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, etc., et al.	)	**THREE-JUDGE COURT**
	)	
Defendants.	)	

BARRON AND SANDERS' REPLY
TO PLAINTIFF'S TRIAL BRIEF ON RES JUDICATA

COME NOW Defendant Intervenors Barron and Sanders pursuant to this Court's order of January 18, 2006, Doc. 214, as amended March 1, 2006, Doc. 235, and submit herein their reply trial brief on the issues of *res judicata* and issue preclusion.

The Gustafson Plaintiffs all but completely fail to address directly any of the arguments made in Barron and Sanders' Trial Brief, even those sections that addressed in very specific terms how the factors relevant to the virtual representation analysis have been met in this case. Barron and Sanders drew examples of the factors which courts have said are relevant to virtual representation, including participation, consent/acquiescence, tactical maneuvering, close relationship, and adequacy, explicitly from other virtual representation cases and showed how there is substantial evidence to support each factor in this case. Rather than addressing these specific assertions and doing so in context, Plaintiffs have described all of the Defendants' arguments in exaggerated generalities which do not accurately reflect the reasoned and fact-specific points that Barron and Sanders or the other Defendants and Defendant Intervenor

Hammett made. Because the Plaintiffs failed even to attempt to address those arguments except in the most cursory and grossly inaccurate manner, there is no need to reiterate the points made in Barron and Sanders' Brief in full here.[1] In addition, Hammett's Reply Brief revisits

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[1]The only specific, factual arguments Barron and Sanders made that Plaintiffs have bothered even to take issue with are addressed casually, briefly and often in footnotes. For instance, Plaintiffs take issue with the assertion that Mark Montiel spearheaded this litigation, or controlled Rice or Montiel. Yet, Plaintiffs fail to explain how it is that the Rice and Montiel plaintiffs were all recruited by Montiel, except John Rice, who is the odd plaintiff among the almost thirty plaintiffs in these three lawsuits, and none of the plaintiffs were kept abreast of the cases or took part in decisions, including whether to appeal, if Montiel were not spearheading that litigation, albeit with some assistance from Rice. See, e.g., Doc. 231 Exh. 19 C. Rice 13-14 (Montiel plaintiff Camilla Rice not only said that she had nothing to do with the decision-making in Montiel v. Rice, she could not even recall the 2001 litigation in which she was a named plaintiff.); Doc. 231 Exh. 20 Lang 8:17-9:1, 27:4-28:9 (Montiel plaintiff John Lang could not recall the name of the 2001 lawsuit and had no contact with his lawyer. He learned the case was dismissed from someone else.) Nor have Plaintiffs explained how it is that Montiel has not been one of the people who spearheaded this lawsuit, at least as much as French, Lathan, and Connors, when Plaintiffs themselves quote a newspaper article in which Montiel states that he intended to bring a lawsuit after Larios even before talking to Marty Connors or Jerry Lathan, and it is clear that Montiel has previously brought numerous redistricting lawsuits on his own. See Doc. 238: 25 n. 18 (for reference to article).

What is egregious about Plaintiffs' attempt to minimize Montiel's role is their references to him as "local counsel" and insinuations that he was hired only as an afterthought, see Doc. 238:25, when Georgia counsel, upon moving to withdraw from the case wrote that "Mark Montiel has served as lead counsel to the Plaintiffs since the inception of this case and will remain as lead counsel in this case." Doc. 182:2.

One of the only other specifics from the many cited in Barron and Sanders' brief with which Plaintiffs took issue was the assertion that, by all appearances, there was tactical maneuvering in the decision not to make Lathan and/or French plaintiffs in this lawsuit. It is not true, as Plaintiffs have said, that French was not made a plaintiff solely because his district did not exceed 4% above the ideal population. While, at first, French said that was the reason, he then testified quite plainly that that was only one among several reasons. Doc. 224 Exh. 30 French Vol. 2 at 70.

More importantly, Lathan and his wife were clearly eligible and willing to be plaintiffs, but they did not do so for reasons Lathan claimed were privileged. Doc. 225 Exh. 32 J. Lathan 24-27. While one might not be able to infer the worst conclusion based on the claim of privilege, the situation here strongly suggests concerns by Plaintiffs' counsel about the Lathans' connection to the Barnett litigation. In other words, the only rational basis for advising the Lathans not to serve as plaintiffs would have been a concern about res judicata.

