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.	§	
	§	

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

COME NOW PLAINTIFFS in the above-styled case ("Plaintiffs"), and, for their Response in Opposition to Defendants' Motion for Judgment on the Pleadings and motion to dismiss "Defendants' Motion"), show the Court as follows:

I. STATEMENT OF THE CASE

Plaintiffs are nineteen Alabama voters who brought this action to remedy violations of their constitutional rights. (Complaint, ¶¶ 1, 2, 8-26). In their First Amended Complaint ("Complaint"), Plaintiffs contend that the redistricting plans currently in place for the Alabama State Senate and House of Representatives ("state legislative plans") violate the Fourteenth Amendment to the United States Constitution in that the plans: (1) deny Plaintiffs the guarantee of one person, one vote and (2) constitute illegal partisan gerrymandering Complaint, ¶1, Counts I and II. Additionally, Plaintiffs' Complaint alleges violation of their First Amendment right of freedom of expression and association. Complaint, ¶1, Count III. Plaintiffs ask this Court to enter declaratory

judgment that the state legislative plans are unconstitutional, to enjoin their further use, and, if necessary, to impose interim, court-drawn plans.

Defendants are Alabama's election officials who would be enjoined from conducting further elections under the state legislative plans if those plans are struck down by this Court. Defendants have moved for judgment on the pleadings and for dismissal for failure to state a claim. For the reasons set forth below, Defendants' Motion should be denied.

II. STANDARD FOR DETERMINING MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION TO DISMISS

The standard governing the Court's determination of a motion for judgment on the pleadings and a motion to dismiss for failure to state a claim are virtually the same. The motions may be granted only when there are no material facts in dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts. *Hawthorne v. Mac Adjustment, Inc.* 140 F.3d 1367 (11th Cir. 1998) citing *Bankers Ins. Co. v. Florida Residential Property and Cas. Joint Underwriting Ass'n*, 137 F.3d 1293, 1295 (11th Cir. 1998). A complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Slagle v. ITT Hartford*, 102 F.3d 494, 497 (11th Cir. 1996) quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957) and citing *Hartford Fire. Ins. Co. v. California*, 509 U.S. 764, 811, 113 S.Ct. 2891, 2916-17, 125 L.E.2d 612 (1993)).

In deciding motions for judgment on the pleadings and for dismissal for failure to state a claim, a court must accept the facts in the complaint as true and view them in a light most favorable to the non-moving party. *Hawthorne* 140 F.3d at 1370 citing *Ortega*

v. Christian, 85 F.3d 1521 (11th Cir. 1996). "[T]he court must treat the complaint's factual allegations - including mixed questions or law and fact – as true and draw all reasonable inferences therefrom in plaintiff's favor." *Collett v. Socialists Peoples' Libyan Arab Jamahiriya*, 362 F.Supp.2d 230 (D.C. Cir. 2005), citing *Macharia v. U.S.*, 334 F.3d 61, 64, 67 (D.C.Cir. 2003)(emphasis added); *Holy Land Found. for Relief & Development v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003). While a court need not accept as true inferences which are not supported by facts set out in the complaint, *Collett*, 362 F.Supp at 238 (emphasis added), all facts and all mixed allegations of law and fact supported by facts set out in the complaint must be accepted as true and construed liberally, granting Plaintiffs the benefit of all inferences that can be derived from the facts alleged.

In *Joyce v. Joyce Beverages, Inc.*, 571 F.2d 703, 707 (2nd Cir. 1978), the Second Circuit discussed the treatment of mixed allegations of law and fact on a motion to dismiss. The *Joyce* plaintiffs alleged that they exchanged their common stock in four bottling companies based on statements made in an exchange offer. Plaintiffs claimed the exchange offer omitted and misstated material facts with intent to defraud them. On the motion to dismiss, the court considered whether plaintiffs could prove any set of facts that, if disclosed, would have been considered by the reasonable shareholder to have "significantly altered the 'total mix' of information made available." *Joyce*, 571 F.2d at 707. Quoting from the Supreme Court's opinion in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976), the court concluded that plaintiffs' allegations that material facts were omitted and misstated – a mixed question of law and fact – must be accepted as true and must be read in the manner most favorable to them: "This is

especially true when dealing with questions of materiality which, since they are 'mixed questions of law and fact,' require delicate assessments of the inferences a "reasonable shareholder" would draw from a given set of facts and the significance of those inferences to him, and these assessment are peculiarly ones for the trier of fact." *Joyce*, 571 F.2d at 709.

In denying the defendant's motion to dismiss, the *Joyce* court ruled:

> Of course, we intimate no views on the merits of this case. It may develop that plaintiffs cannot demonstrate to the trier of fact that the reasonable shareholder would have been misled. It may develop, once discovery has begun, that the plaintiffs actually knew or could not have cared less about the very facts that they claim were misrepresented. **We stress only that the difficult question of materiality should not ordinarily be disposed of on a Rule 12(b)(6) motion.**

Joyce, 571 F.2d at 709(emphasis added).

