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,	)	
	)	
SETH HAMMETT, LOWELL BARRON and HANK SANDERS,	)	
	)	
Defendants-Intervenors.	)	

HAMMETT REPLY TRIAL BRIEF ON *RES JUDICATA*

Defendant-intervenor Seth Hammett, through undersigned counsel, pursuant to this Court's order of January 18, 2006, Doc. 214, as amended March 1, 2006, Doc. 235, submits herein his reply trial brief on the issues of *res judicata* and issue preclusion.

I. THE *GUSTAFSON* PLAINTIFFS' TRIAL BRIEF IS FATALLY FLAWED BY ITS FAILURE TO DISTINGUISH PUBLIC INTERESTS FROM PRIVATE INTERESTS IN THE LAW OF PRIVITY.

The *Gustafson* plaintiffs' entire trial brief relies on a misplaced legal argument: it elides the crucial distinction in binding Supreme Court and Eleventh Circuit precedent between "cases involving broad public interest matters [and] suits in which individual interests are clearly and directly implicated." *EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1289 (11th Cir.2004), *cert. denied*, 126 S.Ct. 42 (2005) (*citing Richards v. Jefferson County*, 517 U.S. 793, 803 (1996)). Throughout virtually all of its sixty pages, peppered with long footnotes, the *Gustafson* brief

urges this Court to commit clear legal error by applying the principles and case law relating to lawsuits clearly and directly implicating private, as opposed to public, interests.

The *Gustafson* plaintiffs make no effort to justify the application of private law principles of privity, and they cannot cite a single redistricting lawsuit that was controlled by private law principles. The reason why is clear enough when one considers the absurd results that would ensue if their erroneous view were the law. It would allow the same lawyers and Republican activists who have been engaged for over a decade in attacks on Alabama's House and Senate districts to retry the same one-person, one-vote claims rejected in *Montiel v. Davis*, 215 F.Supp.2d 1279 (S.D. Ala. 2002) (3-judge court), and *Rice v. English*, 835 So.2d 157 (Ala. 2002).[1] If this Court ruled against the *Gustafson* plaintiffs' claims on their merits, in the view advanced in their trial brief, nothing would prevent these same lawyers and activists from recruiting yet another set of Alabama citizens, who were not given notice of the instant action and did not consent to be bound by the judgment, to bring still another lawsuit contending that the population deviations violate their individual rights to vote. A careful reading of *Pemco*, the main decision the *Gustafson* plaintiffs rely on, shows the fundamental error of their arguments.

Pemco was a Title VII case, which applied the public *law* prohibiting racial discrimination in employment to the *private interests* of the company's African-American workers. *Pemco* says that virtual representation, as one of the theories which can establish privity between parties and non-parties, is "a term of art that we have defined as applying 'when the respective interests are closely aligned *and* the party to the prior litigation adequately

[1] We are assuming for the sake of argument that the *Gustafson* amended complaint could also survive the defenses of failure to state a claim and laches, which is highly unlikely.

represented those interests.'" 383 F.3d at 1287 and n.3 (*quoting* *Jaffree v. Wallace*, 837 F.2d 1461, 1467 (11th Cir.1988)). The *Gustafson* plaintiffs argue that this was only "an effort to loosely define the crux of the virtual representation doctrine. . . ." Doc. 238 at 12 n.6. They imply that *Pemco* replaced these two determining factors, closely aligned interests and adequate representation, with four more specific evidentiary factors: participation in the prior litigation, apparent consent to be bound, tactical maneuvering, and close relationships between the parties and non-parties. *Id*. But *Pemco* says "in this Circuit [the two-factor] language . . . *specifically* defin[es] virtual representation." 383 F.3d at 1287 n.3 (emphasis added). The four factors taken from *Jaffree* are "employed" in *Pemco* as evidentiary factors that are neither necessary nor sufficient in themselves, but can be applied "in concert to determine whether there is virtual representation." 383 F.3d at 1287. Ultimately, whichever factors are found in the facts of a particular case, both of the two factors that *specifically define* virtual representation must be present.

Nevertheless, the *Gustafson* plaintiffs' attempt to find some way to avoid virtual representation by referring to the four evidentiary factors is of no avail. Only the factor of actual participation by the *Gustafson* plaintiffs in the 2001 litigation is missing here. That was by design, the evidence shows, and it does not save the *Gustafson* plaintiffs from privity with the *Montiel*, *Rice* and *Barnett* plaintiffs, because their *public interests* are closely aligned with and were adequately represented by the plaintiffs in the prior lawsuits. Their brief totally omits any reference to the crucial distinction between public and private interests, which *Pemco* clearly makes by referring to *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir.1990):

Hunt involved a general public law issue that affected the plaintiffs' *private*

> *interests* only indirectly, unlike the alleged racial harassment at Pemco. The Supreme Court has *explicitly distinguished* between such generalized public law challenges and more individualized cases, suggesting that there is less preclusion protection for a plaintiff who "complain[s] about an alleged misuse of public funds, or about other public action that has only an indirect impact on his interests." *Richards*, 517 U.S. at 803, 116 S.Ct. at 1768 (citations omitted). Indeed, the Supreme Court has suggested that in cases involving broad *public interest* matters, "we may assume that the States have wide latitude to establish procedures ... to limit the number of judicial proceedings that may be entertained," as opposed to suits in which *individual interests* are clearly and directly implicated. *Id.*

Pemco, 383 F.3d at 1289 (emphases added).