The only other specific Plaintiffs appear to take issue with is French's involvement in

those points well and those arguments are adopted herein.

As pointed out in Hammett's Reply Brief, Plaintiffs have also argued that the public interest aspect of this lawsuit should have little or no bearing on this Court's analysis, and, in doing so, they have mis-characterized the relevant law of this circuit. Again, Hammett' Reply Brief addresses those issues well and is adopted herein.

One of the arguments made zealously by the Gustafson Plaintiffs is worth addressing separately in this brief, however. That is their insistence that, although the Republican Party Executive Committee did control Barnett, see Doc. 238:27, the Executive Committee "has not participated in or attempted to control the Gustafson litigation." Doc. 238:29.[2] Plaintiffs write

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Montiel, which they contend has no relevance to virtual representation. While Plaintiffs say that French's involvement in Montiel was only to give an affidavit, they miss the point. French and Pringle's affidavits were the main affidavits opposing summary judgment, and supplying those affidavits put them in positions of unpaid experts in a case in which they had a personal interest in the outcome. Moreover, given that French aided Montiel in Rice, his related state court lawsuit, that French and Montiel conferred together during the course of the legislature's consideration of the redistricting legislation, and that French also took part in Barnett, albeit in a limited advisory role, there was substantial involvement by French in all of the preceding lawsuits and an identity of interests between French and those prior plaintiffs, not to mention the Republican Party Executive Committee and its leadership.

[2]Plaintiffs' "evidence" for the proposition that the Republican Party is *not* involved in this litigation is the testimony of Twinkle Cavanaugh, current Chair of the Republican Party, 238:29-30, and the assertion that Connors could not have been acting on behalf of the Republican Party in working on this litigation because it was filed after he left the chairmanship of the Republican Party Executive Committee. It would appear, therefore, that the Plaintiffs' references to the Republican Party here are references to the Executive Committee.

Their assertion about Connors conveniently ignores the fact that he was chairman through February 2005, see Doc. 224 Exh. 26 Cavanaugh 20:22-23 (Cavanaugh took over chair in February 2005), and that he and the other litigation managers had already researched and developed the case and hired the attorneys by the fall of 2004, see Doc. 224 Exh. 30, French Vol 2 at 10, not to mention his statements to the media about the proposed litigation and his fundraising efforts while Chairman of the Party in the summer of 2004. Doc. 224, Exh. 27, Connors 68.

Considering that Cavanaugh testified that she could only speak for herself and her four

further that "with very little evidence to support their claims, Defendants essentially characterize this litigation as lawyer-driven litigation orchestrated by the Alabama Republican Party." Id.

The evidence adduced during discovery shows that the connection between the Republican Party Executive Committee and Gustafson is just as strong as that between the Executive Committee and Barnett, notwithstanding the tactical maneuvering undertaken by Plaintiffs to create appearances to the contrary. The dispositive evidence of this connection is in the minutes of the Republican Party Executive and Steering Committees. In 2004 and 2005, on at least four occasions, Jerry Lathan made formal presentations to the Steering Committee[3] or Executive Committee regarding this lawsuit and in those speeches presented this litigation as the central aspect of the Party's official strategy to take over the state legislature.

At the November 2004 Republican Party Steering Committee, Lathan reported on the Party's "*legislative agenda for 2006*" which included retaining the Georgia attorneys who won the redistricting lawsuit "to file a lawsuit for redistricting in Alabama":

> Jerry Lathan gave a report of the legislative agenda for 2006. He told us that two lawyers who successfully won the Georgia redistricting lawsuit have been retained to file a lawsuit for redistricting in Alabama. The Party will not be a

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employees and that she could not speak for the officers or members of the Republican Executive Committee or anyone else for that matter, this is slim evidence indeed. Doc. 224 Exh. 26 Cavanaugh Depo. at 54-55. In addition, given the evidence set out below showing that Jerry Lathan has spoken about this lawsuit on numerous occasions before the Steering Committee and the Executive Committee of the Party, including during Cavanaugh's own tenure as Chair, it is difficult to believe her testimony that she does not know anything about the lawsuit. See Doc. 224 Exh. 26 Cavanaugh 20:22-23 (she became chair in February 2005) and at 50 (she knew nothing about this lawsuit).