In the case now before the Court, Defendants ask the Court to take judicial notice of the entire record of another case, and presumably facts in that record. If the Court were to do so, many material facts will be in dispute. Furthermore, assuming the Court accepted Defendants' unsupported allegation that there is privity among Plaintiffs and the *Montiel* plaintiffs, that issue is a material one of fact in dispute. The existence of the same precludes this Court from granting Defendants' Motion.

III. STATEMENT OF FACTS

On Defendants' motions for judgment on the pleadings and to dismiss for failure to state a claim, based on the authority cited above, the Court must accept as true the following facts:

Plaintiffs are nineteen Alabama voters who brought this action to remedy violations of their constitutional rights. (Complaint, ¶¶ 1, 2, 8-26). In their First Amended Complaint ("Complaint"), Plaintiffs contend that the redistricting plans currently in place for the Alabama State Senate and House of Representatives ("state legislative plans") violate the Fourteenth Amendment to the United States Constitution in that the plans: (1) deny Plaintiffs the guarantee of one person, one vote and (2) constitute illegal partisan gerrymandering Complaint, ¶1, Counts I, II. Additionally, Plaintiffs' Complaint alleges violation of their First Amendment right of freedom of expression and association. Complaint, ¶1, Count III. Plaintiffs do not state any claims based on race. Plaintiffs ask this Court to enter declaratory judgment that the state legislative plans are unconstitutional, to enjoin their further use, and, if necessary, to impose interim, court-drawn plans.

In the background facts set forth in their complaint, Plaintiffs describe the redistricting process in Alabama following the release of the 2000 Decennial Census. Complaint, ¶¶ 104-115. The Census results showed that (1) Alabama's population had increased overall and there had been shifts in the population among the state legislative districts;[1] (2) population of suburban counties significantly increased,[2] Complaint, ¶ 99; (3) population shifted from the urban to suburban areas of Alabama's large cities,

[1] This fact is conceded by Defendants. Answer, ¶ 97.

[2] Defendants concede that there had been population growth in Baldwin, Autauga, Elmore, Lee, Shelby, Blount, St. Clair, Cherokee, Chilton, Limestone, Morgan, and Marshall Counties. Answer, ¶ 99.

Complaint, ¶ 98 and (4) population declined in the black belt counties of central and west Alabama. Complaint, ¶ 100.

The population trends reflected in the 2000 Census noted above, had been in process for several decades. Complaint. ¶ 101. That trend was known to both the Alabama Legislature and then-Governor Siegelman during the 2001 redistricting process. Complaint. ¶ 101.

During the redistricting process, the State of Alabama enacted the redistricting plans for the state House and Senate. Complaint, ¶103. Based on the Census data discussed above, it appeared that the inner-city areas of Alabama's large cities and the smaller black belt counties would have fewer legislative seats, while the population in the suburban areas of the state would have more seats. Complaint, ¶ 104.

The Legislature had the technical capability to draw state legislative districts with minimal population differences; a fact amply demonstrated by the Legislature's drawing the Congressional plan at absolute population equality among the districts. Complaint, ¶107. Instead, the Democratic Governor and Democrat-controlled Legislature intentionally under-populated the urban areas of large cities and the rural black belt counties (generally Democratic), which were diminished and diminishing in population, and overpopulated the growing suburban area that were generally Republican. Complaint, ¶111. In so doing, the Legislature engaged in regional favoritism, which dilutes the voting power of those not in favored areas, including Plaintiffs, as the systematic and intentional overpopulation of perceived Republican-leaning districts also dilutes the voting strength of voters in those districts, including that of Plaintiffs. Complaint, ¶113).

In drawing the malapportioned districts, the Alabama Legislature made no honest good faith effort to construct legislative districts which were equal in population. Complaint, ¶107. Instead, the Legislature allowed itself plus or minus 5% variance from the ideal population.[3] Complaint, ¶107.

The resulting plans show adherence to that allowance. Based on the 2000 Census, the ideal size of a Senate district is 120,942 to 133,302 people, a difference of almost 13,000 or 9.73%. Complaint, ¶108. Of the 35 districts, 16 – almost half – are over or under populated by more than 4%. Complaint, ¶108.

The same pattern is seen in the state House plan. Under the 2000 Census, the ideal size of a state House district is 42,353 people. Complaint, ¶109. Under the House redistricting plan, the size of the districts range from 40,241 to 44,447 people, an overall difference of over 4,000 people or 9.93%. Complaint, ¶109. Of the 105 total districts in the House, 52 are overpopulated and 53 are under-populated, with 38 (over one-third) being over or under-populated by more than 4%. Complaint, ¶109.

The regional favoritism and population inequality among the districts was not the result of any effort to further a legitimate, consistently applied, state policy. Complaint, ¶113. In fact, alternative plans were available to the Legislature and can be drawn which; (1) have lowered population deviations, (2) applied legitimate state policies consistently and, (3) distributed seats geographically according to population figures.

