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

LIONEL GUSTAFSON, et al. Plaintiffs, v. ADRIAN JOHNS, etc., et al. Defendants, LOWELL BARRON and HENRY ("HANK") SANDERS, Movants, SETH HAMMETT, Movant, BOB RILEY, etc., Movant.	)	CIVIL ACTION NO. 1:05-cv-00352-CG-L THREE-JUDGE COURT

REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to this Court's Order of July 19, 2005 (No. 88), Nancy Worley, in her official capacity as Secretary of State of Alabama, a defendant in this action, for herself and on behalf of the 67 Probate Judges who are also named as defendants in their official capacities, submits this Reply to the Gustafson Plaintiffs' Response in Opposition (No. 101) to her Motion for Judgment on the Pleadings (Nos. 84, 85). For the reasons stated in Secretary of State Worley's Motion, her Memorandum in Support, and this Reply, this Court should overrule the Gustafson Plaintiffs' objection and grant Secretary of State Worley's Motion.

STANDARD OF PROOF

Secretary of State Worley disagrees with the Gustafson Plaintiffs' contention that any mixed conclusions of fact and law they have made are to be taken as true. Eleventh Circuit law is to the contrary. In *Gonzalez v. Reno*, 325 F. 3d 1228 (11th Cir. 2003), the Eleventh Circuit pointed out:

> [I]n reviewing a motion to dismiss, we need only accept "well-pleaded facts" and "reasonable inferences from those facts." *Oladeinde v. City of Birmingham*, 963 F. 2d 1481, 1485, (11th Cir. 1992). "[U]nsupported conclusions of law or mixed fact and law have long been recognized not to prevent a Rule 12(b)(6) dismissal." *Marsh v. Butler County*, 268 F. 3d 1014, 1036 n.16 (11th Cir. 2001).

325 F. 3d at 1235. Accordingly, this Court should view the Statement of Facts contained in the Gustafson Plaintiffs' Response with great caution.

FACTUAL BACKGROUND

In this case, the Gustafson Plaintiffs challenge the legislative redistricting plans that the Alabama Legislature adopted in 2002. Those plans were precleared by the United States Department of Justice, and survived a legal challenge in *Montiel v. Davis*, 215 F. Supp. 2d 1279 (S.D. Ala. 2002) (three-judge court).

In their Third Amended Complaint, the Montiel Plaintiffs alleged, among other things, that:

(a) The Legislature failed to comply with applicable one-person one-vote standards, Doc. 83, Exhibit 8 at *e.g.,* 31, 36, 34;

(b) The population deviations "were not based on legitimate considerations incedent to the effectuation of a rational state policy," *id*. at *e.g.,* 38, 40;

(c) "The systematic dilution statewide of individual votes was solely for an unconstitutional, irrational, and invidious policy or purpose and violates constitutional requirements of one-person, one-vote," *id*. at 32; *see also id.* at *e.g.,* 37, 38;

(d) The drafting of the plans served the interests of incumbents, *id*.;

(e) The Senate plan "unnecessarily splits counties, cities, towns, and voting precincts throughout the state and in the malapportioned districts," *id*. at *e.g.,* 38, 48-49, 52; and

(f) The House Plan "unnecessarily splits counties, cities, towns, and voting precincts throughout the state and in the malapportioned districts," *id*. at *e.g.,* 40-41, 46, 90, 54.

In their Complaint, as amended, the Gustafson Plaintiffs contend that the redistricting plans do not satisfy applicable one-person one-vote standards and that the population results in dilution of their voting strength. *See, e.g.,* No. 9 at ¶¶ 105, 107, 109, 112, 114, 115, 116, 135. They further allege that the plans did not result from "any effort to further a legitimate, consistently applied state interest . . . . " *Id*. ¶¶ 113, 118, 138 "(No legitimate redistricting criteria of any sort were used . . . ."). They also allege, albeit in conclusory fashion, that "cohesive communities of interest and political subdivisions" were fragmented. *Id.* at ¶ 134.

Given the Gustafson Plaintiffs' erroneous view of the treatment of mixed questions of fact and law, this Court should make its own review of the record in *Montiel v. Davis*. That review will show not only a similarity in the allegations, but also indicate a reliance on similar evidence.

GENERAL CONSIDERATIONS

In this portion of her Reply, Secretary of State Worley will respond to the Gustafson Plaintiffs' characterization of the General Considerations included in her memorandum in support of her motion for summary judgment. Doc. 85, at 8-9.