[3]The Steering Committee is significantly smaller than the Executive Committee (only about twenty people), is comprised of the officers of the Executive Committee, meets more often, and makes more of the decisions than the Executive Committee does. Doc. 223 Exh. 23 Barnett 18:19-21, 19:10-19, and 86:3-10.

> plaintiff. He said the Democrats in the legislature are worried it will succeed and they may loose [sic] their seats. Lee Fite and others may switch parties.
>
> He said he and others have had six meetings with the Alabama Republican delegation to prepare for taking control of the Senate in 2006. A Section 529 corporation will be formed to raise money to that end. The Party will not be involved in the new corporation.[4]

[Doc. 227 Exh. 35 at 31, Minutes of the Meeting of the *Steering* Committee of the Alabama Republican Party, November 24, 2004]**.**

At the January 8, 2005 Steering Committee meeting, Lathan gave a second report on the lawsuit and again described it as part of the Party's plans to take over the legislature in 2006. In that meeting, the Steering Committee endorsed the legislative takeover strategy. Even the fund-raising efforts (i.e., the creation of a non-profit corporation) were endorsed and approved.

> Jerry Lathan gave a report for plans to take over the legislature in 2006. Money will be raised for a 501(c)(3), a 501(c)(4), and 3 PACs. A lawsuit over redistricting will be filed in Mobile. Legislators are working on the development of a kind of "Contract with Alabama" to focus on issues Alabamaians [sic] will embrace. A general discussion of the direction of the party and these efforts ensued. Elbert Peters made a motion that the Steering Committee endorses [sic] these efforts. The motion carried.

[Doc. 227 Exh. 35:12-13, Minutes of the Meeting of the Steering Committee of the Alabama Republican Party, January 8, 2005].

Lathan also spoke to the State Republican Executive Committee in February 2005 about this lawsuit. [Lathan Depo. at 115-123]. The Minutes report that "Jerry Lathan then detailed plans for gaining control of the legislature. He stated if we win the districts where Bush won, we

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[4]The statement that the "Party" would not be involved in the new corporation appears to have been part of the Executive Committee's tactical maneuvering. As can be seen from the discussion in the text, the Steering Committee of the State Executive Committee was called upon to endorse, and thus facilitate, the fundraising effort to be led by a member of the Party's Steering Committee. A reference in the minutes to endorsement of "these efforts" shows that the Committee voted on all of the matters in that paragraph, not just the "contract with Alabama."

would gain control 65 to 40." [Doc. 227 Exh. 35: 27-28, Minutes of the Executive Committee Meeting February 12, 2005]. While these minutes do not report that Lathan talked about this lawsuit, the newspaper reported that he had discussed the lawsuit at some length, and, when asked about the newspaper article, Lathan said the following about his speech at the February 2005 Executive Committee:

> I explained a broad strategy and I made a presentation to the committee of a plan I wanted to spearhead to take control from the Democrats. One element of that involved possibly filing -- hopefully filing a lawsuit to challenge the districts.

[Doc. 225 Exh. 32 J. Lathan Depo. 116:1-7].

> What I said in my speech was that we believed we had similar facts in Alabama and after a successful effort in Georgia where the court had recognized the greater duty of the State to be fair in the one man/one vote concept in over- and under-population; that this suit would be similar situated in that effort would be based on the same legal theory and principle according to what I understand from my lawyers.

[Doc. 225 Exh. 32 J. Lathan Depo. 119:20 - 120:8].

At the June 18, 2005 State Executive Committee meeting, during the course of reports on other Republican Party projects and initiatives, Lathan also discussed this lawsuit:

> Jerry Lathan discussed the legislative redistricting lawsuit that was filed June 16, 2005 in the Mobile District on behalf of aggrieved voters. He stated that 60% of districts have more or less than 3% variance in size, so the suit is a simple one man-one vote issue. The case has been fast tracked.

