that Defendants cannot adequately protect their interests because Defendants are "bound by their constitutional oaths to represent all citizens of Alabama . . . [and] 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." Barron Motion at ¶6. Movants' argument appears to be that Defendants cannot fulfill their obligation to represent all of Alabama's citizens and also represent Movants' political interests. That argument misses the mark on at least two grounds:

- Movants recognize that Defendants have a duty to all citizens as a result of their elected offices. Movants have that same duty , and therefore "adequate representation" cannot mean that Defendants must represent, on Movants' behalf, the interests of less than all citizens.
- Movants do not have a right to have their political interests represented in this litigation, and therefore, the fact that Defendants may not represent those political interests does not make their representation inadequate.

In summary, Movants' argument appears to be that because Defendants and the Attorney General may not (and in fact, should not) represent the political interests of Movants, the existing defense of the state legislative plans is inadequate. That argument has no merit because Movants' have no right to have their political interests represented. At most, as citizens of Alabama, they may have an interest in seeing legislation upheld, but that interest is being ably represented by the Defendants and the Attorney General.

As a general m

includes more than one hundred (150) employees with diversified skills and training in law, public administration, investigation, consumer affairs, utility regulation, secretarial science and other disciplines. *See http://www.ago.alabama.gov/about.htm.* It is clear that the State Attorney General's Office has the ability, resources, and manpower to adequately represent the interests of all citizens of the State of Alabama in this litigation, including Movants and those they claim to represent.

More specifically, Defendants and the Attorney General have vigorously undertaken their obligation to defend the state legislative plans. Defendants have filed an Answer, denying many allegations in the Plaintiffs' Complaint and have filed motions for judgment on the pleadings and to dismiss for failure to state a claim. Both Defendants and the Attorney General have made clear their intent to defend the plans tooth and nail.

Notably, while Movants complain that they are not adequately represented, a review of the defensive pleadings filed by Defendants and Movants show striking similarities. While Defendants have not asserted identical arguments, particularly the irrelevant political arguments made by Movants, disagreement with particular decisions of the Attorney General regarding litigation of the case does not create inadequacy of representation sufficient to warrant their intervention. "The fact that Proposed Intervenor would have made different strategic choices if she controlled the actions of the [defendants] does not by itself entitle her to intervene in this lawsuit." *Evans v. Buchanan*, 130 F.R.D. 306, 313 (D. Del. 1990) *citing Pate v. Dade County School Bd.*, 588 F.2d 501, 503 (5th Cir.), *cert. denied sub nom. Beckford v. Dade County School Bd.*, 444 U.S. 835 (1979).

Movants Brown and Sanders' reliance on *Clark v. Putnam County*, 168 F.3d 458 (11th Cir. 1999) to their claim that Defendants will not adequately represent the interests of African American voters is misguided. First and foremost, *Putnam County* involved a claim for racial discrimination, which, as discussed above, is not at issue here. In *Putnam County*, white voters filed an action against the county commission seeking to enjoin the commission from enforcing a court-ordered redistricting plan, designed to end racial segregation. *Putnam County*, 168 F.3d at 460. Six black voters sought to intervene. The district court denied the motion to intervene, and the black voters appealed to the Eleventh Circuit. *Putnam County*, 168 F.3d at 461.

The Eleventh Circuit reversed, finding that the defendant county commissioners could not adequately represent the interests of the black voters "because [the county commission] represents the interests of all Putnam County citizens" as opposed to the interests voiced by the intervenors. *Putnam County*, 168 F.3d at 461. The court's point was that the commissioners represented white and black voters and so could not adequately represent the interests of one over the other in a racial discrimination claim. That reasoning does not apply here.

Movants' assertion that, like the intervenors in *Putnam County*, they must be allowed to intervene to protect the interests of African American voters is a red herring. *Putnam County* sought to maintain the rights of African American voters in a county where racial discrimination was the norm and where the county commission redistricting plan had been drawn to provide relief from such discrimination. In this case, race is simply not in issue. The rights of all citizens are at issue in this case, and Defendants, being charged with the duty to uphold those rights are the only necessary parties to this action. At its root, Movants' argument is really that *Putnam County* should mean that because Defendants represent voters of all political opinions,

Defendants' representation is inadequate because they cannot only represent Movants' political interest. That argument equates politics with race, which *Putnam County* does not do.