The Secretary of State reiterates her objection to the Gustafson Plaintiffs' suggestion that an overall population deviation of ± 5% in a legislative redistricting plan is "in and of itself . . . , whether a starting point or goal, . . . unconstitutional." Doc. 9 at 35, ¶ 107. Rather, state legislative redistricting plans with an overall deviation of less than 10% are viewed to have only "minor deviations" from one-person, one-vote standards. *See Brown v. Thomson*, 462 U.S. 835, 842-43, 103 S. Ct. 2690, 2696 (1986). In *Montiel v. Davis*, 215 F. Supp. 2d 1279 (S.D. Ala. 2002), a three-judge panel of this Court explained:

> The 10% *de minimis* threshold recognized in *Brown* does not completely insulate a state's districting plan from attack of any type. Instead, that level serves as the determining point for allocating the burden of proof in a one person one vote case. A maximum deviation of greater than 10% automatically establishes a *prima facie* violation of the one person one vote principle . . . . On the other hand, if the maximum deviation is less than 10%, the population disparity is considered de minimis and the plaintiff *cannot rely on it alone* to prove invidious discrimination or arbitrariness.

215 F. Supp. 2d at 1286 (emphasis added) (quoting *Daly v. Hunt*, 93 F. 3d 1212, 1220 (4th Cir. 1996)). Put differently, a plaintiff challenging a legislative redistricting plan with an overall deviation less than 10% must show something in addition to the deviation. *See id.* More particularly, "[t]o survive summary judgment, the plaintiff would have to produce further evidence to show that the apportionment process had a 'taint of arbitrariness or discrimination.'" *Montiel v. Davis*, 215 F. Supp. 2d at 1286 (quoting *Daly v. Hunt*, 93 F. 3d at 1220, in turn quoting *Roman v. Sincock*, 377 U.S. 695, 710, 84 S. Ct. 1449, 1458 (1964)). Accordingly, such a deviation is not, "in and of itself," unconstitutional.

Indeed, for deviations below 10%, the State is entitled to the benefit of a rebuttable presumption "that the apportionment plan was the result of an 'honest and good faith effort to construct districts . . . as nearly of equal population as is practicable'" *Montiel v. Davis*, 215 F. Supp. 2d at 1286 (quoting *Daly v. Hunt*, 93 F. 3d at 1220) (itself quoting *Reynolds v Sims*, 377 U.S. 533, 577, 84 S. Ct. 1362, 1390 (1964)).

The Gustafson Plaintiffs' reading of *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.) (three-judge court), *aff'd,* 542 U.S. ___, 124 S. Ct. 2806 (2004), to the contrary is unconvincing. At the outset, Secretary of State Worley reiterates her view that the decision of the three-judge court in *Larios* is factually and legally distinguishable. The Gustafson Plaintiffs err in placing great weight on the concurring opinion of Justices Stevens and Breyer; those Justices speak only for themselves and not inconsistently with Secretary of State Worley. Secretary of State Worley has not suggested that "for population deviations of less than 10%, . . . districting decisions could be made for any reason whatsoever." *Cox v. Larios,* 124 S. Ct. at 2808 (Stevens & Breyer, J. J., concurring).

In addition, the Gustafson Plaintiffs suggest that, when they alleged that plans with smaller population deviations could have been drawn, they meant only that "the Legislature had the capability to draw plans at lower population deviations and did not do so." No. 102 at 13. So clarified, the suggestion remains irrelevant. "The possibility that a more equipopulous apportionment plan could have been drawn does not, standing alone, establish a one-person-one-vote violation." *Montiel v. Davis*, 215 F. Supp. 2d at 1288 (citing *Daly v. Hunt*, 93 F. 3d at 1221). Rather, any attempt to rely on "alternative plans as evidence of improper motive is unavailing." *Montiel v. Davis*, 215 F. Supp. 2d at 1288. That is because redistricting is not a

beauty show; the question is whether the plan is constitutional, not whether it is the best that could have been drawn or better than the plan that was adopted.

ARGUMENT

I. Plaintiffs' Claims Are Barred by the Decision in *Montiel v. Davis.*

With respect to res judicata, the Gustafson Plaintiffs contend that the defense does not apply because they are not in privity with the Montiel Plaintiffs and their claims are different.[1] Secretary of State Worley disagrees with these contentions and will address those elements in reverse order.

1. The cause of action are the same.

The Gustafson Plaintiffs' contention that their causes of action and those of the Montiel Plaintiffs are not the same lacks merit. They assert that they make a political gerrymandering claim while the Montiel Plaintiffs make a racial gerrymandering claim, but nowhere explain why the Montiel Plaintiffs could not, themselves, have made political gerrymandering claims. After all, each of the Montiel Plaintiffs had to live in an overpopulated district to pursue a one-person-one-vote claim. *See generally* Doc. 85, Exhibit 8. A cause of action for political gerrymandering existed in 2002, albeit with a different standard and would have represented just another legal theory "arising out of the same nucleus of operative fact." *NAACP v. Hunt*, 891 F. 2d 1555, 1561 (11th Cir. 1990).