[Doc. 227, Exh. 35:29-30 Minutes of the Meeting of the Executive Committee of the Alabama Republican Party, June 18, 2005].

Given the above evidence, it is simply incontestable that both Barnett and Gustafson were efforts made directly on behalf of the Republican Party Executive Committee and approved by the Executive Committee. The Barnett and Gustafson lawsuits were under the common

control of the Alabama Republican Party Executive Committee, either directly (Barnett) or through delegation of that control to its agent Lathan (Gustafson). In each case, the Committee's official representatives hired the lawyers, paid the bills, conceived of the litigation, and made the strategic decisions. In both Barnett and Gustafson, Party members were recruited to be plaintiffs, and none of the recruits played any substantive, decision-making role in the litigation of these cases.[5]

Nor did any of the Barnett or Gustafson recruits have any control over the funding of the litigation. Neither the Alabama Twenty-first Century Foundation in this case nor the Fair Reapportionmant Fund managed directly by the Executive Committee in Barnett has or had any legal obligation to fund these lawsuits nor any legal obligation toward these plaintiffs. Finally, the Plaintiffs chosen, for the most part, have loyalty to the Republican Party Executive Committee by virtue of the offices they hold or have held on the State Executive Committee or their county committees or clubs and thus probably would not, even if they might, buck the

[5]The Plaintiffs make a big point of contending that five of the nineteen Plaintiffs actually sought to become plaintiffs because they had actual knowledge of the "problems" with the 2001 redistricting legislation. These were allegedly Brown, Moore, Oldroyd, Gustafson and Meiers. The truth is that Gustafson, like all of the rest of the Plaintiffs was contacted by a representative of the Litigation Management Committee, and the four other Plaintiffs listed above had heard about the lawsuit through their Party connections before they became involved, with, perhaps, the exception of Oldroyd who claimed that he called the Georgia lawyers. Doc. 226 Exh. 11 Oldroyd Depo. at 19, 29, 30-31 (Gustafson Plaintiff) (contacted State Executive Committee to offer to be a plaintiff but lawyers were selected before he stepped in); Doc. 226 Exh. 1 Gustafson Depo. at 16:15-19 (called by Jerry Lathan and asked to be a plaintiff); Doc. 226 Exh. 3 T. Brown Depo. at 14-15; Doc. 226 Exh. 8 W. Meiers Depo. at 90:23-91:4, 25-26, 76-77 (heard about the challenge at the winter 2005 State Executive Committee meeting and began talking after that to others and was ultimately asked to be a plaintiff); Doc. 226 Exh. 10 Moore Depo. 12 ("'I've heard of a federal case that's coming,' and I said, 'We can check into it.'") The true bottom line, however, is that not even these plaintiffs, reviewed the complaint before it was filed, played any role in choosing the lawyers, or have anything but the most cursory involvement in the litigation.

decision made by the Litigation Management Committee. Lathan, Connors and French are, for all intents and purposes, agents of the Executive Committee which has endorsed this action and delegated to Lathan the authority to manage the action on its behalf.

In sum, the plaintiffs in this case and in Barnett were recruited by representatives of the State Executive Committee specifically to pursue the Committee's official agenda in lawsuits paid for by funds held and controlled by the Committee in Barnett, or raised on behalf of the Committee and held by its agents in Gustafson.

The upshot of all of this is that, even under the strictest common-control theory of privity, it is apparent that the Gustafson and Barnett plaintiffs would be in privity with one another. In EEOC v. Pemco, the Eleventh Circuit cited Montana v. United States, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979), in which the Supreme Court held that preclusion principles applied to the federal government, barring it from bringing suit against the state of Montana when a previous similar suit by a private contractor had been adjudicated on its merits. The Court found privity between the federal government and a private contractor because the Government required the original lawsuit to be filed, reviewed and approved the complaint, paid the attorneys' fees and costs, directed the appeal from State District Court to the Montana Supreme Court, appeared and submitted a brief as *amicus* in the Montana Supreme Court, directed the filing of a notice of appeal, and effectuated the plaintiff's abandonment of that appeal on advice of the Solicitor General. Id. at 155, 99 S.Ct. at 974. Under these circumstances, the Supreme Court found that the United States "plainly had a sufficient 'laboring oar' in the conduct of the state-court litigation to actuate principles of estoppel." Id.