The fundamental flaw in all of the *Gustafson* plaintiffs' arguments is most apparent in their discussion of the last of the four *Pemco* evidentiary factors, close relationships between the parties and non-parties. Doc. 238 at 38-40. They would read closely aligned interests almost entirely out of the definition of virtual representation, squarely asserting that "a close relationship is not established merely because the parties share common *interests*. . . ." *Id*. at 38 (emphasis added). They try to support this erroneous proposition by citing this Circuit's case law governing the application of virtual representation to *private* interests, usually individual, property[2] or liberty interests, like the employment interests at stake in *Pemco*, which requires "an express or implied *legal* relationship in which the parties to the first suit are accountable to the non-parties who file a subsequent suit raising identical issues." Doc. 238 at 39 (*quoting Pemco*, 383 F.3d at 1288 (*quoting Pollard v. Cockrell*, 578 F.2d 1002, 1008 (5th Cir. 1978)) (emphasis added). Application of this private interest standard would prevent privity from ever attaching to any citizens of Alabama to whom the *Montiel*, *Rice* and *Barnett* plaintiffs and their lawyers were not

[2] Property interests are the classic type of private interests that require a much higher level of due process which must be accorded non-parties in subsequent actions than is required for the protection of public interests. *Richards v. Jefferson County*, 517 U.S. 793, 803-05 (1996).

"legally accountable." Doc. 238 at 40. It would make finality in *public* interest litigation, including redistricting litigation, impossible.

In a redistricting case the plaintiffs are seeking to vindicate public interests, not private interests. See Hammett trial brief, Doc. 234 at 37-39. *Pemco* holds that the due process standards for determining sufficiently close relationships to satisfy virtual representation in a case involving public interests "are plainly different" from the *Pollard v. Cockrell* standards the *Gustafson* brief cites, which apply to private interests.[3] 383 F.3d at 1289. *Pemco* cites as an example the Confederate flag cases, where the Eleventh Circuit held that African-American legislators and NAACP members, to whom Alvin Holmes' lawyers were not legally accountable in the first action, were nevertheless in privity with Holmes and bound by the prior judgment against him. *Id*. (*citing NAACP v. Hunt, supra*). Whether plaintiffs and lawyers overlap or not, in redistricting litigation it is the adequate representation of closely aligned public interests that precludes relitigation of claims against the same plans. *Robertson v. Bartels*, 149 F.Supp.2d 443, 449 (D. N.J. 2001) (3-judge court), *aff'd summarily*, 534 U.S. 1110 (2002); *Thompson v. Smith*, 52 F.Supp.2d 1364, 1368-69 (M.D. Ala. 1999) (3-judge court); *Tyus v. Schoemehl*, 93 F.3d 449, 454 (8th Cir. 1996), *cert. denied*, 520 U.S. 1166 (1997). As we will show in the following

[3] Thus the *Gustafson* brief's reliance on *Pollard* to argue that the Eighth Circuit applies "a competing and more expansive application of the doctrine of virtual representation," Doc. 238 at 51-52, is a flat misstatement of the law. They also cite a Fourth Circuit case that plainly is inapposite, because it addresses the law of privity as it applied to the plaintiffs' private interests in pension benefits. *Martin v. American Bancorporation Retirement Plan*, 407 F.3d 643, 650-51 (4th Cir. 2005). In an inconsistent attempt to downplay the Eleventh Circuit's clear distinction between public and private interests in the doctrine of virtual representation, the *Gustafson* plaintiffs argue that "public law" is just one of seven factors to weigh in the balance, Doc. 238 at 49, and they cite the very same Eighth Circuit case, *Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996), *cert. denied*, 520 U.S. 1166 (1997), they later criticize as applying the doctrine too expansively. Doc. 238 at 51-52.

sections of this reply brief, all of the *Gustafson* plaintiffs' contentions are undermined primarily by their failure to apply the law of privity governing public interests.

II. THE *GUSTAFSON* PLAINTIFFS' MANAGERS PARTICIPATED IN THE 2001 LEGISLATIVE REDISTRICTING CASES.

The cases cited at pages 13-15 of the *Gustafson* trial brief all involve claims seeking to vindicate private, not public, interests.[4] In the instant action, it is the prior participation of persons pursuing the plaintiffs' public interests, not the participation of the *Gustafson* plaintiffs personally, that matter for *res judicata* purposes. The same group of lawyers and party activists who are the managers of the *Gustafson* plaintiffs' interests in this action were also managing the same interests in the 2001 redistricting lawsuits.