In deciding *Putnam County*, the Eleventh Circuit also noted that the commissioners' representation might not be adequate because "[i]t would be in the commissioners' interest, for example, to agree on a plan that would preserve their seats, while compromising the proposed interveners' voting power." *Putnam County*, 168 F.3d at 462. That danger is simply not present here. The purpose of this litigation is not to redraw county lines. None of the Defendants' seats are at issue, which might lead them to value their own interests over the voters' interests.

Finally, the Eleventh Circuit pointed out that the Putnam County commissioners did not adequately represent the interest of the intervenors because while the commission was attempting to settle the lawsuit, the intervenors wanted to oppose the action. *Putnam County*, 168 F.3d at 462. Unlike *Putnam County*, where the commissioners could effectively settle the case by drawing a new plan (which might preserve their seats but compromise the intervenors' voting power), there is no possibility of settlement by these Defendants or the Attorney General. None of them have the authority to draw a new plan and have it passed by the Legislature. Even if resolution of the case were possible, for example by a consent judgment in Plaintiffs' favor, Defendants have made clear their intention to vigorously defend the plans.

Movants fail to overcome the necessary presumption of adequate representation afforded by Defendants and their attorneys. Furthermore, the pleadings indicate that Defendants and the Attorney General are vigorously defending the state legislative plans. Having failed to show inadequate representation, Movants' request for intervention as of right must be denied.

Because Movants fail to meet any of the requirements for intervention as of right under F.R.C.P. 24(a)(2), their motions to intervene, whether as officials or individuals, should be denied.

B. Movants Have Not Shown Entitlement to Permissive Intervention Under Either FRCP 24 (b)(1) or (2), and Therefore, Their Motion Must Be Denied

In determining whether permissive intervention will be allowed, assuming a timely motion, the Court must consider whether (1) there is a conditional statutory right to intervene or whether (2) whether Movants raise common questions of law and fact and Movants' participation will not delay the case or unduly prejudice the rights of the parties. F.R.C.P. 24(b). Movants cannot meet the burden of subsections (1) or (2) of Rule 24(b) and, therefore, should not be permitted to intervene.

While the decision of whether to allow permissive intervention is "wholly discretionary with the court," *Purcell v. BankAtlantic Financial Corp.*, 85 F.3d 1508, 1513 (11th Cir.1996), in this case, the Court should exercise its discretion to deny Movants' motions so that the case that Plaintiffs brought – constitutional challenges based on violations of the Fourteenth and First Amendments, not based in any way upon race – can be litigated and concluded in a timely manner, i.e., before the 2006 election cycle. Any relevant questions of law or fact that Movants might raise have been raised by Defendants and the Attorney General. Movants have nothing to add to the defense of the plans which they cannot provide as witnesses. In fact, Movants' participation as a party in the case will add nothing but delay and the insertion of issues which are not relevant. Such will unnecessarily expand the case and delay its resolution, prejudicing Plaintiffs.

To the extent that the Court wishes to allow Movants to participate in some fashion, Plaintiffs request that Movants only be allowed to participate as amicus curiae for the purpose of

lending their support to the defense of the plans through briefs.[5] Defendants (a group of 67 judges and the Secretary of State) and the Attorney General are more than competent to litigate the case without Movants serving as co-defendants. Allowing Movants to participate as amicus curiae, without the right to litigate the case but with the right to lend support to Defendants and have their stated concerns heard, permits Movants, despite their lack of legal interest, to do so.

1. Movants have no conditional statutory right to intervene and therefore should not be permitted to intervene under F.R.C.P. 24(b)(1).

Under F.R.C.P. 24(b)(1), a court may permit intervention if there is a conditional right to intervene provided by federal statute. Just as Movants did not allege that they had an unconditional statutory right to intervene, neither do they claim that they have a conditional statutory right to intervene, and they do not have such a right. None of the statutes upon which Plaintiffs base their claims provides a conditional right to intervene in this action. Therefore, permissive intervention is not proper under F.R.C.P. 24(b)(2).

2. Movants should not be permitted to intervene under F.R.C.P. 24(b)(2).

In order to be permitted to intervene under F.R.C.P. 24(b)(2), Movants must first show that their claims or defenses present a common question of law or fact. Movants do not demonstrate any common questions of law or fact relevant to this case that have not already been raised. Simply because Movants appear to want to litigate other issues, i.e. race-based claims,

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[5] Because the Alabama Attorney General has not authorized Movants or their attorneys to represent the State in any capacity, their appearance as amicus curiae would necessarily be limited to appearing as such in their individual capacities. Ala. Code §§36-15-21 and 36-15-1 (1975)

does not change that fact. Those claims are not the claims of the main action and therefore cannot be common to it.