Aside from the filing of an amicus brief and appeal notices, the Executive Committee, either

directly or through specific delegation of its authority, has played the same roles in the instant lawsuit and in Barnett. Rather than directing a notice of appeal be filed in Barnett, the Executive Committee directed that no notice of appeal be filed and that the claims be abandoned, which is, of course, the same difference. In the instant case, the Executive Committee has delegated its strategic efforts to take over the legislature through this litigation to Lathan, its Vice-chair, and, ultimately, to the Litigation Management Committee he formed, and that Committee has planned the case, hired the lawyers, recruited the plaintiffs, raised the money, and made the strategic decisions in this case.

This all leads to an important point in this litigation: Because of the privity between the Gustafson and Barnett plaintiffs, if the Barnett plaintiffs would be precluded from bringing this lawsuit, the Gustafson plaintiffs, who are in privity with them, would also be precluded. As explained below, even under the due process protections which exist in private-interest litigation, the Barnett plaintiffs would be precluded from bringing the present case. Thus, the Gustafson Plaintiffs, too, are precluded.

The analysis of the three-judge court in Thompson v. Smith, 52 F.Supp.2d 1364, 1369-1370 (M.D. 1999) (three-judge court) is directly on point here. Notably the analysis applied by the Thompson court would have satisfied even private-interest privity requirements. It is evident that no party drew the court's attention to the public interest nature of the litigation and the relaxed due process protections that therefore applied, and the court did not address that issue. It turned out that the parties did not need to raise the distinction between public and private interest cases because the circumstances in Thompson clearly met the due-process requirements for finding privity even in the private-interest context. In that case, the court relied on the following facts in making its privity finding and precluding the second set of plaintiffs.

The first set of plaintiffs, the Rice plaintiffs (John and Camilla Rice), filed suit in federal court to challenge a 1993 state court consent decree creating Alabama's legislative districts. Id. at 1366-1377, 1369-1370. The federal court ordered them to intervene in the state-court action. In the meantime, the second set of plaintiffs, the Thompson plaintiffs were added as plaintiffs in the federal court action; they were not seeking to assert an interest different from the Rice plaintiffs. Id. Those plaintiffs were "invited" to intervene in the state court lawsuit. Id. They were on notice of the class action averments the Rice plaintiffs made in the state court action and were members of that class. Nevertheless, they chose not to intervene. Id. The three-judge panel concluded that there was no reason to believe that the trial court had not protected the interest of the absent putative class members (even though there was no evidence that a class was certified before the Rices' claims were dismissed). Id. at 1370.[6] Based on these circumstances, the three-judge court concluded that the (private-interest) due-process privity requirements set out Richards v. Jefferson County, 517 U.S. 793, 797 n.4, 116 S.Ct. 1761 n.4, 135 L.Ed.2d 76 (1999) were satisfied. Id. at 1369-1370.

Circumstances significantly parallel exist between the Montiel and Barnett plaintiffs. The Montiel class action averments were known to the Barnett plaintiffs who had filed a companion lawsuit only days earlier. The two cases were being handled at the same time, on the same schedule,

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[6]While it is true that there was no ruling on class certification in either case, the three-judge court in Montiel and the state court in Rice had a duty to protect the interest of absent class members because there was never a ruling against class certification. See, e.g., In re Microsoft Corp. Antitrust Litigation, 332 F.Supp.2d 890 (D.Md. 2004) (noting that even where Circuit had held that pre-certification dismissal is not subject to specific requirements of Rule 23(e), the Court had a duty to consider the interest of putative class members before dismissing the lawsuit) and Ceisler v. First Pennsylvania Corp., 1991 WL 83108 *3 (E.D. Pa. May 13, 1991) (court taking upon itself to consider whether withdrawal of class representative before class certification compromises the class); see also Thompson, (three-judge court) (finding that there was every reason to believe that the state trial court had protected the interest of the "putative class members" even where the state court dismissed the case prior to class certification).

in the same hearings, receiving at least some joint orders, were before the same three-judge court and their lawyers were working together on a particular strategy (to get the Alabama Supreme Court to hear the state law claim). The purported class the Montiel plaintiffs sought to represent would have included the Barnett plaintiffs.[7] While the Barnett plaintiffs were not invited to join the litigation in federal court as the Thompson plaintiffs had been in state court, they did not need to be because they *had* joined the litigation by filing a parallel action, and their case was being treated as a companion case.