Indeed, except for lending their names and addresses, the *Gustafson* plaintiffs are not themselves participating in this action; they have played no role in selecting the lawyers, paying their fees, determining what claims would be included in their complaints or making other litigation decisions.[5] These important decisions are being made by the three members of the

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[4] *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986) (en banc) (beneficiaries of pension fund); *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751 (1st Cir. 1994) (purchasers of land); *Kerr-McGee Chemical Corp. v. Hartigan*, 816 F.2d 1177, 1181 (7th Cir. 1987) (dispute over hazardous wastes at company facility); *Ponderosa Development Corp.* v. *Bjordahl*, 787 F.2d 533 (10th Cir. 1986) (corporate fraud and breach of contract); *Borzych* v.*Frank*, 2005 WL 1367212 (W.D. Wis. June 8, 2005) (prisoner complaint regarding library privileges).

[5] Doc. 226 Exh. 1 at 36-37 (Gustafson), Exh. 2 at 8-9 (Hosey), Exh. 3 at 64-69 (Brown), Exh. 4 at 57-58 (Clemens), Exh. 5 at 41-42, 84-85 (Douglas), Exh. 6 at 97 (Hammonds), Exh. 7 at 14 (Little), Exh. 8 at 45-47, 88-89 (Meiers), Exh. 9 at 15-16, 44-45, 55-56, 83 (Lowell Moore), Exh. 10 at 10, 14, 30, 40-44, 56 (Pat Moore), Exh. 11 at 41 (Oldroyd); Doc. 231 Exh. 12 at 13-14, 29-30, 39-40 (Pearson), Exh. 13 at 54-55 (Renshaw), Exh. 14 at 21 (Sanders), Exh. 15 at 28, 43, 76 (Styles), Exh. 16 at 28, 59 (Ward), Exh. 17 at 79 (Wood)

litigation management committee, Republican Vice Chairman Jerry Lathan, Republican State Senator Steve French and former Republican Chairman Marty Connors, in consultation with their lawyer, Mark Montiel. All three of these current managers participated in the *Montiel*, *Barnett* and *Rice* actions in 2001, along with lawyers Mark Montiel and Al Agricola. In fact, with the limited exception of John Rice, none of the plaintiffs in the three 2001 lawsuits challenging Alabama's House and Senate districts actively participated in his or her case.[6] It is the recurring participation of the same litigation managers in the 2001 and 2005 lawsuits that demonstrates how the plaintiffs' aligned interests have been adequately represented.

III. NOTICE AND CONSENT ARE NOT REQUIRED TO BIND THE *GUSTAFSON* PLAINTIFFS' PUBLIC INTERESTS, BUT NOTICE AND CONSENT ARE NONETHELESS PRESENT ACTUALLY OR CONSTRUCTIVELY.

At pages 16-18, the *Gustafson* trial brief argues that "knowledge of the other litigation is the *sine qua non* of the doctrine of 'virtual representation,'" and that the *Gustafson* plaintiffs had no notice of the 2001 lawsuits and did not consent to be bound by their judgments. Again, the *Gustafson* plaintiffs misapply to this public interest case principles governing the preclusion of claims based on private interests. *Richards v. Jefferson County*, the main precedent they cite, explicitly requires this Court to distinguish between a "public action that has only an indirect impact on [plaintiffs'] interests" and an action implicating plaintiffs' private interests. 517 U.S. at 803. "By virtue of presenting a federal constitutional challenge to a State's attempt to levy personal funds, petitioners clearly bring an action of this latter type." *Id.* (*citing* *Tallassee v.*

[6] Doc. 223 Exh. 23 at 65 (Barnett), Exh. 24 at 18, 23-24 (Terry Lathan), Exh. 25 at 8-16 (Johnson); Doc. 231 Exh. 19 at 11-14 (Camilla Rice), Exh. 20 at 8, 19-21, 27-28 (Lang), Exh. 21 at 38, 44 (Humphryes), Exh. 22 at 51-55 (Day).

State ex rel. Brunson, 206 Ala. 169, 89 So. 514 (1921) (distinguishing between "public" and "private" actions). *Richards* implicated the non-parties' private interests in paying a county occupational tax, and the due process requirements of "default, acquiescence or contest" are inapposite to the public interests the *Gustafson* plaintiffs assert. 517 U.S. at 803. All the other cases cited here by the *Gustafson* plaintiffs also involve the protection of private interests.[7]

In any event, the news articles in evidence, Doc. 150, demonstrate the extensive publicity surrounding the planning and prosecution of the 2001 redistricting lawsuits that gave the *Gustafson* plaintiffs actual or constructive notice that claims pursuing their public interests were being litigated. They had the "opportunity to be heard" that due process requires, *Richards*, 517 U.S. at 797 n.4, and they either chose not to participate[8] or were too disinterested to inform themselves about such a choice.[9] The *Gustafson* trial brief's emphasis on the plaintiffs' lack of awareness of the earlier lawsuits actually cuts against their efforts to avoid preclusion of their claims, because it shows their constructive consent to the adequate representation of their public