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[3] Although in paragraph 107 of their Answer Defendants deny Plaintiffs' allegation that a standard of plus or minus 5% was used, in their Tenth Defense Defendants clearly concede that the Legislature used this very standard. (Answer, p. 32: "Tenth Defense: The Legislature's use of a population derivation of ± 5% was not unconstitutional.").

Complaint, ¶110. Instead of using the technology available and following its own guidelines, the Legislature arbitrarily and discriminatorily used the standard of plus or minus 5% population deviation to maintain districts in regions where the population did not warrant the same while correspondingly overpopulating suburban areas surrounding large cities and other fast-growing counties. Complaint, ¶¶ 116- 119.

The effect of the overpopulation of districts, including those where Plaintiffs reside, is to dilute and debase the weight of the votes of citizens living in the overpopulated districts. Complaint, ¶¶115, 116. Because of the growth trends in Alabama, the dilution and debasement of the voters' will be exacerbated throughout the decade. Complaint, ¶117. Thus, the size of the majority that will be denied to elect a Legislature of its choice will increase throughout the decade. Complaint, ¶117).

There are no legitimate, consistently applied state policies which justify the population deviation or regional favoritism. Complaint, ¶¶ 113, 118. In their pleadings, notably, Defendants do not claim otherwise: (1) In their Memorandum in Support of their Motion for Judgment on the Pleadings, Defendants state that they "do not know why the lines were drawn the way they were, they simply run elections using the lines others have established;" (Memorandum In Support of Motion for Judgment on the Pleadings, p. 2) (2) In their Answer, Defendants contend that "[t]he State's complying with Section 5 of the Voting Rights Act is a compelling State interest (Ninth Defense); that "[r]etaining experienced incumbent legislators and the redistricting criteria set for the guidelines . . . on reapportionment are valid, neutral redistricting principles. (Answer, Eleventh and Twelfth Defenses). However, Defendants do not assert that any of these resulted in the

population deviations, required illegal gerrymandering, or necessitated intrusion on First Amendment rights.

Plaintiffs desire to participate in the electoral and political processes on an equal basis with all Alabama citizens. Complaint, ¶128). Unless equally populated districts are established, the voters in under-populated districts will continue to be overrepresented, to the detriment of voters in over-populated districts. Complaint, ¶120).

Furthermore, Plaintiffs allege that they are the victims of illegal partisan gerrymandering, due to an effort on the part of the Democratic-controlled Alabama Legislature and then-Governor Siegelman to maintain or obtain more partisan political advantage for the Democratic voters. Complaint, ¶ 138. The right to equally apportioned districts was sacrificed for politics, to Plaintiffs' detriment. Complaint, ¶ 138. Due to the gerrymandering, the Republican Party – the party receiving majority of total votes in a relevant election including presidential and gubernatorial, among others – has failed to obtain a majority of the relevant seats in an election under the state legislative redistricting plans and will be prevented from doing so in the foreseeable future. Complaint, ¶ 138.

Plaintiffs have and will continue to suffer irreversible harm if elections continue to be held under the current plans. Complaint, ¶120. Plaintiffs have no adequate remedy at law, and thus must ask this Court to declare the plans unconstitutional, enjoin their use, and if the Legislature does not adopt lawful plans, impose interim plans Complaint, ¶121.

II. ARGUMENT AND CITATION OF AUTHORITY

Despite the above facts, which the Court must accept as true and construe in a light most favorable to the Plaintiffs, Defendants – the nonmoving parties – still

maintain that they are entitled to judgment on the pleadings under Federal Rule of Civil Procedure ("F.R.C.P.") 12(c) and that the Court should dismiss Plaintiffs' Complaint for failure to state a claim. Defendants claim that judgment on the pleadings should be entered because Plaintiffs' claims are *res judicata*, in whole or in part, based on *Montiel*. Plaintiffs rebut that argument at length below.

In a slight variation on the res judicata argument, Defendants contend that even if res judicata does not apply to bar Plaintiffs' case, *Montiel* requires the conclusion that Plaintiffs' one person, one vote claim lacks merit. Defendants argue that Plaintiffs should be required to show why the fact that the *Montiel* court found insufficient evidence to rebut the constitutionality of the plans "should not be binding as precedent." Defendants' Brief, p. 13. Of course, the burden is on Defendants, not Plaintiffs, to make that case. As discussed below, Defendants fail to do so.

Finally, Defendants argue that Plaintiffs have not, and in fact, cannot state a claim for political gerrymandering. That argument is based on Defendants' mistaken assumption that political gerrymandering claims are nonjusticiable and that Plaintiffs must prove their case at this stage.

By their motions, Defendants essentially ask this Court to import the *Montiel* record into this case, assume the case at hand is actually *Montiel*, and issue the same judgment. Defendants do not meet the requirements of Rule 12(c) for judgment on the pleadings. Neither the decision in *Montiel* nor Defendants' arguments as to the merits of Plaintiffs' claims entitle Defendants to the relief they seek.