What the Barnett plaintiffs did, however, was even less protective of their rights than what the Thompson plaintiffs did when they failed to intervene in the state action. While the Thompson plaintiffs at least retained their cause of action in federal court, the Barnett plaintiffs abandoned their claims altogether, despite the pendency of two lawsuits seeking certification of classes in which they would be a member, by failing to amend their complaint to state a more specific challenge or to appeal the ruling dismissing the case.[8] In short, there is a stronger case for barring the Barnett

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[7] See Third Amended Complaint, ¶¶ 37 (Montiel "avers, with regard to a class of all citizens of the State of Alabama similarly situated" and Montiel, Day and Humphryes "aver, with regard to a subclass of all citizens of the State of Alabama similarly situated and assigned to State Senate districts ... with populations that violate the requirements of one-person, one-vote") and ¶ 38 (Montiel, Humphryes, and John Rice aver, with regard to a subclass of citizens of the State of Alabama similar situated and assigned to State House districts ... with populations that violate the Fourteenth Amendment requirement of one-person, one-vote").

[8] A fair reading of the pleadings in Barnett suggests that the Court based its dismissal decision not on the plaintiffs' failure to challenge the 2001 redistricting legislation but on their prolonged failure to amend their complaint to challenge the legislation in a specific manner. In short, the Court appears to have grown weary of the Barnett plaintiffs' attempts to get the Court to certify questions to the Alabama Supreme Court before actively prosecuting their claims in federal court. See nn. 9-10 of this Brief for examples of the Barnett Plaintiffs' conflicting messages to the three-judge court. The excerpts are from the same brief, and in one breath Plaintiffs contend unequivocally that they have challenged the 2001 statutes under federal law and in the next breath speak only of "potential questions of federal law" but serious questions of

plaintiffs and those in privity with them from bringing a second action attacking the 2001 legislation than there was in Thompson.

The Thompson court's well-reasoned application of the private-interest-law due-process privity requirements set out in Richards (albeit requirements that need not have been met in Thompson) is directly on point. The Thompson case shows that the Barnett plaintiffs would be precluded from bringing this lawsuit even were this suit a private interest lawsuit. If the Barnett plaintiffs are precluded, even under these private-interest privity principles, it follows, as noted above, that their privies, the Gustafson plaintiffs, are likewise barred. In short, the uncontested evidence adduced during discovery gives rise to several paths which lead to the same conclusion, i.e., that these plaintiffs are precluded from bringing this action.

Even if the Barnett plaintiffs could have brought this lawsuit (they clearly could not), the role the Executive Committee has played: (1) in filing and directly controlling Barnett and (2) by delegating the authority to Lathan to do so in furtherance of the Committee's strategy to take over the legislature in Gustafson, imputes to the Gustafson plaintiffs, among other things, the Barnett plaintiffs' acquiescence and consent to be bound by both Montiel and Rice and further imputes to the Gustafson plaintiffs the Barnett plaintiffs' notice of both the Montiel and Rice actions and their class averments.

These Plaintiffs have maneuvered to avoid the preclusive effects that flow from the Executive Committee's common involvement in, and control of, both Barnett and Gustafson. The Plaintiffs' have blatantly denied any connection between the Executive Committee and this lawsuit, an assertion that was designed to mislead given that the Executive Committee has officially

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state law.

approved and endorsed the lawsuit, and the fund-raising efforts, and that the lawsuit was presented on four occasions to the Executive Committee's governing body as the central aspect of the Committee's attempt to take over the legislature. They have claimed that, because the lawsuit was filed after Connors left the chairmanship, there is no connection between Connors' involvement and the Executive Committee. However, Connors worked on the planning of, and fund-raising for, this lawsuit beginning in the summer of 2004 before leaving the chairmanship in February 2005. See n. 2, supra.