Ragsdale v. Rubbermaid, Inc., 193 F. 3d 1235 (11th Cir. 1999), is not to the contrary. In *Ragsdale*, the Eleventh Circuit recognized the proposition that "[r]es judicata bars the filing of claims which were raised or could have been raised in an earlier proceeding." 193 F. 3d at 1238.

[1] The Gustafson Plaintiffs do not contend that the first two elements of res judicata have not been satisfied.

Furthermore, in pointing out that the court must examine the substance of the actions, not their form, the court continued:

> It is now said, in general, that if a cases arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, that the two cases are really the same 'claim,' 'or 'cause of action' for purposes of res judicata.

Id. at 1239 (quoting *Citibank, N.A. v. Data Lease Financial Corp*., 904 F. 2d 1498, 1503 (11th Cir. 1990)). In *Ragsdale*, the court affirmed the entry of summary judgment against a qui tam plaintiff on res judicata grounds on the ground that a previous retaliatory discharge judgment arose from the same nucleus of operative fact.

The same conclusion holds in this case. The Montiel Plaintiffs alleged that the State acted unconstitutionally when it enacted legislative redistricting plans with an overall deviation of less than 10% that were the product of racial gerrymandering. The Gustafson Plaintiffs attack the same plans, the same legislative state of mind, and the same population deviations, albeit against a backdrop of alleged political gerrymandering. As in *Ragsdale*, the challenged conduct involve, the same "time, space, and origin" and will involve the same witnesses. Accordingly, the fourth element of res judicata is met.

2. Binding the Gustafson Plaintiffs with the judgment against the Montiel Plaintiffs does not offend due process.

Notwithstanding the Gustafson Plaintiffs' denial that they are in privity with the Montiel Plaintiffs and their contention that they were not virtually represented in *Montiel v. Davis*, the result in *Montiel v. Davis* is binding on the Gustafson Plaintiffs. In *Thompson v. Smith,* 52 F. Supp. 2d 1364 (M.D. Ala. 1999), a three-judge federal district court sitting in the Middle District of Alabama noted:

> Alabama law defined "identity of the parties" broadly—as broadly as due process allows. The key is whether the interests of the party against whom res judicata is asserted were adequately represented by a party to the prior lawsuit. When the party against whom res judicata is asserted was not a party to the prior lawsuit, however, the court must undertake a further inquiry to determine whether the application of res judicata would offend the due process guarantees of the fourteenth amendment to the United States Constitution.

52 F. Supp. 2d at 1369 (citations omitted). In *Thompson,* the court held that a judgment against state-court plaintiffs who pursued a challenge to the State's legislative redistricting plans could be binding on federal plaintiffs provided the same claims were made. *Id*. at 1370.

As noted previously, *Robertson v. Bartels*, 148 F. Supp. 2d 443 (D.N.J. 2001) (three-judge court), *aff'd*, 534 U.S. 1110, 122 S. Ct. 914 (2002), also establishes that res judicata (claim preclusion) may properly be applied to the Plaintiffs in this case. Plaintiffs spend a great deal of time arguing that they are not in privity with the plaintiffs in *Montiel v. Davis* and, thus, should not be bound by that decision. *Robertson v. Bartels*, relying on the doctrine of "virtual representation," shows otherwise. *See id.* at 448–53.

The Supreme Court summarily affirmed the judgment in *Robertson v. Bartels*. In *Mandel v. Bradley*, 432 U.S. 173, 97 S. Ct. 2238 (1977) (*per curiam*), the Court described the precedential effect of summary affirmances as follows:

> *Hicks* v. *Miranda*, 422 U.S. 332 (1975), held that lower courts are bound by summary actions on the merits by this Court, but we noted that "(a)scertaining the reach and content of summary actions may itself present issues of real substance". *Id.*, at 345 n. 14. *Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below.*
>
> > "When we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument." (Footnote omitted.) *Fusari* v. *Steinberg*, 419 U.S. 379, 391–392 (1975) (Burger, C. J., concurring).

> *Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They . . . prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.*

432 U.S. at 176, 97 S. Ct. at 2240 (emphasis added).

To determine the "reach and content" of the Supreme Court's summary affirmance in *Robertson v. Bartels*, this Court must look not only to the three-judge district court's opinion, but to the appellants' statement of jurisdiction as well, in order to determine "the specific challenges presented in the statement of jurisdiction" that were "without doubt reject[ed]" as a result of the summary affirmance. Attached as Exhibit 9 is a copy of the appellants' Jurisdictional Statement from *Robertson v. Bartels*. The Court should note that the fifth question presented by the appellants related to the three-judge district court's res judicata holding:

> 5. Does a redistricting challenge based on minority voter dilution claims brought the day following enactment and which are tried and decided within 20 days thereafter preclude the hearing of Equal Protection claims brought by other plaintiffs 16 days after enactment?