Defendants concede that they must demonstrate that, after reviewing the facts in the Complaint as true and in light most favorable to Plaintiffs, there are no material facts

in dispute and Plaintiffs cannot prove any set of facts entitling them to relief. Instead of addressing the pleadings in this case, however, Defendants ask the Court to look at the pleadings in *Montiel v. Davis*, six letters between the State of Alabama and the United States Department of Justice regarding preclearance, and the reapportionment guidelines adopted by the Legislature in 2001. Defendants ask the Court to consider these documents; (1) as public records, (2) by taking judicial notice of them, or (3) to "prevent Plaintiffs from asserting facts outside their context."[4] Defendants' Brief, p. 7. The Court should not consider any of the exhibits provided by the Defendants nor the *Montiel* record as public records, by taking judicial notice or otherwise.

Plaintiffs dispute Defendants' contention that this Court should consider facts outside the record, whether as a matter of public record, by taking judicial notice, or as a means of "prevent[ing] the *Gustafson* Plaintiffs from asserting facts outside their context." Defendants' Brief, p. 7. The procedural mechanisms that Defendants seek to utilize – judgment on the pleadings and motion to dismiss for failure to state a claim – require the movant to show that <u>on the pleadings in the case at hand</u> (and any properly judicially noticed facts), the facts establish judgment as a matter of law for the movant. Defendants have failed to make that showing.

A. General Considerations

[4] Plaintiffs can only assume the last statement means that the Court should not consider Plaintiffs' stated facts without considering facts from other cases. However, as discussed below, on motions for judgment on the pleadings or to dismiss for failure to state a claim, the Court is prohibited from doing so.

In their Motion, Defendants set forth some "general considerations" in order to ensure that "the baselines for this Court's analysis are clear." Defendants' Brief, p. 8. Plaintiffs respond to those as follows:

First, Defendants contend that Plaintiffs are incorrect in alleging that the use of a plus or minus 5% standard in redistricting, whether as a goal or a starting point, is unconstitutional. Defendants' Brief, p. 8. Defendants then discuss the burden of proof in one person, one vote cases and conclude that "it is clear that the Alabama Legislature did not act improperly in using a plus or minus 5% deviation." Defendants' Brief, p. 8.

Plaintiffs do not dispute the burden of proof analysis. However, state legislatures are required to make an honest, good faith effort to draw equally apportioned districts. *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). Plaintiffs' claim here is that the Alabama Legislature did not do so.

Defendants' argument sounds in a "safe harbor" exception, which was rejected last year by both the United States Supreme Court and by the thee-judge panel in *Larios v. Cox*, 300 F. Supp. 1320 (N.D. Ga.), *aff'd*, *Cox v. Larios*, 542 U.S. ___, 124 S. Ct. 2806 (2004). In their concurring opinion, Justice Stevens and Breyer noted: "In challenging the District Court's judgment, appellant invites us to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than ten percent, within which districting decisions could be made for any reason whatsoever. The Court properly rejects that invitation." *Cox v. Larios*, 124 S. Ct. at 2808. In short, there is no safe harbor that Defendants imply and starting at a population deviation of plus or minus 5% or aiming at it is not constitutional.

Defendants also complain that Plaintiffs' allegation that plans with smaller deviations could have been drawn "is entitled to no evidentiary weight." Defendants' Brief, p. 9. Defendants imply that Plaintiffs assert that Congressional and state legislative plans are held to the same standard and that Plaintiffs seek to prove their case by showing plans with lower population deviations could have been drawn. Defendants' Brief, p. 9. Neither implication is correct. Plaintiffs' assertion is one of many in their Complaint and is meant to prove nothing more than it asserts: the Legislature had the capability to draw plans at lower population deviations and did not do so.

Having responded to those issues raised by Defendants, Plaintiffs turn to the substance of Defendants Motion.

1. In General, the Court Should Not Consider the Documents Attached to Defendants' Motion

Except as otherwise noted, this Court should not consider or take judicial notice of the documents attached to Defendants' Memorandum in Support of Motion for Judgment on the Pleadings. This is particularly so in that Defendants appear to ask the Court to consider or take judicial notice of the "facts" as stated in those documents. For example, Defendants attach the preclearance documents and then proceed to state, apparently as fact, their content. Defendants' Brief, p. 5.

a. <u>The Court should not consider the documents simply because the documents may be public records</u>

It appears that Defendants do not simply want the Court to consider the fact of the document or that a statement might be contained in it, but Defendants want the Court to accept those statements as fact. While a court might consider that a public document, required to be filed, contains a certain statement, the court's consideration does not

extend to consider that statement to be fact. *U.S. v. Jones*, 29 F.3d 1549 (11th Cir. 1994) (court may take judicial notice of a document filed in another court 'not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.'"); *Liberty Mut. Ins. Co., v. Rotches Pork Packers, Inc.*, 969 F.2d 1384 (2d. Cir. 1992) (public records and judicial pleadings are not judicially noticed for the truth for the matters stated therein but rather for the fact that they exist).

b. Judicial Notice is Not Appropriate

To their Memorandum in Support of Motion for Judgment on the Pleadings, Defendants attach the preclearance documents, the Guidelines and a copy of the Third Amended Complaint in *Montiel*. (Defendants' Brief, p. 3). Defendants request this Court to take judicial notice of these documents "to the extent necessary" and to take judicial notice of the record and proceedings in *Montiel*. Judicial notice of these documents and the *Montiel* record is neither proper nor necessary.