Other decisions also appear to have been made to blur the Executive Committee's involvement in this lawsuit. The decision, for instance, to start a nonprofit corporation to fund this litigation was one made by the attorneys in this case. Doc. 225 Exh. 32 J. Lathan 40-41. One of the bases for the decision appears to have been to keep the donors' identities secret. Id. However, in Barnett, the Party simply created a fund for the litigation. Doc. 224 Exh. 26 Cavanaugh 53-54 (as executive director, she opened a bank account). It is not clear from the testimony, other than the alleged desire to keep donors' identities secret (donors with probable connections to the Executive Committee and to the Party generally) and to distance the lawsuit from the Executive Committee itself, why the funds could not have been held by Executive Committee as they were in Barnett.

The second tactic the Plaintiffs have undertaken to avoid the preclusive effects that flow from Barnett is their repeated statements that Barnett was merely an impasse lawsuit and that it raised no challenges to the 2001 statutes. Given the uncontested evidence in the record, it is not possible to characterize Barnett in this way. Indeed, Barnett's lead counsel admitted in deposition that challenges to the 2001 statutes had been raised in the pleadings. Doc. 224 Exh. 28 Jordan 67-69 (admitting that pleadings had specifically challenged new and old redistricting statutes). The

arguments made in the Barnett briefs further demonstrate that the Barnett plaintiffs challenged the 2001 statutes.[9] Moreover, the failure to voluntarily dismiss the case after the 2001 legislation had passed and even after pre-clearance,[10] the repeated attempts by the Barnett lawyers to get the federal court to send the Section 200 claims to the Alabama Supreme Court through a certified question,[11] and the qualifying language in the trial court's order ("no specific challenge" as opposed to "no challenge," see 01-433 Doc. 40 at 2), make clear that Barnett was not an impasse suit. Indeed, these points were made in Barron and Sanders' initial trial brief, but were utterly ignored by the Plaintiffs in their response in their efforts to mis-characterize what occurred in Barnett.

On a final and separate note, as discussed by Hammett in his brief, the plaintiffs in Montiel did not just raise challenges to their own districts but raised state-wide, one-person-one-vote claims. Thus, the Plaintiffs' contention that the Montiel plaintiffs could not have adequately represented their interests is unavailing. The one-person-one-vote claim is, in the end, no different from that raised in this case. The law simply requires that, where the population deviations are below 10%, the plaintiff must show that the deviations are the result of an impermissible motive. See, e.g., Montiel v. Davis, 215 F.Supp.2d 1279 (S.D. 2002). The

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[9] See, e.g., Doc. 229 Exh. 40 at 44, Barnett Plaintiffs' Reply to Defendants' Response to Court's Questions and Order ("The Governor omits Paragraph 19 of the [Barnett Plaintiffs'] First Amended Complaint, which says that the districts "as currently drawn, violate the Equal Protection Clause and Section 200 of the Alabama Constitution. ... Such phrasing reaches both the past practice and the new statutes.").

[10] See, e.g., Doc. 229 Exh. 40 at 51-54, Barnett Plaintiffs' Reply to Defendants' Response to Court's Questions and Order (contending that preclearance did not make their claims moot and citing questions of state law and "potential questions of federal law").

[11] See, e.g. Doc. 229 Exh. 40 at 2; see also Doc. 224 Exh. 27 Jordan Depo. 153-154 (acknowledging coordinated effort to get the Section 200 claims before the Alabama Supreme Court at the earliest stage possible).

Montiel plaintiffs made a strategic decision different from that made in Larios, but there was nothing keeping them from making the same arguments in support of their one-person-one-vote claims (except, perhaps, that the facts are not the same in Alabama). Indeed, they were invited to do so when the Defendants in Montiel contended that partisanship was one of the bases for the population deviations, but they did not. Likewise, just as the plaintiffs in Larios did, they could have raised a state-wide, partisan gerrymandering challenge.

In conclusion, the facts are such that no matter how one looks at it, even under the stricter standards applicable only to strictly private-interest lawsuits, the Gustafson plaintiffs' claims are barred by the multiple redistricting lawsuits filed in 2001.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 21st day of March, 2006, as agreed upon by all counsel, I served via email the foregoing to the following attorneys:

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