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[7] *Becherer v. Merrill, Lynch, Pierce, Fenner and Smith, Inc.*, 193 F.3d 415 (6th Cir. 1999) (real estate investments); *Bittinger* v. *Tecumseh Prod. Co.*, 123F.3d 877 (6th Cir. 1997) (insurance benefits); *In re Medomak Canning Co.*, 922 F.2d 895 (1st Cir. 1990) (bankruptcy claims); *Eubanks v. FDIC*, 977 F.2d 166 (5th Cir. 1992) (real estate investments); *Stone* v. *William*, 970 F.2d 1043, 1058-61 (2d Cir. 1992), *cert. denied*, 508 U.S. 906 (1993) (claims to decedent's estate); *Perez v.Volvo Car Corp.*, 247 F.3d 303 (1st Cir. 2001) (claims of automobile purchasers); *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751 (1st Cir. 1994) (land sale); *Desrosiers v. Transamerica Financial, Corp.*, 212 B.R. 716 (Bank. D. Mass. 1997) (commercial investments); *Borzych v. Frank*, --- *F.* Supp. 2d --, 2005 WL 1367212 (W.D. Wis. June 8, 2005) (prisoner suit); *Martin v. Wilks*, 490 U.S. 755, 765 (1989) (employment discrimination); *Holland v. Apfel*, 23 F. Supp. 2d 21(D.D.C. 1998) (social security benefits).

[8] E.g., Doc. 226 Exh. 6 at 76-78 (Hammonds was too busy running a campaign); Doc. 231 Exh. 17 (Wood too busy running a business).

[9] E.g., Doc. 226 Exh. 8 at 33-34 (Meiers), Exh. 11 at 16-17 (Oldroyd).

interests in the 2001 actions. At the very least, the *Gustafson* plaintiffs' failure to inform themselves about the redistricting controversies in timely fashion supports our defense of laches, which is not an issue in the instant bench trial.

More to the point, the same interlocking group of Republican lawyers, legislators and activists who have managed all the past and present actions challenging the 2001 legislative redistricting plans, for whom the *Gustafson* plaintiffs are mere proxies, were very much aware of the 2001 lawsuits. They sometimes pursued different legal strategies and sometimes cooperated – as in their joint efforts to give the Alabama Supreme Court the first shot at a judgment on the merits. But all their choices to participate or not to participate in *Montiel*, *Barnett* and *Rice*, to pursue claims against the 2001 plans to judgment, or not to appeal adverse judgments on the merits were fully informed and deliberate. The principles of virtual representation governing the finality of suits asserting the same public interests bars these litigation managers from recruiting new players to replay the same ball game.

IV. THE *GUSTAFSON* PLAINTIFFS' LITIGATION MANAGERS HAVE ENGAGED IN TACTICAL MANEUVERING.

The *Gustafson* trial brief deploys a number of disparate arguments to divert attention from the extensive tactical maneuvering in which their litigation managers have engaged with other lawyers and activists to avoid having their failures in one lawsuit attacking the 2001 legislative redistricting plans from precluding the claims of other plaintiffs alleging different legal theories in separate actions. Throughout all the depositions, the plaintiffs in *Montiel*, *Rice*, *Barnett* and *Gustafson* and their lawyers invoked attorney-client and spousal privilege to refuse to answer questions about their communications with each other. But the court records in these

proceedings, coupled with the unprivileged testimony of litigation mangers Connors, French and Jerry Lathan, along with the testimony of others, Chris Pringle in particular, reveal the following tactical maneuvers, among others, which fairly may be inferred from the evidence:

(1) At the same time they were prosecuting separate *Barnett* and *Montiel* actions in this Court, Mark Montiel, Bert Jordan and Al Agricola were jointly filing various motions and appeals in state court trying to position the Alabama Supreme Court as the initial forum in which the merits of the 2001 House and Senate plans would be reviewed. In a joint hearing, both sets of lawyers asked this Court to certify questions about the lawfulness of the 2001 plans to the Alabama Supreme Court. Their plan was to have the state supreme court strike down the plans under both the federal and state constitutions, then, because of too little time to adopt and obtain § 5 preclearance of new plans drawn by either the legislative or judicial branches of state government, to ask the federal court to draw plans for use in the 2002 elections.

(2) To maximize their chances for obtaining judicial relief, counsel for *Barnett*, *Montiel* and *Rice* cooperated on some matters and yet maintained separation to pursue different litigation strategies and theories.

(3) The *Barnett* action was filed and financed by Alabama Republican Chairman Connors at the request of Senator French and Representative Pringle, in cooperation with Republican counsel and consultants in D.C., to provide a judicial forum that would draw new plans if, as the Republicans hoped, the legislative process, which was controlled by Democratic majorities in both houses, was unable to enact plans. When House and Senate plans did pass the Legislature and got precleared under the Voting Rights Act, Chairman Connors pulled the plug financially on the *Barnett* lawyers, electing to leave Mark Montiel to challenge the new plans,

with his own resources and $1,500 from Connors, in the separate *Montiel* action. This left Connors free to use the funds at his disposal for campaign purposes, while ensuring that lawsuits remained pending in both federal and state court.