As discussed more fully in Plaintiffs' Responses in Opposition to Defendants two motions to take judicial notice, Defendants' motions for the same should be denied. In a nutshell, Defendants never identify what they are asking the Court to judicially notice with respect to the documents nor do they give any indication of the purpose for which they seek judicial notice. However, based on Defendants' Motion, it seems that Defendants ask the Court to consider everything in the documents as fact and determine that Plaintiffs' claims are barred.

While that argument would fail because neither the documents themselves nor the "facts" stated therein prove that an effort to comply with the Voting Rights Act or the Guidelines necessarily resulted in the population deviations or the districts being drawn

the way they were, the Court cannot take notice of the truth of the "facts" stated in the preclearance documents or the Guidelines, no matter what those facts might be. *U.S. v. Jones*, 29 F.3d 1549 (11th Cir. 1994) (court may take judicial notice of a document filed in another court 'not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.'"); *Liberty Mut. Ins. Co., v. Rotches Pork Packers, Inc.*, 969 F.2d 1384 (2d. Cir. 1992) (public records and judicial pleadings are not judicially noticed for the truth for the matters stated therein but rather for the fact that they exist). Whether Defendants are seeking judicial notice of the facts as stated in the preclearance documents or in the Guidelines or are seeking to use those facts to prove other facts, their request for judicial notice is improper. Under Federal Rule of Evidence 201(b), a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. None of the facts stated in the preclearance documents or in the Guidelines meets either test. To the extent that Defendants are attempting to use those facts to prove another fact, i.e., that a legitimate, consistently applied state interest that necessarily resulted in the malapportioned districts or their configurations, that assertion certainly does not meet the requirements of Rule 201.

Moreover, if Defendants are attempting to prove (1) the truth of facts stated in the preclearance documents or the Guidelines or (2) the truth of some other fact related to the facts in the documents, such as the reason for the population deviations or the configuration of the districts, then all Defendants manage to do is create a material dispute of fact that bars a judgment on the pleadings or the grant of their motion to

dismiss. *Hawthorne v. Mac Adjustment, Inc.* 140 F.3d 1367 (11th Cir. 1998) citing *Bankers Ins. Co. v. Florida Residential Property and Cas. Joint Underwriting Ass'n*, 137 F.3d 1293, 1295 (11th Cir. 1998) (on judgment on the pleadings, no material fact may be in dispute and the facts must be considered in the light most favorable to the nonmoving party); *Hartford Fire. Ins. Co. v. California*, 509 U.S. 764, 811 (1993); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Slagle v. ITT Hartford*, 102 F.3d 494, 497 (11th Cir. 1996) (motion to dismiss improper unless it appears that there is no set of facts under which plaintiff can prevail).

Plaintiffs have alleged that there was no legitimate, consistently-applied state policy that resulted in the population deviation or in the districts being drawn the way they were, and on Defendants' motions for judgment on the pleadings and to dismiss, the Court must accept that fact as true. The Court may not look outside the pleadings to find Defendants' version of the facts. Furthermore, even if the Court were to take judicial notice of facts in the preclearance documents, the Guidelines or the Third Amended Complaint, the Court would be left with disputes of material fact concerning the reasons for the deviations or the districts' configurations, which defeat Defendants' motions, both for judgment on the pleadings and to dismiss. *Hawthorne v. Mac Adjustment, Inc.* 140 F.3d 1367 (11th Cir. 1998); *Ortega v. Christian*, 85 F.3d 1521 (11th Cir. 1996).

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R.Evid. 201(b). Public records and judicial pleadings are not judicially noticed for the truth for the matters stated therein, but for the fact that

they exist. *Liberty Mut. Ins. Co., v. Rotches Pork Packers, Inc.*, 969 F.2d 1384 (2d. Cir. 1992). It is recognized that a "court may take judicial notice of a document filed in another court 'not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.'" *U.S. v. Jones*, 29 F.3d 1549 (11th Cir. 1994) quoting *Liberty Mut.* 969 at 1388. Accordingly, a court may take judicial notice of another court's order only for the limited purpose of recognizing the "judicial act" that the order represents or the subject matter of the litigation. *Jones* 29 F.3d at 1553 9citations omitted).