Jurisdictional Statement i, *Robertson v. Bartels*, 534 U.S. 1110, 122 S. Ct. 914 (2002) (No. 01-721). The *Robertson* appellants' argument challenging the three-judge court's ruling on res judicata is found at pages 22–25 of their Jurisdictional Statement.

Although the *Robertson* appellants argued that res judicata was improper because (i) none of the *Robertson* plaintiffs were parties to the earlier *Page* redistricting case,[2] (ii) none of the *Robertson* plaintiffs were in privity with the parties in *Page*, and (iii) none of the Robertson

[2] This was a disputed point, for the Appellees noted that "two of the appellants—Senator Robertson and Assemblyman Zecker—were in fact named as parties in *Page*, as the *Page* plaintiffs included all Republican members of the State Senate and the Assembly, named collectively." Mot. to Dismiss or Affirm 27, *Robertson v. Bartels*, *Robertson v. Bartels*, 534 U.S. 1110, 122 S. Ct. 914 (2002) (No. 01-721); *see also id.* at 8 & n.3; 148 F. Supp. 2d at 446 n.1.

plaintiffs "had any control over the decisions made by the *Page* teams," *id.* at 23, the Supreme Court "reject[ed] the[se] specific challenges," *Mandel*, 432 U.S. at 176, 97 S. Ct. at 2240. The Court likewise rejected the appellants' argument that their claims were different from the earlier plaintiffs' claims because they were based on different legal theories and would require different proofs, Juris. Statement at 23, and their argument that applying res judicata would unfairly "sideline" aggrieved parties, *id.* *Robertson v. Bartels* thus supports the application of res judicata to plaintiffs (and their attorneys), like those in this case, who seek a "second bite at the apple" in redistricting litigation based on arguments that they could and should have made in prior litigation.

A second bite at the apple is precisely what is presented in this case. The Gustafson Plaintiffs would have gained if the Montiel Plaintiffs had won, but seek not to be bound by their loss. One of the Gustafson Plaintiffs' attorneys chose not to bring a political gerrymandering claim in *Montiel v. Davis*, thereby showing a degree of tactical maneuvering. Indeed, redistricting cases are frequently and substantially lawyer-driven. Finally, the State is entitled to a measure of peace. If the Gustafson Plaintiffs do not prevail, new plaintiffs may appear to respond to the defendants' showing and the court's rationale.

II. The Gustafson Plaintiffs Have Failed To State a Cognizable Political Gerrymandering Claim.

In her Motion, Secretary of State Worley pointed to the Gustafson Plaintiffs' factual allegations and showed how, taken together, they failed to state a cognizable claim for relief. The Gustafson Plaintiffs assert that this relates to what they must prove, not what they must allege. Secretary of State Worley disagrees.

In order to survive dismissal, a complaint must allege facts that, if proven, would entitle the plaintiff to judgment in his or her favor. In her Memorandum, Secretary of State Worley

showed that the factual assertions put forward by the Gustafson Plaintiff were not enough, even if proven, to entitle them to relief. The Gustafson Plaintiffs cannot cure this deficiency by pointing to conclusory allegations that the Democratic Party used classification by party in an invidious manner; that the legislature fragmented communities of interest; the fragmentation diluted the Plaintiffs' voting rights, and "no legitimate redistricting criteria of any sort were used by the legislature in crafting state legislative plans." Doc. 102 at 24.[3] Rather, the Gustafson Plaintiffs must provide a set of facts that, if proven, would entitle them to relief.

More generally, the Gustafson Plaintiffs offer this court "a pig in a poke" with their political gerrymandering claim. They are not sure what standard applies and, likewise, not clear on what proof they would offer. Defendants should not be required to defend against a claim articulated in this fashion.[4] Alternatively, because the facts alleged would not establish a violation, if proven, this Court should dismiss the Gustafson Plaintiffs' political gerrymandering claims.

CONCLUSION

For the reasons stated in Secretary of State Worley's Motion for Judgment on the Pleadings, her Memorandum in Support, including its Exhibits, and this Reply, this Court should grant Secretary of State Worley's Motion and dismiss the Amended Complaint.

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[3] The last assertion is hard to square with *Montiel v. Davis*, where the three-judge court quoted the Guidelines and concluded that the Montiel Plaintiffs "failed to offer evidence, either direct or circumstantial, which establishes to any degree that the Alabama Legislature subordinated traditional race-neutral principles such as those set forth in Section IV of the Guidelines to racial considerations in violation of the Fourteenth Amendment." 215 F. Supp. 2d at 1283.

[4] In the alternative, Secretary of State Worley suggests that, if dismissal is not appropriate, this Court direct the Gustafson Plaintiffs to provide a more definite statement of their political gerrymandering claim, identifying the legal standard on which they rely and the evidentiary showing they intend to make to satisfy that standard with specificity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of August, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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