(4) The record in *Barnett* also plainly shows that Jordan and Agricola were concerned that amending their federal complaint squarely to attack the 2001 plans would undermine their coordinated efforts with Montiel urging the Alabama Supreme Court to review the lawfulness of those plans first. Montiel's amendment of his father's complaint, which took the opposite tack and did proceed to ask this Court to address his federal and state claims against the new plans, allowed the lawyer team to have it both ways in federal and state court. It is clear they were trying to keep all their options open as best they could.

(5) When the decisions in *Larios v. Cox*, 300 F.Supp.2d 1320 (N.D. Ga. 2004) (3-judge court), *aff'd*, 542 U.S. 947 (2004), were announced, Montiel, French and Lathan thought there had been a change in law[10] that provided another chance to challenge the 2001 plans in

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[10] The *Gustafson* trial brief does not squarely rely on an argument that *res judicata* is no bar to this action because *Larios* changed the law. Instead, they say *Larios* "clearly elucidated what had been a particularly murky area of the law," and that somehow helps refute the charge that the litigation managers have been engaged in tactical maneuvering. Doc. 238 at 24. However in a footnote they contend that "application of *res judicata* principles is particularly inappropriate in light of the Court's summary affirmance in *Cox v. Larios*." *Id*. at 24 n.17. They cite *Jaffree v. Wallace*, 837 F.2d 1461, 1469 (11th Cir. 1988) and *Jackson v. DeSoto Parish School Bd.*, 585 F.2d 726, 729 (5th Cir. 1978), for the proposition that a change in law can defeat a defense of *res judicata.* But these precedents cannot be reconciled with a more recent Eleventh Circuit case, *Glazner v. Glazner*, 347 F.3d 1212, 1221 n.5 (11th Cir. 2003), which acknowledges the contrary holding in *James Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535, 541 (1991) ("Of course, retroactivity in civil cases must be limited by the need for finality; once suit is barred by *res judicata* or by statutes of limitation or repose, a new rule cannot reopen the door already closed.").

In any event, in an earlier brief, when the *Gustafson* plaintiffs were represented by *Larios* counsel, they acknowledged that "*Larios* is not a change in the law but an affirmation of it." Doc. 136 at 26.

court. In hopes of avoiding preclusion based on the 2001-02 judgments, they recruited the *Larios* lawyers in Georgia and nineteen Republican plaintiffs who had not been involved in the 2001 lawsuits, and they convinced Chairman Connors and others members of the State Republican Executive Committee to sponsor fundraising for a new litigation fund that would be separate from the Executive Committee funds used to finance *Barnett* and *Montiel*.

The *Gustafson* trial brief at pages 20-22 argues that the plaintiffs in *Montiel* and *Barnett* did not personally engage in tactical maneuvering, because they played no role in the planning, funding or decision-making in those actions. That is fully consistent with our contention that the plaintiffs in all the 2001 and 2005 lawsuits were virtual figureheads for the same overlapping and interlocking sets of litigation managers. And that is fully consistent with the testimony of the *Montiel*[11] and *Barnett*[12] plaintiffs themselves. It has always been different combinations of the same group of Republican lawyers, legislators and activists who managed all these lawsuits and

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[11] E.g., Camilla Rice did not remember anything about her complaint and played no role in the management of the case. Doc. 231 Exh. 19 at 11-14. John Lang did not know the name of his lawsuit, did not believe the complaint fairly stated his objections to the plans, had no contact with his lawyer, Mr. Montiel, did not pay his fees and did not sign a retainer agreement. Doc. 231 Exh. 20 at 8, 19-21, 27-28. Bobby Humphryes, a member of the House of Representatives, did not pay Mr. Montiel a fee, did not read this Court's judgment and trusted strategy decisions, like the decision whether to appeal, to his lawyer. Doc. 231 Exh. 21 at 38, 44. Sheldon Day, Mayor of Thomasville, was not aware that the complaint made claims of racial discrimination, did not read this Court's decision, and was never asked about an appeal. Doc. 231 Exh. 22 at 51-55.

[12] E.g., Les Barnett relied on his lawyers to advise him about litigation decisions and "really didn't know what I was doing." Doc. 223 Exh. 23 at 65. Terry Lathan played no role in selecting her lawyers, never met them, never signed a retainer agreement and never paid any fees. Doc. 223 Exh. 24 at 18, 23-24. She refused to answer questions about conversations with her husband, Jerry Lathan, concerning the lawsuits. *Id.* at 21. Percy Johnson never met his lawyers, never received any court documents and did not know how the lawsuit ended. Doc. 223 Exh. 25 at 8-16.

who, as a practical matter, were the real parties in interest.