At most, the Court can take judicial notice of the (1) existence of the preclearance documents, the Guidelines and the Third Amended Complaint from *Montiel*, as well as the fact that a particular statement might be contained in those documents. The Court cannot consider any such statements to be true.

B. Neither Res Judicata Nor Collateral Estoppel Bar Plaintiffs' Claims

Federal law applies to Defendants' motion as "federal preclusion principles apply to prior federal decisions, whether previously decided in diversity or federal question jurisdiction." *CSX Transp., Inc. v. Brotherhood of Main. of Way Employees*, 327 F.3d 1309, 1316 (11th Cir. 2003). Res judicata can only be applied if all four of the following elements are present: (1) there is a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both cases. *EEOC v. Pemco Aeroplex, Inc.* 383 F.3d 1280 (11th Cir. 2004); *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1296 (11th Cir. 2001); *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235 (11th Cir. 1999).

In the Eleventh Circuit, collateral estoppel can apply only "when the parties are the same (or in privity) [and] if the party against whom the issue was decided had a full and fair opportunity to litigate the issue in the earlier proceeding." *In re Southeast Banking Corp.*, 69 F.3d 1539, 1552 (11th Cir. 1995) citing *Allen v. McCurry*, 449 U.S. 90, 95, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980); *In re St. Laurent*, 991 F.2d 672, 675 (11th Cir. 1993). If identity or privity of the parties cannot be established, then there is no need to examine the other factors in determining whether res judicata or collateral estoppel applies. *Pemco Aeroplex*, 383 F.3d at 1285.

1. Plaintiffs Are Not in Privity with the Montiel Plaintiffs

Plaintiffs argue the extent to which Plaintiffs are not in privity with the *Montiel* plaintiffs in their Brief in Opposition to Defendants Motion to Take Judicial Notice of the Records and Proceedings in *Montiel v. Davis* and Motion to Take Judicial Notice. It is clear from the pleadings filed in the present case that Plaintiffs are not in privity with the *Montiel* plaintiffs. In the event this Court, however, determines that privity between the parties does exist (which it does not), the next factor which must be met for res judicata to apply is whether the causes of action in the different cases are the same.

2. Plaintiffs and *Montiel's* Causes of Actions are not the Same

While there is clearly no privity between the parties in this case and *Montiel*, in the interest of caution, Plaintiffs will address the remaining elements of res judicata and collateral estoppel.

The principle test for determining whether causes of action are the same is whether the primary right and duty are the same in each case. *Ragsdale*, 193 F.3d 1235 (11th Cir. 1999). To determine whether the causes of action are the same, a court must

compare the substance of the actions, not their form. *Id.* at 1239 citing *Citibank, N.A. v. Data Lease Financial Corp.*, 904 F.2d 1498, citing *I.A. Durbin, inc. v. Jefferson Nat. Bank*, 793 F.2d 1541, 1549 (11th Cir. 1986). The court must therefore look to the factual issues to be resolved in this case and compare them with the issues explored in *Montiel. Ragsdale* 193 F.3d at 1240.

In *Montiel*, plaintiffs attempted to assert a one person, one vote claim under the Equal Protection Clause based on racial gerrymandering by the Alabama legislature when passing the Senate and House maps. However, the claim pled was not actually the claim litigated. In its order granting Defendants summary judgment, the Court stated "By couching his claim as a 'one man, one vote' challenge, Montiel effectively evaded potential problems regarding his standing to bring a racial gerrymandering claim. (Order dated July 8, p. 4, n.4).

Looking at the substance of the claim and not its form, the only claim substantively brought and litigated to final judgment in *Montiel* was a racial gerrymander claim. Granting Defendants' summary judgment, the court stated that plaintiffs "failed to proffer evidence, either direct or circumstantial, which established to any degree that the Alabama legislature subordinated race- neutral districting principles such as those set forth in Section IV of the Guidelines to racial considerations in violation of the Fourteenth Amendment." (Order dated July 8, 2002). In other words, the *Montiel* plaintiffs offered insufficient evidence to support their indirectly asserted racial gerrymander claim.

The claims in the present case are separate and distinct from the claim actually litigated in *Montiel.* Plaintiffs' assert the following claims: (1) violation of right to equal

protection of the laws - one person, one vote in Plaintiffs' House and Senate districts; (2) violation of right to equal protection of the laws - partisan gerrymander in Plaintiffs' House and Senate Districts; and (3) violation of First Amendment rights in Plaintiffs' House and Senate Districts. These claims are different causes of action than the cause of action litigated in *Montiel*, and most could not have been brought in *Montiel*.