Furthermore, even if Movants were to raises other issues of fact and law common to the main action, they must still show that their interventions will not "unduly delay or prejudice the adjudication of the rights of the original parties." F.R.C.P. 24(b)(2); *Georgia v. United States Army Corps of Engineers*, 302 F.3d 1242, 1250 (11th Cir. 2002); *Johnson v. Mortham*, 915 F.Supp. 1529, 1535 (N.D. Fla. 1995) ("A number of other factors are relevant to whether permissive intervention should be granted. For example, a court must consider whether the intervention will 'unduly delay or prejudice the adjudication of the rights of the original Parties.'") (citations omitted).

Movants' intervention as defendants, whether in their official capacities or as individuals, will (and will be designed) to make this case more difficult to try in a timely fashion, thus delaying this case. As shown by their proposed pleadings, Movants intend to file separate motions for dismissal for failure to state a claim, duplicative of Defendants' pending motions for judgment on the pleadings and to dismiss for failure to state a claim. Dealing with that motion and its resolution will cause a delay in the case, which would not otherwise be present, as Defendants have answered the Complaint and the parties can move forward with discovery.

Furthermore, Movants' addition to the case as defendants will require Plaintiffs to respond to and litigate against three separate groups of defendants. Such is particularly prejudicial when Plaintiffs cannot obtain any relief from Movants (other than attorneys' fees and costs under 42 U.S.C. § 1988 if Plaintiffs succeed) and Movants and Defendants seek the same outcome: maintenance of the state legislative districts. Movants have argued and can be expected to continue to argue similar issues and file similar motions, which would only duplicate

the efforts of the Attorney General and unduly delay the adjudication of this litigation. *See e.g., Hoots v. Commonwealth of Pa.,* 672 F.2d 1133, 1135 (3rd Cir. 1982) ("The applicants motion for permissive intervention under F.R.C.P.. 24(b)(2) was also denied because the questions of law and fact presented were identical to those already heard and briefed, and intervention would only be a duplication of effort.").

This Court must consider "judicial economy" and "whether the movant's interests are adequately represented" when determining whether permissive intervention is appropriate. *Johnson*, 915 F.Supp. at 1535. It is clear that no judicial economy will result from Movants' intervention. Movants have duplicated and will only continue to duplicate the efforts of Defendants, resulting in several additional answers, motions, and filings with this Court all briefing the same issues and facts. Judicial economy is not served by such duplication and justice is not served when Plaintiffs are required to respond to several additional motions covering the same issues.

In addition, as already discussed, the interests of the Movants are more than adequately represented by the State Attorney General's Office. Therefore, Movants request to permissively intervene should be denied. *See e.g., Hoots v. Commonwealth of Pa.*, 672 F.2d 1133, 1136 (3rd Cir. 1982) ("[W]here, as here, the interests of the applicant in every manner match those of an existing party and the party's representation is deemed adequate, the district court is well within its discretion in deciding that the applicant's contributions to the proceedings would be superfluous and that any resulting delay would be 'undue'.").

CONCLUSION

Movants' Motions to Intervene in their official or individual capacities should be denied. Movants do not meet the requirements for intervention as of right and cannot make the showing

necessary to be allowed to intervene permissively. With respect to intervention as of right, Movants do not have an unconditional statutory right to intervene and have not demonstrated the legal interest, impairment of that interest or inadequate representation that rule requires. Therefore, Movants are not entitled to intervene as a matter of right, in either their official or individual capacities.

The Court should also deny permissive intervention. Movants' addition as defendants is not necessary because the interest they seek to uphold – the preservation of the state legislative plans – is already being defended by Defendants and their attorney, the Attorney General. As Movants cannot afford any relief to Plaintiffs but can be expected to protract this litigation, the interests of judicial economy are not served by the addition of Movants as defendants.

WHEREFORE Movants request that the Court deny the Motions to Intervene of Movant Hammett and of Movants Barron and Sanders be denied and permit this case to proceed with the existing Plaintiffs and Defendants.

Respectfully submitted this 5th day of August, 2005.

Respectfully submitted,

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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.	§	
	§	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day electronically filed the within and foregoing **PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTIONS TO INTERVENE OF SETH HAMMETT AND LOWELL BARRON AND HENRY SANDERS** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties to this matter via electronic notification:

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This 5th day of August, 2005.

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