The *Gustafson* brief also curiously includes in its section on tactical maneuvering, at pages 27-33, an extended argument contending that the "Alabama Republican Party" did not control the *Montiel* and *Rice* lawsuits and does not now control *Gustafson*. This appears to have less to do with tactical maneuvering than it is a back door attempt to transport the requirement of "control" into virtual representation theory. (A shorter section on the control theory of privity appears at pages 56-59 of the *Gustafson* trial brief.) Their argument relies in particular on *Perez-Guzman v. Gracia*, 346 F.3d 229 (1st Cir. 2003), a case that applied not the federal law of privity but the civil code of Puerto Rico, which requires "the most perfect identity between the things, causes, and persons of the litigants, and their capacity as such." 346 F.3d at 234. *Perez-Guzman* concerned a new political party's attempt to gain ballot access. The party in its own name had lost an earlier action in Commonwealth court challenging Puerto Rico's onerous voter petition demands, and a parallel federal court action by the same party members who controlled the Commonwealth court action had been dismissed on *res judicata* grounds. *Id*. at 232-33. When a new party member, who had not participated in the earlier suits, filed another action in federal court, the *res judicata* defense was rejected, because, under Puerto Rico law, it "depended on a combination of two factors: the plaintiffs were members of the Party *and* they controlled its conduct of the litigation." *Id*. at 234 (emphasis in original). In citing *Perez-Guzman*, the *Gustafson* plaintiffs engage in a little more tactical maneuvering by failing to point out that, in this Circuit, the virtual representation theory of privity does not require proof of control, and that

control is a separate way to demonstrate privity.[13] For example, there was no contention in *NAACP v. Hunt* that the plaintiffs who sued over the Confederate flag in 1988 were controlled by the same persons or organization who controlled Alvin Holmes[14] when he sued in 1975. 891 F.2d at 1558-59.

The G*ustafson* plaintiffs were virtually represented in the 2001 lawsuits because of their mutually aligned *interests*. Mutual control is not required. E.g, Doc. 234 at 34-35, 44-45. This is particularly true in repeated attacks on the same redistricting plans. No one contended in *Robertson v. Bartels*, 149 F.Supp.2d 443 (D. N.J. 2001) (3-judge court), *aff'd summarily*, 534 U.S. 1110 (2002), that the Republican plaintiffs had been controlled by the African-American plaintiffs who lost the earlier case challenging New Jersey's legislative redistricting plan. Nor were the competing factions of African-American aldermen and voters in *Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996), *cert. denied*, 520 U.S. 1166 (1997), being controlled by the same person or organization. Even in *Thompson v. Smith*, 52 F.Supp.2d 1364 (M.D. Ala. 1999) (3-judge court), where the prior state court action had been controlled by the same lawyer who controlled the *Thompson* plaintiffs, namely, Mark Montiel, the district court did not dismiss the *Thompson* plaintiffs' attempt to relitigate statewide claims against Alabama's legislative districts on grounds of common control, but because the *Rice* and *Thompson* plaintiffs had "identical or closely-aligned *interests*." 52 F.Supp.2d at 1369 (emphasis added). The *Gustafson* plaintiffs

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[13] The other case cited in this section, *Ethnic Employees of the Library of Congress v. Boorstin*, 751 F.2s 1405 (D.C. Cir. 1985), is another case that concerns private interests in employment, not public interests.

[14] This Court can take judicial notice of common knowledge that no one controls Alvin Holmes.

notably do not contend otherwise, because, if control of both lawsuits by Mr. Montiel justified claim preclusion in *Thompson*, it would warrant the same conclusion in *Gustafson*.

In any event, the *Gustafson* plaintiffs' argument that "the Party" did not control *Montiel* and *Rice* and is not controlling *Gustafson* misses the point of our contention that common control provides a separate basis for finding privity between the 2001 and 2005 plaintiffs. Hammett's trial brief argues that Mark Montiel and the same interlocking group of Republican activists and lawyers, not "the Party," control the instant action and controlled all the 2001 redistricting litigation. Doc. 234 at 44-45. The repeated references in the *Gustafson* brief to "the Party" ignores the uncontroverted evidence, summarized in Hammett's trial brief, Doc. 234 at 24 and n.14, that no one person or group, not even the State Chair or the State Executive Committee, speaks for all Republicans. In Marty Connors' words, there is a "big blob out there which may or may not represent the Republican Party." Doc. 224 Exh. 27 at 52-53. All these Republican elements may disagree on ideology, strategy, tactics and legal theories, but they share the same *interests* in redistricting. Doc. 226 Exh. 7 at 60.

Nevertheless, the *Gustafson* brief undercuts its own argument that "the Party" has not exercised any control over *Montiel* and *Gustafson* when it asserts that "Attorney Bert Jordan . . . represented the Party and the plaintiffs in the *Barnett* litigation." "The Party" was not a named plaintiff in *Barnett*. If Mr. Jordan represented "the Party" as well as the *Barnett* plaintiffs, it was because Marty Connors paid Jordan with State Executive Committee funds and "pulled the plug" on paying further fees after this Court invited Jordan to amend the *Barnett* complaint. French deposition, Doc. 224 Exh. 29 at 91-94. By that reasoning, at some point in time, when Connors paid Mark Montiel $1,500, Mr. Montiel also was representing "the Party." Certainly, Mr.