While Plaintiffs' causes of action and the cause of action actually litigated in *Montiel* arise from the same legislative acts – the passing of the plans – the similarity ends there. The claims actually litigated and decided in *Montiel* are not the same as those being litigated in this case. The *Montiel* claims centered specifically on racial discrimination and gerrymandering in Senate Districts, 34, 22, 24, 28 and 5, and House Districts 101, 68, 70 83, 15 and 79. In contrast, Plaintiffs, who reside in Senate Districts 22, 7, 8, 2, 14, 3 and House Districts 95, 47, 24, 41, 18, 15, 51, 43, 46, 01, 27 and 79, seek relief for violations of the one person, one vote guarantee, illegal partisan gerrymandering and denial of their First Amendment rights. There is no racial discrimination or gerrymandering claim asserted. The Court's inquiry must focus in each case on the facts and occurrences that underlie and support the plaintiffs' requests for relief and not on the specific arguments set for by plaintiffs in each case. *Robertson v. Bartels* 148 F.Supp. 2d 443 (DC N.J. 2001). Thus, the claims in each case are not the same and the fourth factor required for res judicata therefore is not satisfied.

Further, none of the *Montiel* plaintiffs could have brought any of Plaintiffs' claims which assert violation of federal law with regard to Senate Districts 7, 8, 2, 14 and 3, and House Districts, 95, 47, 24, 41, 18, 51, 43, 46, 01 and 27, because none lived in

any of these districts. Thus, the claims asserted by Plaintiffs are not the same claim as that actually litigated in *Montiel*.

Defendants cite *Robertson* in support of their contention that the claims in each case are the same. *Robertson*, however, is clearly distinguishable from the facts at issue. In *Robertson*, the complaints in both cases centered on "one specific area of the [redistricting] plan, namely the 'unpacking' of Essex County, specifically the former District 27, by moving a substantial portion of the African-American population of that district to a new District 34." Both sets of plaintiffs also sought the same remedy – the restoration of voting districts resembling the former District 27 and District 34. In other words, the two cases in *Robertson* involved the same two districts, Districts 27 and 34, and both sets of plaintiffs sought identical relief. In contrast, Plaintiffs' complaint involves 11 House Districts and five Senate Districts never at issue in *Montiel.*

The doctrines of res judicata and collateral estoppel do not apply to this case, and Defendants' motion must be denied. Plaintiffs agree that *Montiel v. Davis* resulted in a final judgment on the merits of the claims actually litigated, which were racial discrimination and racial gerrymander claims. Plaintiffs further agree that the *Montiel* court was a court of competent jurisdiction which and rendered judgment on those claims. These two facts, however, are of no consequence to Plaintiffs' right and ability to bring this action. Because Plaintiffs are not in privity with the *Montiel* plaintiffs and because the claims in the cases are different, there is neither res judicata nor collateral estoppel, and Defendants are not entitled to judgment on the pleadings.

C. Plaintiffs' One Person, One Vote Claim Does Not Lack Merit and Should Not Be Dismissed

Assuming res judicata does not bar Plaintiffs' claims (and it does not), Defendants argue that that Plaintiffs' one person, one vote claim "lacks merit" and should be dismissed. This argument is simply Defendants' res judicata position restated. Defendants claim that *Montiel* decided "the precise" one person, one vote claim stated in this case. Defendants then describe that issue as whether population deviations, in and of themselves, make the plans unconstitutional. Defendants' Brief, pp. 12-13.

Even a cursory reading of Plaintiffs' Complaint shows that is not the issue in this case. For the reasons set forth above, that contention is incorrect. Plaintiffs recognize their burden and all Montiel decided was that the burden was not met in that case. Contrary to Defendants' position that Plaintiffs are required to show why Montiel does not preempt their case, that contention is an affirmative defense offered by Defendants and thus must be proved by them.

Defendants attempt to distinguish *Larios* and persuade the Court that *Larios* is limited to its facts. There simply is no authority for that proposition, either in the opinion of the three-judge panel or the opinions issued by the Supreme Court. *Larios v. Cox*, 300 F. Supp. 1320 (N.D. Ga.), *aff'd*, *Cox v. Larios*, 542 U.S. ___, 124 S. Ct. 2806 (2004).

To prevail on their Motion, Defendants must meet the stringent requirement set forth above, namely that even assuming all the facts alleged in the Amended Complaint to be true and viewing the facts in the light most favorable to Plaintiffs, no issue of material fact remains and Defendants are entitled to judgment as a matter of law. *Mergens v. Dreyfoos*, 166 F.3d 1114 (11th Cir. 1999). This Defendants have not done and cannot do with their vague allegations with respect to the merits of Plaintiffs' one person, one vote claim.

The Amended Complaint alleges that the 2002 Senate and House maps create 52 overpopulated House districts and 53 underpopulated districts. It also alleges that each Plaintiff lives in a Senate or House Districts (and in one instance, both) which are overpopulated and which have a population deviation of more than 4.0%. Plaintiffs claim that the State of Alabama has no legitimate, consistently applied state interest to justify these deviations, and as such, such plans are unconstitutional. Plaintiffs allege the population deviations are designed to maximize the electoral effectiveness of voters in underpopulated regions and to minimize or dissipate the voting strength of voters in over populated regions. Assuming these facts are true and viewing them in a light most favorable to Plaintiffs, Defendants are clearly not entitled to judgment on the pleadings regarding Plaintiffs' one person, one vote claim.