Montiel represents "the Party" in *Gustafson*, (1) because the amended complaint alleges that "[t]he state legislative redistricting plans and the individual districts contained therein constitute intentional discrimination against the Republican Party, its members and other citizens who it may support as candidates," Doc. 9-1, ¶ 136, and (2) because the 21st Century Foundation that is paying the *Gustafson* plaintiffs' lawyers was created and is managed by Republican Vice Chairman Jerry Lathan, and Marty Connors acknowledged soliciting contributors from the business community when he was still Chairman, because "the Republican Party cannot do it alone." Doc. 150 Exh. 57; Doc. 224 Exh. 27 at 68-69.

The *Gustafson* brief finishes off the section on tactical maneuvering by re-emphasizing its mistaken reliance on due process principles governing private interests, as opposed to public interests. It faults the defendant state election officials and intervenors for filing answers in *Montiel* and *Rice* that contained standard denials of the plaintiff class allegations in those two complaints. Doc. 238 at 35-39. The State, they say, had nothing to lose by admitting the class allegations, because a win for the plaintiffs "would have inured to the benefit of the *Gustafson* plaintiffs regardless of class certification," while a win for the defendants "would have bound all future, similarly situated plaintiffs." *Id*. at 36-37.

The first thing to note about this abortive attempt to turn the tables on the defendants is the continuing misplaced reliance on privity principles that must be applied to private interests: the *Gustafson* plaintiffs would have this Court ignore controlling Eleventh Circuit precedent and hold that the only citizens who can be barred from filing yet another lawsuit attacking the same redistricting plans are those who either were certified as members of a class or to whom the lawyers and plaintiffs in the earlier suit were legally accountable.

The second thing to note is the *Gustafson* plaintiffs' concession that they are pursuing the same interests and seeking the same relief as were the *Montiel* and *Rice* plaintiffs. *Id*. at 36-37. Notwithstanding this identity of interests, the *Gustafson* plaintiffs argue, they are not bound by the earlier judgments solely because no classes were certified. In other words, by limiting privity to certified class members, they would render the doctrine of virtual representation an empty letter.

The third thing to note is that the *Gustafson* plaintiffs' amended complaint itself contains no class allegations. They purport to seek relief only for themselves. If this Court were to accept the *Gustafson* plaintiffs' invitation to read the principles governing the virtual representation of public interests out of the law of privity, a loss on the merits for the *Gustafson* plaintiffs, who admit their interests are aligned with the interests of the prior litigants, could not preclude still another lawsuit challenging Alabama's House and Senate districts. This truly is tactical maneuvering.

V. THE *GUSTAFSON* PLAINTIFFS' INTERESTS WERE ADEQUATELY REPRESENTED IN *MONTIEL* AND *RICE*.

The *Gustafson* trial brief, at pages 40-47, bases its contention that the *Gustafson* plaintiffs were not adequately represented by the 2001 plaintiffs on two flawed arguments. First, they renew the argument in their earlier briefs that the *Montiel* and *Rice* plaintiffs did not represent their interests because they relied on theories of racial discrimination instead of partisan discrimination. We have already shown that controlling case law rejects the distinctions based on legal theories rather than on common interests. E.g., Doc. 234 at 40.

Second, they argue that the *Montiel* and *Rice* plaintiffs lacked standing to assert the

claims of those *Gustafson* plaintiffs who reside in different House or Senate districts, and thus could not adequately represent their interests. This standing contention is simply wrong. The amended complaint alleges only statewide claims, not district-specific claims. Even the partisan gerrymandering and First Amendment claims are based on the alleged systematic overpopulation of suburban, Republican districts, not on any district-specific boundary manipulations or splitting of particular political subdivisions.

Since the one-person, one-vote doctrine was first announced in *Reynolds v. Sims*, 377 U.S. 533 (1964), any plaintiff residing in an overpopulated district has been deemed to have standing to attack the entire plan. Thus, in *Thompson v. Smith*, there was no problem of standing that prevented the three-judge court from precluding the *Thompson* plaintiffs' one-person, one-vote claims, whether based merely on arithmetic or on impermissible racial motives:

> The vote-dilution claims in state and federal court allege that the defendants intentionally underpopulated the majority-black districts and overpopulated the majority-white districts in the current redistricting plan for the purpose of diluting white voting strength in violation of the equal protection clause of the fourteenth amendment. Like the one-person-one-vote claims, the vote-dilution claims in both cases arise out of the formation of the state's current redistricting plan. The vote-dilution claims, however, would require proof of racial motivation. *The vote-dilution claims would nevertheless be subject to the same proof in federal court as they were in state court and are identical in substance for purposes of res judicata*; in other words, the plaintiffs in both state and federal court would arguably prove their claim by showing that *a district any where in the State* had been intentionally created with an underpopulated black majority so as to dilute white voting strength.