D. Plaintiffs' Political Gerrymandering Claim Does Not Fail to State a Claim

For their final argument, Defendants assert that Plaintiffs' partisan gerrymander claim should be dismissed the Complaint fails to state a claim to which relief can be granted.

As discussed in the beginning of this Brief, the standard for deciding a motion to dismiss for failure to state a claim is the same as that for a motion for judgment on the pleadings. A court must assume that the factual allegations contained in the complaint are true, and view such allegations in a light most favorable to the non-moving party. *Neitzke v. Williams* 490 U.S. 319, 109 S.Ct. 1827 (1989). A motion to dismiss for failure to state a claim can only be granted if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed 59 (1984).

In their Motion, Defendants appear to conclude either that no claim for partisan gerrymandering can be made or that Plaintiffs will not be able to prove their claim at trial. Neither contention leads to a dismissal of Plaintiffs' claim for failure to state that claim. Instead, the Court must determine whether Plaintiffs have stated a claim of illegal partisan gerrymandering. They have done so.

Plaintiffs' Complaint alleges: (1) that the Democratic-controlled Alabama Legislature used classification by political party in an invidious manner or in a way unrelated to any legitimate objective when it drew the 2002 House and Senate redistricting plans; (2) that the legislature fragmented cohesive communities of interest and political subdivisions between purported districts; (3) that such fragmentation resulted in a dilution and debasement of Plaintiffs' voting rights, political power, and influence; and (4) that no legitimate redistricting criteria of any sort were used by the legislature in crafting state legislative redistricting plans. Complaint, ¶¶ 133-140. Plaintiffs' Complaint further alleges, as required by *Davis v. Bandemer*, 478 U.S. 109 (1986), an intention to discriminate and an actual discriminatory effect. Complaint, ¶¶136, 137. Assuming these allegations are true and viewing them in the light most favorable to Plaintiffs, Plaintiffs' claim must not be dismissed.

While Plaintiffs' Complaint does cite to the test set forth in Justice Kennedy's concurrence in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), Plaintiffs do not do so to the exclusion of the still-valid test from *Davis*. Although Defendants contend that Plaintiffs must "articulate the standard" for such claims, Plaintiffs have done so by asserting a claim under the *Davis* test.

Defendants argue the way that they believe a partisan gerrymander claim cannot be proved. Defendants contend that the claim cannot be proved by showing (1) a lack of proportionality, (2) the use of a population deviation of plus or minus 5%, (3) the possibility of more equality in the population of districts, or (4) the assertion of First Amendment rights. Further, Defendants maintain that the claim cannot be proved by resort to the judicial eye, absent some judicially manageable standards.

These are all arguments that Defendants do not believe that Plaintiffs will be able to prove their claim. Plaintiffs agree that the standard for proving such claims appears in flux, but not impossible. In *Cox v. Larios*, 124 S.Ct. at 280, the Supreme Court concluded:

> It bears emphasis, however, that had the Court in *Vieth* adopted a standard for adjudicating partisan gerrymandering claims, the standard likely would have been satisfied in this case. Appellees alleged that the House and Senate plans were the result of an unconstitutional partisan gerrymander. The District Court rejected that claim because it considered itself bound by the plurality opinion in *Davis v. Bandemer*, 478 U.S. 109 (1986), and Appellees could not show that they had been" essentially shut out of the political process." Appellees do not challenge that ruling, and it is not before us. But the District Court's detailed factual findings regarding appellees' equal protection claim confirm that an impermissible partisan gerrymander is visible to the judicial eye and subject to judicially manageable standards. Indeed, the District Court's findings make clear that appellees could satisfy either the standard endorsed by the Court in its racial gerrymandering cases or that advocated in Justice Powell's dissent in *Bandemer*, 478 U.S., at 173-185, 106 S.Ct. 2797.

To the extent that a claim for partisan gerrymander can be stated under *Davis v. Bandemer*, 478 U.S. 109, 106 S.Ct. 2797 (1985) and *Vieth v. Jubelirer*, 541 U.S. 267, 124

S.Ct. 1769 (2004), Plaintiffs have stated it. Defendants are effectively asking this court to do what Justice Kennedy in *Vieth* would not do; to foreclose all possibility of judicial relief even in the midst of a partisan gerrymander. The Complaint states a claim for partisan gerrymander. Plaintiffs are not required to prove their claim at this point in the litigation. Defendants' arguments with respect to how Plaintiffs may not prove their claim is premature.

Therefore, Defendants' motion to dismiss Plaintiffs' partisan gerrymander claim must be denied.

CONCLUSION

For the foregoing reason, Defendants' Motion for Judgment on the Pleadings must be denied.

This 5th day of August 2005.

Respectfully submitted,

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

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day electronically filed the within and foregoing PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties to this matter via electronic notification:

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