52 F.Supp.2d at 1371 (emphasis added).

Only the *Thompson* plaintiffs' district-specific racial gerrymander claims were not barred, because John Rice and his mother lacked standing to assert such claims in districts where they did not reside. The fundamental basis of racial gerrymander claims under the *Shaw v. Reno*, 509

U.S. 630 (1993), line of cases is that drawing particular district boundaries for the purpose of separating black voters from white voters causes both sets of voters to "suffer the 'special harms' associated with 'personally be[ing] subjected to a racial classification' under the redistricting plan." *Thompson v. Smith*, 52 F.Supp.2d at 1371 n.10 (*quoting* United States v. Hays, 515 U.S. 737 (1995)). *Hays* holds that no plaintiff can allege that he or she has been subjected to such a personal racial classification unless he or she resides in the particular district allegedly drawn for the predominant purpose of including voters belonging to the racial minority. *Accord*, *Sinkfield v. Kelley*, 531 U.S. 28 (2000).

The *Gustafson* plaintiffs assert no *Shaw* claims in this action, obviously because none of them resides in a majority-black district and cannot contend that he or she personally has been classified on the basis of race. If their amended complaint did allege that a particular district's boundaries had been manipulated in a particular way for the predominant purpose of including Republican voters – as opposed to white voters, it would fail to state a claim upon which relief can be granted. *Vieth v. Jubelirer*, 541 U.S. 267 (2004). But even if there were a partisan gerrymander claim recognized by the Supreme Court, it necessarily would be statewide in nature, and one plaintiff would have standing to represent his party's voters in every district.

> In equal protection claims based on partisan gerrymandering, the allegation is that an identifiable political group has had its political voice silenced through the drawing of elective district lines. Although this involves, to a certain extent, manipulation of individual district lines, the injury is done to the entire identifiable political group. The constitutional injury lies not in inequality among various individual districts, but rather in the configuration of the districts as a whole when they serve to disadvantage a certain class of voters. Therefore, unlike a claim for race-based gerrymandering, a plaintiff in a partisan gerrymandering claim need not allege that he lives in a particular district that has been gerrymandered on the basis of political affiliation.

Vieth v. Pennsylvania, 188 F.Supp.2d 532, 540 (M.D. Pa.), *appeal dismissed*, 537 U.S. 801 (2002) (3-judge court). As this passage from the first *Vieth* opinion explains, a partisan gerrymandering claim differs from a racial gerrymandering claim in that a partisan claim is not based on an impermissible classification of the individual voter, but on discrimination against party members as a class or group when the plan is viewed as a whole.[15] Obviously, there is nothing invidious about classifying voters based on party affiliation; otherwise party registration and party primary laws, candidate identification with parties and ballot identification of parties would be unconstitutional. Indeed, the entire American system of representative democracy would be called into question (at least as it has developed since the election of President Jackson in 1828). The law is clear, and this Court is not required to re-examine American history to conclude that no standing issues prevent the *Gustafson* plaintiffs' claims from being precluded by the judgments in *Montiel* and *Rice*.

CONCLUSION

The *Gustafson* plaintiffs have deployed a number of erroneous and inconsistent legal arguments in an attempt to avoid preclusion of their claims in circumstances where they admit they are seeking the same relief with respect to the House and Senate plans as the plaintiffs in

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[15] Justice Stevens' dissenting opinion in the last *Vieth* decision, *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Stevens, J., dissenting), proposed extending the *Hays* standing rule to partisan gerrymandering claims: "Because *Hays* has altered the standing rules for gerrymandering claims--and because, in my view, racial and political gerrymanders are species of the same constitutional concern--the *Hays* standing rule requires dismissal of the statewide claim." *Id*. at 327 (footnote omitted). But no other member of the Court joined Justice Stevens in this view about standing. *E.g.*, 541 at 292 (plurality opinion) ("Though he reaches that result via standing analysis, *post*, [at 327] (dissenting opinion), while we reach it through political-question analysis, our conclusions are the same: these statewide claims are nonjusticiable."). The standing rule in *Vieth I* is still binding precedent.

Montiel v. Davis and *Rice v. English* sought. They are represented by the same lawyer who represented the *Montiel* and *Rice* plaintiffs, and their lawsuit is being managed by the same party activists who funded or participated in *Montiel* and *Rice* and who funded or participated in the companion *Barnett* case, in which they deliberately passed up an invitation by this Court clearly to challenge the redistricting plans in 2001. The same interlocking group of lawyers and party activists have to one extent or another exercised control over all three of the 2001 lawsuits, the several attempts to involve the Alabama Supreme Court, and now this 2005 lawsuit. Under the doctrine of virtual representation, it is the identity of interests, not of plaintiffs or legal theories, that requires preclusion of further attempts to relitigate the same claims, particularly where those interests are public in nature, as opposed to private interests. The people of Alabama and their government are entitled to finality with respect to judgments declaring that their redistricting legislation complies with the Constitution and laws of the United States and Alabama.

Respectfully submitted this 21st day of March, 2006,

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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 on March 21, 2006, 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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